

Negotiating False Claims Act Settlements

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Overview

- Give “Big Picture” view of How False Claims Act (“FCA”) Cases are settled
- Highlight Defense/Government Concerns and Approaches to Negotiating FCA Case Settlements
- Describe roles of DOJ, OIG and defense counsel in negotiation/settlement process
- Provide Guidance as to How to Successfully Achieve a Resolution of a FCA Case

Settlement Considerations: The Defense Perspective

Potential Criminal Exposure

Potential Civil/Administrative Exposure

- Damages
- CMPs
- Exclusion/Corporate Integrity Agreements

Analysis of Potential Legal Defenses

- Statute of Limitations
- Materiality
- Extrapolation/Sampling Methods

Analysis of Potential Factual Defenses

- Medical Necessity – Defense vs. Government Experts
- Valuation – FMV Experts
- Coding – Expert Analysis
- Whistleblowers’ Credibility

Settlement Considerations: The Defense Perspective

Potential Targets

- Parent vs. Subsidiary
- Management/Individuals
- Related Parties, e.g. Physician Groups

Damages Exposure

- Number of incidents/cases
- Temporal Limits
- Potential Multipliers

Litigation Costs

- Legal
- Experts
- E-Discovery
- Client resources/personnel/distraction

Potential Client Transaction(s)

Settlement Considerations: The Government Perspective

How Does the Government Assess its Case?

Government Assessment of Case

- Potential FCA Damages
- Potential Bases for CMPs
 - The Anti-Kickback Statute
 - The Prohibition on Certain Physician Referrals (Stark Law)
 - False or Fraudulent Claims
 - Billing while excluded
 - Select Agents
 - Patient dumping (EMTALA)
 - About 40 other OIG CMPs

Government Assessment of a Case

How does the OIG use
Civil Monetary Penalty
authorities?

Government Assessment of Case: Potential Exclusion

- Mandatory vs. Permissive Exclusion
- Length of Exclusion
- Factors OIG Considers in Seeking Exclusion¹

¹On April 18, 2016, OIG issued updated criteria for implementing permissive exclusion which can be found on OIG's website.

Government Assessment of Case: Evaluating Compliance Programs/Cooperation

- March 2017 DOJ Guidance: Evaluation of Corporate Compliance Programs
- January 2017 Publication of HCCA/OIG: Measuring Compliance Program Effectiveness
- Targets' Cooperation with Government FCA Investigation

Negotiating Settlements: The Government Perspective

Who Negotiates?

- Role of U.S. Attorney's Office
- Role of Main DOJ
- Role of OIG/HHS
- Role of Relator's Counsel

Negotiating Settlements: The Government Perspective

Who Negotiates: Special Circumstances:

- Joint State/Federal Matters
- Pending Federal Criminal Investigation
- Use of Tolling Agreements
 - Civil
 - Criminal

Negotiating Settlements: The Government Perspective

Calculating Damages

Multiples

Interest

Payment Methodologies

Negotiating Settlements: The Government Perspective

Individual Liability

- The “Yates Memorandum”
 - Issued on September 9, 2015
 - Signed by Sally Quillian Yates, Deputy Attorney General

Negotiating Settlements: The Government Perspective

Persuading Defense Counsel

Negotiating Settlements: The Defense Perspective

Persuading the Government: Strength of Case

- Attorney Proffers
- Witness Interviews
- Waiver of Privilege to Internal Investigation (?)
- Disclosure of Expert Analyses/Reports (?)

Persuading the Government: Good Corporate Citizenship

- Policy/Procedure Reforms
- Compliance Programs/Resources
- Number of Employees/Economic Impact
- Service to Indigent Population
- Charitable/Educational Activities

Negotiating Settlements: The Defense Perspective

Persuading the Government: Ability to Pay

- Available Funds/Credit
- Trends for Revenues/Profits/Surplus/Deficit
- Bond Obligations
- Union Contracts
- Financial Disclosures (?)

