State False Claims Acts

How States Can Recover Stolen Money

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The Scope of the Fraud

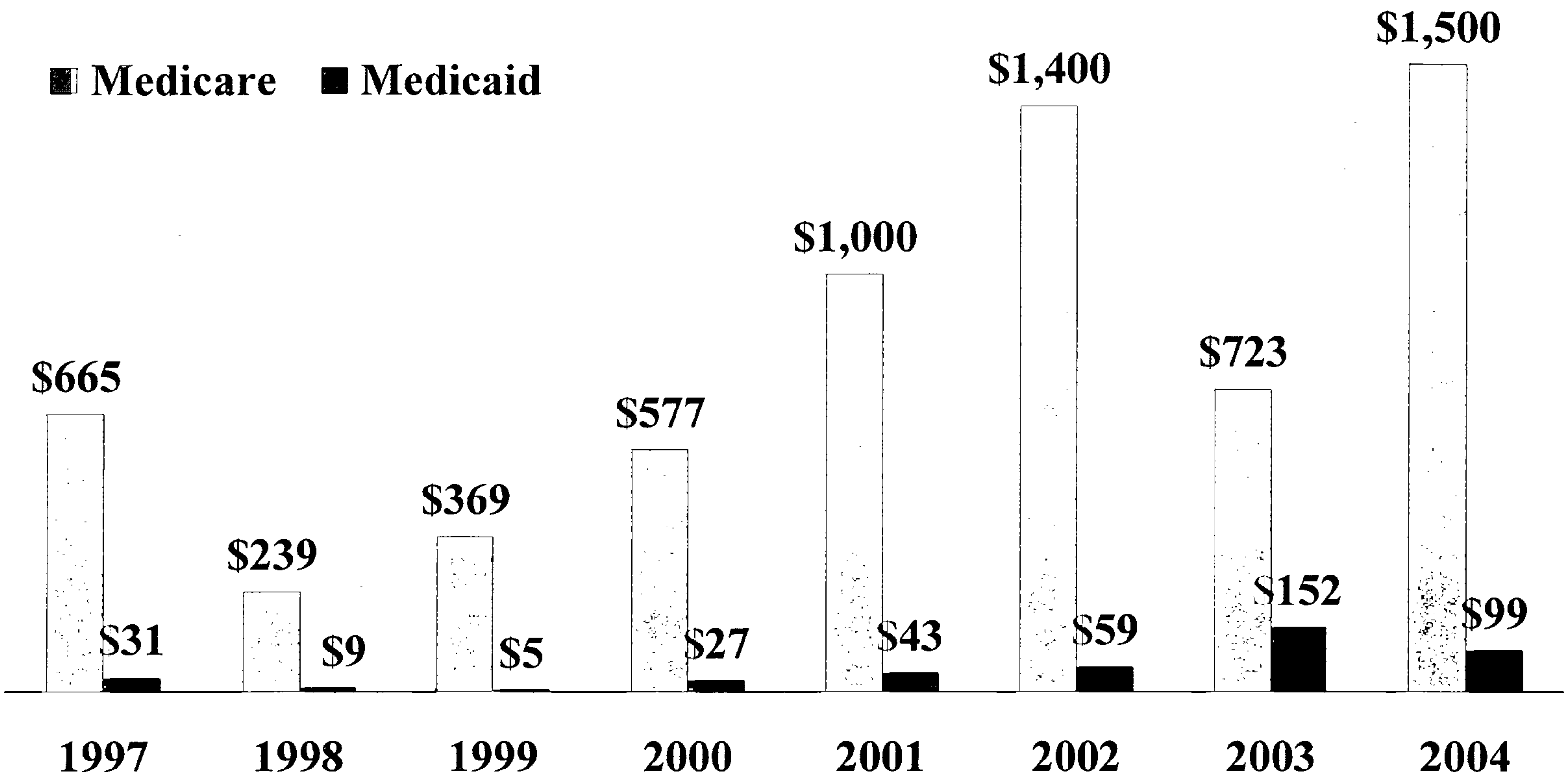
- **No one knows for sure how much fraud** infects Medicaid and Medicare.

