

The False Claims Act & Health Care Fraud

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Presentation Road Map

- Overview of the False Claims Act (FCA)
 - Application of FCA to healthcare industry
 - Case study & benefits of compliance
-

Overview Of The FCA

Overview Of The FCA

- Why overview?
 - Awareness & understanding of:
 - DOJ's broad regulatory enforcement authority
 - FCA's context w/in government's current enforcement paradigm
-

English Common Law

“There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the Government.”



-- Benjamin Franklin

*Qui tam pro domino rege quam
pro si ipso in hac parte sequitur*

Civil War – Lincoln’s Law

- Lincoln sponsored FCA in 1863
 - Defense contractor fraud against Union
 - Proscribed false claims to the U.S.
 - Deputized private citizens as attorney generals or “relators”
 - “Relators” entitled to 50% of recovery
 - U.S. NOT entitled to intervene
-

“Rogue” Justice

“Setting a rogue to catch a rogue’ . . . is the safest and most expeditious way . . . of bringing rogues to justice.”

-- Senator Jacob M. Howard (1863)

**Referring to the enactment
of the False Claims Act *qui tam* provisions**

Modern False Claims Act (FCA)

“Even the most diligent law enforcement efforts cannot root out all the fraud, given the large number of health care providers that bill Medicare.”

-- Senator Charles Grassley (R, Iowa)
Commenting on the 1986 Amendments to the False Claims Act's *qui tam* provisions which he co-sponsored

1986 FCA Amendments

- Treble damages
 - Clarified burden of proof = preponderance
 - “Knowing” intent:
 - Actual knowledge
 - Deliberate ignorance
 - Reckless disregard
-

1986 FCA Amendments Cont.

- Adopted a “reverse false claim” provision
 - Parasitic lawsuits
 - Eliminated “any” govt. knowledge bar
 - Substituted public disclosure bar & original source rule
 - Public disclosure = bar on FCA claim
 - Unless Relator is original source
-

1986 FCA Amendments Cont.

- Relators
 - Retaliation cause of action
 - Right to attorney’s fees, costs & expenses
 - Relator’s role
 - Limited party if Govt. intervenes
 - Relator’s share
 - If Govt. Intervenes = 15-25%
 - If Govt. does not intervene = 25-30%
 - Public disclosure = 0-10%
-

FCA *Qui Tam* Limitations

- Voluntary disclosure liability = 2x damages
 - SOL = 6 years after the date on which the violation is committed
 - But in some cases may go back up to 10 years
 - *Pro se* Relator can proceed if government declines to intervene
-

The FCA & Health Care

- “Somebody reviews these things, right?”
 - Go straight to federal court & file case
 - Without any prior administrative/contractor review
 - “The FCA is a *billing* statute”
 - Quality of care
 - Implied certification
 - Financial conflicts of interest
 - “Perception is reality”
 - Most DOJ enforcement actions settle
 - Settlements create a perception of reality
-

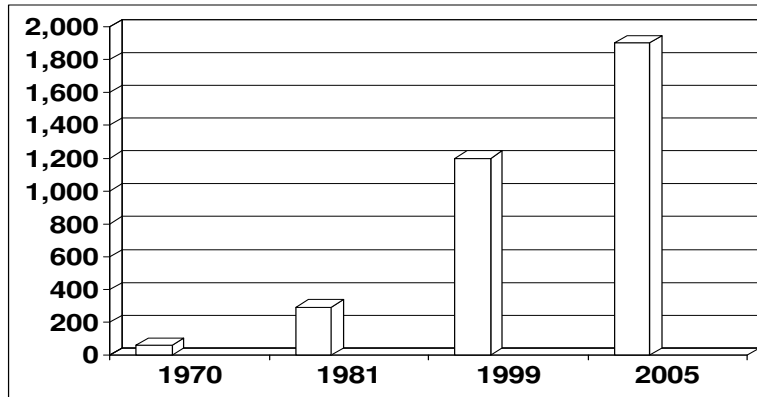
Application Of FCA To Healthcare Industry

