

NEGOTIATING FALSE CLAIMS ACT SETTLEMENTS

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Introduction

- The False Claims Act is the principle enforcement tool of DOJ in the investigation and resolution of health care fraud matters.
- Settlement of FCA cases is a complicated and difficult process involving multiple parties and multiple issues.
- Why do most FCA cases settle?
- Program intended to discuss the background, setting and conduct of settlement negotiations

Basics

Background and setting

- Overview of the False Claims Act?
- Who are the parties
 - Government "victims" - Medicare, Medicaid, etc.
 - Investigating agencies - HHS/OIG, FBI, MFCU, etc.
 - Defendants
 - Relator
- Financial considerations: damages, penalties, relator's personal claims, relator share and attorney fees

Initiating Negotiations

When is the right time to settle?

- Early?
- After pleading litigation?
- After discovery?
- After summary judgment?
- Conduct of parties during investigation

Roles of the Parties

- Who participates?
- What is the role of each?
- What is the relationship between DOJ and its agencies; and the states?
- Does relator have a seat at the table? Can relator object to a settlement?
- What is the relationship between civil and criminal matters?
- How do roles change in declined cases?

Settlement Considerations of the Government

- What are the government's requirements? Will it require commitments of cooperation?
- What is the impact of the "Yates memo"?
- Scope of the release: What is the "covered conduct"?
- Key settlement terms:
 - Cooperation and denials
 - Admissions
 - Dismissal with and without prejudice
- Global settlement
- Press releases
- Approval Process

Interests of the Defendants Beyond the Settlement Amount

- Disclosure requirements
- Tax consequences
- Insurance coverage
- Exclusion/Future compliance/CIA's
- Limitation of future exposure
- Sale or acquisition considerations

Negotiation Strategy

- How do you prepare for negotiations?
- How do you prepare your client?
- How do you best present arguments regarding the merits and the damages?
- Equities and fairness? – litigation risk

Negotiation Considerations

- How much do you educate?
- Do you use witnesses? Experts?
- How do you build trust?
- If you narrow the investigation (by time, location or subject matter) do you narrow the release?
- How and when to negotiate the relator's attorney fees?

Corporate Integrity Agreements

- How and when do you engage the agency and discuss a Corporate Integrity Agreement?
- Agency remedies
- Criteria applied by the OIG?
- Basis for a CIA
- Typical elements of a CIA
- Relevance of the FCA settlement
- What if the defendant does not want a CIA?

Internal Investigations

- What is the role of internal investigations or internal audits?
- Voluntary disclosures?
- Incomplete voluntary disclosure?
- How do they help assess liability and damages?

Impediments to Settlement Beyond Dollar Value

- Overconfidence
- Parties take it too personally
- Litigation has broken trust and communication
- Parallel negotiations over fees and "all-in" offers
- Collateral unresolved matters (see next slide)
- Multiple and overlapping qui tam cases
- Parallel or related unresolved matters
- Relator related issues
 - Relator share issues: Who and how much?
 - The role of the personal claims of relators

Ability to Pay Settlements

- What is the process to base a settlement on financial ability to pay?
- Are the merits considered?

Mediation

- When is mediation appropriate?
- Reasons for engaging in mediation:
 - *Case evaluation*
 - *Building trust and communication*
 - *Help with client problems*
 - *Help with process, discovery and parallel proceedings*

Other Issues or Considerations

- Are there any important recent trends?
- Opposing counsel
 - *What has he or she done that facilitated a deal? Or done to screw up negotiations?*
- What are some negotiation suggestions?

QUESTIONS?

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