# The Troll Under The Bridge

**June 26th, 2018**

# Liability & Risk

**An explorative look into healthcare liability and risk affecting not only the corporate entity but the individuals themselves.**

June 26th, 2018

# Presenters

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# LEARNING OBJECTIVES

False Claims Act – Individual liability

System Surveillance – Design your people and billing system process to ensure clean accurate claim submission

Liability Exposure

# The False Claims Act
## and
## Evaluation and Management Services

1863 False Claims Act provided for "*qui tam* relators," whistleblowers bringing an action on behalf of the government. The statute provided for a 50% award to the whistleblower, as well as a fine of DOUBLE the amount of the false claim and a penalty of $2,000 per claim.

# QUESTIONS

1) What is the False Claims Act?

2) FCA Enforcement Statistics

3) Caldwell Announcement

4) Yates Memo

# BIPARTISAN
# BUDGET ACT OF 2015

**Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015**

Program Fraud Civil Remedies Act and the False Claims Act ("FCA") penalties be "corrected" to adjust for inflation since their last adjustment and then that the penalties be adjusted for inflation each following year.

- 1986: the FCA was completely rewritten and included a minimum penalty of $5,000 per claim and a maximum penalty of $10,000 per claim

- 1996: under the Debt Collection Improvement Act of 1996 ("1996 Act"), the minimum and maximum penalties were increased to $5,500 and $11,000, respectively. (Maximum allowable increase was 10%)
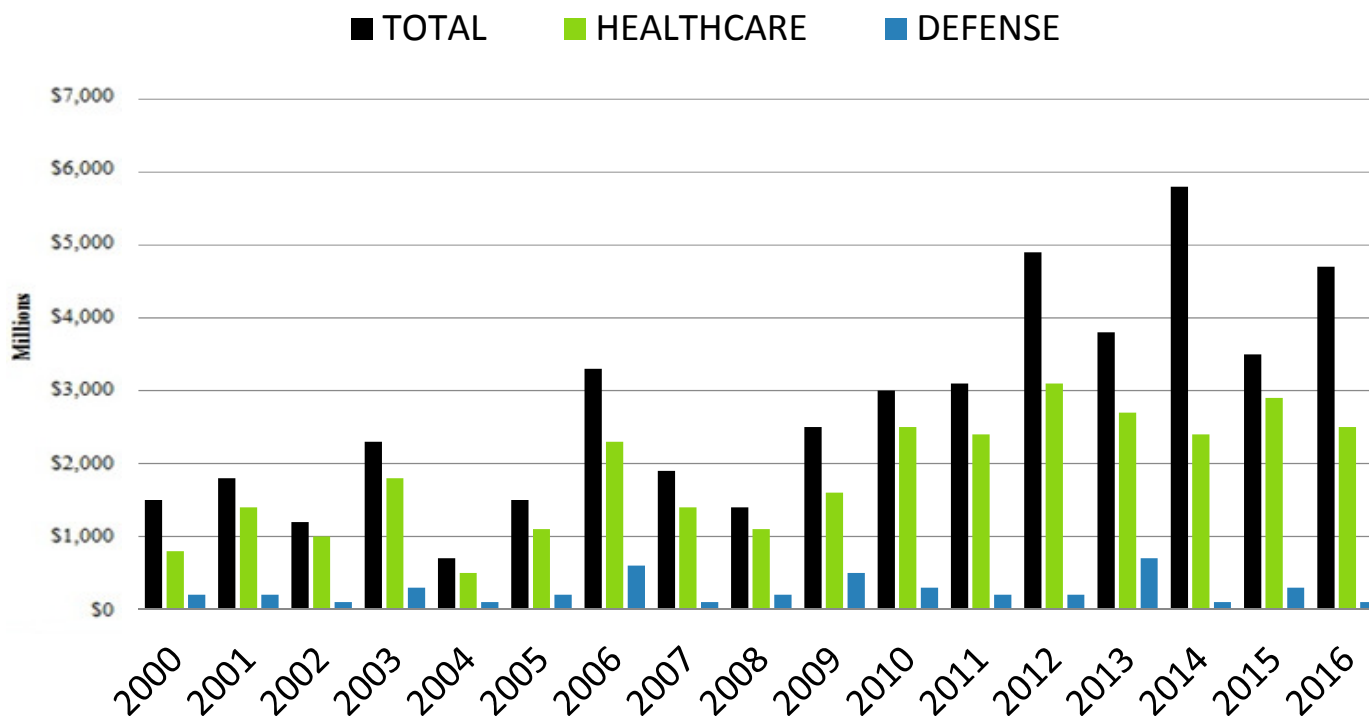
## SO WHAT HAPPENED?

