

Hospital Association of Southern California

Recent Developments in Fraud Enforcement and Litigation; Practical Strategies to Minimize Risks and Liabilities

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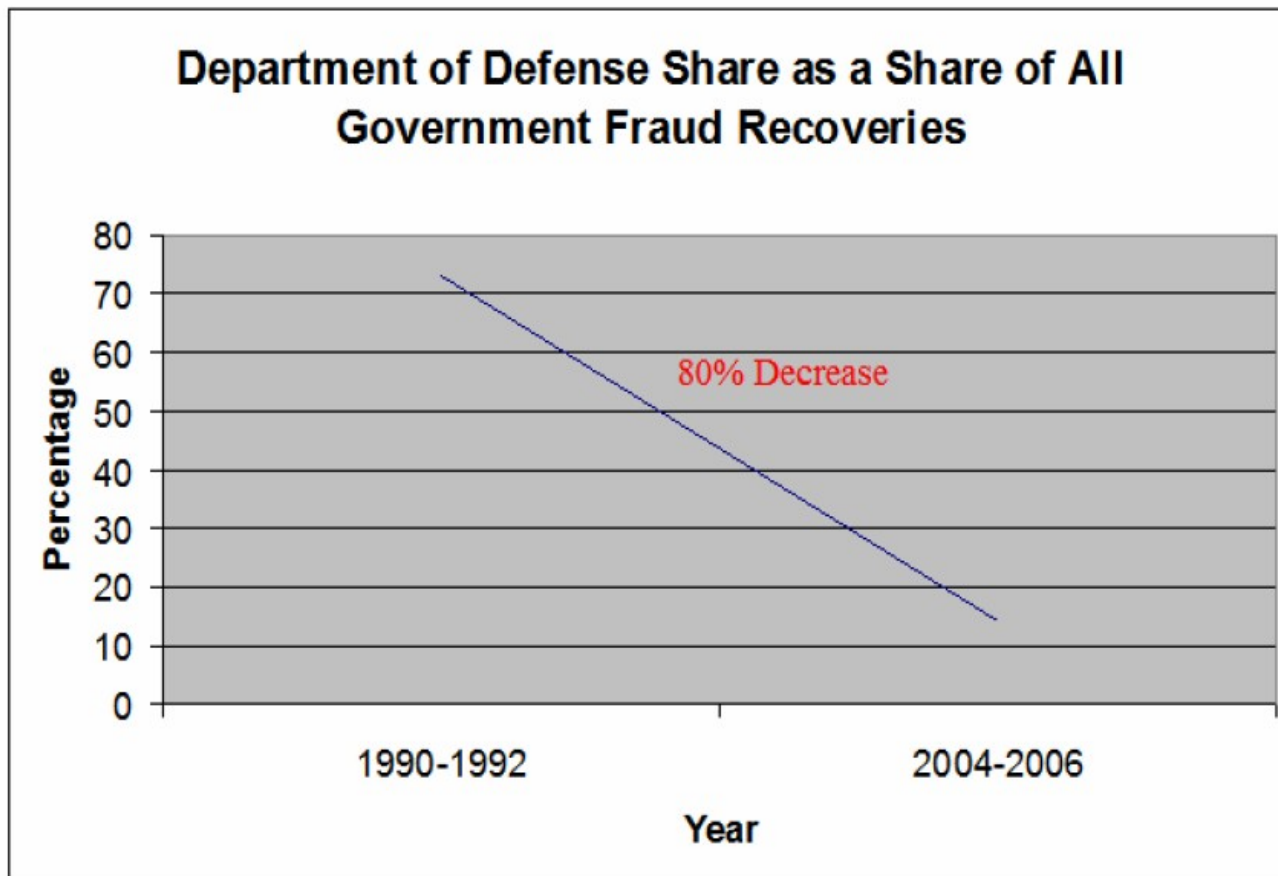
Fraud Case Recoveries FYs 2006 and 2007: Over \$5 Billion

- **U.S. Department of Justice* (DOJ) recovered:**
 - \$3.1 billion in FY 2006
 - \$2 billion in FY 2007
 - More than \$20 billion since 1986 strengthening of False Claims Act by amendments introduced by Sen. Grassley (R. Iowa) and Rep. Berman (D. Ca.)

