False Claims Act Webinar:
2017 Year-in-Review and a Look Forward at 2018

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Roadmap

I. 2017 Year-in-Review
   A. Federal Recoveries
   B. Federal Legislative and Enforcement Developments
   C. Federal Caselaw
   D. Developments in the States

II. Looking Forward at 2018
   A. Developing Issues in the Federal Courts
   B. Developments in Litigation Strategies

2017 YEAR-IN-REVIEW

FEDERAL RECOVERIES

Recoveries Top $3 Billion for 8th Straight Year

- $3.7 billion recovered
- Healthcare cases: $2.47 billion
- DOD recovery doubled its 2016 measure to about $220 million
  - Number of government-initiated cases in this sector doubled, reflecting in part the results of investigations in connection with engagements in Iraq and Afghanistan
- Value of non-healthcare and non-defense settlements and judgments dropped by half, to $1 billion
  - More than $500 million from financial services sector
- $60 million in awards against individuals not involving joint-and-several liability, reflecting DOJ's continued focus on individual accountability
- 674 new qui tam cases (more than 12 a week) filed

FEDERAL LEGISLATIVE AND ENFORCEMENT DEVELOPMENTS

Enacted Legislation: Tax Treatment of Judgments and Settlements

- Tax Act enacted December 22, 2017 (Pub. L. No. 115-97)
  - Extends Internal Revenue Code Section 162(f)'s limitation on deductions for settlement payments and judgments in government litigation
  - May threaten the deductibility of certain payments in FCA actions
  - Section 13306 disallows deductions for settlement payments and judgments in government litigation except in limited circumstances: when the amount was paid as restitution (or to come into compliance with the law) and was identified as a restitution (or compliance) payment in a court order or settlement agreement
  - Government must report the amount paid as restitution to the IRS and the taxpayer
  - Reimbursements for government investigations or litigation are not treated as restitution

Enacted Legislation

- H.R. 657 – Follow the Rule Act
  - Protects employees who refuse to obey employer orders that would require employees to violate a current law, rule, or regulation.
- S.1094 – Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017
  - Establishes the VA Office of Accountability and Whistleblower Protection.
  - Requires the VA to develop criteria to promote protection of whistleblowers.
  - Requires the Government Accountability Office to report to Congress on retaliation against employees.
- S. 585 – Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017
  - Provides additional protections to federal employees who are retaliated against for disclosing waste, fraud, and abuse.
  - Enacts reforms to ensure that managers who retaliate against whistleblowers are held accountable.
  - Provides the Office of Special Counsel with access to information to allow for complete investigations.
  - Directs the Department of Veterans Affairs to address agency-specific shortcomings.

Proposed Legislation

- **House of Representatives**
  - H.R. 702 (passed House) – Federal Employee Antidiscrimination Act of 2017 – Would prohibit nondisclosure agreements that prevent federal employees from disclosing violations of law or instances of waste, fraud, or abuse.
  - H.R. 2196 (passed House) – Would expand the number of individuals to whom a whistleblower in the intelligence community may disclose information related to waste, fraud, or abuse.
  - H.R. 4043 – Whistleblower Protection Extension Act or 2017 – Would require each inspector general's office to have a dedicated official focused on whistleblowers (S. 1869 – companion bill).
  - H.R. 4195 – Congress Leads by Example Act of 2017 – Would provide whistleblower and other antidiscrimination protections for employees of the legislative branch (S. 633 – companion bill).
- **Senate**
  - S. 762 – IRS Whistleblower Improvements Act of 2017 – Provides additional protections to IRS whistleblowers and increases communication between the IRS and whistleblowers.
  - S. 2002 – Ensuring Protections for Intelligence Community Contractor Whistleblowers Act of 2017 – Expands whistleblower protections to employees of intelligence community contractors.
  - S. 807 – Criminal Antitrust Anti-Retaliation Act of 2017 – Extends whistleblower protections to employees who provide information to DOJ related to criminal antitrust violations.

