

AVOIDING FRAUD AND ABUSE LIABILITY
IN PHYSICIAN TRANSACTIONS AND RELATIONSHIPS

Presented By
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THE CAST OF CHARACTERS



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have questions*

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FRAUD AND ABUSE

WHAT'S THE BIG DEAL???



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BIG BROTHER IS WATCHING . . .

It's a veritable alphabet soup of enforcement agencies:

- **US Attorneys Office**
- **Local District Attorney's Office**
- **CMS (HCFA)**
- **DOJ (Justice)**
- **DVA (Veterans' Affairs)**
- **FDA**
- **IRS**
- **Postal Inspector**
- **Commercial Insurance Companies**
- **Private Investigators**
- **State Licensing Boards**
- **Other . . .**
- **State Attorney General's Office**
- **OIG**
- **MFCU (Medicaid Fraud Control Unit)**
- **DOD (Defense – Champus/Tricare)**
- **FBI**
- **DEA**
- **OSHA**
- **MC/MA Carriers & Intermediaries (a/k/a MACs- Medicare Administrative Contractors)**



AND SO ARE POTENTIAL WHISTLEBLOWERS

- Former Employees
- Present (Disgruntled) Employees
- Patients
- (Ex-)Spouses
- Other Physicians
- Other Caregivers
- Competitors
- Consultants
- Professional Whistleblowers

\$\$\$



PICK YOUR POISON

**WHILE HOSPITALS AND CORPORATIONS
CANNOT BE SENTENCED TO PRISON, THEY
CAN BE SENTENCED TO DEATH!!!**



**WHILE PHYSICIANS AND OTHER HEALTH
CARE PROFESSIONALS (USUALLY) ARE NOT
SENTENCED TO DEATH, THEY CAN BE
SENTENCED TO PRISON!!!**



WHO NEEDS CARROTS WHEN YOU GOT A BIG STICK??

**Hundreds of Millions of \$\$\$ in Government Appropriations
Aimed to Detect and Destroy Fraudulent & Abusive Health Industry
Practices**

**Multi-Million Dollar Fines, Settlements and Judicial Decisions
Against Health Care Providers Large and Small, including
Venerable Institutional Providers, Fly-By-Night Companies, and
Individual Practitioners**

All Expenses Paid, One-Way Trips to CLUB FED!!!



CORPORATE INTEGRITY AGREEMENTS **(Adding Insult to Injury?)**

- **Corporate Integrity Agreement (“CIA”) = Government-imposed, “mandatory” compliance program typically requiring regular outside auditing and Gov’t reporting over multi-year period.**
- **Kindler, gentler version = Certification of Compliance Agreement (CCA); Settlement Agreement with “integrity” provisions (IA).**
- **CIA/CCA/IA may be required by Deferred Prosecution Agreement.**
- **CIA/CCA/IA is the price a provider pays to avoid prospect of being excluded from participating in Medicare/Medicaid, etc.**
- **Hundreds if not thousands of providers and other health care industry participants have entered into CIAs/CCAs/IAs since program began in 1994.**



OIG FRAUD ALERT (2015): PHYSICIAN COMPENSATION ARRANGEMENTS MAY RESULT IN SIGNIFICANT LIABILITY

It Takes 2 to Tango . . .

“Physicians who enter into compensation arrangements such as medical directorships must ensure that those arrangements reflect fair market value for bona fide services the physicians actually provide.”

“OIG recently reached settlements with 12 individual physicians who entered into questionable medical directorship and office staff arrangements. OIG alleged that the compensation paid to these physicians . . . constituted improper remuneration under the Anti-Kickback Statute for a number of reasons . . .”



RECENT LEGAL CASES AND SETTLEMENTS

- *U.S. ex rel. Baklid-Kunz v. Halifax Hospital Medical Center*
(\$85 Million Settlement on Eve of Trial - 2013 - physician bonus structure based on volume or value of referrals)
- *U.S. ex rel. Reilly v. North Broward Hospital District*
(\$69.5 Million Settlement – 2015 - Stark and AKS violations involving excess compensation to employed physicians)



RECENT LEGAL CASES AND SETTLEMENTS

- *U.S. ex rel. Dorsey v. Adventist Health System*

(\$115 Million Settlement – 2015 - above-FMV, non-commercially reasonable compensation arrangements with employed physicians, and with tracking of referrals)

