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Managed Care Fraud: Agair Managed Care Plans are at Healthcare Fraud and Abus		
FRAUD AGAINST THE PLAN	FRAUD BY THE PLAN	
* Up-coding * Double Billing	* Manipulation of risk adjustment data	
* Overutilization/Overtreatment	* Retention of overpayments	
* Retention of overpayments by	* Inducement of Beneficiaries	
providers (with Potential applicability of 60-Day Rule)	* Enrollment of ineligible/non- existing beneficiaries	
	* Cherry-picking beneficiaries	
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Requirement of a Compliance Program within a Managed Care Organization

Managed care plans are required under statute to implement a compliance plan to guard against fraud. See 42 C.F.R. § 438.608. The plan must include the Seven Elements:

- 1. Exercise Effective Compliance and Ethics Oversight
- 2. Establish Effective Policies, Procedures and Controls
- 3. Train and Educate Employees on Compliance and Ethics
- 4. Establish Effective Lines of Communication
- 5. Ensure Consistent Enforcement and Discipline of Violations
- 6. Monitor and Audit Compliance and Ethics Programs for Effectiveness
- 7. Appropriate Response to Incidents and Corrective Actions

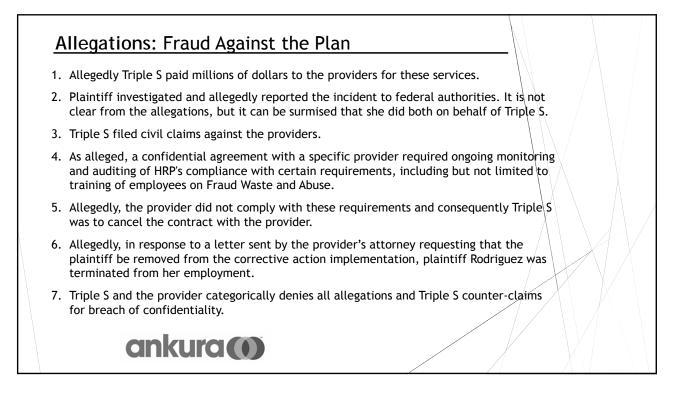


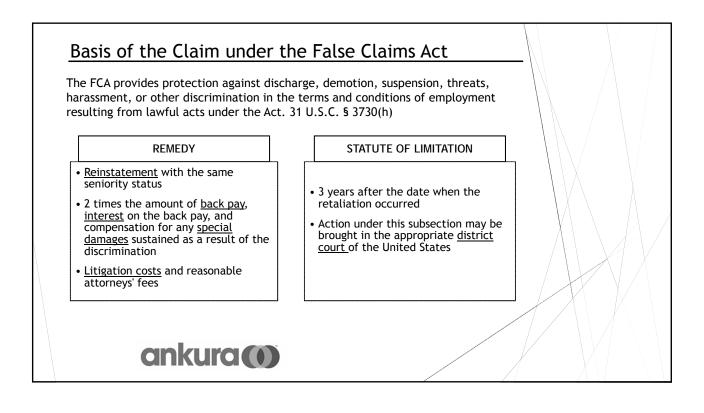
Allegations in Recent Claim filed in the District Court of Puerto Rico. RODRIGUEZ-FALCIANI v. TRIPLE S, 18-1065 (DRD) THIS IS NOT A QUI TAM ACTION; IT IS BASED ON RETALIATORY TERMINATION OF EMPLOYMENT 1. Plaintiff (a licensed attorney) was the Director of TSS's Audit and Investigation Unit at the time she was terminated from her employment in March 2017. 2. She alleges that she was terminated "as a result of her participation in an investigation of suspicious practices by certain laboratories and physicians in Puerto Rico, in which they charged for genetic testing services which were not medically indicated, for people insured by Triple S, including those for whom federal funds were disbursed." 3. Defendant TSS denies such claims, and alleges other reasons for termination including: not following protocols for provider cancellation, lack of documentation to support investigations, bypassing chain of command and breaching confidentiality. ankura

Allegations: Fraud Against the Plan

- 1. Plaintiff was involved in the investigation of TSS's contractual disputes concerning the billing of genetic tests by specific providers.
 - <u>Alleged scheme</u>: "runners and sales representatives from at least two laboratories based in the United States would approach patients at physicians' offices, including those insured by Triple-S, offering them a "free" test, which would not involve the payment of a deductible, since the cost would be assumed by Triple-S.
 - "These individuals would deliver the saliva samples from patients in the offices of the physicians to four laboratories in Puerto Rico which were Triple-S contracted providers.
 - The four laboratories would send the samples to laboratories based in the continental United States.
 - The laboratories in Puerto Rico would then bill Triple-S for the procedure, although their only role was to send the samples to the State-side laboratories".







