

## **STATE FALSE CLAIMS ACTS: CONSIDERATIONS FOR INSURERS**

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With the 1986 overhaul of the federal False Claims Act,<sup>1</sup> civil actions brought by government and individuals founded on allegations of false claims submitted to the government have become commonplace. Historically, such suits have been aimed mostly at government contractors, grantees, and those who provide Medicare and Medicaid services, but that is changing. A widening circle of industries, including the insurance industry, is more frequently being targeted by FCA lawsuits.

One reason is the proliferation of state false claims acts ("FCAs"). California, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Indiana, Massachusetts, Montana, Nevada, Tennessee, and Virginia have adopted FCAs of broad application, and similar acts are under consideration elsewhere.<sup>2</sup> Many state FCAs create comparatively broader liability than the federal act. Moreover, several state FCAs make false claims or false statements submitted to units of local governments and public corporations and instrumentalities created by state law actionable, in addition to false statements submitted to state government.<sup>3</sup> The monetary exposure is high: significant fines (ranging from \$5,000 - \$25,000 or more per occurrence), double or treble damages, costs, and attorneys fees are typically imposed by these state laws.

State FCA claims are exceptionally attractive to entrepreneurial plaintiffs. Besides authorizing suit by the government itself, nearly all state FCAs encourage private "relators" (*qui tam* plaintiffs) to sue on the government's behalf, as the federal FCA does, and handsomely reward a relator who succeeds with a substantial share of the recovery or settlement. Proof of specific intent to defraud is not required to establish FCA liability. Instead, liability attaches for "knowingly" presenting a false statement to obtain money from the government, or to avoid an obligation owed to the government.<sup>4</sup> "Knowingly" is usually defined as acting merely with "deliberate ignorance" of the truth or falsity of information or with "reckless disregard" of the truth or falsity of information.<sup>5</sup> Knowledge of falsity by relatively low-level employees or agents may be sufficient to impose FCA liability on an organization.<sup>6</sup> Statutes of limitations for FCA claims are typically long - seven to ten years.<sup>7</sup> Moreover, because FCAs typically require the relator to provide detailed information about the alleged violation to the attorney general of the state, or similar law enforcement agencies, *qui tam* FCA suits often spawn government investigations, which may proceed without the FCA defendant being aware of the existence of the FCA suit, since these laws usually require suit to be filed under seal and to remain sealed while the government investigates.<sup>8</sup>

Insurers who provide state-paid health coverage, or coverage coordinated with governmentally administered healthcare face potential liability from those operations under both the federal FCA and state FCAs. *See generally, Cooper v. Blue Cross & Blue Shield of Fla.*, 19 F.3d 562 (11<sup>th</sup> Cir. 1994). However, the greater source of potential insurer liability may lie in the "reverse false claim" clauses inserted in virtually all state FCAs.

Such "reverse false claim clauses" deserve special attention. They create liability for knowingly making or using a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money to a government or governmental instrumentality.<sup>9</sup> These clauses would most obviously apply to the under-reporting of taxes and similar obligations, or to making erroneous records and reports from which taxes or similar obligations are assessed. Insurers pay taxes, license fees, and residual market assessments to state governments, local governments, and government instrumentalities. Errors in recordkeeping or reporting relating to such impositions or the unique features of some multi-state insurance products may give rise

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inadvertently to potential "reverse false claim" FCA liability.<sup>10</sup> Similarly, insurer operations, or subsidiary operations, that involve the frequent purchase and sale of real property often require self-reporting and payment of documentary taxes or similar fees associated with such transactions, which if under-reported may also be a source of potential reverse false claim liability.

Unlike the federal FCA, which excludes erroneous tax reporting from its scope, several state FCAs do not.<sup>11</sup> While some states exclude statements or records made in connection with certain state tax laws from their FCAs, premium tax laws and laws imposing insurance-related assessments may lie outside the excluded tax provisions, and thus may remain a potential source of liability in such states.<sup>12</sup> Since the adoption of the Florida FCA in 1994, at least three insurers have been targets of *qui tam* FCA suits, based on alleged improper reporting of premiums used to compute taxes or residual market assessments, alleged improper concealment of market conduct issues to avoid asserted obligations payable to the government, and alleged under-reporting of real estate transaction fees.

