STATE QUI TAM STATUTES: INCENTIVES, DIFFERENCES, & CHALLENGES

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Almost Forty States And Municipalities Have False Claims Acts

- Thirty states have false claims acts with *qui tam* provisions
- Twenty-one states have enacted general false claims statutes
  - CA, DE, FL, GA, HI, IL, IN, IA, MA, MN, MT, NH, NV, NJ, NM, NY, NC, OK, RI, TN, VA
- Nine states have false claims laws that apply exclusively to certain types of health care fraud
  - CO, CT, LA, MA, MD, MI, TX, WA, WI
- Eight municipalities have false claims acts
  - New York City, Chicago, Philadelphia, Washington, D.C., Miami-Dade County, County of Allegheny, Broward County
The Federal Government Gives States A Financial Incentive To Enact Their Own FCA Statutes

- Deficit Reduction Act of 2006, 42 USC §§ 1396a(a), 1396b(i), 1396h(a)
  - Went into effect January 1, 2007
  - States that enact a Medicaid false claims law patterned after the federal FCA receive a 10% reduction in the share owed to the federal government for Medicaid recoveries

- State false claims statutes:
  - Need not be limited to Medicaid
  - Need only be at least effective in rewarding and facilitating *qui tam* actions as the federal FCA
To Remain Eligible For Incentives, State FCAs Must Track Revisions to Federal FCA

- The federal FCA was amended by the Fraud Enforcement and Recovery Act of 2009 (FERA), the Affordable Care Act ("ACA"), and Dodd-Frank

- Sixteen states have revised their false claims acts accordingly

  - CA, CO, CT, DE, GA, HI, IL, IA, MA, MN, MT, NY, RI, TN, TX, WA
To Remain Eligible For Incentives, State FCAs Must Track Revisions to Federal FCA

- The types of amendments states are enacting include:
  - Longer statutes of limitations
    - Rhode Island had to increase its statute of limitations for retaliation actions to at least 3 years to bring in line with the Dodd-Frank Act
  - Broadening the scope of liability
    - Texas broadened the definition of a reverse false claims to bring it in line with the federal statute
  - States must broaden the type of conduct for conspiracy liability
  - Liability must be established for presenting false claims as well as causing false claims to be presented
Many State False Claims Laws Expand Potential Liability Beyond The Scope Of The Federal FCA

- The New York state false claims act authorizes courts to award reasonable expenses, attorneys’ fees and costs to local governments. See N.Y. Fin. Law § 190.7.
- The Virginia false claims act requires losing defendants to pay relator’s attorneys’ fees and the state’s costs. See 2002 Va. Acts, ch. 841, § 8.01-216.3(A).
- State false claims acts create the possibility of parallel liability where state and federal funds are involved.
New York False Claims Act

- Amended in August 2010 to include revisions similar to FERA. See N.Y. Fin. Law § 189.1(b), (c), (g)-194 (2007).
- Further revised in March 2013 to track changes in ACA and Dodd-Frank. See N.Y. Fin. Law § 189.1(h), § 190.2(d), (e).
Differences Between NY And Federal FCA

1. Lower Pleading Burden
Differences Between NY And Federal FCA

“[T]he qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct, or any specific record or statements used, if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section [189] of this article are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government effectively to investigate and defendants fairly to defend the allegations made.” See N.Y. Fin. Law § 192.1-a.
Differences Between NY And Federal FCA

- “Reasonable indication,” “likely to have occurred,” “adequate notice,” and “specific nature of the alleged misconduct” weaken the pleading requirements otherwise applicable to fraud claims under CPLR 3016. See N.Y. Fin. Law § 192.1-a.

- Lower pleading burden than the specificity requirements imposed by Fed. R. Civ. P. 9(b)
Differences Between NY And Federal FCA

2. Contains Definitions That Are Not Included In The Federal FCA
Differences Between NY And Federal FCA

- Definition of “person” excludes state and local governments from liability. See N.Y. Fin. Law § 188.6.

- Definition of “intent” makes clear that acts of “mistake” or “mere negligence” are not subject to liability. See id.
Differences Between NY And Federal FCA

3. NY Attorney General And Local Governments Are Not Required To Investigate Alleged Violations
Differences Between NY And Federal FCA

- The attorney general and local governments have the authority, but are not required, to investigate alleged violations of the NY FCA. See N.Y. Fin. Law § 190.1.

- However, the attorney general must consult with the office of the Medicaid inspector general before filing, superseding or intervening in an action related to Medicaid claims. See N.Y. Fin. Law § 190.1, 190.2(b).
Differences Between NY And Federal FCA

4. Violations Of NY Tax Code Can Form The Basis Of An FCA Suit, Including *Qui Tam* Claims
Differences Between NY And Federal FCA

- False or fraudulent claims, records or statements made under NY state tax laws are actionable if the defendant’s net income or sales exceed $1 million for any taxable year subject to any action, and the damages alleged exceed $350,000. See N.Y. Fin. Law § 189.4(a).

- Before intervening, NY attorney general must consult with the commissioner of the NY Department of Taxation and Finance. See N.Y. Fin. Law § 189.4(b).