Basis of the Claim under the False Claims Act	
PRIMA FACIE CASE:	
1. Protected Conduct	
• The relator must show that his or her conduct was protected under the Act	
 (2. Knowledge • the employer knew about the relator's conduct and 	
• the employer knew about the relator's conduct and	
3. Retaliatory Behavior	
the employer engaged in retaliatory behavior because of such conduct	$\overline{\mathbf{V}}$
"'[P]rotected conduct' [includes] 'activities that reasonably could lead to an FCA [suit], in other words, investigations, inquiries, testimonies or oth activities that concern the employer's knowing submission of false or fraudulent claims for payment to the government." United States ex rel. Nowak v. Medtronic, 806 F. Supp.2d 310, 339 (D. Mass. 2011)	
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Relator or not Relator? -Ethical Duties

BASIC PREMISE: Both a Compliance Officer (whether attorney or not) and an in-house counsel can be relators under the False Claims Act.

THE QUESTION: What information can such relators use to establish the case and when can such relators disclose.

<u>HCCA Code of Ethics:</u> R.1.4; R.2.6 and R.3.2. Disclose to highest authority; resign; maintain confidentiality unless to prevent a crime or required by law.

<u>ABA Model Rules of Professional Conduct</u>: Rule 1.6 (Maintain confidence); R. 1.13 (organization as a client).

See also Sarbanes-Oxley Act Of 2002 Sec. 307.

TAKEAWAY: - Relators who are also attorneys should make every effort to base an FCA complaint on nonconfidential information if the alleged fraud is not ongoing. In contrast, a retaliation claim under the FCA may rely on confidential information pursuant to Rule 1.6, but state retaliation law varies with respect to former in-house counsel standing to sue.



The Impact of the Compliance Program Under the Specific Scenario

Element I. Oversight

- a. The complexity of the organizational structure of the Compliance Program (Fraud Unit);
- b. The hierarchy and reporting responsibilities will also be scrutinized (communications between in house counsel and chief compliance officer);
- c. The sufficiency of oversight on provider activity (timing of identified improper billing and/or overpayments).

Element II. Policies and Procedures

- a. Were policies and procedures in place that would guide the investigation / was it followed?
- b. If the basis for termination was that the plaintiff did not follow proper procedure for provider cancellation, were those procedures pre-established?



The Impact of the Compliance Program Under the Specific Scenario

Element III. Training and Education

- a. Was there a specific protocol pre-established for the Fraud Unit that required specific training?
- b. What was the training required from the providers prior to the allegations?

Element IV. Effective Lines of Communications

- a. How was the overpayment identified? Hotline? / Audit?
- b. What was the communication protocol with the provider once the misconduct was identified? What was the communication protocol afterwards?
- c. Was the communication protocol followed? With the Provider? With the federal authorities? (Interaction with the Legal / Compliance Departments).



The Impact of the Compliance Program Under the Specific Scenario Element V. Consistent Enforcement and Discipline of Violations a. Was there a specific protocol pre-established by the Fraud Unit that required specific enforcement? b. Did the plaintiff follow such protocols? c. Were these protocols not applied consistently with the co-defendant provider? d. Does this has to do with the reason for termination? Element VI. Monitoring and Auditing a. How was the overpayment identified? Hotline? / Audit? b. Was effective monitoring previously implemented? Will this be a reason for termination?

The Impact of the Compliance Program Under the Specific Scenario

Element VII. Appropriate Response to Incidents and Corrective Actions

- a. Perhaps the most important factor in this litigation.
- b. Did the settlement agreement with the provider contain requirements truly similar to a CIA? <u>Is this the standard required from MCOs?</u>
- c. Was the MCO's response appropriate? Did the representative of the MCO (plaintiff) proceed accordingly?
- d. Was there special consideration by the MCO in the case of the co-defendant provider?

TAKEAWAY: The strength of the Compliance Program will serve as a mechanism for offense or defense in litigation, be it *qui tam* or of a retaliatory allegation nature.



THANKS!



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experience in healthcare regulatory matters. He provides compliance and privacy advisory services as well as interim compliance support services. He recently completed a tenure as Interim Chief Compliance Officer at Presence Health, Chicago, and currently serves as consultant for various clients including third party billing companies, health systems and private practitioners.

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Jorge completed the LLM degree in healthcare law with a compliance concentration at Loyola University Chicago School of Law. His thesis focused on the federal government's use of extrapolation methodologies to enforce penalties under the False Claims Act. Jorge is experienced in policy development and interpretation, an expert in Stark Law and the Anti-Kickback Statute, as well as analytical solutions to system-wide compliance glitches, and the implementation of tailored compliance programs.



