
New York Attorney General Files First-of-its-Kind Lawsuit, Casting Spotlight on Recent Developments in State and Local False Claims Acts

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In a ground-breaking development, New York Attorney General Eric Schneiderman filed a lawsuit on Thursday, April 19, 2012, relying on the New York State False Claims Act (NYS FCA) to seek over \$300 million from Sprint-Nextel Corp. for allegedly underpaying sales taxes. This action is the culmination of over a year of increased attention by AG Schneiderman to the NYS FCA and particularly to a 2010 amendment—which is unique among the federal and various state FCAs and which was sponsored by then-State Senator Schneiderman—extending the NYS FCA to misrepresentations relating to taxes.

In January 2011, soon after he took over the AG's Office, AG Schneiderman committed additional resources to the Medicaid Fraud Control Unit, which enforces the NYS FCA in Medicaid matters, and created a new Taxpayer Protection Bureau (TPB) to enforce the NYS FCA in tax and other non-Medicaid contexts, all with the stated objective of strengthening and expanding NYS FCA enforcement. Last Thursday's filing was the TPB's first public invocation of the NYS FCA.

The suit against Sprint originated as a March 2011 complaint filed by a

whistleblower, which prompted a TPB investigation. The complaint alleges that Sprint was and is undercollecting sales taxes on flat-rate access charges for wireless calling plans and thus passing back too small an amount to the New York State and local governments.

The New York State False Claims Act

The NYS FCA was enacted in 2007, based on the federal False Claims Act as it then stood. Both FCAs allow private whistleblowers, as well as the government itself, to file suit to redress fraud against the government (with the NYS FCA covering both fraud against the State and fraud against local governments within the State); both provide for treble damages plus per-claim penalties; and both award whistleblowers a share of any money recovered as a result of their action. However, the current NYS FCA is in some ways broader and in some ways narrower than its current federal counterpart. The lawsuit against Sprint highlights the NYS FCA's unique provision extending it to false claims relating to taxes (above certain dollar thresholds). In addition, the NYS FCA explicitly allows for consequential damages while such damages are not recoverable under the federal FCA, *compare* N.Y. State Fin. Law § 189(1)(g) with *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972), and the NYS FCA seems to require less particularity in pleading fraud than the federal FCA, *compare* N.Y. State Fin. Law § 192(1-a) ("in pleading an action brought under this article the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct") with *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 466-67 (6th Cir. 2011).

In other ways, however, the NYS FCA does not have as broad a reach as its federal counterpart. The US Department of Health and Human Services Office of Inspector General evaluated the NYS FCA in March 2011 and

determined that, unlike the federal statute, the NYS FCA: does not establish liability for knowingly concealing, or knowingly and improperly avoiding or decreasing, an obligation to pay or transmit money or property to the government; does not provide for a government complaint in intervention to relate back, for statute of limitations purposes, to the filing date of the whistleblower's complaint; and more narrowly provides for a whistleblower's recovery of expenses, attorneys' fees, and costs. Unless the NYS FCA is amended by March 31, 2013, to bring it into line with the federal FCA, New York State will lose the right it received in 2007 to retain an increased share of its Medicaid-fraud recoveries. See 42 U.S.C. § 1396h (if state FCA meets certain requirements, federal share of any state Medicaid-fraud recoveries shall be decreased by 10%).

The Sprint lawsuit raises a significant issue regarding the NYS FCA: whether it can constitutionally be applied retroactively to seek damages incurred before the tax-fraud provision was added in 2010. The amendment itself states that it is retroactive, and the complaint against Sprint seeks treble damages on the \$100 million in back taxes allegedly owed since 2005. Legislative intent notwithstanding, however, the constitutional ban on *ex post facto* laws prohibits retroactive application if the statutory provision is too punitive, and there is precedent that retroactive application of a false claims act, with its treble damages and penalties, crosses that threshold. E.g., *U.S. ex rel. Sanders v. Allison Engine Co., Inc.*, 667 F. Supp. 2d 747, 756 (S.D. Ohio 2009) (refusing to apply 2009 amendments to federal FCA retroactively because doing so would violate *Ex Post Facto* clause); *State of New Mexico ex rel. Foy v. Vanderbilt Capital Advisors, LLC*, No. D-101-CV-2008-1895 (N.M. Dist. Ct. Apr. 28, 2010) (finding that effect of New Mexico FCA was even more punitive than federal FCA and holding that its retroactive application would violate *Ex Post Facto* clauses in both federal and state constitutions).

Developments Regarding the New York City False Claims Act

The same week that AG Schneiderman began his landmark action under the NYS FCA, the New York City Council began considering whether to renew and amend the City's 2005 FCA (the NYC FCA) before it expires on June 1, 2012. New York City is one of only four metropolitan areas that have city FCAs (the others being Chicago, Philadelphia, and Allegheny County, PA). The NYC FCA is generally similar to the federal and NYS FCAs (minus the NYS FCA's tax-fraud provision), although the NYC FCA does not allow a whistleblower to sue without the permission of the City's chief lawyer. On April 16, 2012, the Council's Committee on Governmental Operations followed up on a January 2012 hearing to discuss extending the law, which it described as "aimed at strengthening the City's ability to prevent and uncover the misuse of taxpayer dollars." The City's Department of Investigation and Law Department were among those who testified in support of extending the NYC FCA. On April 18, 2012, the City Council formally proposed extending the NYC FCA and referred it to the Council's Committee on Finance.

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