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The Road to Recovery: State False Claims Acts and Fraud in State-Funded Research

By Nicholas Woodfield & R. Scott Oswald

The federal False Claims Act has been quite successful in allowing the federal government to recover funds, almost $5 billion in fiscal year 2014 alone, that otherwise might have been lost to fraud. Indeed, the success of the federal FCA has led a large number of states to adopt their own versions of the law, most of which are modeled on the federal law. While these state FCAs also have proven effective in recouping funds lost to fraud, there are still classes of organizations that escape liability for waste of taxpayer dollars: those organizations that are actually arms of the state itself.

A state university, for example, currently is shielded from liability under most state FCAs. State universities theoretically can engage in wanton waste of state taxpayer funds in such endeavors as scientific or medical research. Local news sources often are plastered in the latest misdeeds of the nearest state universities. Some of the most egregious examples include allegations of rampant plagiarism in Kansas University's bioinformatics program by Mahesh Visvanathan and Gerald Lushington, and fraud at Penn State, where professor Craig Grimes allegedly spent $3 million in research funds for his personal use.

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When the state learns of a university engaged in this kind of waste, it can clean house with the staff and directors of the university, but further legal remedy is needed to actually recoup those funds. Some states have allowed for retaliation claims against the state organization, which protect whistle-blowers who come forward with their concerns. This increases the likelihood that any given scandal will come to the attention of the public, but still leaves the state without recourse to recover the funds lost to fraud.

The Virginia Fraud Against Taxpayers Act

There currently is no case where a state has been able to successfully sue a state institution to recover funds lost to fraud, but at least one attorney general has attempted to do so. Former Virginia Attorney General Ken Cuccinelli attempted to sue the University of Virginia for fraud under the Virginia version of the FCA, called the Virginia Fraud Against Taxpayers Act. Like most states' false claims acts, the VFATA contains *qui tam* provisions that allow an individual to sue on behalf of a state and recover a reward if the individual successfully prosecutes fraud perpetrated against the state. Note that this is distinct from a *retaliation* case, in which someone reporting fraud brings a suit for having been treated badly as a result of reporting fraud.

Cuccinelli brought suit to recover funds expended for allegedly fraudulent activity related to climate change research in the case of *Cuccinelli v. Rector, Visitors of*

Univ. of Virginia, 283 Va. 420, 429 (2012). However, the Supreme Court of Virginia held that the waiver of Virginia's sovereign immunity for retaliation claims under the VFATA did not apply to the other portions of VFATA.

> There is an express waiver of sovereign immunity in FATA in Code § 8.01–216.8, in the context of discrimination protection from *retaliation* for employees of the Commonwealth who report violations of FATA. The express waiver there only serves to highlight the absence of such a waiver in other parts of the Act. In its 2011 amendment, *the General Assembly specifically chose to attach the sovereign immunity waiver only to the retaliatory discharge portion* of Code § 8.01–216.8, and not to the other portions of the statute (*Cuccinelli*, at 430-31 (emphasis added)).

It is worth noting that when it applied the doctrine of sovereign immunity (a state's freedom from being sued) to strike down a VFATA suit, the *Cuccinelli* court did not appear to have a problem with the theoretical concept of a state suing its own institution as long as Virginia had acted affirmatively to make state agencies liable to the state for violations of the VFATA. It is also worth noting that the case may not have been a good test case because the suit was aimed at research grant money expended on a politically sensitive topic that cloaked the suit in a veil of controversy.

Regardless of political views impacting the merits of the research itself, the case was the first test case of its kind, and provides insights into the theory of a state institution's liability for fraud against the state.

Increasing Flexibility by Waiving Immunity

Unsurprisingly, sovereign immunity is a protection that states value highly. Most individuals would be loathe to give up any immunity they might have to lawsuits, so it is hard to conceive of a state willingly subjecting itself to liability except in the most politically pressing types of cases. But the issue of state recovery of fraudulently spent funds from its own institutions presents a unique scenario in which a state actually gains flexibility by giving up control.

Because a state's sovereign immunity extends to its own institutions, many of which enjoy a substantial amount of autonomy, the state is in the interesting predicament of being largely unable to hold its institutions accountable for fraudulent use of funds. Even the individuals responsible may be able to claim sovereign immunity to the extent their actions are within their roles as state employees. By waiving state sovereign immunity under its own FCA, the state can go after these individuals and institutions to reclaim damages. A state recovering funds from a state institution may be, in some sense, ''robbing Peter to pay Paul,'' since the state essentially is moving funds from one state institution to another, but there is a practical impact on the institution acting beyond the scope of its authority. Government institutions are well known for fiercely guarding their budgets, and the ability of an attorney general to take from a fraud-prone institution's coffers creates a strong disincentive for the agency to engage in fraud. The taxpayer may be, in real terms, no richer for the effort, but the increase in accountability creates a more even balance of power, and rewards those who are bold enough to expose the schemes of their superiors.

In practical terms, this makes it more worthwhile for state universities to ensure that professors are not simply stealing their research from others, as allegedly happened at Kansas University. If the university or the professor actually may suffer a financial setback from rampant plagiarism, the university is less likely to look the other way in pursuit of impressive publication numbers and focus instead on new and valuable research. In even more cut-and-dry terms, it encourages universities to assure that money appropriated for research is actually used for research. While public relations fiascos are no doubt unpleasant for these universities, the threat of financial harm would prove an even more potent stick.

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