10 Things You Shoul Taxpayer Protection

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In July of 2012, Georgia taxpayers were given a powerful new tool to hold recipients of state funds accountable: the Georgia Taxpayer Protection False Claims Act (the "GTPFCA" or the "Revised Act"), codified in Chapter 3 of Title 23 and Chapter 4 of Title 49 of the Georgia Code. The GTPFCA substantially revised the previously existing State False Medicaid Claims Act, O.C.G.A. § 49-4-168 *et seq.* (the "Medicaid FCA"), and it created a new statutory scheme covering false or fraudulent claims submitted to non-Medicaid payors, O.C.G.A. § 23-3-120 *et seq.* (the "Non-Medicaid FCA"). Here are some of the most significant aspects of the GTPFCA that every Georgia lawyer should be aware of.

The Act Covers False Claims Submitted to Virtually Any State Payor

False claims submitted to the State Medicaid Program have been actionable under the Medicaid FCA since it was enacted in 2007. The GTPFCA, however, vastly expanded false-claims liability to reach non-Medicaid claims. Under the Revised Act, a false or fraudulent claim involving the money or property of virtually any government body (including counties, cities, school boards, political subdivisions, and even MARTA) is now potentially actionable.[1] The Revised Act even reaches claims submitted not directly to the government, but to government contractors or grantees if government funds will be used to pay the false claim.[2] Thus, a statute that once was largely confined within the healthcare industry is now relevant to all industries and practices.

The Act Covers a Broad Range of Conduct

The Revised Act applies to the straightforward situation involving a knowing presentation of a false claim for payment, but it also extends liability to a broad range of other conduct, including knowingly making or using a false record material to a false claim, possessing state property or funds and knowingly delivering less than all that property or money, knowingly receiving public property as a pledge of an obligation or debt from a government officer or employee who lawfully may not sell or pledge the property, or conspiring to do any of these things.[3] The GTPFCA also reaches "reverse false claims," which involve knowingly concealing, avoiding, or decreasing an obligation to pay or transmit money or property to the state or local government.[4]

"No proof of specific intent to defraud is required."[5] Instead, liability under both the Medicaid and Non-Medicaid parts of the GTPFCA attaches for "knowing" violations, which requires only that an individual have actual knowledge of the falsity **or** act in deliberate ignorance or reckless disregard of the truth or falsity of the information.[6]

Nevertheless, the revised Act's expanded liability is not unlimited. Among other exclusions, the Act does not apply to "claims, records, or statements made concerning taxes under the revenue laws of this state,"[7] nor does it reach payments made by the government to individuals as employment compensation or unrestricted income subsidies.[8]

Methods of Enforcement

The GTPFCA is enforceable through an action by the Attorney General (or a local government designee of the Attorney General),[9] but it is also enforceable through a private right of action, subject to several important qualifications and limitations.[10]

d Know about Georgia's False Claims Act

A private plaintiff must receive written approval by the Attorney General to bring an action to enforce the Non-Medicaid FCA.[11] (The revised Medicaid FCA does not require similar pre-approval for private suits.) The government then must decide whether to intervene and take over the litigation or allow the private plaintiff to proceed.[12] If the state or local government does intervene and take over the litigation, the private litigant may still remain a party to the civil action.[13] If the state has elected not to proceed with the litigation, the local government may nevertheless seek dismissal, even over the plaintiff's objections, and either the state or local government may settle over the plaintiff's objections.[14] Additionally, the court may allow the government to "intervene at a later date upon a showing of good cause."[15]

Civil Penalties and Recoveries

The Non-Medicaid Act provides for a civil penalty of between $5,500 to $11,000 "for each false or fraudulent claim," plus treble damages sustained by the government because of the false claim.[16] There is a so-called "safe harbor" provision for defendants who provide information to and cooperate with government investigators, provided that no prosecution or civil or administrative action was in place at the time the defendant took advantage of the safe harbor, but that safe harbor merely reduces the maximum penalty of two times the government's damages rather than three times said damages.[17]

If the government proceeds with the case, the private litigant is entitled to receive between 15 percent and 25 percent of any proceeds or settlement (or a lesser amount if the disclosures on which the action is based were made by news media or from other specified sources).[18] When the government does not intervene, then the private plaintiff is entitled to receive between 25

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percent and 30 percent of the proceeds or settlement, plus fees and costs.[19] Regardless of whether the government proceeds with the suit, if the private plaintiff "planned and initiated the violation" giving rise to the suit, then his or her share of recovery may be reduced by the court, unless the plaintiff is convicted of criminal conduct arising from the violation, in which case he or she shall not recover anything.[20]

