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STRATEGIC CONSIDERATIONS FOR PARTIES TO MULTI-DEFENDANT FCA LAWSUITS

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Historically, the government and *qui tam* relators have directed False Claims Act (FCA) lawsuits against corporate healthcare defendants who directly submit claims and collect payment from the government. However, increasingly, the government and relators are expanding the scope of potential defendants to include individuals and third parties that allegedly assist healthcare companies to defraud the government such as vendors, consultants, and private equity (PE) firms. This growing trend in multi-defendant FCA actions is especially important for defendants, as liability in FCA cases involving multiple defendants is joint and several.[1]

Increasingly, multiple types of entities and individuals are finding themselves named as defendants in FCA actions. For example, in 2018, the government filed a complaint in intervention against a compounding pharmacy in Florida, two company executives, and, notably, the private equity firm managing both the pharmacy and the PE fund that owns the pharmacy.[2] This case is the first known example of the government including a PE firm as a defendant. Similarly, in February 2019, the government intervened in a lawsuit brought against a supplier of diabetes testing equipment and the supplier's parent company, and added as a defendant a reimbursement consultant who was not originally named in the relator's lawsuit.[3] Also reflective of this trend are two recent FCA settlements against electronic health record (EHR) software vendors. The vendors were accused of causing their customers to submit false claims for payment, among other allegations.[4] As part of these settlements, both EHR vendors agreed to pay millions of dollars ($57.25 and $155 million respectively) and entered into corporate integrity agreements with the government to monitor their compliance.

Although not a healthcare case, in 2017, the United States District Court for the District of Columbia denied motions to dismiss an amended complaint that asserted claims against the corporate defendants' bonding insurance companies.[5] The amended complaint alleged that the insurance companies indirectly caused the submission of false claims or statements to the United States by agreeing to bond the corporate defendants while having clear information that the corporate defendants did not qualify for certain government construction contracts.[6] The inclusion of the bonding insurance companies as defendants is an interesting example of how relators are

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[1] FCA liability can also be imposed by piercing the corporate veil. For example, in *United States v. Dynamic Vision, Inc*., the government charged the sole owner of the company as a defendant, but, when the court found evidence insufficient for direct liability, the government successfully argued for "piercing of the corporate veil" because the owner obstructed discovery during the case and diverted corporate funds to his own personal account or to the accounts of his two other businesses that had no substantive connection to primary corporate defendant. 220 F. Supp. 3d 16 (D.D.C. 2016).

[2] *United States ex rel. Medrano and Lopez v. Diabetic Care Rx, LLC dba Patient Care America, et al*., No. 15-CV-62617 (2019 S.D. Fla.), *see also* DOJ Press Release: "United States Files False Claims Act Complaint Against Compounding Pharmacy, Private Equity Firm, and Two Pharmacy Executives Alleging Payment of Kickbacks," (February 23, 2018), *available at*, https://www.justice.gov/opa/pr/united-states-files-false-claims-act-complaint-against-compounding-pharmacy-private-equity.

[3] *United States et al. v. Arriva Medical, LLC et al*., No. 3:13-cv-00760 (February 2019 M.D. Tenn).

[4] DOJ Press Release: "Electronic Health Records Vendor to Pay $57.25 Million to Settle False Claims Act Allegations (February 6, 2019), *available at*, *https://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-5725-million-settle-false-claims-act-allegations;* DOJ Press Release: "Electronic Health Records Vendor to Pay $155 Million to Settle False Claims Act Allegations" (March 31, 2017), *available at, https://www.justice.gov/opa/pr/electronic-health-records-vendor-pay-155-million-settle-false-claims-act-allegations*.

[5] *United States, ex rel. Scollick v. Narula*, et al, 2017 WL 3268857 (D.D.C. July 31, 2017).

[6] *Id.* at *5.

expanding their suits to name all parties connected to an FCA violation.

This paper explores the unique challenges that multi-defendant FCA actions pose.

I. Background on Relevant Civil Procedure Issues

Multi-defendant FCA actions often raise early procedural issues, especially for defendants facing allegations that are not well-developed or directly tied to the submission of false claims to the government. Thus, a starting strategy for defendants in a multiple-defendant FCA cases is to challenge the sufficiency of the government or relator's complaint.

