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THE FEDERAL FALSE CLAIMS ACT: A POTENTIAL DETERRENT TO MEDICAID FRAUD AND ABUSE

I. Introduction

A scandal that seems certain to occupy headline space during the foreseeable future is the abuse of the Medicare and Medicaid programs,¹ under which state agencies provide medical assistance to the elderly, needy and disabled with largely-federal funding. Medicaid fraud and abuse wastes an estimated three billion dollars of tax money each year.² Senate investigators who studied the problem found that "rampant fraud and abuse exists among practitioners participating in the Medicaid program"³ and among participating medical testing laboratories.⁴

The Federal False Claims Act (FCA),⁵ a statute more than a century old, provides a potential deterrent to such fraud and abuse. The statute gives the federal government civil remedies⁶ not available to the defrauded private purchaser of goods and services. Former Attorney General William Saxbe has described this law as "the most important tool" of the Justice Department's Frauds Section, which is responsible for seeking recovery of damages through civil litigation.⁷

1. 42 U.S.C. §§ 1395-96 (Supp. V, 1975).

2. Thomasson, *Medicaid Abuse Is About As Old As the Program*, N.Y. Times, Sept. 5, 1976, § 4 (The Week in Review), at 4, col. 4.

3. STAFF OF SENATE SPECIAL COMM. ON AGING, 94TH CONG., 2D SESS., FRAUD AND ABUSE AMONG PRACTITIONERS PARTICIPATING IN THE MEDICAID PROGRAM 209 (Comm. Print 1976) [hereinafter cited as STAFF REPORT].

4. S. REP. No. 944, 94th Cong., 2d Sess. 47 (1976).

5. 18 U.S.C. §§ 287, 1001 (1970); 31 U.S.C. §§ 231-35 (1970) [hereinafter cited as FCA].

6. The Medicaid law itself provides no remedy as such, only criminal fines, jail terms or both. 42 U.S.C. § 1395nn (Supp. V, 1975).

7. 1975 ATT'Y GEN. ANN. REP. 68. FCA also contains criminal provisions. 18 U.S.C. § 287 provides:

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1001 (1970) provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick,

This Note will set out a short statement of the history and purpose of the statute, review the acts that are violative of the law and discuss its civil provisions including the authorization of *qui tam* actions (private plaintiff suing on behalf of the federal government and sharing in the recovery), the limitations on such actions, and the recovery of "forfeiture" plus double damages.

II. False Claims Within the Meaning of the False Claims Act

Congress passed the original False Claims Act (Act)⁸ during the Civil War to provide protection against those who attempted to cheat the United States through "frauds and corruptions practiced in obtaining pay from the Government."⁹ The Act imposed civil and criminal liability for presentation of false claims for goods and services,¹⁰ and authorized actions by private plaintiffs to recover civil damages for violations.¹¹ The successful private plaintiff received one-half of the proceeds of the suit and any court costs imposed on the defendant.¹² The Act's civil provisions survive in 31 U.S.C. § 231¹³ with amendments limiting *qui tam* actions¹⁴ and reducing the *qui tam* share of the recovery.¹⁵

scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

8. Act of March 2, 1863, ch. 67, §§ 1-3, 12 Stat. 696.

9. CONG. GLOBE, 37th Cong., 3d Sess. 952 (1863)(remarks of Senator Howard).

10. Act of March 2, 1863, ch. 67, §§ 1-3, 12 Stat. 696.

11. *Id.* § 4.

12. *Id.* § 6.

13. 31 U.S.C. § 231 (1970) provides:

Any person not in the military . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher . . . [or] claim . . . , knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim . . . , shall forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing [of] such act, together with the costs of suit

14. *Id.* § 232(C); see text accompanying notes 73-82 *infra*.

15. 31 U.S.C. § 232(E) (1970); see text accompanying notes 83-87 *infra*.

A. The Nature of the Claim

Congress intended the FCA to stop "plundering of the public treasury."¹⁶ False claims include not only billing the Government for nonexistent, worthless or overpriced goods and services but any wrongful actions which have the purpose and effect of causing the Government immediately to pay out money or transfer property.¹⁷ Therefore FCA liability attaches when the defendant claims payment for goods or services not actually provided,¹⁸ and when the defendant mislabels inferior goods and substitutes them for items that should be supplied under a government contract.¹⁹ This is true even when the defendant contends that the mislabeled items are interchangeable with the ones called for, at least where the items supplied fail to meet specifications.²⁰

The FCA prohibits presentment of fraudulently obtained government checks for payment, even if the proceeds ultimately go to the intended recipients.²¹ If the defendant knows that the Government issued checks to him by mistake, the FCA holds him liable for false claims when he cashes the checks.²²

B. Claims "against the United States"

The FCA speaks in terms of false claims "upon or against the Government of the United States" presented for payment or approval to or by any one in the federal government or the military.²³ Clearly included are claims against the public treasury,²⁴ other federal departments and agencies,²⁵ and wholly-owned government cor-

16. *United States v. McNinch*, 356 U.S. 595, 599 (1958).