- *U.S. ex rel. Drakeford v. Tuomey Healthcare System*

(\$237.5 Million Jury Verdict – 2015 - above-FMV compensation arrangements with 19 part-time physician specialists)



RECENT LEGAL CASES AND SETTLEMENTS

- *U.S. ex rel. Bingham v. HCA*

(\$16.5 Million Settlement – 2012 - hospital's above-market leasing of office space from physician group)

- *West Penn Allegheny Health System*

(\$1.5 Million Settlement – 2014 - following voluntary self-disclosure of hospital leasing of office space to physicians at below-market rental rates)



RECENT LEGAL CASES AND SETTLEMENTS

- *U.S. ex rel. Emanuele v. Medicor Associates (UPMC/Hamot Medical Center)*

(\$20.7 Million Settlement on Eve of Trial – 2017 - involving “technical” Stark violations – all agreements must be signed and in writing)

- *Kane ex rel. New York v. Healthfirst (Mount Sinai Health System)*

(\$3 Million Settlement - violation of 60-day overpayment rule by improperly retaining and failing to timely refund overpayments)



RECENT LEGAL CASES AND SETTLEMENTS

- *Intermountain Healthcare*

(\$25.5 Million Settlement – 2013 - following self-disclosure of numerous violations, including employed physician bonus structures that may have taken into account volume or value of referrals, leasing arrangements with physicians without written or executed lease agreements, including some expired leases, and physician services arrangements not memorialized in writing during the entire time period services were provided)



RECENT LEGAL CASES AND SETTLEMENTS

- *U.S. ex rel. Miller v. Health Management Associates, Physician Alliance*

(\$4 Million Settlement plus % of JV divestiture sale proceeds – 2017 – physician investment in hospital JV at below market purchase price due to mis-applied marketability, corporate risk and lack of control valuation discounts; hospital's failure to properly allocate expenses to the JV resulting in overstated profits benefiting docs; above-market physician compensation arrangements; and sham clinical co-management arrangements)



KEY HEALTH CARE FRAUD AND ABUSE LAWS



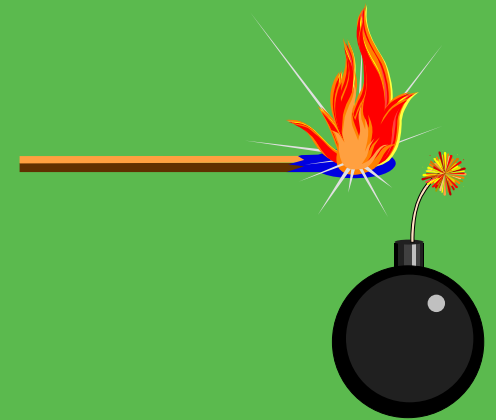
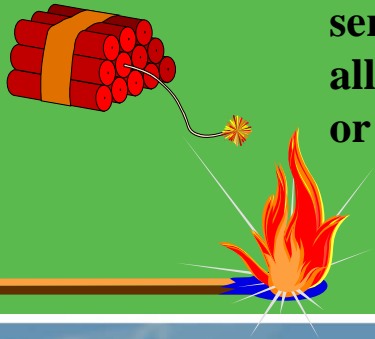
While providers may be subject to civil and/or criminal liability, fines, sanctions and penalties under a host of general laws governing mail fraud, wire fraud, commercial bribery, ERISA (commercial kickbacks), new federalization of health care crimes, etc. . . .



... most problems that providers encounter in the fraud and abuse arena essentially boil down to either:

(i) tripping over the prohibitions on payments for business/referrals or on prohibited types of inter-relationships between providers (e.g., AKS, Stark) ; or

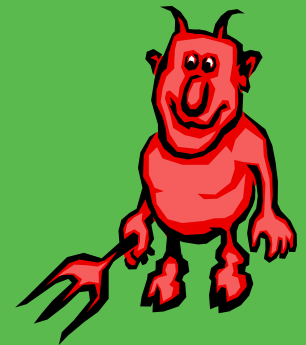
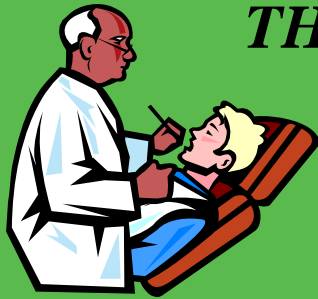
(ii) receiving reimbursement to which the provider was not entitled – not necessarily because the provider did not do the service, but because the provider did not follow to the letter all of the complicated requirements of a particular Medicare or Medicaid law or regulation (FCA).