- If the NY attorney general declines to intervene, the relator may still proceed but must obtain the attorney general’s approval before moving to compel the disclosure of tax records. See id.
Differences Between NY And Federal FCA

5. Public Disclosure Bar Does Not Cover Information Disclosed In Response To State Or Local FOIL Request
Differences Between NY And Federal FCA

- Responses to FOIL and similar requests for information are not subject to the public disclosure bar. See N.Y. Fin. Law § 190.9.(b).

- Information in a federal, New York state, or New York local government report, hearing, audit or investigation are not subject to the public disclosure bar unless “made on the public record or disseminated broadly to the general public.” See N.Y. Fin. Law § 190.9 (b).

- Information is not considered “publicly disclosed” merely because “information of allegations or transactions” is posted on the internet or a computer network. See N.Y. Fin. Law § 190.9.(b)(iii).
Differences Between NY And Federal FCA

6. Court Can Award Reasonable Expenses, Attorneys’ Fees, And Costs To The AG, Local Government, And Qui Tam Plaintiff
Differences Between NY And Federal FCA

- NY false claims act authorizes the award of reasonable expenses, attorneys’ fees, and costs to the local government, as well as to the relator. See N.Y. Fin. Law § 190.7.
  - This provision has the effect of providing an additional layer of consequential damages on top of treble damages
  - Raises potential concerns regarding excessive fines and due process where recovery substantially exceeds actual damages
Differences Between NY And Federal FCA

7. Retaliation Provision Contains An Extremely Broad Definition Of “Lawful Acts” That Are Protected
Differences Between NY And Federal FCA

- “[A] lawful act shall include, but not be limited to, obtaining or transmitting to the state, a local government, a qui tam plaintiff, or private counsel solely employed to investigate, potentially file, or file a cause of action under this article, documents, data, correspondence, electronic mail, or any other information, even thought such act may violate a contract, employment term, or duty owed to the employer or contractor, so long as the possession and transmission of such documents are for the sole purpose of furthering efforts to stop one or more violations of this article.” See N.Y. Fin. Law § 191.2.
Defense Challenges Under The NY FCA

- Retroactivity issues are unresolved

  - *New York v. Sprint Nextel Corp.*, No. 103917/2011 (N.Y. Sup. Ct. July 1, 2013) (retroactive application of the 2010 tax liability amendment “not sufficiently punitive in nature or effect” to warrant preclusion under the *Ex Post Facto* clause)

  - *State ex rel. Grupp v. DHL Express (USA), Inc.*, 970 N.E.2d 391 (N.Y. 2012) (holding that NY FCA is punitive)

Defense Challenges Under the NY FCA

- It is considered a lawful act for “any current or former employee, contractor, or agent of any private or public employer” to obtain and/or transmit proprietary or sensitive information to a third-party, including a *qui tam* plaintiff.

- Does not matter that obtaining or transmitting such information constitutes a breach of a confidentiality agreement or employment term. See N.Y. Fin. Law § 191.2.
Defense Challenges Under the NY FCA

- Companies paid with federal, state and NYC funds face the potential of “triple jeopardy”
  - NYC has its own false claims act. See NYC R.R. §§ 7-801 through 7-810.
NY Is Not The Only State Where Retroactivity Is Unresolved

- In *State ex rel. Foy v. Austin Capital Management Ltd.*, No. D-101-CV-2009-01189 (June 16, 2009), the plaintiff filed a lawsuit under the New Mexico Fraud Against Taxpayers Act, NMSA 1978. §§ 44-9-1 to -14 (“FATA”), alleging that beginning in 2003 the defendants, which include investment management firms, investment advisors, placement agents, the former chair of the ERB and the former State Investment Officer, engaged in improper activity, including misrepresenting investment products and services and paying kickbacks and bribes, that resulted in the ERB and the State Investment Counsel (“SIC”) losing hundreds of millions of dollars.

- The court in *Austin Capital* ruled that the clause in FATA providing for its retroactive application prior to the July 1, 2007 effective date of the legislation violated the *Ex Post Facto* clauses of the federal and New Mexico constitutions.

- The court severed that clause from FATA and allowed the action to proceed as regards conduct that allegedly occurred on or after July 1, 2007. The Court of Appeals affirmed; however, the New Mexico Supreme Court has agreed to hear the matter.
Procedural Regulations of the False Claims Act

FALSE CLAIMS ACT: RULES & REGULATIONS

Statutory Authority: N.Y. State Fin. Law § 194

CHAPTER IX. FALSE OR FRAUDULENT CLAIMS INVOLVING GOVERNMENT FUNDS OR PROPERTY

PART 400. PROCEDURAL REGULATIONS OF THE FALSE CLAIMS ACT

Section 400.1 General Provisions

(a) The State Finance Law, sections 187-194, shall be referred to herein as the "False Claims Act".

(b) Definition of Person: The term "person" as used herein shall mean any natural person, partnership, corporation, association or any other legal entity or individual, other than the state or a local government.

(c) Definition of Attorney General: The term "Attorney General" as used herein shall mean the Attorney General or his or her deputies, designees, assistants or special assistants.

(d) Severability: If any provision herein or the application of such provision to any persons or circumstances shall be held invalid, the validity of the remainder of the provisions and/or the applicability of such provisions to other persons or circumstances shall not be affected thereby.

Section 400.2 Civil Enforcement by the Attorney General

(a) Whenever it shall appear to the Attorney General that any person has engaged or is engaging in conduct that might amount to a violation of the False Claims Act, the Attorney General is authorized to investigate such violations by taking proof and making a determination of the relevant facts and issuing subpoenas in accordance with the Civil Practice Law and Rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought under the False Claims Act by the Attorney General, a local government, or any person, including a qui tam plaintiff.

