

NEW YORK ENACTS STATE FALSE CLAIMS ACT: IMPLICATIONS BEYOND MEDICAID

Health Alert
May 29, 2007

In a whirlwind of Medicaid compliance and enforcement activity this spring, New York enacted its own false claims act as an amendment to the State Finance Law. New York has the largest Medicaid program in the country, and the integrity of that program has been called into question for years. Now, armed with laws requiring mandatory compliance programs; dissemination of fraud, waste, and abuse information to employees and independent contractors; and increased whistleblower protections, the New York State Medicaid Inspector General James Sheehan can aggressively enforce against the Medicaid fraud often estimated to account for as much as 10 percent of the state's Medicaid expenditure each year.

Enactment of the New York State False Claims Act (New York FCA) makes the state eligible to retain 10 percent of the federal share of any provider overpayment New York obtains through prosecution. These Medicaid developments emphasize the need for health care and life science companies to enhance their compliance activities since it is clear that investigations in this area will be increasing.

But the New York FCA is not limited to health care; instead, it applies to false claims of any kind made to the state or to a local government, or to any contractor whose funding comes even in part from the state or a local government. The only exception is for "claims, records, or statements made under the tax law." The New York FCA is modeled after the federal False Claims Act (federal FCA), found at 31 U.S.C. §§3729, et seq, and is expected to operate similarly. Any person who knowingly presents or causes to be presented a "false or fraudulent claim for payment or approval by the state" or a "false record or statement to get a false or fraudulent claim paid or approved by the state" is subjected to civil liability, including treble damages.

The New York FCA establishes liability through actual knowledge, reckless disregard, or deliberate ignorance of truth. Liability can also be established when a person delivers a document certifying receipt of property to be used by the state or a local government without completely knowing that the information on the receipt is true. Acts that might subject a person to liability are not actionable if they are caused by mere negligence or honest mistake. Each false claim creates a basis for liability, and civil penalties of \$6,000 to \$12,000 per false claim can be assessed — on top of an amount three times the actual damages sustained by the state and local governments. Clearly, penalties and damages can add up very quickly. The New York FCA encourages self-disclosure and cooperation with investigators in exchange for capping the damages at twice the actual damages. The ability to avoid treble damages through self-disclosure should be carefully considered with the assistance of legal counsel, particularly given the qui tam provisions and whistleblower protections.

Like the federal FCA, private citizens are encouraged to bring a qui tam case on behalf of the government. The key incentive for qui tam plaintiffs, in addition to recovering attorney's fees and costs, is the personal recovery of 15% to 25% of the proceeds recovered if the attorney general prosecutes the case and 25% to 30% of the proceeds recovered if the whistleblower brings the case alone. A whistleblower suffering retaliation as a result of bringing a qui tam case is entitled to all necessary relief to make the employee whole, including full reinstatement of his or her position and benefits.

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In some ways, the New York FCA is more restrictive than the federal FCA. The New York FCA does not permit any false claim action to be filed against a local government. It also prevents a local government action from binding the state and establishes a process for state approval of local government enforcement actions. The broad reach of the New York FCA could affect any entity having dealings with any state department, board, bureau, division, commission, committee, public benefit corporation, public authority, council, office or governmental entity performing a governmental or proprietary function for the state. The potential for false claims actions should be considered each and every time you enter into dealings with the state or a local government.