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 Exclusion

1 On 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
  
  o Civil

  o Criminal
Negotiating Settlements: The Government Perspective

Calculating Damages

Multiples

Interest

Payment Methodologies

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 (?)

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 a 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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