New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200

NYSBA

COMMERCIAL AND FEDERAL LITIGATION SECTION

1996-1997 Officers

MARK C. ZAUDERER
Chair
Solomon Zauderer Ellenhorn
Frischer & Sharp
45 Rockefeller Plaza
New York, NY 10111
212/956-3700
FAX 212/956-4068

BERNICE K. LEBER
Chair-Elect
Arent Fox
1675 Broadway
New York, NY 10019
212/484-3930
FAX 212/484-3990

JOHN M. NONNA
Executive Vice-Chair
Werner & Kennedy
Paramount Plaza, 46th Fl.
1633 Broadway
New York, NY 10019
212/408-6960
FAX 212/408-6950

MARGARET A. DALE
Secretary
Solomon Zauderer Ellenhorn
Frischer & Sharp
45 Rockefeller Plaza
New York, NY 10111
212/956-3700
FAX 212/956-4068

SHARON M. PORCELLIO
Treasurer
Lippes Silverstein Mathias
& Wexler
700 Guaranty Bldg.
28 Church Street
Buffalo, NY 14202
716/853-5100
FAX 716/853-5199

GERALD G. PAUL
Delegate to the House of Delegates
Flemming, Zulack & Williamson, LLP
35th Floor
One Liberty Plaza
New York, NY 10006
212/412-9540
FAX 212/964-9200

FORMER CHAIRS:
Robert L. Haig
Michael A. Cooper
Shira A. Scheindlin
Harry P. Trueheart, III
P. Kevin Castel
Mark H. Alcott
Gerald G. Paul

REPORT OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION OF THE NEW YORK STATE BAR ASSOCIATION ON THE CIVIL FALSE CLAIMS ACT: ENLISTING CITIZENS IN FIGHTING FRAUD AGAINST THE GOVERNMENT

May 1996

Report of the
Civil Prosecution Committee
of the
New York State Bar Association
Commercial and Federal Litigation Section

The Civil False Claims Act
Enlisting Citizens In Fighting Fraud Against The Government

In October 1995 the United States Department of Justice announced that the government had recovered in excess of one billion dollars in civil fraud cases brought under the revamped "whistleblower" provisions of the Federal False Claims Act. The Assistant Attorney General for the Civil Division, Frank Hunger, praised the 1986 bipartisan effort of Senator Charles Grassley and Representative Howard Berman which overhauled and strengthened the Act as a work of "leadership and vision ... The recovery of over $1 billion demonstrates that the public-private partnership encouraged by the statute works and is an effective tool in our continuing fight against the fraudulent use of public funds."[1]

The Federal False Claims Act, 31 U.S.C. § 3729 ff., is a civil statute allowing the government to recover treble damages and penalties for fraud against the Federal government. The broadly drafted language of the statute aims to capture all kinds of fraud against the government and federally funded government entities. The "whistleblower", or qui tam, provisions of the statute permit a private citizen (individual or corporation) with knowledge of fraud against the Federal Government - known as the "relator" - to bring an action on behalf of the United States and to receive, if successful, a percentage of the recovery.

Since its overhaul in 1986, the Federal False Claims Act has proven to be a powerful means of exposing fraud against the government and recovering defrauded funds. This report describes the history and framework of the Act, outlines its use since 1986, and, on the basis of its success since that time, recommends the enactment of similar legislation in New York.

---

[1] U.S. Department of Justice Office of Public Affairs press release, "Justice Department Recovers Over $1 Billion In Qui Tam Awards And Settlements," October 18, 1995. The figure of $1 billion represents one-third of all recoveries achieved by the Department of Justice in civil fraud cases in the same time period.