(b) If a person subpoenaed to attend an inquiry related to a violation of the False Claims Act fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall without reasonable cause refuse to be sworn or to be examined or to answer a question or to produce a book or paper or data when ordered so to do by the officer conducting such inquiry, or if a person fails to perform any act required to be performed, the Attorney General may institute civil contempt proceedings under section 2308(b) of the Civil Practice Law and Rules or make a motion to compel pursuant to that section or take any other action authorized by law.

Section 400.3 Civil Enforcement by Local Governments

(a) A local government shall consult with the Attorney General prior to filing any action under section 190(1) of the False Claims Act related to the Medicaid program.

(b) A local government filing an action under section 190(1) of the False Claims Act shall provide the Attorney General with a copy of the complaint on or about the date such complaint
is filed.

(c) Under no circumstances shall the state be bound by the act of a local government that files an action involving damages to the state.

Section 400.4 Qui Tam Actions

(a) All qui tam actions shall be served on the Attorney General by the personal delivery of the qui tam complaint and accompanying evidence to a person designated to receive service at the Managing Clerk's Office on the 24th Floor at the Office of the Attorney General at 120 Broadway, New York, New York 10271, unless otherwise authorized by the Attorney General.

(b) A local government, having been authorized by the Attorney General to supersede or intervene in a qui tam action on its own behalf pursuant to section 190(2) of the False Claims Act, shall cooperate with the Attorney General in any subsequent investigation related to the action.

(c) If the state or a local government does not intervene or supersede after the 60 day time period or any extensions obtained under section 190(2)(b) of the False Claims Act, then the qui tam plaintiff has 30 days after such time period or extensions expire to decide whether to proceed with the action.

(i) If the qui tam plaintiff elects to proceed with the action, the qui tam plaintiff shall so advise the court, the state, and applicable local governments, and cause the complaint to be unsealed. After the complaint is unsealed, the qui tam plaintiff shall serve the complaint on any defendant pursuant to the provisions of the Civil Practice Law and Rules and other applicable law.

(ii) If the qui tam plaintiff elects not to proceed with the action, the qui tam plaintiff shall either: (i) voluntarily discontinue the action, without an order and without unsealing the action, by filing with the court a notice of discontinuance and serving a copy of this notice on the Attorney General, who may in the Attorney General's discretion in camera motion to unseal the complaint; or (ii) seek to voluntarily discontinue the action by order of court by making an in camera motion to unseal the complaint and dismiss the action.

(d) If the state or a local government decides not to intervene or supersede in a qui tam action, the qui tam plaintiff may not pursue the qui tam action on a pro se basis unless the qui tam plaintiff is an attorney eligible to represent a party before the court in which the qui tam action is proceeding.

400.5 Public disclosure bar motions

The state shall not seek to dismiss, and shall oppose the dismissal, of a qui tam action pursuant to paragraph (b) of subdivision nine of section one hundred ninety of the New York False Claims Act in the event that:

(a) any cause of action in the qui tam plaintiff's complaint would be dismissed other than a cause of action alleging substantially the same allegations or transactions that have been publicly disclosed in a manner set forth in such paragraph (b); or

(b) any cause of action in the qui tam plaintiff's complaint would be dismissed pursuant to subparagraph (ii) of such paragraph (b) solely because of an alleged public disclosure in a federal report, hearing, audit, or investigation.

400.6 Application of the damage multiplier

The state or a local government's damages shall be trebled or doubled pursuant to section one hundred eighty-nine of the New York False Claims Act before any subtractions are made for compensatory payments received by the government from any source, including but not limited to the defendant, or before any subtractions are otherwise made because of any offset or credit received by the government from any source, including but not limited to the defendant.

400.7 Obligations

(a) For purposes of paragraph (g) of subdivision one of section one hundred eighty-nine of the
New York False Claims Act, an “obligation” can be an obligation of any person and does not have to be an obligation of the person who knowingly makes, uses, or causes to be made or used, a false record or statement material to such obligation to pay or transmit money or property to the state or a local government.

(b) For purposes of paragraph (h) of subdivision one of section one hundred eighty nine of the New York False Claims Act, an “obligation” can be an obligation of any person and does not have to be an obligation of the person who knowingly conceals or who knowingly and improperly avoids or decreases such obligation to pay or transmit money or property to the state or a local government, or who conspires to do the same.

### 400.8 Payment of costs and attorneys’ fees

A person who violates section one hundred eighty-nine of the New York False Claims Act shall be liable for the costs, including attorneys’ fees, of a civil action brought to recover penalties or damages. Such person shall pay all costs borne by the state, a local government, a qui tam plaintiff, or counsel, as may be applicable. All such costs shall be awarded directly against the defendant and shall not be charged from the proceeds, but shall only be awarded if the state, local government or a qui tam plaintiff prevails in the action.

- Report Government Wrongdoing
- Report Patient Abuse & Medicaid Fraud
§ 187. SHORT TITLE

This article shall be known and may be cited as the "New York false claims act".

