



HCCA HEALTHCARE ENFORCEMENT CONFERENCE
WASHINGTON, DC
NOVEMBER 11/5-11/7, 2023

ANATOMY OF A FALSE CLAIMS ACT CASE
INVESTIGATION , NEGOTIATION AND RESOLUTION

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AGENDA
LIFE-CYCLE OF FCA CASE

- Investigation
- Negotiation
- Resolution

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INVESTIGATION

RELATOR'S PRE-FILING INVESTIGATION AND CONSIDERATIONS

INVESTIGATION

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INVESTIGATION

- Analysis of applicable statutes, regulations, and agency policies
- Investigative tools
 - Agency subpoena for documents
 - DOJ subpoena for documents (if parallel criminal investigation)
 - Civil Investigative Demands
 - Documents
 - Interrogatories
 - Testimony
 - Letter request for documents
 - Witness interviews

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ESCOBAR

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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ESCOBAR

- 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

- OIG agent works with DOJ to investigate FCA allegations
- OCIG attorney coordinates within HHS and with DOJ
- Evaluate whether other entities need to be involved

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INVESTIGATION RELATOR'S ROLE

- Relator Interview
- Assisting the Government's Investigation
 - Civil Investigative Demands
 - Administrative Subpoenas
 - "Wearing a Wire"
 - Reviewing and Analyzing Documents
 - Assisting with interviews/depositions
 - Responding to Defendant's "Whitepapers"
 - Working with government experts and investigators
 - Legal Research and Analysis

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INVESTIGATION¹¹ DEFENSE PERSPECTIVE

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SEAL & ELECTION DECISION¹²

Partial Unsealing During Government Investigation

- Partial unsealing by government to disclose overlapping Relators
- Partial unsealing by government to disclose qui tam complaint(s) to Defendant

Government's Intervention Decision

- If government intervenes, government assumes control of intervened claims
- If government declines, Relator and their counsel must decide if they will continue to prosecute case

Case is unsealed

- Government will move to unseal case with its election, and will typically ask to keep under seal its requests to extend the seal
- Dismissal by DOJ

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NEGOTIATION

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OVERVIEW NEGOTIATION

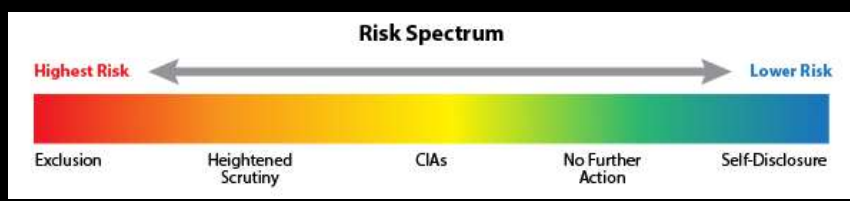
- Timing can vary
- Objectives of the various parties (DOJ, OIG, MFCU, relator, defendant)
- Key negotiating issues
 - Money
 - Scope of release
 - Existence/scope of CIA
 - Relators' share
 - Attorneys' fees

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NEGOTIATION DOJ PRIORITIES

- Make Government whole
- Deter fraud
- Consider, address views of victim agency
- Assess strengths and weaknesses of case
- Release only claims for which damages recovered
- Identify individual wrongdoers and proceed accordingly

NEGOTIATION OIG PRIORITIES



NEGOTIATION RELATOR OBJECTIVES

- Monetary resolution of FCA claims
 - Intervened
 - Non-intervened
- Relator's share percentage
- Resolution of any retaliation claims
- Resolution of attorneys' fee claims
- Impact of Multiple Relators

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NEGOTIATION DEFENDANT OBJECTIVES

- Appropriate monetary resolution covering all claims
 - FCA liability
 - Attorneys' fees
- Release of **all** potential claims
- Least onerous compliance requirements possible going forward

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NEGOTIATION GETTING STARTED

- 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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MONETARY NEGOTIATIONS

- Damages assessment
 - Each party's principled liability assessment
 - Each party's principled quantification of false claims and single damages at issue
- Debate over the appropriate multiplier and calculation of penalties
- Realistic assessment of the respective litigation risks of each party
- Realistic assessment of resources required for, and risks associated with, continued pursuit

RESOLUTIONS

SETTLEMENT AGREEMENT

KEY ISSUES REGARDING THE SCOPE OF RELEASE

OTHER KEY ISSUES

- Impact of state law claims
 - State FCAs
 - States as parties
 - Role of NAMFCU
- Relationship to other litigation with Relators
- Complications resulting from increased focus on individual liability
- Clarity of rules going forward
 - Applicability to all like providers
 - “Leveling the playing field”

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SETTLEMENT ISSUES OIG SPECIFIC ISSUES

- Administrative Remedies
- Corporate Integrity Agreement
- Scope of CIA

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SETTLEMENT ISSUES RELATOR SPECIFIC ISSUE

- Relators' share
 - Negotiation between DOJ and Relator
 - How much did Relator contribute
 - How much did Relators' counsel contribute to the investigation and litigation
 - Posture of the case and many other factors
- Attorneys' fees
 - Negotiation between Provider and Relator
 - Relator's right to object to settlement as unfair, inadequate, unreasonable
- Impact of Multiple Relators
- Fairness, Adequacy, Reasonableness (FAR) Challenge

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SETTLEMENT DEFENSE SPECIFIC ISSUES

- Cooperation
- Individuals
- Who signs
- Confidentiality
- Press release

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