History

The Federal False Claims Act, including its qui tam[2], provisions, originated with President Lincoln in 1863 as a response to fraudulent and abusive practices by defense contractors during the American Civil War.[3] While the statute was a wartime initiative, however, it was not limited to defense procurement fraud. When the "Lincoln Law" was enacted, the concept of private citizen enforcement was an accepted part of the U.S. statutory framework. Ten of the fourteen statutes passed by the first Congress contained qui tam provisions designed to supplement government enforcement, including statutes relating to bank regulation, import duties and copyright infringement.[4] As a California court noted in 1989, the qui tam laws "are firmly rooted in the American legal tradition."[5]

The False Claims Act Since 1986

In 1986, the False Claims Act was substantially amended to provide a powerful and pre-eminent framework for fighting fraud against the Federal Government through a combination of private and public enforcement.[6] The Senate Report on the 1986 Act

---

[2] Qui tam is the short form of qui tam pro domino rege quam pro seipso: "he who as much for the king as for himself." The qui tam action was borrowed from the English common law, which had recognized it since the thirteenth century. Note, "The History and Development of Qui Tam," 1972 Wash. U.L.Q., 81, 83, citing 3 Blackstone, Commentaries on the Laws of England 160 (1st ed. 1768).

[3] Act of March 2, 1863, at ch. 67, 12 Stat. 696-98. It provided for double damages, a $2,000 penalty for each false claim, and a 50% recovery to the qui tam relator.

[4] U.S. ex rel. Stillwell v. Hughes Helicopters, 714 F.Supp. 1084, 1086 n.2 (C.D. Cal. 1989)

[5] id. at 1086.

[6] In 1943, the Supreme Court held in U.S. ex rel. Marcus v. Hess, 317 U.S. 537, reh. denied, 318 U.S. 799 (1943) that nothing in the False Claims Act barred a qui tam suit based entirely on information already disclosed in a government indictment. Consequently, Congress amended the Act to bar all suits based on information already in the government's possession. The amendment was intended to bar "parasitic suits" but had the effect of prohibiting qui tam actions not only where the government was already pursuing an action based on the fraud in question, but where the government had the information but was not taking steps to investigate or prosecute an action. The amendment severely inhibited the use of the qui tam law. The 1986 amendments included a provision to ease this restriction by barring only those suits based on defined categories of publicly disclosed information, unless

stated the Act's purpose to be "not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward. In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease the wave of defrauding public funds."[7]

The principal features of the post-1986 Act are the following:

a. Almost any false claim or false statement that involves payment or a demand for payment from the Federal Government, or which deprives it of revenues in some way, is actionable. Both making, and causing to be made, false claims or statements are covered; for example, a subcontractor who makes false claims for payment to a general contractor knowing that an overpayment by the government will result is liable.[8] False claims made under the Internal Revenue Code are expressly excluded from the Act and its qui tam provisions.[9]

b. Violations of the Act are punishable by treble damages and penalties of up to $10,000 per violation, or double damages if the violator voluntarily disclosed the fraud to the government and cooperated with its investigation.[10]

c. The 1986 amendments clarified the disputed issue of what the Act meant by

---

the plaintiff is the "original source" of the information (31 U.S.C. § 3730 (e) (4)). The 1986 amendments, in addition, imposed an upper limit of 10% on recoveries to the relator in a qui tam action based primarily on public disclosures (31 U.S.C. § 3730 (d) (1).

[7] S. Rep. No. 345, 99th Cong., 2nd Sess. (July 28, 1986), reprinted in U.S. Code Cong. & Admin. News 5266, p.2.

[8] 31 U.S.C. § 3729(a)(1) provides that any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval" is liable to the government for treble damages and penalties of up to $10,000 per violation. Under § 3729(a)(2) making, using or causing to be made "a false record or statement to get a false or fraudulent claim paid or approved" is similarly proscribed. § 3729(a)(3) creates liability for conspiracy "to defraud the Government by getting a false or fraudulent claim allowed or paid." Other provisions of § 3729(a) attempt to "cover the field" of fraud against the government, such as delivery of less property than contracted for.

[9] 31 U.S.C. § 3729 (e).