Enforcement Developments: DOJ Dismissal Memo

- Issued January 10, 2018 by Michael Granston, head of Civil Frauds Section

- Directs DOJ attorneys to consider whether, when declining to intervene, to also move to dismiss meritless FCA cases over relators' objections

- Identifies 7 non-exclusive circumstances which might merit dismissal:
  - when qui tam complaint is facially meritless
  - when an action duplicates a government investigation
  - when an agency recommends dismissal
  - when dismissal would protect DOJ's litigation prerogatives
  - when dismissal safeguards classified information
  - when government's expected costs outweigh its expected gains
  - when elements of action would frustrate the government's investigation

Enforcement Developments: DOJ Dismissal Memo

- Impact uncertain, but some possible implications:
  - Will likely lead to an increase in cases where DOJ exercises its power to dismiss
  - Recognizes that meritlessness of qui tam complaint may be sufficient to warrant dismissal, suggesting that if a defendant presents evidence demonstrating lack of merit to the government, the government may dismiss the case
  - Acknowledges that a substantial class of cases should not proceed, even though they are not obviously meritless
  - Establishes a discretionary government-knowledge bar that may provide for dismissal in cases where public-disclosure bar would not apply
  - Recognizes that DOJ should defer to a client agency's recommendations regarding dismissal

Enforcement Developments: DOJ Memo Re: Agency Guidance Documents

- Issued by Associate AG Rachel Brand on Jan. 25, 2018
- Bars use of agency guidance documents by DOJ in civil enforcement actions, including FCA cases
- Impact unclear, but at least one FCA defendant has already attempted to use the memo against the government: *United States v. Reliance Med. Sys. LLC*, No. 14-cv-6979 (C.D. Cal.)

Other Enforcement and Regulatory Updates

- **Department of Justice**
  - FCA penalty range increases (for violations after Nov. 2, 2015):
    - February 2017: from $10,781 to $21,563 per violation to $10,957 to $21,916 per violation, a 1.6% increase; applies to penalties assessed after February 3, 2017
    - January 2018: from $10,957 to $21,916 per violation to $11,181 to $22,363, per violation; applies to penalties assessed after January 29, 2018
  - In speeches, both AG Sessions and DAG Rosenstein expressed some support for the approach outlined in the Yates Memo, but noted that all DOJ enforcement priorities were under review
- **Other Agencies**
  - Department of Health and Human Services – issued rule codifying authority to exclude entities and individuals from participation in federal healthcare programs for making knowingly false statements
  - Securities and Exchange Commission – brought nine enforcement actions related to companies that had allegedly taken steps to impede whistleblowers but noted improvement in this area
  - Commodity Futures Trading Commission –issued final rules to strengthen its whistleblower program and align it more closely with the SEC's

FEDERAL CASELAW

Fights over *Escobar*

- *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016) approved implied certification liability, but only in certain circumstances

- Extensive Debate in lower courts:

  - False implied certifications
  - Materiality of alleged non-compliance to government payment
  - Scienter: defendant's knowledge of materiality

Escobar: Implied False Certifications

- *Escobar held* that "the implied certification theory can be a basis for liability, **at least** where two conditions are satisfied: **first**, the claim does not merely request payment, but also makes specific representations about the goods or services provided; and **second**, the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths." 136 S.Ct. at 2001 (emphasis added)

- The Court specifically declined to resolve "whether all claims for payment implicitly represent that the billing party is legally entitled to payment" such that a claim for implied false certification may lie. 136 S.Ct. at 2000

- Seventh and Ninth Circuits have held two-prong "test" set out in *Escobar* is mandatory. *See United States v. Sanford-Brown, Ltd.*, 840 F.3d 445 (7th Cir. 2016); *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890 (9th Cir. 2017); *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325 (9th Cir. 2017)

- Fourth Circuit, however, has suggested there may be circumstances other than those identified in *Escobar* that may be sufficient to establish an implied false certification. *United States ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174 (4th Cir. 2017)

Escobar: Materiality

- "[I]f the **Government pays a particular claim** in full despite its **actual knowledge that certain requirements were violated**, that is very strong evidence that those **requirements are not material**." *Escobar*, 136 S. Ct. at 2003 (emphasis added)

- Five Circuits have granted defendants' dispositive motions on this basis. *See United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 35 (1st Cir. 2017); *United States ex rel. Spay v. CVS Caremark Corp.*, 875 F.3d 746, 764 (3d Cir. 2017); *United States ex rel. Petratos v. Genentech, Inc.*, 855 F.3d 481, 490 (3d Cir. 2017); *United States ex rel. Harman v. Trinity Indus. Inc.*, 872 F.3d 645, 667 (5th Cir. 2017); *Abbott v. BP Expl. & Prod., Inc.*, 851 F.3d 384, 388 (5th Cir. 2017); *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 334 (9th Cir. 2017); *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1034 (D.C. Cir. 2017)

