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The Illinois False Claims Act: Key Provisions and Current Trends

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Enacted with the same purpose as the federal False Claims Act, the Illinois False Claims Act creates liability for entities that submit fraudulent claims for payment to the State of Illinois or its municipalities. The basic provisions of the IFCA—the elements of a violation, the potential penalties, and a relator's award for proven violations or settlement recoveries—are substantially similar to the provisions of the FCA and present few surprises to litigants.

In the last two years, however, several Illinois cases have taken a more relator-friendly stance in their interpretation of the statute, especially in relation to one of FCA defendants' key defenses—the public disclosure bar. This article addresses the key components of the statute, as well as the most frequently used affirmative defenses. It also highlights some of the recent IFCA trends from Illinois case law.

Basic Provisions

The IFCA penalizes the making of knowingly false claims to a state entity. A claim is broadly defined as any request or demand made directly to the state, including any demand for payment. 740 Ill. Comp. Stat. 175/3(b)(2). The statute also includes a materiality component, which is interpreted liberally. To be material, a claim need only have "a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 740 Ill. Comp. Stat. 175/3(b)(4). Thus, while materiality is often a fact-specific inquiry, so long as the defendant has submitted a request for funds to the government, which the government would not have paid if it had known of the claim's falsity, the materiality and claim requirements of the IFCA are likely met.

The IFCA also includes a knowledge requirement. It too is liberally construed. To prove that a defendant "knowingly" submitted a false claim, the prosecuting party must show that the defendant submitted the claim with "actual knowledge" of its falsity, "deliberate ignorance of [its] truth or falsity," or "reckless disregard of [its] truth or falsity." 740 Ill. Comp. Stat. 175/3(b)(1)(A). "Reckless disregard," which is the least-stringent mental state, has been construed to mean no more than "ignor[ing] 'obvious warning signs' and refus[ing] to learn of information which [the defendant], in the exercise of prudent judgment, should have discovered." *People ex rel. Beeler, Schad & Diamond, P.C. v. Relax the Back Corp.*, 2016 IL App (1st) 151580, ¶ 27. A defendant may be able to argue that it did not make a "knowingly" false statement if "the pertinent area of the law is unclear and specific factual analysis must be completed to determine if the [defendant's position] was correct[]." *State ex rel. Beeler, Schad & Diamond, P.C. v. Ritz Camera Ctrs. Inc.*, 878 N.E.2d 1152, 1158 (Ill. App. Ct. 2007). The idea behind this argument is that any ambiguity inherent in the underlying regulation belies the scienter necessary to establish fraud.

Because the IFCA is considered an anti-fraud statute, the allegations of an IFCA claim must also be pled with heightened specificity. Pleadings must state what the false claims or representations were, who made them and when, and to whom they were made, such that the facts taken together make fraud a necessary or probable inference. *Hirsch v. Feuer*, 702 N.E.2d 265, 272 (Ill. App. Ct. 1998). These pleading requirements traditionally are easiest to satisfy if the person bringing the suit (referred to as the "relator") is a whistleblower with inside knowledge of the alleged fraud.

While these pleading requirements appear stringent on their face, two recent Illinois appellate court decisions indicate a possible willingness by the courts to relax them in certain instances, thereby potentially making it easier for an outside relator to successfully bring an IFCA suit. For example, the First District indicated earlier this year that a relator need not identify in its complaint a specific fraudulent transaction in order to state a claim, so long as the allegations are sufficient to

create "the probable inference that [the defendant] devised a scheme to knowingly" defraud the government. *People of the State of Illinois ex rel. Lindblom v. Sears Brands, LLC*, 2019 IL App (1st) 180588, ¶ 42 (the "*Home Depot*" decision).

The First District also recently indicated a willingness to relax these pleading standards where a plaintiff has alleged that the essential facts are inaccessible or unobtainable absent pretrial discovery. See *Phone Recovery Servs. LLC ex rel. State of Illinois v. Ameritech Ill. Metro, Inc.*, 2018 IL App (1st) 170968-U, ¶ 41. A relator relying on these relaxed standards, however, should clearly indicate in the complaint why the facts are inaccessible or unobtainable if it wants to withstand dismissal. Defendants should also note that Illinois courts will often give plaintiffs at least one attempt at amending their complaint if the allegations are found to lack the required specificity.

