



OUTSIDE COUNSEL

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New York's New False Claims Act

Tucked inside the heap of New York State's recently enacted budget legislation is a little publicized statute that will likely have a significant, positive impact on future budgets: New York State now has its very own False Claims Act.

The act is modeled on the century-old federal False Claims Act, including whistleblower provisions that provide ample bounties for persons who report false claims against the state.

On April 1, 2007, Governor Eliot Spitzer announced the enactment of New York State's annual budget. The Governor's Office hailed the enacted budget as a significant victory in promoting the governor's initiatives to reform and control the state's burgeoning Medicaid costs. New York's \$45 billion annual Medicaid program, by far the largest in the country, has been riddled with waste and corruption for decades, with critics estimating that fraud accounts for as much as 10 percent of the state's Medicaid expenditures each year.¹

First N.Y. False Claims Act

The initiatives in the 2007 State Budget to combat fraud, waste and abuses in the Medicaid program are estimated to generate approximately \$430 million in savings in 2007-2008, an increase of more than \$130 million over last year.² While the enactment of the 2007 State Budget received ample press coverage, lost within the flood of stories about the arm-twisting and posturing over who won and who lost was any attention to the cornerstone of the governor's fight against Medicaid fraud: the passage of the first-ever New York False Claims Act.

Proposed as an amendment to the state's Finance Law, the New York False Claims Act—copied from the federal government's False Claims Act—subjects any "person" who knowingly presents or causes to be presented "a

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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" to civil liability, including treble damages.³ In submitting the bill, New York

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legislators recognized that the "state is involved in the direct and indirect payment of tens of billions of dollars every year, and the payment of fraudulent claims has a significant adverse effect on the fiscal well being of the state."⁴

In most substantive respects, the New York False Claims Act mirrors its federal counterpart. For example, both the state and federal statutes do not require a showing of specific intent to defraud. Using the identical language of the federal False Claims Act, New York's new law provides that a defendant must have acted "knowingly" in submitting a false claim. As defined by the federal and state statutes, however, "knowingly" includes not just "actual knowledge," but also when a person "acts in deliberate ignorance

of the truth or falsity of such claim or information; or [] acts in reckless disregard of the truth or falsity of such claim or information."⁵ Under both the New York and federal False Claims Acts, a defendant can be found liable for submitting a false or fraudulent claim with a showing of less than actual knowledge.

The New York law, however, is more restrictive than the federal law in that the state's version does not permit any action to be filed against a local government. (The U.S. Supreme Court has decided that states may not be sued under the federal False Claims Act.⁶) In addition, the New York False Claims Act prevents the state from being bound by a local government action involving damages to the state and provides a process by which the state's attorney general can authorize a local government to file an action. These restrictions appear to have been included in the legislation to address potential conflicts between the state law and New York City's municipal false claims ordinance, which has been in effect since May 19, 2005.⁷

'Qui Tam' Actions

Significantly, the enacted New York False Claims Act incorporates the federal provision permitting private citizens to bring "qui tam" actions on behalf of the state to recover amounts paid due to fraud. As an incentive for individuals to bring cases on behalf of the government, the proposed legislation provides that the person (the "relator") instituting the suit is entitled to keep \$2,500 "and/or between fifteen percent and thirty percent of the proceeds recovered in the action or settlement of the action."⁸

Expressly following the guidelines of the federal False Claims Act, the New York legislation includes a sliding scale of the percentage of the award the relator is entitled to depending on the extent of the government's intervention in the matter. If the relator obtains a recovery on behalf of the government (through judgment or settlement) without the government's assistance, the relator is entitled to as much as 25 to 30 percent of the award. If the government intervenes and takes over the prosecution of the

case, the relator is entitled to 15 to 25 percent of any recovered monies.⁹

The New York False Claims Act also adopts the federal False Claims Act requirement that, for a court to have jurisdiction over a qui tam action, the relator bringing the case must be an "original source" of the allegations in the complaint.¹⁰ That is, the whistleblower must have direct and independent knowledge of the information on which the allegations are based and must have voluntarily provided it to the government.¹¹ The federal and state law each impose this jurisdictional requirement to ensure that the relator plaintiff profiting from the recovered award has contributed something of substance to uncovering the fraud. In essence, the qui tam provision provides monetary incentives for whistleblowers who have special knowledge of the fraud and the documentation to back up the charges to come forward and assist the government in recovering monies it has paid out as a result of fraud. Following what the federal government acknowledged over 100 years ago, the New York False Claims Act's qui tam provision is essential in combating fraud because it provides powerful financial incentives to private persons who may know about fraud on the state.

Deficit Reduction Act

The federal government gave the states stark incentives to pass their own false claims legislation. Effective Jan. 1, 2007, the Deficit Reduction Act (DRA) permits states with false claims laws tracking the federal False Claims Act to reduce the "[f]ederal medical assistance percentage with respect to any amounts recovered under a [s]tate action brought under such [state] law...by 10 percentage points."¹² In order to qualify for the incentive, the federal DRA mandates that the state false claim law be patterned after the federal False Claims Act.