With respect to attorneys' fees and costs of litigation, a defendant found to have violated the Non-Medicaid FCA shall be liable to the state or local government "for all costs, reasonable expenses, and reasonable attorney's fees" incurred in prosecuting the action.[21] Under the Medicaid FCA, on the other hand, a defendant found to have committed a violation is liable only for the "costs" incurred by the state to bring the action.[22]

Limitations on Public Employees as Private Plaintiffs

The Revised Act also contains limitations as to who can be parties to such an action. If the plaintiff is a federal, state, or local employee or official, the Non-Medicaid FCA forbids the action if it is "substantially based upon" allegations that the public employee had a duty to investigate or report as part of his or her employment or allegations based on information or records to which the public employee had access as a result of his or her employment or office. [23]

Significantly, the GTPFCA does not require a whistleblower-plaintiff to exhaust any internal reporting channels before filing a private civil action. And where the defendant is a legislator or member of the judiciary, no private action may be brought if the action is based on evidence or information already known to the state at the time the civil action was brought.[24]

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Relaxed Pleading Standards for Non-Medicaid FCA Actions

For civil actions brought pursuant to the Non-Medicaid FCA, private plaintiffs "shall not be required to identify specific claims that result from an alleged course of misconduct or any specific records or statements."[25] Instead, a civil action is sufficiently pled "if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of [the Non-Medicaid FCA] 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 to investigate effectively and defendants to defend fairly the allegations made."[26]

Private litigants under the Medicaid FCA do not benefit from a similarly relaxed pleading standard.

Public Disclosure Bar and Original Source Definitions

Recognizing the likely temptation on the part of private individuals to profit on false-claims information that has been made public, the GTPFCA requires dismissal of any private action "if substantially the same allegations or transactions as alleged in the action" were publicly disclosed in a government hearing, by a government report disseminated to the public at large, or by the news media, "unless the person bringing the action is an original source of the information."[27] For purposes of the Non-Medicaid FCA, information which is disclosed by the government in response to an open records or FOIA request or which is posted on the internet is not considered "publicly disclosed," but the Medicaid FCA contains no such limitations on the definition of "publicly disclosed."[28]

Whereas the old Medicaid FCA defined an "original source" as someone with "direct and independent knowledge of the information" at issue, the Revised Act (both Medicaid and Non-Medicaid portions) now define an "original source" as someone who either has voluntarily disclosed to the government the information on which the allegations are based prior to making public disclosure, or has knowledge that is "independent of and materially adds to the publicly disclosed allegations" and has voluntarily provided the information to the government before filing a civil action under the GTPFCA.[29] However, to qualify as an original source under the Medicaid FCA, the voluntary disclosure/provision of information to the government must be to the Attorney General, while disclosure "to the state or a local government" generally qualifies one as an original source for purposes of the Non-Medicaid FCA.[30]

While on the topic of sources of information, it is worth noting that the Non-Medicaid FCA expressly provides that evidence or information provided to the government by a private person is exempt from disclosure under the Open Records Act and is protected by the common interest privilege and work product doctrines.[31] It goes on to provide that "it is the public policy of this state that private persons be authorized to take actions to provide to the Attorney General or local government such information and evidence," which raises a question about what information a private person is permitted to disclose to the government as part of

a claim under the Non-Medicaid Act.[32] Might this strengthened "public policy" be interpreted to protect an employee who discloses to the government privileged information? Only time will tell how the Revised Act is interpreted and applied by the courts, but this is one provision that all whistleblowers (and their attorneys) should be aware of.

Statutes of Limitations and Repose

Civil actions under the Medicaid FCA must be brought within the later of (a) six years after the date of the violation or (b) four years after the date when facts material to the right of action are known or reasonably should have been known by the state official charged with the responsibility to act in the circumstances.[33] The Non-Medicaid FCA requires that civil actions be brought within the later of (a) six years after the date of the violation or (b) three years after the date when facts material to the right of action are known or reasonably should have been known by the state or local government official charged with responsibility to act.[34] Both the Medicaid and Non-Medicaid Acts provide for a ten-year statute of repose for civil actions.[35]

Expanded Anti-Retaliation Provisions

The 2007 Medicaid FCA contained an anti-retaliation provision that applied only to an "employee" who experienced retaliation for lawful acts done in furtherance of a civil action under the Act.[36] As revised, both parts of the Non-Medicaid FCA contain expanded anti-retaliation provisions that protect not just employees, but also contractors and agents who experience retaliation.[37] This expanded group of potential whistleblowers must file suit, if any, within three years of the retaliation.[38] If successful, the employee, agent, or contractor is entitled to reinstatement, two times the amount of backpay (with interest), and compensation for special damages, including the costs and fees associated with litigation.[39]