Finally, the IFCA penalty provisions are identical to those in the FCA. The FCA currently provides for a penalty range of $11,463 to $22,927 (adjusted annually for inflation) for each false claim. This same range applies to any IFCA violation. 740 Ill. Comp. Stat. 175/3(a)(1). The IFCA also allows for treble damages. When determining the base amount for purposes of calculating treble damages, Illinois courts—like the federal courts—preclude damages from being netted against compensatory payments already made. *People ex rel. Schad, Diamond and Shedden, P.C. v. My Pillow, Inc.*, 2017 IL App (1st) 152668, ¶¶ 75-76 (citing *United States v. Bornstein*, 423 U.S. 303 (1976)), *aff'd*, 2018 IL 122487.

Suits by Private Parties

Suits under the IFCA can be brought by private persons or entities on behalf of the state. To encourage such persons to bring suit, the IFCA permits relators to receive a share of any damages or settlement awarded. Successful relators can receive between 25% and 30% of the awarded damages, plus expenses, fees, and costs in cases where the state does not join in the prosecution, and between 15% and 25% of the awarded damages in cases where the state does intervene. Where a relator merely contributes specific information that helps lead to the action, that individual may receive up to 10% of the proceeds, subject to the court's discretion. 740 Ill. Comp. Stat. 175/4(d). The IFCA's language in these provisions tracks the language of the FCA.

Potential Affirmative Defenses

Once a complaint has been filed, a defendant has a number of potential affirmative defenses available to it, including the public disclosure bar, the government action defense, the government knowledge defense, and the statute of limitations.

Public Disclosure Bar

The public disclosure bar is one of the most frequently litigated affirmative defenses under the IFCA, and many defendants have successfully obtained dismissals relying on this defense. But while Illinois courts have historically applied a more defendant-friendly interpretation to the defense—at least as compared to most other jurisdictions—recent case law suggests a possible shift by the courts toward a more relator-friendly approach as described below.

By way of background, the public disclosure bar, like its federal corollary, prohibits qui tam actions where "substantially the same allegations or transactions" have already been publicly disclosed, and the relator is not an "original source" of the information. 740 Ill. Comp. Stat. 175/4(e)(4)(A). The bar is designed to prevent parasitic lawsuits by relators who learn of an alleged fraud through public channels and then seek remuneration even though they contributed nothing to its exposure.

To determine whether the public disclosure bar applies, Illinois courts first consider whether the complaint is based upon information that has been publicly disclosed through one of four statutorily-recognized channels. A claim is based upon public information if the allegations are substantially similar to such information. In the past, litigants could satisfy this requirement simply by showing that the "critical elements" of the relator's claim were in the public domain. *U.S. ex rel. Feingold v. AdminaStar Fed., Inc.*, 324 F.3d 492, 495 (7th Cir. 2003). But the First District's April 2019 decision in *Home Depot* utilized different language, potentially suggesting that a different framework may now apply.

Specifically, *Home Depot* held that to satisfy the "substantially the same as" requirement, a defendant must show that the disclosure identified both the misrepresented facts and the true facts, such that the alleged fraud could be inferred from the disclosure itself. 2019 IL App (1st) 180588, ¶¶ 30, 32.

This framework is not new in the FCA realm. It is often referred to as the "X + Y = Z" framework. *See U.S. ex rel. Springfield Terminal Ry. Co v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994). But it has not previously been relied upon by Illinois courts. IFCA defendants should be prepared for relators to argue that this articulation of the standard is more demanding than the prior "critical elements" articulation.

Any public disclosure must also have been made through a statutorily-recognized source. These sources include: a criminal, civil, or administrative hearing in which the state or its agent is a party, a state legislative, state auditor general, or other state report, hearing, audit, or investigation; or (3) the news media. As part of the statute's 2012 amendments, the definition of "state report" was narrowed to encompass only reports known by the unit of government being defrauded, as opposed to reports known by any unit of government. *Lyons Township ex rel. Kielczynski v. Village of Indian Head Park*, 2017 IL App (1st) 161574, ¶ 16.

The definition of news media, however, remains broad. When interpreting "news media" under the IFCA, at least one Illinois court has borrowed the Illinois Code of Civil Procedure's definition of news medium, which includes "any newspaper or other periodical issued at regular intervals whether in print or electronic format and having a general circulation." 735 Ill. Comp. Stat. 5/8-902(b). Internet sources—including public websites and online articles—are also frequently considered "news media" under the IFCA.