American Health Care Industry

- Largest “legal” industry in the U.S.
 - U.S. spends more on health care than any other nation
 - U.S. has a uniquely complex health care financing & payment system
 - Federal & State governments are stakeholders
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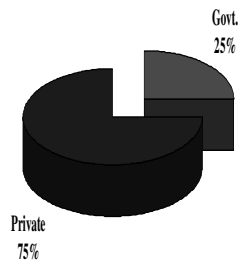
Health Care Expenditures

64 Million 295.3 Billion 1.2 Trillion 1.9 Trillion

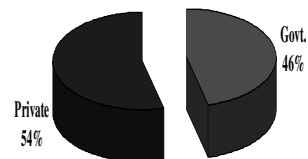


Govt. (Fed & State) % of Health Care In United States

1960



2003



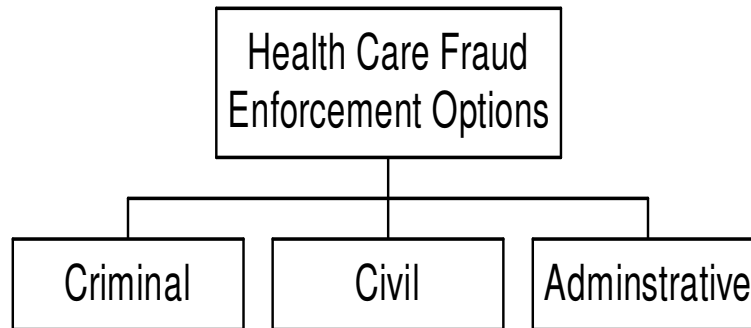
Health Care Fraud & Abuse Program

- Created by HIPAA
 - Partnership between DOJ, HHS-OIG, CMS, and state Medicaid agencies
 - FCA principal means of civil fraud recoveries
 - Recoveries used to fund additional enforcement
-