- **The U.S. Government (CMS and GAO) estimates 9 percent** of all Medicare spending (2004) is paid in error (over $19 billion), while Texas estimates an overpayment rate of 13.7 percent in the Fee for Service program (2005). This number includes fraud, abuse and mistakes. False Claims Acts only address the fraud component.

- ***The New York Times* reports** that the former chief Medicaid fraud inspector for New York City believes 10 percent of state Medicaid dollars went to fraud.

- **A 2003 TAF report found little Medicaid fraud recovery. In fact,** Medicare recoveries under the False Claims Act accounted for 24 times more money than Medicaid.

Medicaid Recoveries Are Dwarfed by Medicare Settlements



The Scope of the Fraud (cont.)

- **Since TAF's 2003 report, the Federal Government has made some progress**, but only in the arena of Medicaid pharmaceutical fraud.
- **Congress is now seeking help from the states** in the battle against Medicaid fraud.
- **A key factor in the lack of Medicaid False Claims Act recoveries is that too few states have their own False Claims Act laws.**
- **Congress is now encouraging states, by a provision in the Deficit Reduction Act of 2005, to adopt their own False Claims Act laws.**

The Federal False Claims Act

- **Since 1986, the False Claims Act has returned $20 billion** to the U.S. Government, making it the most effective fraud-fighting tool we have.

- **The U.S. Government is getting back $15 for every $1 invested** in health care investigations and prosecutions.

- **The structure of DoJ limits recoveries**, and fewer than 100 cases (of all types) are resolved every year.

- **States have begun to supplement the effort.** Sixteen states now have False Claims Act laws.

How a False Claims Act Works

- **Allows whistleblowers to bring suits under seal** in the name of the state (*qui tam* actions) against parties that have committed fraud against a state program.
- **Gives control of whistleblower suits to the State Attorney General.**
- **Provides for triple damages** so the state is "made whole" for the costs of investigation, lost interest and whistleblower awards on top of what was taken by fraud.
- **Provides awards to whistleblowers of 15 to 30 percent**, depending on circumstances (awards under the Federal FCA have averaged 17 percent)

Why Whistleblower Awards are Needed

- **An insider is often the only person who both understands the fraud** and has the evidence to support a fraud charge.

- **Whistleblowers need incentives in order to overcome the certainty of losing employment** and being black-balled in their profession.

- **Whistleblower cases take time** and put tremendous financial and emotional stress on relators and their families.

Why Frivolous Lawsuits are Rare

- **A lawyer must take the case.** A False Claims Act lawyer will only take a case if he or she thinks it can be won, and that means a substantial body of evidence must point to substantive fraud.

- **The case must present new information.** If the facts have previously been disclosed in a newspaper article, court proceeding, or other investigation, the case will be dismissed.

- **If a whistleblower brings a frivolous action**, the defendants are awarded reasonable attorneys' fees and expenses.

Why False Claims Acts Are Effective

- **Damages are tripled;**
- **Whistleblowers come forward with evidence** that would otherwise remain secret;
- **Whistleblower cases cannot be ignored** or easily derailed;
- **The Government is able to streamline and focus their investigations** due the evidence of the whistleblower;
- **The Government is the big financial winner** getting, on average, 83 percent of total awards.

False Claims Act Math: A Case Example

- **Assumption:** The amount defrauded from the Government by the defendant is $20 million.
- **The case is adjudicated for triple damages** of $60 million.
- **The whistleblower is awarded the national average** of 17% of the settlement, or $10.2 million, which is shared with his or her lawyer, and upon which taxes are paid.
- **The Government nets out $50.8 million**.

Why the Deficit Reduction Act Is Important to the States

- **The DRA creates cash incentives for strong laws:** If a state enacts a False Claims Act that is closely modeled on the federal version of the law, the Federal Government will increase the state share of FCA Medicaid awards by 10 percentage points.

- **10 percentage points is actually 20 percent or more.** When the Federal-State Medicaid split is 50-50, a qualifying state will split awards 40-60, with the state getting 60 percent. In practice, states will get 20 to 34 percent <u>more</u> settlement money if they have a state False Claims Act that qualifies under the DRA.

