

2009-10 MN RIMS Board

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Attention MN RIMS Members:

Please take a minute and go to the National Society website to make certain your contact information is current. Since the membership follows the member, if you have a change in employment, you must update your contact information. Thank you for your assistance.

MN RIMS Member News

Mary Peter, Named One of "Top Women in Finance"

Mary Peter, Director of Enterprise Risk Management (ERM), at Eide Baily, LLP, has been named as one of 2009's Top Women in Finance by Finance and Commerce newspaper. This award honors women who have shown innovation, leadership and a positive influence on their business, industry and community. Ms. Peter was one of 26 women to receive this prestigious recognition at an awards program held November 5, 2009.

Recap of November's Chapter Meeting

The current status of the 2009 Flu Pandemic was the topic of the November 17th meeting. A panel group presented various views of the current state of the pandemic.

Bill Baker, Senior Vice President with Marsh, discussed the pandemic from an insurance perspective. Many of your current policies are not likely to respond to a claim from the pandemic due to the lack of a covered triggered event or exclusions. Director & Officer coverage could come into play if perhaps there is a financial loss at a company that did not prudently plan, prepare or create a business continuity plan or crisis management plan. A few markets provide a 1st and 3rd party stand alone coverage for pandemics. They tend to be pricey and have very large deductibles. Bottom line; do not rely on your current insurance policies to respond to a pandemic.

Cindy Larson, Infection Control Practitioner at Mercy Hospital & Allina Health System, quoted "The only thing predictable about influenza is unpredictability." The viruses are constantly changing. She defined a pandemic as, a new virus that can cause illness and be able to pass easily from human to human and have geographical spread in two to three waves. The current status seems to show that we have just passed the peak of the 2nd wave and interestingly, 80- 85% of cases in Minnesota are in the metro area. The hospitals are over stressed. The importance of a business continuity plan can not be over emphasized.

On the topic of business continuity planning, Marsha Smith, Business Continuity Management Consultant of Medtronic, reviewed what preparation Medtronic has taken. Medtronic initiated pandemic planning in 2006 with the Avian Flu activity. They have an active Corporate Pandemic Task Force and created an internal website for pandemic planning. They emphasized administrative controls such as crisis management teams, communication, health & safety policies & procedures including social distancing were most effective for preparedness. Lessons learned are that the WHO Pandemic Phases did not work as originally planned and rigid trigger based action plans were not flexible enough to work with the fluid situation of a constantly changing environment. Some extreme responses globally were observed and a geographically dispersed sales staff proved to be very challenging.

The status of the current flu pandemic is constantly changing. Relying on your current insurance policies to protect you from a financial loss may prove to be less than effective. A well planned business continuity plan will serve you best to mitigate the effects of the current pandemic.



Membership

Minnesota RIMS would like to welcome the following individuals who have become new members since the last newsletter was published.

New Members:

Deputies

Elizabeth Whillock – Prime Therapeutics
Mary-J Thompson – Buffalo Wild Wings Inc.
Jana Smith – Buffalo Wild Wings Inc.
Diane Madison – Target Corporation

Associates

Jacob Nelson – Arthur J. Gallagher

Minnesota RIMS Membership:

| | |
|-------------|-----|
| Company | 94 |
| Deputy | 197 |
| Associates | 57 |
| Affiliate | 0 |
| Educational | 1 |
| Student | 2 |

Total Current Membership 257
Membership Goal 291

2009/2010 Membership Committee

Committee Chair:

Wendy Hearn – UnitedHealth Group

Committee Members:

Kendra Hillstrom – EcoLabs

Bobbi Pearson – Cargill Inc.

Reesa Baker – RJF Agencies Inc.

Mary's Musings

By Mary Wells, Arthur J. Gallagher

Items of Interest:

"The following article does not necessarily reflect the views and opinions of the MN RIMS Chapter, but is meant to generate discussion among the Chapter Members"

The New MN False Claims Act

By Dean B. Thomson, Esq. and Hannah R. Stein, Esq.