- Two other Circuits have relied on the government's taking adverse action against defendants to *support* a finding of materiality. *See Triple Canopy*, 857 F.3d at 178-79; *United States v. Luce*, 873 F.3d 999, 1008 (7th Cir. 2017)

- *United States ex rel. Ruckh v. Salus Rehabilitation, LLC*, 8:11-cv-1303-T-23TBM, 2018 WL 375720 (M.D. Fla. Jan. 11, 2018): threw out $350 million verdict for relator

Escobar: Materiality

- Other factors indicating materiality
  - Defendant's actions to cover up noncompliance: *Triple Canopy*, 857 F.3d at 178
  - Government's decision to intervene: *Triple Canopy*, 857 F.3d at 179
  - "common sense": *Triple Canopy*, 857 F.3d at 179
  - Initiation of an investigation: *Cf. Petratos*, 855 F.3d at 485, 490

- Materiality despite continued government payment?

  United States ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890, 901 (9th Cir. 2017)

- Knowledge of allegations versus actual misconduct
  - *Campie*, 862 F.3d at 906-07
  - Many district courts
  - But *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29 (1st Cir. 2017); *D'Agostino v. ev3, Inc.*, 845 F.3d 1, 9 (1st Cir. 2016); *cf.United States ex rel. Petratos v. Genentech, Inc.*, 855 F.3d 481 (3d Cir. 2017)

Escobar: Scienter

- The Court in *Escobar* made clear that materiality is an aspect of scienter, holding that liability may lie only when "the defendant knowingly violated a requirement that the defendant **knows is material** to the Government's payment decision." *Escobar*, 136 S. Ct. at 1996 (emphasis added)

- The Court admonished lower courts to address concerns about fair notice and open-ended liability through "strict enforcement of the Act's materiality **and scienter requirements**" **Cite**.

- So far, only two district courts have alluded to this requirement. *See United States v. DynCorp. Int'l, LLC*, 253 F. Supp. 3d 89 (D.D.C. 2017); *United States ex rel. Ruckh v. Salus Rehabilitation, LLC*, 8:11-cv-1303-T-23TBM, 2018 WL 375720 (M.D. Fla. Jan. 11, 2018)

- An important and under-used aspect of *Escobar*

First-to-File Bar

- In 2015, Supreme Court in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), held that first-to-file bar does not apply once the earlier-filed action is no longer pending, but did not specify how a relator must proceed after dismissal

- Courts continued this past year to debate whether a first-to-file bar dismissal can be cured by amendment or only by filing a new action:

  - D.C. Circuit held that a relator must file a new action. *United States ex rel. Shea v. Cellco Partnership*, 863 F.3d 923 (D.C. Cir. 2017) (WilmerHale represented the Defendants.)
  - Fourth Circuit more narrowly held that a relator could not cure the defect with an amended pleading that did not affirmatively allege that earlier-filed actions were no longer pending. *United States ex rel. Carter v. Halliburton Co.*, 866 F.3d 199 (4th Cir. 2017)
  - District courts reached mixed conclusions on the permissibility of amendment
- Will be addressed by Second Circuit in *United States ex rel. Wood v. Allergan* (argument Feb. 7, 2018)

Rule 9(b)

- Courts continue to wrestle with the level of detail that a complaint must include to survive a motion to dismiss:
  - The Sixth Circuit retreated from a prior endorsement of what it called a "relaxed" pleading standard that might apply when relevant evidence is beyond a relator's knowledge; it affirmed the dismissal of a complaint that failed to identify a single fraudulent prescription that was allegedly submitted for reimbursement as a result of the defendant's misconduct. *United States ex rel. Hirt v. Walgreen Co.,* 846 F.3d 879, 881 (6th Cir. 2017)
  - In an opinion from last week, the Eleventh Circuit followed this approach and affirmed dismissal of a relator's complaint—amended four times—that failed to provide examples of specific patients who were ineligible for hospice care or specific falsifications that were made. *United States ex rel. Chase v. HPC Healthcare, Inc. et al*., 2018 WL 526039 (11th Cir. Jan. 24, 2018)
  - By contrast, the Second Circuit permitted a complaint to go forward that did not identify a single false claim, holding that the relevant evidence to supply the missing allegations was uniquely in the defendant's possession and the complaint created the "strong inference" that the claims were actually submitted; it characterized talk of a circuit split as "greatly exaggerated." *United States ex rel. Chorches for Bankruptcy Estate of Fabula v. American Medical Response, Inc.*, 865 F.3d 71, 86 (2d Cir. 2017)