But while the definition of news media remains broad, in some instances Illinois courts have required news media sources to more clearly identify the actual defendants and to more accurately describe the alleged wrongful conduct in order for the bar to apply. For example, in *Home Depot*, the court refused to apply the bar where the news sources did not specifically identify the named defendant as engaging in wrongful conduct. 2019 IL App (1st) 180588, ¶ 33.

And courts have become even more stringent where the allegations target industry-wide misconduct. In *Phone Recovery Services*, for example, the court held that substantially similar allegations had not been publicly disclosed in a news article—even though the article described the same type of misconduct as was alleged in the complaint and addressed the same industry—because the article focused on a different jurisdiction (states other than Illinois) and did not identify all of the defendants named in the complaint. 2018 Ill. App. 170968, ¶ 30.

The court also found persuasive that the relator had identified the specific "mechanism" through which the alleged fraud was being committed, something the news article did not do. *Id.* ¶ 35. Defendants facing allegations of industry-wide misconduct should keep in mind, however, that they may be able to distinguish *Phone Recovery* if the industry in which they operate is composed of a small number of easily identifiable participants.

Finally, if these initial inquiries under the public disclosure bar are answered in the defendant's favor, then a relator must demonstrate that it is an "original source" of the allegations to avoid dismissal. Described as a savings clause, the original source exception preserves a relator's right to bring suit when the relator voluntarily discloses information that is "independent of" and "materially adds to" the information already in the public domain. 740 Ill. Comp. Stat. 175/4(e)(4)(B).

Technically, courts should only get to the original source question after first deciding that the other requirements of the bar have been met, but in practice, courts will often jump to the original source inquiry early on, especially if the court is persuaded that the relator is an original source. A Seventh Circuit decision that is often relied upon by relators when arguing that they are an original source is *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999).

Lamers involved a dispute related to the way in which the city was implementing its bus service to accommodate schoolchildren. The relator in *Lamers* was able to avoid dismissal by asserting that he gained first-hand knowledge of the alleged fraud—and was therefore an original source—by personally observing the city's bus routes in action, including whether they were impermissibly functioning as private school buses. The Seventh Circuit found this persuasive and concluded that the district court was right not to apply the bar and to entertain Lamers' claim.

One other aspect of the original source inquiry that often comes into play is the fact that many courts have held that a relator's specialized knowledge or industry expertise does not transform that relator into an original source. See, e.g., *U.S. ex rel. Fried v. W. Indep. Sch. Dist.*, 527 F.3d 439, 443 (5th Cir. 2008); *A-1 Ambulance Serv., Inc. v. State of California*, 202 F.3d 1238, 1245 (9th Cir. 2000). Courts have similarly been dissuaded by assertions that a relator spent a significant amount

of time compiling or analyzing public data. See, e.g., *U.S. ex rel. Alcohol Found., Inc. v. Kalmanovitz Charitable Found., Inc.*, 186 F. Supp. 2d 458, 463 (S.D.N.Y. 2002); *U.S. ex rel. JDJ & Assocs. LLP v. Natixis*, No. 15-cv-5427, 2017 WL 4357797, at *11 (S.D.N.Y. Sept. 29, 2017). While the Illinois courts have not specifically ruled on these issues, several federal courts have done so, and Illinois courts have repeatedly indicated that federal law is persuasive.

In sum, the public disclosure bar can prove to be a useful defense for defendants facing an IFCA claim. However, defendants should be aware of the Illinois courts' shift toward a more fine-grained approach to the public disclosure bar.

Government Action Bar

Another potentially available affirmative defense is the government action bar, which bars *qui tam* actions when the claims are "the subject of a civil suit or an administrative civil money penalty proceeding in which the State is already a party." 740 Ill. Comp. Stat. 175/4(e)(3). This bar, however, only applies to adversarial proceedings. In *People ex rel. Lindblom v. Sears Brands, LLC* (the "*Best Buy*" decision), decided just last year, the First District reversed a dismissal based on the government action bar after concluding that an Illinois Department of Revenue audit did not constitute an administrative civil money penalty proceeding because it was not sufficiently adversarial. 2018 IL App (1st) 171468, ¶¶ 31-33.

This decision also emphasized that the bar does not apply to investigations or other steps that are likely to lead to a proceeding; the proceeding must already be underway. The First District reaffirmed its position on this issue just this past year in the *Home Depot* decision, where it refused to revisit this issue and explicitly reiterated its holding in *Best Buy* that a Department audit does not qualify as an administrative civil money penalty proceeding. 2019 IL App (1st) 180588 ¶ 37.

