The 'New' New Jersey False Claims Act: It Was Born to Run

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On Jan. 7, 2008, the New Jersey Legislature joined 20 other states and the District of Columbia in passing its version of a civil false claims act. The New Jersey False Claims Act, NJSA §§ 2A:32C-1 through 17, went into legal effect 60 days later on March 13. New Jersey follows the state of New York, as the first of the densely populated mid-Atlantic states to pass a potent false claims act. Although patterned closely after the successful federal False Claims Act, the New Jersey statute contains some interesting provisions that offer both traction for whistleblowers who choose to bring their false claims cases in New Jersey and significant incentives for state prosecutors and state entities that fall victim to myriad fraud schemes.

Versions of a false claims statute or similar legislation had been pending before the New Jersey Legislature since at least 2000. Then Assemblyman Reed Gusciora, D-Trenton, initially proposed supplementing Title 2A of the New Jersey statutes and amending P.L 1968, c. 413, NJS § 30:40D-17, in order to authorize private persons to bring an action on behalf of a public entity against those who cause the state to pay false claims. One of the current law's sponsors, Sen. John H. Adler, D-Cherry Hill, had introduced similar legislation every year since 2003. Prior to its recent enactment, New Jersey's proponents in the fight against Medicaid fraud eagerly anticipated the Legislature's efforts to prevent waste, abuse and fraud and to recover funds lost through illegal means.

In early 2006, Sens. Adler and Joseph F. Vitale, D-Middlesex, co-sponsored and reintroduced the New Jersey False Claims Act, or NJFCA, as Senate Bill No. 360. Following its referral to the state Senate Judiciary Committee and the state Senate Budget and Appropriations Committee, the New Jersey Senate unanimously passed S360 in June 2006. In July 2006, the New Jersey General Assembly received the proposed legislation and referred it to the state Assembly Judiciary Committee. On Jan. 3, 2008, the proposed New Jersey false claims statute was reported out of the Assembly Judiciary Committee with amendments. Both the Senate and the Assembly unanimously passed the Assembly's amended version of the NJFCA on Jan. 7, 2008. Gov. Jon Corzine approved the NJFCA on Jan. 13, 2008, and it became effective 60 days later.

The NJFCA is modeled after and, in many significant respects, follows the federal False Claims Act, or FCA. During President Abraham Lincoln's administration, Congress enacted the federal FCA in order to fight fraud committed by unscrupulous defense contractors during the Civil War. The "qui tam" provisions of the federal FCA permit a private citizen to bring evidence of fraud against the federal government to the government's attention. In recognition of the citizen's assistance to the government in recovering the damages, fines and penalties related to the fraudulent conduct, a citizen is entitled to receive a reward, namely a portion of the government's fraud recovery. Since its enactment in 1863, the federal FCA has been amended a number of times, including the most significant amendments that occurred in 1986. Other amendments to the federal FCA have been pending before Congress for some time.

Both the NJFCA and the federal FCA provide for the initiation of a false claims lawsuit by a qui tam plaintiff, also known as a "whistleblower" or a "relator." A qui tam plaintiff is a private citizen who, in the name of the state or federal government, files a civil action against a defendant that has committed false claims violations by, inter alia, making a claim for government funds to which it is not entitled. This series will focus predominantly on the similarities and some notable differences between the NJFCA and the federal FCA, with an emphasis on the qui tam provisions in both statutes.

Over the past two decades, as a result of the successful government-private relator working relationship, enormous benefits have resulted from the qui tam provisions of the federal FCA. The most obvious advantage of the qui tam provisions of the federal act and its state counterparts is that knowledgeable citizens are incentivized to come forward and take the risks attendant in reporting fraud perpetrated upon the government. In return, the government has reaped the benefits of the qui tam relators' efforts: the return to the federal treasury of taxpayer funds that had been obtained through false or fraudulent means. Total False Claims Act recoveries since the 1986 amendments now total more than $23 billion.

There have been fewer apparent but equally important benefits emanating from the qui tam provisions of the federal statute. These include the practical consequences of the concerted efforts of prosecutors working closely with a now highly specialized private relators' bar. This successful relationship forged between government attorneys and the private relators' bar has emerged since the 1986 amendments reinvigorated the federal FCA. The federal FCA has proven to be a strong and lucrative tool for the federal government for several reasons: it attracts insiders who are knowledgeable about fraud to come forward and report it to the government; the federal FCA has tapped skilled legal talent to assist the government in prosecuting false claims act cases; and it enables the government to maintain quality control on private litigants through the government's ability to continue as a party in federal FCA cases, wherever that involvement falls on the continuum that spans from the government leading the prosecution to merely monitoring the qui tam plaintiff's case.