Civil Investigative Demands

The Non-Medicaid FCA permits the Attorney General (or designee) to issue a Civil Investigative Demand ("CID") to any person whom is believed to "be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation."[40] The CID can require the recipient to produce the information in their possession, answer interrogatories or testify with respect to such information, or provide any combination of such production, interrogatory answers, or testimony.[41] Information obtained by the Attorney General through a CID may be shared with a *qui tam* relator if the Attorney General deems it necessary.[42]

The Medicaid FCA does not expressly provide for or prohibit the use of CIDs. However, the Non-Medicaid Act allows the Attorney General to issue CIDs "before commencing a civil proceeding under [the Non-Medicaid FCA] *or other false claims law*,"[43] a term broadly defined to include not only the Non-Medicaid FCA, but "[a] ny act of Congress or of the legislature" that creates "a civil remedy with respect to any false claim against . . . any officer or employee of any state, the District of Columbia, local government, or the United States."[44] Thus, it is at least conceivable that the Attorney General will issue CIDs in connection with investigations under the Medicaid FCA as well as the Non-Medicaid FCA. However, language requiring a claimant to proceed under the Medicaid FCA if such a claim is available, among other factors, indicates a legislative intent that the Non-Medicaid FCA's provisions (including those relating to CIDs) should not apply in the context of Medicaid FCA claims.[45]

In conclusion, the GTPFCA significantly expands the scope of false-claims liability in Georgia. Whereas the scope of liability was once confined to the healthcare industry, the Revised Act now potentially affects all persons and entities that do business with state and local governments. By being alert to the possibility that one of your clients may have information that could give rise to a claim under the new Non-Medicaid FCA, you can better serve your clients while simultaneously protecting taxpayer dollars from being applied to false or fraudulent claims. ●

References

1 O.C.G.A. § 23-3-120(3), (6).
2 O.C.G.A. § 23-3-120(1)(B).
3 O.C.G.A. § 23-3-121(a).
4 O.C.G.A. § 23-3-121(a)(7).
5 O.C.G.A. § 23-3-120(2); *see also* O.C.G.A. § 49-4-168(2) ("no proof of specific intent to defraud" is required).
6 O.C.G.A. § 23-3-120(2).
7 O.C.G.A. § 23-3-121(e).
8 O.C.G.A. § 23-3-120(1).
9 O.C.G.A. § 23-3-122(a).
10 O.C.G.A. § 23-3-122(b).
11 O.C.G.A. § 23-3-122(b)(1).
12 O.C.G.A. § 23-3-122(b)(4).
13 O.C.G.A. § 23-3-122(c)(1).
14 O.C.G.A. § 23-3-122(c)(2), (3).
15 O.C.G.A. § 23-3-122(e).
16 O.C.G.A. § 23-3-121(a)
17 O.C.G.A. § 23-3-121(b).
18 O.C.G.A. § 23-3-122(h)(1).
19 O.C.G.A. § 23-3-122(h)(2).
20 O.C.G.A. § 23-3-122(h)(1), (2), (3)
21 O.C.G.A. § 23-3-121(c).
22 O.C.G.A. § 49-4-168.1(c).
23 O.C.G.A. § 23-3-122(i).
24 O.C.G.A. § 23-3-122(j)(1).
25 O.C.G.A. § 23-3-123(c).
26 *Id.*
27 O.C.G.A. § 23-3-122(j)(3). *See also Knox Cnty. ex rel Environmental Termite & Pest Control, Inc. v. Arrow Exterminators, Inc.*, 350 S.W.3d 511, 523 (Tenn. 2011) (jurisdictional bar "is intended to encourage private citizens to assist state and local government in ferreting out fraud but, at the same time, to prevent parasitic plaintiffs from piggybacking on public disclosures of fraud to bring qui tam actions.").
28 *Compare* O.C.G.A. § 23-3-122(j)(3)(B) *with* O.C.G.A. § 49-4-168.2(l)(2).
29 O.C.G.A. § 23-3-122(j)(3)(C); O.C.G.A. § 49-4-168.2(l)(1).
30 *Id.*
31 O.C.G.A. § 23-3-122(b)(6).
32 *Id.*
33 O.C.G.A. § 49-4-168.5.
34 O.C.G.A. § 23-3-123(a).
35 O.C.G.A. § 23-3-123(a); O.C.G.A. § 49-4-168.5.
36 O.C.G.A. § 49-4-168.4.
37 O.C.G.A. § 49-4-168.4; O.C.G.A. § 23-3-122(l).
38 O.C.G.A. § 49-4-168.4(c); O.C.G.A. § 23-3-122(l)(3).
39 O.C.G.A. § 49-4-168.4(b); O.C.G.A. § 23-3-122(l)(2).
40 O.C.G.A. § 23-3-125(b)(1).
41 *Id.*
42 *Id.*
43 O.C.G.A. § 23-3-125(b)(1) (emphasis added).
44 O.C.G.A. § 23-3-125(a)(3).
45 O.C.G.A. § 23-3-127.