17. *United States v. Tieger*, 234 F.2d 589, 591 (3d Cir. 1956), *approved in United States v. McNinch*, 356 U.S. 595, 599 (1958).

18. *See, e.g., United States v. Greenberg*, 237 F. Supp. 439 (S.D.N.Y. 1965); *United States v. Gardner*, 73 F. Supp. 644 (N.D. Ala. 1947).

19. *See, e.g., United States v. Bornstein*, 423 U.S. 303 (1976); *Henry v. United States*, 424 F.2d 677 (5th Cir. 1970).

20. *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972).

21. *United States v. Silver*, 384 F. Supp. 617 (E.D.N.Y. 1974), *aff'd*, 515 F.2d 505 (2d Cir. 1975).

22. *See, e.g., Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied sub nom. Peterson v. Matthews*, 423 U.S. 830 (1975); *United States v. Scolnick*, 219 F. Supp. 408 (D. Mass. 1963).

23. 31 U.S.C. § 231 (1970).

24. *See, e.g., Evans v. United States*, 11 F.2d 37 (4th Cir. 1926)(claim for tax refund).

25. *United States v. McNinch*, 356 U.S. 595 (1958) (Federal Housing Administration).

porations.²⁶ Also included are claims against state and private agencies that disburse federal funds.²⁷

In *United States ex rel. Marcus v. Hess*²⁸ the Supreme Court affirmed a trial court judgment against respondent electrical contractors who had engaged in collusive bidding to obtain contracts from Pennsylvania municipalities and school districts. Respondents had known that the Federal Public Works Administration (PWA) funded the projects, and that applicable federal regulations required competitive bidding.²⁹ They submitted estimates for payment to the local governments involved, and were compensated from a joint bank account containing both federal and local funds. The federal government would never have placed the money in the bank account had it known that respondents received the contract through collusive bidding.³⁰ The Court concluded that Congress intended FCA to impose liability on any person who knowingly helped cause the Government to pay claims grounded in fraud, whether or not that person had direct contractual relations with the Government.³¹

III. Scienter and Intent

FCA liability attaches only when the defendant knows: (1) that the claim he presents, or causes to be presented, is false; or (2) that a document he causes to be used in support of a claim contains a "fraudulent or fictitious statement or entry."³² Mere negligence in the preparation or submission of claims does not satisfy this scienter requirement.³³ Knowledge of the falsity must be personal to the defendant,³⁴ and will not be imputed to a supervisor or superior.³⁵ Thus, the law does not impute the knowledge to a corporate em-

26. *Rainwater v. United States*, 356 U.S. 590 (1958) (Commodity Credit Corp.).

27. See *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

28. *Id.*

29. *Id.* at 542-43.

30. *Id.* at 543.

31. *Id.* at 544-45.

32. 31 U.S.C. § 231 (1970).

33. *United States v. Ekelman & Assocs., Inc.*, 532 F.2d 545 (6th Cir. 1976); *United States v. Shapleigh*, 54 F. 126 (8th Cir. 1893); *contra*, *United States v. Coop. Grain & Supply Co.*, 476 F.2d 47 (8th Cir. 1973).

34. *United States v. Priola*, 272 F.2d 589 (5th Cir. 1959).

35. *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1008-09 (5th Cir. 1972).

ployer where the wrongdoer's goal is personal profit rather than enrichment of the corporation.³⁶

Courts have expressed opposing views as to whether the FCA requires specific intent to defraud, deceive, or obtain property wrongfully. However, the decisions almost invariably have found liability when the defendant knew he was submitting a false claim, and no liability when he did not.³⁷

IV. The Number of Forfeitures

FCA imposes a "forfeiture" of \$2,000 for doing or committing "any of the acts prohibited."³⁸ The forfeiture is considered a civil penalty because the FCA's chief purpose is to restore to the federal government money taken through false claims, and because the defendant is not subject to imprisonment for failure to satisfy the judgment.³⁹ Therefore, actions under the criminal and civil forfeiture provisions of FCA do not subject the defendant to double jeopardy.⁴⁰

The defendant is liable for a forfeiture for each false claim where "the incidence of fraud is . . . clearly individualized."⁴¹ The number of contracts is not controlling, since the contractor might present many false claims under a single contract and thus "convert 'the

36. *United States v. Ridgley State Bank*, 357 F.2d 495 (5th Cir. 1966); *contra*, *United States v. Hangar One, Inc.*, 406 F. Supp. 60, 139 (N.D. Ala. 1975).