As a direct consequence of the significant similarities between the NJFCA and the federal FCA, the advantages stemming from a 23-year working relationship between many seasoned federal prosecutors, proactive states' attorneys general and private relators' counsel under the federal act will inure to New Jersey's reinvigorated fraud fighting efforts. Those charged with enforcing the New Jersey false claims statute will benefit from the participation of experienced relators' counsel in false claims investigations and litigation. Many relators' counsel have, for more than two decades, litigated side-by-side with the federal government and a number of already active states pursuing claims. Naturally, they will want to bring their expertise and resources to bear on cases filed under New Jersey's newly minted act.

Although the New Jersey statute is modeled after the federal FCA, the NJFCA has some unusual provisions not found in the federal FCA — or in other state false claims laws containing qui tam provisions. The provisions of the NJFCA that differ from its federal predecessor can be generally grouped as follows: those provisions regarding the statute's application; terms governing the filing, investigation and prosecution of cases brought pursuant to the NJFCA; and the provisions which direct the distribution of false claims act

proceeds among the key players, including those who choose to actively investigate and prosecute fraud in New Jersey.

Wider Statutory Application

The NJFCA mimics the federal act's language, which imposes liability upon people who present or cause to be presented false or fraudulent claims for payment or approval to an employee or officer of the government. But the NJFCA also adds that "presenting" a false claim to an "agent of the State, or to any contractor, grantee or other recipient of State funds" will trigger a violation of the act. This provision appears to be a significant effort by New Jersey legislators to assist the state in reaching fraud involving all government funds, wherever they may be found, when the false claim for the funds is presented, paid or approved. This language will cover contractors, subcontractors, consultants and other entities that contract directly or indirectly with New Jersey. The federal FCA is under amendment to clarify proceeds among the key players, including those who choose to actively investigate and prosecute fraud in New Jersey. The federal FCA is under amendment to clarify Congress' similar intent to impose potential liability, as the New Jersey statute already provides, for false claims made to any "recipient of State funds."

NJFCA's Broad Definition of False 'Claim'

The NJFCA imposes liability for making "a false or fraudulent claim." The definition of what constitutes a "claim" determines the scope of conduct, which will trigger the liability provisions of the act. The NJFCA defines the term "claim" broadly to include, as its federal counterpart does, "a request or demand, under a contract or otherwise, for money [or] property." However, the New Jersey statute goes further. It adds that a request for "services" can also trigger the act's application. In addition, a false "claim" under the NJFCA includes a false request or demand for government money or property made to "any employee, officer, or agent of the State," as well as to those listed in the federal act (contractors, grantees and other recipients of government funds). The New Jersey Legislature has defined "state" very broadly to include: "any of the principal departments of the Executive Branch of State government, and any division, board, bureau, office, commission, or other instrumentality within or created by such department; and any independent State authority, commission, instrumentality or agency." Like the federal FCA, the NJFCA is triggered where the state government "provides any portion of the money, [or] property ... requested or demanded." The NJFCA also attaches liability if the state "will reimburse ... for any portion of the ... services requested or demanded."

The expansive definition of what constitutes a false "claim" under the NJFCA to specifically include false requests for government services means the New Jersey statute can easily reach frauds that are sometimes more difficult to prosecute under its federal counterpart. The NJFCA will police against claims for false or fraudulent goods but will also target shoddy or fraudulent services provided by unscrupulous contractors or other personal services contractors who are now fair game for more vigorous fraud enforcement. Private sector contractors now deliver many public services, and also "finance, operate and manage various public responsibilities." State agencies involved with health services, mental health, corrections, higher education and Medicaid have increasingly privatized their services. The privately contracted bridge inspector who fails

to inspect a New Jersey bridge or subcontracted road inspector who fails to do his job is now clearly susceptible to NJFCA liability. The New Jersey Legislature has assured that its fraud-fighting efforts will reach the ever-increasing state funds (now in the billions) paid by the state government to any private contractor who provides services to the state, whether related to education, prisons, health care, construction, local government services, etc.

Joint, Several Liability for NJFCA Penalties and Damages

Potential violators of the NJFCA, like those subject to federal FCA damages and penalties, face serious financial consequences: a judgment for three times the state's damages, plus civil penalties "allowed under the federal False Claims Act," (which are currently $5,500 to $11,000 per violation). Moreover, the losing defendant will have to pay attorney fees and costs to the state prosecutors as well as qui tam plaintiff's counsel. The federal FCA's provision for a qui tam plaintiff's reasonable attorney fees is located at 31 U.S.C. § 3730(d)(1) and (2). Of note, the federal FCA does not provide for payment of the government's counsel fees and costs.