Government Knowledge Defense

Another potential defense is the government knowledge defense. As already discussed, for IFCA liability to attach, a defendant must have "knowingly" presented a false claim to the government. The government knowledge defense attacks this threshold scienter requirement. It "applies where the government knows and approves of the particulars of a claim for payment before that claim is presented[,] effectively negat[ing] the fraud or falsity required to establish a violation of the [Illinois False Claims] Act." *State ex rel. Schad v. Nat'l Bus. Furniture, LLC*, 2016 IL App (1st) 150526, ¶ 30.

The "approval" requirement referenced in this case should not be overlooked. This defense gains the most traction where it can be shown that the state knew of the issue and condoned or encouraged it. Said another way, it is not the state's awareness of the falsity that typically provides the defense, but rather the state's involvement in and encouragement of the defendant's conduct. It is this evidence of "approval" that shows the defendant did not knowingly submit a false or fraudulent claim. For example, the defense was relied upon successfully in a case where it was shown that the government instructed the defendant to submit its claim in a particular way, even though it was not the correct way to do so, and the defendant simply followed the government's instructions. *U.S. ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 543-45 (7th Cir. 1999).

Defendants should be aware that without some sort of clearly expressed approval or encouragement of the conduct by the state, a court may not find this argument persuasive. Awareness or suspicion of wrongful conduct by the state may not be sufficient.

Statute of Limitations

The IFCA provides that claims may not be brought more than six years after the violation occurred or more than three years after discovery of the violation, but in no event can they be brought more than ten years after the violation occurred. 740 Ill. Comp. Stat. 175/5(b). Unlike the public disclosure and government action bars, the statute of limitations defense has not been the focus of recent Illinois appellate court litigation. However, a few things are worth pointing out.

First, as to the "discovery" rule, the language of the IFCA states that a claim cannot be brought more than three years "after the date when facts material to the right of action are known or reasonably should have been known by the official of the State charged with responsibility to act." 740 Ill. Comp. Stat. 175/5(b)(2). Previously, there had been some disagreement in the federal case law over whether the term "relator" can be substituted for "official of the State" in *qui tam* actions, such that the limitations period starts to run when the relator learns of the alleged fraud, as opposed to when a state official

learns of the fraud. The U.S. Supreme Court recently held in *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1514 (2019), that at least under the FCA, the plain language of the act does not permit such a substitution. The same logic would presumably apply to the IFCA.

Second, if the state ultimately decides to intervene, any new details or claims added at that time will relate back to the filing date of the relator's complaint, provided the state's new claims arise out of the same conduct, transactions, or occurrences identified in the original complaint. 740 Ill. Comp. Stat. 175/5(c).

Third, litigants should be aware that Illinois law gives plaintiffs who voluntarily dismiss their complaint a one-time right to refile that complaint within one year, even if the statute of limitations for bringing such an action expires during that one year period. See 735 Ill. Comp. Stat. 5/13-217. Actions refiled under this statute are considered new actions, and plaintiffs have even been permitted to raise new theories of liability upon refiling, especially if they arose out of the same transaction or occurrence identified in the original pleading. See *Richter v. Prairie Farms Dairy, Inc.,* 2015 IL App (4th) 140613, ¶ 41.

Finally, relators may try to avoid a statute of limitations defense by arguing that*Cochise Consultancy* established a uniform, 10-year limitations period for all FCA cases. In addition to the substitution issue discussed above, *Cochise Consultancy* also addressed whether the three-year "discovery rule" in the FCA can be invoked in cases where the government declines to intervene. The Supreme Court held that it could. Illinois courts have not yet specifically addressed *Cochise Consultancy*, but defendants should have strong arguments against any such contention under the plain language of the IFCA.

Conclusion

The IFCA is identical to the FCA in many respects, and is often interpreted similarly. Relators bringing qui tam actions should plead their claims with as much specificity as possible and be wary of the affirmative defenses described above. Defendants should take note of the recent Illinois court decisions discussed above, which suggest a possible shift toward a more relator-friendly stance in IFCA actions, and defendants should be prepared with countervailing arguments. It remains to be seen whether these trends will take root.

This article is the first in a series of articles addressing the False Claims Acts of states that see relatively frequent state FCA lawsuits. In addition to Illinois, these states include California, Massachusetts, Florida, and New York. Information on these other states' statutes can be found in their respective articles.