THE BIG 3: KICKBACKS, SELF-REFERRALS, AND FALSE CLAIMS

*(A/K/A “LIES, BRIBES, AND PERKS” -
THE HOLY TRINITY OF EVIL!!!)*



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KICKBACKS

(Definitely not your parents' definition of kickbacks)

Anti-Kickback Law (also referred to as the Medicare and Medicaid Anti-Kickback Statute or AKS) –

- Prohibits anyone from knowingly and willfully offering, paying, soliciting or receiving anything of value in return for or to induce, recommend or arrange the referral of an individual or the purchase or lease of a product or service covered under Medicare, Medicaid or another gov'tal health care program.

[In short, no \$\$ for referrals, including arranging for them]



MORE ON KICKBACKS

- **Underlying Purposes of AKS: (i) curb over-utilization; (ii) hold down Medicare/Medicaid cost increases; (iii) avoid interference with patient freedom of choice; and (iv) prevent anti-competitive practices**
- **Intent-Based (criminal/civil/administrative)**
- **Applies to Everybody (including indirect participants)**
- **“One Purpose” Test (Greber; Anderson/Baptist Medical Center – convictions against hospital CEO, COO and two physicians for sham physician consulting arrangements; hospital VP and hospital lawyer also were indicted; hospital settled case against it for \$17.5 Million)**
- **Penalties: Criminal (i.e., Serious Jail Time), Civil (up to approx. \$75,000 per act as of 2017), and Administrative (i.e., exclusion from most Federal Health Care Programs)**



MORE ON KICKBACKS

- **Private Party Contractual Disputes**
- **Statutory Exceptions (discounts, employment, GPOs, co-insurance waivers under PHSA, managed care)**
- **“Safe Harbor” Regulations (investments, space/equipment rentals, personal service/management contracts, etc.)**
- **OIG Advisory Opinions**
- **Fair Market Value (proxy for intent)**
- **Predicate Act for FCA liability (i.e., “boot-strapping”)**

- **Other federal anti-kickback authorities include the Eliminating Kickbacks in Recovery Act of 2018 (EKRA) – prohibiting kickbacks for referrals to recovery homes, clinical treatment facilities and clinical laboratories**



AKS – “Safe Harbor” Regulations

- Investment Interests: “Large”; “Small” (60/40 rules)
- Space/Equipment Rentals
- Personal Services/Management Contracts
- Sale of practices: only sales to other practitioners or sales to hospitals by retiring practitioners in HPSA
- Referral services
- Warranties
- Discounts
- Employees



AKS – “Safe Harbor” Regulations

- GPOs
- Waiver of coinsurance and deductible amounts (inpatient hospital services; PHSA recipients)
- Managed care
- Rural areas
- ASCs (investments in)
- Group practices (investments in)
- Practitioner recruitment (limited to rural hospitals)



AKS – “Safe Harbor” Regulations

- OB malpractice insurance subsidies
- Referral agreements for specialty services
- Cooperative hospital service organizations
- Ambulance replenishing arrangements
- Federally Qualified Health Centers (FQHCs)
- Electronic prescribing arrangements/ Electronic health records
- Free or discounted local transportation services
- Future safe harbors???



AKS – “Safe Harbor” for Small Company Investments

- **No more than 40% of each investment class held by investors in position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity (“tainted investors”)**
- **Equivalent investment terms for passive investors irrespective of their ability to refer**
- **Investment terms not related to past or future referral expectations**
- **No requirement to refer or to be in position to refer**



AKS – “Safe Harbor” for Small Company Investments

- No marketing or furnishing of services to passive investors differently than to non-investors
- No more than 40% of the entity’s gross revenues derived from referrals or business from investors
- Neither the entity, nor another investor, may loan funds to or guarantee loan for a tainted investor who uses part of such loan to obtain the investment
- Payments to investors must be directly proportional to contributed capital (including FMV of any preoperational services rendered)



AKS – “Safe Harbor” for Space/Equipment Rentals & Personal Services/Management Contracts

- Agreement is signed and in writing
- Agreement covers all premises/equipment/services being furnished during the term
- If not a full-time arrangement, the schedule of intervals, their precise length, and exact rent/charges must be specified
- Term of agreement is at least 1 year



