

Seeking the CURE

With Health Care Fraud Rampant, States
Are Urged to Pass Their Own False Claims Acts,
But Foes Warn of Windfalls for Plaintiffs Lawyers

JOHN GIBEAUT

AS IF THE CIVIL WAR HADN'T STARTED OFF BADLY enough for the Union on the battlefield, Abraham Lincoln soon found himself fighting a second enemy at home: war profiteers out to make a buck by cheating the government in just about every way imaginable.

Some would sell the same broken-down horses several times over to different cavalry units. Others would peddle gunpowder mixed with sawdust. Still others would slap a fresh coat of paint on some leaky old tub, then offer the vessel to the Navy as seaworthy. Traffic also was brisk in rotten rations and dead mules.

So at Lincoln's urging, Congress in 1863 passed the False Claims Act to give both the government and private citizens vast new powers to take unscrupulous contractors to court.

Also known as the Lincoln Law, the act today receives widespread recognition as the most effective federal legal weapon against fraud in government programs. Most of the credit goes to a key provision that allows private litigants to sue in the government's name and share in any recovery. Called *qui tam*, the feature also allows whistle-blowers—*relators* in the act's lingo—to file claims secretly

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while Justice Department prosecutors decide whether to intervene and take over the civil litigation.

The False Claims Act may have yet to realize its ultimate reach, however, as Congress attempts to expand the statute's already wide scope to the states beginning in January to get a handle on health care fraud—the most popular way to steal from taxpayers.

As part of the 2005 Deficit Reduction Act, lawmakers decided in February to prod states into passing their own false claims acts with incentives to increase their share of recoveries in Medicaid fraud cases. The inducements would allow states to up their takes by 10 percentage points, provided their false claims acts follow the federal model. By involving more states and more lawyers, supporters hope to increase recovery amounts across the board.

Though any state can share in Medicaid recoveries regardless of whether it has a false claims act, the federal law that Congress wants the states to mimic dangles the extra enticement of triple damages.

WORLDS REMOVED

IN LINCOLN'S DAY, QUI TAM WAS NEITHER UNUSUAL NOR controversial. The first Congress enacted citizen suit provisions to supplement scant federal law enforcement in a number of broad fields, such as bank regulation and copyright infringement. Fast-forward to today's tort reform-drenched political climate, however, and qui tam takes on an almost sinister tone.

The vital citizen suit provision that Congress insists on as part of any state false claims act unnerves more than a few legislators and lobbyists for health care providers. Opponents argue that added state qui tam procedures would do little more than create undeserved windfalls for whistle-blowers and their lawyers. Moreover, some state false claims acts on the books and the few new ones debated so far may fall short of the federal requirements.

With health care fraud as the No. 1 drain on federal and state treasuries, supporters can't see how any state can reject an offer that's as good as the one Congress made in the Deficit Reduction Act. Supporters say the federal False Claims Act's success virtually ensures similar accomplishments at the state level.

"Given that the Department of Justice is so strapped for resources, the state agencies and attorneys general offices pose a formidable force in qui tam enforcement," says Janet L. Goldstein, a plaintiffs lawyer from Washington, D.C. "I think you'll see a real shift in focus toward state cases. We've got state attorneys general who are very excited about these cases."



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Health care fraud is far and away the leading target of qui tam actions at the federal level. Health care scams accounted for 46 percent of 2,490 qui tam cases filed and \$5 billion in recoveries from 1987 to 2005, according to the Government Accountability Office. Procurement fraud, exemplified by the proverbial \$500 toilet seat, placed a distant second, accounting for 33 percent of cases and \$1.4 billion in recoveries. Likewise, health care whistle-blowers were rewarded the most handsomely, taking home \$842 million, nearly triple the \$291 million won by their counterparts in procurement cases.

Health care fraud can be as simple as billing for services not performed or as elaborate as the 2005 admission by Swiss pharmaceutical company Serono SA that it tried to boost sales of a nearly worthless AIDS drug, partly by taking 10 physicians on an all-expenses-paid trip to a medical conference in Cannes, France. In exchange, each doctor was to write 30 new prescriptions for the drug Serostim. The medication costs \$21,000 for each three-month course of treatment, totaling \$630,000 in new prescriptions per doctor.