Although the New Jersey statute references and adopts the federal FCA's treble damages and civil penalties regimes, the New Jersey act expressly provides for joint and several liability for these penalties and damages. By providing that the defendants are jointly and severally liable for all of the government's damages, the NJFCA undermines a deep-pocket defendant's ability to downplay its exposure for false claims violations in which it may have played a relatively minor, yet significant, role. This provision will also encourage prosecutors to go after co-conspirators where the state can recover its judgment from one or two solvent co-defendants.

Filing, Investigation and Prosecution by the AG

An action under the NJFCA may be filed in federal or state court, with the Superior Court of New Jersey exercising jurisdiction over state court actions. In contrast, a federal FCA case is filed only in the federal district court in which the defendant may be found, resides, transacts business or in which the false claims act violations occurred. Both statutes provide for the federal district court to exercise pendent jurisdiction over state claims. There is, however, a clear incentive for filing false claims act cases in federal court, even those initiated by the state attorney general. On one hand, it relieves the state courts of the cost of administration of these cases, but it also provides the litigants with the federal judiciary's longer experience with the issues presented under the similarly worded federal statute.

There are 21 counties in New Jersey, each serving as a seat for the Superior Court, New Jersey's civil trial division. Each of the 21 county clerk's offices that may receive filings for the New Jersey Superior Court must become very comfortable with all of the nuances of the seal provisions, which are an integral part of the NJFCA. A false claims litigant and his counsel must feel comfortable walking into any New Jersey State Court clerk's office and meeting with staff who will assist in making certain that the technical aspects of filing a case under seal are meticulously met. Most federal district court clerks' offices, although not all, are

conversant with the seal provisions. The training of 21 state clerks offices to handle delicate filing requirements designed to preserve the seal will take some time. However, as the NJFCA becomes more widely known, frauds that are perpetrated solely against the state and its agencies will be exposed and provide opportunities for cases involving NJFCA violations to be filed in New Jersey state court only.

Civil Investigative Demand Provision

The NJFCA does not explicitly refer to the attorney general's pre-complaint investigative powers as "civil investigative demands," as does its federal counterpart. However, the authority to investigate suspected false claims act violations prior to the filing of the government's complaint, which are conferred upon the attorney general in NJFCA § 2A:32C-14, are materially similar to § 3733 of the federal FCA. This is a new and powerful investigative tool bestowed upon the New Jersey Attorney General's Office by the Legislature. The NJFCA provides: "If the attorney general has reason to believe that a person has engaged in, or is engaging in, an act or practice which violates this act, or any other relevant statute or regulation, the Attorney General or the Attorney General's designee may administer oaths and affirmations, and request or compel the attendance of witnesses or the production of documents. The Attorney General may issue, or designate another to issue, subpoenas to compel the attendance of witnesses and the production of books, records, accounts, papers and documents."

The federal FCA contains language to the same effect at 31 U.S.C. § 3733.

The differences between the NJFCA and the federal FCA in these provisions that address the attorney general's authority when conducting pre-filing false claims act investigations are mainly, but not entirely, procedural. First, the focus of the attorney general's pre-filing investigation is slightly different under the NJFCA. The New Jersey Attorney General has the right to issue a pre-complaint subpoena when he "has reason to believe that a person has engaged or is engaging in" a violation of the false claims act or similar statute, thus focusing on the existence of the violation.

The federal statute, on the other hand, provides that the attorney general's right to issue civil investigative demands arises when he has reason to believe that a person may possess or control documents or "information relevant to a false claims law investigation," lending a slightly different focus to the inquiry — the location of information regarding the false claims law investigation. Second, the scope of the powers conferred pursuant to the NJFCA is diminished, but only slightly, compared to the federal FCA. The attorney general may "issue ... subpoenas to compel the attendance of witnesses and the production of ... documents." Under the federal FCA, the attorney general may issue civil investigative demands, including requests for answers to written interrogatories, in addition to requiring that documents be produced and witnesses appear to provide oral testimony under oath. While the provision describing the attorney general's authority to issue subpoenas in aid of its investigation does not explicitly describe this as a "pre-complaint" exercise, it is apparent from a careful review of the NJFCA that the New Jersey Legislature intended the attorney general to issue such subpoenas before the state files its complaint.