New York is not the only state to have been enticed by the DRA's monetary incentive. Until last year only 17 states, including the District of Columbia, had enacted any state false claims legislation. Within the last year, and mostly in 2007, 18 states other than New York also introduced new false claims act legislation or amendments to existing laws to bring them into compliance with the DRA.¹³ If all these laws are enacted, 33 states will have false claims laws mirroring the federal False Claims Act.

The federal False Claims Act has proved to be a powerful weapon in the federal government's arsenal to recover monies paid out as a result of fraudulent claims. Since being amended and improved in 1986, more than three thousand federal qui tam cases have been filed and more than \$3 billion have been recovered by the federal government.¹⁴ Particularly in the area of Medicaid fraud, qui tam actions have made "hunting for Medicaid fraud so efficient that when the

[federal government] uses the [False Claims Act] against health care fraud, the [f]ederal government recovers \$13 back for every dollar it spends on investigations, litigation and whistle-blower awards."¹⁵ It is likely that the reach and power of the federal False Claims Act, especially in the area of Medicaid fraud, will only expand as a result of having mirroring state legislation in well over half the states.

New York State has wasted no time in showing that it plans to use its new False Claims Act aggressively to fight health care fraud. On April 6—less than a week after New York's False Claims Act was enacted—the state hired former Assistant U.S. Attorney James Sheehan to be the New York State Medicaid Inspector General. As an assistant U.S. attorney in Philadelphia since 1980, Mr. Sheehan brought some of the biggest health care False Claims Act cases in the nation.

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Fiscal Benefits

The fiscal benefits of New York State's new False Claims Act will not be immediate. If New York City's false claims ordinance is any indication, it will take some time before the legislation gains traction. Since the enactment of New York City's false claims ordinance in 2005, only five proposed civil complaints have been received, but neither the Corporation Counsel's Office nor any qui tam plaintiffs brought enforcement actions.¹⁶

The slow start of enforcement actions under the New York City ordinance, however, should not be confused with ineffective legislation. The state may in fact benefit from the slow evolution of enforcement of the false claims legislation, since the government is still developing the necessary administrative processes for investigating and pursuing false claims under the new laws. For example, while the 2007 State Budget makes allowance for 157 new staff members, including 100 new auditors, in the Office of Medicaid Inspector General, the budget does not contemplate the possibility of additional resources, perhaps even a new unit, being needed at the New York Attorney General's Office to review the qui tam complaints filed under seal

by relators.¹⁷ The attorney general will have to designate adequate staff to sift through the qui tam complaints in order to separate the valid cases from the work of crackpots.

New York State is still far behind the federal government in terms of enforcing the false claims laws, but in all likelihood, it will only be a question of time before it catches up. As the national momentum to prosecute false claims grows, the New York False Claims Act (along with the city counterpart) is likely to become a powerful tool in the fight against fraud.

While the New York False Claims Act was passed within the context of corruption in the Medicaid system, it—like the federal False Claims Act—by its terms may be applied broadly to all claims for monies from the state government. State funds finance a myriad of programs beyond health care, such as public housing assistance, scientific and medical research, emergency relief, agricultural support, and environmental compliance. Each of these programs involves claims being submitted to draw down state funds. Thus, each claim submitted, if done so fraudulently or falsely, has the potential of exposing claimants to liability under the new false claims legislation.

The New York False Claims Act has the power to be applied broadly to almost any situation where state dollars are involved.

1. See "Sampling of Editorials From Upstate New York," Associated Press (March 28, 2007).

2. See <http://www.ny.gov/governor/press/0401074.html> (last viewed April 8, 2007).

3. Senate Bill 2064, 2007 Bill Text NY S.B. 2064 (Jan. 30, 2007); Assembly Bill 4308, 2007 Bill Text NY A.B. 4308 (Jan. 30, 2007).

4. 2007 NY S.B. 2064.

5. *Id.*; 1007 NY A.B. 4308 (emphasis added). See also 31 USC §3730.

6. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 US 765, 784 (2000).

7. See John Boese, "United States: Legislative Updates," Monday Business Briefing (March 20, 2007) (citing Fraud-Mail Alert Nos. 05-04-07 and 04-06-29).

8. 2007 NY S.B. 2064; 2007 NY S.A. 4308.

9. *Id.*; See also 31 USC §3730.

10. See *Rockwell Int'l Corp. v. United States*, 127 S.Ct. 1397, 2007 U.S. LEXIS 3778, at *19 (March 27, 2007).

11. *Id.*

12. The Deficit Reduction Act of 2005, Public Law 109-171 (Feb. 8, 2006).

13. See Boese, "United States: Legislative Updates"; www.taf.org/statefca.htm (last viewed April 6, 2007).

14. 2007 NY S.B. 2064.

15. James Moorman, "State Should Blow Whistle on False Claims," The Times Union, Pg. A9 (April 10, 2006).

16. See Letter from Corporation Counsel M. Cardozo to Mayor Bloomberg and City Council, New York City False Claims Act, at 2-3 (Feb. 28, 2007).

17. See <http://www.ny.gov/governor/press/0401074.html>.