37. *See, e.g.*, *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1007 (5th Cir. 1972) ("guilty knowledge of a purpose on the part of [the defendant] to cheat the Government" required); *United States v. Mead*, 426 F.2d 118, 121, 123 (9th Cir. 1970) (Government must prove each element of common law fraud); *Acme Process Equip. Co. v. United States*, 347 F.2d 509, 527 (Ct. Cl. 1965), *rev'd on other grounds*, 385 U.S. 138 (1966) (knowing presentation of a false claim sufficient) (dictum); *Fleming v. United States*, 336 F.2d 475, 478-79 (10th Cir. 1964), *cert. denied*, 380 U.S. 907 (1965) (no need to prove every element of common law fraud); *United States v. National Wholesalers*, 236 F.2d 944, 950 (9th Cir. 1956), *cert. denied*, 353 U.S. 930 (1957) (intent to work a deceit required); *United States ex rel. Brensilber v. Bausch & Lomb Optical Co.*, 131 F.2d 545, 546 (2d Cir. 1942), *aff'd mem.*, 320 U.S. 711 (1943) (fraud "in its accepted sense of deceit"); *United States v. Foster Wheeler Corp.*, 316 F. Supp. 963, 967 (S.D.N.Y. 1970), *aff'd*, 447 F.2d 100 (2d Cir. 1971) (no need to prove intent to deceive); *United States v. Park Motors, Inc.*, 107 F. Supp. 168, 177 (E.D. Tenn. 1952) (dismissing action for failure to prove that defendant "intended . . . to get something out of the Government to which he knew he was not entitled.")

38. 31 U.S.C. § 231 (1970).

39. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551 (1943).

40. *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956).

41. *United States v. Bornstein*, 423 U.S. 303, 310-11 (1976).

Act's forfeiture provision into little more than a \$2,000 license for . . . fraud.'"⁴²

The number of false claims, or invoices, vouchers or bills, does not necessarily determine the number of forfeitures in all kinds of cases. In *United States v. Bornstein*,⁴³ defendant subcontractor supplied hundreds of misbranded electron tubes to a prime contractor making radio sets for the Army. Defendant sent these tubes to the prime contractor in three shipments, with three false certificates of compliance and twenty-one packing lists bearing falsified inspection symbols.⁴⁴ The prime contractor submitted thirty-five claims for payment, which the Government paid with eight vouchers.⁴⁵ The Supreme Court ordered imposition of a forfeiture for each of the three shipments, since each time the defendant shipped tubes it thereby enabled and caused the prime contractor to build substandard radios for which the Government would be asked to pay.⁴⁶ The number of claims did not determine the number of forfeitures because the defendant did not necessarily cause the prime contractor to submit any particular number of claims, and FCA penalizes a person for his own acts, not for the acts of others.⁴⁷

The Supreme Court has not decided expressly whether a forfeiture must be imposed for each violation. The Fifth Circuit has held that the number of forfeitures may be reduced if the recovery would do more than "reflect a fair ratio to damages."⁴⁸ An earlier Fifth Circuit opinion and two Fourth Circuit decisions concluded that courts have no choice but to impose forfeitures for each violation.⁴⁹

The sum of money subject to forfeiture may exceed greatly the dollar amount of the false claims.⁵⁰ Liability arises, and a forfeiture

42. *Id.*

43. *Id.* at 303.

44. *United States v. Bornstein*, 361 F. Supp. 869, 872-73 (D.N.J. 1973).

45. *United States v. Bornstein*, 504 F.2d 368, 372 (3d Cir. 1974).

46. 423 U.S. at 312-13.

47. *Id.*

48. *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied sub nom. Peterson v. Matthews*, 423 U.S. 830 (1975).