§ 188. DEFINITIONS

As used in this article, the following terms shall mean:

1. "Claim"
   (a) means any request or demand, whether under a contract or otherwise, for money or property that:
      (i) is presented to an officer, employee or agent of the state or a local government; or
      (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the state or a local government's behalf or to advance a state or local government program or interest, and if the state or local government (A) provides or has provided any portion of the money or property requested or demanded; or (B) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded;
   (b) does not include requests or demands for money or property that the state or a local government has already paid to an individual as compensation for government employment or as an income subsidy with no restrictions on that individual's use of the money or property.

2. "False claim" means any claim which is, either in whole or part, false or fraudulent.

3. "Knowing and knowingly"
   (a) means that a person, with respect to information:
      (i) has actual knowledge of the information;
      (ii) acts in deliberate ignorance of the truth or falsity of the information; or
      (iii) acts in reckless disregard of the truth or falsity of the information; and
   (b) require no proof of specific intent to defraud, provided, however that acts occurring by mistake or as a result of mere negligence are not covered by this article.

4. "Obligation" means an established duty, whether or not fixed, arising from an
express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

5. "Material" means having a natural tendency to influence, or be capable of influencing the payment or receipt of money or property.

6. "Local government" means any New York county, city, town, village, school district, board of cooperative educational services, local public benefit corporation or other municipal corporation or political subdivision of the state, or of such local government.

7. "Original source" means a person who:
   (a) prior to a public disclosure under paragraph (b) of subdivision nine of section one hundred ninety of this article has voluntarily disclosed to the state or a local government the information on which allegations or transactions in a cause of action are based; or
   (b) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the state or a local government before or simultaneous with filing an action under this article.

8. "Person" means any natural person, partnership, corporation, association or any other legal entity or individual, other than the state or a local government.

9. "State" means the state of New York and any state department, board, bureau, division, commission, committee, public benefit corporation, public authority, council, office or other governmental entity performing a governmental or proprietary function for the state.

§ 189. LIABILITY FOR CERTAIN ACTS

1. Subject to the provisions of subdivision two of this section, any person who:
   (a) knowingly presents, or causes to be presented a false or fraudulent claim for payment or approval;
   (b) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
   (c) conspires to commit a violation of paragraph (a), (b), (d), (e), (f) or (g) of this subdivision;
   (d) has possession, custody, or control of property or money used, or to be used, by the state or a local government and knowingly delivers, or causes to be delivered, less than all of that money or property;
   (e) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the state or a local government and, intending to defraud the state or a local government, makes or delivers the receipt without completely
knowing that the information on the receipt is true;

(f) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the state or a local government knowing that the officer or employee violates a provision of law when selling or pledging such property;

(g) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government; or

(h) knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a local government, or conspires to do the same; shall be liable to the state or a local government, as applicable, for a civil penalty of not less than six thousand dollars and not more than twelve thousand dollars, plus three times the amount of all damages, including consequential damages, which the state or local government sustains because of the act of that person.

2. The court may assess not more than two times the amount of damages sustained because of the act of the person described in subdivision one of this section, if the court finds that:

(a) the person committing the violation of this section had furnished all information known to such person about the violation, to those officials responsible for investigating false claims violations on behalf of the state and any local government that sustained damages, within thirty days after the date on which such person first obtained the information;

(b) such person fully cooperated with any government investigation of such violation; and

(c) at the time such person furnished information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation.

3. A person who violates this section shall also be liable for the costs, including attorneys' fees, of a civil action brought to recover any such penalty or damages.

4.(a) This section shall apply to claims, records, or statements made under the tax law only if

(i) the net income or sales of the person against whom the action is brought equals or exceeds one million dollars for any taxable year subject to any action brought pursuant to this article;

(ii) the damages pleaded in such action exceed three hundred and fifty thousand dollars; and

(iii) The person is alleged to have violated paragraph (a), (b), (c), (d), (e), (f) or (g) of subdivision one of this section; provided, however, that nothing in this subparagraph shall be deemed to modify or restrict the application of
such paragraphs to any act alleged that relates to a violation of the tax law. 

(b) The attorney general shall consult with the commissioner of the department of taxation and finance prior to filing or intervening in any action under this article that is based on the filing of false claims, records or statements made under the tax law. If the state declines to participate or to authorize participation by a local government in such an action pursuant to subdivision two of section one hundred ninety of this article, the qui tam plaintiff must obtain approval from the attorney general before making any motion to compel the department of taxation and finance to disclose tax records.

§ 190. CIVIL ACTIONS FOR FALSE CLAIMS

1. Civil enforcement actions.

The attorney general shall have the authority to investigate violations under section one hundred eighty-nine of this article. If the attorney general believes that a person has violated or is violating such section, then the attorney general may bring a civil action on behalf of the people of the state of New York or on behalf of a local government against such person. A local government also shall have the authority to investigate violations that may have resulted in damages to such local government under section one hundred eighty-nine of this article, and may bring a civil action on its own behalf, or on behalf of any subdivision of such local government, to recover damages sustained by such local government as a result of such violations. No action may be filed pursuant to this subdivision against the federal government, the state or a local government, or any officer or employee thereof acting in his or her official capacity. The attorney general shall consult with the office of medicaid inspector general prior to filing any action related to the medicaid program.

