

# Modern Healthcare

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## Anti-fraud fervor: States step up false claims actions to recover Medicaid dollars

By [Lisa Schencker](#) | July 25, 2015



Jaws  
dropped at  
news this  
summer  
that the  
federal  
government  
was seeking  
as much as

\$3.3 billion from drugmaker [Novartis](#)<sup>[1]</sup>  
for allegedly paying kickbacks to  
pharmacies.

But the feds aren't the only ones trying to  
make Novartis pay up on [false claims](#)<sup>[2]</sup>  
allegations, and it's not just Medicare  
dollars at stake. Eleven states are also  
parties to the lawsuit under the authority  
of their own false claims laws. They're  
seeking to recover money paid out by  
their state Medicaid programs.

The Novartis case is the latest example  
of states using their own false claims  
laws to pursue questionable [Medicaid](#)<sup>[3]</sup>  
billings by drugmakers, healthcare  
providers and suppliers. Lured by the  
potential for big paydays, several states,  
including Maryland and Vermont, passed  
or expanded their false claims laws this

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year, bringing the number of states with their own false claims statutes to nearly 30, according to the Taxpayers Against Fraud Education Fund.

Many state false claims laws are similar to the federal law, financially penalizing those who knowingly submit false claims to state programs such as Medicaid. Many of the state laws also allow whistle-blowers to initiate lawsuits on behalf of the state.

A factor behind the growing number of states that have adopted and more aggressively used their own false claims laws is the federal Deficit Reduction Act of 2005, which gave them a strong financial incentive to establish their own statutes. Prior to that law, only about half as many states had their own false claims laws, said Patrick Burns, co-director of the Taxpayers Against Fraud Education Fund, a not-for-profit funded by whistle-blowers and law firms that represent them.

Under that federal law, if a state's false claims law meets certain requirements, the state is not only entitled to its share of the recovered Medicaid funds but also to a portion of the federal government's share.

It's a trend that could mean more legal tangles for providers and manufacturers. The Novartis case is "going to become more of the common type of case you're going to see in False Claims Act cases," said John Kelly, a former assistant chief for healthcare fraud at the U.S. Justice Department. "It's not going to get any easier out there for companies subject to this."

But some state Republican leaders and business groups oppose state false claims laws, arguing that they hurt business. Earlier this month, Republican-led Wisconsin repealed its false claims statute, a move applauded by the U.S. Chamber Institute for Legal Reform.

Lisa Rickard, the institute's president, said in a written statement that the money Wisconsin had spent investigating false claims cases would be better spent elsewhere. "This flawed law incentivized private bounty hunter plaintiffs to sue companies suspected of defrauding the state's medical assistance program, and despite its good intentions, proved ineffective and costly," she said.

Under the federal False Claims Act, the federal government may file cases against

those it alleges submitted false claims to programs such as Medicare and Medicaid, or the government may join cases brought by private whistle-blowers. Federal False Claims Act cases allow triple damages plus thousands of dollars in penalties for each false claim. Because of the massive potential penalties and other possible consequences, such as exclusion from federal healthcare programs, most False Claims Act cases that are joined by the federal government end up settling. Whistle-blowers in successful cases are entitled to a percentage of any money recovered.

### MH TAKEAWAYS

Lured by the potential for big paydays, the number of states that have passed their own false claims laws has reached nearly 30.

For its fiscal 2014, the federal government collected \$2.3 billion in False Claims Act settlements and judgments involving federal health programs such as Medicare, Medicaid and Tricare. That kind of cash is hard for states facing budget crunches to ignore, and it's leading many of them to increasingly make use of their own false claims laws, experts say.

State false claims act cases often target big recipients of Medicaid dollars such as nursing homes, home healthcare companies, hospices and durable medical equipment suppliers, whereas federal false claims cases might include more allegations of doctor billing fraud and upcoding for hospital stays, Burns said. Pharmaceutical companies have been targeted in a number of state cases, though hospitals and other providers have also been at the center of state cases.

"The conduct which provides the basis for a federal False Claims Act case will oftentimes also provide a basis for a violation of the state false claims act," said Mark Silberman, a former special assistant U.S. attorney.

Success among pioneering states pushed the current growth in the use of state false claims laws. Texas was one of the first to experience a big payday. In the late 1990s, it was the first state to join whistle-blower Vena-A-Care of the Florida Keys in a False Claims suit against a number of pharmaceutical companies. Pharmacy Ven-A-Care and Texas accused the drug companies of misreporting their pricing to the state, leading the state to overpay pharmacists.

The companies settled, and the state's share—after the whistle-blowers, attorneys and the federal government were paid—was \$182 million, according to the Texas attorney general's civil Medicaid fraud division.



"More and more whistle-blowers ended up filing suit under the fraud statute," said Patrick O'Connell, the first chief of Texas' civil Medicaid fraud section. "We were bringing back a lot of money to the state." Texas' success helped inspire the Deficit Reduction Act of

2005, he said.

California, New York and Virginia also have become leaders in using their false claims laws, Burns said. "Other states woke up and smelled the coffee."

Maryland passed a false claims law in 2011, and recovered \$39.8 million in fiscal 2014, up from \$1.2 million in fiscal 2012. That prompted the state to expand its false claims law this year to include areas beyond healthcare. "We've been very pleased with the results," said David Nitkin, a spokesman for the Maryland attorney general's office.

Since 2009, Indiana has recovered more than \$165 million as a result of whistleblower cases filed under its false claims act.

Both Indiana and Maryland have used their false claims laws to join federally led suits as well as to lead their own false claims suits.

Some states have false claims laws but don't pursue their own cases. Just having the laws on the books allows those states to collect extra money in federally led False Claims Act cases, Burns said. He called such states "parasitic."

Some other states either do not have false claims laws, or else their laws aren't considered strong enough by the federal government to allow them to collect the extra cash from federal suits. Ohio and Pennsylvania are among the larger states without their own laws.

Political and business opposition helps explain why the laws haven't gotten off the ground in some states. "It's a shame because this is not an anti-business statute, it's an anti-fraud statute," O'Connell said. "Good doctors and pharmacies and hospital chains should want us to go after the bad guys because they're competing at a disadvantage."

The Maryland Chamber of Commerce and the U.S. Chamber institute wrote to Maryland lawmakers last year opposing expansion of the state's law.

On its website, the U.S. Chamber Institute for Legal Reform says the federal False Claims Act is overzealously enforced, "turning what should be simple contractual disagreements and paperwork mistakes into claims for fraud." It says that "although well-intentioned, the law has been transformed into a lucrative money machine for plaintiffs' lawyers and their clients—while hurting American businesses and taxpayers."

Many parts of state false claims laws don't work well and create a disincentive to doing business with federal and state government programs, said Peter Hutt, a partner at Akin Gump in Washington who works with the U.S. Chamber's institute. Small states, for example, might not be able to recoup much money after whistleblowers are paid their shares, he said. States would do better to focus on compliance programs.

Silberman, who represents providers in state false claims cases, said providers

should beware of states looking for big paydays from the laws. Any time a provider receives a request for information, there is the potential that it could lead to a false claims action, he cautioned.

Burns said the increase in state false claims activity will add pressure for defendants to settle in such cases. "Even if you could dance out of the way of a bullet coming from New York or Texas or California or the big cannon coming from the federal government, at some point you're done," he said. "The best thing you can do is run, not walk to the settlement table."

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