N.J. AG's Pleading on Intervention Lifts Seal

Apparently, under the NJFCA, the seal is lifted automatically upon the filing of the attorney general's pleading that he is intervening in some or all of the action or declining to intervene. Under slightly different terms, the federal FCA provides that government must decide whether to intervene before the expiration of the initial 60-day seal period or any extension thereof, but does not require that a responsive or reflexive pleading be filed regarding the decision to intervene. It requires only that the government "notify the Court that it declines to take over the action." The federal government often keeps false claims act cases under seal for years and only when the government is ready for the action to be made public does it make the decision on intervention, thereby causing the seal to be lifted. While there are no official statistics on the length of time a qui tam case is kept under seal, in the Eastern District of Pennsylvania, for example, an intervened case is often kept under seal for several years. In the meantime, under both the New Jersey and federal laws, the complaint remains under seal for at least 60 days, and is not served on defendant until ordered by the court.

From a qui tam relator's perspective, New Jersey's requirement that the attorney general file a pleading for either intervention or declination can be highly problematic if prompt and meaningful communication between the relator and the prosecutor has not occurred prior to these decisions being made. This provision may need to be extended if good cause is shown to the court to preclude lifting of the seal. Moreover, the defendant may be unnecessarily harmed by premature disclosures if matters, which should be under seal, blow open with little warning to the relator or his counsel. If the attorney general provides the relator adequate notice of its decision against intervention, the relator may choose not to proceed with the action. The relator may opt to dismiss his complaint while it still is under seal as provided by § 2A:32C-5.c. If this occurs, a putative defendant will not be harmed in any way from a disclosure that may never have to be made.

Interestingly, neither statute requires advance notice by the federal government or by the state of the attorney general's intention to intervene or to decline. Without such notice, there is no opportunity for the qui tam plaintiff or his counsel to prepare for the impending unsealing (which follows from the intervention/declination decision), or to provide relevant information or, more importantly, address the state's putative concerns regarding the case. Perhaps a 30-day notice provision, similar to that enacted in New Jersey regarding the existence of a pending investigation based upon the same facts as the qui tam action (N.J.S. § 2A:32C-5.e), could be included in the amendments to the New Jersey statute to avoid unnecessary mishaps.

Distribution of Proceeds: Incentives for the State to Move Forward With a Case

The reality of limited government resources causes both a delay in the pre-complaint investigation of False Claims Act cases at both the federal and state level, and often affects the government's decision to take a primary role in the litigation. This is referred to as the attorney general's decision "to proceed with the

action" under the New Jersey False Claims Act, or NJFCA. Under the federal False Claims Act, this decision is commonly referred to as the government's decision to "intervene" or "decline" to intervene in the case brought by a qui tam relator.

The New Jersey Legislature has provided the state attorney general with an excellent opportunity to self-fund future investigations and prosecutions of False Claims Act cases through both the recovery of fees and costs under N.J.S. § 2A:32C-8.a and the establishment of the False Claims Prosecution Fund pursuant to N.J.S. § 2A:32C-7.c. Both sections provide powerful incentives for the attorney general to intervene in False Claims Act cases under N.J.S. § 2A:32C-5.d. Over time, if carefully implemented, the attorney general will be able to fund much, if not all, of its False Claims Act initiatives no matter how dire the restraints of the state treasury. Although there are other state false claims acts that provide similar incentives, neither provision is found in the federal FCA.

Fees and Costs Available for Initiating, Assuming Control

Under the NJFCA, when the attorney general becomes involved in a False Claims Act case, either by initiating the action or by assuming control of an action previously brought by a qui tam plaintiff, the attorney general "shall be awarded reasonable attorney's fees, expenses, and costs." A number of state false claims acts contain similar provisions. Surprisingly, the federal False Claims Act has never contained such a potent funding tool. Therefore, the federal government's attorneys lack similar incentives and the potential for the U.S. attorney general to recoup the considerable resources it dedicates to fighting fraud.

Of course, the New Jersey attorney general's opportunity to recover attorney fees and costs is completely contingent upon his initiating a false claims action on his own or assuming control (aka "taking over") of an action brought by a qui tam relator under the NJFCA. N.J.S. § 2A:32C-8.a. The New Jersey Legislature wisely both enacted this legislation requiring the enforcement of the NJFCA and simultaneously provided the necessary funding. The office charged with enforcing the NJFCA, namely the attorney general, has a compelling incentive to become actively engaged with a qui tam plaintiff's case early on — the promise of receiving their counsel fees and costs at the resolution of the matter. This funding provision empowers the New Jersey attorney general to make his intervention decisions with the knowledge that he will directly benefit from active prosecution of a NJFCA case. The fees and costs provision of the NJFCA should be a clear incentive for the Attorney General's Office to take an early and active investigative and prosecutorial role — and, at the very least, should soften any reticence on the part of the attorney general to become involved in meritorious qui tam matters because of funding or staffing concerns.

