415.956.2828 (t)
415.956.6457 (f)

Robert Dollar Building
311 California Street, 10th Flr.
San Francisco CA 94104

202.777.8950 (t)
202.347.8429 (f)

Victor Building
750 9th Street, NW, Suite 710
Washington DC 20001

ROGERS JOSEPH O'DONNELL

www.rjo.com

RJO Update: Government Contracts

July 2012

States Broadening Their False Claims Acts in Response to Federal Incentives

By Aaron P. Silberman and Dennis J. Callahan

Contractors in the growing number of states with false claims acts (FCAs) modeled on the federal FCA need to prepare for changes. Responding to federal incentives, state legislatures are revising their FCAs to expand contractor liability, encourage and protect whistleblowers and limit contractor defenses. These changes will increase government enforcement and encourage more whistleblower, or "*qui tam*," lawsuits.

Since its enactment during the Civil War, the federal False Claims Act has been a primary tool for the U.S. Government to recover fraudulent payments made to government contractors. Over the past twenty years, states have enacted their own false claims acts. Over 30 states have FCAs. Most include *qui tam* provisions, like those of the federal FCA that enable private citizens ("relators") to bring false claims actions on behalf of the government. In about two-thirds of these states, including California, the FCAs apply *generally* to *all* false claims, while the FCAs of the remaining states, such as those of Maryland and Texas, only apply to health care or Medicaid fraud.[1]

The number of states with FCAs is growing. For example, Georgia, which has had a Medicaid False Claims Act on the books since 2007, enacted in April 2012 the Taxpayer Protection False Claims Act, which applies to all contractors doing business with state and local governments in Georgia. Several other state legislatures, including Pennsylvania and Washington, have introduced one or (often) more FCA bills in recent years that have failed at various stages. In an era of large state budget deficits, and with seemingly little downside for states, it may be only a matter time before the "holdout" states enact FCAs of their own.

In recent years, Congress has toughened the federal FCA to broaden contractors' liability, to facilitate *qui tam* lawsuits, and to further protect whistleblowers from retaliation. Congress has also encouraged states to strengthen their FCAs in these same particulars. States whose FCAs are as effective as the federal FCA, in facilitating *qui tam* actions involving federal health care programs, are allowed to keep the lion's share of Medicaid expenditures recovered in false claims cases. This federal incentive has prompted legislation now pending in many states, including bills in California and Illinois, discussed below, as well as Michigan and Minnesota.

---

[1] For a periodically updated list of state FCA legislation and enforcement actions, see the Taxpayers Against Fraud Education Fund website at http://www.taf.org/statefca.htm.

2012 Rogers Joseph O'Donnell ©

False claims liability already presents a substantial risk to government contractors. The U.S. Department of Justice recently announced that in fiscal year 2011 the federal government recovered nearly $3 billion in *qui tam* actions, 80% of which involved fraud against federal health care programs. State attorneys general have also aggressively pursued state FCA actions, particularly in the health care area. For example, on July 2, 2012, the California Attorney General announced the settlement of claims against GlaxoSmithKline for off-label marketing of drugs. The suits were brought under state and federal FCAs and other laws, and they included nearly every state in the Union. The settlements totaled $3 billion, with California's share totaling over $44 million.[2] On the same day, the New York Attorney General announced its share of the settlements to be over $146 million.[3]

The federal-state collaboration in the GlaxoSmithKline lawsuits is no anomaly. The federal FCA anticipates cases where state and local governments will be co-plaintiffs with the United States, many states' FCA laws closely track the federal model, and many courts rely on cases decided under the federal FCA when interpreting state FCAs. Congress has acted to further motivate states to enact strong false claims laws against Medicaid fraud, through a number of actions.

The Deficit Reduction Act of 2005 (DRA), at Ch. 3, Sec. 6031, "Eliminating Fraud, Waste, and Abuse in Medicaid: Encouraging the Enactment of State False Claims Acts," amended the Social Security Act to increase by 10% a state's share of medical assistance payments recouped in false claims actions, so long as that state's FCA meets the following four criteria, as determined by the Office of Inspector General of the U.S. Department of Health and Human Services (HHS) and the United States Attorney General:

1. The state FCA establishes liability to the state for false or fraudulent claims with respect to Medicaid spending;

2. The state FCA provisions are at least as effective in rewarding and facilitating *qui tam* claims as those described in the federal FCA;

3. The state FCA provides for filing under seal for 60 days with review by the state AG; and

4. The state FCA contains a civil penalty that is not less than the federal FCA civil penalty.

Since the passage of the DRA, the federal False Claims Act has been strengthened, first in 2009, by the Fraud Enforcement and Recovery Act, and twice in 2010, by the Patient

---

[2] The California Attorney General Office's press release announcing the settlement is available on the Office's website at http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-joins-nationwide-3-billion-settlement.