Some state FCAs go even further. Massachusetts, for instance, imposes liability on a person who "enters into an agreement, contract, or understanding with one or more officials . . . knowing the information contained therein is false."<sup>13</sup> Tennessee does so as to any person who "knowing makes, uses, or causes to be made or used any false or fraudulent conduct, representation, or practice in order to procure anything of value directly or indirectly from the state."<sup>14</sup> Either of those provisions potentially could create FCA liability for "knowingly" presenting incorrect information to the state's insurance regulator in connection with an application for a certificate of authority, change of ownership approval, rate and form applications, and consent orders approving them.

Given the significant breadth of exposure under these laws, organizations would be wise to consider taking steps that will lower the risk. Since FCA liability arises from submitting false information "knowingly," it may be advisable to put procedures in place to regularly test for errors in invoices and tax-related reports to state government. Organizations that frequently or regularly submit invoices to state or local government agencies, or to organizations funded in whole or in part by state funds, may wish to consider regularly auditing a sample of the accounts to evaluate the extent of the organization's error ratio and to correct any problems identified by a significant error rate. Similarly, organizations should consider regular audits of a random sample of state tax records and tax-related reports. Since many false claims act cases are instituted by disgruntled employees or former employees, consideration should be given to ways of regularly seeking comment from those who deal with government billing, collection, and tax-related reporting about problems they perceive or suggestions they have for improving accuracy and reducing errors. If the organization conducts exit interviews of departing employees, it may be wise to include interview questions designed to elicit the exiting employee's knowledge or views about the accuracy of the company's government and tax-related billings and reports. Such initiatives may have benefits on more than one level. They may help identify potential problems, and they will help establish that the company was acting neither with "deliberate ignorance" nor "reckless disregard," should an FCA suit arise in connection with such operations.

Additionally, when discussing data errors in premium reports with state insurance regulators or statistical reporting bureaus, or when negotiating a resolution of such problems with state regulators, organizations should be sensitive to potential FCA issues. For instance, an unqualified recitation of fact in a consent order negotiated with the state insurance regulator, or in correspondence or discussions with the regulator, has the potential to become a party admission in a *qui tam* FCA suit that the organization may not know of, if the suit remains under seal while such regulatory negotiations are taking place.

If served with a *qui tam* FCA complaint, organizations should immediately investigate whether there are grounds to conclusively dismiss the *qui tam* suit at an early stage without reaching the merits and without merits discovery. Like the federal act, nearly all state FCAs contain jurisdictional bars which preclude subject matter jurisdiction over a *qui tam* FCA suit where its allegations are substantially related to information that

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has been publicly disclosed by various means, unless the relator can establish that he is the "original source" of the information underlying the allegations in the *qui tam* action.<sup>15</sup> Similarly, many state FCAs impose certain procedural requirements on *qui tam* plaintiffs, violations of which, if substantial, may result in with-prejudice dismissal of the *qui tam* action without the necessity of addressing the merits.<sup>16</sup> The state FCA should be carefully examined for other more unique procedural defenses. The Florida FCA, for instance, contains an exclusive venue provision requiring *qui tam* actions to be brought only in the trial court district that encompasses the state Capitol.<sup>17</sup>

Thoroughly cataloging merits defenses is beyond the scope of this discussion. However, counsel for an insurer subject to an FCA suit should consider whether the particular state FCA should be regarded as a remedial law to be liberally construed, or instead as penal, and therefore strictly construed;<sup>18</sup> whether ambiguity in the substantive law or contract language on which the false claim allegations are based affords a defense that the allegedly false claim is not objectively false;<sup>19</sup> whether the insurer's training and internal quality control systems afford a defense that the alleged falsity does not arise from deliberate ignorance or reckless disregard; and whether the due process and excessive fine clauses of the federal or applicable state constitutions may prevent, or at least reduce, the monetary exposure of the target defendant.<sup>20</sup>