In the end, Serono wound up repaying \$567 million in bogus claims covered by Medicaid and federal health plans for veterans and government workers as part of a \$704 million civil and criminal settlement. The investigation also produced five criminal indictments against individuals.

Prosecutors say the fraud may well have gone undetected had an employee at a company laboratory in Rockland, Mass., been unable to file a secret qui tam complaint. Four other employees filed similar lawsuits in Maryland and Connecticut. The five whistle-blowers will share \$51.8 million from the recovery.

But detractors can't resist pulling out familiar arguments

that the incentives will do nothing more than line plaintiffs lawyers' pockets or serve as launch pads for politically ambitious state attorneys general who may be more interested in television exposure than building solid cases.

"The idea of being able to get in front of a camera and tell people how much money you are recovering and how tough you are on defrauders of the state is very appealing," says Washington, D.C., defense lawyer John T. Boese, author of one of the leading texts on the federal act and co-chair of this past June's ABA national institute on qui tam enforcement. "The idea of waiting four years for a case to develop is not so appealing."

Despite the tort reform arguments from some quarters, qui tam cases stand apart because they boil down to government actions to recover stolen tax money. While other plaintiffs lawyers can pick and choose their cases, a qui tam complaint obligates the government at least to investigate the matter.

And unlike personal injury plaintiffs with nothing to lose and everything to gain, qui tam whistle-blowers risk their jobs and careers. Supporters say that highly detailed pleading requirements for fraud complaints and a battery of government lawyers to vet cases add further assurance against abuse.

"This is not a practice that lends itself to voluminous filings with the hope that some of it sticks to the wall," says New York City plaintiffs lawyer Neil V. Getnick. "These cases are not developed during the discovery phase. These cases are developed during the pre-pleading phase. The very nature of the practice does not lend

itself to a blunderbuss approach."

Still, Boese says that qui tam plaintiffs lawyering in recent years has come to resemble what he describes as the "franchise model" of the highly criticized 1990s state tobacco litigation, where the handful of plaintiffs firms in control spread their costs and made billions of dollars in fees by farming out much of the actual work to local counsel.

Boese says he regularly encounters plaintiffs lawyers in false claims cases who appear to use a similar tag-team approach. "Will this become tobacco?" Boese asks. "It already has."

A STAUNCH SUPPORTER IN THE SENATE

THAT'S NOT THE KIND OF TALK U.S. SENATE FINANCE Committee Chairman Chuck Grassley wants to hear.

"It ought to be black and white as far as state legislators are concerned," says the Iowa Republican, the act's loudest supporter. "If you are a forward-looking state legislator, you should have passed this years ago, instead of waiting for an incentive from the federal government."

Grassley helped breathe new life into the False Claims Act in 1986 after it had fallen into disuse. He sponsored amendments that tilted the odds toward plaintiffs and prosecutors, and that receive most of the recognition for raising recoveries from close to zilch before enactment to more than \$15 billion over the last two decades.

Grassley also was the leading sponsor of the Deficit Reduction Act's current state inducements, which take effect on Jan. 1.

Besides health care, the False Claims Act also deals with fraud in virtually any federal endeavor that involves outside contractors—from defense procurement to student loans and veterans benefits. The law also covers fraudulent Medicare payments. The federal government pays 100 percent of Medicare, so the new incentives apply only to the unique federal-state Medicaid partnership. The feds pick up almost 60 percent of Medicaid's cost, with the states responsible for the remainder.

No one disputes that fraud poses a monster problem in health care and other government programs. Government and private estimates of health care fraud losses range from 3 percent to 10 percent of state and federal outlays. And the Department of Health and Human Services, which administers Medicare and Medicaid,



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places fraud losses at 5 percent.

Even by conservative estimates, the potential losses are staggering, considering how much the government spends on health care.

Topping Social Security and the military, the federal and state governments spend more money on health care than just about anything else. For the 2006 budget year that ended Sept. 30, the feds expected to spend \$343 billion on Medicare for senior citizens and another \$192 billion on Medicaid coverage for poor people. Add an expected state Medicaid contribution of another \$142 billion, and the two programs total \$677 billion. By comparison, Social Security was expected to cost \$550 billion at year's end, while the Pentagon was on track to spend \$420 billion.

Though a handful of legislatures considered false claims statutes during the spring and summer, the Deficit Reduction Act's February passage came after bill-filing deadlines in many states. The issue promises to heat up considerably this fall with the approach of the deficit act's effective date, just ahead of the next round of legislative sessions.