The FCA is subject to a heightened pleading standard under Federal Rule of Civil Procedure 9(b). This means plaintiffs cannot make general allegations of fraud, but must plead with specificity. The purpose of the heightened pleading standard is to put defendants on notice of the alleged fraud so that they can fairly respond to the allegations and to deter plaintiffs from making general allegations of fraud as a pretext to discover unknown wrongs or as a mechanism for harassing defendants.[7] Although there are some differences in the way the circuits implement Rule 9(b)'s heightened pleading standard in FCA cases, courts generally agree that, in order to survive a motion to dismiss, the government or relator must include details answering the "who, what, when, where, and how" of the alleged fraud.[8]

In FCA cases involving multiple defendants, it is not well-settled to what extent the government or relator must plead these specifics with respect to ***each*** named defendant – with defendants contending that the operative complaint must be specific as to each defendant's purported fraudulent conduct, while plaintiffs argue that "group-pleading" is permissible when, for example, the complaint alleges conduct common to the group.

Recent case law illustrates that courts may approach this issue differently. For example, the Northern District of Texas dismissed an FCA complaint last year filed against sixteen different defendants on the grounds that the relator failed to distinguish between each of the defendants.[9] Last year, the Northern District of Florida reached a similar conclusion, explaining that "[i]f a plaintiff sues more than one defendant for fraud, the plaintiff cannot "lump together" several

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[7] *United States ex rel. Folliard v. CDW Tech. Servs. Inc*., 722 F. Supp. 2d 20, 25 (D.D.C. 2010) (holding the purpose of Rule 9(b) is to give defendants sufficient notice to prepare their defense and to discourage fraud claims solely as a pretext for discovery of unknown wrongs or purely for nuisance value); *United States ex rel. Anita Silingo v. WellPoint, Inc*., 904 F.3d 667, 677 (9th Cir. 2018) ("[T]he rule serves "to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis.")

[8] *See e.g., United States ex rel. Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 379 (4th Cir. 2008); United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.,* 838 F.3d 750, 770 (6th Cir. 2016); *United States ex rel. Kelly v. Novartis Pharms. Corp*., 827 F.3d 5, 13 (1st Cir. 2016); *United States. ex rel. Ge v. Takeda Pharm.* Co., Ltd., 737 F.3d 116, 121, 124 (1st Cir. 2013); *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc*., 637 F.3d 1047, 1055 (9th Cir. 2011).

[9] *United States ex rel. Hendrickson v. Bank of Am., N.A*., 343 F. Supp. 3d 610, 633 (N.D. Tex. 2018) ("Rule 9(b) requirements must be met as to each defendant. It is impermissible to make general allegations that lump all defendants together....")(citing *In re Parkcentral Glob. Litig*., 884 F.Supp.2d 464, 470-71 (N.D. Tex. 2012).

defendants and allege generally the defendants' participation in a fraud scheme."[10]

The Ninth Circuit, however, recently reversed a lower court ruling that dismissed a FCA complaint against multiple defendants accused of making false Medicare Advantage risk adjustment certifications on similar "group pleading" grounds. Although the Ninth Circuit acknowledged that a plaintiff must differentiate allegations with respect to differently-situated defendants and identify each defendants' specific role in the alleged fraud, it held that "a complaint need not distinguish between defendants that ***had the exact same role in a fraud***."[11] (emphasis added). According to the Ninth Circuit, this type of fraudulent scheme is known as a "wheel conspiracy" and involves "a single member or group (the hub) separately agree[ing] with two or more other members or groups (the spokes)" to commit fraud. [12] This contrasts to a "chain conspiracy" where "each person is responsible for a distinct act within the overall plan."[13] With respect to a chain conspiracy, the Ninth Circuit held that "a complaint must separately identify which defendant was responsible for what distinct part of the plan. . . By contrast, if a fraudulent scheme resembles a wheel conspiracy, then any parallel actions of the 'spokes' can be addressed by collective allegations."[14]

The Ninth Circuit based its ruling, in part, on a 2016 decision involving some of the same defendants and similar allegations relating to Medicare Advantage. In *United States ex rel. Swoben v. United Healthcare Insurance,* the court explained that "[t]here is no flaw in a pleading . . . where collective allegations are used to describe the actions of multiple defendants who are alleged to have engaged in precisely the same conduct."[15] Similar to the Ninth Circuit decisions, the Eastern District of North Carolina recently denied a motion to dismiss a FCA complaint against forty-eight LLC defendants that own and operate adult care homes. Although the court did not provide a detailed rationale for its decision, it found that the relator had satisfied the "who, what, when, where and how" pleading requirement with respect to each defendant by alleging facts to support that ***all*** defendants had implemented the same fraudulent scheme to defraud Medicaid under a policy directed by the individual member-manager of all forty-eight LLCs.[16] The individual member-manager was also named as a defendant (bringing the total number of defendants named in the lawsuit to forty-nine).

