

Client Alert

Special Matters & Government Investigations Practice Group

May 15, 2012

New Law Extends Georgia False Claims Liability to Non-Medicaid Claims

Significant Revisions Also Made to Existing State False Medicaid Claims Act

Introduction

On April 16, 2012, Georgia Governor Nathan Deal signed into law House Bill 822, thereby enacting the new “Georgia Taxpayer Protection False Claims Act,” while also making significant revisions to the existing “State False Medicaid Claims Act” of 2007.

The new law significantly expands the ability of the Georgia Attorney General’s Office (the “Attorney General”) or private *qui tam* whistleblowers, acting on behalf of the government, to bring civil false claims actions against an individual, firm, corporation, or other legal entity. Specifically, the Georgia Taxpayer Protection False Claims Act (the GTPFCA or the “non-Medicaid FCA”) broadens liability for state false claims in order to reach ***non-Medicaid claims*** involving the money or property of state or local government, including counties, cities, towns, school boards, and any “other political subdivision of the state or of such local government,” including the Metropolitan Atlanta Rapid Transit Authority (MARTA).¹ Notably, the new non-Medicaid FCA only permits civil actions by *qui tam* whistleblowers who have received ***written approval by the Attorney General*** to bring a case.²

The Attorney General may delegate investigations of non-Medicaid false claims to local district attorneys or other appropriate local government officials.³ Additionally, the Attorney General may delegate the authority to bring a non-Medicaid civil action to a local government.⁴ However, the Attorney General retains responsibility for Medicaid fraud actions under the revised State False Medicaid Claims Act (the SFMCA or the “Medicaid FCA”).⁵ Additionally, private individuals (“relators”) bringing *qui tam* actions under the Medicaid FCA may continue to do so without having to secure the written approval of the Attorney General.⁶

For more information, contact:

Christopher C. Burris
+1 404 572 4708
cburris@kslaw.com

Stephen S. Cowen
+1 404 572 4688
scowen@kslaw.com

Paul B. Murphy
+1 404 572 4730
pbmurphy@kslaw.com

Richard L. Shackelford
+1 404 572 4995
rshackelford@kslaw.com

King & Spalding
Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600
Fax: +1 404 572 5100

www.kslaw.com

Client Alert

Special Matters & Government Investigations Practice Group

As explained in more detail below, Georgia's Medicaid and non-Medicaid FCAs both contain language closely tracking several recent amendments to the federal False Claims Act (FCA), 31 U.S.C. § 3729, *et seq.* For example, both Georgia acts provide that a court shall dismiss a civil action brought by a relator if substantially the same allegations were already publicly disclosed, unless dismissal is opposed by the government, or unless the relator is an "original source" of the information.⁷ Similar to the recent Federal amendments, the Georgia acts also expand the definition of who qualifies as an "original source."⁸ As discussed below, there are several key differences between the definitions of "original source" and "public disclosure" within Georgia's Medicaid FCA and the non-Medicaid FCA, respectively. Under both acts, *qui tam* whistleblowers also may be entitled to share in any funds recovered under a successful FCA action, whether focused on Medicaid or non-Medicaid claims.⁹

"This is designed to protect the taxpayers from having our tax money fraudulently taken and stolen by those who are not ethical and who are cheating the system," said State Senator William T. Ligon, Jr. (R-Brunswick) in his presentation of the bill to the General Assembly's upper chamber in March.¹⁰

As House Bill 822 contains no effective date for the new non-Medicaid FCA, nor the revisions to the existing Medicaid FCA, the provisions will become effective July 1, 2012, pursuant to O.C.G.A. § 1-3-4.