[10] 31 U.S.C. § 3729 (a) (A)-(C).

the "knowing" submission of false claims, specifically to include not just actual knowledge, but also deliberate ignorance and reckless disregard for the truth. Thus government contractors have a duty to ascertain that they are entitled to the public funds to which they lay claim, and to prevent the conscious avoidance of an enquiry which would reveal the existence of fraud.[11]

d. The government must prove its case on a "preponderance of the evidence."[12]

e. The statute of limitations is six years from the date the fraud was committed.[13] The statute also permits a plaintiff to rely upon fraudulent concealment which allows an action to be brought within three years from the date the responsible government official knew or should have known about the fraud. There is an absolute limit of ten years from the date the fraud was committed.[14]

f. Above all, the 1986 amendments were designed to encourage private citizens to come forward with information about fraud against the government by strengthening the qui tam provisions of the Act. The qui tam law works in the following way:

i. The relator's complaint is filed under seal without service on the defendant and is delivered, together with a "disclosure statement" containing all facts material to the action, to the Department of Justice and the local United States Attorney.[15] The government then has a period of time[16] within which to investigate the relator's allegations in the complaint and decide whether to "intervene in," (or take over) the

---

[11] S. Rep. No. 345, 99th Cong., 2d Sess. 20, at 21.

[12] 31 U.S.C. § 3731 (c): " ... the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence."

[13] 31 U.S.C. § 3731 (b)

[14] 31 U.S.C. § 3731 (b) (2)

[15] 31 U.S.C. § 3730 (b) (2)

[16] While the statutory period of time for the government's investigation is 60 days, 31 U.S.C. § 3730 (b) (2), the government almost invariably seeks to extend this period under 31 U.S.C. § 3730 (b) (3), and complex qui tam cases can be under seal for as much as two years or longer.

action or to allow the relator to pursue the action alone.[17]

ii. If the government decides to intervene, the government has "primary responsibility for prosecuting the action," but the relator has the right to "continue as a party" to it, subject only to conduct which may hinder the government's prosecution of the case or would be repetitious, irrelevant or harassing.[18]

iii. The government may dismiss or settle an action over the objection of the relator provided that the court has afforded the relator an opportunity to be heard.[19]

iv. The relator's share of the recovery is 15-25% if the government intervenes,[20] and 25-30% if the relator pursues the action alone.[21] In certain circumstances, the relator's share may be limited to 0-10%.[22] Courts are authorized to reduce the share of a relator who "planned and initiated" the wrongdoing, and a relator who is criminally

---

[17] 31 U.S.C. § 3730 (b) (2)

[18] 31 U.S.C. § 3730 (c) (1), (2) (C) and (D).

[19] 31 U.S.C. § 3730 (C) (2)

[20] The average relator share is 17.9%: see Department of Justice press release, supra, note 1.

[21] 31 U.S.C. § 3730 (d) (2). Department of Justice figures indicate that $15.5 million has been recovered since 1986 in qui tam cases in which the government did not intervene (in addition to the $1 billion recovered in cases in which the government did intervene or settle). The average relator share was 28%: see Department of Justice press release, supra, note 1. While statistics are not available on the fate of cases in which the government does not intervene, it would appear that most are dismissed or not pursued by the relator; the government intervenes in 24% of all qui tam cases filed, and of the remaining 76%, only 38 were known to be in active litigation as of September 1995: see Taxpayers Against Fraud, "False Claims Act and Qui Tam Quarterly Review," October 1995 (available from The False Claims Act Legal Center, 1250 Connecticut Avenue, NW, Suite 401, Washington, DC 20036.)

[22] Where an action is based primarily on "specific information" that is publicly disclosed, the relator's share may be limited to up to 10%. 31 U.S.C. § 3730 (d) (1).

convicted must be dismissed from the action.[23]

v. The Act prohibits actions "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."[24] An original source is defined as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action."[25] The "public disclosure" bar is intended to prohibit qui tam cases in which the relator seeks to rely on information that is acquired from public sources - so-called "parasitic" claims - unless the relator is an original source of the information as defined in the Act. This issue has been heavily litigated and the circuits sometimes disagree on what disclosures are "public"[26] and what constitutes "direct and independent" knowledge.[27] The "public disclosure" bar

---

[23] 31 U.S.C. § 3730 (d) (3)

[24] 31 U.S.C. § 3730 (e) (4) (A)

[25] 31 U.S.C. § 3730(e)(4)(B)

[26] Some courts have held that disclosures made during discovery or pleadings filed in civil litigation are "publicly disclosed," whether or not the discovery materials were actually filed and accessible to the public. U.S. ex rel. Stinson v. Prudential Insurance, 944 F.2d 1149 (3d Cir. 1991); U.S. ex rel. Kreindler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1158 (2d Cir.) cert. denied, 113 S.Ct. 2962, 125 L.Ed.2d 663 (1993). The D.C. Circuit, however, has held that discovery materials that are not filed with the court and only theoretically available to the public are not publicly disclosed. U.S. ex rel. Springfield Rail Terminal Co. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994)