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### Endnotes

1. 31 U.S.C. §§ 3729-3733
2. Bills proposing such statutes have been introduced in recent years in Alabama, Arkansas, Colorado, Connecticut, Kansas, Maryland, Minnesota, Mississippi, Missouri, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Texas, and Washington.
3. California, the District of Columbia, Delaware, Florida, Hawaii, Illinois, Indiana, Massachusetts, Montana, Nevada, Tennessee, and Virginia have enacted False Claims Acts with substantially broader scope than the federal act after which they are patterned. *E.g.*, § 68.082, Fla. Stat.; Cal. Gov't Code § 12650(b)(1); Del. Code. Ann. tit. 6, §1202(3); Mass. Gen. Laws Ann. ch. 12, § 5A; Tenn. Code. Ann. §§ 4-18-101 - 4-18-108 (2002).
4. *E.g.*, § 68.082, Fla. Stat.
5. *Id.*
6. *Grand Union Co. v. United States.*, 696 F.2d 888 (11<sup>th</sup> Cir. 1983) (evidence which permitted the inference that check-out cashiers knowingly permitted Food and Nutrition Service agents to purchase ineligible nonfood items with food stamps presented substantial fact issue as to whether the grocery store chain violated the False Claims Act, precluding summary judgment for defendant).
7. *E.g.*, § 68.089, Fla. Stat.
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10. Consider, for example, an insurer providing a multi-state large-risk workers' compensation program with a negotiated nationwide premium computation formula. If the manual premium in a given state would normally be "x," but the insurer reallocates some premium to accommodate the nationwide premium

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algorithm, that act could be viewed as making a false record to reduce premium tax obligations to that state.

11. *E.g.*, Del. Code. Ann. tit. 6, §§ 1201-1209; Nev. Rev. Stat. Ann. §§ 357.010, *et seq.*; Haw. Rev. Stat. Ann. §§ 46-171 - 46-179.

12. *Compare* Tenn. Code. Ann. § 4-18-103(f) *with* Tenn. Code. Ann. § 56-4-205 (premium tax outside Tennessee Internal Revenue Code, which contains the taxes excluded from Tennessee's FCA). *See also*, §§ 213.05, 213.30, Fla. Stat. (removing certain taxes from qui tam provisions of the Florida FCA, but not affecting the right of the state itself to sue under the FCA for false tax reporting, and not excluding residual market assessments and agent licensing fees from the FCA).

13. Mass. Gen. Laws Ann. ch. 12, § 5B(7)(West 2002)

14. Tenn. Code. Ann. § 4-18-103(a)(9)

15. *E.g.*, § 68.087(3), Fla. Stat.

16. *See, e.g.*, § 68.083, Fla. Stat. *See United States ex rel. Pilon v. Martin Marrietta Corp.*, 60 F.3d 995 (2<sup>nd</sup> Cir., 1995); *Erickson v. American Inst. of Biological Sciences*, 716 F. Supp. 908 (E.D.Va. 1989). *See also*, *Bailey v. Davis*, 273 So.2d 422, 423 (Fla. App. 1973); *Kinzel v. City of North Miami*, 212 So.2d 327, 328 (Fla. App. 1968); *Ferry Morse Seed Co. v. Hitchcock*, 426 So.2d 958, 961 (Fla. 1983).

17. § 68.083(3), Fla. Stat.

18. *Compare, e.g.*, § 68.091(1), Fla. Stat. ("This act shall be liberally construed to effectuate its remedial and deterrent purposes.") *with In Re: One 1993 Dodge Intrepid*, 645 So.2d 551 (Fla. App. 1994) (recognizing that the Excessive Fines Clause applies even though a forfeiture statute is legislatively characterized as remedial).

19. *See United States ex rel. Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730 (7<sup>th</sup> Cir. 1999). *See generally*, *General Electric Company v. U.S. Environmental Protection Agency*, 53 F.3d 1324 (D.C. Cir. 1995).

20. *See, e.g.*, *In re Forfeiture of: 1990 Chevrolet Blazer*; 684 So.2d 197 (Fla. App. 1996); *Electric Company v. U.S. Environmental Protection Agency*, *supra*.