Legal Opinion Letter

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QUIETLY EXPANDING *QUI TAM*: FEDERAL LAW ENCOURAGES NEW STATE FALSE CLAIMS ACTS

by
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A little-known but potentially far-reaching provision of the new Deficit Reduction Act, advocated by Senator Charles Grassley and enacted on February 8, 2006, will have a significant adverse effect on a broad spectrum of corporations and nonprofit institutions. *See* Deficit Reduction Act of 2005, Pub. L. 109-171, §§ 6031-33 (2006) (to be codified at 42 U.S.C. §§ 1902(a), 1903(i)(10), and 1909). The new provision strongly encourages states to enact false claims laws with private *qui tam* enforcement as well as state government enforcement. This provision is virtually certain to encourage and increase *qui tam* enforcement across all industries and institutions.

Economic Incentive Provision. The new law contains a strong economic incentive for states to enact false claims laws patterned after the Federal False Claims Act, which provides for mandatory treble damages and civil penalties and is enforced by both private whistleblowers and the U.S. Department of Justice. Under this new provision, the Federal Government agrees to turn over ten percent of its share of the recovery to the state when an action to recover Medicaid funds is litigated under a qualifying state false claims statute. *See* Pub. L. 109-171, § 6031 (to be codified at 42 U.S.C. § 1909). Thus, if the state provides 40 percent of the funding to its Medicaid program, it would actually be able to retain 50 percent of the recovery. To qualify for the 10 percent bonus, the state *qui tam* law must contain the following provisions:

- Liability provisions modeled on those found in the Federal FCA;
- Provisions that "are at least as effective in rewarding and facilitating *qui tam* actions;"
- A requirement that the complaint be filed under seal for 60 days with review by the state Attorney General; and
- A civil penalty that is not less than that authorized in the Federal FCA.

Although these provisions go into effect on January 1, 2007, a rush to state houses to enact *qui tam* laws meeting these requirements has already begun. On January 3, 2006, Michigan approved a state Medicaid false claims law with *qui tam* provisions. *See* The Medicaid False Claim Act, Mich. Comp. Laws §§ 400.601 – 400.612 (2006). Representatives in other states, including Connecticut, Missouri and New York, are discussing similar initiatives. *See Ethical Imperatives*, HARTFORD COURANT, Feb. 10, 2006 (Attorney General of Connecticut believes state should enact a false claims act); *Rewards Urged in Missouri Medicaid Fraud Cases*, ST. LOUIS POST-DISPATCH, Feb. 9, 2006

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(testimony presented to state Senate Special Committee on whistleblower provisions under federal approach to Medicaid fraud); A.B. 2027, 228th Ann. Legis. Sess. (N.Y. 2005) (introducing false claims legislation with *qui tam* provisions).

Since state false claims laws need not limit *qui tam* enforcement only to Medicaid fraud in order to qualify for the incentive, plaintiffs' lobbying groups are pushing states to enact more extensive liability provisions. A Washington, D.C. whistleblower advocacy group, Taxpayers Against Fraud ("TAF"), is already circulating a "model" state FCA for states to enact in order to qualify for the incentive. The provisions in this model are much more pro-plaintiff than those in the Federal FCA, however, from both a procedural and substantive standpoint, and they far exceed the requirements for obtaining the federal 10 percent bonus in the new Medicaid provisions. For example, TAF's "model" promotes an extra liability provision not found in the Federal FCA that would impose FCA liability for the inadvertent receipt of payments that were the result of a false claim, if the recipient discovers the falsity of the claim and fails to report it. The TAF model law is not limited to Medicaid fraud and applies to all industries and institutions which deal with state governments. The whistleblowers' bar is likely to aggressively seek the enactment of state false claims laws that are based on this very pro-plaintiff template.

Mandatory Employee Education Provision. A second significant FCA-related provision in the Deficit Reduction Act requires certain health care entities to educate their employees about federal and state false claims laws. *See* Pub. L. 109-171, § 6032 (to be codified at 42 U.S.C. § 1902(a)). It requires any entity that receives or makes annual payments of $5 million or more under a state Medicaid plan to implement written policies for all employees, management, contractors or agents of the entity. The policies must include "detailed information" regarding:

- The Federal FCA;
- The administrative remedies found in the Program Fraud Civil Remedies Act;
- Any state laws imposing civil or criminal penalties for false claims or statements;
- The whistleblower protections provided under such laws;
- The role of such laws in preventing and detecting fraud, waste, and abuse in federal health care programs; and
- The entity's own policies and procedures for detecting and preventing fraud.

Entities covered by this provision must also include in their employee handbooks a specific discussion of the topics listed above. Because this requirement is characterized as a "condition of payment," plaintiffs can be expected to argue that non-compliance gives rise to potential FCA liability. By encouraging employees to bring *qui tam* suits, the provision also sets up a conflict with corporate compliance programs that rely on employees to disclose information about problems for correction, rather than allowing undisclosed problems to form the basis for *qui tam* suits.

Those outside the health care industry should be very concerned about the precedent set by Congress in adopting such a provision. If it is successful in encouraging more *qui tam* suits against the health care industry, Sen. Grassley and the whistleblower lobby will be encouraged to add similar provisions to a defense bill for contractors, a highway bill for construction companies, and a higher education bill for universities and other grantees. Such an expansion of the "training" provision is certain to undermine corporate compliance programs in these areas.

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