Before deficit reduction passed, 15 states and the District of Columbia had false claims laws that allowed some form of qui tam litigation. Five of them deal only with health care fraud. If this year's limited experience is any indication, however, many legislators likely will balk at the qui tam provisions.

RESISTANCE FROM PROVIDERS

WITH STRONG BIPARTISAN SUPPORT THAT INCLUDED A Republican governor and a Democratic attorney general, Missouri state Sen. Chris Koster figured his false claims act was a shoo-in. Though the Senate twice passed it unanimously, Koster could only watch as opposition to qui tam drowned his bill in May before the House Special Committee on Health Care Facilities, whose 11 members include six health care providers.

"It was a hot bill," says Republican Koster, a former elected prosecutor from the Kansas City area. "It was very strongly worded. It had provisions in there that I think really shook the provider community."

To be sure, Koster's bill may not have received federal approval anyway, because it would have dismissed suits the state rejected, rather than let relators proceed alone as the federal act does. Though additional proposed criminal penalties also worried providers, even the limited qui tam section proved too much for House committee members. In an effort to keep money away from plaintiffs lawyers, they stripped out qui tam in favor of a straight reward system for tipsters. Neither that version nor the Senate's



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made it to a House floor vote before the session ended.

"We felt the attorney was going to get a huge chunk of the payout, just by referring the case to the attorney general," says Republican House committee chairman Dr. Rob Schaaf, a family physician from St. Joseph. "We just didn't think that was necessary."

Providers also are skeptical of President Bush's claim that the Deficit Reduction Act can save Medicare and Medicaid more than \$48 billion by 2015 and not cut services. The administration aims to accomplish that by a combination of stepped-up fraud enforcement, higher Medicare premiums for some seniors and reduction of federal payments for prescription drugs.

But organized medicine in Missouri says already miserly Medicaid reimbursements don't justify the risk of doctors getting nailed for fraud to boot.

"They literally lose money on Medicaid," says Tom Holloway, lobbyist for the Missouri State Medical Association. "They get 30 to 35 cents on the dollar. They see it as charity care. A lot of them just point-blank told me they're going to get out."

In New York, plaintiffs lawyer Getnick reports similar reactions from legislators there, who passed a massive health care fraud bill in June sans qui tam. Costing \$45 billion a year and eclipsing the entire budgets of most other states, New York's Medicaid program is the nation's largest and most generous. It's also a system repeatedly criticized as rife with fraud.

Opponents of qui tam conjure up visions of disgruntled employees clogging the courts and running up legal bills with meritless claims. But Getnick notes that rival providers in some competitive sectors, such as drug manufacturing, also can become qui tam plaintiffs.

"If a pharmaceutical company is able to make huge

profits by cheating the government, it becomes much more difficult for a competitor to follow the law," says Getnick, who also serves as board chairman for Taxpayers Against Fraud. The influential lobbying organization also helps plaintiffs and their lawyers assemble qui tam cases and finances litigation.

Relators currently file qui tam actions under seal in federal court, usually along with corresponding state claims, while the Justice Department investigates the allegations to decide whether to intervene and take over the litigation before serving the defendant. The department on average accepts one in three cases. Though cases today typically wind up in a single federal court, the proposed state incentives hold the possibility of parallel proceedings across numerous jurisdictions.

As Justice investigates, defense lawyers scramble to learn the nature of the allegations, who filed them and where. Boese says it's like voting in Chicago.

"You show up early and often," he told an ABA conference on health care fraud in May. "I'm going to start calling state attorney general offices, and I'm going to talk to everyone as quickly as I can. You've got to figure out what's going on."

Though federal qui tam actions can continue without the government's participation, whistle-blowers who go it alone stand only about a 5 percent chance of success and average only \$22,400 in payments when they do win, compared with a \$175,754 average with government intervention.

The federal act hasn't always worked so efficiently. It saw only sporadic use until 1943, when Congress crippled it by severely curtailing qui tam in response to complaints of "parasitic suits" where whistle-blowers filed cases based on public knowledge, such as criminal indictments. For its success, the act depends on true inside information that normal investigative techniques often fail to reveal. The 1943 restrictions also applied to frauds the government knew about but didn't pursue.

Things changed in 1986 when Grassley assumed the lead in fighting fraud with amendments that changed the face of the False Claims Act.

