Negotiation Strategies in False Claims Act Cases

Gabriel L. Imperato, Esq.

The ever increasing number of civil actions being filed pursuant to the United States False Claims Act ("FCA"), whether initiated by a whistleblower or directly by the Federal or state government has required health care defense attorneys to develop creative new strategies for defense against FCA claims. The option to litigate these claims is severely curtailed due to the threat of treble damages, catastrophic monetary penalties, potential exclusion from federal and state health care programs, and the prospect that discovery during civil litigation might unearth facts which give rise to even greater civil and/or criminal liability. Accordingly, counsel for defendants must implement defense strategies that are designed to achieve a reasonable resolution of the case, while avoiding exclusion from federal and/or state health care programs, and maintaining the prospect of some viable future for their clients in the health care business. This article will discuss the strategies a practitioner might use when negotiating the resolution of an FCA case. The article will cover strategies relating to the following subject areas: (1) internal investigation; (2) negotiation; (3) compliance and administrative sanctions; (4) fixing damages and limiting parallel liability.

Internal Investigation

The most effective defense to a FCA claim begins by determining the facts that underlie the whistleblower's and/or government's allegations. This may seem like a fundamental element of any defense strategy but its significance cannot be underestimated. A thorough understanding of the facts can put the defendant in a stronger negotiating position with the government and/or counsel for the whistleblower. Because the government usually has already had a head start once an FCA complaint is filed under seal, it is essential that the defendant becomes as informed as possible about the nature of the allegations. Although the government's case and the facts which it believes supports its case may have some merit, a thorough internal investigation may develop a much clearer, less culpable, picture of the true circumstances underlying the claim. This is a significant aspect of any FCA defendant's negotiating position (the disparity between the government's allegations and what the government can ultimately prove when challenged). Experience has proven that the government often attempts to force the actual facts in a particular situation into general, often disparate, fact patterns that have traditionally been viewed as indicators of health care fraud. An internal investigation enables a defendant to thoroughly review underlying facts, and serves to narrow the scope of the government's broad based, even sometimes, "canned" allegations. An internal investigation may not necessarily result in complete positive findings in connection with each and every allegation in an FCA case, nor will it necessarily absolve an organization and all individuals within an organization. However, there is no substitute for knowing the facts when developing your negotiating position. A thorough and verified understanding of the facts and applicable law can put the defendant closer to the position of "seller," instead of "buyer,", or at least closer to leveling the playing field, when negotiating with government representatives and attempting to resolve FCA liability.

Negotiation Strategies

The development of the facts underlying the FCA claim provides a sound basis for the FCA defendant to judge for himself whether the facts support a finding of knowing and willful conduct or even conduct in deliberate disregard or deliberate ignorance of the requirements of the law. If the defendant can persuade the government that the facts do not support these FCA state of mind requirements for liability, i.e. mere mistake, instead of acting in "deliberate ignorance" or "knowingly and willfully", then the defendant has already succeeded in reducing liability to double damages, or mere recovery of overpayment amounts, instead of triple damages and penalties. Clearly, this is one of the most important positions to stake out during negotiations under the FCA.

The facts underlying the government's FCA case should be discoverable through negotiation and without the necessity of engaging in formal discovery under the rules of civil procedure. This is important because often the United States Attorney or state authorities will often notify you of their intention to pursue an action under the FCA in a demand letter prior to filing suit. Because an FCA claim is essentially a civil action in which the parties are entitled to broad civil discovery, there is usually little reluctance on the part of government authorities to share the underlying facts which they claim support their allegations. Accordingly, a discussion with government representatives and a review of their work papers and evidence is of great value when assessing the degree of culpability which might be established if the case were to be litigated. This assessment of the facts underlying the government's case will not only assist in determining the defendant's exposure to liability, but is also invaluable when determining the areas of focus in a defendant's internal investigation. Once an assessment of the government's

position is made and hopefully after the defendant has conducted its own internal investigation, the facts and circumstances in mitigation of the FCA allegations can be presented to the government in an effort to arrive at an acceptable settlement of the matter.

Finally, an FCA defendant should keep in mind that the government may attempt to move the settlement discussions at a rapid pace, especially if the case involves a whistleblower/relator represented by counsel. Typically, the government will attempt to establish a time line for settlement, and will determine a certain date by which the case will commence to litigation, absent a settlement between the parties. The defendant's interest in negotiations is just the opposite, since, in most cases, a delay in settlement works to the defendant's advantage. The government will be inclined to settle a matter and avoid litigation as long as it continues to believe it can achieve its objectives as to settlement amount and collateral liability (e.g. institution of a corporate integrity agreement). Therefore, a competent negotiating strategy should always offer the government the option of settlement without the need for litigation, while at the same time safeguarding the defendant's reasonable objectives with respect to the settlement amount.

