

4th Annual HCCA Healthcare Enforcement Compliance Conference

Trying a False Claims Act *Qui Tam* Case

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Pretrial Strategies and Preparation

- Proceed as though there will be a trial
 - Phased approach
 - Motion practice
 - Discovery
 - Dispositive motions
 - Experts
- Use of mock juries

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The Decision to Proceed to Trial

- The “court house” steps decision
- Types of FCA cases that go to trial
- Impact of intervention

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Focus on Evidentiary Issues to Ensure a Level Playing Field

➤ Extrapolation for liability and damages

- *U.S. ex rel. Ruckh v. CMC II LLC*, Case No. 8:11-cv-1303 (M.D. Fla. Dec. 29, 2016) (Merryday, J.) (denying defendants' motion to exclude relator's expert on statistical sampling and damages because a small sample size typically is not dispositive in excluding expert opinion formulated with established principles and techniques, and the margin of error in the expert's study is within permissible bounds)
- *United States v. Robinson*, 2015 WL 1479396 (E.D. Ky. Mar. 31, 2015) (Van Tatenhove, J.) (admitting statistical sampling and collecting cases supporting the finding that “statistical sampling methods and extrapolation have been accepted in the Sixth Circuit and in other jurisdictions as reliable and acceptable evidence in determining facts related to [FCA] claims as well as other adjudicative facts”).

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Evidentiary Issues (cont'd)

➤ *Daubert* motions

- *U.S. ex rel. Dolan v. Long Grove Manor, Inc.*, Case No. 10 C 368 (N.D. Ill. July 12, 2018 (Bucklo, J.) (accepting opinion of relator's economics and data analytics expert for analysis of whether defendants exaggerated therapy minutes during Medicare assessment periods, but rejecting expert's opinion on damages due to failure to consider true therapy needs of patients)

➤ Prejudicial evidence and inferences

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Proper Measure of Actual FCA Damages

Benefit of the bargain principle

- The "benefit of the bargain" standard is typically applied where the government receives a tangible service or benefit. *U.S. v. Bornstein*, 423 U.S. 303, 317, n. 13 (noting that the government's damages after receiving deficient electron tubes for radio kits were "equal to the difference between the market value of the tubes it received and retained and the market value that the tubes would have had if they had been of the specified quality.")
- *U.S. ex rel. Wall v. Circle C Const., LLC*, 813 F. 3d 616, 617 (6th Cir. 2016) ("Actual damages are the difference in value between what the government bargained for and what the government received.")
- *United States ex rel. Thomas v. Siemens AG*, 991 F. Supp. 2d 540, 573 (E.D. Pa. 2014) (measuring FCA damages "as the difference between what the government actually paid and what the government would have paid had it known of the falsity of the defendant's claim")

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Proper Measure of Actual FCA Damages (cont'd)

The "taint" theory

- *U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 386 (4th Cir. 2015) ("By reimbursing the [defendant hospital] for services that it was legally prohibited from paying [under the Stark Law], the government has suffered injury equivalent to the full amount of the payments.")
- *U.S. v. Rogan*, 517 F. 3d 449, 453 (7th Cir. 2008) (The proper measure of damages for Stark or AKS violations is the full amount of each claim because the government would not have paid the tainted claim if it had known of the illegal referral; no offset of damages is available)
- *U.S. ex rel. Emanuele v. Medisor Associates*, Case No. 10-245 Erie, 2017 WL 385341 (W.D. Pa. Oct. 26, 2017)

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Eighth Amendment Excessive Fines Clause

- The 8th Amendment commands that "excessive fines" not be "imposed." U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")
- The Supreme Court defines "excessive" as "beyond common measure or proportion." *U.S. v. Bajakajian*, 524 U.S. 321, 335 (1998)

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Eighth Amendment Excessive Fines Clause (cont'd)

- Open issues:
 - Can corporations claim protection from the Excessive Fines Clause? The Supreme Court has not decided the issue.
 - Does the Excessive Fines Clause apply to defendants in a *qui tam* case?
 - *U.S. v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008) ("It is far from clear that the Excessive Fines Clause applies to civil actions under the False Claims Act." The judgment entered (\$64M) is less than 4 times actual damages (\$17M), within the single digit level that *State Farm v. Campbell* thinks not grossly excessive for punitive damages).
 - *U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364 (4th Cir. 2015) (holding that award of damages and civil penalties did not violate 5th or 8th Amendments where jury found that hospital submitted 21,730 false claims with a value of \$39.3M and final judgment entered for \$237M)

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Jury Instructions

- Lack of model instructions

- *Escobar* materiality instruction

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Post-Trial Motions

- **FRCP 50(a) and (b):**
 - *U.S. ex rel. Ruckh v. Salus Rehabilitation, Inc.*, 304 F. Supp. 3d 1258 (M.D. Fla. 2018)
 - *U.S. ex rel. Ortolano v. Amin Radiology*, 2015 WL 403221, Case No. 5:10-cv-583 (M.D. Fla. Jan. 28, 2015 (Hodges, J.), *affirmed* Case No. 15-10838 (11th Cir. 2016)

- **FRCP 62(b) motion to stay execution of judgment:**
 - *U.S. ex rel. Ruckh v. Salus Rehabilitation, Inc.*, Case No. 8:11-cv-1303 (M.D. Fla. March 15, 2017) (Merryday, J.)

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Attorney's Fees for Defendants

- 31 U.S.C. § 3730(d)(4). *In non-intervention cases, prevailing defendants may recover reasonable attorneys' fees and expenses if the court finds a relator's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."*
- 31 U.S.C. § 3730(g). *Fees and expenses to prevailing defendant, states that the provisions of § 2412(d) of title 28 shall apply*
- 28 U.S.C. § 2412(d)(1)(D) ("If, in a civil action brought by the United States . . . the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.")
 - U.S. ex rel. Wall v. Circle C Const., LLC, 868 F.3d 466 (6th Cir. 2016)

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THANK YOU

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