

THE ANTI-KICKBACK STATUTE

A Chameleon In Disguise



PRESENTER

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What IS a Kickback???

What is the definition?

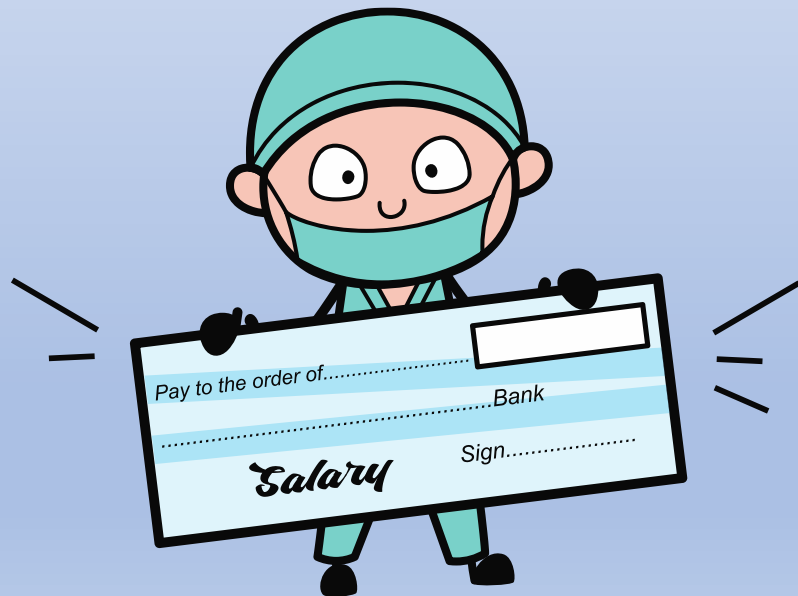
1. A portion of an income or profit given to someone as payment for having made the income possible, especially as in an underhand scheme involving the use of political or professional influence.

Alternate Definition:

2. Payment made to a person in a position of trust to corrupt his judgment

Q: But Why Is It Bad ?

Referral decision may be based on income **for the referring physician**



When it **must** be based upon most appropriate medical provider **for the patient.**



GENERAL ANTI-KICKBACK STATUTE

There is a General Anti-Kickback Statute, 41 U.S.C. §§ 8701-07, and it defines a kickback as follows:

The term “kickback” means **any** money, fee, commission, credit, **gift, gratuity, thing of value, or compensation of any kind** that is provided to a **prime contractor**, prime contractor employee, subcontractor, or **subcontractor** employee to improperly **obtain or reward favorable treatment** in connection with a prime contract or a subcontract relating to a prime contract.

KICKBACKS

[Continued]

Any cash flow, whether or not a legally defined “kickback,” is potentially a FCA violation—

1. If federal money is moved—
2. from where the government intended for it to go
3. to someplace else, even if that is . . . ,
4. back to the recipient.

ACA Turns an AKA Violation Into an FCA Violation

[A] claim that includes items or services resulting from a violation of [the Anti-Kickback Statute] constitutes a false or fraudulent claim for purposes of subchapter III of chapter 37 of Title 31 [the False Claims Act].

Patient Protection and Affordable Care Act

Medicare-Medicaid AKA

The Focus is on the Inducement Factor

(1) [k]nowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash *or in kind*—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

[or]

42 U.S. Code § 1320a–7b(b)

(2) [k]nowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or *in kind* to any person *to induce* such person—

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program

Q: But Why Is It a False Claim ?

Because the Government
Paid \$\$ to the Contractor, for
Payment to a **Subcontractor**



But the \$\$ **stayed** with the
Contractor

☞ The Government Was OVERBILLED

Federal Employee Health Benefits Program

United States ex rel. Kessler v. APWU

STEP ONE: U.S. Treasury (FEHP \$\$ for Benefits Plan) → Union Plan

*Two Parts: “On Formula” for Administrative Expenses
“Off Formula” for Claims & UR*

STEP TWO: Off Formula \$\$ → UR (with 20% rebate on savings plus IT)

STEP THREE: Rebate Returned \$\$ → On Formula

RESULT: Kickback

Why Is a **Co-Pay Waiver** a **Kickback/False Claim?**

- Government Requires Beneficiary to Pay Share (20%) of Fee for Service
 - The Government Mandates that Fee Charged is the “UCR”: Usual, Customary, Reasonable
 - If Co-Pay Is Waivered, then Real Fee Is Only 80% ,
 - Then Medicare Is Being Over-Charged
- and*
- The Beneficiary Is Being Induced to Use This Provider

Exchanging Patient Lists/Referrals

Patient Lists and Referrals Are Valuable

Example:

- DME Company Provided Patient Lists to Doctors
- Doctors Saw Patients & Billed Medicare & Medicaid
- Doctors Prescribed TENS Units
- Patients Purchased TENS Units From Company
- DME Company Billed Medicare & Medicaid

STARK VIOLATIONS

Why Are Self Referrals Considered Kickback?

