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February 28 – March 1

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Ability To Pay



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Disclaimer

- The views expressed in this presentation do not necessarily represent the views of the Department of Justice or the United States.



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Learning Objectives

- Examine when it may be appropriate to consider an ability to pay settlement in a False Claims Act matter.
- Explore the factors the Department of Justice evaluates as part of an ability to pay settlement.
- Understand the unique roles played by each party to an ability to pay settlement, including the defendant, the Government and the relator.



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What is “Ability to Pay?”

- The Department of Justice permits the defendant to pay less than the amount of the False Claims Act loss due to the defendant’s lack of financial resources.
- Whether to consider an individual’s finances when trying to resolve an FCA matter is within the Department of Justice’s discretion.



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What “Ability to Pay” Is Not

- Not a discount program.
- No longer disputing liability under FCA, simply the amount to be settle the claims.



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A Balancing Act

- Striking a balance between accountability and the financial resources to satisfy a settlement.
- Is there a value to the government and the public in allowing the defendant remain in business?
- Effect of non-monetary provisions of the settlement, *i.e.*, the corporate integrity agreement and temporary exclusion from program participation.



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The Unique Roles of the Parties

- Defendant
 - Duty to fully disclose
- The Government
 - Enforceability and collectability
- Relator
 - Due diligence
 - Fair, adequate and reasonable



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The Defendant's Role

- Burden
 - Defendant must demonstrate inability to pay a proposed settlement amount.
- Duty to fully disclose
 - Assets and liabilities
 - The disclosure must be in writing
 - Supported by adequate documentation, *e.g.*, bank statements, financial statements, and tax returns
- Forms signed under penalty of perjury



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The Government's Role

- Analysis
- Enforcement



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The Government's Role

Analysis

- Available Funds/Credit
- Income statements, balance sheets, cash flow
- Trends for Revenues/Profits/Surplus/Deficit
- Bond Obligations
- Union Contracts
- Financial Disclosures
- Bankruptcy



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The Government's Role

- Enforcement
 - How does DOJ reasonably enforce ability to pay settlements?



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The Relator's Role

- Evaluation of Fair, Adequate and Reasonable
- “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.***”

31 U.S.C. § 3730(c)(2)(B)



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Fair, Adequate and Reasonable

- Step 1: Valid Government purpose or policy for the dismissal, and a rational relationship between the dismissal and purpose/policy.
- Step 2: Burden switches to the relator 'to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.'
- *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998)



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Fair, Adequate and Reasonable

- How much information can be shared?
- Opportunity to discuss the underlying analysis with the analyst who performed it but withholding the underlying financial documents—is reasonable and discharges any right to limited discovery that the Relator may have.
 - *Guthrie v. A Plus Home Health Care, Inc.*,
2014 U.S. Dist. LEXIS 199052 (S.D. Fla. Nov. 5,
2014)



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Fair, Adequate and Reasonable

- Objections
 - Appropriate Time Period
 - Fraudulent Transfers
- Plaintiff's Memorandum of Law, *U.S. ex rel. Galuten v. Univ. of Missouri-Columbia*, Civ. No. 2:11-cv-04140-FJG (W.D. Mo.)



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Payment Options

- Pay over time, generally do not extend beyond five years.
- Includes an upfront payment, interest likely added to any amounts owed, plus assurances that the debt will be paid in full.
- Some examples are promissory notes, letters of credit from a bank, or other forms of security.
- Contingency Payments



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Trend in Frequency?

- *United States ex rel. Simons v. North Central Florida Hospice, Inc. d/b/a Haven Hospice*, Case No. 3:16-cv-330-J-32JRK (M.D. Fla.)
 - The government has agreed to accept \$5,085,024 to resolve these allegations based on Haven's ability to pay.
- *United States ex rel. McKenzie Stepe v. RS Compounding LLC, Renier Gobeia*, Case No. 8:13-cv-3150-T-33AEP (M.D. Fla.)
 - In an ability-to-pay settlement, the government agreed to accept \$1.2 million to resolve these allegations.



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Trend in Frequency?

- *United States ex rel. Taylor v. Life Care Centers of America, Inc.*, No. 1:12-cv-64 (E.D. Tenn.)
 - Based on the company's ability to pay, the settlement will be paid over the next three years, and includes a \$45 million initial payment. (\$145 million)
- *United States ex rel. Emerson and Tuesca v. Signature HealthCARE, LLC, et al.*, Case No. 1:15-cv-00027 (M.D. Tenn.)
 - Settlement agreement provided that “the United States has a valid claim against Signature in the amount of \$232 million”
 - In an ability-to-pay settlement, the government agreed to accept \$29.1 million to resolve these allegations.



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Trend in Frequency?

- *United States ex rel. Hellein v. WellCare Health Plans Inc.*, (M.D. Fla.)
 - Florida-Based Wellcare Health Plans agrees to pay \$137.5 million to resolve False Claims Act allegations.
 - WellCare alleged to have submitted false Medicare claims and misrepresented the corporation's spending on medical care to avoid refunding overpayments.



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BEST PRACTICES

- Relator's counsel should perform an ability to pay evaluation when deciding whether to bring a qui tam suit against a particular defendant.



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References

- 31 U.S.C. § 3730(c)(2)(B)
- *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998)
- *Guthrie v. A Plus Home Health Care, Inc.*, 2014 U.S. Dist. LEXIS 199052 (S.D. Fla. Nov. 5, 2014)
- *Stone v. Hospice of the Comforter, Inc.*, 2013 U.S. Dist. LEXIS 201339 (M.D. Fla. Oct. 28, 2013)
- *U.S. ex rel. Galuten v. Univ. of Missouri-Columbia*, Civ. No. 2:11-cv-04140-FJG (W.D. Mo.) (Pl.'s Mem of Law)



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- *U.S. ex rel. Simons v. North Central Florida Hospice, Inc.* No. 3:16-cv-330-J-32JRK (M.D. Fla.)
 - <https://www.justice.gov/usao-mdfl/pr/united-states-settles-false-claims-allegations-against-haven-hospice-more-5-million>
- *United States ex rel. McKenzie Stepe v. RS Compounding LLC, Renier Gobeia*, No. 8:13-cv-3150-T-33AEP (M.D. Fla.)
 - <https://www.justice.gov/usao-mdfl/pr/government-settles-12-million-lawsuit-against-florida-compounding-pharmacy-and-its>



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- *United States ex rel. Taylor v. Life Care Centers of America, Inc.*, No. 1:12-cv-64 (E.D. Tenn.)
 - <https://www.justice.gov/usao-edtn/pr/life-care-centers-america-inc-agrees-pay-145-million-resolve-false-claims-act>
- *United States ex rel. Emerson and Tuesca v. Signature HealthCARE, LLC, et al.*, Case No. 1:15-cv-00027 (M.D. Tenn.)
 - <https://www.justice.gov/usao-ndga/pr/signature-healthcare-pay-more-30-million-resolve-false-claims-act-allegations-related> *Guthrie v.*



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