

# Health Care Fraud

COMMENTARY

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## How *Qui Tam* Helps Fight Medicaid Fraud

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Unscrupulous medical providers and institutions defraud Medicaid out of millions of dollars on federal and state levels almost daily. *Qui tam* attorneys around the country prosecute fraud cases on behalf of the federal government under the False Claims Act, 31 U.S.C. § 3730. In light of the Deficit Reduction Act of 2005, Florida and several other states amended their false-claims statutes to parallel the FCA to help fight Medicaid fraud and to potentially gain access to additional funds from the federal government.

The Florida False Claims Act, Fla. Stat. Ann. § 68.083, is modeled after and tracks the language of its federal counterpart. Both laws are broad and encompass any kind of fraudulent claim for payment *against the government*.

Medicaid is a joint effort between each state and the federal government. The program helps low-income families and individuals obtain access to health care, based on eligibility criteria. Each state sets guidelines for and administers its own Medicaid system.

In Florida Medicaid started Jan. 1, 1970, with the purpose of providing basic medical services for the poor. In 1989 Congress changed the Medicaid rules and required states to cover all Medicaid-related services for children that were permitted by the Social Security Act. This broadened Medicaid's coverage of low-income Americans and changed the level of services Medicaid was required to cover. Since then, states have created administrators for their Medicaid services programs. The Florida administrator is the Agency for Health Care Administration. AHCA carries out all functions related to the Medicaid program.

So what does *qui tam* have to do with Medicaid? *Qui tam* suits are brought by private citizens on behalf of the federal or state government to recover for fraud, waste and abuse. *Qui tam* is the shortened version for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who as well for the king as for himself sues

in this matter." There are many provisions in federal law and some in state law that prohibit a business from retaliating against an employee who acts as a whistle-blower. This, of course, has nothing to do with real life, and in almost all cases the whistle-blower suffers significant and intense retaliation.

Until recently, Medicaid was a fee-for-service system. In such a system, the medical provider can send bills, including any fraudulent bills, directly to the government. When whistle-blowers filed claims, they were permitted to bring those claims on behalf of the government and then collect a percentage of the damages awarded by the court. This is a pretty simple analysis. The so-called "line of fraud" is straight. It starts with the fraudfeasor submitting a fraudulent bill directly to the government for payment. The fraudfeasor actually "presents" the bill to the government. I quoted "presents" because in Section 3729(a)(1) of the federal FCA the words used are "exactly that any person who ... (1) knowingly presents, or causes to be presented ... a false or fraudulent claim for payment or approval."

There are seven subsections to Section 3729(a), but subsection (1) is the only one that uses the term "presents." In *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), written by Judge John G. Roberts Jr., who is now the chief justice of the United States, Roberts argued that the federal FCA's "presents" requirement must be interpreted in Section 3729(a)(2) as well as subsection (a)(1). This leap of language and analysis has created a new barrier for whistle-blowers to overcome in bringing their claims. Without presentment it appears that whistle-blowers may lose their rights to bring the claim based on subject matter jurisdiction.

Jump forward to Florida and the state of the law there. In June Florida announced a new Medicaid program that would shift the beneficiaries under Medicaid to HMOs run by private businesses. Under the plan, the state would

pay monthly premiums to private health insurers rather than fee-for-service payments to health care providers. The Agency for Health Care Administration designed the reform payment systems to include comprehensive and catastrophic premiums and will contract with managed care plans, including HMOs, exclusive provider organizations, licensed health insurers, specialty plans and provider service networks.

The question remains whether this change will cause a paradigm shift in the perception of who is being defrauded. Will the inclusion of private-party intermediaries eliminate a whistle-blower's rights to bring a claim on behalf of the government even though the government is no longer technically being defrauded?

These important issues can be addressed by dividing them into two primary queries:

- What is a "false claim"? How does its definition assist or hamper the whistle-blower's right to take action? and
- Can a false claim, as defined under both federal and state legislation, be presented to anyone other than the government?

First, take note that the same standard is applied to the evaluation of a whistle-blower/*qui tam* claim under both the federal and state statutes. The focus can be on either the federal or the state law to derive an accurate analysis of how the new HMO plan will affect a person's rights to bring a Medicaid fraud claim. This article focuses on the federal FCA due to the abundance of cases and significant history, especially in comparison to the Florida statute, a virtual infant when compared to the federal body of law. Although many cases from Florida are cited herein, they mostly reflect federal law.

