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Massachusetts False Claims Act Amendments Expand Liability Exposure

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This article, after presenting a brief summary of the Massachusetts False Claims Act, discusses some of the more significant recent amendments.

Massachusetts recently amended its False Claims Act ("MFCA" or the "Act").[1] Those amendments increase incentives and broaden the circumstances in which individuals, including government employees, can bring MFCA claims. The amendments should be of interest to any person or entity doing business with the Commonwealth or any of its political subdivisions because the amendments significantly increase the potential for becoming a defendant in an MFCA action. Indeed, even an individual or entity that has not done business with a Massachusetts governmental entity, but makes a false record or statement material to another's obligation to pay a Massachusetts governmental entity or to another's false claim, has exposure, as does an individual or entity that is the beneficiary of another's false claim or of an overpayment by a Massachusetts governmental entity.

Key provisions of the amendments:

- Broaden the MFCA predicate acts to include not only false "claims" for government payments, but also false statements "material" to a false claim;

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- Eliminate a court's authority to reduce or eliminate a bounty award to a "relator" (a private plaintiff suing on behalf of the government) who knowingly participated in the false claim;
- Broaden the definition of those possessing "original" information about false claims; MFCA actions brought by such persons — even if based on information already in the public domain — cannot be dismissed;
- Permit all current and former state employees to bring MFCA actions based on information learned in the course of their employment;
- Permit the Attorney General and other state government actors to override the "public disclosure bar"; and
- Expand the categories of persons protected from retaliation.

This article, after presenting a brief summary of the MFCA, discusses some of the more significant amendments at greater length.

MFCA BACKGROUND, SUMMARY

The MFCA was enacted in 2000 (like the recent amendments, as "outside sections" to a budget bill). The MFCA is modeled on the Civil War-era federal False Claims Act. In broad strokes, the MFCA authorizes the Massachusetts Attorney General to investigate false claims involving "state funds or funds from any political subdivision" of the Commonwealth, and to bring an action for civil penalties and to recover three times the amount of damages (payments and consequential damages), along with investigation and litigation expenses.[2]

The principal aspect of the MFCA (and of the federal FCA) that enhances the likelihood of litigation for parties that contract with government entities is its "über bounty hunter" feature: it authorizes a "relator" to bring an MFCA action on behalf of the Commonwealth or its political subdivisions.[3] Such an action must be filed under seal.[4] The relator is required to give the Attorney General notice of the suit, and the Attorney General then has a period of time to evaluate whether to intervene and thereby take over control of prosecution of the action from the relator.[5] If the Attorney General intervenes, the case is unsealed and the complaint is served on the defendant(s).[6]

If the case is resolved adverse to the defendant, the relator receives a bounty: 15 - 25 percent of any proceeds, unless the court finds the action was "based primarily" on information not provided by the relator, in which case the relator still receives a bounty, but no more than 10 percent of any proceeds.[7]

If the Attorney General elects not to intervene, the relator may conduct the MFCA action.[8] The Attorney General may thereafter, for good cause, intervene at any time.[9] If the Attorney General does not intervene, and the suit is either resolved by settlement or the relator prevails, the court determines the amount of the relator's bounty: between 25 and 30 percent of any proceeds, plus reasonable expenses (including attorney and expert witness fees).[10] Many relator actions in which attorneys general do not intervene are withdrawn or adjudicated in favor of the defendants. If the defendant prevails, the court may award attorneys' fees and costs against the realtor if it finds the action was frivolous or pursued in bad faith.[11]

MFCA's statute of limitations states that actions "may not be brought (i) more than six years after the date on which the violation occurred; or (ii) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official within the office of the attorney general charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last."[12]

Any information or documents provided to the Attorney General by a relator or anyone else in connection with an MFCA investigation or action are exempt from disclosure under the Massachusetts Public Records Law.[13] (Thus insulating the relator's and the government's actions from outside scrutiny.)

A separate Massachusetts statute criminalizes the submission of false claims to the Commonwealth or any of its political subdivisions, providing for a fine of $10,000 and "imprisonment in the state prison for not more than five years, or in the house of correction for not more than two-and-one-half years."[14]

In 2009 the federal False Claims Act was amended — largely to make it more relator-friendly — by the Fraud Enforcement and Recovery Act ("FERA"). The federal act was amended again in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") and by the Patient Protection and Affordable Care Act.