49. *United States v. Ridglea State Bank*, 357 F.2d 495 (5th Cir. 1966); *United States v. Brown*, 274 F.2d 107 (4th Cir. 1960); *United States v. Cato Bros., Inc.*, 273 F.2d 153 (4th Cir. 1959).

50. *See, e.g., United States v. Brown*, 274 F.2d 107 (4th Cir. 1960); *United States v. De Witt*, 265 F.2d 393 (5th Cir. 1959)(summary judgment against defendants for forfeitures and double damages with respect to twenty-nine transactions, and trial ordered as to twenty-one others—each involving a false claim for \$160).

may be assessed, where the Government suffers no actual damages—as, for example, where the falsity of the claim is discovered before payment.⁵¹

V. Recovery For Damages

In addition to forfeitures, FCA imposes liability for “double the damages which the United States may have sustained.”⁵² An action under the statute is civil rather than criminal in nature even though more than actual damages may be recovered.⁵³ Thus, the possibility of double damages does not subject the defendant to double jeopardy when civil and criminal suits are based on the same conduct.⁵⁴

The measure of damages is the “benefit of the bargain”—the difference in value between the items claimed for and those supplied.⁵⁵ “Consequential” damages such as the cost of removing what was supplied and installing what was specified may not be recovered.⁵⁶ In collusive bidding cases the measure of damages is the difference between the contract price and what it would have been if the bidding had been free and open.⁵⁷

Recoverable damages must be doubled before deductions for compensatory payments.⁵⁸ Otherwise, the liability of the defendant would be affected by payments from collateral sources such as his prime contractor, and defendant could nullify the double damages clause by tendering payment before judgment is rendered.⁵⁹

The Court of Appeals for the Eighth Circuit has held that pre-judgment interest should be assessed *and doubled* because “interest can properly be recovered as ‘damage’ under the False Claims Act.”⁶⁰ The Second and Fifth Circuits disagree, because Congress

51. *Rex Trailer Co. v. United States*, 350 U.S. 148, 153 n.5 (1956).

52. 31 U.S.C. § 231 (1970).

53. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550-52 (1943).

54. *Id.*

55. *United States v. Bornstein*, 423 U.S. 303, 316 n.13 (1976); *contra*, *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1010-11 (5th Cir. 1972).

56. *United States v. Aerodex, Inc.* 469 F.2d 1003, 1010-11 (5th Cir. 1972); *see United States v. Bornstein*, 423 U.S. 303, 316 (1976).

57. *United States ex rel. Marcus v. Hess*, 41 F. Supp. 197, 214 (W.D. Pa. 1941), *aff'd*, 317 U.S. 537 (1943).

58. *United States v. Bornstein*, 423 U.S. 303, 316 (1976).

59. *Id.*

60. *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 62 (8th Cir. 1973).

chose double recovery plus forfeiture as the means of ensuring that the Government is made whole.⁶¹

VI. *Qui Tam* Suits

Any one may bring suit on behalf of himself and the federal government for FCA violations, and share in the recovery if successful.⁶² The Supreme Court in *United States ex rel. Marcus v. Hess*⁶³ approved this *qui tam* action⁶⁴ as an effective means of preventing frauds upon the public treasury,⁶⁵ although at the time the Act allowed unscrupulous plaintiffs to reap windfalls by bringing suits based on information obtained merely by reading indictments, transcripts of congressional hearings, and other government papers.⁶⁶ Congress amended the statute less than a year later.⁶⁷

Under the amended Act a private plaintiff must notify the Attorney General and turn over the evidence and information underlying the action.⁶⁸ If the Government intervenes within sixty days, the *qui tam* plaintiff may not maintain the action unless the Government fails to carry it forward with due diligence.⁶⁹ Intervention does not deprive the private plaintiff of a vested right, since the test of his right to recover is the successful prosecution of the suit, not the filing of the complaint.⁷⁰ No *qui tam* suit may be commenced after

61. See, e.g., *Peterson v. Weinberger*, 508 F.2d 45, 55 (5th Cir.), cert. denied sub nom. *Peterson v. Matthews*, 423 U.S. 830 (1975); *United States v. Foster Wheeler Corp.*, 447 F.2d 100, 102 (2d Cir. 1971).

62. 31 U.S.C. § 232 (1970).

63. 317 U.S. 537 (1943).

64. A *qui tam* action is defined as:

An action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution

BLACK'S LAW DICTIONARY 1414 (Rev. 4th ed. 1968).

65. 317 U.S. at 540-41.

66. *Id.* at 558-62 (Jackson, J., dissenting); see also 89 CONG. REC. 10,848-49 (1943)(remarks of Congressman Hancock).