1. Physician Invests in Clinic
2. Physician Refers Patients to Clinic
3. Clinic Bills Medicare
4. Physician Gets Share of Medicare Payment

→ *Self Inducement* ←



Whistleblower Exception to HIPPA

“Now What?”



Disclosures by Whistleblowers

45 CFR 164.502(j)(i)

A covered entity does not violate the HIPPA Privacy Requirements if an employee or a business associate discloses protected health information, provided that:

- (i) The employee or associate “believes in good faith that the covered entity has engaged in conduct that is unlawful”; and
- (ii) The disclosure is to . . . an attorney retained by or on behalf of the employee or associate for the purpose of determining the legal options of the workforce member or business associate with regard to the [unlawful conduct].

False Claims Act

31 USC 3730(b)(2)

- “A copy of the complaint and a written disclosure of and substantially all material evidence and information the person possesses shall be served on the government pursuant to” the Federal Rules of Civil Procedure.
- This is to allow the government to investigate and intervene in the lawsuit.

False Claims Act

31 USC 3730(h)

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of [filing a False Claims action] or other efforts to stop [False Claims Act] violations

Points to Take Home

- Cannot fire or punish employee for taking patient PHI for purpose of filing a False Claims Act or reporting a suspected violation
- This applies if you have reason to know that the reason the employee took the PHI was to file an FCA lawsuit or to report a violation
- Company Policy is **NOT** a defense if you discipline the employee
- Failure of employee to inform Compliance is **NOT** a defense if you discipline the employee
- Employment contract is **NOT** a defense if you discipline the employee

What Do You Do Now?



The employee & his attorney are responsible for the information—

And so are you

*USA ex rel. Alvord v.
Lakeland Regional Medical Center*
(Middle District of Florida, Sept. 2012)

- Relator-Employee gave PHI to attorney—kept none for herself
- Attorney gave PHI to Government and filed FCA complaint under seal
- Included PHI in the complaint
- Government declined, then case came out from under seal
- PHI was disclosed, and made available to the press
- Absent employment agreement specifying protection of PHI there is no requirement on the part of the employee or his attorney to protect the information

Motion for Sanctions Filed

- Defendant sent breach notification letters to patients
- Court placed responsibility for breach placed not on employee but on attorney
- Court found obligation to maintain privacy of PHI *not just from HIPPA, but from Court's electronic court records requirements*
- Attorney gave explanation that breach was transient and inadvertent
- Defendant asked for the “stolen” PHI to be returned and to be excluded as evidence at trial—Court said “No”
- But—Court ordered attorney to pay for the breach notices sent to patients
- And—Court ordered records in docket to be redacted

Moral of the Story

1. Employee can take PHI for whistleblower purposes and can use to bring FCA lawsuit
2. Cannot discipline employee if you know (or suspect) that this is why the employee took the information
3. Employee Not Responsible for Disclosure of Records under HIPPA, as he is not a covered entity
4. Provider's remedy is through employment agreement
5. Attorney is responsible both under employee's employment agreement and through court filing requirements

SEARCHING THE NOOKS AND CRANNIES OF THE FALSE CLAIMS ACT

THINGS YOU DIDN'T KNOW—PROBABLY DIDN'T WANT TO—BUT SHOULD



ONLY *ONE* FALSE CLAIMS ACT BUT *SEVEN DWARFS* VIOLATIONS

- (A) Presenting **False Claims**
- (B) Using a **False Statement** Regarding Claims
- (C) **Conspiracy**
- (D) **Conversion** of Property or Money
- (E) Making or Using a **Document**
- (F) **Pledges**
- (G) **Reverse False Claim**

Conversion of Property or Money

31 U.S.C. 3729(a)(1)(D)

[A]ny person who:

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property

Reverse False Claim

31 U.S.C. 3729(a)(1)(G)

[A]ny person who:

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government

What Is a Claim?

31 U.S.C. 3729(a)(2)

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—

(B)(i) is presented to an officer, employee, or agent of the United States; or

[CONTINUED]

What Is a Claim?

31 U.S.C. 3729(a)(2)

(B) (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

What Is an “Obligation”?

31 U.S.C. 3729(b)(3)

The term “obligation” means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment

~ PENALTY AMOUNTS ~

Penalties apply—

- to **each** false claim presented, or false statement used, or other violation,
- **No matter how much** the claim or damage may be for,
- **whether or not** a claim is paid,
- Initially, \$5,000 to \$10,000 per claim, statement, etc.

But

~ PENALTY AMOUNTS ~ INCREASE YEARLY

Penalty Amounts Change Periodically

- Increases with Inflation**
- Depends when the FCA Violation Occurred**
- Depends when a Judgment Is Entered or a Settlement Is Made**

~ PENALTY AMOUNTS ~

“The times, they are a’ chan—ging”

Imposed As Of	1986	Sept. 30 1999	August 1 2016	Feb. 3 2017	Jan. 29 2018	June 19 2020	Jan. 11 2021
Minimum	\$5,000	\$5,500	\$10,781	\$10,957	\$11,181	\$11,665	\$11,803
Maximum	\$10,000	\$11,000	\$21,563	\$21,916	\$22,363	\$23,331	\$23,607