

Fast and loose on Medicaid fraud

■ State Senate bill excludes most effective tool—whistle-blower lawsuits; at least Assembly is trying

BY NEIL V. GETNICK

My law firm and I specialize in fighting frauds on the federal and state treasuries by helping citizens bring cases under the Federal False Claims Act and their state equivalents.

But what really helped me understand what's going on in Albany in the fight against Medicaid fraud harkened back to my days as a young prosecutor arraigning three-card montecas in night court. These cases involved defendants who were particularly skillful in rapidly moving three playing cards around the surface of a cardboard box, inviting passersby to place a bet and pick the right one. The three-card monte players could ensure a consistent outcome: The public always lost.

The State Senate majority announced in March it had passed "the toughest most comprehensive plan to combat Medicaid fraud." It wasn't. The bill excluded the single most effective fraud-fighting tool: citizen-initiated whistle-blower lawsuits.

The Senate majority proclaimed that its bill included a False Claims Act. It explained that "the federal Deficit Reduction Act encourages the states to adopt state False Claims Acts

mirroring the federal False Claims Act" by providing the state with a larger share of Medicaid fraud recoveries. But the Senate bill did not mirror the federal law; in fact, it excised the whistle-blower suit provisions needed to qualify for the larger share of funds.

So I traveled to Albany as a concerned citizen with a record as a private attorney in fighting Medicaid fraud, and as chairman of Taxpayers Against Fraud, a Washington-based, nonprofit, public-interest organization dedicated to combating fraud against the government through the promotion and use of False Claims Acts.

I thought I had a pretty powerful message to deliver: The Senate told us it did one thing, when in fact it did precisely the opposite. Instead I was told that as a lawyer what I had to say was self-serving and inconsequential and, by definition, at odds with the health care community. So I pointed out that I was indeed a lawyer, a former fraud prosecutor who continued to fight fraud as a private practitioner. False Claims Acts, with their whistle-blower provisions, are aligned with the interests of medical professionals dedicated to delivering cost-efficient care.

But why take my word for it? Why not listen to Charles Grass-

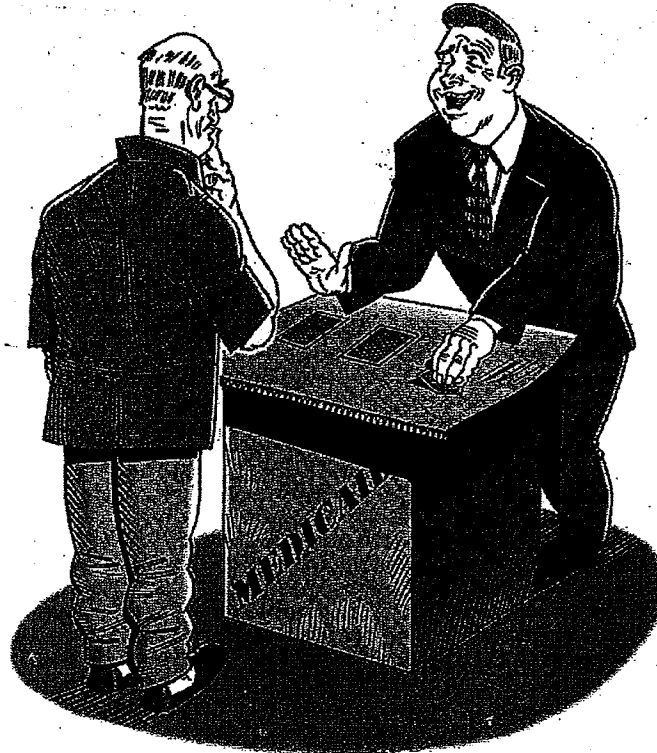


ILLUSTRATION BY MARTIN KOZLOWSKI

ley, Republican chairman of the U.S. Senate Finance Committee, a strong fiscal conservative and the original Senate sponsor of the federal False Claims Act? In a March letter to federal officials, Grassley explained that the recently passed Deficit Reduction Act requires that a state False Claims Act contain provisions for whistle-blower lawsuits to qualify the state for retaining a larger share of Medicaid fraud recoveries.

After all that, how did the Senate majority respond? On

Wednesday, the Senate passed a new bill stripping out the False Claims Act portion of its proposed law. The principal sponsor of the legislation, Sen. Dean Skelos (R-Rockville Centre), recently said of that new bill: "Why does [the law] have to be linked to more work for trial lawyers?" One answer might be because the Senate majority told the public it passed a False Claims Act in March.

Skelos also removed from the new bill sections allowing for government-initiated cases with

treble-damage recovery provisions and for the state attorney general to protect workers who expose Medicaid fraud from employer retaliation. And neither Skelos nor his Senate majority colleagues have even attempted to explain to the public what happened to the \$325 million in anticipated anti-fraud recoveries they scored to the state budget based on their original bill.

We now stand as much chance of seeing those recovered funds as we would in trying our luck in three-card monte.

What happened on the Assembly side is a different story. From the beginning, the Assembly passed a real False Claims Act bill. But it did not allow whistle-blower cases to proceed in the absence of government participation. Again, Sen. Grassley wrote a letter explaining that the Deficit Reduction Act required such a provision.

The Assembly reacted by passing a new bill fixing that problem. There are still some significant flaws in the bill, but it demonstrated a willingness to get things right and will likely make changes next time around.

But nothing is going to get done without similar action by the Senate.

Just last week a federal audit severely criticized New York's anti-fraud efforts. But beware of members of the State Senate majority who are heralding themselves as the vanguard fighting Medicaid fraud. When called upon to make the good fight, they went into a full retreat. And even the best three-card monte dealer can't move so fast that his victims don't realize, after their money is gone, what's happened.



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