### What Is a False Claim?

The definition of a false claim has a great bearing on a whistle-blower's right to take action against the fraudfeasor because the onus of proving that the fraudfeasor made such a fraudulent claim against the government lies with the whistle-blower.

In *United States ex rel. Campbell v. Lockheed Martin Corp.*, 282 F. Supp. 2d 1338 (M.D. Fla. 2003), the court noted that although "claim" is not specifically defined in the False Claims Act, Section 3729(c) states, "For purposes of this section, 'claim' includes any request or demand, whether *under a contract or otherwise*, for money or property which is made to a contractor, grantee, or other recipient if the United States government provides any portion of the money or property which is requested

or demanded, or if the government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded" (emphasis added).

The U.S. Supreme Court, while analyzing this section in *United States v. Neifert-White Co.*, 390 U.S. 228 (1968), held: "Analogous reasoning leads us to hold today that the False Claims Act should not be given the narrow reading that respondent urges. This remedial statute reaches beyond 'claims,' which might be legally enforced, to all fraudulent attempts to cause the government to pay out sums of money."

In *Campbell* the District Court said, "[T]he fact that the government might, by some unrelated means, ultimately be protected against loss does not mean that no claim is made against the U.S. Treasury in the first instance."

The Supreme Court, in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541-42 (1943), affirmed that "government money is as truly expended whether by checks drawn directly against the Treasury to the ultimate recipient or by grants in aid to states."

The U.S. Court of Appeals for the 6th Circuit, while examining the ambit of Section 3729(c) in *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 614 (6th Cir. 2006), held:

The focus of this language is on the money paid out by the government in response to a false statement or fraudulent request for payment. There is nothing in this language to suggest the claim must be shown to have been presented to the government, so long as it can be shown that the claim was paid with government funds. The legislative history of the FCA solidifies this interpretation of the statutory language. The committee reports written when Congress restructured Section 3729 in 1986, breaking section (a) into subsections and adding subsection (c), indicate that Congress intended to broaden the reach of the FCA to cover fraudulent claims submitted by subcontractors that result in loss to the government.

Further, the 6th Circuit pointed to *Neifert-White* and *Marcus* and said, "The Supreme Court has consistently reaffirmed that the FCA is a remedial statute and should be construed broadly." *Id.* at 618.

A collective reading of these judgments and the definition of a claim under Section 3729(c) shows that the ambit of a claim is fairly large and ought to be construed accordingly. This will allow for whistle-blowers to prove that a fraudulent claim has been made as long as the end result is the

defrauding of the United States because the government ultimately pays the premiums. The definition requires only that “any portion” of the claimed amount be paid by the state, and hence the insurance premium the state pays ought to adequately fulfill this requirement.

The language of the Florida False Claims Act is similar to that of the federal FCA. It defines a “claim” as including “any written or electronically submitted request or demand, under a contract or otherwise, for money, property, or services, which is made to any employee, officer or agent of an agency or to any contractor, grantee or other recipient if the agency provides any portion of the money or property requested or demanded or if the agency will reimburse the contractor, grantee or other recipient for any portion of the money or property requested or demanded” (emphasis added).

Hence the whistle-blower receives a similar advantage under the Florida False Claims Act as under its federal counterpart.

### **Can a False Claim Be Presented to Anyone Other than the Government?**

The above cases all directly show a link between the fraud and the draw on the public fisc. However, can a false claim, as defined under both federal and state legislation, be presented to anyone other than the government?

Section 3729(a)(1) of the federal FCA states that any person who:

knowingly presents, or causes to be presented, to an officer or employee of the United States government or a member of the armed forces the United States a false or fraudulent claim for payment or approval ... is liable to the United States government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus three times the amount of damages which the government sustains because of the act of that person.

The plain reading of this language indicates that the false or fraudulent claim must be made to an officer or employee of the U.S. government or a member of the military.

The U.S. District Court for the Southern District of Florida, in *United States ex rel. Heater v. Holy Cross Hospital*, 2007 WL 2480236 (S.D. Fla. 2007), said, “To succeed in an FCA claim, a relator must prove the following three elements: (1) a false or fraudulent claim (2) which was presented, or caused to be presented, by the defendant to the United States for payment or approval (3) with the knowledge that the claim was false” (emphasis added).