67. Act of December 23, 1943, ch. 377, 57 Stat. 608 (codified at 31 U.S.C. §§ 232-35 (1970)).

68. 31 U.S.C. § 232(C) (1970).

69. *Id.*

70. *Sherr v. Anaconda Wire & Cable Co.*, 149 F.2d 680 (2d Cir.), cert. denied, 326 U.S. 762 (1945); *United States ex rel. Rodriguez v. Weekly Publications, Inc.*, 68 F. Supp. 767 (S.D.N.Y. 1946).

the Government⁷¹ or another private plaintiff⁷² has brought suit with respect to the same transactions.

The amendments provide that the court shall have no jurisdiction to hear the *qui tam* plaintiff's action "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought"⁷³ This "original information" limitation goes to the subject matter jurisdiction of the court to hear the private plaintiff's suit, but it does not affect the court's power to hear the case as presented by the United States.⁷⁴

The limitation applies even where the plaintiff has given the Government the information before bringing the action.⁷⁵ It does not operate where the official possessing the facts is implicated in the alleged fraud.⁷⁶ Even if the plaintiff has researched and correlated information pointing to a violation, the *qui tam* suit is barred if the "essential facts," including "negative facts" (such as a failure to file required papers), were in the hands of the Government. It is not necessary that any single official knew of their existence or cumulative significance.⁷⁷

The original Act gave the *qui tam* plaintiff one-half of the recovery and any court costs imposed on the defendant.⁷⁸ Under the amended Act, the court *may* award plaintiff the amount it deems fair compensation for obtaining a satisfied judgment or settlement,⁷⁹ but no more than one-fourth of the recovery plus reasonable com-

71. United States *ex rel.* Benjamin v. Hendrick, 52 F. Supp. 60 (S.D.N.Y. 1943).

72. United States *ex rel.* B.F. Goodrich Co., 41 F. Supp. 574 (S.D.N.Y. 1941).

73. 31 U.S.C. § 232(C) (1970).

74. United States *ex rel.* Bayarsky v. Brooks, 154 F.2d 344 (3d Cir.), *cert. denied sub nom.* Brooks v. United States *ex rel.* Bayarsky, 329 U.S. 716 (1946); United States v. Pittman, 151 F.2d 851 (5th Cir. 1945), *cert. denied*, 328 U.S. 843 (1946).

75. United States v. Aster, 176 F. Supp. 208 (E.D. Pa. 1959), *aff'd*, 275 F.2d 281 (3d Cir. 1960). An exception was made for suits pending at the effective date of the amendment. 31 U.S.C. § 232(C) (1970).

76. United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949).

77. United States v. Armour & Co., 146 F. Supp. 546 (D.D.C. 1956), *aff'd*, 254 F.2d 90 (D.C. Cir. 1958).

78. Act of March 2, 1863, ch. 67, § 6, 12 Stat. 696.

79. The Act always has prohibited withdrawal or discontinuance of *qui tam* suits without the written consent of the court and the district attorney. 31 U.S.C. § 232(B) (1970); Act of March 2, 1863, ch. 67, § 4, 12 Stat. 698.

compensation for necessary expenses and any court costs imposed on the defendant.⁸⁰ If the United States intervenes in the suit, the court may award the person, who originally brought suit, up to one-tenth of the satisfied judgment or settlement⁸¹ as compensation for having disclosed original information.⁸²

VII. Medicaid Fraud and the False Claim Act

In 1965 Congress increased the federal government's participation in public health care through grants to the states.⁸³ Almost immediately, fraud and abuse of the Medicaid and Medicare programs began.⁸⁴ Combined local and federal expenditures under Medicaid have grown from \$1.5 billion in fiscal 1966 to the current fifteen billion dollars a year.⁸⁵ An estimated three billion dollars or more in tax money—*i.e.*, at least 20 percent of the total—is wasted annually through fraud and abuse.⁸⁶

The Medicaid law imposes criminal liability for some kinds of fraud and abuse.⁸⁷ It provides penalties ranging up to a \$10,000 fine and one year imprisonment for knowing and willful misrepresentation of a material fact in an application for Medicaid benefits or payments.⁸⁸ The same misdemeanor penalties attach for seeking, offering or taking bribes, kickbacks, rebates or referral fees in connection with Medicaid services or payments.⁸⁹

The extent of the fraud and abuse in the Medicaid program indicates that the possibility of prosecution and conviction has failed to provide an adequate deterrent.⁹⁰ Recent legislation authorizes the

80. 31 U.S.C. § 232(E)(2) (1970).