The government ignored the 1996 increase because it was limited to a 10% cap. Instead, penalties were increased by 216%:
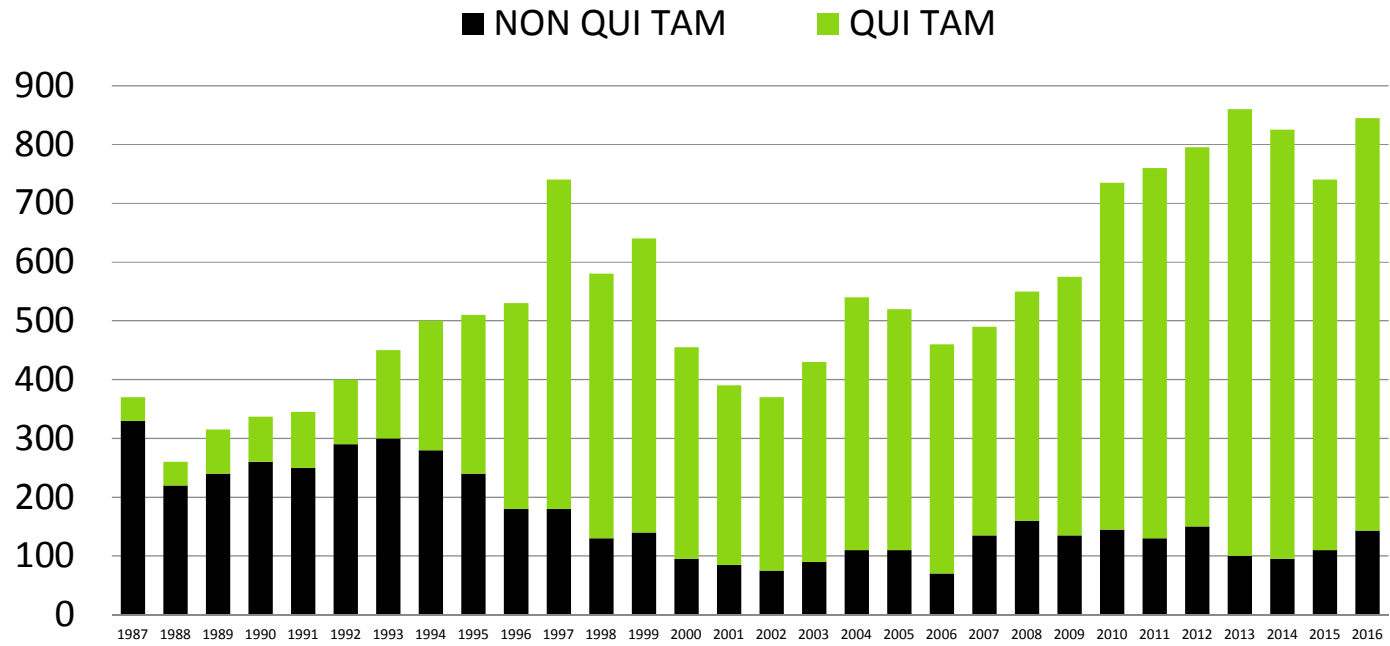
Minimum penalty  $5,500 ➡ $10,781

Maximum penalty  $11,000 ➡ $21,563

Effective date August 1, 2016.

# Annual FCA Recoveries by Industry

# False Claims Act New Matters

# MEDICAL BILLING COVERAGE: HOSPITAL BENCHMARK ANALYTICS

| Year | Settled Cases | Total Settlement Amount | Average Settlement Amount | Largest Settlement |
|---|---|---|---|---|
| PY2017 | 18 | $386,150,000 | $21,452,777 | $70 M (STARK; ANTI-KICKBACK) |
| 2016 | 20 | $360,850,000 | $18,042,500 | $244.2 M (STARK; ANTI-KICKBACK) |
| 2015 | 16 | $330,000,000 | $20,625,000 | $75 M (INPATIENT/OUTPATIENT) |
| 2014 | 17 | $255,497,000 | $15,029,235 | $97 M (INPATIENT/OUTPATIENT) |
| 2013 | 25 | $221,624,153 | $8,864,966 | $39 M (STARK; ANTI-KICKBACK) |
| 2012 | 23 | $177,917,502 | $7,735,544 | $43 M (FAILURE TO PREQUALIFY) |