[3] The New York Attorney General's press release of the settlement is available at http://www.ag.ny.gov/press-release/ag-schneiderman-announces-146-million-nys-record-fraud-settlement-pharma-giant.

2012 Rogers Joseph O'Donnell ©
A Professional Law Corporation

Protection and Affordable Care Act and by the Dodd-Frank Wall Street Reform Act. HHS is now in the process of reviewing state FCAs and pending bills to determine whether the state FCA still promotes *qui tam* claims to the level of the federal FCA, and thus still qualifies for the bonus 10% recoupment incentive. The additional incentive applies only in the Medicaid context, and thus only requires the state FCA to apply to Medicaid fraud. Nonetheless, where a state has a "generally applicable" FCA statute, one may anticipate that changes to align with the tougher federal FCA likely will apply to all fraudulent claims made by state contractors.

For example, California has acted to toughen its FCA to conform to the federal standards, and, for the most part, has not limited proposed changes to Medicaid fraud. After previously qualifying the California FCA for the 10% bonus, HHS again reviewed that FCA in 2011 and identified twelve provisions that no longer satisfy requirements for the additional recoupment incentive. In HHS's view, among the ways the California FCA is not as effective as the federal FCA in facilitating *qui tam* actions are the following: stronger federal protections against retaliation by whistleblowers' employers, longer federal statute of limitations periods, a narrower state definition of who qualifies as an "original source" of false claims information (and so may maintain FCA actions based on publicly disclosed information), the state's ban of *qui tam* actions by state employees who discover alleged false claims in the course of their employment, and the state's requirement for state FCA liability that the claims in question had been "presented" to a state agency.

In response to HHS's determination, in February 2012, a bill was introduced to the California Legislature that answers all twelve areas identified by HHS. With one exception, Assembly Bill (AB) No. 2492 would strengthen the state FCA with respect to all *qui tam* actions – not just those that relate to Medicaid payments. The exception concerns whether *qui tam* relators may be state employees who discover potentially false or fraudulent claims submissions in the course of their employment. AB 2492 would continue to deny court jurisdiction for such FCA claims brought by state employees, except for those cases in which the claims relate to California's Medicaid Program. A.B. 2492 is progressing through the California legislature. On July 2, 2012, the Senate Appropriations Committee passed the bill. AB 2492 is now on the Senate Floor, likely its final stop before reaching the Governor's desk.

Likewise, in February 2012, Illinois House Bill 5388 was introduced to address the ways HHS had determined that state's generally applicable false claims statute no longer qualified for the 10% bonus. The bill, among other things, would broaden the definition of "original source" to allow previously unqualified relators to file *qui tam* actions. Under the current Illinois FCA, the whistleblower must have direct and independent knowledge of the basis of the allegation. The Illinois bill would expand the "original source" definition to enable those who have any information that materially adds to publicly disclosed allegations or transactions to qualify as relators.

Overall, these developments portend increased aggressive prosecution of *qui tam* suits under state FCAs and increased potential exposure of government contractors to false claims allegations. For example, elimination of the "presentment" requirement in state FCAs will

2012 Rogers Joseph O'Donnell ©

expose to potential FCA liability grantees and subgrantees who have not presented claims directly to the government agency that funded their grants.

Similarly, expanding the definition of "original source" in state FCAs may prompt companies to bring *qui tam* suits against their industry competitors based on information that may be publicly available, but the importance of which may not be fully understood beyond a small circle of insiders.

Contractors doing publicly funded work in states with false claims laws – as prime or subcontractors or as grantees or subgrantees – need to keep a close eye on pending FCA legislation in those states. When changes to FCAs in those states become law, as likely will occur in most if not all of those states, the risks and potential liabilities to contractors doing publicly funded work will increase substantially. Contractors would be well advised to consider the increased exposure in all of their contracting decisions and in their continuing efforts to assure integrity through compliant business controls and processes.

How We Can Help Your Company

Aaron Silberman (asilberman@rjo.com) is a past Co-Chair, and is a current Vice Chair, of the Procurement Fraud Committee of the ABA Section of Public Contract Law. For nearly 20 years Aaron, has advised contractors in federal and state false claims investigations, and has represented them in false claims act litigation. For five years, Dennis Callahan (dcallahan@rjo.com) has represented government contractors in false claims and fraud investigations and litigation, and has advised companies regarding their systems for complying with federal and state procurement statutes and regulations. Please contact Aaron and Dennis if you have any questions about this subject, including how your company can best protect itself from expanding false claims liability.

2012 Rogers Joseph O'Donnell ©