81. This is a departure from the historic rule, at least in England, that the sovereign could not compromise or settle a *qui tam* suit. See *Sherr v. Anaconda Wire & Cable Co.*, 149 F.2d 680 (2d Cir. 1945).

82. 31 U.S.C. § 232(E)(1) (1970).

83. 42 U.S.C. §§ 1395-96 (1970).

84. Thomasson, *supra* note 2, at 4, col. 3.

85. STAFF REPORT, *supra* note 3, at 5.

86. Thomasson, *supra* note 2.

87. Senate sponsored amendments that would have increased the penalties failed to win House approval in the waning days of the 94th Congress. 122 CONG. REC. H12,181-82 (daily ed. Oct. 1, 1976).

88. 42 U.S.C. § 1395nn(a) (Supp. V, 1975).

89. *Id.* § 1395nn(b).

90. See, *e.g.*, Thomasson, *supra* note 2; STAFF REPORT, *supra* note 3.

appointment of an inspector general within the Department of Health, Education, and Welfare to audit the Medicaid programs to detect fraud and abuse.⁹¹ Whatever may be the effect of that measure, and others directed specifically to Medicaid problems, FCA should continue to play a potentially important—perhaps a superior—role in preventing and punishing Medicaid fraud.

The criminal penalties for false claims under FCA range up to five years imprisonment, compared with one year under the Medicaid law.⁹² Possible fines under both statutes are \$10,000. In addition, the FCA civil provisions expose the defendant to liability⁹³ for \$2,000 forfeitures, double damages and court costs.⁹⁴ The wrongdoer also risks the possibility of a *qui tam* suit by a private plaintiff—an associate, an employee, or even a patient⁹⁵—who seeks to share in the recovery.

In *United States ex rel. Davis v. Long's Drugs, Inc.*,⁹⁶ a pharmacist brought an FCA action against drug stores he had worked for, alleging he saw them submit false claims for prescriptions to Medi-Cal, the state agency created to implement Medicaid in California. Defendants moved to dismiss. They contended the claims were not claims against the United States, and argued that plaintiff could not maintain the *qui tam* suit because state prosecutors and Medi-Cal officials had the information underlying the suit before the action was brought.⁹⁷

The United States District Court for the Southern District of California held that Medi-Cal claims were claims against the United States, because the state agency was 50 percent federally funded and subject to extensive federal regulation.⁹⁸ The court followed the principle of *United States ex rel. Marcus v. Hess*,⁹⁹ in which the Supreme Court held that claims against Pennsylvania municipi-

91. Act of October 15, 1976, Pub. L. No. 94-505, 90 Stat. 2429.

92. 18 U.S.C. §§ 287, 1001 (1970); 42 U.S.C. § 1395nn (1970).

93. Actions for criminal penalties and FCA civil forfeiture and double damages may be based on the same transactions. See text accompanying notes 44-45, 58-59 *supra*.

94. 31 U.S.C. § 231 (1970).

95. See *Peterson v. Weinberger*, 508 F.2d 45, 54 (5th Cir.), *cert. denied sub nom. Peterson v. Matthews*, 423 U.S. 830 (1975).

96. 411 F. Supp. 1144 (S.D. Cal. 1976).

97. *Id.* at 1144-45.

98. *Id.* at 1146-49.

99. 317 U.S. 537 (1943).

palities and school districts for work on federally-funded projects were claims against the United States. The *Hess* decision leaves little room for doubt that claims against MediCal and the other state and private Medicaid intermediaries are claims against the United States within the meaning of FCA.

The *Long's Drugs* decision also held that data in the possession of MediCal officials and state prosecutors were not information in the possession of the United States within the meaning of the "original information" limitation on *qui tam* suits under the FCA.¹⁰⁰ No reason emerges why the statute should be interpreted to the contrary. As long as the federal government does not require routine disclosure by the states of all claims information, *qui tam* suits for Medicaid fraud will be possible both where the wrongdoer has succeeded in concealing his fraud, and where state officials know of the fraud or would know if facts in their possession were correlated so as to detect violations.