N.J. Attorney General's False Claims Prosecution Fund

New Jersey lawmakers also made certain that, while they provided private citizens with incentives to bring False Claims Act cases, they rendered the Attorney General's Office self-funded in their new obligations through New Jersey's unique False Claims Prosecution Fund provision. That provision requires that the attorney general receive "10% of the proceeds in any action or settlement of the claim that it brings" and

earmarks these funds for ongoing investigations and prosecutions of false claims under the New Jersey statute. There is no parallel under the federal False Claims Act; although similar provisions can be found in other state false claims acts.

Proceeds of FCA Case Compensate Injured Entities

New Jersey's Legislature has also given affected government agencies a vested interest in the successful prosecution of false claims suits — an award equal to the amount it was defrauded. Section 2A:32C-7.e of the NJFCA provides that, following any distributions to the person who brings the action on behalf of the state (§ 2A:32C-7.a, b and d), and to the Attorney General's False Claims Prosecution Fund (§ 2A:32C-7.c), the state entity actually "injured by the submission of the false claim" receives an award equal to its compensatory damages. This may prove to be a controversial provision if not carefully administered moving forward. The aggrieved agency must be required to accurately assess its actual harm. The reverse incentive to bloat damages could have an overall deleterious impact on the overall fraud-fighting scenario.

Amazingly, at times, the lack of full or meaningful cooperation by an aggrieved agency has proven an impediment to proving that a false claim occurred. Bureaucratic intransigence and even outright hostility has derailed many a False Claims Act case from seeing the light of day over the years. There are instances where an affected government agency is simply unwilling or otherwise lacks any incentive to take the position that the defendant (perhaps an important defense contractor or consultant) submitted false claims that caused the state agency to pay unwarranted government funds. An agency with a vested financial interest in recouping these monies is a powerful advocate against fraud, waste and abuse. The New Jersey Legislature has given its state agencies a real impetus to actively cooperate in the prosecution of qui tam matters — the return to that agency of the funds lost through false claims.

The Qui Tam Plaintiff's Share of the Recovered Proceeds

Under both the NJFCA and the federal statute, a qui tam plaintiff receives 15 to 25 percent of proceeds of the action or settlement of the claim in cases where the government intervenes and 25 to 30 percent if the government does not intervene (thereby leaving the relator, through his counsel, to prosecute the claim without any government resources or assistance). The NJFCA does not impose an upper limit on the qui tam plaintiff's share of the recovery where the government intervenes but the case is based in large part on the government's own information. Instead, it permits the reviewing court to exercise discretion in awarding a share of the proceeds of a false claims judgment or settlement to the qui tam plaintiff.

The New Jersey Legislature desired to provide an incentive, without legislative upper limits, for whistleblowers to come forward, to report fraudulent conduct by initiating qui tam actions and to do all they can to advance their cases. The NJFCA permits New Jersey courts to assess the value of the qui tam plaintiff's contribution in an intervened False Claims Act case, where the government had significant information about the fraud in addition to the relator's information. Having information is very different from having the will, wherewithal and resources to prosecute the fraud. This is an indication of their

recognition of the integral role of qui tam relators in efforts to prosecute fraud, waste and abuse. This provision (N.J.S. § 2A:32C-7(b)) sends a message to potential relators and to the qui tam bar, in general, that the New Jersey Legislature views the private citizen who reports false claims violations as an integral component in the effort to fight fraud — even in those instances where the recovery is ultimately based predominantly on the government's own information. •

The State Legislature May Still Have a Little Work to Do

In February 2006, Congress enacted the Deficit Reduction Act of 2005, or DRA. Sections 6031, 6032 and 6034 of the DRA provided amendments to Title XIX of the Social Security Act, 42 USC § 1396, et seq., and constituted efforts to form an alliance between the federal government and the states to ratchet up efforts to protect the integrity of the Medicaid program.

Through the DRA, Congress provided the states with an incentive to pursue frauds against joint federal and state Medicaid funds by first enacting state false claims acts, then using these laws to prosecute Medicaid fraud. State false claims legislation must meet the requirements of Section 6031(b) of the DRA, which essentially requires that the state false claims law, among other procedural requirements, "be at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as" the federal FCA.

In exchange, when states bring cases pursuant to these state fraud statutes, the recovering state receives an enhanced 10 percent share of Medicaid funds recovered, according to Section 6031(a). Section 6031(b) of the Deficit Reduction Act authorizes the Office of Inspector General of the Department of Health and Human Services, or HHS, in consultation with the Attorney General's Office, to determine whether a particular state false claims act meets minimum DRA requirements contained at Section 6031(b)(2).

