

The Rising Tide of State False Claims Act Cases

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When it comes to false claims cases, the federal False Claims Act tends to be the first thing attorneys think of. That may be because the federal statute tends to get a lot of publicity — with good reason. [According to the U.S. Department of Justice \(DOJ\)](#), it secured more than \$5.6 billion in False Claims Act settlements and judgments in the fiscal year that ended September 30, 2021. Since 1986, when Congress strengthened the federal False Claims Act by providing more attractive incentives for whistleblowers, the DOJ has secured more than \$70 billion in settlements and judgments.

While the federal False Claims Act has long enjoyed the spotlight, it might need to get used to sharing it more often. State attorneys general are increasingly taking advantage of their states' false claims statutes, which provide them great power as sovereigns to hold individuals and corporate entities accountable for allegedly defrauding their states' governments. These historically overlooked state statutes are finally getting their days in the sun, despite many of them having become, effectively, dead letter laws that were seemingly ignored — or at least underappreciated — for years by state attorneys general.

A recent uptick in state false claims prosecutions suggests that state attorneys general are expanding their toolbox by reacquainting themselves with the power their state false claims statutes provide them to pursue alleged wrongdoers. Although state attorneys general have in the past often used their states' false claims statutes to piggyback on federal False Claims Act cases involving Medicare fraud brought by the DOJ, they are coming to realize those statutes give them power to pursue a broad array of fraudulent claims beyond those covered by the federal False Claims Act or arising within the health care industry, such as tax claims, securities fraud, and misrepresentations in the cybersecurity context.

A brief history of the federal and state false claims acts

The origins of the federal False Claims Act date back to the Civil War. The Union Army found itself entering into transactions for sorely needed supplies with crooked suppliers. These suppliers were taking advantage of the high wartime demand for their products and the low odds of being held accountable for wrongdoing. Many suppliers sold shoddy products at high prices, and frequently shipped fewer items than were purchased.

In 1862, while the Civil War was raging, Congress investigated this fraud. Its investigation led to passage of the False Claims Act, which was signed into law by President Abraham Lincoln on March 2, 1863. The statute was amended in 1943 to limit the financial gains attorneys and whistleblowers could receive after what some politicians perceived to be a common practice of attorneys taking advantage of successful criminal prosecutions of fraud by quickly filing civil suits for the same conduct. Congress again amended the statute in 1986, after a wave of highly

publicized defense contractor fraud, to provide whistleblowers with more incentives to expose fraud against the government. In 2009 and 2010, the False Claims Act was amended again to conform to the newly passed Dodd–Frank Wall Street Reform and Consumer Protection Act and the Affordable Care Act.

For more than a century, the federal False Claims Act was the only false claims statute on the books in the U.S. But starting in the late 20th century, states began enacting their own false claims statutes. Today, 30 states — including California (enacted in 1987), Florida (1994), Georgia (2007), Illinois (1991), Michigan (2006), Nevada (1999), New Jersey (2008), New York (2007), Texas (1995), the District of Columbia (2011), and Puerto Rico (2018) — have enacted their own false claims statutes. However, some states' statutes only cover Medicaid fraud, leaving these state attorneys general unable to pursue the wide array of fraudulent activity the DOJ can pursue under the federal False Claims Act. The states with “Medicaid-only” false claims laws are Colorado, Connecticut, Louisiana, Maryland, Michigan, New Hampshire, Texas, and Washington.

When discussing state false claims statutes, we would be remiss if we did not mention that municipalities and counties are enacting their own false claims statutes. New York City enacted its False Claims Act in 2005, but it expired in 2012. Miami-Dade County, FL, enacted its False Claims Ordinance in 1999. Chicago enacted its False Claims Act in 2004. Philadelphia did the same in 2010. Allegheny County, PA, enacted its False Claims Act in 2011. These acts add to the mix more prosecutors who will likely relish the opportunity to bring false claims cases against entities allegedly defrauding their sovereigns.

Recent cases suggest state attorneys general will more aggressively wield their states' false claims statutes

As state attorneys general continue to realize the tools they have in the form of state statutes to pursue alleged wrongdoing, and as they continue to see success in sprawling litigation, including with the recent opioid cases, we expect they will wield their states' false claims statutes more aggressively through prosecutions of false claims cases — particularly those arising outside the traditional context of Medicaid and the health care industry.

For example, in August 2022, District of Columbia Attorney General Karl A. Racine announced his office was [bringing a tax fraud lawsuit under D.C.'s False Claims Act](#) against billionaire technology executive Michael J. Saylor, co-founder of publicly traded data tracking company MicroStrategy. The lawsuit alleges Saylor illegally avoided more than \$25 million in D.C. taxes by falsely claiming to be a resident of other jurisdictions with personal income taxes lower than D.C.'s, even though he has allegedly been a D.C. resident since 2005.

In July 2022, the New York attorney general's office [settled a New York False Claims Act case](#) against Egon Zehnder International, Inc., a headhunting firm that allegedly bilked the state out of \$13.3 million in taxes. The attorney general intervened in the case in 2022.

In February 2022, the New Jersey attorney general's office [settled a New Jersey False Claims Act case](#) against a number of private bus companies and related parties for \$20.5 million. The case, in which the attorney general's office intervened in late 2020, alleged the defendants overcharged New Jersey Transit by billing the agency for miles and hours not driven, as well as underreporting missed bus trips on routes the companies operated for the agency. The settlement was New Jersey's largest-ever False Claims Act settlement outside the health care sector.

And, in February 2021, the California attorney general's office [settled a California False Claims Act case](#) it brought against General Motors for \$5.75 million. The California attorney general alleged the company misled investors about the financial implications of its ignition switch problems, causing the California Public Employees' Retirement System to lose millions of dollars because GM's actions artificially inflated its stock price.

In addition, we also expect state attorneys general to pursue false claims cases in the cybersecurity arena, given the importance of cybersecurity today and in the future and the lucrative nature of cybersecurity consulting. The prototypical case of this type is one the DOJ settled in July 2022. In that case, the DOJ [announced a settlement against a defense contractor](#) in a False Claims Act case where a whistleblower alleged the company misrepresented its compliance with the federal government's cybersecurity requirements. The case arose when the contractor's senior director for cybersecurity alleged it fraudulently induced the federal government to contract with it by not fully disclosing its noncompliance with the U.S. Department of Defense's cybersecurity requirements.

Expect more state attorneys general to get in the false claims game

Over the past few decades, few state attorneys general seemed to have viewed their states' false claims acts as key tools in their toolbox for prosecuting wrongdoing that defrauded their sovereigns. That appears to be changing.

These once, effectively, dead letter statutes used mostly to tag along on federal False Claims Act cases targeting Medicaid fraud appear poised to start driving more investigations, prosecutions, and interventions by state attorneys general. Whether concerning tax fraud, securities fraud, misrepresentations in the cybersecurity context, or other types of misconduct, we expect a new wave of state (and local) false claims cases to surface over the next few years. The scope and types of claims at issue in state and local false claims cases differ markedly from those under the federal False Claims Act. In-house counsel at entities being investigated or prosecuted by state attorneys general for alleged violations of state or local false claims statutes or ordinances should ensure they are well-versed in the nuances of the various state and local false claims statutes and ordinances on the books.

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