These three decisions support the proposition that "[a] good claim against one defendant [does] not become inadequate simply because a co-defendant [is] alleged to have committed the same wrongful acts."[17]

Given the potential nuances in bringing and defending against a FCA case involving

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[10] *United States and State of Florida ex rel. Schiff v. Norman*, No. 8:15-CV-1506-T-23AEP, 2018 WL 264253, at *1 (M.D. Fla. Jan. 2, 2018).
[11] *WellPoint*, 904 F.3d at 677.
[12] *Id*. at 678 (internal quotations and citations omitted).
[13] *Id*.
[14] *Id*.
[15] *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1184 (9th Cir. 2016).
[16] *United States and State of Florida ex rel. Gugenheim v. Meridian Senior Living, LLC*, No. 5:16-CV-410-BO, 2018 WL 1463347, at *2 (E.D.N.C. Mar. 23, 2018), *motion to certify appeal denied*, No. 5:16-CV-410-BO, 2018 WL 3067734 (E.D.N.C. June 21, 2018).
[17] *WellPoint*, 904 F.3d at 677.

multiple defendants, potential plaintiffs and defendants should consider the potential risks and benefits of that strategy.

II. Strategic Considerations for Relator's Counsel in Naming Parties in an FCA Lawsuit

Clients presenting a potential FCA case for evaluation almost always have a view of what happened. Not only of what factually transpired, but also who are the responsible parties and what about their behavior is wrongful. It is important to consider seriously a client's articulation of the harm involved in a particular case, both because of a lawyer's duty to his or her client, and because the client likely has the superior view as to industry practices and why violating those norms is harmful. Nevertheless, conscientious relator's counsel can help shape a case for its ultimate good by working with a client to determine which actors will be named defendants and which will not.

A multitude of case-specific factors are involved in deciding whether and when to add additional defendants, but a relatively small number tend to dominate the discussion. Generally, the most important of these considerations are framing the legal and factual investigation and development of the case, ensuring that the defendants have the means to pay any eventual recovery, and protecting a client from similar FCA cases or related publicly disclosed allegations or transactions.

While these topics are framed below as decisions made at the outset or at least filing of a case, it is important to remember that they are continuing considerations for counsel. Moreover, these issues may be appropriate topics for discussion with the government when presenting a pre-filing disclosure and subsequently previewing a potential case with a US Attorney's Office. We have found it highly beneficial to address potential gaps in a case and possible solutions up front. Likewise, as the government's investigation progresses, its view of which defendants to focus resources on or seek settlement with will undoubtedly evolve. Keeping an open line of communication with the government will help ensure that you and your client are privy to that thinking and react appropriately.

A. Shaping the Legal and Factual Case

One of the primary questions is how and to what extent does the naming of the individuals change the complexion of the case. This can include a potential defendant's impact on the factual and legal framing of the case and implications for a case's investigation, settlement, and litigation strategy.

The manner in which naming particular defendants can shape the framing of a case is well-illustrated when considering a health care case that has referral issues potentially implicating the Stark law.[18] The Stark law prohibits physicians from making referrals for certain services to an entity with which they have a financial relationship and prohibits the referred entity from billing the government for the services.[19] The Stark law is designed to combat the potential over-use of health services rendered as a result of an improper financial relationship, and thus most Stark cases

[18] *See* 42 U.S.C. § 1395nn.
[19] *Id*.

also present issues of billing for medically necessary services.[20]

A potential client is likely to view the case from either the medically unnecessary services or improper referral lens. Perhaps she is a physician upset that her colleagues are performing unnecessary procedures, or a compliance officer who has complained to his institutional employer about improper financial arrangements with referring physicians. For the government, however, cases that involve both of these bases for liability are likely to be viewed as far stronger than those that present only one. The Stark allegations avoid issues of scienter and claim-by claim analysis that can trip up investigations. But a Stark case even if technically viable, is unlikely to get much purchase with the government unless it is tied to the potential for government or patient harm. While such a case can be pled with only one side of the referral, it becomes far stronger if both the referring and referred entities are named as defendants.