Background

Congress notably amended the Federal FCA in recent years with the Fraud Enforcement and Recovery Act of 2009 (FERA), the Patient Protection and Affordable Care Act of 2010 (PPACA), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").¹¹ Following the enactment of these laws, the Office of Inspector General for the U.S. Department of Health & Human Services (HHS-OIG) informed the Georgia Department of Community Health in March 2011 that Georgia's Medicaid FCA no longer met the requirements under Section 1909 of the Social Security Act (as amended by the Deficit Reduction Act of 2005), which allows states fulfilling the requirements of Section 1909 to receive an *extra ten percent* of any funds recovered by a civil action under a state Medicaid False Claims Act.¹²

HHS-OIG provided Georgia a two-year grace period, through March 31, 2013, to amend the State's Medicaid FCA in order to establish "liability for the same breadth of conduct" as the federal FCA in the wake of the recent amendments.¹³ HHS-OIG also noted that Georgia would need to amend its Medicaid FCA to "contain provisions that are at least as effective in rewarding and facilitating *qui tam* actions for false and fraudulent claims as those described in sections 3730 through 3732" of the federal FCA.¹⁴

Even before this year's revisions, the Attorney General already had made successful use of the 2007 state Medicaid FCA. State Representative Edward Lindsey (R-Atlanta), lead sponsor of House Bill 822, noted during his presentation

Client Alert

Special Matters & Government Investigations Practice Group

of the bill to the Georgia House in March that: “Georgia last year spent less than four million dollars prosecuting fraudulent claims and recouped almost sixteen million dollars.”¹⁵

With House Bill 822 now signed into law, it is expected that Georgia will resubmit the revised Medicaid FCA to HHS-OIG for a determination as to whether the statute now complies with the Section 1909 requirements, consequently allowing Georgia to continue receiving an increased share of Medicaid-fraud recoveries upon expiration of the current grace period.

Similarities between Georgia’s Medicaid and non-Medicaid FCAs

In many ways, Georgia’s Medicaid and non-Medicaid FCAs (the “Acts”) are similar in both structure and language.

- **Definition of “Material”** - Both Acts create liability for making, using, or causing to be made or used “a false record or statement material to a false or fraudulent claim.”¹⁶ Further, both Acts use the FERA-created definition of “material” which defines the term as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”¹⁷
- **Definition of “Obligation”** - Both Acts generally track the FERA-created definition of “obligation,” which covers established duties arising from express or implied contractual, grantor-grantee, or licensor-licensee relationships, as well as duties arising from fee-based or similar relationships, from laws and regulations, and from overpayment retention.¹⁸
- **Liability for Overpayment Retention** - Both Acts create liability for overpayment retention (following the language added to the federal FCA by FERA in 2009), even in the absence of a false record or statement (*i.e.*, liability for knowingly concealing, improperly avoiding, or decreasing an obligation to pay or transmit money or property to the state government, or to the local government under the non-Medicaid FCA).¹⁹
- **Civil Penalties/Damages** - Both Acts provide for civil penalties ranging between \$5,500.00 up to \$11,000.00 for each false or fraudulent claim, in addition to three times the amount of damages sustained by the government.²⁰
- **Expanded Anti-Retaliation Scope** - Both Acts mirror the language of FERA used to expand the class of whistleblowers protected from workplace retaliation to include *contractors or agents*, in addition to employees.²¹
- **Anti-Retaliation Statute of Limitations** - Both the Acts track the language of Dodd-Frank providing a *three-year statute of limitations* for anti-retaliation claims by whistleblowers.²²
- **Civil Investigative Demands** - Georgia’s new non-Medicaid FCA states that the Attorney General (or a designee) may issue a civil investigative demand (CID) to individuals who “may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation.”²³ The Attorney General may issue such CIDs prior to commencing a civil action under the non-Medicaid FCA “or

Client Alert

Special Matters & Government Investigations Practice Group

other false claims law,” which could arguably extend the Attorney General’s CID power to false claims investigations under the state Medicaid FCA, though this is not stated expressly in House Bill 822.²⁴

Differences between Georgia’s Medicaid and non-Medicaid FCAs

In several substantive areas, Georgia’s Medicaid and non-Medicaid FCAs differ on key elements related to a state false claims civil action.

