

# SEARCHING THE NOOKS AND CRANNIES OF THE FALSE CLAIMS ACT

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



# **PRESENTER**

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# 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
Minimum	\$5,000	\$5,500	\$10,781	\$10,957	\$11,181	\$11,665
Maximum	\$10,000	\$11,000	\$21,563	\$21,916	\$22,363	\$23,331

# KICKBACKS

## Its Not Just Your Mother's AKA ~~Anymore.~~

1. There is a General Anti-Kickback Statute, 41 U.S.C. §§ 8701-07:

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 from the recipient—
2. from where the government intended for it to go
3. to someplace else, and
4. back again to the recipient.

# 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