[27] e.g., in U.S. ex rel. Stinson v. Prudential Insurance, 944 F. 2d 1149 (3d Cir. 1991), a law firm brought a qui tam action based on information acquired through discovery in another case. The court held that the action was barred under 3730(e)(4)(A), but stated: "Undoubtedly, it is not necessary for a relator to have all the relevant information in order to qualify as 'independent.' See Implementation Hearing, at 3 ('A party with knowledge of fraud against the Government ought to be able to maintain a qui tam action as long as he had some of the information in advance of the public disclosure.' (statement of Sen. Grassley). Nonetheless, the relator must possess substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand

ensures that suits cannot be filed by persons who have contributed nothing substantial to uncovering the essential elements of the case.

vi. The 1986 amendments created a federal cause of action for employees who experience retaliatory conduct by their employers because of their acts in furtherance of a qui tam action, providing for double the amount of back pay plus interest, reinstatement and compensation for special damages.[28] The employee need not be a qui tam relator in order to bring an action under this section.[29]

Use of the qui tam law

The qui tam law has been particularly successful as a weapon against defense procurement fraud and, increasingly, health care fraud.[30] In 1995, these two categories together accounted for 84% of all qui tam cases filed. (48% were defense cases and 36% health care cases.)[31] A random sample of recent qui tam cases brought in other fields includes cases involving construction and housing,[32] environmental compliance,[33] scientific

---

the significance of a publicly disclosed transaction or allegation." (at 1160); in U.S. ex rel. Barajas v. Northrop Corp., 5 F.3d 407 (9th Cir. 1993) the government joined the relators' action and filed an amended complaint. Two months later, the government obtained a criminal indictment against Northrop, which pleaded guilty, The relators were then permitted to file an amended complaint which included the allegations contained in the indictment. Defendants argued that the complaint should be dismissed because it was based on publicly disclosed information. The court ruled against the motion to dismiss: "Barajas is an original source with respect to the proposed amendments if he played some part, whether direct or indirect, in the public disclosure of the allegations that are the subject of the proposed amendments." (at 411)

[28] 31 U.S.C. § 3730 (h)

[29] Neal v. Honeywell, 33 F.3d 860 (7th Cir. 1994); Mikes v. Strauss, 889 F.Supp. 746 (S.D.N.Y. 1995)

[30] In 1992, 5% of qui tam cases filed were health care fraud cases. In 1995, the figure was 36%: see Department of Justice press release, supra, note 1.

[31] id.

[32] U.S. ex rel. Virgin Islands Housing Authority v. Coastal General Construction Services Corp. et al., 27 F.3d 911 (3rd Cir. 1994).

research,[34] agricultural subsidies and orders,[35] banking,[36] postal services,[37] and telecommunications.[38]

The largest single recovery in a qui tam suit to date was in April 1994, when defense contractor United Technologies Corporation agreed to pay the Government $150 million in settlement of a qui tam action commenced by its former chief financial officer. In March 1989, the relator had allegedly delivered a report to corporate management on alleged fraudulent billing practices by the company's Sikorsky Aircraft Division going back to at least 1982. According to the complaint in the action, management ordered that all copies of the report be destroyed. The relator's case alleged, in essence, that United Technologies habitually billed for work not yet performed. The Department of Justice found that the inflated progress payments constituted interest-free loans from the government and resulted in additional debt service costs to the government. No criminal charges were filed against United Technologies, nor was it barred from or penalized in respect of future government contract work.

The largest health care fraud recovery in a qui tam case was the settlement reached with National Health Laboratories ("NHL") in November 1993. In the late 1980s, Jack Dowden, then a sales manager with MetWest, Inc., a rival diagnostic testing laboratory, reported to his company executives that NHL was engaging in Medicare billing practices involving the "unbundling" of blood test packages that Dowden (and later, after Dowden had filed a qui tam case, the Federal Government) characterized as fraudulent.[39] MetWest did

---

[33] U.S. ex rel. Fallon et al. v. Accudyne Corp. and Alliance Techsystems, Inc., 880 F. Supp. 636 (W.D. Wis. 1995); 1995 U.S. Dist. LEXIS 11931 (W.D. Wis. June 19, 1995).