A relatively few medical practitioners and laboratories account for a disproportionately large share of the total sum siphoned away by Medicaid fraud and abuse.¹⁰¹ Each must employ individuals who can observe any wrongdoing, as allegedly was observed by the plaintiff in *Long's Drugs*. Many of these individuals might find it advantageous to bring suit under the FCA, if they knew of the *qui tam* provisions. The private plaintiff brings suit at his own cost,¹⁰² but his share of the recovery may be substantial.¹⁰³ If the Government intervenes after filing of the complaint, the person who brought suit may avoid the potentially high cost of pre-trial discovery and still share in the recovery.¹⁰⁴ A plaintiff who lacks sufficient resources to maintain the action could retain counsel on a contingent fee basis, and the attorney could guarantee or advance the expenses of the litigation if the client remained ultimately liable for them.¹⁰⁵ These considerations, however, must be carefully weighed against the probabilities of plaintiff's loss of employment; lack of government

100. 411 F. Supp. at 1149-53.

101. S. REP. No. 944, 94th Cong., 2d Sess. (1976); STAFF REPORT, *supra* note 3.

102. 31 U.S.C. § 232(B) (1970).

103. *See id.* § 232(E); *see also* text accompanying note 130 *infra*.

104. 31 U.S.C. § 232(E)(1) (1970).

105. *See, e.g.*, N.Y. STATE BAR ASS'N, THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY 42, DR 5-103 (1975).

intervention; and the unwillingness of members of the Bar to take cases on a contingent fee basis.

Much of the fraud and abuse that otherwise might go undetected can be brought to light by private plaintiffs motivated by the possibility of financial gain. Knowledge of that possibility can deter potential wrongdoers from practicing fraud against Medicaid. Moreover, not every action for Medicaid fraud will necessitate the expenditure of time and resources of government prosecutors. The United States may refrain from intervening and continue to recover double damages and forfeitures, less the *qui tam* plaintiff's share.¹⁰⁶

Additional savings in government time and expense result from application of the doctrine of collateral estoppel to FCA cases. Once a defendant has been convicted under the FCA's criminal provisions, there is no need for the Government to litigate the issue of his civil liability for the same transactions.¹⁰⁷ If the Government waives damages, it avoids the necessity of proving their extent,¹⁰⁸ but retains the right to recover forfeitures of \$2,000 for each violation.¹⁰⁹

Senate investigators have catalogued the most common forms of Medicaid fraud and abuse in so-called Medicaid mills. These include referring patients from one practitioner to another within the facility, even though there is no medical need ("ping-ponging"); treating each family member who accompanies a patient to the facility, or billing as though each received treatment ("ganging," which usually involves a mother and her children); multiple billing; billing for services not rendered, for services more extensive than those actually rendered ("upgrading"), or for services rendered by others or by unlicensed practitioners; supplying less than the quantity of medication prescribed ("shorting"); and substituting less-expensive "generic" drugs for name-brand drugs.¹¹⁰

The FCA clearly encompasses the practices of double billing, billing for services not rendered, "shorting" and "upgrading."¹¹¹ The substitution of "generic" drugs for name-brand medication may

106. See 31 U.S.C. §§ 231-32 (1970).

107. *United States v. Zulli*, 418 F. Supp. 252 (E.D. Pa. 1975).

108. See *id.* at 254.

109. See text accompanying note 56 *supra*.

110. STAFF REPORT, *supra* note 3, at 18-19.

111. See text accompanying notes 17-18 *supra*.

constitute a false claim.¹¹² Charging the name-brand price for the less-expensive "generic" is clearly a violation.¹¹³ "Ganging" and "ping-ponging" result in claims not properly reimbursable under Medicaid, since the services performed are not "reasonable and necessary" to the diagnosis or treatment of an illness, injury or malformity.¹¹⁴ Therefore, claims made as a result of these practices are "false claims" even if the unnecessary services have been rendered in fact.¹¹⁵

Another kind of false claim formed the basis of liability in *Peterson v. Weinberger*.¹¹⁶ Plaintiff physician sued the Government for stopping his Medicare payments, and the Government counter-claimed under the FCA. The doctor's brother owned the majority interest in a nursing home and the sole interest in a corporation that provided the nursing home with physical therapy services. The nursing home lost its Medicare eligibility and the corporation lacked certification, so the owner found himself unable to claim reimbursement for certain treatments that actually had been rendered. He had an employee prepare claim forms, using the doctor's "provider number" as though the doctor were making the claims. He forged the physician's signature as certifying that the doctor had rendered or supervised the treatments personally, as Medicare required.¹¹⁷

The nursing home owner was both civilly and criminally liable under the FCA for submitting the claims.¹¹⁸ Moreover, the doctor was civilly liable for depositing the reimbursement checks to his own account¹¹⁹ and forwarding the proceeds to his brother.¹²⁰

The trial court imposed double damages for 120 false claims, but

112. See text accompanying note 20 *supra*.

113. See, e.g., *United States v. Greenberg*, 237 F. Supp. 439 (S.D.N.Y. 1965) (liability where government contractor certified he paid more in wages than he actually had in executing cost-plus-fixed-fee contract).

