



The False Claims Act and Podiatrists

The consequences to you can be dire.

BY LAWRENCE F. KOBAK, DPM, JD

At this stage, we all know that the False Claims Act started during the Civil War. It was passed by Congress and signed by then President Lincoln in 1863. It was passed in response to federal contractors selling defective goods to the Union troops. Many podiatrists ask, what can this 148-year-old law have to do with me?. Let's take a deep dive and explore.

The False Claims Act is a *qui tam* law. Simply put, a "relator", or whistleblower, is rewarded for bringing a situation involving someone submitting false claims to the federal government. In effect, a citizen, the relator, sues on behalf of the government and gets a percentage of the recovery. The law has been amended several times over the years, but the gist of the law has remained the same.

Let's get a bit more modern when medicine became a more common part of the scenario scene with this law. In 1987, an eye surgeon, working for an eye clinic was the relator, alleging that the eye clinic was per-

er got a percentage of the \$605,000 that was recovered by the federal government. In 2020, the last year we have statistics for, the Federal Government recovered \$1.6 billion from cases involving whistleblow-

Frequently, whistleblowers are disgruntled former employees who feel they know detailed information about the "fraudulent" operation where they worked.

forming unnecessary surgeries. Here is one key point: nobody alleged that the surgeries were not done, just not necessary. The claims involved money paid to the physicians through federal programs, such as Medicare. The claim was settled, but you get the picture. The whistleblow-

ers under the False Claims Act. The whistleblowers obtained \$309 million of that total.

Frequently, whistleblowers are disgruntled former employees who feel they know detailed information about the "fraudulent" operation

Continued on page 38

False Claim Act (from page 37)

where they worked. Not only do they exact revenge by giving their prior employer a giant-sized migraine, but they also stand to get paid well for the privilege! One

disregard the truth that you should have known to be the case. Look at the Medicare Attestation on your insurance forms, electronic or otherwise. It states: “Anyone who misrepresents, falsifies, or conceals essential information required for payment

the whistleblower comes out with at 15% of the amount of money recovered. This is further reason why you do not want the words “disgruntled” and “former employee” in the same sentence.

Another important area is data analytics. Is your practice using certain codes out of proportion to other similar practices in your area? Of course, there may be very good reasons for that. For example, if you have a surgical podiatric practice, that might be a perfectly good reason why you use bunionectomy codes much more than your neighboring general podiatry practices do. Your health law attorneys should make this clear to the investigators as early as possible.

Tests ordered, even if your entity does not bill for it, but another unrelated entity does bill for it, is also fair game for investigation. If it is found you ordered tests inappropriately, you can be responsible for the cost paid out for these tests, even though you were never paid one cent for ordering them! This is something that comes up frequently. Nonparticipating providers think they are bullet-proof. They are not.

If all this was not enough to digest, you might also wonder what

It is also important to note that False Claim Act actions can be either civil or criminal.

point should be made at this time: the whistleblower must not have participated in the false claims to collect their share of the settlement or jury award.

It is also important to note that False Claim Act actions can be either civil or criminal. The civil actions will only involve money. The criminal actions can also involve real prison time. They can both have consequences such as getting barred from federal programs, like Medicare and Medicaid as well as Tricare. They can both also have licensure ramifications with your state board of podiatry.

The False Claims Act prohibits the following that applies to podiatry bills involving federal funds:

- 1) Knowingly presenting or causing to be presented a false claim for payment or approval;
- 2) Knowingly making, using or causing to be made or used, a false claim record or statement **which is false or fraudulent.**

That means that you cannot submit a bill that involves federal funds, that you the podiatrist knew, or *should have known*, was not true or was not necessary for the patient’s well-being. You cannot falsify or have someone else falsify your medical records to justify your insurance claim. You cannot hide your head in the sand and claim you did not know what you were doing or having others do in your behalf. You have a responsibility to check the accuracy of your biller or billing service concerning what goes out of the office under your name. You cannot recklessly

of Federal funds, may be subject to fine, imprisonment, or civil penalties under applicable Federal laws.” It is right there for you to see.