2012 MFCA AMENDMENTS

The federal Deficit Reduction Act of 2005 ("DRA") provided that states that adopted false claims acts modeled on the federal act would be eligible for a 10-percent increase in their share of any recovery from an action for Medicaid fraud brought under the state's false claims law. The Inspector General of the Department of Health and Human Services, in consultation with the United States Attorney General, is charged with determining whether state false claims statutes meet specific requirements set forth in the DRA. In December 2006, the Inspector General notified the Massachusetts Attorney General's office that the MFCA met DRA's requirements. Then, in 2011, the Inspector General informed the Attorney General that, in light of intervening amendments to the federal FCA, the MFCA no longer met DRA's requirements. That notification was an impetus for some of the recent MFCA amendments. Several of the changes discussed below correspond to changes to the federal False Claims Act that were made by FERA in 2009. For example, the "material" statement change; the broader definitions of "claim," "obligation" and "original source" in § 5A, and the expanded scope of liability for conspiracy in § 5B(a)(3). Others, however, are broader in scope or otherwise different, and create bases for the pursuit of claims that would not survive were they brought under the federal act.

Among the key changes wrought by the amendments are the following:

What Actions can Give Rise to an MFCA Claim?

The revisions now allow an MFCA complaint to be based on a false statement "material" to a false claim or "material" to an obligation to pay the Commonwealth.[15] These provisions are intended to defeat two arguments that have had some success with the courts: (1) only a false "claim" is sufficient to support an MFCA action, and (2) proof of a defendant's intent is required. Pre-amendment, the Act limited actionable events to false claims, records and statements, and required scienter. "Material" is defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[16]

The amendments also expand the scope of conspiracy liability. Section 5B(3) previously was limited to conspiracy to defraud through fraudulent

claims; it now reaches any violation of the nine other subsections of Section 5B (e.g., knowing purchase of public property from someone not authorized to sell it (subsection 7); entering into an agreement with a governmental entity "knowing the information contained therein is false" (e.g., a representation or warranty; subsection 8); knowing concealment, avoidance or reduction of an obligation to pay (subsection 9 — the so-called "reverse false claim")).

The amendments add a definition of "obligation" to clarify that the MFCA applies to contingent as well as fixed obligations, and to retention of an overpayment as well as to implied contractual obligations.[17]

Who May Bring a Claim as a Relator?

The amendments eliminate a court's authority to reduce or eliminate an award to a relator who "knowingly participated" in the violation of the MFCA.[18] The amendments authorize a court to "reduce or eliminate" an award to a relator "who planned and initiated the violation ... upon which the action was brought."[19] Conspicuous by its absence in this provision is any mention of reducing or eliminating an award to a relator who "merely" knowingly participated in defrauding the Commonwealth as part of a scheme "planned and initiated" by someone else.

The amendments also eliminate a provision that restricted MFCA suits by certain state employees, including attorneys, based on information learned in the course of their employment.[20] This change may create incentives for those categories of state employees to pursue MFCA claims, although § 5G(a) still precludes MFCA actions against state constitutional officers, legislators and judges based on information known to the Commonwealth when the action was brought (and see the prior government action bar in § 5G(b) and what is left of the public disclosure bar, discussed below). Also, where a government employee relator is required to uncover fraud as part of his or her employment duties, the fruits of that effort belong to his employer — the government, and the employee therefore does not qualify as an "original source." (See discussion of "original source" below.)

Except as noted in the previous paragraph, the amendments virtually eliminate the "government knowledge bar" — claims brought by a relator "who knew or had reason to know that the attorney general, the state auditor or the inspector general already had knowledge of the situation" are now permitted.[21]

Public Disclosure Bar

The amendments permit the Attorney General and other state government actors to override the "public disclosure bar," by giving the Commonwealth or any political subdivision the power to prevent dismissal of an MFCA claim based on the same allegations or transactions as (1) a publicly disclosed action already pending in a Massachusetts court or administrative forum to which the Commonwealth is a party, (2) a Massachusetts legislative, administrative, Auditor's or Inspector General's report, or (3) information publicly disclosed in the news media.[22] Such disclosures in, for example, a *federal* court action or administrative proceeding or a Congressional or *federal* administrative report no longer give rise to the public disclosure bar. In addition to the Attorney General's "veto" power over public disclosure bar dismissal, an MFCA action may not be dismissed in such circumstances if the relator is the "original source" of the information.[23] The amendments have also broadened the definition of "original source," so that it now includes not only someone who has non-public knowledge of false claims, which s/he voluntarily disclosed to the Commonwealth, but also someone who has knowledge that "materially adds" to publicly disclosed allegations of false claims. Also, an "original source's" information no longer need be "direct."[24]

