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The Tar Heel State Steps Up Its Fight Against Fraud

Since the passage of the North Carolina False Claims Act in 2009, which became effective Jan. 1, 2010, North Carolinians have had a powerful weapon to combat fraud against their tax dollars and to return these funds to the state coffers. At the time it was passed, North Carolina joined 25 other states and the District of Columbia by enacting its own False Claims Act.

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Editor's note: This is the first of two articles about North Carolina's False Claims Act.

Since the passage of the North Carolina False Claims Act in 2009, which became effective Jan. 1, 2010, North Carolinians have had a powerful weapon to combat fraud against their tax dollars and to return these funds to the state coffers. At the time it was passed, North Carolina joined 25 other states and the District of Columbia by enacting its own False Claims Act.

The North Carolina Medical Assistance Provider False Claims Act, a narrower predecessor to the N.C. FCA that specifically applies to the presentation of false claims by providers of medical assistance under the North Carolina Medical Assistance Program, is still in effect.

Like the Federal False Claims Act upon which it is modeled, the North Carolina False Claims Act is designed to deter and punish those who make false or fraudulent claims for payment by the state and to provide powerful incentives for whistleblowers. In addition to imposing penalties of $5,500 to $11,000 for each false claim submitted to the state and treble damages against wrongdoers, the N.C. FCA contains a qui tam provision allowing private citizens with knowledge of fraud against the state to file suit on behalf of the state and to receive between 15 and 30 percent of the amount recovered from the fraudster as a reward.

The federal FCA has been the federal government's single most powerful tool to combat fraud and waste against the public fisc. Since the federal FCA was amended in 1986, more than $30 billion has been recovered from those who sought to fraudulently profit from taxpayer dollars. It has been used to expose every type of scheme affecting federal funds, including health care, contracting, defense, disaster relief and education fraud.

The federal FCA was strengthened in 2009 by the Fraud Enforcement and Recovery Act (FERA) and again in 2010 by the Patient Protection and Affordable Care Act (PPACA). These acts include amendments that expanded qui tam relators' rights and clarified often-conflicting circuit court interpretations of many of the federal FCA's key provisions. This emboldened federal FCA has resulted in greater recoveries of taxpayer funds.

According to the Department of Justice, in 2010 alone, the U.S. government recovered $3 billion under the qui tam provisions of the FCA. Overall, the public-private partnership embedded in the federal FCA to combat the rampant fraud, waste and abuse against federal taxpayers has ensured this unprecedented success.

The purpose of this article is to guide practitioners concerning some of the key similarities and differences between the federal FCA and the N.C. FCA. While the N.C. FCA can also be used as a very powerful weapon to combat fraud committed on the state of North Carolina, practitioners should, however, be mindful of the differences between the two statutes that are discussed herein.

Given the effectiveness of the federal FCA in both deterring fraud and recovering taxpayer funds from wrongdoers, various states followed suit in enacting their own false claims statutes, many with qui tam provisions. In 2005, Congress provided states with an added incentive to pass their own versions of the FCA — a 10 percent bonus. The Deficit Reduction Act included provisions

aimed at incentivizing state governments to pass false claims acts with robust qui tam provisions. Through the DRA, Congress pledged that when a state has a false claims act that was "at least as effective" as the federal FCA in facilitating and rewarding qui tam actions, the federal government would share 10 percent of any federal Medicaid false claims recovery with the state.

Additionally, to receive this bonus, the state FCA must also establish liability to the state for fraudulent claims with respect to Medicaid spending, contain a civil penalty that is not less than the penalty under the federal FCA, and contain a requirement for filing a case "under seal for 60 days with review by the state attorney general." This DRA bonus serves as a powerful incentive for states to pass their own qui tam false claims acts.

In keeping with the state movement toward robust false claims acts, the North Carolina Legislature passed a false claims statute in 2009. Unfortunately, on March 21, 2011, the Department of Health and Human Services (HHS) found the current N.C. FCA to be "not as effective in rewarding and facilitating" potential whistleblowers as the federal FCA. This article analyzes the rationale for this decision, as well as other differences and similarities between the federal FCA and the N.C. FCA.

