TWELVE "MUST KNOW" ELEMENTS WHEN SETTLING AN FCA HEALTH CARE CASE[1]

1. Know the process – Whether settling a qui tam or a case initiated by the Department of Justice, keep in mind that this is not a simple bilateral negotiation. The affected agency may be interested in administrative actions such as Corporate Integrity Agreements that are outside the negotiation of the FCA settlement. In addition, any criminal liability will be addressed in a separate proceeding. If the case was begun as a qui tam action, you must know if there are private claims brought by the relator and you must separately negotiate the relator's counsel fees. Finally, if the Department has declined to enter the case, they still have a role in approving the settlement and this may impact whether they have a role in the negotiations. If the government declines to take over the suit, the defendant should receive a letter from the Department of Justice that outlines the process. If you do not receive the letter, you should ask for it.
2. Know the players – The more people in a negotiation the more difficult the negotiation. Here you may have multiple relators, multiple federal agencies including the Department of Justice, state representatives, and even multiple defendants. You should know the role, authority, and limits of everyone at the table. For example, you need to understand the settlement authority of the AUSA or trial attorney with whom you are dealing and that he or she will need to get approval for the proposed settlement. The approval takes time and depends on the amount of single damages and will require a letter describing the views of the affected agency, usually CMS.
3. Know the Department's requirements – Whether a qui tam or not, you need to know the standard terms in the settlement agreement in order to obtain a release from the Department of Justice. These start with the scope of the release – as to the conduct being covered and the causes of action being settled. In addition there are requirements regarding the allowability of costs. Certain matters such as levels of cooperation with the investigation and tax consequences will not be included. There will be no

[1] Prepared by Steve Altman. Altman Dispute Resolution Services. Stephenaltman.com. This is not intended and should not be relied upon as legal advice.

negotiation over the contents of, or the decision of the government to issue a press release.

4. Be familiar with the "Yates" Memo and its updates – In September 2015 Deputy Attorney General Sally Yates issued a memorandum concerning "Individual Accountability for Corporate Wrongdoing". The Department of Justice practice under this memorandum is developing. Among its important aspects are requirements that corporations provide all relevant information concerning individuals involved in the matter in order to receive credit for any cooperation and limitations on the scope of the release that prohibit the release of individuals upon resolution with the corporation.
5. Know when to negotiate – There are several opportunities to resolve the matter: prior to the government's decision on intervention, before or after motions, during or after discovery. Ask whether you need to conduct an investigation. Do you need to take discovery? Are there preliminary motions regarding the pleadings or the status of the relator? How much will it cost in both money and time to litigate? Is there value in limiting publicity to a one time announcement of a settlement?
6. Know that the negotiation may be protracted – Patience and persistence are critical to obtain a satisfactory resolution. Educating the opposition and yourself in a complicated matter with many possible outcomes takes time. Changing the expectations of the opposition and of your client also takes time. Expect that the settlement negotiations can be protracted and do not lose sight of the fact that whatever you do in the litigation has consequences for the discussions at the settlement table.
7. Know how and when to deal with the agency – Whether it be CMS or TRICARE or another government entity, keep in mind that the agency will make its own decision regarding administrative sanctions. The decision turns on the company's "present responsibility" to do business with the government and participate in government programs. This will be an additional negotiation. The agency will be aware of, and may participate in the FCA settlement discussions. A simultaneous discussion will enable the parties to know if there will be a Corporate Integrity Agreement or other requirements to avoid an exclusion from the program.

8. Know how and when to deal with the relator – In a declined qui tam, you should know the extent of the government's ongoing review of the case and whether they might actually be helpful in brokering a settlement. Also, keep in mind that while relator's employment claims and entitlement to fees and costs should be separate negotiations, wrapping them up at the same time may make it easier to settle each piece.
9. Know how to prepare – Obviously the government's interests are to recover its damages, apply penalties and to maintain the integrity of the program. To address these a defendant must consider the merits of the government's case, the calculation of damages and steps it can take to assure future compliance. A thorough investigation is required. A presentation of the defendant's efforts to avoid the submission of false claims may also be necessary. Representations made during negotiations that later prove to be incorrect do great damage to the ability to reach an agreement.
10. Know how to present arguments over damages, penalties and liability – Keep in mind that damages can be tripled. Therefore reducing the single damages by a dollar can reduce the settlement by two or more. Damage calculations can be very complicated and a thorough grasp is required prior to negotiations. As to liability, much emphasis is spent on arguing the law at the expense of how the case will be proven. People matter. Whether experts or key employees, using the actual witnesses, whether in person or by affidavit, may bring home that FCA cases are hard to try and involve people not just "corporate entities".
11. Know whether it is worthwhile to negotiate over the defendant's ability to pay. The government may consider the financial situation of the defendant after a thorough review of the corporate balance sheet and any and all additional information they deem helpful. The negotiation will not turn on the litigation risk of receiving the defendant's net worth but on how much the government believes the defendant is able to afford.
12. Know when, why and how to use mediation – FCA cases raise many of the reasons that litigants use mediation including emotional issues, multiple parties, lack of trust, need for confidentiality, the need to save the time and expense of litigation, need to talk directly to opposing parties, the need to have someone oversee and drive the settlement process, and differences in

the parties' assessments of the value of the case. Make sure you hire a mediator that has the skills required for the particular mediation. And then make sure your mediation advocacy skills, especially knowing how to use the advantages of having a mediator, are put to use.