The differences between the federal FCA and the NJFCA have yet to fully play out in actual practice. Most recently, the HHS inspector general has determined, because of several provisions of the NJFCA that diverge from the federal FCA in terms of rewarding and facilitating qui tam actions, the NJFCA does not meet DRA requirements. This means that, while the NJFCA certainly meets the intended purpose of encouraging ordinary citizens to aid the state in uncovering and prosecuting claims for misuses of state funds, the state will not receive an enhanced share of Medicaid funds recovered through state false claims cases until the DRA requirements are met through amendment of the existing NJFCA.

Pending State Action Bars the Qui Tam Plaintiff's Case

The NJFCA provides in N.J.S. § 2A:32C-9.b that the qui tam plaintiff cannot bring "an action based upon allegations or transactions that are the subject of a pending action or administrative proceeding in the State." This provision varies from the federal FCA in a small but meaningful manner.

The federal act, 31 U.S.C. § 3730(e)(3), only prohibits a qui tam plaintiff from filing suit if there is a pending civil suit or administrative proceeding "in which the Government is already a party." This failure to permit

the qui tam plaintiff to proceed with a suit based on transactions or allegations that are the subject of a pending action or administrative proceeding to which the state is not a party, in part, caused the HHS inspector general to conclude that the NJFCA failed to meet DRA requirements. A modest amendment adding the words "in which the State is already a party" to N.J.S. § 2A:32C-9.b will easily address this technicality.

The AG 'Taking Control Over' the Qui Tam Plaintiff's Action

When a false claims act complaint is filed by a qui tam plaintiff, "and the action is based upon the facts underlying a pending investigation by the Attorney General," the New Jersey Attorney General's Office may "take over the action on behalf of the State," according to N.J.S. § 2A:32C-5.e. In order to do so, "the Attorney General shall give the person written notification, within 30 days after notice of the action is served on the Attorney General, that the Attorney General is conducting an investigation of the facts of the action and will take over the action." Curiously, there is no similar provision under the federal False Claims Act .

The language of Section 2A:32C-5.e of the NJFCA does not explicitly state how the qui tam plaintiff's case is affected, if at all, when the New Jersey Attorney General "takes over the action." It appears that the HHS inspector general has assumed that the effect of this language is to preclude the relator from continuing as a party (and is therefore jurisdictionally barred) when an investigation was under way before the relator filed the qui tam action, even if the relator were the "original source" of the government's information. Unfortunately, the statute is simply not clear on this point, nor was HHS when it denied New Jersey DRA approval. While at first glance § 2A:32C-5.e may appear to be a jurisdictional bar to the qui tam plaintiff's suit, a careful reading of the entire statute reveals that the "limitations on bringing an action" (the jurisdictional bars to bringing an action) are contained elsewhere in N.J.S. § 2A:32C-9.c.

That section provides:

"No action brought under this act shall be based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing or audit conducted by or at the request of the Legislature or by the news media, unless the action is brought by the Attorney General, or unless the person bringing the action is an original source of the information. For purposes of this subsection, the term 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the State before filing an action under this act based on the information."

This provision is nearly identical to § 3730(e)(4) of the federal act. The HHS inspector general compared § 2A:32C-5.e to § 3730(c)(3) and (e)(4) of the federal FCA, even though NJFCA 2A:32C-9.c closely follows the very words contained in 31U.S.C. § 3730 (e)(4). When read in concert, the language (including section headings) of §§ 2A:32C-5.e and 2A:32C-9.c reveals that the text in § 2A:32C-5.e is a mere procedural requirement imposed upon the Attorney General's Office, while the language of § 2A:32C-9.c proscribes the

filing of an action where there is a pending investigation by the Attorney General's Office (a public disclosure), unless the relator is the original source.

Accordingly, the NJFCA "allows the relator to continue as a party even if an investigation was underway before the relator filed the qui tam action, unless the qui tam action was based upon a public disclosure of the allegations or transactions and the relator was not an original source" as required by the DRA.

Admittedly, the meaning of what is meant for the attorney general to "take over the action on behalf of the State" is not spelled out in Section 2A:32C-5.e. However, these terms are clarified when read in context and juxtaposed with Section 2A:32C-6.a, which describes the attorney general's primary prosecutorial responsibility "if the Attorney General proceeds with the action." Section 2A:32C-6.a of the NJFCA largely follows the federal FCA, 31 U.S.C. § 3730(c). The federal FCA in 31 U.S.C. § 3730(b)(4)(A) and (B) refers to the government's decision on whether to take an active role in prosecuting a false claims act case filed by a qui tam plaintiff, either proceeding with the action (intervening) or declining "to take over the action."