[34] U.S. ex rel. Berge v. The Board of Trustees of the University of Alabama et al., (D MD No. N-93-158)

[35] U.S. ex rel. Sequoia Orange Co. v. Sunland Packing House Co., et al., 912 F.Supp. 1325 (E.D. Cal. 1995).

[36] U.S. ex rel. Lamar v. Burke and Arsenal Credit Union, 894 F.Supp. 1345 (E.D. Mo. 1995).

[37] U.S. ex rel. Eitel v. Evergreen International Airlines, Inc., et al., 886 F.Supp. 750 (W.D. Wash. 1995).

[38] U.S. ex rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810 (9th Cir. 1995).

[39] NHL packaged a series of up to 42 blood tests and marketed them to doctors at a very low price. NHL added two unnecessary tests to the package and billed Medicare not at the package price but at the price which included the additional tests, billed individually. This

not heed Dowden's warning. Dowden was effectively demoted and finally resigned rather than participate in the practices, which MetWest (and other national diagnostic testing laboratories) had adopted. NHL's settlement with the government of civil and criminal charges came to $111 million. MetWest and its parent, MetPath, Inc., also the subject of a qui tam suit by Dowden, later reached a $40 million settlement with the government.

State False Claims Acts

Several States have followed the federal lead by enacting False Claims Acts to combat fraud committed against their own programs.

The Florida False Claims Act (Fla. Stat. Ann. § 68.081-092 (Supp. 1995)) is similar to the Federal legislation, but contains a number of additional protections and clemencies for defendants: (i) government employees and ex-employees are barred from bringing qui tam actions based on knowledge obtained in the scope of their employment, and attorneys for the State government are totally barred from bringing actions (§ 68.087 (4)); (ii) persons who obtained their information from a government employee not acting in the scope of employment are barred from bringing actions (§ 68.087 (5)); and (iii) local governments cannot be sued under the Act (§ 68.087 (6)).

The Tennessee Medicaid False Claims Act (Tenn. Code Ann 75-5-182, et seq. (1994), as the name suggests, is limited to fraud committed against the State's health benefits program for the poor and disabled. The legislation substantially mirrors the Federal False Claims Act. In addition, Tennessee has enacted the **Health Care False Claims Act** (Tenn. Code Ann. § 56-26-401, et seq. (1994)). This applies the same provisions to fraud committed against private health insurance companies, which under the legislation creates a liability in civil penalties and treble damages to the State (§ 56-26-403 (a) (1)).

The Illinois Whistleblower Reward and Protection Act (Ill Rev. Stat. ch. 740 § 175 (1993) substantially mirrors the Federal False Claims Act.

The California False Claims Act (Cal. Govt. Code §§ 12650-12654), enacted in 1987, is patterned after the Federal legislation. In the California Act, however, the relator's share of the recovery is between 15% and 33% if the government joins the action and between 25% and 50% if the government does not join. (§ 12652 (g) (2) and (3)). The legislation extends the authority to bring false claims actions to political subdivisions within the State (§ 12652 (b)).

---

tripled the cost that Medicare should have paid.

Proposed False Claims Acts in New York

A bill to enact a New York State False Claims Act (S.1584, A.2665) substantially the same as the Federal legislation was introduced by Senator Leichter in 1992. The bill was not reintroduced in the current session.

The New York City Public Advocate has drafted false claims legislation for New York City which was introduced into the City Council on November 16, 1995.[40] The bill is modeled on the Federal False Claims Act.[41]

The New York State Attorney General introduced a False Claims and False Information Act bill into the State legislature on April 11, 1996. The bill differs in many material respects from the Federal legislation.[42]

---

[40] Intro No. 666, Local Law to amend the administrative code of the city of New York in relation to authorizing the imposition of a civil penalty against anyone who files a false claim for payment with the city and to permit private persons to bring actions for such penalties on behalf of the city and to share in the damages awards.

