

NEW WEAPON TO COMBAT FALSE CLAIMS AGAINST NEW JERSEY'S MEDICAID PROGRAM

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Perhaps the biggest federal tool used in the battle against health care fraud is a federal civil statute entitled the **False Claims Act (FCA)**. It has been described as the single most important tool taxpayers have to combat fraud committed against the federal government. To give you an idea regarding its effectiveness, in fiscal year 2010 the U.S. Justice Department secured \$3 billion in civil settlements and judgments in cases involving fraud against the government. Of this amount, approximately \$ 2.4 billion was recovered through the FCA. It is also worthy to note that of the \$3billion in government recoveries, approximately \$2.5 billion, or 83%, was attributable to health care fraud.

As its moniker-Lincoln's Law- reflects, the FCA dates back to the Civil War and was originally focused on preventing fraud perpetrated against the government by suppliers. Armed with 1986 revisions and now amendments brought about by the enactment of the **Fraud Enforcement Recovery Act of 2009 (FERA)**, it is no wonder why the FCA has been so instrumental in the battle against fraud. It applies to fraud involving any federally funded program or contract except tax fraud. As the statistics above reveal, the focus of the FCA use has now shifted from defense contracting to health care fraud.

Federal efforts did not stop with enhancements to the FCA. Seeking to encourage states to upgrade their own anti-fraud efforts, Congress enacted the **Deficit Recovery Act of 2005 (DRA)**. In the Medicaid fraud provisions of the DRA, states were provided monetary incentives, in the form of enhanced Medicaid monies, to enact state false claims acts that match or exceed the federal counterpart.

Responding to this "federal persuasion", in 2008 New Jersey enacted its own false claims act, entitled "**The New Jersey False Claims Act**", (NJFCA), **N.J.S.A. 2A:32C-1**, to combat fraud against the state's Medicaid program.. Upon review of the NJFCA by the Office of Inspector General, U.S. Department of Health and Human Services (OIG), it was found that the NFCA did not fully comport with federal guidelines, that is, it was not at least as effective as its federal counterpart. Thus corrective amendments of the NJFCA, that now pass OIG scrutiny, were signed into law shortly before our last change of gubernatorial administrations.

The NJFCA, which essentially mirrors the FCA, establishes civil liability for false or fraudulent claims made against all state funded programs, including Medicaid. It authorizes any person to bring a civil action in the Superior Court of New Jersey against any other person who knowingly causes the State to pay a false or fraudulent claim and imposes onerous financial penalties on the offender. Thus it can be expected that the NJFCA will be utilized extensively to combat fraudulent schemes employed against such a tempting target as our state Medicaid program.

NJFCA prohibits a person or entity from doing the following:

knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval;

knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim;

conspiring to defraud the State by getting a false or fraudulent claim allowed or paid by the State;

having possession, custody, or control of property or money used, or to be used, by the State and knowingly deliver, or cause to be delivered, less than all of that money or property;

being authorized to make or deliver a document certifying receipt of property used, or to be used, by the State and, intending to defraud the State, make or deliver the receipt without completely knowing that the information on the receipt is true;

knowingly buying, or receiving, as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property;

knowingly making, using, or causing to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to transit money or property to the State.

Violations are punishable by treble damages (3x the State's damages) plus civil penalties of \$5,000 to \$10,000 per false claim. The civil penalties upper limit may be adjusted upward for inflation. Since it is a civil statute, the burden of proof, which rests on the government, is only a preponderance of the evidence standard.

Under the NJFCA, the requisite mental state, "knowing" or "knowingly", can be established not only by proving actual knowledge, but also by proving just deliberate ignorance or reckless disregard of the truth or falsity of information. Thus, to meet this legal threshold the state will not be required to prove a specific intent to defraud. In the same vein it is important to note that the breadth, complexity, and changing nature of Medicaid policies and rules will not, *per se*, provide a defense to NJFCA liability. The failure to stay abreast of changing rules, or to make a reasonable inquiry where a situation may require clarification, generally will not suffice as a defense to an NJFCA violation. In short, no longer will a practitioner be able to defend by claiming ignorance of the practice's billing practices; the practitioner is expected to implement reasonable measures

to ensure compliance with proper billing procedures and familiarize themselves with the legal requirements for cost reimbursement.

Like its federal counterpart, the NJFCA encourages whistleblowing by providing for *qui tam* enforcement, which allows private citizens—called relators—to litigate fraud claims on behalf of the State. These complaints must initially be filed with the New Jersey Attorney General (AG), where they are sealed up to 60 days while the state investigates the allegations and determines whether to intervene in and take over the suit. For good cause the State may also seek extension of time under which the complaint remains sealed.

If the AG chooses to intervene in the suit, it takes over control of the litigation, with the relator having the right to continue as a party to the action. But if the state declines intervention, the relator may continue the litigation without the AG's active participation. Either way once the complaint is unsealed, it will be served on the defendant Medicaid participant, and the defendant will have to answer and litigation will proceed in accordance with the rules of court.

If the AG takes charge of the litigation and is successful, the relator is entitled to between 15% and 25% of the recovery, except that the percentage may be reduced to no more than 10% if the action was based primarily on information that was not provided by the relator. If the AG does not take over the litigation and the relator proceeds with the litigation and is successful, then the relator is entitled to an award of between 15% and 30% of the recovery. If successful, both the AG and the relator are entitled to obtain costs of litigation, including reasonable attorney fees and expenses. Whistleblowing, motivated by the possibility of sharing in massive recoveries, is the key to success of any state or federal FCA.

It should be noted that, if the relator knowingly planned and/or initiated the violation of the NJFCA, then the court may reduce the relator's award. If convicted criminally for conduct that is part of the NJFCA action, the relator must be dismissed from the *qui tam* civil action and will be precluded from receiving an award.

The time period for bringing an action under the NJFCA is broad, basically six years from the date of violation, or three years from the date when facts that are material to the civil action are known or should have been known, but in no event more than 10 years from the date of violation.

The NJFCA establishes joint and several liability, meaning any or all perpetrators in a fraudulent scheme can be held liable for the entire amount of the fraud. In addition, it includes the presentation of a false or fraudulent claim not only to the State, but also to "any employee, officer or agent of the State, or to any contractor, grantee, or other recipient if the State provides any portion of the money, property, or services requested or demanded, or if the State will reimburse the contractor, grantee, or other recipient for any portion of the money, property, or services requested or demanded." This is highly relevant to the state Medicaid program, because the state contracts with private managed

care carriers to administer the state program. Thus, although most false claims are presented to private contractors, as opposed to being directly presented to the State, they will still be within reach of the NJFCA.

It is particularly noteworthy that the NJFCA requires the AG to notify the appropriate licensing authority of any licensee who is found to have violated any provision of the NJFCA. Therefore, physicians can count on scrutiny from the Board of Medical Examiners if civil liability for a violation of the NJFCA is found, and should keep in mind that a violation of “any insurance prevention law” is also grounds for Board discipline under N.J.S.A. 45:1-21(k).

Like its federal counterpart, it is expected that the NJFCA will be a formidable tool in the fight against fraud, particularly fraud against the New Jersey Medicaid Program. Healthcare professionals have a duty to stay abreast of changes to Medicaid claims rules and policies, and to make reasonable inquiries when existing guidance is not clear. “Turning a blind eye” or other forms of deliberate ignorance will not constitute a defense. Practitioners must take all reasonable steps to ensure compliance with the ever changing rules, regulations and procedures of Medicaid billing. As always, when in doubt regarding claims submissions, seek qualified legal counsel who can assist with obtaining coding and other expert advisors within the protections of the attorney-client privilege.

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