AKS – “Safe Harbor” for Space/Equipment Rentals & Personal Services/Management Contracts

- **Aggregate charge/compensation is set in advance, consistent with FMV, and not determined in manner that takes into account volume or value of Medicare/Medicaid referrals or other business generated between the parties**
- **Aggregate items/services furnished are commercially reasonable (& not otherwise illegal)**



AKS – “Safe Harbor” for ASC Investments

- Different safe harbors for general or same specialty surgeon-owned ASCs, single-specialty ASCs, multi-specialty ASCs, and hospital/physician ASCs
- Some similar requirements to “small investments” safe harbor: investment returns must be proportional to capital investment, no loans to assist investors acquire ownership interest, no investment terms based on past or future referral volume, etc.



AKS – “Safe Harbor” for ASC Investments

- At least 1/3 of each physician investor’s annual medical practice income from all sources must be derived from performance of Medicare-covered ASC procedures
- In multi-specialty ASCs, at least 1/3 of the Medicare-covered ASC procedures performed by each physician investor also must be performed at the subject ASC
- Limits on ancillary services at ASC, non-discriminatory services to patients, and ASC use of hospital space, equipment or services must satisfy other safe harbors, etc.



SELF-REFERRALS (The morass that is the “Stark Law”)

Anti-Referral Laws (also referred to as the Stark I and II Physician Self-Referral Laws and by several glorious Phases of Stark Regulations) –

- Among other things, Stark prohibit a physician from referring a Medicare or Medicaid patient to a health care provider for certain designated health services (DHS) furnished to such Medicare or Medicaid patient, if the physician or an immediate family member has an ownership or investment interest in or financial or compensation arrangement with the health care provider, unless one of certain limited exceptions applies.



Physician Self-Referrals (Stark)

WHAT IS PROHIBITED?

- Referral by physician for Designated Health Service where there is a Financial Relationship and no applicable exception
- Submission of Claim for the DHS



MORE ON SELF-REFERRALS



Violation of Stark is punishable by:

- **Mandatory disgorgement of Medicare/Medicaid receipts from tainted referrals, plus >\$24,000 civil money penalty as of 2017 for each tainted referral and for each claim submitted pursuant to a tainted referral, plus >\$161,000 civil money penalty as of 2017 for circumvention schemes such as cross-referral arrangements, plus potential FCA liability.**



MORE ON SELF-REFERRALS

- **Designated health services include:**
 - clinical laboratory services; physical therapy services; occupational therapy services; radiology, including MRIs, CTs, ultrasounds, x-rays and certain other imaging modalities; radiation therapy services and supplies; durable medical equipment and supplies; parenteral and enteral nutrients, equipment and supplies; prosthetics, orthotics, and prosthetic devices; home health services and supplies; outpatient prescription drugs; and inpatient and outpatient hospital services
- **Similar exceptions to the AKS safe harbors (but “in-office/group practice” exception in lieu of investments)**



MORE ON SELF-REFERRALS

Referral:

- Request by physician for DHS
- Ordering DHS
- The certifying or recertifying of the need for DHS
- A request for a consultation with another physician and any test or procedure ordered by or to be performed by (or under the supervision of) that other physician that includes DHS



MORE ON SELF-REFERRALS

*Only applies to “physicians”
(and immediate family members):*

- MD (allopathic physicians)
- DO (osteopathic physicians)
- DMD (dentists)
- DDS (dentists)
- OD (optometrists)
- DPM (podiatrists)
- DC (chiropractor)



MORE ON SELF-REFERRALS

- **Important to Bear in Mind: A Prohibited Financial Relationship Need Not Relate Directly to DHS in Order to Implicate Stark and to Preclude Other DHS Referrals; Indeed, a Prohibited Financial Relationship may not even Relate to Health Care . . .**
- **“Direct” versus “Indirect” Compensation Arrangements**
- **What it Means to “Stand in the Shoes” (physician-owners required; physician-employees permitted)**
- **Imputed Referrals to Physicians who Direct or Control Referrals of Other Physicians**



MORE ON SELF-REFERRALS

- **Unlike the AKS, the Stark Law is a strict liability statute; failure to comply fully with an applicable exception renders the referral (and payment for that referral) improper**
- **Stark Regulations (Stark I, Stark II - Phases I, II, III and Beyond)**
- **Comparable State Laws (PA - Workers' Compensation)**
- **Predicate Act for FCA Liability (i.e., “boot-strapping”)**