[41] In addition to minor procedural differences, the most significant departures from the Federal legislation are: (1) the relator's share if the city does not join the action is between 10% and 25% (25% to 30% in the Federal legislation); (2) a relator who is found to have planned and initiated the wrongdoing must be dismissed from the action (the Federal legislation provides that the relator's share may be reduced); (3) the complaint is not filed until after the city has investigated the allegations, which may take up to 120 days. The city, if it decides to join, then must file the action within 60 days of that decision (the Federal legislation provides for the complaint to be filed with the court under seal and to remain under seal until the Department of Justice has conducted its investigation: see supra, notes 16-18 and accompanying text); (4) there are specific provisions relating to the circumstances in which city employees may bring qui tam actions (the Federal legislation does not address this issue); (5) there is no provision for civil investigative demands (for production, under the Federal legislation, of documents and information to the Attorney General: 31 U.S.C. § 3733.)

[42] The primary departures from the Federal legislation are: (1) the bill creates criminal in addition to civil liability and the attorney general is given concurrent jurisdiction with the relevant district attorney to prosecute; (2) the bill prohibits the submission of false, fraudulent or misleading information as well as the submission of false claims; (3) the victim of a violation may be a private accident and health insurance company licensed to do business in the State as well as a State agency; (3) certification by the attorney general is a condition precedent to the filing of a qui tam action; (4) the attorney general may withdraw a certification or convert a qui tam action into an attorney general civil enforcement action during the course of the action; (5) the attorney general may remove the qui tam plaintiff

Neither the Public Advocate's nor the State Attorney General's bill has been the subject of legislative hearings to date. Depending on the progress of these bills, each may merit further detailed examination in a subsequent report.

Conclusion

The Federal False Claims Act and its State equivalents have provided governments with a more powerful and more flexible means of recovering defrauded funds than common law contract claims, regulatory actions and civil penalty statutes. A statute applying to New York State and political subdivisions would provide New York with the same level of protection from unscrupulous profiteering at the expense of State and local taxpayers.

The False Claims Act's qui tam provisions are intended to serve the public interest by encouraging private parties (both individuals and corporations) with knowledge of fraud against public funds to come forward with their information and to assist and cooperate with the government's investigation. The qui tam law provides an incentive for doing so in the form of a monetary reward. Often, the qui tam bounty provides the financial wherewithal by which fraud can be brought to light. Without the likelihood of compensation, most people could not afford the risks to their careers and livelihood that becoming a whistleblower

---

from an action in his discretion if certain conditions are present; (6) the statute of limitations for qui tam actions is four years. (There are no corresponding provisions to (1) through (6) above in the Federal Act). (7) The relator's share of the recovery may be as little as $1,000 or as much as 40% of the proceeds, categorized according to whether the attorney general converts, supersedes or intervenes in the action; the relator's percentage share is determined by the attorney general according to certain stated criteria (under the Federal Act relators receive a percentage of the proceeds - there are no fixed sum payments, and the relator's share is determined by the court); (8) public disclosure is not a jurisdictional bar (as it is in the Federal Act) but a matter to be taken into account by the attorney general in determining the relator's share of the proceeds; (9) qui tam actions may not be brought against members of the Federal or State judiciary, senior Federal or State executive branch officials, or members of Congress or the State judiciary (the Federal Act bars qui tam actions by members of the armed forces against members of the armed forces and actions against members of the Congress, senior executive branch officials and members of the judiciary only if the information was known to the government when the action was brought); (10) the attorney general may proceed by way of an alternate remedy (e.g., civil money penalty) even if he does not intervene in or supersede a qui tam action (the Federal Act contemplates that the government must intervene in the action in order to pursue an alternate remedy); (11) there is no provision for civil investigative demands (see previous footnote). In addition to these departures from the Federal Act, the bill, unlike the California legislation, does not provide for the Act to apply to political subdivisions in addition to the State.

frequently entails. Such persons include employees of government contractors who (notwithstanding the anti-retaliation provisions of the Act) risk isolation, dismissal, demotion and/or permanent career injury. Qui tam actions can also provide compensation to corporations and business people whose market share has suffered as a result of fraudulent, anti-competitive and abusive practices in their industry. Corporations in that situation might otherwise see no other choice open to them than to participate in the practices, or risk bankruptcy.[43]

While the full extent to which public dollars are squandered and stolen cannot be accurately measured or predicted, the magnitude of fraud and abuse against Federal

---

[43] Two cases in point are the $111 million National Health Laboratories (NHL) case referred to above and U.S. ex rel. Wells v. Huntleigh Technology, Civil Action No. 95-95, DNJ) which was settled in 1995.

