False Claims Act Cases: With No End In Sight, Why You Should Consider Litigating And How To Maximize Your Litigation Advantages

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Over the past few years, the government's emphasis on conducting fraud and abuse investigations – especially in the healthcare industry – has resulted in scores of settlements and billions of dollars paid to the government under the False Claims Act (FCA). The government has been assisted in these endeavors by an ever-growing cadre of whistleblowers filing *qui tam* complaints on the government's behalf. As the number of lawsuits and the government's demands for damages have increased, however, it may be time to recalibrate the risks and benefits of litigating, rather than settling, these cases. This article discusses a number of strategies and tactics for defendants to consider when litigating against the government in such actions.

The Government's Pre-Litigation Discovery Advantage

Traditionally, the playing field has favored the government – and the decision to settle. When a whistleblower files an action on behalf of the government, the case remains sealed for sixty days to give the government time to determine whether to intervene in the case. Upon a showing of "good cause," however, the government may move for an extension of time to keep the case under seal. Thus, while the case remains under seal and the defendant is unaware of the specific allegations, the government engages in extensive one-sided discovery that usually goes beyond the question of whether to pursue the case. Since the FCA does not limit the number of extensions the government may seek, it is often several *years* before the government finally completes the underlying investigation. By the time the complaint is unsealed, the government has already secured its evidence, tested its witnesses, developed its case, and strengthened its litigation position, all before the defendant has even been informed of the specific allegations. As a result, the defendant, already burdened by the costs of providing discovery during the investigation and aware of the potentially draconian penalties under the FCA, may prefer to settle, rather than litigate, a case for which it is far less prepared at the start than the government.

The Ever-Increasing Government Settlement Demands and Publicity May Lead to More Litigation

Recent circumstances suggest, however, that the traditional balance in favor of settling may be shifting, and that potential defendants should weigh the growing disadvantages of settling against the advantages to be gained through litigating the case. Among the disadvantages of settling, corporate defendants, in particular, should consider the following:

> First, the costs of settling under the FCA are increasing – effective August 1, 2016, for all violations occurring after November 2, 2015, the minimum per-claim penalty amount will increase from $5,500 to $10,781, while the maximum penalty will jump from $11,000 to $21,563. Since these cases typically involve thousands of claims, the penalties can be staggering.
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> Second, the Department of Justice's "Yates Memo," issued last September, requires corporate defendants to cooperate fully, including by providing all relevant facts (as defined by the government) about individual employees, in order to receive *any* credit (*i.e.*, a reduced damages multiplier) as part of any settlement. Where trying to protect

both the company and its employees means risking a worse settlement, it may be less expensive in the long run to fight the government.

Third, while defendants have previously preferred to "wait and see" the government's case, or try to reach a settlement before the case is unsealed, this calculus, too, has shifted – in part, because of the way the government has handled these cases. The government's liberal use of subpoenas and CIDs also serves to notify a defendant's clients and customers of the investigation, while the triumphant press releases announcing a settlement merely publicizes the government's view of the case. Thus, it may be more advantageous to be seen as fighting the charges than as conceding them through a settlement.

Strategies and Tactics When Litigating Against the Government

If no pre-litigation settlement is reached and the lawsuit proceeds, the government becomes much like any other plaintiff. This leveling of the playing field gives rise to a number of strategies and tactics that defendants in FCA cases should consider:

1. *Move To Unseal The Complaint Before The Government Decides To Intervene.* The sheer volume of FCA cases places significant burdens on the Department of Justice's resources. While this contributes to longer delays in unsealing cases, it also provides powerful incentives for defendants to force the unsealing of the complaint before the government can draw out the investigation – *and* the time period covered by the complaint for damages purposes.

2. *Use Discovery, Especially Contention Interrogatories, To The Fullest Extent.* The defendant should get the government to provide all the facts that support the various contentions in the FCA complaint. This will not only provide an early understanding of the key facts upon which the government is relying, but will also lock the government in to these facts as the basis for its case.

3. *Seek And Deploy Experts.* Many FCA cases are expert driven. In medical necessity cases, experts can be effectively used to rebut the government's claims that services were false because they were not medically necessary. In Anti-Kickback related cases, experts can opine that the value of the services and the structure of the contracts were commercially reasonable and in-line with fair market value. It also is helpful to retain experts early in the case, so that they can assist with the discovery strategy.

4. *Move To Dismiss.* Often the allegations in a FCA complaint are vast, generalized, and conclusory. Under the Supreme Court's *Iqbal* and *Twombley* decisions, however, the plaintiff is required to plead its case with plausible specificity – and particularity in making fraud allegations. The defendant can move to dismiss the complaint for failure to provide the necessary detail. *Even if the court denies the motion, the defendant will still have had an opportunity to try to narrow the case, while also educating the court about the weaknesses in the government's claims.*

5. *Consider Moving To BiFurcate The Trial.* In FCA cases alleging improper billing, conducting unnecessary procedures, or a lack of medical necessity, the government often relies on emails or internal communications to prove wrongful intent, before presenting evidence of the actual, objective falsehood required under the FCA. Bifurcating the trial forces the government (or relator) to prove that actual false claims were made before showing that the defendant had the requisite knowledge or intent to submit false claims.

6. *Oppose The Government's Attempt To Use Statistical Extrapolations.* The government typically alleges vast, far-reaching violations of the FCA through extrapolation from a small sample of claims. While extrapolation has historically been used to determine damages *after* liability has been established, the government is increasingly attempting to use it to establish liability. Courts have been mixed in their rulings on statistical extrapolation, but it is particularly important to contest its use in FCA cases.

7. *Remember: The Government Can Be Sanctioned, Like Any Other Party, for Failing to Comply With Its Discovery Obligations.* Once a case is in active litigation, the defendant can serve requests for discovery, depose the government's witnesses, and file motions, etc. Like any other party, the government can be sanctioned for non-compliance with its discovery obligations or for improper pleadings (pursuant to Rule 11).

The stakes in FCA cases are, unfortunately, getting higher. With increased penalties; redefined, stricter requirements for cooperation; and more plaintiff's lawyers willing to litigate FCA cases that the government has declined, it is likely that more FCA cases will be fought in court. Given these circumstances, FCA defendants should consider fully how to benefit from the level playing field in an unsealed, litigated case.

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