

STATE FALSE CLAIMS AND *QUI TAM* LEGISLATION

The Federal False Claims Act Helps The U.S. Pursue Fraud on the U.S. Government

The federal civil False Claims Act (FCA) is the federal government's primary weapon to combat fraud committed against federally funded government programs. The statute authorizes the Attorney General to file civil lawsuits to reclaim three times the amount of damages lost, and penalties of up to \$11,000 per claim, from any person, partnership or corporation that submits, or causes someone else to submit, a false claim for federal funds. The federal statute has been held to apply to virtually every type of commercial transaction with a government entity – from hospital bills submitted to Medicare, to claims submitted under highway construction contracts, to claims for space shuttle parts designed for NASA, to claims to recoup losses under farm loan guarantee programs. The government's great success under the statute is due, in large part, to the fact that when enacting the statute, Congress lowered the bar – the plaintiff in an FCA lawsuit does not have to prove intent to defraud. In an FCA lawsuit, a company can be held liable if it knew, or should have known, its claim was false.

The Federal False Claims Act Pays Up To A 30% Bounty To Private Individuals To Sue On The U.S. Government's Behalf

While few could argue against fighting fraud, the FCA is not only the weapon of choice for the government. The statute also authorizes individuals to bring suit on behalf of the government, to keep up to 30% of what they recover for the government, to recover damages when an employer "retaliates" against them for whistleblowing activity, and to receive full compensation for their attorneys' fees and expenses. These private plaintiffs are formally called *qui tam* plaintiffs or "relators", and these lawsuits are called *qui tam* lawsuits. In the hands of an aggressive group of plaintiffs' attorneys, the *qui tam* lawsuit has become a potent vehicle for abuse.

Congress Wants States To Enact Their Own False Claims Act Laws

Whipped up by unsupported horror stories about unrecovered losses of scarce Medicaid funds, Congress has offered states a financial incentive to enact their own *qui tam* statutes. Under the Deficit Reduction Act of 2005 (DRA), states that enact FCAs that are "at least as effective" as the federal statute in encouraging and "facilitating" *qui tam* lawsuits will get to keep an additional 10% of the funds recovered in a Medicaid fraud case.

States May Actually Lose Money By Allowing Private False Claims Act (called “Qui Tam”) Lawsuits

Clearly, the promise of a 10% bonus is attractive to state legislators, but a closer look at practices under the federal statute prove that state Medicaid programs don't gain from buying in to the litigation quagmire. Whistleblowers and their attorneys, most of whom have already blown the whistle by filing suit under the federal statute, will be the big winners under state *qui tam* statutes. And that's why their advocacy group drafted the “model” legislation released within minutes of the DRA's passage.

Today, without state *qui tam* statutes, states already recover double damages, just like the federal government does, in Medicaid cases filed under the federal statute and pursued jointly by state and federal prosecutors. But for whistleblowers, the problem in those cases is that they only receive 30% of the federal half of the recovery. Once a state passes a *qui tam* statute, though, the state will also pay the whistleblower a share. Mathematically, all the DRA's bonus will do for the state is offset that cost – if a state is lucky, the federal Medicaid Trust Fund loses 10%, the whistleblower wins big, and the state gets exactly what it would have recovered had it not let loose a new brand of lawsuit.

States Are Quick To Jump On The Trend To Consider False Claims Act Legislation, But After Considering The Proposals Fewer Than Half Have Accepted Congress's Deal

At least 27 states introduced false claims legislation in 2007 to either enact a false claims statute or amend an existing statute: Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maine, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah and Wyoming. Bills have passed in 12 states so far: Florida, Georgia, Louisiana, Montana, Nevada, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, Texas, and Utah. Some of the bills addressed only false claims in the context of Medicaid programs. Other bills addressed all false claims submitted to the state. No bills passed in 2006.

As of November 2007, 21 states and the District of Columbia have false claims statutes allowing *qui tam* lawsuits. An additional 6 states have false claims statutes that do not allow *qui tam* lawsuits.

Why Is It Important To Address State *Qui Tam* Legislation?

- **State *Qui Tam* legislation is unnecessary.** Those who commit fraud should be investigated and appropriately punished – and an immensely complex array of state and federal statutes and regulations already exists to do so. State *qui tam*

legislation adds players to that already complex system, further delaying the investigation and prosecution of meritorious cases.

- **State FCA lawsuits will encourage unnecessary litigation and impose tremendous costs on the industries.** Lawsuits brought under the federal FCA already generate many millions of dollars for state and federal governments. Enacting state *qui tam* statutes is likely to significantly increase the number of these lawsuits, many of them duplicative or unwarranted. Under state *qui tam* statutes, businesses will face multiple lawsuits and even duplicative civil penalties for the same allegedly wrongful act. Companies would be forced to incur high defense costs to litigate the same act over and over again.
- **State *qui tam* lawsuits will create confusion in the law and make it harder to resolve those FCA cases that the government chooses to pursue.** New state FCA laws could be inconsistent with the federal FCA. Trial lawyers lobbying the state FCA bills are trying to change the rules so they can better position themselves in litigation and settlement discussions. Taxpayers Against Fraud (TAF), an advocacy group organized by whistleblowers' attorneys, is circulating a "model" state FCA. The TAF model bill would increase legal liability, remove certain defenses, and otherwise create inconsistencies with the federal FCA. If lawmakers adopt the TAF approach, companies would be forced to spend more resources attempting to determine what is required by multiple FCA laws, aligning corporate practices with those requirements, and defending lawsuits brought under different state and federal enforcement schemes. These changes would stack the deck in favor of the trial lawyers, increase costs of defending these lawsuits, and help force unwarranted settlements of meritless claims.
- **States are not likely to recoup much, if any, of the federal financial incentive.** The additional monies recovered by the state from the federal Medicaid Trust Fund for enacting state FCA legislation would be countered by the need to share the proceeds recovered by the state with the private *qui tam* plaintiff. **There is little, if any, net financial gain for enacting this troublesome private *qui tam* legislation.**