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Cracking Down on Medicaid Provider Fraud – The Straight Facts on the False Claims Act

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Why Missouri Needs a False Claims Act

- **To be good stewards of limited health care resources**
- **Federal law allows States to keep an additional 10% of money recovered if they have a State False Claims act that is at least as effective as the federal act.**
- **To promote a business climate that is honest and straightforward. A False Claims Act creates a level field of opportunity for honest providers.**
- **False Claims Acts are a proven success. The federal False Claims act has a track record of returning more than \$16 billion in stolen funds.ⁱ**
- **False Claims Acts are effective, cost-efficient fraud-fighting tools. Studies show that the federal government recovers \$15 for every \$1 invested in prosecuting false claims act health care provider fraud cases.ⁱⁱ**
- **Medicaid fraud is not a victimless crime. Every dollar obtained fraudulently means that someone will not get the health care they need.**

What is Provider Fraud?

- Providers of healthcare services commit fraud when they engage in dishonest practices which are intentional, ongoing and systematic.
- Provider fraud is estimated to comprise up to 90% of fraud against Missouri's Medicaid program and cost the state from \$200-\$500 million per year.
- Examples of fraud uncovered at the national level through the False Claims Act include: billing for goods and services that were never delivered or rendered; billing for work or tests not performed; charging more than once for the same goods or service; and billing for brand-named drugs when generic drugs are actually provided.

How Can Missouri Combat Fraud?

- The Missouri Legislature can pass a bill to enact a state version of the Federal “False Claims Act.” This gives the state more effective means for the Attorney General to prosecute providers who commit fraud against the state.
- A False Claims Act bill was passed by the Senate during the 2006 legislative session but no action was taken by the full House of Representatives.

Are Other States Using the False Claims Act?

- Yes, 19 states have enacted False Claims Acts. Fourteen of these, and the District of Columbia have whistleblower provisions: California, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Nevada, New Hampshire, New Mexico, Tennessee, Texas, and Virginia.ⁱⁱⁱ
- Texas successfully recovered \$55 million in Medicaid fraud from three pharmaceutical companies. There are many other examples of states which have successfully prosecuted Medicaid provider fraud.
- The federal Deficit Reduction Act passed in February 2006, through the leadership of Senator Charles Grassley (R-Iowa), urges states to implement False Claims Acts that are at least as effective as the Federal False Claims Act that recovers Medicare and other fraud perpetrated against the federal government.

How does a False Claims Act Work?

- A whistleblower is allowed to bring a suit under seal in the name of the state against parties who have committed fraud.
- The whistleblower must give control of the suit to the Attorney General.
- The Attorney General decides whether the suit should proceed or be dismissed.
- If fraud is found, the person who commits fraud pays treble damages (to cover costs of the investigation, lost interest and whistleblower awards).
- Whistleblowers may get awards of 15-30% of the award, depending on circumstances.

Why are whistleblowers important?

- An insider is often the only person who both understands the fraud and has the evidence to support a fraud charge
- Whistleblowers need incentives to overcome the certainty of losing employment and perhaps being blackballed in their profession
- Whistleblower cases take time and put tremendous financial and emotional stress on whistleblowers and their families

Will a state False Claims Act discourage physicians and other health providers from participating in Medicaid?

- This is very unlikely. The Federal False Claims Act weeds out fraud in committed by Medicare and Medicaid providers (as well as fraud in other programs), and hasn't discouraged doctors from providing services. The impact of a state False Claims Act should not be significantly different on providers.

- Providers claim that Medicaid billing is complex, making it difficult to bill accurately and that their reimbursement rates are too low. These problems can be fixed and should not be used to prevent prosecution of intentional fraud.

Will providers have frivolous suits brought against them?

- This is unlikely. A lawyer must take the case and would do so only if there was a good chance of winning. That requires a substantial amount of evidence pointing to substantive fraud.
- The case must present new information. If the facts have been previously disclosed in a news article or audit, for example, the case is thrown out.
- If a whistleblower brings a frivolous action, the defendants are awarded reasonable attorneys' fees and expenses.
- During the last 20 years, nearly 5000 cases have been filed against fraudsters. Only NINE cases have been deemed frivolous in a court of law.^{iv}

Legislation Passed by the Missouri Senate

Senate Bill 1742, which was approved by the Senate in the 2006 Legislative session, provided for a strong False Claims Act in Missouri. Following is a summary of the bill.

Who will be prosecuted for fraud?

- Only those who ***“knowingly”*** present claims for services that were not provided, were not medically necessary, or were in lesser value than those for which billing was submitted. ***Billing errors are not fraud.***
- Only those who knowingly solicit or receive a kickback for referring or arranging for the furnishing of services. ***There is an exclusion for rebates or discounts that are properly disclosed and appropriately reflected in the claim.***
- Those who conduct business within the contractual agreements with the state of Missouri have no need to be concerned about a state False Claims Act.

Consequences of committing fraud

- Committing fraud is a class C felony on the first conviction and a Class B felony on the second. Any “natural person,” that is an individual, who commits fraud is barred from being a Medicaid provider for 10 years.
- An individual may receive a suspended sentence for a first violation that involves less than \$50,000.
- An individual may not receive a suspended sentence for any second violation or subsequent violation. A person convicted of a second or subsequent violation must serve at least 85% of any term of imprisonment ordered as punishment.

Role of whistleblowers

- Any person may initiate a civil action in the name of the state (This is called “qui tam” in legalese). BUT the whistleblower must bring the complaint and written disclosure of all evidence to the Attorney General. This complaint is kept under seal for at least 120 days. The AG may elect to intervene and proceed with action

after 60 days. During the time the complaint is kept under seal, the AG may talk with the accused provider to facilitate a resolution of the claim before beginning judicial proceedings.

- The case only goes forward in court if the Attorney General decides to act on it.
- The whistleblower's action in the proceedings may be limited if the AG shows that such participation hampers an investigation or prosecution OR the defendant shows that their participation is unduly harassing or causes undue burden or expense
- If a court rules against a defendant, the whistleblower shall be awarded 15-25% of the monetary proceeds resulting from the action or settlement of claims.
- If the court finds that an action initiated by a whistleblower is based primarily on information not provided by that person (such as an audit or legislative report), the whistleblower shall be awarded no more than 10%
- If the court finds that the whistleblower participated in the fraud, it may reduce the amount of monetary reward

Protections for the whistleblower

An employer cannot fire, demote, suspend, threaten, harass or other discriminate against a whistleblower. An employer who violates this must reinstate the whistleblower without loss of seniority, pay two times the amount of lost back pay, pay interest on back pay, compensate for any special damages and provide any other relief needed to make an employee whole.

Protections for employers

- None of the whistleblower's right listed above are applicable if the employee files a frivolous or fictitious claim, has participated in perpetrating the fraud being investigated, or is convicted of criminal conduct arising from perpetrating fraud.
- Any person who intentionally files a false report or claim alleging fraud is guilty of a class D felony.

Statue of limitations

The stature of limitations is five years from the time of payment or from the time the claim was submitted, if payment was not made. Health care providers must maintain adequate records for at least 5 years.

ⁱ Taxpayers Against Fraud, powerpoint presentation "How States can recover stolen money", 2006

ⁱⁱ *ibid*

ⁱⁱⁱ Barger, Bucy, Eubanks, and Raspanti, States, Statutes and Fraud: *An Empirical Study of Emerging State False Claims Acts*, 2006

^{iv} <http://www.taf.org/FCA-2006report.pdf>