

Anatomy of a False Claims Act Case

INVESTIGATION, NEGOTIATION AND
RESOLUTION

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Investigation

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Relator's Pre-Filing Investigation and Considerations

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- ▶ 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?

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Investigation – DOJ's Perspective

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- ▶ 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

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Investigation – DOJ's Perspective (cont'd)

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- ▶ 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

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Supreme Court *Escobar* Precedent

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Universal Health Servs., Inc. v. United States ex rel. Escobar,
136 S. Ct. 1989 (2016)

- ▶ 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.

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Supreme Court *Escobar* Precedent

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Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016)

- ▶ 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

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- ▶ 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

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Investigation - Defense Perspective

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- ▶ 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

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Self - Disclosures

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- ▶ 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

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Negotiation

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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

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Negotiation – DOJ Priorities

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- ▶ 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

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OIG Objectives

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- ▶ 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

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Relator Objectives

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- ▶ 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

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Defendant Objectives

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- ▶ 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

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Negotiation – Getting Started

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

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Alternative Dispute Resolution

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- ▶ Federal government committed to ADR in “appropriate civil cases”
 - ▶ <http://www.jamsadr.com/files/Uploads/Documents/Articles/Stevens-False-Claims-Act-2012-11-20.pdf>
- ▶ Benefits of mediation
 - ▶ Objective neutral gives all parties an important reality check
 - ▶ Use of an impartial intermediary can change the personal dynamics
- ▶ Non-binding

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Monetary Negotiations

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- ▶ 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

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Other Considerations

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- ▶ "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

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Resolution

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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

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Settlement Agreement – Key Issues Regarding the Scope of Release

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- ▶ 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

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Resolution: Other Key Issues

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- ▶ 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

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Resolution: Defense-Specific Issues

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

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Resolution: OIG-Specific Issues

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- ▶ Administrative Remedies
 - ▶ Negotiated Exclusion
 - ▶ Corporate Integrity Agreement
 - ▶ OCIG sends initial draft
 - ▶ Standard language
 - ▶ Also specific terms based on conduct and provider
 - ▶ Negotiated between OCIG and defendant
 - ▶ Timing issues

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Criteria for Implementing Exclusion Authority

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- ▶ 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
- ▶ <https://oig.hhs.gov/exclusions/files/1128b7exclusion-criteria.pdf>

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Refusing to Enter Into a Corporate Integrity Agreement

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- ▶ 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

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Resolution: Relator-Specific Issues

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- ▶ 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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