DISCOVERY IN DECLINED QUI TAM CASES

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Agenda for Panel

1. “Advanced Placement Qui Tam 101”: Discuss the unique role of discovery in declined False Claims Act cases
2. “Best Practices for Avoiding the Mine Fields”: Explore common but difficult discovery challenges in declined False Claims Act discovery
3. Answer questions
Advanced Placement Qui Tam 101
Qui Tam Overview: The Numbers

- Whistleblower cases continue to increase, even if the government declines to intervene.

- Of the 799 total new matters initiated in FY 2017:
  - 674 were new *qui tam* matters
  - 125 matters were government-led

  - Of the total $3.7 billion recoveries (settlements and judgments):
    - $265 million were government-led
    - $3.44 billion were *qui tam* led
      - $3.01 billion were government-intervened cases
      - $426 million were government-declined cases

  - Of the $393 million in total relator share awards:
    - Relators’ awards where the U.S. intervened was $349 million
    - Relators’ awards where the U.S. declined was $43.6
Relators Are Prosecuting More Declined Cases

• Of the $3.7B in False Claims Act recoveries in 2017, about $425.8M came from relators who successfully pursued declined cases.

• Compare to the $265.6M in recoveries from FCA cases without any relator.

• The highest amount recovered in declined cases was in $512.3M in 2015; the next highest total recovery from declined cases in a year was $173.9M in 2011
Trends in Modern *Qui Tam* Suits

• Defense counsel must be prepared to defend litigation, not merely investigation

• Expanding universe of relators including:
  – Consultants
  – Executives
  – Physicians
  – Corporations
False Claims Act Qui Tam Provisions

31 U.S.C.A. 3730(b) Actions by private persons.—

• (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.

• (4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--
  • [Intervene or]
  • (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

...
§3730 Cont’d.: The Government is Never Fully Out

• **(2)(A)** The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

• **(B)** The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.
The Government is Never Fully Out Cont’d.

• (3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government’s expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.
§3730 Cont’d.: Government Can Stay Discovery

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government’s investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.
§3730 Cont’d.: Government Can Pursue Alternate Remedy

• (5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.
Best Practices for Avoiding the Minefields
Challenges in Declined Qui Tam Discovery

1. *Escobar* -- Proving or Disproving “Materiality”
2. Attorney-Client Privilege Issues in a Post-Investigative, Declined World
3. Relator’s Documents
4. Proportionality/Scope of Discovery
5. Statistical Sampling
6. Electronic Discovery
7. Preparing for Summary Judgment and Trial
Escobar and Discovery
Supreme Court decision, June 16, 2016, that altered the landscape of False Claims Act litigation

- Implied certification of compliance is a viable theory of liability “at least where two conditions are satisfied:”
  - (1) the claim does not merely request payment, but also makes specific representations about the goods or services provided; and
  - (2) the defendant's failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half truths

*United States ex rel. Escobar v. Universal Health*
Escobar cont’d.

• A matter is material
  – (1) “if a reasonable [person] would attach importance to it in determining a choice of action in the transaction”; or
  – (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter “in determining [a] choice of action,” even though a reasonable person would not.

• Label attached to obligation is relevant but not dispositive
  – No more “condition of payment” versus “condition of participation distinction”
  – No single fact is dispositive so discovery can be expansive
Proving or Disproving “Materiality”: Getting Discovery From the Government

• **Federal Government**
  – Touhy Standard - authority of the government to limit involvement of its employees in disputes between private litigants (see case in materials)

• **State Governments**
  – California does not have a formal regulation analogous to the Touhy rule
  – Informal survey indicates no analogous Touhy rule at the state level
Proving or Disproving “Materiality”: Deposing the Government

• **Federal Government**
  – 45 C.F.R. Part 2 (HHS Regulations regarding Testimony by employees and production of documents in proceedings where the United States is not a Party)
    • The request must be in writing and state the nature of requested testimony
    • The request must provide reasons why the testimony would be in the interests of the agency or the Federal Government
    • The request must explain why the testimony is unavailable by any other means
  – Department of Defense Directive 5405.2 (See conference materials)

• **State Governments**
Materiality and Continued Payment by Government: What’s a Relator to do?

• Agency (sets policy) vs DOJ (conducts litigation)

• If there is nothing in the public domain regarding agency’s reason for continued payment, contact the agency’s legal department

• Seek a statement of interest from DOJ
Privilege Issues
Discovery and the Attorney-Client Privilege
The Basics

(1) Attorney-client relationship
(2) Attorney acting in capacity as an attorney
(3) Communication made in confidence between the attorney and client (waiver by dissemination)
(4) For the purpose of securing legal advice
(5) Crime fraud exception applies when attorney furthers the fraud
(6) Can waive privilege to try to show lack of scienter but there are pitfalls
The Privilege Log

Privilege logs: What are they; how do they get screwed up; what are the consequences?

1. What are they?

2. How do they get screwed up?
   - They are not created (waiver in declined case after production to the government without a privilege log);
   - They are under inclusive (not enough information to show privilege);
   - They are over inclusive (non-privileged material is included)

The Privilege Log cont’d.

Best Practice/Questions Relator needs to ask:

• Did the defendant log in response to a government subpoena?