SELF-REFERRALS: LEADING EXCEPTIONS

- **In-Office Ancillary Services (for solo docs and *qualifying group practices*) and Personally-Performed Physician Professional Services**
- **Ownership Exceptions (publicly-traded securities, rural providers, “whole hospital” exception, but on again/off again re specialty hospitals - no more under PPACA)**
- **Office Space and Equipment Rentals (NEW: Timeshare Arrangements)**
- **Bona Fide Employment Relationships**
- **Personal Services Arrangements**
- **Physician (and some NPP) Recruitment (and limited retention)**
- **Indirect Compensation Arrangements**
- **Isolated Transactions**
- **Other Fair Market Value Arrangements**



SELF-REFERRALS: LEADING EXCEPTIONS

- **Temporary Compliance Lapses (Missing Signatures, etc.)**
- **Holdover Arrangements (services, leases, etc.)**
- **Medical Staff Incidental Benefits**
- **Non-Monetary Compensation**
- **Professional Courtesy**
- **Academic Medical Centers**
- **OB Malpractice Insurance Subsidies**
- **Electronic Prescribing Arrangements/Electronic Health Records**
- **Other Exceptions (compliance training, charitable donations, risk-sharing arrangements, etc.)**



PHYSICIAN COMP: GENERAL CONCEPTS

Physician Compensation Generally Must Be:

- Set in Advance (amount or permitted formula)
- Consistent with FMV
- Not Determined in a Manner that Takes into Account the Volume or Value of Referrals (VVR) or Other Business Generated Between the Parties
- Commercially Reasonable (w/out referrals)



Bona Fide Employment Relationships

- **Employment for identifiable services**
- **Compensation is Consistent with FMV of furnished services**
- **Not determined in manner that takes into account referrals (but productivity bonuses for personally furnished services ok)**
- **Commercially reasonable even if no referrals**
- **This exception does not require written contract (but written contract is strongly recommended)**



Space and Equipment Leases

- Arrangement is signed and in writing, and specifies arrangements in adequate detail
- Rental charges set in advance, consistent with FMV, and does not take into account volume or value of referrals (per-use/per-click payments prohibited if reflecting referrals by lessor to lessee; percentage arrangements also prohibited if based on use of space/equipment)
- Minimum 1-year term required, but early termination permitted if no new lease during first year of original term
- Holdovers allowed subject to limits
- Commercially reasonable even if no referrals



Timeshare Arrangements

- **Covers premises, equipment, personnel, etc.**
- **Must be predominantly for E&M services and on same/set schedule**
- **No advanced imaging or radiation therapy equipment, or lab equipment (other than for CLIA-waived tests)**
- **Per-use/per-click payments are prohibited**
- **No conveyance of possessory leasehold interest**



Personal Services Arrangements

- **Similar requirements to exceptions for space and equipment leases – arrangement signed and in writing w/adequate detail, term of at least 1-year, comp is set in advance, consistent with FMV, and does not take into account VVR, commercially reasonable for legit business purposes**
- **Arrangement covers all services provided by physician, or cross-references other arrangements or a master list of contracts that is maintained and updated centrally; holdover arrangements ok w/limits; limits on incentives that could induce medically necessary services to patients**



In-Office Ancillary Services

- Most commonly used exception for practices that provide DHS
- Site of service must be either:
 - “Same building” in which physician or group regularly practices (see below); or
 - “Centralized building” used exclusively by group



In-Office Ancillary Services

- Ancillary to referring physician's professional services.
- Personally performed by referring physician, a "member of the group practice" or individuals "directly supervised" by referring physician or by another "physician in the group practice."
- Billed by physician performing or supervising the performance of the service (or that physician's group practice).



