Anatomy of a False Claims Act Case

INVESTIGATION, NEGOTIATION AND RESOLUTION

Investigation
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, where and why” supporting fraud and damages?
- Specific examples of the fraud?
- Requisite scienter/knowledge evidence for Defendant?
- 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?

Investigation – DOJ’s Perspective

- Government investigates *qui tams*, non *qui tams*, agency referrals, self disclosures
- Goal is to decide whether to intervene (*qui tams*) or pursue
- Considerations
  - Evidence that a violation of 31 U.S.C. § 3729(a)(1) has occurred
  - Evidence that violation was “knowing” as defined in § 3729(b)(1)
  - Evidence and arguments regarding materiality
  - Damages (amount and provability)
  - Agency policies and priorities
  - Strength of likely defenses
  - Resources necessary
Investigation – DOJ’s Perspective (cont’d)

- Sources of evidence:
  - Applicable statutes, regulations, and policies
  - Relators and other witnesses with knowledge
  - Internal and external/third party audits
  - Agency subpoenas and Civil Investigative Demands
  - Presentations by, and discussions with, counsel

- Other considerations:
  - OIG
  - Responsibility of individuals

Supreme Court Escobar Precedent


- 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.
Supreme Court Escobar Precedent


- 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 - 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 regarding investigative steps
- Individual liability issues
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
- Impact of the Granston Memo

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
Negotiation

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
Negotiation – DOJ Priorities

- Make government whole
- Deter fraud
- Consider and address views of victim agency
- Identify individual wrongdoers and proceed accordingly
- Fairly reflect strengths and weaknesses of case
- Provide a release tailored to damages recovered

OIG Objectives

- Appropriate prospective program safeguards in exchange for forbearance of exclusion authority
  - Evaluation of Risk

Risk Categories
- Highest Risk - Exclusion
- High Risk - Heightened Scrutiny
- Medium Risk - CIAs
- Lower Risk - No Further Action
- Low Risk - Self-Disclosure
**Relator Objectives**

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

**Defendant Objectives**

- Appropriate monetary resolution covering all claims
  - FCA liability
  - Attorneys’ fees
- Release of all potential claims
- Least onerous compliance requirements possible going forward
- Minimize reputational/business impacts
- Appropriate consideration of individual liability/indemnification
Negotiation – Getting Started

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

Alternative Dispute Resolution

- Federal government committed to ADR in “appropriate civil cases”
- Benefits of mediation
  - Objective neutral gives all parties an important reality check
  - Use of an impartial intermediary can change the personal dynamics
- Non-binding
Monetary Negotiations

- Damages assessment
  - Each party’s principled assessment of damages (which may include use of sampling and extrapolation)
  - Each party’s principled quantification of false claims at issue
- Realistic assessment of the respective litigation risks of each party
- Debate over the appropriate multiplier and calculation of penalties
- Realistic assessment of resources required for, and risks associated with, continued pursuit

Other Considerations

- “Cooperation Credit”
- Justice Manual 4-4.112 (Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters)
  - Voluntary Disclosure
  - Forms of Cooperation
  - Remedial Measures
Resolution

Settlement Agreement

- DOJ sends initial draft
- Standard language (including re: restitution)
- Key terms to negotiate (ideally before handshake agreement reached):
  - Covered conduct
  - Released parties
- (Mostly) Non-negotiable terms, including:
  - Post-handshake interest
  - Definition and treatment of “unallowable costs”
  - Agreement to cooperate with investigation of individuals
Settlement Agreement – Key Issues Regarding the Scope of Release

- Defining the “Covered Conduct” to be released
- Defining released parties
- Express reservation of unreleased claims, including:
  - Criminal liability
  - Tax liability
  - Mandatory (and/or permissive) exclusion from government programs
  - Liability of individuals
- Dismissal of complaint with prejudice as to Covered Conduct but without prejudice as to remainder
- Handling of non-intervened claims

Resolution: Other Key Issues

- Impact of state law claims
  - State FCAs
  - States as parties
  - Role of NAMFCU
- Parallel criminal investigations
- Relationship to other litigation with Relators
- Issues that may arise from increased focus on individual liability
- Clarity of rules going forward: “Leveling the playing field” for all like providers
Resolution: Defense-Specific Issues

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

Resolution: OIG-Specific Issues

- Administrative Remedies
  - Negotiated Exclusion
  - Corporate Integrity Agreement
    - OIG sends initial draft
    - Standard language
    - Also specific terms based on conduct and provider
    - Negotiated between OIG and defendant
  - Timing issues
Criteria for Implementing Exclusion Authority

- Presume period exclusion under 1128(b)(7) when there is Federal health care program fraud
- Four categories of factors to determine where one falls on the compliance risk spectrum
  - Nature and circumstances of conduct
  - Conduct during investigation
  - Significant ameliorative efforts
  - History of compliance

Refusing to Enter Into a Corporate Integrity Agreement

- Heightened Risk category on risk spectrum
- As of October 1, 2018, OIG began posting the names of any entities that refuse to enter into a CIA on its website
Resolution: Relator-Specific Issues

- Relator’s right to object to settlement as unfair, inadequate, unreasonable
- Declined vs. intervened cases and claims within cases
- Attorney fees—between Relator and Defendant
- Retaliation claims
- Releases
- Relator’s share—between Relator and DOJ

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