Further, citing *United States ex rel. Clausen v. Laboratory Corporation of America*, 290 F.3d 1301, 1311 (2005), the District Court held, “The False Claims Act does not create liability merely for a health care provider’s disregard of government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the government to pay amounts it does not owe.” Therefore, to establish a valid FCA claim, a relator must show that the defendant actually presented a false or fraudulent claim to Medicare/Medicaid for reimbursement. *Id.* “The submission of a claim is ... the *sine qua non* of a False Claims Act violation.” *Id.*

This brings us back to *Totten*, where the very distressed D.C. Circuit concluded that it lacked jurisdiction to entertain claims of fraud that are presented to third-party intermediaries, even though the fraudfeasor has direct knowledge their fraudulent claim will be presented to the government for reimbursement or paid with government funds. *Totten* held that the defendants’ presentation of a fraudulent claim to Amtrak did not constitute presentation of a fraudulent claim “to an officer or employee of the United States government” so as to state a claim under the FCA. In the appeals court’s view, the only entity that the defendants defrauded was a grantee of federal funds, not the federal government itself. Since the defendants had not defrauded the government, the plaintiff could not state a claim under the FCA; therefore, the court reasoned, he could not invoke the court’s jurisdiction under 28 U.S.C.A. § 1331.

The *Totten* requirement will affect the Florida whistle-blower’s claim since the false claim will have to be presented to the privately run HMOs and not directly to the government.

### **Subsections (a)(2) and (a)(3)**

Although most of the above-cited cases refer to a prerequisite of a false claim being presented to the United States, subsections (2) and (3) of Section 3729 make no reference to a presentation of claim. The text of the subsections is as follows:

(2) The False Claims Act imposes civil liability and treble damages upon any person who knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government and (3) conspires to defraud the government by getting a false or fraudulent claim allowed or paid.

The following extract from the Senate report made during the 1986 amendment of the False Claims Act, 1986 U.S.C.C.A.N. 5266, reveals the legislative intent to broaden the scope of the act. The committee desired to include

fraudulent claims presented to anyone as long as the government suffers the loss:

A claim upon any government agency or instrumentality, quasi-governmental corporation, or non-appropriated fund activity is a claim upon the United States under the act. In addition, a false claim is actionable although the claims or false statements were made to a party other than the government, if the payment thereon would ultimately result in a loss to the United States. *United States v. Lagerbusch*, 361 F.2d 449 (3d Cir. 1966); *Murray & Sorenson Inc. v. United States*, 207 F.2d 119 (1st Cir. 1953). For example, a false claim to the recipient of a grant from the United States or to a state under a program financed in part by the United States is a false claim to the United States. See, for example, *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *United States ex rel. Davis v. Long's Drugs*, 411 F. Supp. 1114 (S.D. Cal. 1976).

Referring to the above paragraph, the 6th Circuit made this observation in *Sanders*:

These reports provide strong evidence that Congress intended the 1986 amendments to overrule restrictive judicial interpretations of the FCA and increase the reach of the statute. By rewording the statute and adding subsection (c), Congress accomplished this expansion, including making the FCA applicable to cases in which the government sustains a financial loss, regardless of whether the false claim is actually presented to the government. Reading a presentment requirement into Sections 3729(a)(2) and (a)(3) is contrary to this purpose and contradicts the plain language of the statute.

In *Corsello v. Lincare Inc.* 428 F.3d 1008 (11th Cir. 2005), the 11th Circuit held, “[T]o state a claim under Section 3729(a)(3), the plaintiff must show (1) that the defendant conspired with one or more persons to get a false or fraudulent claim paid by the United States; (2) that one or more of the conspirators performed any act to effect the object of the conspiracy; and (3) that the United States suffered damages as a result of the false or fraudulent claim.” This clearly shows the absence of any presentation requirement under Section 3729(a)(3).

In *United States v. Southland Management Corp.*, 326 F.3d 669, 674 (5th Cir. 2003), the 5th Circuit noted that the False Claims Act covers a claim that “is made to someone — including the government itself — who will at least in part use government money or property to pay it.”

Hence an action may be brought by a whistle-blower under subsections (2) and (3) even if the false claim has been presented to a private organization, as long as the government’s money is involved and the fraudulent claim has been paid.