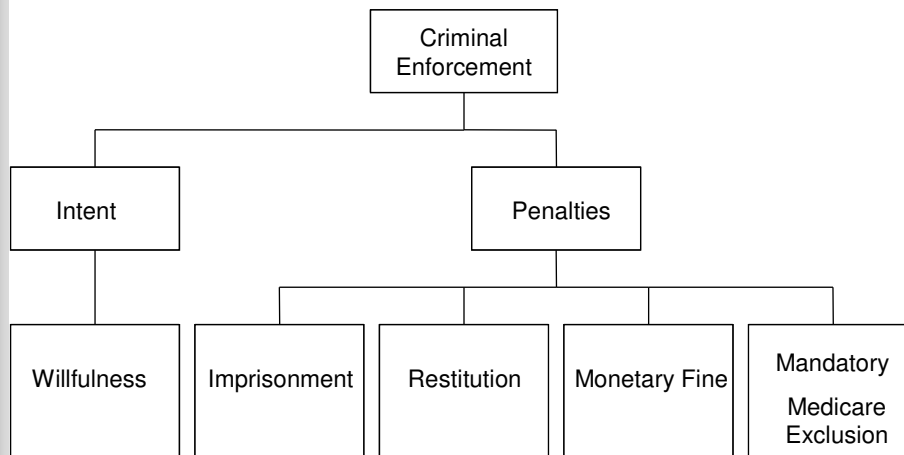
Health Care Fraud And DOJ

- Goal – continued dismantlement of criminal enterprises engaging in health care fraud
 - Criminal and civil divisions located in Washington, DC
 - 93 United States Attorneys' Offices
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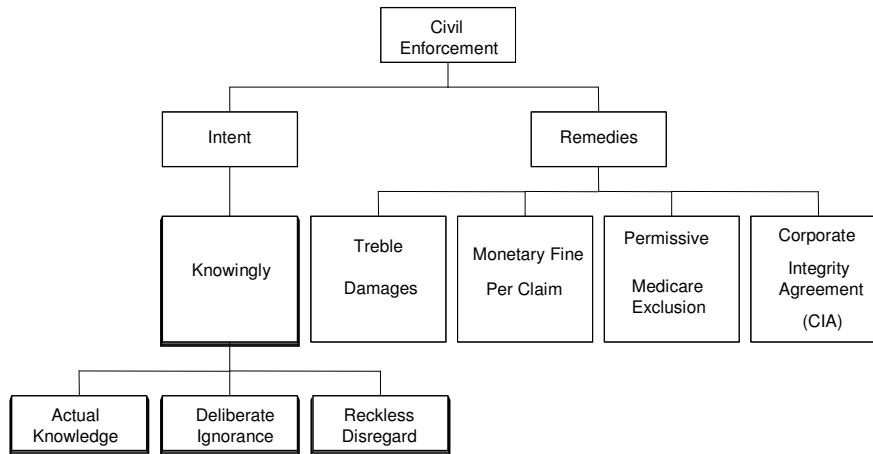
Health Care Fraud Enforcement



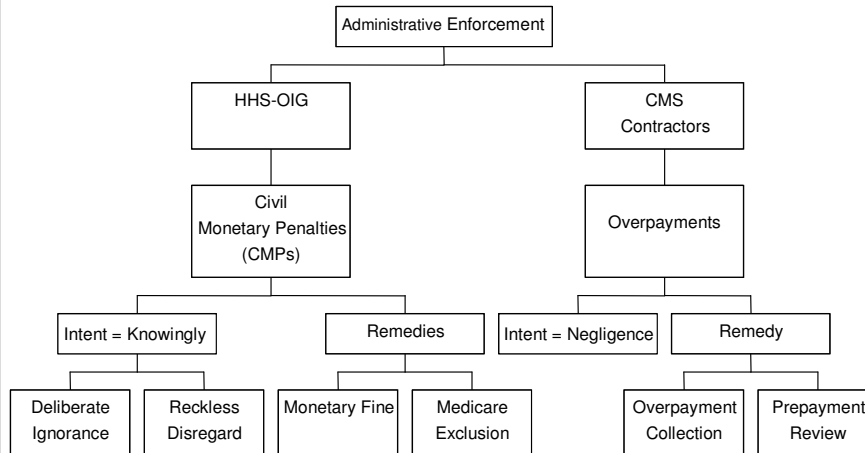
Criminal Enforcement



Civil Enforcement

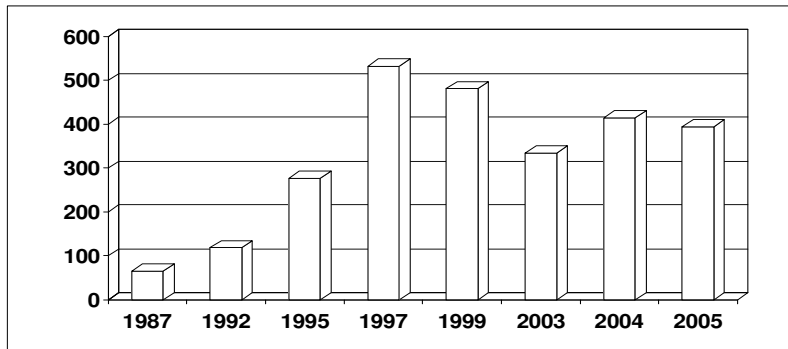


Administrative Enforcement



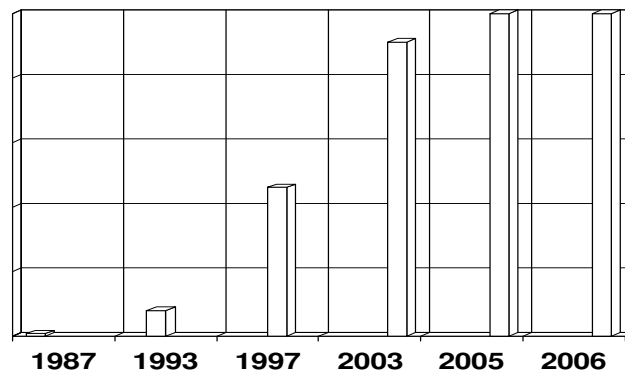
Health Care FCA *Qui Tam* Case Filings Per Year