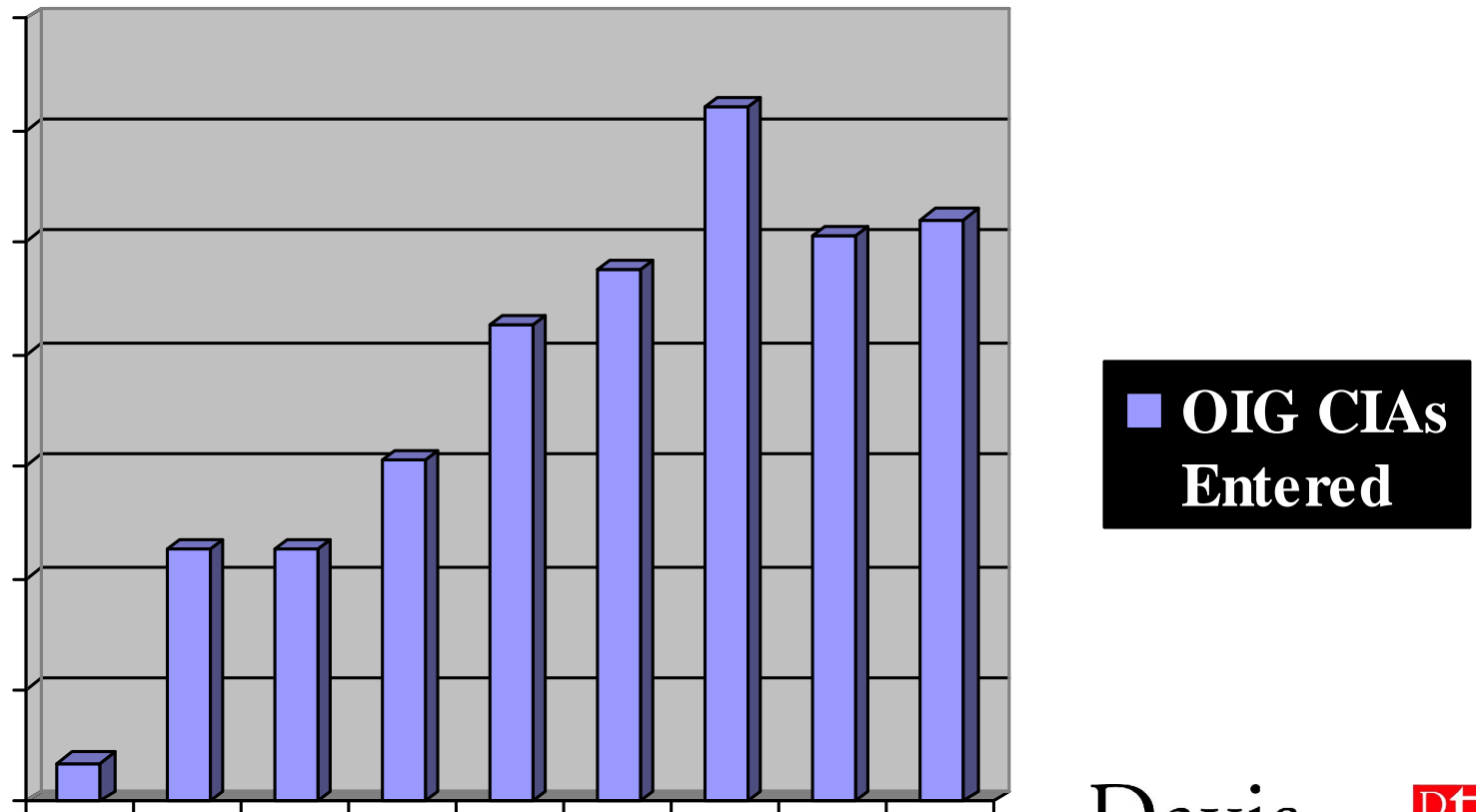
* See www.usdoj.gov/opa/pr/2007/November/07_civ_873.html

FY 2007 Results:

- **\$1.54 billion from healthcare cases, both independent gov't claims and cases filed by *qui tam* whistleblowers**
 - **Roughly half, \$800 million, from pharma claims**
- **\$1.45 billion from False Claims Act law suits (healthcare and contracting claims) started by *qui tam* whistleblowers**
 - **only \$48.4 million from recoveries related to Dep't. of Defense contracting**



Corporate Integrity Agreements



Government Resources

- **HIPAA created Health Care Fraud and Abuse Budget Account, which comprises majority of OIG budget, 75 - 80 percent**
- **HIPAA increased funding to combat fraud up to 2003; capped since 2003 at \$160M**
- **Discretionary funds 20 percent of OIG budget; in FY 2007 nearly \$40 million**
- **Deficit Reduction Act increased funding for *Medicaid* fraud control activities: through FY 2010, additional \$25 million annually for *Medicaid* integrity activities**

Government Resources cont'd . . .

- DOJ fraud lawyer says DOJ keeps 3 percent of civil case collections – “we eat what we kill from last year’s collections”
- For last 3-4 years, says collections constant, generating around \$300M per year for DOJ enforcement

Deficit Reduction Act (2006)

- **Substantial enforcement provisions:**
 - **\$100 million increase FY 2006 for *Medicare* Integrity Program**
 - **States incentivized to enact false claims provisions similar to FCA**
 - **Mandated education of employees about false claims provisions**
 - **Funding for *Medicaid* enforcement**

Deficit Reduction Act Incentives for State False Claims Acts

- States with qualified state FCA retain ten percent of federal funds otherwise returned after case resolution
- OIG and DOJ qualify state FCA provisions
- In 2000, only 8 states (including California) had *qui tam* statutes; since, 13 more have enacted such statutes, and 7 states have received OIG approval

Medicaid Program Enforcement

- Paralleling increase in Medicaid costs, growth in state Medicaid Fraud Control Units (MFCUs)
 - FY 2007 \$170 million federal funds awarded to 49 MFCUs, employing ~ 1,900 staff
- MFCU and state Attorney General staff assuming important role in false claims cases
- Roles coordinated at national level by National Association of MFCUs (NAMFCU)
 - designate state enforcement teams
 - division of labor creates efficiency
 - develop model settlement agreements
 - states endorsing active role private lawyers

False Claims Correction Act of 2007

- **Introduced Sept. 2007 by Sen. Grassley, with House bill introduced in Dec. 2007 by California's Congressman Berman**
- **Senate and House bills referred to respective Judiciary Committees**
- **Senate bill recently (early April '08) reported out of committee, to Senate floor for debate**

False Claims Correction Act

- **Would profoundly impact False Claims cases:**
 - **Remove requirement that false claims be “presented” to federal gov’t employee; would apply if gov’t money involved**
 - **Amend statute of limitations to 10 years, for all cases; codify “relation back doctrine”**
 - **Permit claims for keeping overpayments**

False Claims Correction Act

■ Would:

- **Extend whistleblower protections**
- **Facilitate use of civil investigative deposition subpoenas (authorize delegation)**
- **Limit ability to obtain dismissal of claims based upon publicly disclosed information, making same DOJ's exclusive right**

False Claims Correction Act

- Most important, would permit gov't employee as *qui tam* relator after reported facts up chain of command, and 12 months passed without action
- Major incentive for government employees involved in auditing program fraud to document facts, then pursue privately
- Turn government personnel into bounty hunters for personal gain

California False Claims Act

- Enacted in 1987, first state to enact a FCA; modeled on federal, with differences:
 - Gov't Code Section 12651(a)(8) creates violation for beneficiary of false claim who discovers such and fails to correct
 - State law established a maximum of \$10,000 for penalties, but no minimum (unlike fed's)
 - This was basis for federal OIG rejection of California FCA under the DRA provisions

Strategies to Reduce Risks and Minimize Liabilities

- Obviously, organized compliance efforts will minimize risks
- Other practical ways to reduce exposure and costs include:
 - responsiveness to potential whistleblowers
 - voluntary disclosure
 - care in responding to gov't requests
 - strategies to respond to investigations
 - strategies to expedite and resolve investigations

Responsiveness to Potential Whistleblowers

- Satisfactory resolution of compliance issues and feedback makes less likely employee will turn into a *qui tam* relator
- Atmosphere of non-retaliation reduces risks from federal FCA and California FCA retaliation claims

