

STATE ENFORCEMENT ACTIONS: WHERE ARE THEY GOING IN TODAY'S ENFORCEMENT CLIMATE?

Health Care Compliance Association
Healthcare Enforcement Compliance Conference
November 6, 2018 – 9:45-10:45 A.M.

Candice M. Deisher

Assistant Attorney
General/Lead Attorney
Virginia Attorney
General's Office
cdeisher@oag.state.va.us



**Marc S.
Raspanti**

Pietragallo Gordon Alfano Bosick &
Raspanti, LLP
MSR@Pietragallo.com
www.pietragallo.com



November 6, 2018 – 9:45-10:45 A.M.

THE FUTURE OF STATE HEALTHCARE FRAUD INVESTIGATIONS AND EXCLUSIVE STATE CONCERNS.

- ▶ Similar to the United States, states continue to prioritize healthcare fraud enforcement.
- ▶ Medicaid expansion increases the necessity for states to effectively police fraud.
- ▶ Managed Care

STATE ENFORCEMENT AUTHORITY

- ▶ Criminal Investigations & Actions
- ▶ Civil Investigations & Actions
 - State false claims act cases
 - State initiated investigations – no whistleblower
- ▶ Administrative Investigations & Audits

STATES THAT HAVE PASSED STATE FCA'S

- ▶ Alaska
- ▶ California
- ▶ Colorado
- ▶ Connecticut
- ▶ Delaware
- ▶ District of Columbia
- ▶ Florida
- ▶ Georgia
- ▶ Hawaii
- ▶ Illinois
- ▶ Indiana
- ▶ Iowa
- ▶ Louisiana
- ▶ Maryland
- ▶ Massachusetts
- ▶ Michigan
- ▶ Minnesota
- ▶ Montana
- ▶ Nevada
- ▶ New Hampshire
- ▶ New Jersey
- ▶ New Mexico
- ▶ New York
- ▶ North Carolina
- ▶ Oklahoma
- ▶ Puerto Rico (signed July 2018)
- ▶ Rhode Island
- ▶ Tennessee
- ▶ Texas
- ▶ Vermont
- ▶ Virginia
- ▶ Washington
- ▶ Wisconsin (repealed 2015 Wisconsin Act 55)

COMMON PROCEDURAL POSTURE OF FCA CASES

- ▶ State FCA claim only filed in state court
- ▶ Federal FCA Action plus at least one state claim filed in one federal court action
- ▶ Federal FCA Action plus multiple state claims filed in one federal court action

TYPICAL STATE CONCERNS:

- ▶ What nexus, if any, does the State have with the alleged fraud?
- ▶ If the State has a nexus with the alleged fraud, what is the extent of potential damages to the State?
- ▶ Where are the witnesses, defendant, and much of the evidence located?
- ▶ What resources can be, or should be, deployed by the State based on the allegations raised in the complaint?
- ▶ Who will take the lead on the investigation and why?
- ▶ Settlement Teams vs. Litigation Teams (NAMFCU)

RELATORS

What states are they filing cases in?

WHAT TYPES OF CASES ARE RELATORS CURRENTLY FILING?

- ▶ Off-label cases
- ▶ Medical necessity cases
- ▶ Kickback cases
- ▶ Nursing home and hospice cases
- ▶ Upcoding
- ▶ Hospital fraud
- ▶ Laboratory fraud

WHY DOES A RELATOR NAME A STATE IN A *QUI TAM* COMPLAINT?

- ▶ State Medicaid programs are impacted by fraud.
- ▶ Obtain greater investigative and litigation resources for his/her *Qui Tam* case.
- ▶ Obtain greater leverage at the settlement table.
- ▶ State CIDs vs Federal CIDs.
- ▶ Greater recovery of damages to relator and to the state.

WHAT CAN OR SHOULD RELATOR'S COUNSEL DO TO INTEREST A STATE IN A *QUI TAM* CASE?

- ▶ Show the state how it is impacted in a material way by the specific fraud alleged in the complaint.
- ▶ File a good complaint with supporting disclosure materials that include state specific information, if possible.
- ▶ Offer to assist in every way possible!
- ▶ Offer to litigate with or for the state?
- ▶ Always be a good partner with state prosecutors!
- ▶ Be mindful of the complexities involved in multi-state litigation.
- ▶ Do the best you can to keep the states up to speed at all times in the litigation.

What are Some State Specific Issues Related to Settlement and Litigation?

1. What is the Damage Theory that will apply to the case?
2. How much are the single damages at issue and how are they calculated?
3. What is the “scope of the release” sought from the state?
4. Will the state have to, or want to, litigate, join the settlement, or decline the settlement?
5. Does the state have the necessary resources to litigate the case if it does not settle?
6. What witnesses will be needed from the single state agency if a settlement does not occur?

Many states can recover litigation costs.

For example:

- ▶ **Virginia Fraud Against Taxpayers Act**
§8.01-216.3(A)(7)
- ▶ “A person violating this section shall be liable to the Commonwealth for reasonable attorney fees and costs of a civil action brought to recover any such penalties or damages. All such fees and costs shall be paid to the Attorney General’s Office by the defendant and shall not be included in any damages or civil penalties recovered in a civil action based on a violation of this section.”

INVESTIGATION AND BEST PRACTICES



HOW DO YOU KNOW THERE IS AN INVESTIGATION?

- ▶ Search Warrant
- ▶ Civil Investigative Demand (CID) – (31 U.S.C. § 3733; *many states have a similar provision*)
- ▶ Subpoena

WHAT CAN THE GOVERNMENT OBTAIN?

CID Scope is Broad – government must have “...reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation...31 U.S.C. § 3733. *States have similar authority.*

CID INVESTIGATIVE TOOLS

Documents

Interrogatories

Oral Testimony

WHAT DOES IT MEAN IF YOU RECEIVE A CID OR SUBPOENA?

- ▶ Essentially, it means the serving government entity believes the company may have evidence related to the subject(s) of its investigation.
- ▶ The company may or may not be the target of the government's investigation.
- ▶ A CID can stem from a *qui tam* case or from an investigation that is government initiated.

WHAT CAN A CID OR SUBPOENA TELL YOU?

- ▶ Can sometimes indicate the stage of the investigation.
- ▶ Can often indicate the potential subject matter of the investigation based on the requests in the CID or subpoena.
- ▶ Can indicate what government entity/entities may be investigating the company (national vs local in scope).

WHAT HAPPENS AFTER A CID OR SUBPOENA IS RECEIVED?

- ❑ Communication with counsel and the government
- ❑ Marshalling internal assets
- ❑ Gathering data
- ❑ Preparing a response to the government

BEST PRACTICE CONSIDERATIONS

- ❑ Reach out to company counsel (in-house or outside) right away.
- ❑ Contact the government ASAP (usually through counsel).
- ❑ Contact IT/affected staff to ensure data-retention procedures are put in place so that the company can preserve any information requested by the government (i.e. hold letter, etc.).
- ❑ Involve an ESI vendor early in the process.
- ❑ Cooperate in good faith.
- ❑ Complete production by the deadline unless an extension or a rolling production has been granted by the government.

QUESTIONS???