2. Qui tam civil actions.

(a) Any person may bring a qui tam civil action for a violation of section one hundred eighty-nine of this article on behalf of the person and the people of the state of New York or a local government. No action may be filed pursuant to this subdivision against the federal government, the state or a local government, or any officer or employee thereof acting in his or her official capacity. For purposes of subparagraphs (i) and (iv) of paragraph (a) of subdivision eight of section seventy-three of the public officers law, any activity by a former government employee in connection with the securing of rights, protections or benefits related to preparing or filing an action under this article shall not be deemed to be an appearance or practice before any agency.

(b) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the state pursuant to subdivision one of section three hundred seven of the civil practice law and rules. Any complaint filed in a court of the state of New York shall be filed in supreme court in camera, shall remain under seal for at least sixty days, and shall not be served on the defendant until the court so orders. The seal shall not preclude the attorney
general, a local government, or the qui tam plaintiff from serving the complaint, any
other pleadings, or the written disclosure of substantially all material evidence and
information possessed by the person bringing the action, on relevant state or local
government agencies, or on law enforcement authorities of the state, a local
government, or other jurisdictions, so that the actions may be investigated or
prosecuted, except that such seal applies to the agencies or authorities so served to
the same extent as the seal applies to other parties in the action.

If the allegations in the complaint allege a violation of section one hundred eighty-nine of this article involving damages to a local government, then the attorney
general may at any time provide a copy of such complaint and written disclosure to
the attorney for such local government; provided, however, that if the allegations in
the complaint involve damages only to a city with a population of one million or
more, or only to the state and such a city, then the attorney general shall provide
such complaint and written disclosure to the corporation counsel of such city within
thirty days. The state may elect to supersede or intervene and proceed with the
action, or to authorize a local government that may have sustained damages to
supersede or intervene, within sixty days after it receives both the complaint and the
material evidence and information; provided, however, that if the allegations in the
complaint involve damages only to a city with a population of one million or more,
then the attorney general may not supersede or intervene in such action without the
consent of the corporation counsel of such city.

The attorney general shall consult with the office of the medicaid inspector general
prior to superseding or intervening in any action related to the medicaid program.

The attorney general may, for good cause shown, move the court for extensions of
the time during which the complaint remains under seal under this subdivision. Any
such motions may be supported by affidavits or other submissions in camera.

(c) Prior to the expiration of the sixty day period or any extensions obtained under
paragraph (b) of this subdivision, the attorney general shall notify the court that he
or she:

(i) intends to file a complaint against the defendant on behalf of the people of
the state of New York or a local government, and thereby be substituted as the
plaintiff in the action and convert the action in all respects from a qui tam civil
action brought by a private person into a civil enforcement action by the
attorney general under subdivision one of this section;

(ii) intends to intervene in such action, as of right, so as to aid and assist the
plaintiff in the action; or

(iii) if the action involves damages sustained by a local government, intends to
grant the local government permission to:

(A) file and serve a complaint against the defendant, and thereby be
substituted as the plaintiff in the action and convert the action in all respects
from a qui tam civil action brought by a private person into a civil
enforcement action by the local government under subdivision one of this
section; or

(B) intervene in such action, as of right, so as to aid and assist the plaintiff in the action. The attorney general shall provide the local government with a copy of any such notification at the same time the court is notified.

(d) If the state notifies the court that it intends to file a complaint against the defendant and thereby be substituted as the plaintiff in the action, or to permit a local government to do so, such complaint, whether filed separately or as an amendment to the qui tam plaintiff's complaint, must be filed within thirty days after the notification to the court. For statute of limitations purposes, any such complaint filed by the state or a local government shall relate back to the filing date of the complaint of the qui tam plaintiff, to the extent that the cause of action of the state or local government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the complaint of the qui tam plaintiff.

(e) If the state notifies the court that it intends to intervene in the action, or to permit a local government to do so, such motion to intervene, whether filed separately or as an amendment to the qui tam plaintiff’s complaint, shall be filed within thirty days after the notification to the court. For statute of limitations purposes, any complaint filed by the state or a local government, whether filed separately or as an amendment to the qui tam plaintiff’s complaint, shall relate back to the filing date of the complaint of the qui tam plaintiff, to the extent that the cause of action of the state or local government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the complaint of the qui tam plaintiff.

(f) If the state declines to participate in the action or to authorize participation by a local government, the qui tam action may proceed subject to judicial review under this section, the civil practice law and rules, and other applicable law. The qui tam plaintiff shall provide the state or any applicable local government with a copy of any document filed with the court on or about the date it is filed, or any order issued by the court on or about the date it is issued. A qui tam plaintiff shall notify the state or any applicable local government within five business days of any decision, order or verdict resulting in judgment in favor of the state or local government.

3. Time to answer.

If the state decides to participate in a qui tam action or to authorize the participation of a local government, the court shall order that the qui tam complaint be unsealed and served at the time of the filing of the complaint or intervention motion by the state or local government. After the complaint is unsealed, or if a complaint is filed by the state or a local government pursuant to subdivision one of this section, the defendant shall be served with the complaint and summons pursuant to article three of the civil practice law and rules. A copy of any complaint which alleges that damages were sustained by a local government shall also be served on such local government. The defendant shall be required to respond to the summons and complaint within the
time allotted under rule three hundred twenty of the civil practice law and rules.

4. Related actions.

When a person brings a qui tam action under this section, no person other than the attorney general, or a local government attorney acting pursuant to subdivision one of this section or paragraph (b) of subdivision two of this section, may intervene or bring a related civil action based upon the facts underlying the pending action; provided, however, that nothing in this subdivision shall be deemed to deny persons the right, upon leave of court, to file briefs amicus curiae.