In-Office Ancillary Services – “Same Building” must be:

1. Open 35 hours/week, staffed by group 30 hours per week (“Main Office” test) or
2. Open 8 hours per week, staffed by referring physician 6 hours per week, patient usually sees physician there for non-DHS (“Patient-Specific” test) or
3. Open 8 hours per week, staffed by referring physician or group members 6 hours per week, and either
 - Referring physician orders DHS on site during visit; or
 - Group member is on site when DHS is performed(“Physician-Specific” test)



In-Office Ancillary Services - “Centralized Building”

- Group practices only
- Exclusively used by group
- No shared facilities allowed



Isolated Transactions

- Amounts paid to physician as isolated financial transaction such as one-time sale of property or medical practice (no other non-excepted transactions for 6 months)
- Amount is consistent with FMV, not determined in manner that takes into account VVR, and commercially reasonable even if no referrals
- Must be single payment or integrally related installments w/aggregate payment amount fixed before 1st installment and immediately negotiable or guaranteed by third party or otherwise secured to assure payment in event of default; Commercially reasonable closing adjustments ok for 6 months



Physician Recruitment (and NPPs)

- **Payment by hospital to induce an eligible physician recruitment candidate to relocate and join hospital's medical staff (docs in practice \leq 1 year, moving office 25 miles or more, or seeing 75% new patients)**
- **Special rules for recruiting doc to join existing group (incentives must flow to recruited doc except for actual costs like headhunter fees; limited overhead allocations permitted in cases of income/collection guarantees)**
- **NPP recruitment ltd to PAs, NPs, nurse specialists, midwives, clinical social workers and clinical psychologists – ltd to 50% actual comp, signing bonus & benefits for 2 yrs**



Medical Staff Incidental Benefits

- **Comp offered to all members of Med Staff practicing in same specialty; not offered in manner that takes into account VVR; offered during periods when Med Staff members making rounds or engaged in other activities benefiting hospital or its patients**
- **Comp is provided/used only on hospital campus (covers items like free parking, meals in cafeteria, and lab coats or scrubs – also includes internet access, pagers, 2-way radios used off-campus to access hospital records, etc.)**
- **Comp is of low value – less than \$34 per occurrence during CY 2018 (annual inflation updates)**



Non-Monetary Compensation

- Offered in the form of items or services (excluding cash or cash equivalents such as gift certificates, stocks or bonds, or airline frequent flyer miles) that does not exceed an aggregate of \$407 per physician per year during CY 2018 (annual inflation updates)
- Not determined in manner that takes into account VVR; cannot be solicited by the physician or practice
- Inadvertent overage payments up to 50% of the current annual limit can be returned within earlier of 180 days or end of calendar year (can be used only once every 3 years for a specific physician)

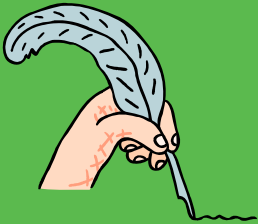


Temporary Non-Compliance

- Exception available if arrangement fully compliant for at least 180 days, arrangement falls out of compliance for reasons beyond the entity's control, and the entity promptly takes remedial action
- Non-compliance must be rectified w/in 90 days
- Exception may be used once every 3 years with respect to any particular physician
- Exception not available to remedy non-monetary comp exception or medical staff incidental benefits exception



Temporary Non-Compliance with Signature Requirements



- **Exception available if parties obtain required signatures within 90 calendar days following date the arrangement became non-compliant**
- **Exception may be used once every 3 years with respect to any particular physician**



Relaxed Standards for Satisfying Written Agreement

- **In order to determine if a contract is in writing, relaxed standards permit reliance on a contemporaneous collection of documents evidencing course of conduct.**
- **These may include Board meeting minutes, written communications (letters and emails), time sheets, fee schedules, checks, check requests and invoices, accounts payable/receivable records, etc.**
- **Signature from each party required on at least 1 document**



FALSE CLAIMS

(If it's not a "true" claim, then it's a "false" one)

False Claims Laws (including the False Claims Act or "FCA") –

- prohibits anyone from knowingly presenting or causing to be presented any claim for payment under Medicare, Medicaid or another governmental health care program for a medical item or service that the person knows or should know was not provided as claimed, was false or fraudulent, or was for a pattern of medical items or services that were not medically necessary.



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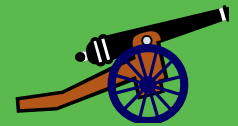


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EVERYTHING YOU EVER WANTED TO KNOW ABOUT THE FCA BUT WERE AFRAID TO ASK, AND THEN SOME

- **FCA is a Civil War era statute that originally was enacted to prevent people from defrauding the Union Army. Today, the most frequent application of the FCA is against health care providers.**
- **Practically speaking, any violation of Medicare or Medicaid rules (including inadvertent violations) can trigger scrutiny, and potential liability, under the FCA.**



(The “Inexcusable Sloppiness” Standard)

FCA knowledge standard: person submits a false claim either knowingly, or in reckless disregard or deliberate ignorance of the truth or falsity of the information. Thus, documentation of compliance efforts is critical.



