

1-1-2005

GAO Stresses Need for Federal Oversight of State Use of Contingency-Fee Consultants in Medicaid Financing

Susan E. Cancelosi

University of Houston, scancelosi@wayne.edu

Recommended Citation

Susan E. Cancelosi, *GAO Stresses Need for Federal Oversight of State Use of Contingency-Fee Consultants in Medicaid Financing*, *Health L. Persp.* (2005).

Available at: <https://digitalcommons.wayne.edu/lawfrp/221>

This Article is brought to you for free and open access by the Law School at DigitalCommons@WayneState. It has been accepted for inclusion in Law Faculty Research Publications by an authorized administrator of DigitalCommons@WayneState.

GAO Stresses Need for Federal Oversight of State Use of Contingency-Fee Consultants in Medicaid Financing

By Susan E. Cancelosi, J.D., LL.M.
secancel@central.uh.edu

With literally billions of dollars at stake (\$276 billion for fiscal year 2003¹), Medicaid spending draws intense scrutiny from both Congress and the States. The entire program, as the General Accounting Office (“GAO”) states in a June 2005 report, “is by its size and structure at risk of waste and exploitation.”² As part of government efforts to control these risks, the Senate Committee on Finance asked the GAO to investigate use by the States of consultants to develop projects that maximize federal Medicaid reimbursement with the consultants paid on a contingency fee basis. The GAO’s June report highlighted problems in every area it evaluated and called for the Centers for Medicare and Medicaid Services (“CMS”) to strengthen its oversight of Medicaid, in particular Medicaid “current and emerging financing schemes.”³

The GAO targeted three key issues: (1) the extent of State use of contingency-fee consultants to develop projects intended to maximize federal Medicaid reimbursement, (2) the extent to which Medicaid claims arising out of such projects are “consistent with federal law and policy,” and (3) the extent to which the States and CMS exercise oversight of such claims.⁴ To focus its review, the GAO selected five major categories of Medicaid claims: targeted case management services, rehabilitation services, supplemental payment arrangements, school-based services, and administrative costs.⁵ The GAO also selected Georgia and Massachusetts as its case studies for the review.

According to the GAO, State use of contingency-fee consultants to maximize federal Medicaid reimbursement is widespread: Fully 34 states reported in 2004 that they had adopted this approach at some point.⁶ Moreover, in the five areas of claims that the GAO targeted, spending overall has increased dramatically in recent years. For example, taking into account all States (not just Georgia and Massachusetts) for the fiscal years from 1999 through 2003, the GAO found that federal and State spending on targeted case management has increased by 76 percent (from \$1.7 to \$3 billion).⁷ The GAO also found that projects in Georgia and Massachusetts presumably developed specifically to

¹ U.S. GEN. ACCOUNTING OFFICE [hereinafter GAO], MEDICAID FINANCING: STATES’ USE OF CONTINGENCY-FEE CONSULTANTS TO MAXIMIZE FEDERAL REIMBURSEMENTS HIGHLIGHTS NEED FOR IMPROVED FEDERAL OVERSIGHT, Report No. GAO-05-748 (June 2005), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-05-748> [hereinafter *Report*].

² GAO, *Highlights: Medicaid Financing: States’ Use of Contingency-Fee Consultants to Maximize Federal Reimbursements Highlights Need for Improved Federal Oversight* (June 2005), available at <http://www.gao.gov/highlights/d05748high.pdf>.

³ *Id.*

⁴ GAO, *Report*, *supra* note 1, at 3.

⁵ *Id.* at 4.

⁶ *Id.*

⁷ *Id.*

maximize federal Medicaid reimbursement resulted in about \$1.5 billion in additional funds for Georgia from fiscal year 2000 through fiscal year 2003 and almost \$570 million in additional funds for Massachusetts, with \$82 million paid to Georgia’s contingency-fee consultants for that period and \$11 million paid to Massachusetts’ contingency-fee consultants.⁸

Out of all the claims that the GAO reviewed in this investigation, it found problems with claims that “appeared to be inconsistent with current CMS policy, claims that were inconsistent with federal law, and claims from projects that undermined the fiscal integrity of the Medicaid program.”⁹ These problems typically appeared in areas where “federal policy had been inconsistently applied, was evolving, or was not specific” or in cases where Medicaid payments were made directly to State or local government agencies as Medicaid providers.¹⁰ The GAO noted in general a lack of sufficient or appropriate oversight from both the States and CMS.