5. Rights of the parties of qui tam actions.

(a) If the attorney general elects to convert the qui tam civil action into an attorney general enforcement action, then the state shall have the primary responsibility for prosecuting the action.

If the attorney general elects to intervene in the qui tam civil action then the state and the person who commenced the action, and any local government which sustained damages and intervenes in the action, shall share primary responsibility for prosecuting the action.

If the attorney general elects to permit a local government to convert the action into a civil enforcement action, then the local government shall have primary responsibility for investigating and prosecuting the action. If the action involves damages to a local government but not the state, and the local government intervenes in the qui tam civil action, then the local government and the person who commenced the action shall share primary responsibility for prosecuting the action.

Under no circumstances shall the state or a local government be bound by an act of the person bringing the original action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (b) of this subdivision. Under no circumstances shall the state be bound by the act of a local government that intervenes in an action involving damages to the state.

If neither the attorney general nor a local government intervenes in the qui tam action then the qui tam plaintiff shall have the responsibility for prosecuting the action, subject to the attorney general's right to intervene at a later date upon a showing of good cause.

(b) (i) The state may move to dismiss the action notwithstanding the objections of the person initiating the action if the person has been served with the motion to dismiss and the court has provided the person with an opportunity to be heard on the motion. If the action involves damages to both the state and a local government, then the state shall consult with such local government before moving to dismiss the action. If the action involves damages sustained by a local government but not the state, then the local government may move to dismiss the action notwithstanding the objections of the person initiating the action if the person has been served with the motion to dismiss and the court has provided the person with an opportunity to be heard on the
(ii) The state or a local government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after an opportunity to be heard, that the proposed settlement is fair, adequate, and reasonable with respect to all parties under all the circumstances. Upon a showing of good cause, such opportunity to be heard may be held in camera.

(iii) Upon a showing by the attorney general or a local government that the original plaintiff's unrestricted participation during the course of the litigation would interfere with or unduly delay the prosecution of the case, or would be repetitious or irrelevant, or upon a showing by the defendant that the original qui tam plaintiff's unrestricted participation during the course of the litigation would be for purposes of harassment or would cause the defendant undue burden, the court may, in its discretion, impose limitations on the original plaintiff's participation in the case, such as (A) limiting the number of witnesses the person may call; (B) limiting the length of the testimony of such witnesses; (C) limiting the person's cross-examination of witnesses; or (D) otherwise limiting the participation by the person in the litigation.

(c) Notwithstanding any other provision of law, whether or not the attorney general or a local government elects to supersede or intervene in a qui tam civil action, the attorney general and such local government may elect to pursue any remedy available with respect to the criminal or civil prosecution of the presentation of false claims, including any administrative proceeding to determine a civil money penalty or to refer the matter to the office of the medicaid inspector general for medicaid related matters. If any such alternate civil remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section.

(d) Notwithstanding any other provision of law, whether or not the attorney general elects to supersede or intervene in a qui tam civil action, or to permit a local government to supersede or intervene in the qui tam civil action, upon a showing by the state or local government that certain actions of discovery by the person initiating the action would interfere with the state's or a local government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than sixty days. Such a showing shall be conducted in camera. The court may extend the period of such stay upon a further showing in camera that the state or a local government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

6. Awards to qui tam plaintiff.

(a) If the attorney general elects to convert the qui tam civil action into an attorney general enforcement action, or to permit a local government to convert the action
into a civil enforcement action by such local government, or if the attorney general or a local government elects to intervene in the qui tam civil action, then the person or persons who initiated the qui tam civil action collectively shall be entitled to receive between fifteen and twenty-five percent of the proceeds recovered in the action or in settlement of the action. The court shall determine the percentage of the proceeds to which a person commencing a qui tam civil action is entitled, by considering the extent to which the plaintiff substantially contributed to the prosecution of the action. Where the court finds that the action was based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil or administrative hearing, in a legislative or administrative report, hearing, audit or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than ten percent of the proceeds, taking into account the significance of the information and the role of the person or persons bringing the action in advancing the case to litigation. Any such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, reasonable attorneys' fees, and costs pursuant to article eighty-one of the civil practice law and rules. All such expenses, fees, and costs shall be awarded against the defendant.

(b) If the attorney general or a local government does not elect to intervene or convert the action, and the action is successful, then the person or persons who initiated the qui tam action which obtains proceeds shall be entitled to receive between twenty-five and thirty percent of the proceeds recovered in the action or settlement of the action. The court shall determine the percentage of the proceeds to which a person commencing a qui tam civil action is entitled, by considering the extent to which the plaintiff substantially contributed to the prosecution of the action. Such person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, reasonable attorneys' fees, and costs pursuant to article eighty-one of the civil practice law and rules. All such expenses, fees, and costs shall be awarded against the defendant.

(c) With the exception of a court award of costs, expenses or attorneys' fees, any payment to a person pursuant to this paragraph shall be made from the proceeds.

(d) If the attorney general or a local government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

7. Costs, expenses, disbursements and attorneys' fees.

In any action brought pursuant to this article, the court may award any local government that participates as a party in the action an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees, plus costs pursuant to article eighty-one of the civil practice law.
and rules. All such expenses, fees and costs shall be awarded directly against the defendant and shall not be charged from the proceeds, but shall only be awarded if a local government prevails in the action.