- **Scope** - As noted above, while Georgia’s Medicaid FCA addresses false or fraudulent Medicaid claims (including overpayment retention), the new non-Medicaid FCA allows a civil action for false or fraudulent claims involving any other request or demand for money or property of state or local government (with the exception of taxes under the revenue laws of the state, and payments to individuals as employment compensation or unrestricted income subsidies).²⁵
- **Written Approval to Bring *Qui Tam* Actions** - The new non-Medicaid FCA requires that private persons obtain the written approval of the Attorney General in order to bring a non-Medicaid *qui tam* civil action. However, the revised Medicaid FCA does not require pre-approval by the Attorney General for private whistleblowers to commence a suit.²⁶
- **Original Source** - Both Acts follow PPACA’s expansion of the definition of who qualifies as the “original source” of information underlying a false claims civil action by eliminating the requirement of “direct and independent knowledge.” Instead, both Acts allow an individual to qualify as an “original source” based on “knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions....” To qualify as an “original source,” however, an individual must voluntarily provide such information **to the Attorney General** in the case of Medicaid false claims, while such information must be provided **to the state or local government** for any non-Medicaid false claims.²⁷
- **Public Disclosure** - Both Acts, respectively, allow the government to oppose the dismissal of a *qui tam* civil action when substantially the same allegations or transactions as alleged in the civil action or in a claim were “publicly disclosed.” While Georgia’s Medicaid FCA provides a state-level analogue to the federal FCA’s “public disclosure” definition, as amended by PPACA, the state’s new non-Medicaid FCA contains **a narrower definition** of public disclosures. Specifically, the definition of “public disclosure” for non-Medicaid civil actions does not encompass information disclosed or provided in federal or state responses to open records requests. Further, Georgia’s non-Medicaid FCA notes that “allegations or transactions are not publicly disclosed in the news media merely because information of allegations or transactions have been posted on the Internet or on a computer network, unless the action is brought by the Attorney General or local government, or the person bringing the action is an original source of the information.”²⁸
- **Statute of Limitations** - Both Acts require that civil actions be brought within six (6) years after the date a violation was committed, or within a specified amount of time after material facts are “known or reasonably should have been known” by the state government official charged with acting, whichever occurs last. The

Client Alert

Special Matters & Government Investigations Practice Group

revised Medicaid FCA allows civil actions for Medicaid false claims to be brought within **four (4) years** after the date facts material to the civil action are “known or reasonably should have been known” by responsible state officials. (Previously, the former Georgia Medicaid FCA limited this provision to three (3) years). For non-Medicaid state false claims, a civil action may be brought within **three (3) years** after the date facts material to the civil action are “known or reasonably should have been known” by responsible **state or local government** officials. Both Acts ultimately prohibit state false claims actions, whether Medicaid or non-Medicaid in nature, from being filed “more than ten years after the date upon which the violation was committed.”²⁹

- **Attorney’s Fees** - Those who violate the non-Medicaid FCA will be liable for all costs, reasonable expenses, and reasonable attorney’s fees **incurred by the state or local government** in prosecuting the civil action. Under Georgia’s Medicaid FCA, violators face liability for the state’s “costs” in bringing the civil action.³⁰
- **Exemption of Whistleblower Evidence from Opens Records Requests** - Under the non-Medicaid FCA, any “evidence and information” provided to the Attorney General (or to his designee) as part of a non-Medicaid civil action brought by a *qui tam* whistleblower is protected by the common interest privilege and work product doctrine, and such evidence and information is exempt from disclosure under the state’s open records law. Further, the non-Medicaid FCA encourages whistleblowers to gather evidence and information for their case, stating: “To effectuate the law enforcement purposes of this article in combating fraud and false claims directed at the public’s funds, it is the public policy of this state that private persons be authorized to take actions to provide to the Attorney General or local government such information and evidence.”³¹
- **Non-Medicaid False Claims Pleadings** - The State’s non-Medicaid FCA expressly states that *qui tam* whistleblowers “shall not be required to identify specific claims that result from an alleged course of misconduct or any specific records or statements” Instead, whistleblowers in a non-Medicaid false claims civil action may meet pleading standards under state law if “the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of [Georgia’s non-Medicaid FCA] are likely to have occurred and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government to investigate effectively and defendants to defend fairly the allegations made.” The revised Medicaid FCA does not contain a similarly relaxed pleading standard.³²