As of 2020, the financial penalties range from \$11,665 to \$23, 331 per claim! On top of that, the government can ask for up to triple damages. That means if the claims in question add up to \$250,000, they can ask for \$750,000 plus the financial penalties. There may be a thousand or more claims involved. Do the math. The money penalties get prohibitive very quickly. That is why most of these actions get settled prior to any trial. The stakes are just too high for most practitioners.

If it is found you ordered tests inappropriately, you can be responsible for the cost paid out for these tests, even though you were never paid one cent for ordering them!

Can you imagine in your podiatry practice, being called out for billing E/M visits on your Medicare patients, at two levels too high? The government can go back up to six years. We are potentially talking about thousands of claims. At penalties over \$11,000 for *each* individual claim, something “seemingly innocuous” as bumping up the level of E/M visits can be life changing. Now remember that podiatric assistant that you fired? She/he makes out very well under this law. Without getting into too many legal details,

decides whether the Federal Government goes the civil route or the criminal route. Please remember that the burden for the government is much higher criminally. They must prove “beyond a reasonable doubt” you are guilty. In the civil arena, all that is required is the “preponderance of the evidence”, which causes liability, not guilt. Additionally, if the government goes after a podiatrist criminally, they must prove that there was a specific intent to submit a fraudulent claim.

Continued on page 40

False Claim Act (from page 38)

In a civil action, no such intent is needed. In the real world, there are other considerations. These include the podiatrist's cooperation with the investigation. Taking an uncooperative stance can be severely punished by the government. Remember, they have unlimited resources.

Since 2005, all Medicaid providers that make at least \$5 million dollars annually are required to have a written compliance program. It is beyond the scope of this article to go into details regarding what is required in that document. Suffice it to say that the policy must include detailed provisions as to how your practice prevents fraud, waste, and abuse. *It is recommended, but not required, that all practices have such a written policy.* It goes a long way to prove to investigating agencies that there is no criminal intent. Of course, the written policy without actual application is as meaningless as purchasing the OSHA manual and leaving it in its original wrapper.

As part of the suggested policy, some means of regular self-audit is crucial. This may mean hiring an outside company that audits a certain cross-section of your charts monthly, or simply having various practitioners in the practice audit each other's charts. If you elect to have the podiatrists in your practice audit each other, the partici-

pants must be knowledgeable in the requirements of the relevant billing codes.

After reading this, you may no longer want to eat your lunch or dinner. However, there are ways to tremendously reduce the chances of ever being set upon by the government under the False Claims Act. These involve accurate and complete charting. It involves using certified podiatric medical coders. It involves performing self-audits on your own charts and insurance forms. Do these audits on a regular basis. If possible, have your partner/colleague review each other's charts and billing

It is important to adequately value your staff.

every month. Take 10 random charts and review. There are also commercial self-audit services that are available that are not too expensive. At the very least, this all shows a willingness to do things the correct and honest way. That should eliminate the criminal aspect of any False Claim Act investigation. If your own staff does the billing, have them become certified billers with one of the certifying bodies as well as taking continuing education courses on billing.

It is important to adequately value your staff. That includes everyone from your podiatric partners, junior colleagues, nurses, podiatric assistants, down to being respectful to the cleaning service. This involves adequate salaries, decent working conditions and benefits. Most of all, it involves a modicum of respect and appreciation for your employees. You might be surprised how far a pizza goes to show appreciation for your staff going beyond what is normally expected on a busy day.

In the end, there are at least four areas that will help to shield you from the consequences of a False Claims Act prosecution. They are:

- 1) Complete and accurate medical records that substantiate your treatment of the patient;
- 2) Using certified billers;
- 3) Establish written compliance policies that include some kind of self-audit and
- 4) Not alienating your staff.

Of course, there are no guarantees! **PM**



Dr. Kobak is Senior Counsel in Frier Levitt's Healthcare Department in the Uniondale, New York. Larry has extensive experience representing physicians in connection with licensure issues, as well as successfully defending physicians before Medical Boards, OPMC, OPD investigations, as well as Medicare Fraud, Fraud & Abuse, Hospital Actions, RAC Audits, Medicare Audits, OIG Fraud, Healthcare Fraud, Medical Audits, and Health Plan Billing Audits. As a licensed podiatrist

prior to becoming an attorney, he served as the international president of the Academy of Ambulatory Foot and Ankle Surgery.