

# Does The New Jersey False Claims Act Live Up To Higher Federal Standards? Not Yet

by James A. Robertson, Esq. and John W. Kaveney, Esq.

New Jersey hospitals are well aware of the Federal and New Jersey False Claims Acts and their significant penalties. Everyone has heard of the million dollar settlements with healthcare entities from across the country relating to their alleged false and fraudulent claims. These lawsuits, and the federal government's general mission to identify and prosecute fraud, show no sign of slowing down as the United States Department of Justice ("USDOJ") recovered a record \$3 billion in false claims' cases in fiscal year 2010. Since 1986, the USDOJ has now recovered more than \$27 billion through false and fraudulent claim lawsuits and settlements. Through various legislations over the past several years, the Federal False Claims Act has been refined and strengthened to provide the government and the public with an even more potent tool to combat healthcare fraud.

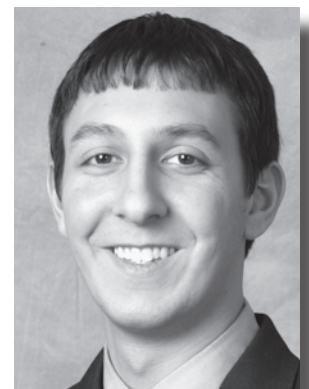
As a result, the Office of Inspector General ("OIG") of the United States Department of Health & Human Services ("DHHS") now seeks to ensure that each State's false claims statute similarly reflects the modified and strengthened language contained in the Federal False Claims Act. The primary means of accomplishing this goal is through an incentive program adopted by the Social Security Act. Should New Jersey choose to adopt these revisions, there will be an even greater incentive and urgency for hospitals and other healthcare entities to ensure false or fraudulent claims are not submitted and that proper audit and oversight programs are in place to avoid the broad liability and significant penalties of these statutes.

## Background

New Jersey hospitals have historically been forced to ensure compliance with both the Federal and New Jersey False Claims Acts to avoid the extreme penalties associated with such violations. While there is no absolute requirement that state false claims acts mimic the Federal False Claims Act, section 1909 of the Social Security Act (the "Act"), which was adopted in 2005 as part of the Deficit Reduction Act, creates a financial incentive for States to enact false claims' statutes that meet a set criteria. That criteria includes requirements that: (1) the law



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establishes liability to the State for false or fraudulent claims; (2) the law's provisions are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims; (3) the law requires filing a false claims action under seal for the first 60 days with review by the State Attorney General; and (4) the law contain a civil penalty at least as severe as the civil penalty authorized under the Federal False Claims Act.

In exchange, complying states receive an increased share of any amounts recovered pursuant to the individual state's false claims statute. Typically, a State can expect approximately an additional 10% share in any recovery from a false or fraudulent claim lawsuit or settlement. This additional revenue is a significant incentive for states, especially in a struggling economy where each state is doing everything it can to combat budget deficits and revenue shortfalls. New Jersey is no different as it struggles with a \$29.7 billion budget, of which, \$5 billion was allocated to the Department of Human Services. Thus, it is likely that New Jersey will make every effort to generate additional revenue through this federal incentive program.

The OIG has granted a two year grace period for compliance, which will end on March 31, 2013. Thereafter, a previously approved State will no longer qualify for the incentive unless its State False Claims Act has been: (1) amended and resubmitted to the OIG, and (2) either approved by the OIG or identified as under review.

## The OIG's Review of State False Claims Acts

On March 21, 2011, the OIG issued a letter to the New Jersey Attorney General, Paula T. Dow, providing a review and critique of the New Jersey False Claims Act and its satisfaction, or lack thereof, with Section 1909 of the Act. This review

was performed upon the request of the State of New Jersey as part of a larger program offered by the OIG to assist states in ensuring compliance with section 1909 of the Act in light of recent amendments to the Federal False Claims Act. Approximately 26 of the 50 states requested a review by the OIG. Following review of the New Jersey False Claims Act, in consultation with the USDOJ, the OIG determined the New Jersey statute did not meet the requirements of section 1909 of the Act and thus requires amendment if New Jersey desires to receive the financial incentive after March 31, 2013.

### Distinctions Between the Federal and New Jersey False Claims Acts

The inconsistencies between the present Federal False Claims Act and the New Jersey False Claims Act are due to the recent passage over the past few years of three key pieces of legislation. While most Americans are likely familiar with them, they may not have known each contained key revisions to the Federal False Claims Act. Specifically, these legislations are: (1) the Fraud Enforcement and Recovery Act of 2009 (“FERA”) adopted May 20, 2009; (2) the Patient Protection and Affordable Care Act (“ACA”) adopted March 23, 2010; and (3) the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) adopted July 21, 2010. Through these bills, the bases for liability and the rights of qui tam relators were expanded upon and more specifically defined.

The first required revision identified by the OIG amends the basis for liability. In 2009, FERA amended the actions upon which liability can be based and the definitions of such terms as “claim,” “obligation” and “material.” Most significantly, liability for “knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval” no longer requires that the claim be made or presented to an officer or employee of the government. This revision significantly expands the scope of potential actions covered by the statute thereby increasing the possibility of a violation of the Federal False Claims Act. Moreover, FERA also expanded the scope of the definition of a “claim.” The term now broadly encompasses requests or demands for money or property regardless of whether

or not the United States has title to the money or property and includes requests or demands by third parties “if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest.” Finally, FERA also provided the terms “obligation” and “material” with expansive definitions. Consequently, more claims will fall within the scrutiny of the Federal False Claims Act thereby increasing the potential for exposure by hospitals and other healthcare providers.