Cal. Gov't Code § 12653(b) provides, in summary:

- **Employer may not discriminate because of lawful acts in furtherance of false claims action**
- **Employer who violates liable for relief making employee whole, including reinstatement, two times back pay with interest, special damages sustained, and if appropriate, punitive damages**
- **Litigation costs and attorney's fees are recoverable, like federal FCA**

Voluntary Disclosure

- For each false claim, federal FCA permits up to \$11,000 penalty, with minimum penalty of \$5,500; no Cal. min.
- Federal and Cal. statutes allow argument no penalty required if make voluntary disclosure consistent with FCA
- Under statute, damages after disclosure may be limited to double, rather than triple
- In actual practice, gov't may agree to less than double

Other Benefit to Disclosure: Defense to *Qui Tam* Whistleblower Action

- FCA and Cal. FCA contain “public disclosure bar”
- Includes not only disclosures in court and administrative hearings and news reports, but also disclosures in context of audits and investigations
- Exception for “original sources,” with direct and independent knowledge, who provided information to gov’t

OIG Voluntary Disclosure Protocol

- All here probably know about the HHS OIG's voluntary disclosure protocol, first established as part of a pilot project over ten years ago
 - Published, complex, expensive, time-consuming protocol
 - May require privilege waiver
 - May not be worth the trouble
- Now, new OIG guidance

April 15, 2008 New OIG Guidance: Second “Open Letter to Providers”

- Following 2006 “Open Letter” vague incentives for self-disclosure, OIG issued second “Open Letter” April 15, 2008
- Recognizing providers unimpressed with complexity & delays from existing self disclosure protocol (SDP), OIG now admits:
“the success of the SDP is contingent on OIG responding to the self-disclosure promptly and making resolution of the matter a priority”
- OIG claims has “streamlined” its “internal process”

New “Open Letter” Explicitly Holds Out Promise of No CIA

- 2006 Open Letter suggested OIG would favorably consider disclosure when deciding whether to require CIA
- Experience shown unreliable
- New Open Letter promises:

“we generally will not require the provider to enter into a Corporate Integrity Agreement or Certification of Compliance Agreement”

Some Negatives With New Self Disclosure Protocol

■ Providers:

“must be in a position to complete the investigation and damages assessment within 3 months after acceptance into the SDP”

Open Letter Requirements

- **“Basic information” as required in published SDP; see 63 Fed. Reg. 58401, and www.oig.hhs.gov/authorities/docs/selfdisclosure.pdf**
- **Complete description of conduct**
- **Description of provider's internal investigation or commitment regarding when to complete**
- **Estimate of damages to federal health care programs and methodology used to calculate or commitment regarding when to complete**
- **Statement of laws potentially violated**

Other Risk Reduction Strategies: Exercise Care In Responding to Government Document Requests

- **Importance of preserving records so no allegations of misconduct**
 - Do not ignore
 - Do not destroy responsive records, including e-mail and other electronically stored information; include off-site records
 - Notify employees to preserve records
 - Cease automatic deletion of information
 - Identify point person to deal with subpoena

Importance of Narrowing Investigation Scope and Prompt Resolution

- **U.S. Attorney's Offices in California have full-time auditors assigned**
- **Have multi-issue checklist, work through in all open cases, regardless of original allegations**
 - **L.A. U.S. Att'y auditor, former cost report auditor, looks at cost reports, regardless of initial case allegations**

Document Retention Policies

- **Virtually all subpoenas and litigation discovery requests seek e-mails**
- **E-mails routinely contain candid statements, often not well thought out**
- **Establish document retention policy, and implement it routinely; stop keeping old e-mails**

Review and Improve Medical Records: Ensure Physician Orders

- **Fundamental requirement for all claims to government payors: medical necessity**
- **No matter the subject of investigation, if gov't auditor or consultant is reviewing claims files, will look for absence of physician orders**
- **Finding/reconstructing from shadow files after the fact is time consuming, expensive, and error prone**

Stark Compliance

- **DOJ fraud litigator tips for our hospital clients:**
“review financial arrangements with physicians”