"Take over" in NJFCA § 2A:32C-5.e should be read as a synonym for the primary prosecutorial role assumed by the attorney general when he or she "proceeds with" a false claim action originally filed by a qui tam plaintiff. The New Jersey act, N.J.S. § 2A:32C-6.a, like the federal FCA 31 U.S.C. § 3730(c) (and consistent with the requirements of the federal DRA), permits the qui tam plaintiff to continue as a party after the state attorney general "takes over" the action, even if an investigation were under way before the relator filed the case, so long as the relator was an original source of the information. Although not necessary under the above analysis, a minor amendment clarifying that "proceeding with" and "taking over" are synonyms for the attorney general taking a primary prosecutorial role will resolve this confusion.

In contrast to the position taken by the HHS inspector general, N.J.S. § 2A:32C-5.e of the NJFCA, when read in conjunction with NJS § 2A:32C-6.a, actually affords greater protection to the qui tam plaintiff. This provision requires the Attorney General's Office, in a prompt manner, to alert the qui tam relator and his or her counsel that there is already a pending investigation based upon the same underlying facts as the allegations contained in a qui tam complaint filed under the NJFCA. There are several important practical benefits to this prompt disclosure of any pending investigations. First, if the relator is not an original source (and therefore barred from proceeding with the qui tam action under N.J.S. § 2A:32C-9.c), the relator will be able to assess his options very early in the litigation. If the relator decides to discontinue his action, no further expenditures of time or money will occur.

On the other hand, where the qui tam relator is an original source, this provision facilitates earlier cooperation between the state and the relator's private counsel. The attorney general should be encouraged to promptly disclose his view on the legal status of the relator in order to avoid unnecessary disputes over credit years later.

Reduction for Attorney Fees, Expenses and Costs

There is one provision in the New Jersey Statute, 2A:32C-8(b), that will discourage some qui tam plaintiffs from filing in New Jersey when considering viable venues for multi-jurisdictional matters. It could also dissuade plaintiffs from basing their claims on the new NJFCA. The qui tam plaintiff's statutory award is calculated only after taking a reduction from the total proceeds for the qui tam plaintiff's counsel fees and costs.

The NJFCA provides for the distribution of the recovered proceeds as follows:

• First, the qui tam plaintiff's reasonable attorney fees and costs are paid from the proceeds before any distribution (2A:32C-8).

• Second, the qui tam plaintiff receives its share of an intervened or non-intervened action (2A:32C-7.a, b., or d); or the attorney general receives 10 percent of any case it brings (in other words, where there is no qui tam plaintiff)(2A:32C-7.c).

• Third, the affected state agency injured by the submission of the false claim may receive an amount equal to its compensatory damages (2A:32C-7e.).

While the attorney general is entitled to an award of reasonable attorney fees and costs, the statute does not provide for the payment of these fees and costs either before or during the distribution. The process laid out in the NJFCA for distributing the proceeds of a false claim action requires both a distribution of proceeds to the qui tam plaintiff before any funds are released to the state pursuant to § 2A:32C-7.e, and the payment, where permitted, of the attorney general's fees and costs following any distribution to the affected state agency and the general fund. This order of distribution meets with 2A:32C-8.c., which provides that neither the state nor the attorney general is liable to pay the expenses, attorney fees, costs, etc. of either the qui tam plaintiff or the defendant ("any person ... bringing or defending an action under this act.").

As illustrated above, the qui tam plaintiff receives both its attorney fees (and costs, etc.) and its share of the proceeds recovered from the defendant before any proceeds are released to either the state agency, the general fund, or the Attorney General's Office (in terms of counsel fees and costs). Where the Attorney General's Office initiates the case, it receives its 10 percent share of the proceeds before funds are distributed to the affected state agency or the general fund, according to 2A:32C-7.e. If the action relates to false or fraudulent Medicaid claims, the state treasurer is required to deposit 25 percent of the state's share of the proceeds in the Medicaid Fraud Control Fund, according to 2A:32C-13.b. All remaining proceeds are deposited in the state's general fund, according to 2A:32C-7.e. and 2A:32C-13.c. In other words, the qui tam plaintiff receives 15 to 30 percent of what is left of the proceeds recovered by or on behalf of the state after the qui tam plaintiff's attorney fees and costs have been paid.

False claims cases are time-consuming, difficult and expensive. They can go on for many years against powerful, well-heeled defendants. Even the out-of-pocket costs for experts, travel and litigation expenses can, and do, easily add up to substantial sums.