Money In a DRA-Qualifying State With a 50-50 Medicaid Split

- **Federal-State Medicaid split**: 50:50
- **Amount stolen** by defendant: $20 million ($10 million from the State and $10 million from the Feds)
- **The DRA bonus to the state increases the state's recovery share** to 60 percent (a 40-60 split)
- **Damages are tripled to $60 million**, with the Feds getting $24 million (40 percent) and the State getting $36 million (60 percent)
- **The whistleblower's share** (17% average) is $10.2 million, of which $4.08 million comes from the Feds and $6.12 million comes from the State
- **The net recovery is** $19.92 million to the Feds and $29.88 million to the State.

Money In a DRA-Qualifying State With a 70-30 Medicaid Split

- **Federal-State Medicaid split**: 70:30
- **Amount stolen** by defendant: $20 million; $14 million from the Feds and $6 million from the State
- **The DRA bonus to the state increases the state's recovery share** to 40 percent (60 percent to Feds and 40 percent to State)
- **Damages are tripled to $60 million**, with the Feds owed $36 million and the State owed $24 million
- **The whistleblower share** (17% average) is $10.2 million, of which $6.12 million comes from the Feds and $4.08 million from the State.
- **The net recovery is** $29.88 million to the Feds and $19.92 million to the State.

Summary

State	Amount defrauded in a $20 Million Medicaid Scheme	Liability When No State FCA (triple damages on Fed side alone)	Liability With State DRA-qualifying FCA (triple damages on both Fed and State side)
State A has 50:50 split	Feds: $10 million State: $10 million	Feds: $30 million State: $10 million	Feds: $24 million State: $36 million
State B has 70:30 split	Feds: $14 million State: $6 million	Feds: $42 million State: $6 million	Feds: $36 million State: $24 million

Benefits of a State False Claims Act

- A state FCA, if used, will recoup substantial amounts of money for the state.
- A state could require reinvesting recoveries in its Medicaid program
- Once up and running, a state FCA will have a substantial deterrence effect on future fraud.
- A state FCA will level the playing field for honest providers.
- A state FCA will reveal weaknesses in administration and cost management.
- A state FCA can help states suppress nursing home abuse and other quality of care inadequacies.

What a State Needs to Do to Qualify Under the Deficit Reduction Act

- **State FCA must establish liability to the State for false or fraudulent Medicaid claims;**
- **Include provisions that are <u>at least as effective</u> in rewarding and facilitating *qui tam* actions as the Federal False Claims Act;**
- **Include civil penalties that are not less than those enumerated in the Federal False Claims Act;**
- **Include a requirement for filing an action under seal for 60 days with review by the State Attorney General.**

What a State Needs to Do to Qualify Under the Deficit Reduction Act

- What are some considerations for States?
  - Whistleblower initiating a lawsuit
  - Rights of the whistleblower and the State
  - Whistleblower share of recovery
  - Statute of limitations
  - Burden of proof (preponderance of the evidence)
  - Jurisdictional bars (first to file and public disclosure)

What is the Role of the Federal Government in DRA Review?

- **OIG-HHS must determine**, in consultation with the Justice Department, whether a State law meets the four DRA requirements

- **OIG-HHS will publish** a notice in the Federal Register with its guidelines for reviewing State laws

- **OIG-HHS will be available** to answer questions

State Responsibility for State FCAs

- **State bears ultimate responsibility** for enacting a State FCA and prosecuting Medicaid fraud cases
  - **Each State must engage** in its own analysis of whether to enact a State FCA that qualifies for the DRA incentive
  - **Each State must decide** which FCA provisions to include
  - **Each State Attorney General must investigate** and pursue State FCA cases

Increased Federal-State Government Cooperation

- **We expect increased Federal-State Government cooperation** to pursue Medicaid fraud cases

- **There will be more need to communicate** among the State Attorneys General, Medicaid Fraud Control Units, and Federal Government (Justice Department, OIG-HHS, CMS)