Vegas, which has a significant number of Spanish-speaking people, they are being scammed by people who are trying to take advantage of them and others. The rationale is that some of these metropolitan statistical areas are being flooded with advertising from illegitimate actors promising mortgage reductions and modifications for a fee. HUD will use these funds to advertise HUD services, as well as to explain the availability of HUD-approved counseling to homeowners to avoid some of these scams.

No. 2 is the authorization of $50 million to be provided through the Housing Counseling Program at the Department of Housing and Urban Development to HUD-certified housing counseling agencies located in the 50 metropolitan statistical areas. These would be areas with the highest incidence of home foreclosures per capita, for the purpose of assisting homeowners with inquiries regarding mortgage modification assistance and mortgage scams.

We have found in the economic recovery package, and in the housing bill, that direct moneys went to these agencies—approved agencies—to help them talk to people and counsel them as to what they can do to avoid foreclosure. It has worked very well.

The 2008 housing bill and subsequent spending bills directed funds to counseling agencies, but the metropolitan statistical areas that are hardest hit—Las Vegas among those—still need more resources given the depth of the problem.

Additional resources will allow HUD-certified agencies to staff up and meet growing demand for their services, which will counterbalance the increase in illegitimate agencies promising mortgage modification services for a fee. These entities that are going to get this money charge nothing.

Finally, Madam President, the authorization of $5 million to HUD's Office of Fair Housing and Equal Opportunity will help to provide additional personnel in HUD offices located in these 50 areas with the highest incidence of foreclosure. The rationale, of course, is that local HUD offices in these areas are understaffed and unable to meet the demand for their services and expertise concerning mortgage scams. Fair Housing Program personnel are trained to address these issues, and they are badly needed.

I would hope the managers and those other Members who are interested in this issue would review this matter. We believe strongly this is the right direction. If people have a better idea, I would be happy to visit with them. I will not call for a vote until people, of course, have an opportunity to review this in detail.

The PRESIDING OFFICER. The Republican whip.

AMENDMENT NO. 985

Mr. KYL. Madam President, I ask unanimous consent to lay aside the pending amendment for purposes of offering an amendment.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report the amendment.

The assistant legislative clerk read as follows:

The Senator from Arizona [Mr. KYL] proposes an amendment numbered 985.

Mr. KYL. Madam President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To modify the definition of the term ''obligation'')

On page 26, strike lines 1 through 5, and insert the following:

''(3) the term 'obligation' means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

Mr. KYL. Madam President, let me describe this amendment briefly and note that it is my understanding that when Senator LEAHY is able to be on the Senate floor, it is his intention to suggest that we take this amendment by unanimous consent. It has been worked out with representatives on both sides of the aisle, but I would like to describe it briefly.

This is an amendment relating to section 4 of the bill, which amends the False Claims Act. My amendment replaces the bill's proposed definition of the word ''obligation,'' which has important implications for the so-called ''reverse'' False Claims Act pursuant to which private parties may be held liable for failing to pay an obligation due to the United States.

This amendment originally grew out of concerns about the underlying bill that were raised by the Chamber of Commerce and other business groups. Having reviewed those concerns, I have concluded that some of them could only arise under a strained reading of the bill.

The bill's new definition of the word ''obligation,'' in particular, posed several problems. The original language spoke of ''contingent'' obligations. Such contingent or potential duties could include duties to pay penalties or fines, which could arise—and at least become ''contingent'' obligations—as soon as the conduct that is the basis for the fine has occurred.

Obviously, we don't want the Government or anyone else suing under the False Claims Act to treble and enforce a fine before the duty to pay that fine has been formally established. It is unlikely that Justice would ever have brought suit to enforce a claim of this nature, but the FCA can also be enforced by private realtors who often may be motivated by personal gain and not always exercise the same good judgment that the Government usually does.

To preclude such a reading of the act, my amendment strikes contingent obligations from the FCA's new definition of ''obligation.''

My amendment also makes a few other housekeeping changes to the definition of ''obligation.'' It removes the words ''quasi-contractual relationship.'' A ''quasi-contract'' is a remedy for a breach of duty, not an independent source of a duty. The amendment also makes clear that the words ''similar relationship'' only modify the words ''fee-based relationship'' and not the entire list of relationships that precede that term.