## False Claim Act Settlements in Indiana and Surrounding States

| Settling Defendant | Jurisdiction | Settled Amount | Audit and Legal Expense | Description |
|---|---|---|---|---|
| IU Health | Indiana | $ 18,000,000.00 | Unknown | MD vs Midwive |
| Crawford Memorial Hospital | Illinois | $ 590,000.00 | $ 1,200,000.00 | Length of Stay |
| St. Francis, Beech Grove | Indiana | $ 3,100,000.00 | Unknown | 2002-2008 Kyphoplasty billed as in patient |
| Deaconess Health | Indiana | $ 2,110,000.00 | Unknown | 2002-2008 Kyphoplasty billed as in patient |
| St. John's Anderson | Indiana | $ 826,000.00 | Unknown | 2002-2008 Kyphoplasty billed as in patient |
| St. Jospeh | Indiana | $ 3,500,000.00 | Unknown | 2015 Kyphoplasty billed as in patient |
| St. Francis, Beech Grove | Indiana | $ 1,800,000.00 | Unknown | 2003-2010 Implanting ICD prior to Guidelines |
| Community Heart & Vascular | Indiana | $ 1,400,000.00 | Unknown | 2003-2010 Implanting ICD prior to Guidelines |
| St. Vincent, Indianapolis | Indiana | $ 14,800,000.00 | Unknown | 2003-2010 Implanting ICD prior to Guidelines |
| Lutheran Health | Indiana | $ 13,000,000.00 | Unknown | 2003-2010 Implanting ICD prior to Guidelines |
| Lutheran Health | Indiana | $ 5,790,000.00 | Unknown | Outpatient billed as Inpatient |
| Community Health | Indiana | $ 20,000,000.00 | Unknown | Overbilled Outpatient Surgeries (facilities not owned by Community) |
| Reid Health | Indiana | $ - | $ 750,000.00 | Whistleblower - Erroneous Claim |
| Princeton General Hospital | Indiana | $ 1,100,000.00 | Unknown | Outpatient billed as Inpatient |
| Robinson Health | Ohio | $ 10,000,000.00 | Unknown | Anti-kickback Improper Referral - Management Services |
| Portage Hospital | Michigan | $ 4,440,000.00 | Unknown | Hospital Owned Hospice Billing |
| St. Joseph | Kentucky | $ 16,500,000.00 | Unknown | Unnecessary Cardiac Procedures |
| St. Mary's | Michicgan | $ 3,500,000.00 | Unknown | Physician not present for Chemotherapy Administration |
| Norton Healthcare | IN/KY | $ 1,000,000.00 | Unknown | Billing For Separate Services |
| Ingalls Memorial | Illinois | $ 20,000,000.00 | Unknown | Patients Neer Treated For Cardiac Procedures |
| Forum Health | Ohio | $ 3,000,000.00 | Unknown | Upcoding |
| Health Alliance of Greater Cincinnati | Ohio | $ 3,000,000.00 | Unknown | Upcoding |
| Heartland Dental | Illinois | $ 3,000,000.00 | Unknown | Issed Rx without DEA Registration |
| Maury Regional | Tennessee | $ 4,000,000.00 | Unknown | Improper documentation of Ambulance Services |
| EMH Regional | Ohio | $ 4,405,000.00 | Unknown | Unnecessary Cardiac Procedures |
| | | | | |
| Claims | | Sub-Total | Sub-Total | Total |
| 25 | | $ 158,861,000.00 | $ 1,950,000.00 | $ 160,811,000.00 |
| | | | | Average: $6,432,440 |

## Elements of an E/M Code

- **History**
  - **Chief Complaint**
  - **History of Present Illness**
  - **Review of Systems**
  - **Past, Family, &/or Social History**
- **Examination**
- **Medical Decision Making**

*\*\*Items in red must be conducted by billing provider*
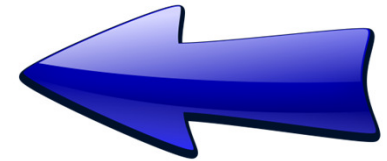
# EVALUATION AND MANAGEMENT SERVICES

E/M services are the most common source of "upcoding" whistleblower claims.