Besides adding protection from retaliation for whistle-blowers, the amendments contained major financial plums. Included was an increase in relator shares, from a maximum of 10 percent, to at least 15 percent and up to 25 percent of the recovery, with government intervention and depending on the relator's contribution to the action's success. In the remedy department, lawmakers increased damages from double to triple the cost of the fraud, and upped other penalties from \$2,000 to between \$5,000 and \$10,000 per false claim.

Moreover, because some courts demanded that plaintiffs produce clear and convincing evidence to prevail, Congress set a uniform standard of proof at the lower preponderance level.

Lawmakers also expanded scienter from the knowing submission of a false claim to cover recklessness and deliberate ignorance.

This year, HHS Inspector General Daniel R. Levinson's office likely struck a nerve in the provider community when in late August it published guidelines for determining whether individual state false claims acts qualify for increased awards. Among other factors in evaluating compliance with the federal version, HHS, in consultation with the Justice Department, will consider whether state laws allow sealed complaints and contain qui tam provisions that permit relators to proceed solo should the government decline the case. HHS also recommends that states award relators at least 15 percent of any recovery from their shares and provide for assessments against defendants for costs and attorney fees.

'THE RIGHT THING TO DO'

THROUGHOUT THE SPRING, GRASSLEY HAD PRESSED HHS and Justice especially hard on the qui tam provisions.

"There's no doubt that this is the right thing to do, but if a state doesn't want to pass it, it doesn't have to," says Grassley. "But it's not worth doing if you don't have the qui tam provision. They can either pass it according to the intent of Congress or forget it."

Members of the defense bar had hoped that HHS would show some flexibility because the Deficit Reduction Act also states simply that state false claims statutes must be "at least as effective in rewarding and facilitating qui tam actions" as the federal law. Though HHS strongly suggests that states won't qualify for more money if they don't meet the minimum provisions laid out in the guidelines, the department also appeared to leave itself some wiggle room by saying it would evaluate more restrictive state laws on a case-by-case basis.

"No realistic evaluation of these guidelines will be possible until the OIG begins rendering decisions," Boese wrote in a client newsletter.

Texas could be an early testing ground for the HHS guidance. Though Texas has one of the nation's most successful state acts, it still may not qualify for larger recoveries, because a case dies and the relator gets thrown out of court if the state turns it down. Nevertheless, Congress and other states looked to Texas as a model in pondering the new weapons against health care fraud.

"No good deed goes unpunished," says Patrick J. O'Connell, civil Medicaid fraud chief for the Texas attorney general's office, which has recovered more than \$100 million since 1999, when relators first began bringing qui tam cases after a change in the law. "We have become sort of a lightning rod for what a state can do if it uses its false claims act correctly."

Like New York, Texas sucks up Medicaid dollars big time. With about 30 percent of Texas residents lacking private insurance, the nation's highest

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rate, state Medicaid spending doubles every six to seven years. Today, Medicaid costs taxpayers \$750 for each man, woman and child in the state, easily more than some families pay in premiums for private health insurance.

The Lone Star State's budget for Medicaid is expected to climb from the current \$17 billion annually to \$136 billion a year within 20 years, according to the nonpartisan Texas Public Policy Foundation. That's almost as much as the entire \$138 billion state budget for the current year that began Sept. 1. So business is vigorous in O'Connell's office, which has grown from two to nine lawyers. "We've got more than we can do," O'Connell says. "We're working nonstop."

MORE THAN ENOUGH ENCOURAGEMENT

BUT DEFENSE LAWYER BOESE SAYS THE FEDERAL RELATOR cut is more than enough to encourage the mega-national cases that yield global settlements responsible for much of the act's recent success, regardless of whether states have their own false claims acts. Of the top 25 federal cases that have settled since 1992 for \$100 million or more, 21 involved pharmaceutical companies, hospital and nursing home chains, medical device makers and other medical providers or support industries.

Of greater concern to Boese is a separate provision in the Deficit Reduction Act that requires nearly every provider to conduct employee education programs on fraud and how to file false claims complaints. Besides their potential for increasing the number of new cases, Boese says such programs also undermine the stricter internal company compliance plans and financial controls that have become

hallmarks of post-Enron corporate self-accountability.

Worker training in the False Claims Act could become the functional equivalent of a company hiring a plaintiffs lawyer and suing itself, Boese complains.