The GAO report follows past GAO critiques of Medicaid financing. For example, in 2001, acting on a request from Charles E. Grassley, then the ranking Republican minority leader of the Senate Finance Committee, the GAO investigated consultants who advised health care providers on ways to maximize federal Medicare and Medicaid billing reimbursement. The resulting report concluded that health care consultant advice, based on certain workshops the GAO attended, “would exacerbate integrity problems and result in unlawful conduct.”¹¹ At the time Senator Grassley blasted the use of consultants in Medicare and Medicaid billing, saying: “There’s an industry based on milking federal health care programs. This is bad business. The federal government isn’t anybody’s cash cow.”¹² In its June 2005 report on contingency-fee consultants, the GAO complained that CMS had not fully adopted all of the GAO’s past recommendations on Medicaid financing reform and oversight.¹³ Concurrent with releasing the report, GAO staff testified before the Senate Committee on Finance on June 28, 2005, with statements entitled “CMS’s Commitment to Helping States Safeguard Program Dollars Is Limited” and “States’ Efforts to Maximize Federal Reimbursements Highlight Need for Improved Federal Oversight.”¹⁴

⁸ *Id.*

⁹ *Id.* at 4-5.

¹⁰ *Id.* at 5..

¹¹ GAO, HEALTH CARE: CONSULTANTS’ BILLING ADVICE MAY LEAD TO IMPROPERLY PAID INSURANCE CLAIMS, Report No. GAO-01-818 (June 2001), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-01-818>.

¹² Office of U.S. Sen. Charles E. Grassley, *Grassley Works to Shut Down Medicare, Medicaid Consulting Fraud* (June 27, 2001), at <http://grassley.senate.gov/releases/2001/p01r6-27.htm>.

¹³ GAO, *Report*, *supra* note 1, at 6.

¹⁴ Leslie G. Aronovitz, Medicaid Fraud and Abuse: CMS’s Commitment to Helping States Safeguard Program Dollars Is Limited, GAO Testimony Before the Committee on Finance, U.S. Senate (June 28, 2006), available at <http://www.gao.gov/new.items/d05855t.pdf>; Kathryn G. Allen, Medicaid: States’ Efforts to Maximize Federal Reimbursements Highlight Need for Improved Federal Oversight, GAO Testimony Before the Committee on Finance, U.S. Senate (June 28, 2005), available at <http://www.gao.gov/new.items/d05836t.pdf>.

In response to the June GAO report, Georgia took issue with the report's implication that the use "of contingency-fee consultants is somehow illegitimate."¹⁵ The GAO responded that, while the use of contingency-fee contracts is "allowed under law," it still found such use "problematic" in the context of projects intended to maximize federal Medicaid reimbursement.¹⁶ Both Georgia and Massachusetts also argued that their claims in fact complied with the law, to which the GAO replied that "[a]lthough most may not be illegal," it felt that many were inconsistent with Medicaid's cost-sharing design or CMS policy and that additional oversight was still needed.¹⁷

Senator Grassley, now the chairman of the Senate Finance Committee, responded to the June 2005 report by saying, "It's alarming to find that a majority of states use contingency-fee consultants to increase the federal dollars they claim from Medicaid, and that those increases are often achieved through schemes of questionable legality."¹⁸ On the other side, while acknowledging that the "Medicaid program is unquestionably paying for things that it should not be paying for," CMS administrator Dr. Mark B. McClellan noted that CMS "does not have the authority to require states to disclose their use of contingency-fee consultants."¹⁹ And at least one consultant for Georgia highlighted the need for assistance for the States in dealing with Medicaid, calling the program "large, complex and incoherent."²⁰

Taken all together, the GAO criticisms seem somewhat overstated, especially in light of the admission by the GAO that the various techniques adopted by the States "may not be illegal," and one could argue that the States are fully justified in their attempts to access any available federal Medicaid funds within the confines of current law. The fact that most of the issues arose – as the GAO itself acknowledged – in areas of inconsistent, vague or evolving federal policy calls into question the validity of criticizing the claims on any level. It would seem almost un-American to condemn anyone for looking for the loophole as long as it's legal. The fact that States use consultants to search out the inconsistencies – and pay the consultants on a contingency fee basis rather than allocating scarce resources without a guarantee of results – would seem just good business from some perspectives. On the other hand, everyone pays for Medicaid in the long run, and exploiting the weak points in the system smacks of robbing Peter to pay Paul.

¹⁵ GAO, *Report*, *supra* note 1, at 7.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Robert Pear, *U.S. Report Faults States' Medicaid Tactics*, N.Y. TIMES, June 28, 2005, available at <http://www.nytimes.com/2005/06/28/politics/28medicaid.html?pagewanted=print>.

¹⁹ *Id.*

²⁰ *Id.*