66 119 277 533 481 334 415 394



Total Health Care Fraud Recoveries Under The FCA

\$11.4 Million \$155.3 Million \$920.4 Million \$1.8 Billion \$1.1 Billion 1.6 Billion



Total Recoveries Under The FCA Since 1986 Amendments

- Over \$20 billion
-

DOJ And HHS-OIG Annual Statistics 2006

- 523 criminal convictions
 - 3,425 program exclusions
 - 266 civil actions filed in federal court
 - \$38.2 billion in savings/expected recoveries
-

The Anti-Kickback Statute

- Criminal statute - BUT
 - Can form basis for FCA liability
 - Remuneration can be anything of value
 - Greater compliance with safe harbor, generally means less risk
-

The Stark Law

- Civil statute
 - Remedy is payment disallowance - BUT
 - Can form basis for FCA liability
 - Applicable only if physician is involved
 - To avoid violation, must fully satisfy exception (strict liability)
-

Anywhere Medical Center

“Falseness often lurks beneath fair hair.”

-- Danish Proverb

The Setting

- Anywhere USA
 - Medical Center
 - Large provider of healthcare in community
 - E.g., \$200 Million in annual income from federal govt. payments
 - Loss of payments would be “devastating”
-

The Setting Cont.

- Allegations relate to professional service agreements including:
 - Medical director contracts
 - Recruiting agreements
 - Joint ventures
 - Leases
 - With large physician group practices in the area
-

The Setting Cont.

- Adequate Healthcare Compliance & Corporate Responsibility?
 - No in-house counsel
 - No compliance officer “for a number of months”
 - No internal review of contracts or financial relationships
-

The Complaint

- Concern voiced at board meeting
 - Director/Trustee raises compliance issues
 - Chairman Legal Committee dismisses issue
 - Other complaints
 - Physicians, employees, patients
 - Confidential Source
 - Provides “sensitive info.” to govt.
-

Govt.’s Investigation

- Consider allegations
 - Administrative, civil, or criminal action?
 - Scope and nature of the investigation
 - Assemble investigative team
-

Govt.'s Investigation Cont.

- Request claims history, sample or medical review from contractor
 - Gather evidence - how?
 - Interviews
 - Review and analyze key documents
-

Govt.'s Investigation Cont.

- Administrative or HIPAA subpoena relating to “Federal health care offenses”
 - Why?
 - Focusing on:
 - Faculty practice plan
 - Physician relationships with hospital
 - Contracts & professional service agreements
 - Hospital compliance program records
-

Govt.'s Investigation Cont.

- Medical Center's response:
 - Public statement:
 - Initiated internal investigation
 - Hired a compliance officer
 - Hired three attorneys/in-house counsel
 - Initiated review of all contracts
 - Request concerns raised via hotline
-

Govt.'s Investigation Cont.

- Which potential issues should be pursued?
 - Tainted Claims under FCA
 - Illegal kickbacks for referrals
 - Stark violations due to improper financial arrangements
 - State violations?
 - Approach hospital to discuss settlement
 - Exhaust options before taking action
-

Allegations & Settlement

- Govt. contended \$120 million in false claims
 - Treble damages = \$360 million
 - \$11K penalty per fraudulent claim
 - Exclusion of hospital and/or physicians
 - Public & professional stigma
 - SEC filings/loss of stock value
-

Allegations & Settlement Cont.