Indeed, some states actually could lose money with their own statutes if they must pay at least a 15 percent relator's share. Washington state prosecutor David W. Waterbury says he's no math whiz, but a 15 percent relator's share sounds like more to him than the promised 10 percentage point increase in the state's share of damages.

"As portrayed, it looks like states are leaving money on the table," says Waterbury, Medicaid fraud control director for the state attorney general's office. What's more, he says, nothing would stop legislators from passing an even more ambitious false claims act aimed at all sorts of state contracts. Waterbury wonders who would pay for that.

"You have to take the blinders off," Waterbury says. "While this sounds seductive, it may cover the waterfront. If the statute covers everything, you're looking at replicating the Civil Division at the Department of Justice."

At the Civil Division, commercial litigation director Michael F. Hertz says his prosecutors likely will notice little difference in their jobs as state involvement increases.

"I'm not sure we know exactly how this is going to play out or work," Hertz says. "But I don't think it will change that much."

Though total damages are expected to increase and the distribution of awards will change, the states, as they now do, are expected to continue to divvy up recoveries among themselves through the National Association of Medicaid Fraud Control Units, which operates out of the attorney

general's office in most states.

"Both of those are mathematical calculations," Hertz says. "The work for lawyers won't change that much."

Federal and state prosecutors say they already work together smoothly, though they expect to see much more of one another in the future. The national association already assembles state teams to assist in cases, and representatives from states with false claims acts meet by conference call every two weeks.

"It will intensify the relationship with DOJ," says Vermont fraud chief Linda A. Purdy, the outgoing association president. "It brings more people into the mix, which requires more efforts at coordination."

MORE TO CONSIDER

BUT THOUGH JUSTICE DEPARTMENT lawyers publicly downplay problems the approaching era may cause, one former health care fraud prosecutor says Congress failed to appreciate the increased complexity that would accompany an explosion in parallel proceedings. Jonathan L. Diesenhau served as a senior Justice Department trial counsel specializing in false claims cases from 1998 to 2005, when he left for private practice and defense work in Washington, D.C. He envisions control over qui tam sliding away from federal prosecutors to relators and their lawyers.

"Every step of the way, you have a national consortium of people in a case," Diesenhau says. "The federal prosecutor's job becomes one of traffic cop, not law enforcer."

Besides creating new perils for defendants and administrative headaches for prosecutors, Diesenhau says criminal enforcement may become a major victim of stepped-up state civil litigation in multiple forums. He cites the possibility of a rogue state unsealing a civil complaint on its own or allowing discovery and tipping off defendants who may be under criminal investigation elsewhere where complaints remain sealed.

"Those circumstances would present a real possibility that the relator could seek deposition testimony from witnesses the government would not

want deposed or, of greater concern, individuals whose status in the criminal investigation dictated that they assert their Fifth Amendment rights and decline to testify," Diesenhau writes in a recent analysis of the Deficit Reduction Act.

Career federal criminal prosecutors often single out New York's Eliot Spitzer as a prime specimen of a genus of political creatures that inhabit the offices of elected state attorneys general and just don't respect the integrity of other agencies' investigations.

As the Democratic gubernatorial candidate in the November election, Spitzer enjoys widespread recognition as the state prosecutor who embarrassed the feds by getting the jump on them in a string of high-profile Wall Street corruption cases. He also severely chastised New York legislators early in the summer for failing to include qui tam in this year's health care fraud legislation.

"Having these state AGs ride along really can undermine federal criminal prosecutions," Diesenhau says. "The problem is many times greater with state qui tam out there. Criminal prosecution would grind to a halt. Prosecutors would lose interest if there are too many players."

Grassley says in one way he's reliving the resistance to his 1986 amendments, which largely came from defense contractors. He says state legislators should expect more of the same from health care providers as they debate false claims acts.

"They're going to be fighting the same battle I fought 20 years ago," Grassley says. "But we're right, and right wins out—most of the time."

And he says he's not about to listen to federal prosecutors sing the blues about states crowding the field.

"If they want to do their jobs, then they should take these cases from the whistle-blowers," Grassley says. "Sometimes they don't want to. Sometimes it's workload, and sometimes there are more powerful forces at work. Sometimes they don't want a farmer from Iowa who knows something about fraud on the government telling them what to do." ■

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