Compliance Issues and Administrative Sanctions

When determining settlement options in FCA cases, health care providers must also take into consideration the possibility of exclusion from Federal health care programs (e.g. Medicare, Medicaid, Champus). At the outset, it is necessary to determine if the government will agree to waive exclusion from Federal health care programs if a settlement can be reached. However, this waiver of sanctions is often in return for a commitment by the defendant organization to agree to, what is commonly referred to as, a corporate integrity agreement. These agreements

are modeled on the eight standards in the Federal Sentencing Guidelines for Health Care organization compliance programs, but have additional reporting, monitoring and auditing requirements which are much more specific and onerous than a standard voluntary compliance program. The standards in these corporate integrity agreements are designed to ensure compliance and continued oversight of the health care organization's continued participation in the Medicare, Medicaid and other Federal health care programs. It is often useful to raise this issue at the outset of negotiations because, if it is determined that the government intends to seek exclusion of the defendant from Federal health care programs, it may change the assessment of whether to settle or litigate the FCA claim.

There are occasions when the United States Attorney or the Office of Inspector General of Health and Human Services will not agree to specifically waive exclusion in any settlement agreement under the FCA. However, when this is the case, the defendant should not agree to the imposition of a corporate integrity agreement since this is customarily a quid pro quo for the waiver by the government of its discretionary authority to seek the administrative sanction of exclusion. [1]

Minimizing Damages and Limiting Parallel Liability

Finally, the most important aspect of negotiating the resolution of a FCA case is the amount which the defendant will have to pay in order to achieve a settlement with the United States or any state government. In the usual case, the government expects a catastrophic large amount of money, while the defendant is prepared to pay a much smaller sum. The challenge for the attorney representing the defendant is to attempt to bring the government and the client to a settlement amount on which both parties can agree.

The FCA provides for triple damages, plus a penalty of up to $11,500 per false claim. Therefore, it is not unusual for the government's claim, at least in theory, to appear quite substantial. However, in many cases the Department of Justice ("DOJ") will consider a settlement based on double the amount of Medicare, Medicaid or other Federal health care program loss. Accordingly, during the negotiation process it is important to come to an agreement with the government about what will constitute single damages or single program loss. Even if the government will not agree to double damages, but if the amount of single damages can be successfully determined, it may facilitate a quick resolution of the negotiations.

If the parties remain too far apart on the settlement amount, the defendant may initiate alternative dispute resolution ("ADR"). The Department of Justice's ADR Policy ("ADR Policy") [2], emphasizes that it is incumbent upon DOJ attorneys to consider alternatives to litigation. The ADR Policy also points out that the use of ADR may be of real value prior to the filing of a complaint as an aid to the settlement negotiation process, especially where preparing the case for trial would require a burdensome commitment of significant resources and where defense lawyers are willing to consider ADR." ADR is appropriate when it is clear that both parties would like to fix the amount of damages without costly litigation. ADR Policy stresses that the DOJ is fully committed to encouraging the use of ADR in appropriate cases. In fact, the DOJ has demonstrated its commitment to ADR by settling almost 90% of the cases referred by fraud units and approximately half of those prior to the filing of a complaint.

At the very least, once the DOJ agrees to a mediation or arbitration, it will typically develop a "bottom line" figure to which it will be willing to agree to settle. This has the effect of forcing the government to rethink its claim and to formalize its goals in bringing the FCA claim.

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[1] See Criteria for Implementing Section 1128(b)(7) Exclusion Authority, April 18, 2016 , Superceding Criteria for Implementing Permissive Exclusion Authority, 62 Fed. Reg. 55,410 (1997).

ADR proceedings can also be quite educational for the defendant by testing the merits of the government's position and the realistic parameters of a possible settlement in resolution of the government of the FCA matter. Relators' counsel has also recently reflected a new interest in ADR as a method to more expeditiously move cases to settlement.

Finally, one must always take into account potential parallel liability involving a FCA action, especially if litigation ensues and discovery of additional facts are made on the public record. These additional facts could give rise to further liability in connection with the discovery of additional false claims and possible further civil or criminal liability, not to mention the cost of continued litigation and potential adverse publicity. Furthermore, the settlement of a FCA case may limit the extent to which the action could result in parallel liability with a medical professional's state licensure board or with Medicare or a state health care program. Accordingly, a sound strategy for negotiating a resolution of a FCA case is a must given the scope of collateral liability for a health care organization.

[2] See 61 Fed. Reg. 36,895 (1998).