Jack Dowden, a MetWest regional sales manager, reported the practices of National Health Laboratories to MetWest corporate management not only because he believed they were fraudulent but because he was losing business to NHL, which was offering doctors rock-bottom prices and undercutting its competitors. MetWest reportedly suggested to Dowden that he keep his views to himself, and adopted NHL's billing practices. Ultimately, he filed a qui tam suit against NHL, MetPath and MetWest, and was awarded around $23 million of the total recoveries against them. Had MetPath and MetWest joined Dowden in his lawsuit instead of copying NHL's billing practices, they would have been awarded millions of dollars rather than having to pay around $40 million to settle with the government.

In the Huntleigh Technology case, Ron Wells, a Florida supplier of medical equipment, exposed the marketing and sale of a lymphedema pump that was being promoted by Huntleigh, its manufacturer, as a quality pump for which Medicare would reimburse in excess of $4000. Wells, a specialist supplier of lymphedema pumps, believed that the pump was a low quality pump reimbursable at only $500. He reported this to the government and conducted a vigorous campaign in his industry to warn doctors and other suppliers of what he believed to be a fraud. His competitors, however, did not heed his warnings, and Wells' business declined as other suppliers made huge profits by flooding the market with Huntleigh's pump. Wells' decision to refuse to participate in the rampant profiteering going on around him, and finally to avail himself of the qui tam provisions of the False Claims Act, protected both his own business interests and the U.S. taxpayers'. Wells helped clean up his industry (Medicare downgraded the reimbursement of the pump to the lower level after his complaints) and received 18% of the settlement of approximately $5 million that Huntleigh reached with the government in 1995.

Government programs continues to be documented in congressional hearings,[44] government reports[45] and the media. The need for a specific statutory provision in New York designed to proscribe, deter and assist in detecting the acts of those who would seek to rob the public purse, and simultaneously to ensure that the likelihood of recovering diverted taxpayer funds is maximized, must also be addressed. The value of the Federal False Claims Act and its qui tam provisions in so doing has been demonstrated and documented in the nine years since the current legislation came into effect.

This Report recommends that legislation modeled on the Federal False Claims Act be enacted for New York State and its political subdivisions.

Civil Prosecution Committee
May 1996

Authors:

Neil V. Getnick, Chair
Lesley Ann Skillen

---

[44] e.g., Health Care Reform: How Proposals Address Fraud and Abuse, testimony of Leslie G. Aronovitz, Associate Director, Health Financing Issues, Health, Education, and Human Services Division, before the Subcommittee on Legislation and National Security and on Human Resources and Intergovernmental Relations, Committee on Government Operations, House of Representatives, March 17, 1994 GAO/T HEHS-94-124; Fraud and Abuse: Medicare Continues to Be Vulnerable to Exploitation by Unscrupulous Providers, testimony of S.F. Jaggar, Director of Health Financing and Public Health Issues, before the Senate Special Committee on Aging, November 2, 1996, GAO/T-HEHS-96-7.

[45] e.g., General Accounting Office, Medicare: Excessive Payments for Medical Supplies Continue Despite Improvements, August 1995, GAO/HEHS-95-171; General Accounting Office, Medicare Spending: Modern Management Strategies Needed to Curb Billions in Unnecessary Payments, September 1995, GAO/HEHS-95-210; General Accounting Office, Supplemental Security Income: Disability Program Vulnerable to Applicant Fraud When Middlemen Are Used, GAO/HEHS-95-116, August 31, 1995; General Accounting Office, Medicare: Tighter Rules Needed to Curtail Overcharges for Therapy in Nursing Homes, March 1995, GAO/HEHS-95-23; General Accounting Office, Health Insurance: Vulnerable Payers Lose Billions to Fraud and Abuse, May 1992, GAO/HRD-92-69.