Intervention by the Attorney General — Relation Back

The amendments clarify that the Attorney General, upon intervening in a relator's action, may amend the complaint to add claims that will relate back to the filing of the complaint by the relator.[25]

Confidentiality

The Attorney General is now authorized to share with a relator otherwise confidential information produced by third parties "if the attorney general determines it is necessary as part of a false claims act investigation."[26] Previously disclosure was limited to federal and state law enforcement authorities and in court proceedings. This revision — providing a relator with supplemental information he or she might not otherwise possess or be entitled to obtain — might prove especially useful as a discovery device for a complicit

relator who is facing the prospect of criminal charges (or who has already been charged). Indeed, it could provide an additional incentive for such a person to bring an MFCA suit — to obtain relator status entitling him/her to request such disclosure.

Anti-Retaliation

Section 5J forbids an employer from prohibiting disclosure about false claims to law enforcement agencies and from prohibiting assistance to MFCA actions. It also creates a retaliation cause of action. The amendments expand the categories of persons protected by the anti-retaliation provisions in § 5J to include "contractors" and "agents" in addition to employees. Also, the amendments clarify that an employee, contractor or agent who has been "discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment" is entitled to "all relief necessary to make that employee, contractor or agent whole," including without limitation "reinstatement with the same seniority status ..., twice the amount of back pay, interest on the back pay and compensation for any special damages."[27]

The MFCA previously limited retaliation recovery for those who had "participat[ed] in conduct which directly or indirectly resulted in a false claim being submitted to the commonwealth" to those who had been harassed, threatened or otherwise coerced into participating and who voluntarily disclosed information about the false claim to the government "prior to being dismissed."[28] That provision has been eliminated. The only requirement now is that the plaintiff has been discriminated against because of his or her "lawful acts... in furtherance of" an MFCA action or "other efforts to stop a violation of" the Act.[29] This is another way in which the amendments have opened up recovery for individuals complicit in false claims.

Retroactivity Provision

The MFCA amendments are part of a budget bill with an effective date of July 1, 2012. The budget bill was signed by the Governor on July 8. The Act states that MFCA actions "may be brought for acts or omissions that occurred prior to the effective date of this section."[30] However, courts have held, as a con-

stitutional matter, that substantive provisions of false claims statutes, because of their punitive aspects, may not be given retroactive effect.[31]

NOTES

[1] Mass. Gen. Laws ch. 12 §§ 5A - 5O. Section references in the following endnotes are to the MFCA, unless otherwise noted.
[2] § 5B.
[3] § 5C(2).
[4] § 5C(3).
[5] *Id.*
[6] § 5C(5).
[7] §§ 5F(1), (2).
[8] § 5D(6).
[9] *Id.*
[10] § 5C(4).
[11] § 5I(2).
[12] § 5K(1).
[13] §§ 5C(3), 5N(11).
[14] Mass. Gen. Laws ch. 266 § 67B; *see also* ch. 118E § 40 (same punishment for false statements to secure Medicaid benefits).
[15] §§ 5B(a)(2), (9).
[16] § 5A.
[17] § 5A.
[18] Former § 5F(5).
[19] § 5F(5).
[20] Former § 5G(4).
[21] Former § 5G(3).
[22] § 5G(c).
[23] *Id.*
[24] § 5A.
[25] § 5K(2).
[26] § 5N(8).
[27] §§ 5J(2), (3).
[28] Former § 5J(4).
[29] § 5J(2).
[30] § 5K(1).

[31] *See, e.g., Massachusetts v. Schering-Plough Corp*., 779 F.Supp.2d 224, 238 and n.8 (D. Mass. 2011) (the Ex Post Facto Clause bars retroactive application of the MFCA); *United States ex rel. Baker v. Community Health Sys.*, Inc., 709 F. Supp. 2d 1084, 1108-12 (D.N.M. 2010) (federal False Claims Act amendments); *United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747, 758 (S.D. Ohio 2009) (federal False Claims Act amendments (dicta)); *New Mexico ex rel. Foy v. Vanderbilt Capital Advisors, LLC*, No. D-101-CV-2008-1895, 2010 WL 3216465 (N.M. Dist. Ct. Apr. 28, 2010) (New Mexico Fraud Against Taxpayers Act); *but see United States ex rel. Miller v. Bill Harbart Int'l Constr., Inc.*, 608 F.3d 871, 878-79 (D.C. Cir. 2010) (retroactive application of federal False Claims Act amendments does not violate Ex Post Facto Clause); *United States ex rel. Drake v. NSI, Inc.*, 736 F.Supp.2d 489, 498-502 (D. Conn. 2010) (same).