The NJFCA actually requires that the qui tam plaintiff's attorney fees be paid out of the proceeds recovered by or on behalf of the state. In stark contrast, under the federal FCA, a qui tam plaintiff receives an award based on a percentage of the total proceeds recouped by the government. The qui tam relator's counsel fees and costs are paid by the defendant in addition to that amount and not taken from the government's proceeds, according to 31 USC 3730(d). Under the federal FCA, the defendant would be responsible for the qui tam plaintiff's fees and costs over and above the compensatory damages and penalties owed to the government under the federal act. The HHS inspector general properly based its conclusion that the NJFCA failed to meet DRA requirements on this reduction of the qui tam plaintiff's award for counsel fees and costs.

The reason that the payment of qui tam plaintiff's counsel fees from the state's proceeds will dissuade some qui tam plaintiffs from bringing their cases to New Jersey is that multi-jurisdictional false claims act cases against national or international providers are likely to involve millions of dollars in attorney fees and costs. Reducing the relator's award by these fees before calculating the qui tam plaintiff's share will serve to reduce the incentive for the qui tam plaintiff to come forward in the first place.

Moreover, this reduction only inures to the benefit of the defendant who is found to have committed the fraud. Lastly, and most importantly, such a reduction of the proceeds to pay the fees and costs of the qui tam plaintiff will create an irreconcilable conflict of interest between the relator and relator's counsel, who has expended considerable legal fees and costs in litigating the case and recovering the damages and penalties. This provision will need to be amended by the Legislature. •

All of the New Jersey Players Should Be Ready

The passage of the New Jersey False Claims Act, or NJFCA, is an integral component of New Jersey's statewide efforts to investigate and prosecute fraud involving state and federal funds. Since 2005, the U.S. attorney in New Jersey has been in the spotlight as a health care enforcement force to be reckoned with. At the same time, the creation of the New Jersey Office of Medicaid Inspector General offers the opportunity for a formidable centralized office for investigating Medicaid fraud and abuse and coordinating anti-fraud efforts. In May 2008, Gov. Jon Corzine appointed Mark Anderson, a veteran federal fraud prosecutor, to serve as the first New Jersey Medicaid Fraud inspector general. Anderson will have the ability to shape the focus and extent of Medicaid enforcement and draw upon his considerable private and public legal experience to make New Jersey a dynamic leader in fraud prosecutions. The NJFCA also provides funding for Medicaid enforcement efforts.

In addition to these efforts to curb fraud, waste and abuse in the health care arena, the NJFCA will also encourage citizens who know about all types of fraud involving state dollars to come forward. The non-Medicaid expenditures at the state level are substantial, and all state spending is expected to rise dramatically in the wake of the recent federal stimulus legislation. Experienced qui tam relators' counsel have been pursuing these non-health care false claims actions under the federal statute and are also well-versed on the claims and defenses to be raised in these arenas.

To countermand this gearing-up by litigants on the prosecution and enforcement end, defense counsel, many of whom have practiced under the federal FCA, have been preparing their government contractor clients for the next wave of qui tam suits. Before the ink on the NJFCA was dry, defense attorneys in the Garden State began sounding the rallying cry, calling for "companies that do business with the state" to "become familiar with the NJFCA and the key defenses to potential claims in order to defend against qui tam lawsuits under the new statute."

The potential claims and defenses associated with the NJFCA will be largely based upon those developed over the past 20 years of federal FCA litigation. Litigation under New Jersey's false claims statute promises to involve many of these same claims and defenses — plus a few novel theories related to distinct provisions of New Jersey's newest weapon against waste, fraud and abuse. Experienced qui tam counsel will certainly prove a valuable asset in advancing these claims and in responding to novel theories raised by the defense bar.

Conclusion

New Jersey has a potent new statute, which, if properly cultivated, utilized and protected, will reap significant rewards for the taxpayers of the Garden State. Most other states that have passed similar laws have experienced a sizeable increase in their fraud recoveries. The state of New York, which through a similar combination of a robust state false claims act and the appointment of James G. Sheehan in a role akin to New Jersey's Office of Medicaid Inspector General, has recovered more than $250 million in the last year alone. The next few years will be crucial to watch how the state, the Attorney General's Office, qui tam relators and their counsel, as well as the Medicaid inspector general, choose to give shape to these new fraud enforcement abilities for the benefit of the New Jersey taxpayer. The state should do everything it can to encourage the filing of meritorious claims under its new statute. Only time will reveal the benefits to the taxpayers of New Jersey from their Legislature's bold and ambitious efforts. •

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