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Defending *Qui Tam* Suits Under New Jersey's New False Claims Act

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The federal civil False Claims Act ("FCA") has been the federal government's favorite weapon to enforce its antifraud initiatives, particularly in the healthcare industry. New Jersey has now joined 20 other states and the District of Columbia in enacting its own version of the federal law to target alleged fraud by companies that do business with the State. On January 13, 2008, Governor Jon S. Corzine signed the New Jersey False Claims Act ("NJFCA"), which takes effect 60 days later, on March 13, 2008.

The federal act was enacted at the initiative of President Lincoln to encourage citizens to come forward with information about defense contract fraud by authorizing suit in the name of the government and providing a portion of the recovery as a reward. It became known as the *qui tam* statute based on the Latin phrase for "who sues on behalf of the king as well as himself." The FCA provides for treble damages plus civil penalties for making false claims on federally funded programs. The *qui tam* provisions allow the private citizen who brings the



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suit, called the "relator," to receive up to 30 percent of the recovery.

New Jersey's new statute follows the federal version, and will invite suits by a new group of bounty-hunters – those involved with companies that do business with the State or "any contractor, grantee, or other recipient of State funds." Federal officials have tried to stretch the FCA to cover a broad range of alleged fraud against the government. The legislative history of the NJFCA suggests that New Jersey will try to do the same. Companies that do business with the State should therefore become familiar with the NJFCA and key defenses to potential claims.

What Conduct Does The NJFCA Cover?

The federal Deficit Reduction Act of 2005 contained financial incentives for

states to enact anti-fraud legislation modeled after the federal statute. Any state with a law patterned sufficiently after the federal act and applicable to Medicaid claims would be entitled to an extra 10 percent share of recoveries on Medicaid claims. The New Jersey statute, however, like many of those passed in other states, is not limited to Medicaid claims, and will apply to virtually all types of companies that engage in business, directly or indirectly, with the State.

The following acts are prohibited by the NJFCA:

- Knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval to an employee, officer or agent of the State, or to any contractor, grantee, or other recipient of State funds;
- Knowingly making, using, or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the State;
- Conspiring to defraud the State by getting a false or fraudulent claim allowed or paid by the State;
- Knowingly making, using, or causing to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the State;
- Having possession, custody, or control of public property or money used or to be used by the State and knowingly delivering or causing to be delivered less property than the amount for which the person receives a certificate or receipt;
- Being authorized to make or deliver a document certifying receipt of property used or to be used by the State and, intending to defraud the entity, making or

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delivering a receipt without completely knowing that the information on the receipt is true; or

- Knowingly buying, or receiving as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.

The "State" is defined to include all agencies and independent authorities of the State government. Though county and municipal government entities are not within the definition, a false claim on a local project could be covered if the claim is submitted to a "contractor, grantee, or other recipient of State funds."

As in the federal act, "knowing" and "knowingly" go beyond "actual knowledge," and include acts in "reckless disregard" or "deliberate ignorance" of the truth or falsity of the information. Except for the provision regarding certification of receipt of State property, no proof of specific intent to defraud is required. While "innocent mistake" and "mere negligence" are express defenses, plaintiffs will likely argue that the knowledge requirement is satisfied if a defendant submits a claim without due regard for its accuracy (reckless disregard) or consciously refuses to obtain additional facts that would disclose the inaccuracy (deliberate ignorance). Accordingly, the existence of an effective corporate compliance program, even if it fails to prevent submission of every inaccurate claim, should help to show that an alleged violation was, at worst, "innocently mistaken" or "merely negligent" rather than "knowing."

What Are The *Qui Tam* Provisions Of The NJFCA?

A *qui tam* complaint is filed under seal and is not initially served on the defendant. The plaintiff must immediately send the Attorney General a copy, together with written disclosure of substantially all material evidence and information the person possesses. The Attorney General has 60 days to determine whether to intervene in the action, but this period is subject to extension; under the federal statute, complex *qui tam* cases often remain under seal and investigation for several years. If the Attorney General decides not to intervene, the relator may then pursue the action alone.

The NJFCA provides for treble damages (or double damages in instances of timely self-disclosure and full coopera-

tion) and civil penalties of at least \$5,000 to \$10,000 per false claim (subject to adjustment for inflation). The relator's share is 15-25 percent if the Attorney General intervenes, but the court is authorized to reduce the share of a relator who "knowingly planned and initiated" the violation. If the relator prevails alone, the share is 25-30 percent. The relator's attorney's fees are recoverable in a successful suit, as are those of the defendant in the event the court finds that the relator's claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."

A *qui tam* action is barred if "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 person bringing the action is an original source of the information." An "original source" is someone with "direct and independent knowledge" of the underlying information who "has voluntarily provided the information to the State" before filing the action. This "public disclosure" bar seeks to prevent suits by individuals who have no significant information of their own but seek to obtain a relator's share by piggy-backing on public information.

The NJFCA creates a cause of action for any employee, whether or not a relator, who suffers retaliatory conduct for disclosing information to the State or law enforcement agencies, or for acts in furtherance of a false claims action. The remedies include double back pay, reinstatement, special and punitive damages, and attorney's fees.

What Are Defenses To Allegations That A Claim Is "False" Or "Knowing"?

An NJFCA suit may be based either on an alleged false statement of fact, *e.g.*, that costs were incurred, or on a statement alleged to be false because it lacks a legal basis, *e.g.*, that costs fall within a category that is legally eligible for reimbursement. The complexity and ambiguity of the statutes, rules, regulations, and contract provisions governing many government programs often make it difficult for even an experienced professional in a particular industry to be sure that every submission to the government is correct. The low threshold of intent under the

NJFCA will invite *qui tam* allegations that false claims of legal entitlement were knowingly made. As with the federal act, the elements of falsity and knowledge are likely to be two of the key battlegrounds for defense.

A claim should not be considered false under the NJFCA if reasonable minds could differ regarding the meaning of an ambiguous legal standard. A recent federal case in Nevada demonstrates this principle. In *United States v. Prabhu*, the government sued a doctor for submitting false claims. The doctor responded that the governing reimbursement rules were not clear, and that, over a thirteen-year period, he and his staff had routinely contacted and followed the instructions of his carrier and Medicare representatives. The court also considered evidence that the doctor had strived to follow applicable Medicare reimbursement rules and was committed to compliance.

The court granted the doctor's motion for summary judgment on the ground that the government had not established falsity: "Claims are not 'false' under the FCA unless they are furnished in violation of some controlling rule, regulation or standard" or "when reasonable persons can disagree regarding whether the service was properly billed to the Government."

Prabhu and similar cases also provide a model for challenging the NJFCA element of knowledge. Considering these same facts, the *Prabhu* court stated that a defendant "does not act 'knowingly' when his conduct is consistent with a reasonable interpretation of ambiguous regulatory guidance" or "when he follows Government instructions regarding the claims."

Inaccuracies will, inevitably, find their way into State submissions for payment, and the NJFCA will encourage *qui tam* plaintiffs to seek a bounty in areas of State contracting not reached by the federal act. Demonstrating both the ambiguity of the applicable law and the defendant's efforts at compliance will buttress the defense that the alleged violations were the product of "innocent mistake" or "mere negligence" rather than being "false" and "knowing" under the NJFCA. Indeed, companies that do not already have in place a comprehensive compliance program – including training, anonymous reporting, and self-auditing – should make the implementation of such a program a top priority.