If you have any questions about this Client Alert or would like copies of the new Georgia Taxpayer Protection False Claims Act and the revised State False Medicaid Claims Act, please do not hesitate to contact: Christopher C. Burris (+1 404 572 4708 or cburris@kslaw.com); Stephen S. Cowen (+1 404 572 4688 or scowen@kslaw.com); Paul B. Murphy (+1 404 572 4730 or pbmurphy@kslaw.com); or Richard L. Shackelford (+1 404 572 4995 or rshackelford@kslaw.com).

Client Alert

Special Matters & Government Investigations Practice Group

Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at www.kslaw.com.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice.

¹ The GTPFCA prohibits state false claims civil actions from being brought by any current or former public employee or official who seeks to base allegations on wrongdoing or misconduct the public employee or official had a duty to report or investigate. Also prohibited are any GTPFCA civil actions where a current or former public employee or official seeks to base allegations on information or records to which the public employee or official had access as a result of his or her public employment or office. Further, the GTPFCA excludes any court's jurisdiction from extending to *qui tam* civil actions against Georgia state legislators or members of the judiciary "if the civil action is based on evidence or information known to the state when the civil action was brought." See HB 822, Part I, § 1-2, to be codified as O.C.G.A. §§ 23-3-122(i) and (j).

² HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-122(b)(1).

³ *Id.*, to be codified as O.C.G.A. § 23-3-122(a).

⁴ *Id.*

⁵ HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.2(a).

⁶ HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.2(b).

⁷ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-122(j)(3), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.2(l)(2).

⁸ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-122(j)(3)(C), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.2(l)(1).

⁹ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-122(h)(1), with O.C.G.A. § 49-4-168.2(i)(1).

¹⁰ Video Recording of Senate Proceedings, Mar. 27, 2012, at 1 hr., 8 min., 10 sec. (Senate Day 39 pm 1) (remarks by Sen. William T. Ligon, Jr. (R-3rd)), <http://www.gpb.org/lawmakers/2012/day-39>.

¹¹ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009); Patient Protection and Affordable Care Act, Pub. L. 111-148, § 10104(j)(2), 124 Stat. 119, 901; and Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, § 1079A, 124 Stat. 1376, 2079 (2010).

¹² Letter of Mar. 21, 2011, from Inspector General Daniel R. Levinson, U.S. Department of Health and Human Services, to Robert M. Finlayson III, Office of Inspector General, Georgia Department of Community Health.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Video Recording of House Proceedings, Mar. 7, 2012, at 49 min., 17 sec. (House Day 30 pm 4) (remarks by Rep. Edward Lindsey (R-54th)), <http://www.gpb.org/lawmakers/2012/day-30>.

¹⁶ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-121(a)(2), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.1(a)(2).

¹⁷ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-120(4), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168(3).

¹⁸ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-120(5), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168(4).

¹⁹ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-121(a)(7), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.1(a)(7).

²⁰ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-121(a), with O.C.G.A. § 49-4-168.1(a).

²¹ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-122(l)(1), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.4(a).

Client Alert

Special Matters & Government Investigations Practice Group

²² Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-122(l)(3), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.4(c).

²³ HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-125(b).

²⁴ *Id.*, to be codified at O.C.G.A. § 23-3-125(b)(1).

²⁵ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. §§ 23-3-120(1) and 23-3-121(e), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168(1).

²⁶ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-122(b)(1), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.2(b).

²⁷ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-122(j)(3)(C), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.2(l)(1).

²⁸ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-122(j)(3), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.2(l)(2).

²⁹ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-123(a), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.5.

³⁰ Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-121(c), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.1(c).

³¹ HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-122(b)(6).

³² Compare HB 822, Part I, § 1-2, to be codified as O.C.G.A. § 23-3-123(c), with HB 822, Part II, § 2-1, to be codified as O.C.G.A. § 49-4-168.3(b). See also O.C.G.A. § 9-11-9(b).