Brownstein Hyatt Farber Schreck's Litigation Team Wins One of the First Cases to Be Tried Under New Mexico's Fraud Against Taxpayers Act

Key takeaways for companies to consider when doing government-contract work

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Brownstein's litigation team scored a major victory for client Flintco, a New Mexico-based contractor, in one of New Mexico's first trials under the Fraud Against Taxpayers Act. The recently adopted act allows a person to sue on behalf of taxpayers when public funds are involved. In this case, the plaintiffs were seeking approximately $8.8 million in total damages related to a $60 million renovation project on the University of New Mexico's Pit. After mandatory trebling of damages, potential statutory fines and attorney fees, total damages would have been close to $30 million. The monetary damages were daunting for Flintco. What was equally concerning, however, was the potentially devastating reputational hit the 76-year-old local company faced.

Brownstein's litigation team maneuvered through what is considered uncharted territory because very few Fraud Against Taxpayers Act cases ever make it to trial. This was one of the first in New Mexico, if not one of the first nationally. In fact, the majority of these cases settle because the consequences of going to trial can be devastating for a company, including: additional bad publicity over a longer period of time, the possibility of being banned from government contracting, and less control over which subsidiary of the company will be banned.

Brownstein's client was vindicated when a 12-person Santa Fe jury decided Flintco did not violate the Fraud Against Taxpayers Act. The successful litigation team of Eric Burris and Adam Lyons created the following five points for companies to consider when doing government-contract work.

1. **Plaintiffs will likely continue to use the conspiracy claim to stack the deck against the defendants**. This aspect of the claim allows the jury to choose to ignore all positive testimony, including support from the government agency. Achieving dismissal before trial in that circumstance becomes extremely difficult. **A corporation seeking to defend against such a suit must determine at the outset that it is willing to go to trial.** If not, early settlement becomes the best course.

2. **The vast majority of any settlement is actually paid to the public, rather than to the plaintiffs. That fact creates disincentives against settlement for both sides**. Because most of any recovery **goes** to the public, a settlement payment will have to be significantly over actual value to create a real interest in settlement on the part of plaintiffs. At the same time, because the settlement amount has

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to be approved by the presiding judge and thus will be public, defendants have a disincentive to offer more than a nominal amount. Again, this suggests pushing for early settlement discussions, before plaintiff has incurred significant costs, if settlement is to be considered.

3. The state statutes are largely patterned on the federal False Claims Act. Unlike the recently enacted state statutes, the federal act has been in existence for more than a century and there is a large body of federal case law extending liability under that act. Specifically, federal case law encompasses both "factual frauds" (overcharging or failing to provide goods) and "legal fraud" (in which technical violations are equated to fraudulent conduct). **The availability of claims based on these "legal frauds" hugely expands the type of conduct that can be the source of liability beyond that which most government contractors would think of as being fraudulent when it occurred. At the same time, much of the case law on "legal frauds" builds in fail-safes that check a plaintiff's ability to prove such a case. A focus on those fail-safes (materiality, in particular) is essential to defending against the "legal fraud" claim.**

4. In addition to the legal defense, the factual defense of truth should not be ignored. When dealing with "legal frauds" that defense **is best established through solid record keeping and even in creating records beyond what the government entity requires.**

5. **Given the problems that a qui tam action poses for the defendants, the best defense is a strong offense**. New Mexico's statute, for example, allows an award of attorneys' fees against the plaintiff if the suit can be shown to have been vexatious, frivolous or brought primarily for the purpose of harassment. Because the availability of treble damages, statutory fines and attorneys' fees makes these claims very appealing to plaintiffs even without a legitimate basis, focusing not only on substantive weakness, but also on the failure to adequately investigate can prove a solid defense strategy. A further consideration in that regard is whether to bring a counterclaim. Under the New Mexico statute, frivolousness is a question for the court, on which the court may prohibit argument to the jury. Arguing that the plaintiff brings the claim maliciously is a powerful argument for the defense, regardless of whether it ultimately leads to recovery of fees. Use of a counterclaim (such as for malicious abuse of process) ensures that the defendant will be able to put this point before the jury.

Thus, because of the potential for very large awards, qui tam actions under the state statutes are going to remain a reality. **Government contractors must plan for such by keeping proper records and over-documenting the correctness of their actions. Should litigation occur despite the contractor's best efforts, an aggressive defense is the best posture to undertake.** Litigating this type of case as though it is a traditional, private lawsuit where settlement at the end of discovery is the most likely outcome **is unlikely to be a successful approach**. Because the recovery system in this type of claim disincentivizes settlement at the actual value of the likely recovery, settlement will require a substantial premium to be possible. It is important to remember that the first of these cases to be tried by

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a jury went against the plaintiffs and is now a disincentive to plaintiffs in bringing this type of claim, particularly where plaintiffs do not have an internal whistleblower to substantiate their position. **Assembling government witnesses to support the defense (even if the jury is entitled to ignore their testimony due to the presence of a conspiracy claim) is a key element of the defense. Focusing discovery to establish strong government support for the defense position is a key point for a successful defense of a qui tam suit.**

Brownstein's attorneys litigate and try cases before federal and state courts at both the trial and appellate levels, government agencies and arbitration tribunals throughout the country. The strength of our market reputation in New Mexico has expanded our work for existing clients and earned high-level roles for new clients. We have worked on some of the most demanding disputes in New Mexico, many of which were cases of first impression, and have particular strength in intellectual property litigation.

Eric Burris, shareholder, brings 25 years of experience in civil litigation, including representation of clients in complex commercial litigation, employment and labor issues, defense of mass tort and personal injury litigation, and liability for design and manufacture of products ranging from motor vehicles and agricultural chemicals to pharmaceuticals and medical devices.

Adam Lyons, shareholder, has successfully litigated cases in state and federal courts in numerous jurisdictions at both trial and appellate levels. His practice focuses on commercial disputes, employment litigation and real estate litigation.

More information about the win is available here:
Albuquerque Journal, March 5, 2013
Albuquerque Journal, March 6, 2013

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