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States Likely To Ramp Up FCA Enforcement Amid COVID-19

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The COVID-19 pandemic has not only ravaged the health of Americans, but it has also decimated state tax revenues and state coffers.[1] Echoing the steps taken in response to the financial crisis of 2008, states are likely poised to adopt austerity measures that will reverberate for years as state tax revenue plummets.

Cutting costs, however, will not be the only means of protecting state funds. States are also likely to aggressively recover taxpayer dollars lost to waste, fraud and abuse.

How will they do this?

Following the 2008 financial crisis, states began to aggressively ramp up enforcement of nonhealth care-related fraud committed on state taxpayer funds.

In New York in 2011, for example, then-Attorney General Eric Schneiderman created, within the office for the first time ever, the Taxpayer Protection Bureau.[2] The bureau was comprised of a newly minted team of attorneys who, separate from its Medicaid Fraud Control Unit, would investigate state False Claims Act violations where non-Medicaid funds were at issue.

Despite that being a time period where New York was imposing budget cuts and hiring freezes,[3] the state attorney general's office invested in a new unit with dedicated staff. And that bet paid off for New Yorkers.

Practice Areas

Civil Fraud, False Claims, *Qui Tam* and Whistleblower Actions

State Attorneys General

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The Taxpayer Protection Bureau settled cases with entities in the range of millions of dollars in the first year,[4] including the notable $330 million settlement against the cell phone carrier Sprint Communications Inc. for failing to pay state and local sales taxes on calling plans sold to New Yorkers.[5]

The same playbook is likely to be used by states and localities this time around through their analogous whistleblower statutes, commonly known as the False Claims Act.

As procurement lawyers know, the federal FCA was first enacted during the Civil War as "Lincoln's Law" to root out fraud in government contracting.[6] The law allowed the federal government to obtain significant damages against those who defrauded, for example, the Union Army by fraudulently providing broken-down and used wartime equipment.[7]

Since then, the FCA has been used repeatedly to recover billions of federal taxpayer dollars lost through fraud committed against government programs, ranging from health care fraud to procurement fraud, grant fraud and mortgage fraud.[8]

States and localities have traditionally used the statute to recover against those who defraud state Medicaid programs — creating, within the attorney general's office of each state, a unit known as the Medicaid Fraud Control Unit.[9]

In recent years, state attorneys general have broadened their FCA portfolio of cases beyond just health care cases. In addition to New York state, other states are now taking a much more aggressive tack to expand their FCA enforcement matters, in cases ranging from tax avoidance schemes to government mischarging schemes under state contracts.

This prioritization of nonhealth-care fraud cases is reflected in recent legislative efforts as well. Several months ago, California Assembly member Mark Stone, D-Scotts Valley, with the strong endorsement of California Attorney General Xavier Becerra, introduced statewide legislation to expand the reach of the California FCA to cover tax fraud.[10] The bill had previously failed to move in the legislature due to intense opposition from the business community.[11]

Significantly, in the same press release that backed the proposed legislation to expand the California FCA, Becerra highlighted the impact of the law by pointing to an eye-popping $102 million settlement his office entered into with BP PLC over alleged overcharges for natural gas under three successive state contracts.[12]

These kinds of state-enforced, nonhealth-care-related cases brought under a state FCA are becoming more commonplace. In Illinois, for example, the state attorney general's office has resolved a string of Illinois FCA cases for tax fraud.

And several notable multistate settlements have also occurred, even without the federal government's lead. In

July 2019, the state attorneys general for Illinois, Massachusetts, New Jersey, New York, and Tennessee, along with the Baltimore City Solicitor, entered a $5.8 million settlement with research company LexisNexis Risk Solutions and several of its affiliates for withholding fees from law enforcement agencies when the research company resold information on automobile crash reports.[13]

Likewise, the New Jersey Attorney General in 2018 reached a $1.5 million settlement with Ranco Construction Inc., a construction company, regarding failure to pay prevailing wages on government contracts.[14]

This focus on state FCA enforcement is atop of what state attorneys general are already well-known for: consumer protection enforcement, including privacy violations, and antitrust enforcement.

This is a foreshadowing, and state attorneys general will likely continue to ramp up their use of FCA authority to recover taxpayer dollars for their state interests. Indeed, the whistleblower bar is similarly tracking the growing state authorities under which cases can be filed, and will likely be pushing states to do more in this area.[15]

So what does this mean for industry?

While government contractors and their outside counsel typically have fluency on federal contracting rules — including relevant regulatory flow-down clauses and programmatic functions within each relevant agency – states and municipalities operate differently.

In this way, government contractors must now become fluent in ensuring that their broader federal regulatory and contractual compliance programs are also in sync with various state regulatory and contractual requirements. For example, for public contract work in New York, the state's applicable prevailing wage rates differ on a county-by-county basis and may be dissimilar from federal requirements (and could therefore serve as the basis of a state FCA violation).[16]

It is therefore incumbent on those in a compliance and legal function within a government contractor to conduct regular audits that ensure the company and its personnel are attentive to and abiding by state regulatory and contractual rules, which can differ from federal rules.

The consequences of ignoring such requirements can lead to significant penalties under the state False Claims Acts and otherwise. State attorneys general are increasingly likely to accept referrals from state agencies where audits show irregularities in contracting invoices that could lead to full-blown investigations.

And of course, state and local whistleblowers are becoming more aware of the various avenues of recovery through whistleblower rewards programs. It will therefore remain imperative for companies to develop robust internal whistleblower programs as well, to allow for thorough investigation of any whistleblower report related to the receipt of state funds. These initial investments can help mitigate the risk of state attorney

general FCA investigations that are certainly on the horizon.

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