Whereas an isolated occurrence might be treated as mere negligence or an innocent error, numerous occurrences might be deemed “a pattern or practice” that becomes a false claim. The line between innocent errors and false claims has become increasingly blurred.



FCA INTERPLAY WITH STARK/AKS

What does Stark/AKS have to do with submission of false claims?

FCA Theories of Liability:

- **Express False Certification**
- **Implied False Certification**

Several courts including the Third Circuit and SCOTUS have recognized that a violation of Stark/AKS can be pursued under the FCA under certain circumstances. Affordable Care Act (PPACA) provisions also essentially codified this result.



MORE ON THE FCA

- **Penalties under the FCA are 3 times damages plus \$10,957 - \$21,916 per false claim as of 2017 (e.g., each CMS/HCFA-1500 claim form). It is not unprecedented for a mere \$10,000-\$20,000 in questionable overpayments to translate into potential FCA liability in upwards of \$1 million or more!!!**
- **Latest FCA trend is to go after not just traditional over-utilization or upcoding and other revenue-maximizing practices, but also under-utilization and under-treatment scenarios.**



STILL MORE ON THE FCA

•FCA includes whistleblower (qui tam) provisions that allow private parties to file lawsuits on behalf of the Government, essentially turning hospitals, physicians and other providers into walking meal tickets for anybody who comes into contact with them and has reason to believe of a billing rule violation or improper financial relationship, including existing/former employees, contractors, ex-spouses, consultants, competitors, patients, etc.



•Whistleblower (the “relator”) generally gets between 15%-30% of the ultimate recovery (plus attorneys’ fees), depending on his or her role in the case and whether or not the Government intervenes.



Fraud Enforcement and Recovery Act of 2009 (“FERA”)

- **Expands the scope of liability under the FCA to include:**
 - **Anyone who makes a false statement or claim to virtually any recipient of federal funds (not just claims submitted directly to a government officer or employee)**
 - **Anyone who knowingly retains a government overpayment without regard to whether or not that entity used a false statement or claim to do so (“reverse false claims”)**
- **FERA’s changes also:**
 - **Expand whistleblower protections**
 - **Require FCA violators to reimburse Gov’t’s litigation costs**
 - **Increase Gov’t’s investigative authority and ability to share information with whistleblowers**



Patient Protection and Affordable Care Act (“PPACA”)

- Expanded Use of AKS, FCA and More
- Defines “Overpayments” as any funds received or retained under Medicare/Medicaid to which person or entity is not entitled
- Affirmative obligation to report and refund Overpayments within 60 days after identification (or date cost report is due, if applicable) - failure to timely refund is separately actionable
- Regulation on reporting and returning overpayments proposed in 2012 and adopted in 2016 - final rule has 6-year lookback period; up to 6 months to investigate diligently, then 2 months to report and return overpayment



PHYSICIAN CONTRACTING COMPLIANCE ISSUES

- **Medical Directorships, Consulting/Contractor Arrangements, and Employment Relationships (full-time v part-time) - satisfying the “one purpose” test?**
- **Fair Market Value and Commercial Reasonableness: The Importance of Each and Distinctions Between Them**
 - **FMV = Value in arms-length transactions, consistent with general market value, with bona fide bargaining b/w well-informed parties not compelled to consummate the transaction and not in position to refer to the other**
 - **Commercial Reasonableness = important as to services and payments (commercially reasonable even in the absence of referrals?)**
 - **Who determines FMV and CR?**
 - **In addition to FMV and CR, also must be no payment based on VVR (volume or value of referrals)**

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PHYSICIAN CONTRACTING COMPLIANCE ISSUES

- **When are Physician “Time Sheets” Desirable or Necessary?**
- **When is it Permissible to Compensate Physicians Above Median Reported Salary Survey Levels?**
- **What Payment Methodologies Are Available for Compensating Physicians? Fixed salary? Per diem? Hourly? Fee for service? Percentage?**
- **Limitations on Terminating and/or Amending Physician Contracts – what if scope of services or required time commitment changes over course of the contract?**
- **What are the Consequences of Payments that Do Not Conform to the Written Contract Specifications?**
- **Unsigned Contracts and Lapsed Contracts; Problems with Back-Dated Contracts?**
- **Directed Referrals/Tracking of Referrals – Sharing Data with Physicians?**