• Did the defendant show materials it now claims to be privileged to the government prior to declination?
  – The A/C privilege cannot be a sword and a shield

• How to attack the claims of privilege?
  – Motion(s) for determination of privilege claims under FRCP Rule 26
Consequences of Waiving Privilege in FCA Litigation Can Be Dire

VI. Conclusion

Accordingly, it is hereby ORDERED that:

1. Relator Elin Baklid-Kunz’s Renewed Motion for Determination of Defendants’ Privilege Claims and Memorandum in Support Thereof (Doc. 137) is GRANTED IN PART and DENIED IN PART;

   a. The motion is GRANTED to the extent Relator requests a determination of Halifax’s privilege claims.

   b. The motion is DENIED to the extent Relator requests attorneys’ fees for her efforts to obtain Court determination of the privilege claims.
Outside Counsel v. In-House Counsel

• Whereas communications between corporate clients and outside counsel are “cloaked with a presumption of privilege,” communications with in-house counsel “involve a much different dynamic.”

• “[M]odern corporate counsel have become involved in all facets of the enterprises for which they work. As a consequence, in-house legal counsel participates in and renders decisions about business, technical, scientific, public relations... as well as purely legal issues. ... As such, general business advice, unrelated to legal advice, is not protected by the privilege even though conveyed by an attorney to the client, because the purpose and intent is not to communicate legal advice.”

Case study:  
U.S. ex rel. Baklid-Kunz v. Halifax Hospital Medical Center, case # 6:09-cv-01002 (MD FL)

The Facts

• Relator worked in the compliance department, which department reported to the legal department

• Defendants claimed privilege for compliance event log, audit-related documents, and communications between the defendants’ in-house legal department and non-lawyer personnel.
Audit-Related Communications

- The court found that many audit-related communications were not privileged.
- The audits were performed by non-lawyers, such as case management, compliance, and finance personnel.
- When these communications were sent to lawyers (among non-lawyer recipients), the court did not find the primary purpose was to seek legal advice.
Halifax – Other Lessons Learned

Compliance Structure

• Just because the compliance department operated under the supervision and oversight of the legal department, did not mean documents created by compliance were automatically privileged.

• Instead, defendants were required to demonstrate for each document that the primary purpose and intent of the correspondence was to seek or provide legal advice.

• The court reviewed sample of compliance event log entries and found that “none of them evidence[d] legal advice sought or received,” noting that no “lawyer [had] commented on the information recorded nor [had] an employee in the Compliance Department indicated that he or she would seek advice of counsel.”
The Relator’s Documents
Relator’s Documents Cont’d.

• Document collection
  – *Cafasso v. General Dynamics, et al.*, 637 F.3d 1047 (9th 2011) (affirming grant of summary judgment and sanctions for data dump; articulates general rule)
Relator’s Documents Cont’d.

• Counterclaims
  – *E.g.*, *United States ex rel. Cieszyski v. LifeWatch Servs.*, 2016 U.S. Dist. Lexis 60993 (N.D. Ill 2016) (counterclaim dismissed: “LifeWatch does not allege that relator took documents for any reason other than to support his FCA claim, or that the documents were made public or given to any third party other than the government and his counsel. That is, there are no allegations of acts that caused independent damages…”)

  versus

Relator’s Documents Cont’d.

• Document Preservation and Electronic searching
  – Personal Email
  – Laptop/Equipment
  – Social Media
Proportionality and Scope of Discovery
“Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.”
Issues Raised by Proportionality

- **Scope of Corporate Discovery**
- **Selection of Custodians**
- **Use of Informal Discovery**
- **Statistical Sampling**
Challenges with Statistical Sampling
Statistical Sampling

• The use of statistical sampling in FCA cases to prove liability and/or damages will continue to be a hot topic.

• U.S. ex rel. Michaels v. Agape Senior Community, Inc.
  • Fourth Circuit declined to decide the issue
  • Circuit split
Statistical Sampling Cases Since *Agape*

- **Affirmed Sampling**
    - Court noted the government’s use of statistical sampling as a reasonable basis for the jury’s damages award
  - *Life Care Centers of America* Settlement (October 2016)
    - Settlement based on statistical sampling of 400 patient admissions to allege fraud and improper billing
    - The government relied on statistical sampling as part of the settlement process, and the court took no issue with the method

- **Rejected Sampling**
  - *United States v. Vista Hospice Care* (N.D. Tex. June 20, 2016)
    - Court found that statistical sampling could not be used to establish liability for fraud in submitting claims for patients who were ineligible for hospice
    - Notice of Appeal filed on December 14, 2017
Statistical Sampling

• Challenges in medical necessity cases
• Different views on usefulness of sampling
  – “Proof” versus “resource”
  – Example: Life Care Centers $145m settlement
• Parties should work on parallel tracks in good faith in order to efficiently advance discovery
• Can be key to reaching resolution between parties
Electronic Discovery Challenges
E-discovery Challenge: Proliferation of Data Sources

- Providers may have multiple repositories for data storage:
  - E-mail
  - Shared space
  - Mobile devices
  - Billing platforms
  - Coding software
  - Different types of data depending on type of provider
E-Discovery Challenge: When to Use Predictive Coding

- Predictive coding uses a program to automate keyword searches, filtering, and sampling to reduce the volume of irrelevant / non-responsive documents that require manual review.

- Most large document cases are still using search term strings as the primary approach.
E-discovery Challenge: Agreeing to Search Terms and Custodians

• How do the parties work together on this?
• Constant communication is helpful to making progress
• Discussion about experiences where communications have broken down (i.e., a side not speaking with one voice; or a lack of early collaboration between counsel on discovery approach)
Looking Ahead to Summary
Judgment and Trial
Preparing for Summary Judgment and Trial

• For Relators and Defendants:
  – Review documents early for your SJ exhibits
  – Engage experts early
  – Work backwards from jury instructions
Partially Declined Case Discovery Challenges

• Are the Government and Relator one plaintiff for Rules 26 purposes?
• Need to coordinate on every step of discovery: ROGs, RPDs, witness selection, deposition scheduling; respect for Government defensive discovery time frames.
• Opportunities abound to double team the defense
QUESTIONS

Don’t be shy.