

NORTH CAROLINA ENACTS *QUI TAM* REMEDIES AGAINST MEDICAID FRAUD

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North Carolina has a new False Claims Act (“State FCA”) effective January 1, 2010, permitting private citizens to file civil *qui tam* (whistleblower) actions in the State’s name to recover treble damages, plus civil penalties, costs, and attorneys’ fees against hospitals and Medicaid providers who submit false or fraudulent claims for payment or approval. The new act (House Bill 1135), codified under Chapter 1, Article 52 (N.C.G.S §§1-605 through 617), applies to all claims submitted to the state (education, transportation, education, for example), not just claims for Medicaid reimbursement.

The potential financial impact created by the new legislation could be significant to hospitals and other health care providers particularly in the knowing retention of overpayments. In addition to the provision for treble damages, the new act provides for larger civil penalties of \$5,500 to \$11,000 per claim. The new act coincides with recent amendments to the federal false claims act which enlarges penalties for knowingly retaining Medicare or Medicaid overpayments and for making false or fraudulent claims for payment. North Carolina’s new FCA imposes liability to a person who “knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the State or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the State.” The act defines “obligation” as “an established duty, whether or not fixed, arising ... from the retention of any overpayment.” In other words, “knowingly and improperly” failing to return an overpayment, when there is an “established duty” to do so, becomes the basis for a civil action and penalties.

Under the State FCA, civil actions for false claims may be brought by either private persons or the Attorney General. If a private person brings the action, he or she is required to serve a copy of the complaint together with “written disclosure of

substantially all material evidence and information the person possesses” on the Attorney General who may choose to intervene and proceed with the action. If the State intervenes and proceeds with the action, it assumes primary responsibility for its prosecution. The *qui tam* plaintiff retains the right to continue as a party, subject to certain limitations. If the State elects not to proceed with the action, the *qui tam* plaintiff has the right to prosecute the action, but the State can continue to monitor it, receive copies of deposition transcripts, and, on motion for good cause, intervene at a later date. A successful plaintiff may receive 15 to 30 percent of the recovered proceeds of the action or settlement of the claim, plus attorneys’ fees and costs. Once filed, an action may be dismissed voluntarily by a *qui tam* plaintiff only if the court and the Attorney General have given written consent.

The act also provides protection to whistleblower employees discharged, demoted, suspended, threatened, or harassed who initiate actions as *qui tam* plaintiffs or participate in the investigation or prosecution of a State FCA action. Relief includes reinstatement, two times the back pay, interest on the back pay, litigation costs, and attorneys’ fees.

In addition to the new *qui tam* actions and other civil remedies, the State FCA contains provisions for a “civil investigation demand” (CID), an administrative subpoena by the Attorney General to obtain documents or objects relevant to an investigation under the act. CID’s can be served on any person, not just someone who may be the subject of an investigation. And a CID may include an express demand for any “product of discovery,” including the original or duplicate of any deposition, interrogatory, document, etc. obtained by any method of discovery in any judicial or administrative proceeding. Production of documents and objects in response to a CID must be made under a sworn certificate by the person to whom the demand is directed stating that all of the documentary material required by the demand and in the possession or control of the responding party has been produced and made available.

House Bill 1135 made no changes to North Carolina’s current Medical Assistance Provider False Claims Act (N.C.G.S. §108A-70.10 et seq.) which provides statutory relief

and penalties nearly identical to those under the new State FCA against Medicaid providers who knowingly present false or fraudulent claims for payment. The old law also contains CID provisions similar to the new act and includes provisions for interrogatories and examinations under oath. But actions may not be brought under both acts.

The new act does, however, amend Chapter 108A and give new enforcement ammunition to the Attorney General by providing for a “healthcare fraud subpoena to produce documents.” These subpoenas can be used to compel a corporation or governmental entity, not individuals, to produce documents relevant to a criminal investigation of a violation of N.C.G.S. §108A-63, the Medical Assistance Provider Fraud statute. The new act amends that statute by creating a new legal basis for criminal liability, making it unlawful for a provider to knowingly and willfully execute or attempt to execute a scheme or artifice to defraud the Medical Assistance Program by way of false pretenses or representations.

Finally, House Bill 1135 provides a new obstruction of justice offense (NCGS §108A-63(f)), making it unlawful for any provider to make a false entry in or to alter, destroy, or conceal or make a false statement about a record related to the provision of services under the Medicaid Program.