

MEMORANDUM

TO: HEALTH CARE CLIENTS

DATE: April 16, 2007

RE: New York Enacts State False Claims Act And Steps Up Medicaid Fraud Enforcement

I. INTRODUCTION

New York has the largest Medicaid program in the country, spending approximately \$50 billion per year. This week, New York enacted its own false claims act, with a “qui tam” whistleblower provision, and appointed James Sheehan, a career prosecutor from the Eastern District of Pennsylvania specializing in complex health care enforcement, as the New York State Medicare Inspector General. It appears that Governor Elliot Spitzer and Attorney General Andrew Cuomo are following through on campaign promises to strengthen enforcement against Medicaid fraud. While vigorous enforcement of anti-fraud provisions of course has public benefit, increased investigatory activity can also sweep too broadly. These developments underscore the importance for health care and life sciences companies doing business in New York to enhance their compliance activities.

II. NEW YORK'S STATE FALSE CLAIMS ACT

The federal False Claims Act, 31 U.S.C. §§ 3729, *et seq.* (the “FCA”), first enacted after the Civil War, has traditionally been the primary means for enforcement against health care fraud, including Medicare and Medicaid fraud. The FCA contains “qui tam” provisions permitting private persons to bring suit on behalf of the government in exchange for a share of the recovery, and has been touted as a significant tool for combating fraud in federal and state programs, including Medicaid. Recently, however, states have been enacting their own false claims acts with qui tam provisions, permitting private plaintiffs to bring suit in state courts on behalf of state governments. Moreover, in early 2006,

Congress passed the Deficit Reduction Act of 2005, P.L. 109-71 (the “DRA”), giving states a financial incentive to do so.¹

New York State’s Legislature has tried often in recent history to enact its own false claims act, and until now unsuccessfully. For example, during the 2005-2006 term, there were five bills introduced in the Assembly and Senate offering a false claims act, and each bill died before reaching the Governor’s desk.² On April 9, 2007, however, Governor Spitzer signed legislation implementing the Health and Mental Hygiene Budget for the 2007-2008 Fiscal Year. New York State’s False Claims Act (the “New York FCA”) is tucked away inside this legislation.³ Given the pressure to enact the budget and the accompanying celerity with which this budget bill moved through the Assembly and the Senate, this legislation received little notice until signed into law. Nevertheless, the New York FCA is immediately effective, and entities having any interaction with New York’s Medicaid programs are immediately potential targets of an enforcement action under that statute – either by the New York State government or a qui tam plaintiff.

The New York FCA is modeled after the federal FCA and should in fact operate very similar to the FCA. Below are some of the highlights of the New York FCA:

- New York State, any local New York governments, and any private citizen (as a qui tam plaintiff) can institute an enforcement action;

¹ See Reed Smith Health Care Bulletin HC-2006-01. This bulletin is posted in Reed Smith’s on-line library at http://www.reedsmith.com/_db/_documents/hc0601.pdf. New York is the 17th jurisdiction, aside from the federal government, to enact a false claims act with qui tam provisions. The others are California, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, Nevada, Tennessee, Texas and Virginia.

² See 2005-2006 New York Legislature A. 5110, A. 10406, A. 11498, S. 1991, S. 6872.

³ See 2007-2008 New York Legislature S. 2108 or A. 4308, available at <http://assembly.state.ny.us/leg/?bn=S02108>.

- Each “claim” that provides a basis for liability to New York State is subject to a civil penalty of \$6,000 to \$12,000
- Treble damages are available to New York State and its local governments;
- There are seven (7) grounds for liability; each is duplicative of the grounds for liability under the federal FCA. Each ground for liability involves some sort of intentional or reckless falsity in obtaining payment from, or avoiding payment to, the New York State government;
- Acts that may subject one to liability are not actionable if they are caused by mere negligence or a mistake; and
- Like the federal FCA, qui tam plaintiffs are entitled to a percentage of the proceeds collected from the defendant, which can range from 15% to 30% – a significant incentive.

III. RENEWED NEW YORK STATE INTEREST IN MEDICAID FRAUD ENFORCEMENT

The New York FCA is a component of the current administration’s repeatedly expressed interest in stepped-up enforcement against Medicaid fraud. Since January 1, 2007 – when Eliot Spitzer and Andrew Cuomo began their terms as Governor and Attorney General, respectively – they have taken several additional actions to further this goal.

In January, Attorney General Cuomo commissioned District Attorney Joe Hynes to conduct a thorough review of New York’s Medicaid Fraud Control Unit (“MFCU”) to improve the effectiveness of its operations. Shortly thereafter, he announced the creation of a joint task force between his office and the authorities in Nassau County, with the primary goal being to identify and pursue suspected cases of Medicaid fraud. The program will enable the two offices to share resources and information, which represents a dramatic shift from the state’s previous practice of waiting for local governments to refer cases of suspected Medicaid fraud.

Last week, shortly before signing the budget bill containing the New York FCA, Gov. Spitzer nominated James G. Sheehan to serve as New York State Medicaid Inspector General. The Medicaid Inspector General oversees the Office of the Medicaid Inspector General, which is charged with enforcement of the state laws governing abuse and fraud. Mr. Sheehan has served as an Associate U.S.

Attorney for Civil Programs in the Eastern District of Pennsylvania since 1980, specializing in health care fraud enforcement. While working in Pennsylvania, he prosecuted significant cases against health care entities and worked extensively with qui tam plaintiffs and their lawyers to identify and pursue health care fraud cases. In addition to enacting the New York FCA, the Legislature also strengthened the Office of the Medicaid Inspector General – adding 157 new positions, including 100 auditors – to enable greater fraud enforcement.

IV. CONCLUSION

Given the resources New York is now putting into Medicaid fraud enforcement, it is clear that investigative activity in this area will be increasing. Any entity that interacts with the Medicaid programs of New York State or any local government in the state should review its compliance procedures now to ensure that they are current, and that they are working as intended. In addition, procedures for handling investigative requests and subpoenas should be reviewed, so that dealings with the state under these new enforcement initiatives can be smoothly coordinated and handled properly from the start.

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