8. Exclusion from recovery.

If the court finds that the qui tam civil action was brought by a person who planned or initiated the violation of section one hundred eighty-nine of this article upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise be entitled to receive under subdivision six of this section, taking into account the role of such person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the qui tam civil action is convicted of criminal conduct arising from his or her role in the violation of section one hundred eighty-nine of this article, that person shall be dismissed from the qui tam civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the attorney general to supersede or intervene in such action and to civilly prosecute the same on behalf of the state or a local government.


(a) The court shall dismiss a qui tam action under this article if:

   (i) it is based on allegations or transactions which are the subject of a pending civil action or an administrative action in which the state or a local government is already a party;

   (ii) the state or local government has reached a binding settlement or other agreement with the person who violated section one hundred eighty-nine of this article resolving the matter and such agreement has been approved in writing by the attorney general, or by the applicable local government attorney; or

   (iii) against a member of the legislature, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the state when the action was brought.

(b) The court shall dismiss a qui tam action under this article, unless opposed by the state or an applicable local government, or unless the qui tam plaintiff is an original source of the information, if substantially the same allegations or transactions as alleged in the action were publicly disclosed:

   (i) in a state or local government criminal, civil, or administrative hearing in which the state or a local government or its agent is a party;

   (ii) in a federal, New York state or New York local government report, hearing, audit, or investigation that is made on the public record or disseminated broadly to the general public; provided that such information shall not be
deemed "publicly disclosed" in a report or investigation because it was disclosed or provided pursuant to article six of the public officers law, or under any other federal, state or local law, rule or program enabling the public to request, receive or view documents or information in the possession of public officials or public agencies;

(iii) in the news media, provided that such allegations or transactions are not "publicly disclosed" in the "news media" merely because information of allegations or transactions have been posted on the internet or on a computer network.

10. Liability.

Neither the state nor any local government shall be liable for any expenses which any person incurs in bringing a qui tam civil action under this article.

§ 191. REMEDIES

1. Any current or former employee, contractor, or agent of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, or otherwise harmed or penalized by an employer, or a prospective employer, because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action brought under this article or other efforts to stop one or more violations of this article, shall be entitled to all relief necessary to make the employee, contractor or agent whole. Such relief shall include but not be limited to:

   (a) an injunction to restrain continued discrimination;
   (b) hiring, contracting or reinstatement to the position such person would have had but for the discrimination or to an equivalent position;
   (c) reinstatement of full fringe benefits and seniority rights;
   (d) payment of two times back pay, plus interest; and
   (e) compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

2. For purposes of this section, a "lawful act" shall include, but not be limited to, obtaining or transmitting to the state, a local government, a qui tam plaintiff, or private counsel solely employed to investigate, potentially file, or file a cause of action under this article, documents, data, correspondence, electronic mail, or any other information, even though such act may violate a contract, employment term, or duty owed to the employer or contractor, so long as the possession and transmission of such documents are for the sole purpose of furthering efforts to stop one or more violations of this article. Nothing in this subdivision shall be interpreted to prevent any law enforcement authority from bringing a civil or criminal action against any person for violating any provision of law.
3. An employee, contractor or agent described in subdivision one of this section may bring an action in the appropriate supreme court for the relief provided in this section.

§ 192. LIMITATION OF ACTIONS, BURDEN OF PROOF

(1) A civil action under this article shall be commenced no later than ten years after the date on which the violation of this article is committed. Notwithstanding any other provision of law, for the purposes of this article, an action under this article is commenced by the filing of the complaint.

(1-a) For purposes of applying rule three thousand sixteen of the civil practice law and rules, in pleading an action brought under this article the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct, or any specific records or statements used, if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of section one hundred eighty-nine of this article are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government effectively to investigate and defendants fairly to defend the allegations made.

(2) In any action brought under this article, the state, a local government that participates as a party in the action, or the person bringing the qui tam civil action, shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

§ 193. OTHER LAW ENFORCEMENT AUTHORITY AND DUTIES

This article shall not:

1. preempt the authority, or relieve the duty, of other law enforcement agencies to investigate and prosecute suspected violations of law;

2. prevent or prohibit a person from voluntarily disclosing any information concerning a violation of this article to any law enforcement agency; or

3. limit any of the powers granted elsewhere in this chapter and other laws to the attorney general or state agencies or local governments to investigate possible violations of this article and take appropriate action against wrongdoers.

§ 194. REGULATIONS

The attorney general is authorized to adopt such rules and regulations as is necessary to effectuate the purposes of this article.
American Bar Association
Section of State and Local Government Law

2015 Spring Meeting

LITIGATING A FALSE CLAIMS CASE – By the Numbers
Susan K. Stewart, Esq., Deputy Attorney General and Construction Law Counsel
State of Nevada Office of the Attorney General

April 23-26, 2015
The Loews Philadelphia
Philadelphia, PA
Background

The Nevada Office of the Attorney General does not have a designated non-Medicaid Fraud False Claim unit/division.

False Claim Act cases are assigned to individual Deputies based upon the subject matter.


Three states – Nevada, New Mexico and Virginia – and 46 California municipalities and public agencies filed Notices of Intervention in the action.