Patterns in Federal Settlements

- Healthcare/Pharma/Med Device:
  - Improper manufacturing practices
  - Anti-Kickback Statute
  - Off-label uses
  - Inaccurate billing codes; inadequate review of billing codes
- Defense/Procurement
  - Overbilling
  - Improper use of small, minority-owned, veteran-owed status
  - Customs: countries of origin
- Financial
  - Mortgage lending and servicing (end of Direct Endorsement Lending cases?)

DEVELOPMENTS IN THE STATES

State Legislative Activity

- The federal Deficit Reduction Act (DRA), passed in 2005, encourages states to fight Medicaid fraud by granting to a state a portion of the federal share of Medicaid funds, so long as the state has enacted a false claims statute that is “at least as effective” as the federal FCA

- HHS determined in 2017 that several states were not in compliance with DRA because their statutes did not reflect the increase in civil penalties authorized under the federal FCA (as mandated by the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015); most non-compliant states were granted a grace period through 2018

- In 2017, Arkansas, Oklahoma, Maryland, California, and Illinois amended their state statutes to align them with the penalties authorized in the federal FCA; similar bills remain pending in North Carolina, Michigan, and Kansas

- A bill is pending in Illinois that would remove the authority of private parties to bring qui tam actions for false claims related to certain taxes, placing sole authority to bring such actions with the Illinois Attorney General and the Illinois Department of Revenue

State Settlements and Judgments

- As in prior years, the most significant state false claims settlements in 2017 related to alleged Medicaid fraud; states have continued to join forces with the federal government, individually and in multi-state efforts

- One of the most significant 2017 settlements: Mylan Inc. agreed to pay $465 million to the federal government, all 50 states, and DC for allegedly underpaying Medicaid rebates

- Another significant 2017 settlement: Shire Pharmaceuticals LLC's agreed to pay $350 million to the federal government, 37 states, and DC for an alleged kickback scheme

- Significant state court decision: New Jersey Supreme Court held in *Matter of Enforcement of New Jersey False Claims Act Subpoenas* that the NJ False Claims Act does not authorize the NJ Attorney General to invoke her subpoena power after declining to intervene in a qui tam action

2018 LOOK AHEAD

Issues Heading to Supreme Court

- **Materiality and Continued Government Payment**: *Gilead Sciences, Inc. v. United States ex rel. Campie* (docketed Jan. 3, 2018)
  - Whether an FCA allegation fails when the Government continued to approve and pay for products after learning of alleged regulatory infractions and the pleadings offer no basis for overcoming the strong inference of immateriality that arises from the Government's response
- **First-to-File Bar**: *United States ex rel. Carter v. Kellogg, Brown & Root Services, Inc.* (filed Jan. 25, 2018)
  - 1. Under the first-to-file bar . . . may later actions proceed without refiling once all earlier actions have been dismissed, or must later actions be dismissed and refiled?
  - 2. Is the first-to-file bar . . . jurisdictional or not, and if jurisdictional, is the first-to file bar applied only at time of filing, or may it be lifted by amendment, supplement, or later events?
- **Rule 9(b)**: *DePuy Orthopaedics, Inc. v. United States ex rel. Nargol* (due Feb. 5, 2018)
  - Whether Fed. R. Civ. P. 9(b) requires FCA relators to allege particularized details about specific instances of false claims rather than just describing an allegedly fraudulent scheme and providing "reliable indicia" that some false claims were submitted as a result

2018 Developments

Cybersecurity

- New DoD/DFARS requirements
- New GSA requirements on the horizon
- “A Practitioner’s Guide to Cybersecurity Whistleblowing”

Infrastructure Plan?

Further DOJ Initiatives?

- Criticism of DOJ in *United States ex rel. Wall v. Circle C Constr., LLC*, 813 F.3d at 616 (6th Cir. 2016) and *United States ex rel. Ribik v. HCR ManorCare Inc.,* No. 1:09-cv-00013 (E.D. Va.)
- Reconsideration of “Yates Memo”?

Questions?

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