The Federal Civil False Claims Act allows the federal government to pursue fines

and treble damages against contractors who assert "false" claims. Fortunately, the scope of the Federal Act was limited and applied to only federal (or federally funded) projects in Minnesota. But in the 2009 legislative session, hidden within an omnibus spending bill, the Minnesota Legislature passed a Minnesota False Claims Act (MnFCA), which applies to all Minnesota state or municipally-funded projects. The MnFCA is similar to the federal False Claims Act, and carries identical penalties. It is crucial that Minnesota contractors be aware of the MnFCA, as past practices may now expose a contractor to MnFCA civil penalties.

This paper will first review basic provisions of the Act, then highlight its favorable and unfavorable terms, and conclude with suggestions on how to avoid being the subject of a false claim investigation

Basic provisions of the Act

The purpose of the Act is to penalize anyone who "knowingly" attempts to defraud the government by submitting a false claim to the government for payment. In general, the law levies penalties on persons who "knowingly" cause the government to pay more money than it should be paying – or, conversely, who "knowingly" pay the government less or cause the government to request less than the government is actually due.

While "knowingly" sounds like it is aimed at deliberate fraud, in fact, the definition of "knowingly" is broader than one might imagine. The definition of "knowingly" given in the MnFCA is essentially identical to that of the federal FCA: Subd. 3. Knowing and knowingly. "Knowing" and "knowingly" mean that a person, with respect to information:
(1) has actual knowledge of the information;
(2) acts in deliberate ignorance of the truth or falsity of the information; or
(3) acts in reckless disregard of the truth or falsity of the information.

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2009-2010 RIMS COMMITTEES

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No proof of specific intent to defraud is required, but in no case is a person who acts merely negligently, inadvertently, or mistakenly with respect to information deemed to have acted knowingly.

Therefore, "recklessly" submitting any document the state or local government requires on a project that arguably affects payment, no matter how peripheral, can be grounds for FCA sanctions. For example, contractors are often asked to certify compliance with environmental, immigration, or DBE programs as part of a pay application. If an incorrect certification can affect payment, the government can claim it is a false "claim" and seek FCA remedies. Furthermore, while "mistake" is explicitly exempted from liability, the burden will inevitably be on the contractor to show that any false information the contractor submitted was a forgivable "mistake" and not a "reckless" error justifying sanctions.

"False" is also not necessarily an objective standard. For instance, if a contractor certifies that it has made "good faith efforts" to meet a Disadvantaged Business Enterprise goal on a Project, and the government later believes to the contrary, the government can allege the contractor's certification to be "false" and seek to recover treble damages.

Finally, just as in the Federal FCA, under the MnFCA, the government need only prove its case by a preponderance of the evidence. This means the government must only prove that it is "more likely than not" that the contractor "knowingly" violated the MnFCA in order to establish contractor liability.

Penalties For Violation Of The MnFCA

As in the federal FCA, violations of the MnFCA are punishable by (1) a civil penalty of not less than \$5,500 and not more than \$11,000 per claim, plus (2) triple the government's damages. Because the federal and Minnesota Acts in regard to penalties are identical, we

can assume the state and municipalities will seek to levy similar damage claims. The person violating the MnFCA must also pay the costs the government occurs in bringing suit against the violator.

Like the federal FCA, the MnFCA contains a "whistleblower" or "qui tam" provision. This allows private individuals to bring MnFCA claims on behalf of the government. If an individual brings a suit pursuant to the qui tam provision, and succeeds in the suit, the individual receives some portion of the money recovered from the false claimant. The MnFCA and federal FCA qui tam provisions are virtually identical in substance, though there are a few differences.

In order for a private individual to commence suit under the MnFCA, the individual must submit his or her complaint to the court and the appropriate government prosecuting attorney. The prosecuting attorney then has 60 days in which to decide whether to "intervene" in the action. If the prosecuting attorney decides to intervene, the prosecuting attorney assumes primary responsibility for prosecuting the action, though the qui tam plaintiff remains a party. After the 60 days, the complaint is served on the defendant. If the prosecuting attorney decides not to intervene, the qui tam plaintiff may continue the action on his or her own.

Should the qui tam plaintiff be an employee of the accused, the accused may not fire or otherwise punish the qui tam plaintiff for bringing the case. Should the accused take any such prohibited action against the qui tam plaintiff, the qui tam plaintiff is entitled to reinstatement, twice their lost compensation, interest, and other special damages.