- Terms of civil FCA settlement:
 - “wrongdoing in connection w/ compliance & COI charges”
 - Pay govt. Millions
 - No admission of wrongdoing
 - Five year CIA (training & education)
 - No exclusion (c.f., loss of funds “devastating”)
-

Benefits Of Compliance

“Prevention is better than cure.”

-- Epictetus, Greek Philosopher

Benefits Of Compliance

- Impact on Medical Center:
 - “Investigation is ongoing & [we] are cooperating”
 - Govt. not precluded from pursuing charges “against individuals” – who?
 - \$ millions in legal fees
-

Benefits Of Compliance Cont.

- Medical Center statement:
 - “to avoid delay, uncertainty, inconvenience & expenses of protracted litigation”
 - Allegations do not relate to quality of care or patient billings
 - Others are doing it/we are the “poster child”
-

Benefits of Compliance Cont.

- Helps ensure provider is properly paid
 - Avenue for employee grievances and complaints
 - Likely prevent and deter health care fraud and abuse
 - Elimination/reduction of liability
-

Top FCA Settlements

- **“Top” as reported by Taxpayers Against Fraud**
 - **All providers settled allegations only**
 - **No admissions of fraud or wrongdoing**
-

Top FCA Settlements

- **#1 Tenet Healthcare (July 2006)**
 - Ability to pay . . .
 - Paid \$900 million for false claims involving:
 - Kickbacks paid to physicians in exchange for referrals
 - Manipulation of outlier payments
 - Upcoding
 - Bill padding
-

Top FCA Settlements Cont.

- **#2 HCA (Dec. 2000)**
 - Paid over \$731 million for false claims involving:
 - Medically unnecessary laboratory tests
 - Upcoding medical problems
 - Billing for nonreimbursable advertising & costs
 - Settlement did not resolve allegations:
 - Kickbacks paid to physicians in exchange for referrals
-

Top FCA Settlements Cont.

- **#3 HCA (June 2003)**
 - Paid \$631 million for false claims involving:
 - Kickbacks paid to physicians in exchange for referrals
 - Cost report fraud
-

Top FCA Settlements Cont.

- **#4 Serona (Oct. 2005)**

- Paid \$704 million and \$567 million for false claims involving:

- Kickbacks paid to doctors to prescribe a drug
 - Kickbacks paid to specialist pharmacies for recommending the drug
 - Illegal off-label marketing of the drug
-

Top FCA Settlements Cont.

- **#5 TAP Pharmaceutical Products, Inc. (Oct. 2001)**

- Paid over \$559 million for false claims involving:

- Kickbacks paid to doctors by providing free samples knowing that they would bill govt. for each dose
 - As part of scheme to fraudulent price & market a drug
 - At time, the drug accounted for 10% of expenditures for prescription drugs under Medicare Part A
-

Other Recent FCA Settlements

- **Erlanger Medical Center (Oct. 2005)**

- \$40 million
- Kickbacks & financial relationships

- **Medco Health Solutions (Oct. 2006)**

- \$155 million
 - Kickbacks from manufacturers to favorably promote and market their drugs
-

Recent FCA Settlements Cont.

- **Lincare (May 2006)**

- \$10 million
- Kickbacks to doctors for home oxygen supplies

- **AdvancePCS (Sept 2005)**

- \$138 million
 - Kickbacks from drug manufacturers in exchange for marketing their drugs to beneficiaries
-

Recent FCA Settlements Cont.

- **American Medical Response, Inc. (Oct. 2006)**
 - \$9 million
 - Illegal inducements to hospitals in return for referrals of ambulance transports
-

**“All the problems of
the world can be solved,
if people would just stop & *think*”**

-- Socrates

Quality Health Care

- **Quality** – A degree of excellence
 - **Excellence** – Quality of being excellent; virtue
 - **Virtue** – Conformity to a standard of right
-

**“A business culture
built on excellence will most
frequently outperform a culture in
which [financial] success is the
singular objective”**

-- Peter W. Schultz

Questions

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