The State of Nevada and its political subdivisions have purchased over 500 miles of JM pipe during the relevant time period.

Nevada intervenes February 1, 2010.

Allegations

The general allegations against J-M currently doing business as JM Eagle™ are set forth in the operative and Fifth Amended Complaint as follows:

[J-M's] fraud caused federal, state and local governments to purchase and install PVC pipe that has only a fraction of the strength and endurance Defendant J-M represented it to have. This, in turn, has caused failures of the PVC pipe in the field and has resulted in PVC pipe in the ground that will need to be replaced in a fraction of the time that Defendant represented it would last, and that the federal, state, and local governments relying on those representations, expected it to last. Defendant perpetrated this fraud through the following actions, among other:

a) using poor quality materials…;
b) running the manufacturing process…at speeds that damaged the quality of the PVC pipe while failing to properly maintain the manufacturing equipment;
c) cherry-picking, rather than randomly selecting, PVC pipe for testing…;
d) consistently misrepresenting the quality and strength of the PVC pipe;
e) presenting and causing distributors to present false claims ….

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1 Case No. ED CV06-0055-GW, United States District Court for the Central District of California (filed under seal January 18, 2006 and unsealed February 4, 2010). Formosa and Plaintiffs have settled.
2 State of Nevada’s Notice of Election to Intervene February 1, 2010 (Docket No. 82).
The Fifth Amended Complaint also alleges violations of False Claims Act Statutes of 12 states including the District of Columbia, as well as other political subdivisions and public water and sewer agencies within those same states.4

Complaints in Intervention

Nevada, Virginia and several California municipalities and public agencies filed Complaints in Intervention (a total of 36 were lodged with the court) under FRCP 15(a). The Court denied the Motions stating:

What started as a complicated qui tam matter based upon the federal False Claims Act and certain state law-equivalents threatens, given the complaints-in-intervention, to morph into a massive overwhelmingly state-law-based litigation. The tail would not simply be wagging the dog; it would be swinging it in circles, to dizzying effect. 5

Nevada, along with 50 other public entities, filed a complaint in Superior Court of the State of California for the County of Los Angeles asserting common law claims against J-M Manufacturing, Formosa Plastics Corporation and Walter Wang (owner and principal of J-M). 6 The State Court action is stayed pending the resolution of the Federal Court lawsuit.

Trial

Trial and discovery are bifurcated. The first-phase trial addressed Falsity, Materiality, and Scienter under the Federal False Claims Act and the state False Claims Acts asserted in the action.7 The Bifurcation Order also required Plaintiff to ‘introduce at the first trial five examples of ‘false claims.’ The evidence to be introduced through these examples includes the payments made, how such payments were made, and the relevance of industry standards in the payment process.’

Plaintiffs designated:

- Calleguas Municipal Water District
- Commonwealth of Virginia on behalf of the City of Norfolk
- Palmdale Water District (Palmdale, California)
- South Tahoe Public Utility District (South Lake Tahoe, California)
- State of Nevada on behalf of the City of Reno

Trial begins September 16, 2013, with opening statements delivered the next day. On the 30th day of trial, counsel delivers closing arguments and the case goes to the jury on the 31st day of trial, November 6, 2013.

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3 Fifth Amended Complaint, pg.1:8-28 December 27, 2011 (Docket No. 568).
5 Civil Minutes – General, Tentative Ruling November 8, 2010 (Docket No. 315).
6 Case No. BC459943.
7 Order Addressing Bifurcation, December 7, 2011 (Docket No. 551).
Day 36, the jury reaches a verdict. The following is excerpted from the Special Verdict Form:

28. As to plaintiff City of Reno (“Reno”),

Type 1 FCA Claims

(a) Did Defendant J-M Manufacturing Company, Inc. (“J-M”) present or cause to be presented to a Reno officer or employee a claim for payment or approval that was false or fraudulent?

_______ Yes  _______ No

(b) Did Defendant J-M make, use or cause to be made or used a false record or statement in order to get a false or fraudulent claim paid or approved by Reno?

_______ Yes  _______ No

The Special Verdict Form then instructed jurors how to proceed depending on whether they answered the proceeding questions in the affirmative or negative.

Type 1 FCA Claims

29. Identify – by project title, claim number, or (if the claim document was admitted during the trial) by Exhibit Number – each false or fraudulent claims presented or caused to be presented to Reno by Defendant J-M.

30. As to each false or fraudulent claim presented or caused to be presented by J-M to Reno, please identity/ describe with the claim was false and/or fraudulent.

31. Did J-M act “knowingly” in regards to the false or fraudulent claims as to each of the claims identified in question 30, above?

32. As to each claim where you answered “yes” in question 31, was the false or fraudulent aspect of the claim “material” to Reno’s decision-making body?

A similar series of questions were asked with regard to the Type 2 FCA Claims.8

The jury reaches a unanimous verdict for Plaintiff, completing the 50 page Special Verdict Form listing every project by name and exhibit number finding that in every project J-M presented or made a false claim, that J-M did so knowingly and that the false or fraudulent aspect of the claim was ‘material’ to the decision-making body. Id.

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8 Special Verdict Form, November 14, 2013 (Docket No. 1794).
The Numbers

- 550 Exhibits
- 31 witnesses
- 50 Motions in limine
- 2016 docket entries
- 12 law firms
- 7 Courts