Statute Of Limitations/Repose

The MnFCA and the federal FCA have identical statute of limitations periods: specifically, the qui tam relator or government must bring their claim within (1) six years of the fraudulent activity or (2) with-

in three years of discovery of the fraudulent activity, whichever is longer, but (3) in no event more than ten years after the fraudulent activity. Additionally, in practice, the government will pressure alleged violators to voluntarily toll (suspend) the statute of limitations while the government takes time to investigate and decide what it wants to do. Generally, prospective defendants have little incentive not to accede to the government's demands in the hope that the government will decide not to pursue a suit.

"Cooperation Discount"

The MnFCA, like the federal FCA, provides that if the person committing a violation under the FCA fully cooperates with a government officer who is charged with investigation of the violation (e.g., furnishes the investigator with all relevant documents), the person's penalty is reduced from treble the government's damages to double the government's damages. This reduction in damages is only available if the violating party cooperates without having any actual knowledge of the government investigation and before any court or administrative action is commenced.

Some Bright Spots

The MnFCA contains a few provisions that may provide some relief to contractors.

Safe Harbor Provision

The MnFCA provides a safe harbor provision, which is unlike anything in the federal FCA. The provision states that before bringing suit, the "original source" must inform the defendant business of its purported fraud. The business then has 45 days to correct its fraud. The safe harbor provision is not available if the defendant was deliberately attempting to defraud the government (as opposed to recklessly doing so).

It is difficult to imagine how this safe harbor would work in regard to activities that cannot be corrected.

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Limitation On Contractor Liability For Actions Of Employees

The MnFCA provides that an employer is not responsible for fraudulent acts of “non-managerial employees” unless the employer “had knowledge of the act, ratified the act, or was reckless in the hiring or supervision of the employee.” It is, accordingly, tacitly assumed that the employer is responsible for the fraudulent acts of its managers. Nevertheless, the MnFCA is more lenient in this aspect than the federal law, which has no provision exempting the employer from any vicarious liability for the acts of its employees.

Definition Of “Claim” Arguably Narrower

The federal FCA levies a penalty on those who in some way submit a fraudulent “claim”. In the federal FCA, the definition of “claim” states: “claim” includes any request or demand, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

By contrast, the MnFCA defines a claim as follows:

“Claim” includes a request or demand for money or property that is made by a contractor, grantee, or other recipient to the state or a political subdivision if the state or the political subdivision has provided or will provide a portion of the money or property that is requested or demanded, or if the state or the political subdivision will reimburse the contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.

This definition potentially limits application of the law to only situations wherein a claim for payment is made directly to the state government. It is questionable, therefore, whether a subcontractor that does not directly make a claim to the state or political subdivision can be subject to MnFCA liability.

Reporting Provisions

The MnFCA contains a provision requiring the Minnesota Attorney General to report

every year to the legislature regarding the profitability of the statute (the net proceeds received by the state via the MnFCA, and the time spent by the Attorney General's office in reviewing/prosecuting the claims). This could provide an avenue for yearly petitions to the legislature regarding any enforcement excesses and problems with the MnFCA.

The Black Holes Surrounding the Bright Spots

There are several ways in which the MnFCA is significantly worse than the federal FCA:

No Attorney's Fees Or Costs For Defendants

While the MnFCA provides for the defendant to pay the state's costs and attorney's fees in the event that the defendant loses the lawsuit, the statute explicitly provides that should the government lose the case, the government does not have to pay the defendant's costs and fees – arguably, under any circumstances.

No Penalties For Bad Actor Qui Tam Plaintiffs

While the federal FCA contains a provision allowing the court to reduce or remove completely a qui tam plaintiff's compensation if the qui tam plaintiff was the actual cause of the FCA violation, there is no such provision in the MnFCA. Arguably, therefore, under the MnFCA, a defendant's employee could help develop a false claim, send the false claim in to the Minnesota government on behalf of the defendant, and turn around and sue the defendant as a qui tam plaintiff for the false claim the employee helped create!

No Need For “Diligence”

The federal FCA specifies that the Attorney General must “diligently” investigate claims. The word “diligently” is left out of the MnFCA. This implies that the Minnesota Attorney General has no obligation to investigate in a timely manner, which could lead to claims well past the time the corporation might have corrected the problems with prompt notice.

