

By Michael E. Gerould



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## A NEW WEAPON AGAINST FRAUD

The Federal False Claims Act (“Federal FCA”), a law enacted during the Civil War to aid in the prosecution of fraud against the government by unscrupulous government contractors, now has found its counterpart in Minnesota. The Federal FCA opened the door for private citizens to (1) sue any person who submits a fraudulent invoice or bill (“false claim”) to the federal government, and (2) obtain a portion of whatever defrauded money is recovered.

Effective on July 1, 2010, Minnesota joined 22 other states, along with the District of Columbia, with its own version of the False Claims Act. Like its federal counterpart, the Minnesota False Claims Act (“Minnesota FCA”) was enacted as a way to (1) deter potential fraud against the Minnesota government and (2) recover some of the taxpayer dollars that have been misappropriated through certain acts of fraud against the Minnesota government.

### **The Mechanics of the False Claims Act**

#### **Qui Tam Actions**

The Federal FCA and the Minnesota FCA both provide for the prosecution of claims by the government via direct actions. However, as has historically been the case with the Federal FCA, it is anticipated that the primary driving force behind the prosecution of false claims under the Minnesota FCA will be through its *qui tam* provisions. *Qui tam* is an abbreviation of a Latin phrase loosely translated to mean “he who brings a case on behalf of our lord the King, as well as for himself.” This *qui tam* provision allows private citizens (“Relators”) – acting as private attorneys general – to sue any person who defrauds the government (and, thereby, taxpayers) through the submission of false claims (“Claimants”) to recover the amount of a fraud. Relators are often

employees of Claimants, or someone with firsthand knowledge of the false claim, including contractors, subcontractors, or agents. If a Relator is successful in recovering on a false claim, he or she may be able to share in the proceeds of the ultimate recovery.

Over the years, the Federal FCA has proven tremendously successful in both deterring fraudulent conduct and recovering defrauded taxpayer dollars. Without question, the *qui tam* component has been central to the success of the Federal FCA. Indeed, the Federal FCA has provided the basis for the recovery of more than \$25 billion in taxpayer dollars since 1986 – for false claims related to the spectrum of government spending programs – of which as much as 15% to 30% has been disbursed to Relators via *qui tam* lawsuits. The most common type of fraud that has been prosecuted in the past 24 years has been related to overcharging for goods or services provided to the government.

#### **Whistleblower Protections**

The Federal and Minnesota Acts both contain whistleblower protections for certain Relators. If certain conditions are met, these whistleblower protections make it illegal to retaliate against an individual for reporting fraudulent conduct pursuant to the Act. This is essential because Relators in *qui tam* actions are often employees of – or are otherwise susceptible to retaliation by – Claimants they are pursuing under the Act. Without such protections in place, there would be an often unacceptable risk for these Relators to come forward with the necessary information to successfully prosecute a false claim.

While historically the Federal FCA provided these whistleblower protections to only employees of Claimants, the Federal FCA was amended in 2009, by the Fraud Enforcement and Recovery Act, to

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afford like protection to certain contractors and agents of Claimants. The Minnesota FCA provides these same broadened whistleblower protections.

### **Penalties and Attorney Fees**

The Minnesota FCA has the same penalty and attorney fee provisions as its federal counterpart. Both Acts provide for fixed penalties ranging from \$5,500 to \$11,000 per false claim, plus trebling of the amount of actual damage incurred by the government. Moreover, under both Acts, the successful plaintiff – whether it is the government initiating suit on its own behalf or Relators initiating suit on behalf of the respective government body – may be entitled to recover reasonable costs and attorney fees. Under the Federal FCA, this has proven to be a significant incentive for those without the resources required to initiate and prosecute a lawsuit.

### **NOTABLE DIFFERENCES BETWEEN THE TWO ACTS**

Despite the vast similarities between the Federal and Minnesota Acts, it is their differences that have been the primary source of commentary. Some believe these differences will result in the Minnesota FCA having a lesser impact on the prosecution of fraud than the Federal FCA has had, while others believe these differences provide Claimants with a necessary opportunity to prevent or remedy a fraudulent claim prior to being prosecuted. Some of the differences between the two Acts may prove significant and are worth noting.

#### **No Liability for Mere Negligence**

The first notable difference between the two Acts comes into play where the alleged false claim stems from “mere negligence, inadvertence, or mistake.” Under the Minnesota FCA, a person will not be liable for a false claim stemming from “mere negligence, inadvertence, or mistake.” The Federal FCA does not contain a similar explicit exception to liability, but it has been interpreted by some to contain a parallel implicit exception. Given the interpretation of the Federal FCA, it is unclear whether the explicit exception under Minnesota law will lead to different results.

#### **Right to Cure**

Another notable difference between the two Acts is the “safe harbor” or “right to cure” provision found in the Minnesota FCA that is not provided in its federal counterpart. Specifically, the Minnesota FCA provides that if the Claimant lacks fraudulent intent and is informed of the allegations of fraud by someone with firsthand knowledge of the information, the Claimant will not be liable if it repays the total amount of the fraud within 45 days of receiving the information.

As the Minnesota FCA does not itself require Relators to inform Claimants of false claims prior to initiating a lawsuit, it will be up to the respective Claimants to ensure that sufficient internal compliance programs are in place to provide people with the necessary incentives to report potential false claims internally.

#### **No Liability for the Conduct of Nonmanagerial Employees**

The Minnesota FCA contains a specific exception for nonmanagerial employees: an employer will not be liable for the fraudulent claims of nonmanagerial employees unless the employer “had knowledge of the act, ratified the act, or was reckless in the hiring or supervision of the employee.” This exception is not found in the Federal FCA. Under the Federal FCA, an employer will be found liable unconditionally, regardless of the source of the respective violation. Consequently, employers who may otherwise be subject to liability under the Federal FCA may not be found liable under the Minnesota FCA if the violations are committed by nonmanagerial employees. Whether this difference will prove material is yet to be seen.

#### **Government’s Duty to Investigate**

The last notable difference between the two Acts is that the Minnesota FCA does not impose a duty upon the government to investigate *all* potentially fraudulent claims. So, while the federal government has an affirmative duty to investigate *all* claims that may potentially be fraudulent, under the Minnesota FCA the Minnesota government may be more selective in the claims it chooses to investigate and pursue. It is unclear whether the Minnesota FCA will prove as successful as the Federal FCA in uncovering fraud without the use of government resources in investigating *all* potential claims. This will likely depend on the scope and strength of the government’s pre-investigation screening process.

### **CONCLUSION**

The Minnesota FCA became effective on July 1, 2010. Like its federal counterpart, the Minnesota FCA should prove to be a valuable piece of legislation in both deterring potential fraud on the government and in recouping some of the resulting losses. The Minnesota FCA mirrors the Federal FCA in its stated intents and purposes, but the divergence of the Minnesota FCA may result in different, less effective outcomes.

*This article is for informational purposes only and is not intended to constitute legal advice. If you intend to navigate the nuances and complexities involved with this new legislation – whether as a government contractor or a private citizen with knowledge of a potential violation – you are encouraged to seek the advice of legal counsel prior to doing so.*