People with access to relevant information include:

- **Nurses and Nursing Assistants**
- **Front Desk personnel**
- **Billers and Coders**
- **Other Doctors**
- **Financial Staff**

"Ancillary staff may record the ROS and/or PFSH. Alternatively, the patient may complete a form to provide the ROS and/or PFSH. You must provide a notation supplementing or confirming the information recorded by others to document that the physician reviewed the information."

 - *Medicare Evaluation and Management Services Documentation Guide*

# Defending an E/M FCA Case

**Motion to Dismiss**
- Challenges only LEGAL sufficiency
- Assumes every fact alleged in the Complaint is true, INCLUDING interpretation of Medicare rules and guidelines

**Discovery**
- Very broad
- Can include discovery on every chart with an E/M claim
- Can include depositions of staff and former staff
- Includes depositions of physicians
- Last 1-2 years
- Extremely expensive

## Summary Judgment

- Undisputed material facts demonstrate Plaintiff or Defendant cannot prevail
- UNDISPUTED FACTS ONLY
- If the opposing party can raise a material fact, motion denied
- Successful in legal disputes, but not factual disputes
- Very complex, very expensive

## Trial

- Not going to happen
- Minimum penalty
    $5,500 ➡ $10,781
- Maximum penalty
    $11,000 ➡ $21,563

- 99215 - $166.01
    X 3 = $498.03 PLUS $21,563
    **POTENTIAL PENALTY $22,061.03**
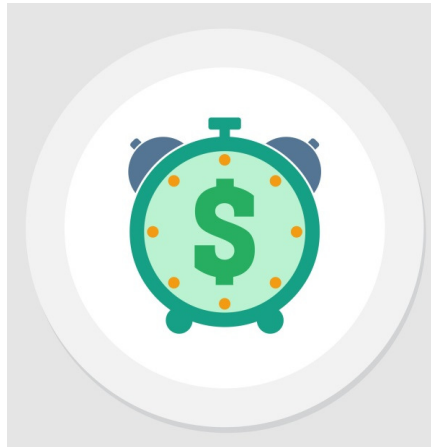
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## COSTS

- **Insurance NOW covers civil FCA fines and penalties, legal defense and audit expenses.**
- Attorney's fees:  FCA only allows Defendants to recover attorney's fees against whistleblowers if it is shown their claim was completely frivolous. Whistleblowers do not have the money to pay the fees, even if ordered to.

## Why is it important?

Balance sheet protector, protection for the organization/entity, individuals, etc.

## How are we protected?

**Pay on Behalf Language for:**
1. Defense Costs
2. Pre-Claims Costs
3. Investigation/forensic audit costs
4. Civil fines and penalties

## What's covered?

Various billing errors and omissions, as well as other regulatory violations including:
**Medicare, Medicaid, & Commercial Billing Investigations, False Claims Act Allegations, STARK & EMTALA Actions, Cover Grant for Third Party Presenting On Behalf of Hospital, Pre-Claim Investigation Costs (Investigation Costs without Written Demand)**

# MEDICAL BILLING:
# HEALTHCARE REGULATORY COVERAGE

**Examples of Recent & Classic Violations (included but not limited to)...**

- Billing for services not rendered
- Medically unnecessary
- Unbundling
- Duplication
- Bundling
- Double billing
- Up-coding
- Billing for brand
- Kickbacks
- Improper referral arrangements

## WHAT IS EXCLUDED / NOT COVERED?

- Business Disputes

- Restitution

- Disgorgement

- Criminal Actions

- Corporate Integrity Agreements: Internal Implementation

- Moral Hazards: known losses or circumstances

- Anti-Trust Violations

- Routine Billing Inquiries

- Prior Known Losses

- Criminal Proceedings, *except when the same conduct is also alleged in the Civil Proceeding*

- Private Citizen Billing Cases, *except for Qui Tam Actions*

- Internal costs for auditors and coders.

# SUMMARY

- The False Claims Act is the Government's primary weapon against healthcare fraud
- Almost anybody with (even limited) knowledge about a healthcare provider can be a whistleblower
- E/M codes are one of the most common underlying claims in FCA cases
- Even if the coding was correct, defense costs can be astronomical
- Even if the coding was correct, nobody can risk trial
- The penalties for FCA violations dwarf the payments for E/M claims

# THANK YOU