



# Prosecution and Defense: Points of Collaboration and Contention

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## Roadmap

- Points of Contention
- Points of Collaboration
- Trends

## Points of Contention

- Interpretation and application of scienter standard
- Declination as government's view of merits
- Materiality/*Escobar*
- Brand Memo
- Granston Memo
- *AseraCare*

## Interpretation and Application of Scienter Standard

- Reckless disregard
- Deliberate ignorance
- Actual knowledge
- Intent

## Declination as Government's View of Merits

- Declination not commentary on merits
  - Government may decline for many reasons
    - Lack of resources
    - Comparatively low loss amount
    - Confidence in relator's counsel
- But declination has significant practical impact on case

## Materiality/*Escobar*

- Subjective vs. objective
- Continued government payment
- *Escobar's* progeny—something for everyone
  - “*Escobar* rejects a system of government traps, zaps, and zingers \* \* \* a scattering of claims in a smattering of facilities is a wholly insufficient basis from which to infer the existence of a massive, authorized, cohesive, concerted, enduring, top-down, corporate scheme to defraud the government.” *Ruckh v. Salus Rehab., LLC*, No. 8:11-cv-1303, 2018 WL 375720, at \*8 (M.D. Fla. 2018 Jan. 11, 2018)
  - *U.S. ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012 (9th Cir. 2018), cert. denied sub nom. *Stephens Inst. v. U.S. ex rel. Rose*, 139 S. Ct. 1464, 203 L. Ed. 2d 684 (2019)

## Brand Memo

- Government use of sub-regulatory guidance
- Applicability
  - Did it survive implementation of the Justice Manual?
- Trends/impacts
  - Greater reliance by government/relators on statutes and regulations
- Concerns

## Granston Memo

- Government dismissal of *qui tam* cases
- Applicability
- Trends/impacts
  - More efforts by the government to dismiss *qui tam* cases
    - Mixed results
- Concerns

## *AseraCare*

- Eleventh Circuit opinion dated 9/12/19
- Hospice liability under the FCA
  - Potential implications for medical necessity cases generally
- Who won?
  - Use of expert testimony
  - Proving/bifurcating falsity and knowledge
  - Linking evidence of improper certification practices to the specific claims

## *AseraCare (cont'd)*

- Open questions
  - Will the decision chill hospice/medical necessity cases?
  - What will constitute sufficient evidence of linkage between evidence of improper certification and specific claims?
- Next steps

## Points of Collaboration

- Statistical sampling
- Pleading with particularity
- Scope of discovery
- Relator/counsel participation in settlement efforts

## Statistical Sampling

- FCA or non-FCA cases?
- Liability or damages?
- Health care or non-health care cases?
- Stipulated sampling plans
- Agreement as to scope

## Pleading with Particularity

- Who, what, when, where, and how of the alleged fraud
- Compliance with particularity standard
  - Representative examples
  - Reliable indicia leading to strong inference
- Agreement on amending/re-pleading complaints

## Scope of Discovery

- Proportionality as applied to FCA cases
- Agreement on scope
- Stipulated search terms
- Fishing expeditions

## Relator/Counsel Participation in Settlement Efforts

- Pre-intervention decision
  - Partial lift
- Post-intervention decision
  - Formal settlement discussions
    - Mediation
    - Settlement conferences
  - Informal settlement discussions
- Experiences with and advantages of joint settlement efforts

## Trends

- More declined cases being litigated by relators' counsel
- Relators filing only (h) claims instead of substantive FCA claims
- Relationship between relators and government—love or hate?



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