Negotiating Settlements: The Defense Perspective

Calculating Damages/Multipliers

- Medical Necessity
- Value of Services Received
- CMS vs. Provider Data
- Sampling /Extrapolation

Interest

Payment Methodologies

- Ability to Pay

Negotiating Settlements: Drafting the Agreement

Drafting Settlements Agreements: The Government Perspective

Contents of the Settlement Agreement

- Defining “Covered Conduct”
- Carve Outs
- Defining the Settling Entity
- Signatories

Drafting Settlements Agreements: The Government Perspective

Release Language

Relator's Counsel Fee

Relator's Share of Recovery

Drafting Settlements Agreements: The Defense Perspective

Contents of the Settlement Agreement

- Defining "Covered Conduct"
- Carve Outs

Defining the Settling Entity

Signatories

- HHS/OIG
- Main Justice
- US Attorney's Office
- Relators
- Relators' Counsel

Drafting Settlements Agreements: The Defense Perspective

Release Language

- Former Employee/Whistleblower vs. Professional Relators
- Allegations in Complaint
- Temporal Extensions
- Cross-Release
- Covered Conduct vs. Potential Claims

Relators' Share of Recovery

Relators' Counsel Fee

Disclaimer of Liability/Wrongdoing

Negotiating Settlements: Corporate Integrity Agreements

- Contents of Corporate Integrity Agreements:
 - Can be claims, arrangements, or both.
 - Typically last 5 years and include requirements to:
 - Hire a compliance officer/appoint a compliance committee;
 - Develop written standards and policies;
 - Implement a comprehensive employee training program;
 - Retain an independent review organization to conduct annual reviews;
 - Establish a confidential disclosure program;
 - Restrict employment of ineligible persons;
 - Report overpayments, reportable events, and ongoing investigations/legal proceedings; and
 - Provide an implementation report and annual reports to OIG on the status of the entity's compliance activities.

Integrity Agreements are for smaller entities and have slightly different terms, like quarterly reviews and can be as short as three years.

Negotiating Settlements: Corporate Integrity Agreements

- Factors Government Considers in Whether to Require a Corporate Integrity Agreement

- Defense Perspective on Corporate Integrity Agreements

- Cost/Challenges of Corporate Integrity Agreements

Negotiating Settlements: Special Concerns for the Defense

Special Circumstances:

- Joint State/Federal Matters
- Pending Criminal Investigations
- Government Intervention on Only a Portion of Relators' Case
- Tolling Agreements
- Insurance Coverage

Secondary Concerns: The Defense Perspective

Publicity:

- Government Press Release
- Posting on Government Website
- Government Press Conference
- Unsealing of Complaint
- FOIA

Secondary Concerns: The Defense Perspective

Cooperation Clauses

Confidentiality of Documents

Compliance Reform

Follow-up Litigation:

- Class Action Lawsuits
- Securities Litigation/Derivative Actions
- Employment Litigation

The Effect of *Universal Health Services v. United States ex rel. Escobar* on Settlement Negotiations: The Government Perspective

The Effect of *Universal Health Services v. United States ex rel. Escobar* on Settlement Negotiations: The Defense Perspective

Government Perspective on the Yates Memorandum

- Focus on Individuals Needed for Deterrence
- Need to Affirm Public Trust in Justice System by Assuring that Those Responsible for Organization/Corporation Misconduct Are Held Accountable
- Reinforces Importance of Establishing Corporate/Organization Culture of Compliance

The Defense Perspective on the Yates Memorandum

- Concern that Focus on Individuals Will Deter Qualified Executives from Serving in Health Care Management
- May Make Settlement/Resolution More Difficult
 - Policy expressly forbids releasing individuals based on corporate resolutions
 - Focus on individual liability in civil cases, without regard to ability to pay-very troubling
- Pits Executives Against Their Health Care Employees
- Emphasis on Joint Civil/Criminal Investigations Raises Ethical Concerns, see, e.g. New Jersey RPC 3.4(g)

QUESTIONS?

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