PHYSICIAN-HOSPITAL TRANSACTIONS IN THE FRAUD AND ABUSE GRAY AREA

- **Medical Practice Acquisitions, Coupled with Employment of Acquired Physicians**
- **Issues Include: Aggressive valuation methodologies; higher post-transaction compensation (capped v uncapped); handling of in-office ancillary services; individual FMV compensation tracking v aggregate FMV group compensation; installment payments/earn-outs; directed referrals to employer's affiliates and preferred providers; restrictive covenants; employer financial operating losses**



PHYSICIAN-HOSPITAL TRANSACTIONS **IN THE FRAUD AND ABUSE GRAY AREA**

- **Leasing of Whole Medical Practice (Virtual Employment)**
- **Issues Include: Aggressive valuation methodologies; higher post-transaction compensation (capped v uncapped); handling of in-office ancillary services; individual FMV compensation tracking v aggregate FMV group compensation; who keeps receivables upon termination; directed referrals to employer's affiliates and preferred providers; restrictive covenants; employer financial operating losses; payments for right of first refusal to acquire medical practice**



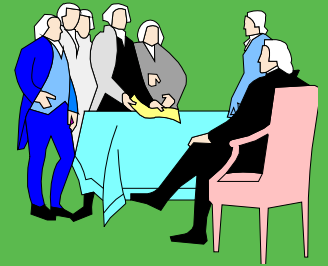
PHYSICIAN-HOSPITAL TRANSACTIONS **IN THE FRAUD AND ABUSE GRAY AREA**

- **Clinical Co-Management Arrangements**
- **Issues Include: Clinical co-management v full service line management; purposes of the co-management company; ownership of the co-management company; capital contributions and distributions; physician eligibility requirements and active participation criteria; fixed v variable compensation methodologies; contract term and renewal; gainsharing considerations; restrictive covenants**



SELF-REPORTING & VOLUNTARY DISCLOSURE

- **Voluntary Disclosure Programs**
- **OIG Provider Self-Disclosure Protocol (for AKS violations and other violations of law)**
- **CMS Voluntary Self-Referral Disclosure Protocol (for Stark only violations; great for technical violations)**
- **Advisory Opinions**



10 COMPLIANCE RULES YOU WILL NEVER SEE IN PRINT:

RULE #1:

- **Contrary to Popular Adage, the “Sum of the Parts” is Sometimes Greater Than the “Whole”!**

RULE #2:

- **It is Not Illegal to Be Unlucky, Misguided, or Just Plain Stooooopid!**

RULE #3:

- **It is Not Illegal to Be the Richest Person in the Room!**

RULE #4:

- **When it Comes to Stats and Data: Figures Sometime Lie, and Liars Sometimes Figure!**

RULE #5:

- **Money is Never for Nothing, and No Lunch is Ever for Free!**



10 COMPLIANCE RULES YOU WILL NEVER SEE IN PRINT:

RULE #6:

- **Nobody Wants to be Called “Below Average”, and Nobody Wants to Be Paid Like it Either!**

RULE #7:

- **Evolution is Good: Somebody Has to Be the First to Innovate! In the Game of Musical Chairs, the Last Person Standing Generally Loses!**

RULE #8:

- **No Margin, No Mission!**

RULE #9:

- **With Fraud and Abuse Compliance, the “Journey” is Sometimes More Important than the “Destination”!**

RULE #10:

- **To Err is Human; to Forgive and Forget, Well that is Downright Superhuman!**

BONUS RULE #11:

- **Rolling the Dice is Not a Great Compliance Strategy, But Playing the Odds Will Sometimes Pay Great Dividends!**



FINAL THOUGHTS . . .



*Health Care Lawyer &
Compliance Officer's
Lament:*

*"We are born naked, wet and hungry.
Then things get worse!"*

*"Sometimes you get to be the fly, and
sometimes you get to be the windshield!"*

The truth may set you free, or it may lock you up!!!"



*"Before you criticize someone, you should walk a
mile in their shoes . . .*

*That way, when you criticize them,
you're a mile away and you have their shoes!!!"*

