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Stemming the tide of frivolous lawsuits for businesses

Dating back to the Civil War, the federal government (with help from private individuals who share in the proceeds of recovery) has prosecuted the presentation of false claims to the government for payment. The federal False Claims Act has had a significant effect on the business community.

On the state level, Maryland has only recently adopted a broad false claims statute. Maryland's 2015 proposal to enact an expansive state False Claims Act was met with resistance from the business community, fearful that the expanded statute would result in numerous lawsuits brought by private individuals on behalf of the state for alleged false claims. However, there are some key differences between the federal and state statutes that will likely result in Maryland's False Claims Act having minimal impact on the state's businesses.

Effective June 1, 2015, the Maryland False Claims Act expanded the scope of fraudulent conduct previously punishable under the Maryland False Health Claims Act. Under the False Claims Act, state and local governments, as well as private citizens acting on their behalf (known as qui tam plaintiffs or relators), may bring a cause of action seeking damages, civil penalties and attorney's fees against contractors and subcontractors accused of submitting false claims for payment to government entities.

The Maryland Chamber of Commerce voiced concern "the new standards in this bill for prosecuting alleged fraud are unfair to businesses and would put a chilling effect on businesses contracting with the state." Specifically, the Chamber feared if "the state contracts out its enforcement responsibilities to private individuals, business will face increased defense costs and the state will have no incentive to curtail cases of marginal merit."

Most states have enacted false claims statutes that mirror the federal statute. These statutes typically provide that subsequent to the filing of a complaint by a qui tam plaintiff, the state prosecuting authority has a specified amount of time to review and investigate the

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allegations and decide whether to join the litigation. In all other jurisdictions, the state's election to decline intervention does not preclude the suit from proceeding.

However, statistics show that 95 percent of federal qui tam plaintiffs who proceed without government intervention fail to recover. Unfortunately, defendants in many of those cases incur substantial legal fees. Perhaps taking this into account, Maryland has elected a unique, more restrictive approach, enlisting the Office of the Attorney General (OAG) as gatekeeper. Under the Maryland law, if the OAG declines to intervene in suits initiated by private individuals, these actions must be dismissed by the court.

This limitation should have a profound impact on the volume of cases brought by private individuals and inform how businesses defend against them. Prospective plaintiffs must consider the financial gamble involved where potentially costly litigation could be abruptly cut short. In addition, these plaintiffs do not have leverage to extract a "nuisance value" settlement before the OAG elects to participate in the lawsuit. Business owners can assess the likelihood of intervention before contemplating settlement.

Proactive measures

The OAG's annual report on the False Claims Act bears this out. Of the 14 claims investigated by the OAG in fiscal 2016, four resulted from qui tam actions. The state declined to intervene in one, and the other three remained under investigation at the time the report was issued. Ever mindful of limited resources, the OAG will be required to be extremely selective before intervening in cases, meaning many will be summarily dismissed.

Attorney General Brian E. Frosh's assertion that "(t)his check means that frivolous or unsubstantiated suits will be weeded out" seems well founded. This is good news for the Maryland business community. The legislation should serve its intended purpose to weed out and punish bad actors, while protecting law-abiding businesses from costly defense of unmerited litigation.

Any Maryland entity that does business with the federal or state government should undertake proactive measures to minimize their potential exposure under the act by implementing internal policies and procedures aimed at uncovering and stopping fraud, waste and abuse.

Begin by investing time in understanding the applicable regulations and laws governing the goods and services being billed. To the extent possible, verify that claims contain accurate and complete information. If a business becomes aware of any billing problem, it should notify the appropriate parties immediately and take measures to rectify the issue. Prudent businesses train employees in compliance with relevant requirements and enact internal protocols that encourage employee reporting of concerns of fraud to designated individuals within the company. To guard against future allegations of retaliation by potential whistleblowers, businesses should devise and follow procedures for documenting employee reviews and reasons for termination.

Should a business still find itself subjected to a claim, it will want to work with in-house or outside counsel to implement a litigation hold and promptly initiate an internal investigation. Depending on the outcome, counsel may undertake discussions with the government regarding a resolution that would avoid litigation or present sufficient information to persuade the government to decline to intervene.

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