Settling and Mediating False Claims Act Cases

HEALTHCARE ENFORCEMENT COMPLIANCE CONFERENCE 2019
NOVEMBER 3, 2019

Agenda

When to initiate settlement discussions
Use of mediation
Roles of settlement participants
Individual versus corporate defendants
Calculating/negotiating settlement value
Covered conduct and releases
Publicity considerations
Private payer concerns
Initiation of Settlement Discussions

Who should initiate?

Typical decision points/settlement opportunities within a case

How to initiate

Roles of Settlement Participants

Role of DOJ/USAO
  ◦ Levels of authority to resolve

Role of states/NAMFCU

Role of relator’s counsel

Role of HHS-OIG

Role of defense counsel and client
Individual Versus Corporate Defendants

Yates Memo implications for individuals
Settlement releases for individuals, corporations
Roles of counsel
Uniquely corporate concerns, e.g.:
  ◦ SEC filings
  ◦ Board authority/resolutions
  ◦ Impact on affiliates

Mediation and How It Can Help

How mediation works
Benefits of third-party neutral vs parties alone
  ◦ Communicate to client in ways counsel may have difficulty
  ◦ Helps switch focus from litigating to compromising
  ◦ Good mediators skilled in settlement art
  ◦ If successful, a lot done in one day
Will DOJ agree to mediate?
Court-ordered versus voluntary
Valuation of the Case

Statutory damages paradigm
Trial versus settlement damages
Quantitative pre-settlement preparation
Skilled know-how in healthcare, esp. payment/reimbursement structures
Potential for statistical sampling and extrapolation
Parties’ highly divergent evaluations of damages
Impact of tax consequences defined by restitution/penalty allocation

Covered Conduct and Releases

Only covered conduct is released
Only get release if pay
Timing of discussion
Second in importance only to dollar amount (maybe)
Includes conduct alleged in complaint/investigated, and time period
Arguments relating to liability, multi-defendant scenarios
Cold-comfort option
Settlement Publicity Considerations

Pre-settlement disclosures by publicly traded entities
Government’s press release
Press conferences
Unsealing/posting of qui tam complaint
Defendant responses

Collateral Private Payer Concerns

Disclosure obligations of settlement to private payers
Potential audits/demands by private payers
Distinctions between federal program liability and private payer concerns.
Contact Information

LAURA LAEMMLE-WEIDENFELD
Jones Day
LWeidenfeld@jonesday.com

SEAN O’CONNELL
Hunton Andrews Kurth
soconnell@hunton.com

JAN SYMCHYCH
JAMS
Jan.symchych@gmail.com

JACK WENIK
Epstein Becker & Green
JWenik@ebglaw.com