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Contrastingly, the scope of the New Jersey False Claims Act's definition of liability is not as broad. It defines liability as, among other things, knowingly presenting or causing to be presented a false claim to the employees, officers or agents of the New Jersey or to any contractor, grantee or other recipient of New Jersey funds. Likewise, the New Jersey False Claims Act's definition of "claim" is not as expansive. It encompasses requests or demands for money, property or services made to any employee, officer or agent of New Jersey, or to any contractor, grantee or other recipient if the State provides any portion of the money, property or services requested or reimburses for any of the money, property or services, making it narrower than the Federal False Claims Act.

The OIG also identified necessary revisions to the qui tam aspects of the New Jersey False Claims Act to ensure full satisfaction with section 1909(b)(2) of the Act. A qui tam action is the mechanism by which private individuals can assist in the prosecution of false and fraudulent claims and receive a portion of any award or settlement resulting from that lawsuit. One revision concerns the right to relief by a whistleblower that is discharged, demoted, suspended, harassed or in any manner discriminated against. The Federal False Claims Act, through amendments in FERA and the Dodd-Frank Act, permits recovery of such relief whenever the whistleblower takes action "in furtherance of other efforts to stop 1 or more violations." The New Jersey False Claims Act, however, requires a more specific set of circumstances to entitle a whistleblower to relief: (1) a voluntary disclosure of information to the State or law enforcement agency, or other acts in furtherance of a false claims action, such as testimony for the government or assistance in filing an action. While similar, New Jersey's requirement for relief is not as broadly defined as in the federal statute and thus was identified by the OIG as an area requiring amendment to ensure greater facilitation of qui tam actions.

Another significant distinction identified by the OIG that will have a profound impact upon false claims actions in New Jersey concerns government intervention in qui tam actions. FERA amended the Federal False Claims Act to include a new paragraph, which states that if the government elects to intervene in a qui tam action, it "may file its own complaint or amend the complaint of a person who has brought an action . . . to clarify or add detail . . . and to add any additional claims with respect to which the [g]overnment contends it is entitled to relief." This means that once a qui tam action is filed, if the government ultimately decides to intervene, it would not be barred from amending and revising the original complaint to identify new claims or add new details because any such amendments would automatically relate back to the filing date of the original complaint. As a result, the government is not

restricted by the statute of limitations. New Jersey presently has no similar statutory provision to allow for such amendments by the State upon intervention in a qui tam action.

The OIG also states that the New Jersey False Claims Act is less effective in rewarding and facilitating qui tam actions due to its broader rules for dismissals of such claims. Pursuant to an amendment by the ACA, courts are instructed to dismiss claims under the Federal False Claims Act, unless opposed by the government, if there was public disclosure of substantially the same allegations either through: (1) a criminal, civil or administrative proceeding in which the government is a party; (2) a federal report, hearing, audit or investigation; or (3) by the news media. However, the New Jersey False Claims Act does expressly permit the State of New Jersey the opportunity to oppose or block a dismissal and additionally requires dismissal in a broader context of circumstances. Thus, the OIG's requested amendment would provide greater protection of qui tam actions from dismissal by the courts.

One of the exceptions to the above rules for dismissal is where the individual bringing the claim is the "original source" of the information. While the Federal and New Jersey False Claims Acts previously had identical definitions for what constituted an "original source," the ACA has since broadened the definition in the Federal False Claims Act thereby creating a larger class of individuals whose qui tam actions would be protected from mandatory dismissal by the courts. The Federal False Claims Act now defines "original source" to include an individual who either: (1) voluntarily disclosed the information to the government prior to a public disclosure or (2) has independent knowledge of information that materially adds to the publicly disclosed allegations and that information is voluntarily discloses to the government prior to the filing of an action. New Jersey's False Claims Act maintains the prior federal definition of "original source," which includes an individual with direct and independent knowledge of the information, which he or she voluntarily provides to the State before filing an action based on that information. Thus, while the New Jersey statute requires independent knowledge and voluntary disclosure to the government, the federal statute only requires disclosure to the government prior to public disclosure or that the individual have some new material information. The New Jersey definition is therefore more restrictive and thus does not facilitate and reward qui tam actions to the same extent as the Federal False Claims Act.

Finally, the OIG criticized the New Jersey False Claims Act for limiting qui tam actions brought by present or former employees or agents of the State, or a political subdivision of the State, where the information relied upon is discovered in a civil, criminal or administrative investigation or audit

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that is within the scope of the individual's job description or duties. Thus, New Jersey does not permit qui tam actions by individuals that only were able to obtain the information about the fraud because of their job description or duties. The Federal False Claims Act contains no such limitation and thus is less restrictive upon qui tam actions.

### **Conclusion**

New Jersey is consequently left in a position where it must strengthen its False Claims Act and broaden its protection of qui tam actions or face losing the significant financial incentive provided pursuant to section 1909 of the Act. While no action by the Legislature has been taken as of yet, it is likely the New Jersey Legislature will act to adopt these amendments prior to the OIG's deadline to ensure this additional stream of revenue in the future. If New Jersey chooses to enact these amendments into its False Claims Act, it will only further

expand the scope of liability and the rights of those bringing qui tam actions thereby placing added pressure on New Jersey hospitals to continue being ever vigilant in their self-auditing and oversight programs to ensure false or fraudulent claims are not submitted to the state or federal government.

### ***About the author***

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