How to Avoid “False” Claim Liability

While fighting fraud appears to be a good idea in theory, the MnFCA creates a substantial risk of government abuse. For instance, the federal government has often counterclaimed with false claims charges when a contractor brings a case against

the government for nonpayment of a claim under a contract. The threat alone of such counterclaims can often deter contractors from making valid claims for the money they are owed. Furthermore, contractors cannot expect measured responses from small city councils and school boards, which might assert MnFCA charges with minimal cause simply because they are angry over the claim. Additionally, losing an MnFCA claim could result in debarment in the way that a losing a simple breach of contract claim would not. There are, in short, significant incentives for the state, municipal agencies, and qui tam plaintiffs under this legislation to bring MnFCA claims irrespective of whether they are justified.

In order to protect against MnFCA liability, contractors should carefully prepare and review all payment claims and any other submissions the contractor must make to the government for a project. Additionally, contractors should consider implementing a comprehensive compliance program to ensure that they are in compliance with all Minnesota and federal laws and regulations that relate to “claims” for payment. Noncompliance with a law or regulation could arguably transform the contractor's entire set of pay applications into “false claims” as state or municipal owners could argue that payment of the contractor was premised on the contractor's contractual agreement to comply with all applicable laws and regulations. For suggestions on how to create such a compliance program, see our prior October, 2008 Briefing Paper, *New Federal Regulations Require Contractors to Have Compliance Programs* (www.fwhtlaw.com). Notably, the Act is not effective until July 1, 2010, giving the industry some time to implement compliance programs.

Finally, with the penalties for false claims now so severe, it would be prudent to review any claim for a time extension or additional compensation with counsel to make sure it is properly prepared and founded in law and fact. While the MnFCA discourages careless assertions of entitlement, it need not affect legitimate, well supported claims.

Communication

Please submit all items to:
pmschulz@travelers.com

The purpose of this committee is to act as the primary coordinator of all Chapter communication that is distributed to the membership via newsletter, e-mail and the website.

Minnesota RIMS publishes its newsletter approximately two weeks prior to a scheduled Minnesota RIMS function or event. If you wish to submit articles or information to be included in the Minnesota RIMS SCOPE, please keep the publication calendar in mind.

Information must be in a .doc or .txt format for inclusion. Minnesota RIMS reserves the right to truncate, edit, omit or size any submission as it sees fit. Priority for inclusion of items will be for those articles that have the most interest to RIMS membership.

Employment submissions must have a contact name, telephone number and e-mail address or website address in lieu of personal contact information. They must also have an expiration date for application submissions.

2009/2010 Communication Committee

Committee Chair:

Patty Schulz –
The Travelers Companies, Inc.

Committee Members:

Carmen Ferguson – Bemis

Eric Benson – United HealthGroup

Cheryl Humphrey – Kim Burmeister

Mary Wells – Arthur J Gallagher

Beth Iacono – Nash Finch Company

MN RIMS Committees

Please consider how you may best contribute to MN RIMS – the return benefits are numerous! In addition to personal satisfaction, serving on the Board or a committee allows you to gain professional development and build relationships. To learn more about getting involved in any of the Chapter's activities, please contact the Committee Chair listed or any Board member!

2009-2010 MM RIMS Chapter Meetings and Events Schedule

January 28, 2010

Annual Seminar – “Are We There Yet?”
Location: Minneapolis Convention Center

February 16, 2010

Chapter Meeting

March 16, 2010

Partner Appreciation Night

April 25-29, 2010

National RIMS Conference
Location: Boston, MA

May 18, 2010

Chapter Annual Meeting

July 12, 2010

Annual Golf Tournament

Upcoming Industry Events

These events are listed as a courtesy to our members who are interested in educational opportunities. They are not sponsored by Minnesota RIMS. Event information includes the sponsoring entity, date of event, the location, a brief program description, and contact information.

Check out the course calendar under “Education” on the RIMS website (<http://www.rims.org/>) for upcoming seminars of interest!

Employment Opportunities

Employment listings may not be a complete job description and are done as a courtesy to the Risk Management Community. Any inquiries should be made directly with the listed member company. Minnesota RIMS does not charge a fee for posting a listing for member companies.

There are currently no listed employment opportunities.