114. 42 U.S.C. § 1395y(a)(1) (1970).

115. See, e.g., *United States v. De Witt*, 265 F.2d 393 (5th Cir. 1959) (applications resulting in payments in connection with loan guarantees not properly obtained).

116. 508 F.2d 45 (5th Cir.), *cert. denied sub nom. Peterson v. Matthews*, 423 U.S. 830 (1975).

117. *Id.* at 47-48.

118. *Id.* at 54; *United States v. Peterson*, 488 F.2d 645 (5th Cir. 1974).

119. The checks were from a private insurance carrier which operated a Medicaid program pursuant to government contract. 508 F.2d at 48. False claims need not be made directly against the United States. See text accompanying notes 27-31 *supra*.

120. 508 F.2d at 48-49.

forfeitures for only fifty.¹²¹ The Court of Appeals for the Fifth Circuit agreed that the number of forfeitures might be reduced to reflect a fair ratio to damages.¹²² Although, an earlier Fifth Circuit opinion apparently had approved the opposite view:¹²³

[T]he \$2,000 forfeiture is not something ancillary or discretionary It is not surprising, in light of the language of the statute, that the forfeiture amount has been held to be mandatory and beyond the power of the courts to modify no matter how disproportionate the forfeiture may seem in relation to the actual damage suffered by the government.

No matter which view prevails, civil liability for false claims against Medicaid can be much greater than the amount falsely claimed. Even in the *Peterson* case, 120 false claims amounting to \$16,153.44 resulted in assessment of fifty forfeitures of \$2,000 each.¹²⁴ Depending upon the billing procedure of the state agency, insurance carrier or other claims intermediary, the practitioner's submission of each false claim may constitute a causative act giving rise to liability. Where the claims are forwarded as itemized by the "provider," his submission of each claim to the Medicaid agent causes the agent to present each one to the United States. Since the number of claims is not fortuitous or beyond the defendant's knowledge or control, a forfeiture might be assessed for each one.¹²⁵ Therefore, liability for a \$2,000 forfeiture might result from each false claim, *e.g.*, a twenty-five dollar examination, or an overcharge or "shorting" of a few cents.

VIII. Conclusion

The FCA provides a potentially effective remedy and deterrent to Medicaid fraud and abuse. The authorization of *qui tam* suits may reduce the chance that fraud will go undetected by giving private citizens financial incentive to expose it. Many who might profit by bringing suit are employees and patients of dishonest practitioners

121. *Peterson v. Richardson*, 370 F. Supp. 1259, 1267-68 (N.D. Tex. 1973), *aff'd sub nom. Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied sub nom. Peterson v. Matthews*, 423 U.S. 830 (1975).

122. 508 F.2d at 55.

123. *United States v. Ridgley State Bank*, 357 F.2d 495, 499 (5th Cir. 1966)(dictum)(citations omitted).

124. 370 F. Supp. at 1267-68, *aff'd*, 508 F.2d at 55.

125. *See United States v. Bornstein*, 423 U.S. 303 (1976); *see text accompanying notes 48-52 supra*.

and testing labs. Litigation can be costly, but the private plaintiff may avoid substantially all of the expense if the Government chooses to intervene in the action. If the *qui tam* plaintiff lacks the resources to maintain the suit, he may be able to resort to a contingent fee arrangement with an attorney willing to advance or guarantee the expenses.

The FCA's criminal sanctions are more severe than those in the Medicaid law, and the FCA provisions for double damages and forfeitures expose the defendant to greater liability than an action for actual damages. The Government is more likely to be made whole, and the defendant less likely to profit from his wrongdoing. Perhaps most important, a relatively small false claim may result in a relatively large liability.

If the applicability of the FCA and its *qui tam* provisions to Medicaid fraud becomes more widely known, it might have significant remedial and deterrent effects. Medicaid and Medicare "providers" will be aware that financial motives may prompt employees, associates and patients to supplement the Government's efforts to detect fraud and abuse and sue for recovery. They may realize that the potential losses from false claims are greater than the potential gains.

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