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)
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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