Under some readings of the rule of the last antecedent, the comma in the committee-reported bill that preceded the words ''or similar relationship'' could be read to reverse the usual presumption of that rule and have the words ''similar relationship'' modify all of the words in that list. My amendment makes clear that ''similar relationship'' only modifies ''fee-based relationship.''

As a result of discussions with the sponsors of the bill, I have also agreed to allow my amendment to add duties arising out of regulations, rather than just statutes, to the list of obligations made actionable under the law. I declined, however, to also allow obligations to be enforced that arise out of a mere rule. The term ''rule'' is defined at section 551 of title V, and as that definition makes clear, the term is far too broad. It can include all manner of rules of which defendants would have no reasonable notice.

Regulations, on the other hand, are published in the Federal Register in the Code of Federal Regulations, and so Congress can reasonably expect participants in regulated industries to have notice of them. Thus, as amended, the term ''obligation'' encompasses duties arising out of statutes and out of formal regulations published in the CFR.

I might also say a few words about aspects of the definition of obligation that I ultimately concluded that it was not necessary to address in this amendment. At the Judiciary Committee's mark up of this bill, I circulated an amendment that would limit obligations arising out the retention of any overpayment so as to make clear that no obligation arises if the defendant is pursuing some type of administrative, judicial, or other process for reconciliation of alleged overpayments. The sponsors of the bill raised the concern, however, that such a safe harbor might immunize parties that intentionally and maliciously obtain an overpayment, and then spend years exhausting a reconciliation process, all in bad faith and knowing full well that they must repay the money, but earning interest on the overpayment in the interim. Apparently incidents like this have occurred, in cases involving sums that allowed the defendant to earn tens of millions of dollars in interest. The sponsors of the bill also noted to me that, under subparagraph (G)'s modification of the reverse False Claims

Act, avoiding or decreasing an obligation is only actionable, in relevant part, if the defendant ''knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.'' Therefore, a good-faith pursuit of a reconciliation process would not be actionable.

I asked my staff to research the meaning of ''knowingly and improperly'' to confirm that a person who pursues reconciliation of an overpayment in good faith could not be held liable under the reverse False Claims Act. The answer that I received is that the term ''knowingly and improperly,'' though infrequently used in the caselaw, is consistently construed to mean that a person either acted with bad intent or that he employed means that are inherently tortious or illegal.

For example, the State of Massachusetts uses the standard of ''knowing and improper'' to determine whether a business competitor's inducing a third party to breach a contract constitutes tortious interference with contract. See Boyle v. Boston Foundation, Inc., 788 F.Supp. 627 (D. Mass. 1992); Restuccia v. Burk Technology, Inc., 1996 WL 1329386, at *3 (Aug. 13, 1996). And as the cases giving content to the Massachusetts standard make clear, under that test the ''[d]efendant's liability may arise from improper motives or from the use of improper means.'' United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 816 (1990) (quoting Top Service Body Shop, Inc. v. Allstate Ins. Co., 283 Or. 201, 209–210 (1978). See also United Truck Leasing at pages 816–817, quoting other cases as construing this standard to require an ''improper purpose or improper means.'' The Top Service Body Shop case, quoted by the Massachusetts court, further elaborates, at footnote 11, on what types of means constitute ''improper means.'' These are noted to commonly include ''violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood.'' In the False Claim Act context, this list may include other improper means, but ''improper means'' must be means that are malum in se—that is, means that are inherently wrongful and constitute an independent tort.

Though less carefully considered than the Massachusetts intentional-interference jurisprudence, other judicial uses of the words ''knowing and improper'' confirm that the term would not reach good-faith exhaustion of procedures for reconciling an overpayment. In the Matter of Banas, 144 N.J. 75, 81 (1996), for example, reprimands a lawyer for ''knowingly and improperly retaining—his client's—$5,000 payment.'' And the court makes clear that it bases this conclusion on a previous finding that the lawyer ''knew from the beginning that the purpose of the payment'' was to satisfy a condition that he had not met. See Banas at 80. In another attorney-sanctions case, In re Aston-Nevada Limited Partnership, 391 B.R. 84, 102 (D. Nev. 2006), the court found that the lawyer ''repeatedly, knowingly, and improperly'' misused particular words in his filings, and then emphasized that the lawyer's ''prevarications and misstatements were deliberate and not careless.''