The North Carolina False Claims Act

While the N.C. FCA mirrors the federal FCA in many respects, there are important differences that lawyers should be aware of that have significant implications for bringing a case under the N.C. FCA. The N.C. FCA mirrors the federal FCA in many respects. The language of the liability provisions for the federal FCA and the N.C. FCA are virtually identical, and both laws provide for the same measure of damages. In addition, the award structures for qui tam relators and key definitions (i.e., "knowing," "material" and "obligation") are the same under both statutes. Like the federal FCA, the N.C. FCA also contains a strong anti-retaliation provision, which affords redress for North Carolina whistleblowers who are fired, demoted or otherwise retaliated against for blowing the whistle on their employer or a government contractor. Additionally, the N.C. FCA specifically states that it should be interpreted in a manner consistent with the federal FCA, including its amendments.

Despite the great similarities between the federal FCA and its North Carolina counterpart, there are differences between these statutes in a number of significant areas. Through two letters issued to the director of the Medicaid Investigations Unit of North Carolina's Department of Justice, the HHS has highlighted five provisions of the N.C. FCA thought not to be as effective at incentivizing qui tam suits as the federal FCA: the public disclosure bar; the original-source exception; the first-to-file provision; the public employee limitation on qui tam suits; and the lack of a clear statute of limitations on anti-retaliation actions. Additionally, several other provisions, though not raised by HHS, may also impact the overall strength of the N.C. FCA. These will be addressed in greater detail below.

The Public Disclosure Bar

The N.C. FCA's public disclosure provision is both broader and more stringent than the federal version. Under the federal FCA, a court shall dismiss an action or claim, unless opposed by the government, if substantially the same allegations or transactions as alleged in the claim were publicly disclosed: (1) in a federal criminal, civil or administrative hearing in which the government or its agent is a party; (2) in a congressional, Government Accountability Office or other federal report, hearing, audit or investigation; or (3) by the news media, unless the action is brought by the attorney general or a person who is an original source of the information.

By contrast, the N.C. FCA does not allow the state of North Carolina to oppose a defendant or court's dismissal of a case based on its public disclosure bar. It also includes a broader definition of what constitutes a public disclosure.

More specifically, the N.C. FCA includes as public disclosures hearings in which the government was not a party. In qui tam litigation, the public disclosure bar was intended to block parasitic lawsuits based on public information obtained by those who contributed nothing to exposing the so-called fraud, but should also allow meritorious suits to continue. To achieve this important balance, the federal FCA specifically delineates what constitutes a public disclosure and allows the government to oppose a court's dismissal of a case based on the public disclosure bar. Thus, North Carolina's public disclosure bar may prove to be a roadblock to potential whistleblowers, and therefore, a deterrent to the filing of meritorious qui tam suits.

The Original-Source Exception

The original-source exception to the public disclosure bar permits a relator to proceed, even if there is a public disclosure, if the relator qualifies as an original source. North Carolina's original-source exception to the public disclosure bar is narrower than its federal counterpart.

Under the N.C. FCA, an individual is an "original source" of publicly disclosed allegations if that individual 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 based on that information. Prior to 2010, the federal FCA had a nearly identical original-source exception as the N.C. FCA, but in 2010 the federal FCA was amended. The federal FCA now provides that an individual need only have "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions" to qualify as an "original source." This provision moderates a potentially unforgiving and previously contentious public disclosure bar. The N.C. FCA lacks the relaxed standard of the federal FCA and may not, therefore, be as effective in incentivizing qui tam suits. •

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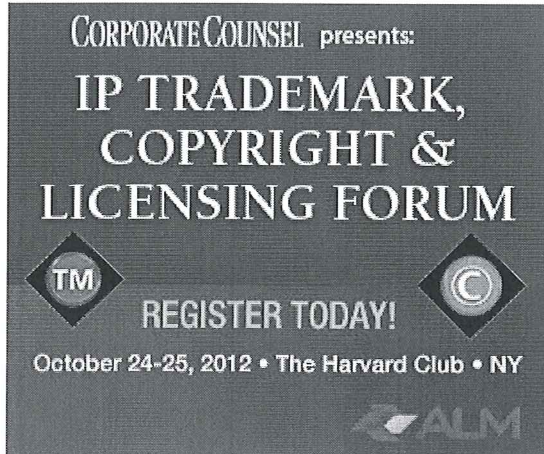

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