

Anatomy of a False Claims Act Case

Investigation, Negotiation, Litigation,
and Resolution

1

Agenda – Life-Cycle of FCA Case

- Investigation
- Litigation
- Negotiation
- Resolution

2

Investigation

3

Relator's Pre-Filing Investigation and Considerations

- Knowledge of facts involving clear FCA violation?
- Documentary evidence, other proof of fraud?
- Sufficient evidence of "who, what, when, and where" supporting fraud and damages?
- Specific examples of the fraud?
- Damages large enough to justify risks to relator?
- Level of government interest in specific area of law and type of fraud? Is it material to the government?

4

Investigation – DOJ's Perspective

- *Qui tam* v. non-*qui tam*
- DOJ handling of *qui tam* investigations
- Basic steps
 - Is there a violation?
 - Are there false claims?
 - Are the false claims material?
 - Did the provider act knowingly?
 - Was the government damaged?

5

Investigation – DOJ's Perspective (cont'd)

- Applicable regulations and government policy
- Internal and external audits
- Relators
- Witnesses
- OIG and agency
- Responsibility of individuals

6

Investigation - OIG's Role

- OCIG attorney assigned when OIG notified of case
- OCIG attorney coordinates with defrauded agencies, Main DOJ attorney and/or AUSA assigned
 - Evaluate whether other entities need to be involved
 - Evaluate merits of case
 - Consult with counsel and agent re investigative steps
- Individual liability issues

7

Self - Disclosures

- Intersection of self-disclosure under HHS-OIG Self-Disclosure Protocol and *qui tam* filing alleging related facts
- No bar to *qui tam*
- Impact of self-disclosure on OIG view of defendant
- Impact of self-disclosure on potential multiplier under *qui tam*

8

Investigation - Defense Perspective

- Indicators that you might be under investigation
- When to retain expert counsel
- Steps to take when you receive a subpoena/CID/request letter
 - What you can learn from the subpoena
 - Responding to the subpoena
- Consider how proactive a role to take
- Yates Memo considerations
 - Potential parallel criminal investigation
 - Focus on individuals
- Missteps to avoid
- Attempt to negotiate resolution, or litigate?

9

Litigation

10

Key Topics

- Overview
- Motions to Dismiss – g(b)
- Counterclaims Against Relator
- Privilege Issues in Discovery (and Elsewhere)
- Breadth of Discovery Requests
- Sampling and Extrapolation
- Motions for Summary Judgment
- Experts

11

Rule 9(b) Motions to Dismiss

- Question of extent to which relator/government must identify claims actually submitted
- Is description of the fraudulent scheme enough?
- Does it matter if the relator is/was an insider?
- Evolution of the law among the circuits

12

Counterclaims Against Relator

- Increased use of counterclaims against relators.
- To what extent can relator obtain documents from employer/defendant and provide to government or otherwise use for litigation?
- What guidance does government give to relators who are current employees regarding taking documents from workplace?
- What steps can employer take when it learns relator is current employee?

13

Privilege Issues in Discovery (and Elsewhere)

- Invocation of advice-of-counsel defense and resulting waiver
- Good faith reliance
- In-house counsel as relators
- Protection of pre-litigation investigation work product

14

Statistical Sampling and Extrapolation

- Use of sampling in FCA cases versus overpayment situations
- Use of sampling in different types of FCA cases
- Is there a distinction between using sampling for “damages” versus for “liability” purposes?

15

Motions for Summary Judgment

- Potential usefulness for defendant? Plaintiff?
- Motions for partial SJ
- Timing issues

16

Negotiation and Resolution

17

Overview - Negotiation

- Timing can vary
- Objectives of the various parties (DOJ, OIG, MFCU, relator, defendant)
- Key negotiating issues
 - Money
 - Scope of release
 - Existence/scope of CIA
 - Relators' share
 - Attorneys' fees

18

Negotiation – DOJ Priorities

- Make Government whole
- Deter fraud
- Consider, address views of victim agency
- Discern individual wrongdoers and proceed accordingly
- Assess strengths and weaknesses of case

19

OIG Objectives

- Appropriate program safeguards OIG
 - Exclusion
 - Reservation of authority
 - Corporate Integrity Agreements
 - Independent review organizations (IROs)
 - Legal IROs
 - Monitors

20

Relator Objectives

- Monetary resolution of FCA claims
 - Intervened
 - Non-intervened
- Relator's share percentage
- Resolution of any retaliation claims
- Resolution of attorneys' fee claims

21

Defendant Objectives

- Appropriate monetary resolution covering all claims
 - FCA liability
 - Attorneys' fees
- Release of **all** potential claims
- Least onerous compliance requirements possible going forward

22

Negotiation – Getting Started

- Initiation of discussions
 - When?
 - By whom?
- Mediation
- Who is at the table?
 - Intervened cases
 - Declined cases
- Roles of:
 - Relators
 - OIG

23

Alternative Dispute Resolution

- Federal government committed to ADR in “appropriate civil cases”
 - See:
<http://www.jamsadr.com/files/Uploads/Documents/Articles/Stevens-False-Claims-Act-2012-11-20.pdf>
- Benefits of mediation
 - Objective neutral gives an important reality check
 - Use of an impartial intermediary can change the personal dynamic
- Non-binding

24

Monetary Negotiations

- Assessment of merits of the case
 - Each party's principled liability assessment
 - Each party's principled quantification of false claims and single damages at issue
- Debate over the appropriate multiplier
- Realistic assessment of the respective litigation risks of each party
- The pragmatic phase

25

Key Issues Regarding the Scope of Release

- Defining the "Covered Conduct" to be released
- Defining released parties
- Carve-outs from release
 - Criminal liability
 - Antitrust
 - Tax
- Dismissal of Complaint with prejudice
 - Non-intervened claims

26

Key Issues Relating to Corporate Integrity Agreements

- Overarching issues
 - Effectiveness of existing compliance program
 - Track record of provider
- CIA vs. Reservation of Rights
- Scope of CIA
 - Definition of issues covered by CIA
 - IRO?
 - Legal IRO?
 - Monitor?

27

Key Issues Affecting Relators

- Relators' share
 - Negotiation between DOJ and Relator
 - How much did Relator contribute
 - How much did Relators' counsel contribute to the investigation and litigation
 - Posture of the case and many other factors
- Attorneys' fees
 - Negotiation between Provider and Relator

28

Other Key Issues

- Impact of state law claims
 - State FCAs
 - States as parties
 - Role of NAMFCU
- Relationship to other litigation with Relators
- Complications resulting from increased focus on individual liability
- Clarity of rules going forward
 - Applicability to all like providers
 - “Leveling the playing field”

29

Resolution: Settlement Agreement

- DOJ sends initial draft
- Standard language
- Key terms to negotiate:
 - Covered conduct
 - Released parties
- (Mostly) Non-negotiable terms

30

Settlement – Other Considerations

- Cooperation
- Individuals
- Who signs
- Confidentiality
- Press release

31

Resolution: OIG-Specific Issues

- Administrative Remedies
- Corporate Integrity Agreement
 - OIG sends initial draft
 - Standard language
 - Also specific terms based on conduct and provider
 - Negotiated between OIG and defendant
- Timing issues

32

Resolution: Relator-Specific Issues

- Attorney fees and retaliation claims
- Relator's share
- Relator's right to object to settlement as unfair, inadequate, unreasonable

33

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34