

## Anatomy of a False Claims Act Case

Investigation, Negotiation and Resolution

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## Investigation

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## 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 the relator?
- Level of Government interest in specific area of law and type of fraud? Is it material to the government?

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### Investigation – DOJ’s Perspective

- Government may investigate *qui tams*, non *qui tams*, agency referrals, self disclosures
- 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?

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### Recent SC *Escobar* Precedent

*Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. ---, 136 S. Ct. 1989 (2016)

- Key Issues: Implied Certification & Materiality
- Implied certification liability does not depend on whether a requirement is labeled a condition of payment (overruling *United States ex rel. Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001) and similar cases)

What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government’s payment decision. *Id.* at 1996.

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### Recent SC *Escobar* Precedent

*Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. ---, 136 S. Ct. 1989 (2016)

- Reaffirms “‘material’ means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property” *Id.* at 2002
- Materiality can be objective OR subjective:
  - Would a reasonable person attach importance to it in deciding whether to pay?
  - Would the government attach importance to it in deciding whether to pay even if a reasonable person would not?

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### Investigation – DOJ’s Perspective (cont’d)

- Applicable regulations and government policy
- Internal and external/third party audits
- Relators
- Other witnesses with knowledge
- OIG
- Responsibility of individuals

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### Investigation - OIG’s Role

- OCIG attorney assigned when OIG notified of case
- OCIG attorney coordinates with defrauded agency, Main DOJ attorney and/or AUSA assigned
  - Evaluate merits of case
  - Consult with counsel and agent re investigative steps
- Individual liability issues

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### Self - Disclosures

- Intersection of self-disclosure under HHS-OIG Self-Disclosure Protocol and *qui tam* filing alleging related facts
- Impact of self-disclosure on civil and administrative resolution to the case

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## 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
- Missteps to avoid
- Attempt to negotiate resolution, or litigate?
- Individuals and Impact of Yates Memo

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## Negotiation and Resolution

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## Overview - Negotiation

- Timing can vary
- Objectives of the various parties (DOJ, OIG, MFCU, relator, defendant)
- Key negotiating issues
  - Civil monetary damages
  - Scope of release
  - Administrative remedy
  - Relators' share
  - Attorneys' fees

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### 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
- Release tailored to conduct investigated and damages recovered

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### OIG Objectives

- Appropriate prospective program safeguards in exchange for forbearance of exclusion authority
  - OIG reservation of rights
  - Corporate or Individual Integrity Agreements
    - Independent review organizations (IROs)
    - Legal IROs
    - Monitors

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### Relator Objectives

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

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## Defendant Objectives

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

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## Negotiation – Getting Started

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

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## 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

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## Monetary Negotiations

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

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## 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

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## 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?

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### 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

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### Other Key Issues

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

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### Resolution: Settlement Agreement

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

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### Settlement – Other Considerations

- Cooperation
- Individuals
  - Impact of Yates Memo
  - Limitation on Releases
- Who signs
- Confidentiality
- Press release

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### Resolution: OIG-Specific Issues

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

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### Resolution: Relator-Specific Issues

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

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