However, that may all change soon enough. On Dec. 19, 2006, the 6th Circuit decided *United States ex rel. Sanders v. Allison Engine Co.* In that case couple of whistle-blowers sued several companies for making generator sets with allegedly defective material and using unqualified personnel to fabricate the products. The sets were used on Navy ships at a cost of \$1 billion per vessel. The funding for the building of those ships came directly from the coffers of the United States.

After five weeks at trial the whistle-blowers did not present any evidence that the subcontracting defendants ever presented a direct request for payment to the government. The defense claimed the presentment requirement, as stated in *Totten*, required dismissal. The trial court agreed and dismissed the claim at the close of the evidence.

The 6th Circuit reversed. Writing for the majority, Circuit Judge Julia Smith Gibbons set forth a cogent and detailed analysis as to why *Totten* is incorrect. Her opinion sets out a logical and understandable rationale explaining why Sections 3729(a)(2) and (a)(3) do not have a presentment requirement.

Judge Gibbons is not the first circuit judge to agree with the analysis that the presentment requirement does not expand beyond Section 3729(a)(1). However, she is certainly the most vocal in detailing why the *Totten* opinion is simply wrong.

Recently the Supreme Court agreed to hear the *Allison* case. Given the present makeup of the court and the fact that the *Totten* author sits in the chief justice’s chair, it is hard to imagine a world where the *Totten* decision is not upheld and the *Allison* analysis is shot down. With that in mind we sit waiting for direction on the future of un-presented *qui tam* claims.

### Conclusion

The transition of Medicaid into the hands of private HMOs will affect the rights of the whistle-blower. The creation of a third-party intermediary paid by Medicaid on a capitation basis could prevent whistle-blowers who find fraud at the service-provider level from bringing a *qui tam* claim. Certainly an HMO capitation system could give rise to a new type of fraud. But “capitation fraud” will be far more limited than the significant and prevalent fraud that now occurs.

The most common fraud occurs between the medical provider and the paying agency. Usually the government is the paying agency and therefore there was a direct line between fraudfeasor and presentment to the government for payment. However, if the HMO is capitated on a per-head basis regardless of the bill submission by the medical providers, the fraud is no longer directly against the government but rather against the third-party administrator. That administrator could bring a civil suit to recover the funds paid for fraudulent bills, but the lack of penalties, interest and possible criminal punishment makes it much more tempting to engage in such behavior. Unfortunately, *Totten* may prohibit such a claim, at least from a federal statutory action framework.

It is well understood that the courts have ruled in a majority of cases that a fraudulent claim must have been made to the United States as required under Section 3729(a)(1). However, the whistle-blower's rights can be protected by a wide interpretation accorded to the definition of "claim" under Section 3729(c). Further, a study of the legislative intent reveals that the 1986 amendments to the FCA were enacted with a view to widen the scope of the law.

But even with the amendments, it is hard to imagine that Congress had in its sights the huge number of Medicaid fraud suits that would be brought in the 1990s and early 2000s. More than 20 years after the amendments, the broad-brush approach to *qui tam* is now a proven remedy for catching and deterring fraud.

New amendments are needed to continue to foster the cottage industry of civil attorneys assisting U.S. attorneys' offices around the country with their *qui tam* investigations. Each state must enact its own *qui tam* statutes (there are now 22 states with *qui tam* law). This will give states the ability to potentially capture additional funds for Medicaid and Medicare fraud prosecution at a local level, pursuant to the Deficit Reduction Act of 2005. Each state must create a "mini-FCA" and reach farther with its protective language to permit whistle-blowers greater latitude with regard to "presentment" requirements.

This will force whistle-blowers to use state statutory frameworks more often and provide the states with a greater percentage of the recovered funds.

As an aside, what is truly amazing about the entire False Claims Act is that cause and effect are usually not so well laid out by government legislators. Many laws have unknown and undesired effects beyond what the legislature thought they would have when enacting the laws. The federal and state False Claims Acts are the rare exception, the *qui tam* actions having brought the government literally billions of dollars in returned revenue, penalties and interest.

We must continue to prosecute fraud at all levels. Simply because the fraud is submitted to a private entity when that party is acting on behalf of the government should not be a reason to stop the prosecution of any fraudfeasor by either the government or any private whistle-blower.

Over time, entities and species adapt to a changing environment. The change in the *qui tam* landscape over the past decade has led to the most recent changes putting private industry in the way of government. The fastest and easiest way to continue using *qui tam* to prosecute and deter fraud in Florida's Medicaid system will be to amend the state's *qui tam* law.

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