Given that the words ''knowingly and improperly'' have a fixed meaning that, at the very least, requires either improper motives or inherently improper means, the changes made by this bill cannot be read to make actionable the retention of an overpayment when the defendant is pursuing in good-faith the exhaustion of a reconciliation procedure. It is with this understanding that I have declined to insist on further qualification of the bill's predication of liability on the retention of an overpayment.

Finally, as a matter of usage, I would note that, contrary to the wording of the bill's new definition of ''obligation,'' duties arise from contracts and the like, not from ''relationships.'' The bill's language is somewhat Oprahfied in this regard, but given that the sponsors have accommodated me on other, more substantial issues, I did not think it worth forcing a rewording of the provision to address this problem.

Other groups have also suggested the bill's new definition of the word ''claim,'' by encompassing situations where money is spent or used ''to advance a government program or interest,'' could make actionable under the False Claims Act any garden-variety overbilling or underpayment of a contractor by a subcontractor if some Federal money is involved in the project. I think this is an unreasonable reading of the bill that is precluded by the committee report, as well as by common sense. The report makes clear that the purpose of the new definition of ''claim'' is to overrule the Totten and Allison Engine cases and preclude application of a formalistic presentment requirement of an unnecessary intent requirement, and to restore the previous understanding of the law. And that previous understanding, as well as common sense, dictate that a particular transaction does not ''advance a Government program or interest'' unless it is predominantly federal in character—something that at least would require, as the report notes in footnote 4, that the claim ultimately results in a loss to the government. Obviously, the government does not intend to make actionable under the FCA any garden-variety dispute between a general contractor and a subcontractor simply because the general receives some federal money. On the other hand, if the transaction is still predominantly Federal in character, and the false claim results in a loss to the government, recovery under the FCA should not be precluded simply because the claim was not directly presented to the government, or because the malfeasant did not specifically intend to defraud the government.

Madam President, I ask unanimous consent to lay aside this amendment for the purpose of calling up four other amendments pending at the desk, and those numbers are 986, 987, 988, and 989.

Mr. KAUFMAN. Will the Senator please yield so we have a chance to look at the amendments?

The PRESIDING OFFICER. Is there objection?

Mr. KAUFMAN. Object.

The PRESIDING OFFICER. Objection is heard.

Mr. KYL. I am happy to share these amendments with the other side, but I was not aware the other side had a veto over amendments offered by Members of this side of the aisle.

Mr. KAUFMAN. I would just like to——

Mr. KYL. I am happy to share the amendment, of course. I will withhold for a moment so the Senator can see what the amendment is, and perhaps we can move forward.

Mr. KAUFMAN. Madam President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. LEAHY. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mrs. HAGAN). Without objection, it is so ordered.

Mr. LEAHY. Madam President, I understand there is a pending amendment?

The PRESIDING OFFICER. The Senator is correct.

Mr. LEAHY. I ask unanimous consent that the pending amendment be set aside and it be in order for me to send an amendment to the desk.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 993

Mr. LEAHY. Madam President, I send to the desk an amendment on behalf of myself and Senator GRASSLEY. I ask for its immediate consideration.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Vermont [Mr. LEAHY], for himself and Mr. GRASSLEY, proposes an amendment numbered 993.

Mr. LEAHY. I ask unanimous consent that the reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

(Purpose: To clarify the amendments relating to major fraud)

On page 15, strike beginning with line 20 through page 16, line 10, and insert the following:

(d) MAJOR FRAUD AGAINST THE GOVERNMENT AMENDED TO INCLUDE ECONOMIC RELIEF AND TROUBLED ASSET RELIEF PROGRAM FUNDS.—Section 1031(a) of title 18, United States Code, is amended by—

(1) inserting after ''or promises, in'' the following: ''any grant, contract, subcontract, subsidy, loan, guarantee, insurance or other form of Federal assistance, including