On the other hand, several strategic considerations counsel against naming marginal additional defendants. While naming of a defendant does not force the government to take any particular investigative steps, it may effectively convert an individual that would ordinarily be viewed as witnesses into a potential defendant, thereby complicating the government's investigation. Another consideration that weighs against adding marginal defendants is the likelihood that they will engage separate counsel. Multiple sets of defense counsel each with their own focus can greatly complicate efforts to settle or litigate a case. Finally, surrounding a relatively straightforward story of fraud with a massive conspiracy or numerous undifferentiated defendants can make a case seem unwieldy or more difficult to investigate than need be.

B. Ensuring Recovery

Attempting to ensure that the named defendants can pay any recovery drives much of the concern for naming additional defendants, perhaps more so than it should. As we note above, the FCA provides for joint and several liability and naming a party with sufficient funds provides a potential avenue for ameliorating ability to pay issues, but in practice the frequency with which naming the perfect defendants solves this problem is vanishingly low.

With respect to corporate subsidiaries and parents, the general practice is usually to name any and all corporate subsidiaries that appear to be related to the fraud on the assumption that relators are unlikely to have strong facts related to the inner-workings of the corporate structure, and that defendants are likely to use the corporate structure to avoid liability. While the extent to which defendants successfully avoid liability to the government based on their corporate structure is likely overblown, naming multiple corporate subsidiaries is unlikely to substantially change the scope of the investigation and therefore has little downside. When naming parent companies, it is helpful to remember that unlike the Federal FCA, many state FCAs contain "inadvertent beneficiary" provisions which make a parent company liable for benefiting from a subsidiary's fraud and failing to disclose it to the government within a reasonable time.[21] These provisions provide a far easier basis for parent liability than would establishing facts sufficient to support a

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[20] *See*, *e.g.*, 42 U.S.C. § 1395y(a)(1)(A) (Medicare does not cover items or services that "are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member.").

[21] *See, e.g.,* California FCA Cal. Gov't Code § 12651(A)(8).

veil-piercing theory.

Naming individual defendants is usually less valuable. They are likely to require separate counsel and therefore complicate the government's investigation. Moreover, it is relatively unusual that the government will obtain substantial funds from an individual where the corporation is unable to pay a settlement or judgement. Naming these individuals is usually justified only when the individuals are the owners of the company and have benefitted substantially from the fraud, there are concrete concerns about the company's ability to pay, and there are facts that suggest the individuals have taken and/or hidden substantial assets in their own name.

Again, these concerns are well addressed with the government before or after a case has been filed to ensure that any benefit from naming additional parties is not overwhelmed by complications to the investigation.

C. Protection from First-to-File and Public Disclosure Concerns

Finally, relators' counsel needs to be aware for the potential that a previous or subsequent case will raise issues under the First-to-File Bar[22] or that allegations of fraud were previously disclosed raising Public Disclosure Bar[23] concerns.

The details of these provisions are beyond the scope of this article and highly case-specific. However, a relator faced with an earlier filed case alleging the same fraudulent scheme who has named a distinct defendant is armed with a powerful (but by no means insuperable) argument that at least a portion of any settlement attributable to that defendant belongs to him or her notwithstanding the earlier filed case. When filing a case, it is generally not possible to know of the existence of earlier filed cases, because they are likely under seal, and thus a vigilant relator's counsel should consider naming colorable defendants to provide his or her client with leverage should it turn out that the case is not first. Likewise, a party filing an FCA case would take these steps to prevent subsequent filers from naming additional defendants of which the first filer was aware

Similarly, under the Public Disclosure Bar, some courts have found that public disclosures of fraud are not considered bars to distinct defendants. Again, this is highly case-specific, but considering these issues goes a long way to ensuring that a client is in the best position to deal with these defenses.

III. The Government's Perspective on Which Parties Should be Held Liable

Before undertaking a FCA investigation or defense, both relator's counsel and defense counsel must be aware of the scope of potential liability to a target corporation, its corporate officers, and employees, and must develop a plan for addressing the scope issue from the outset. The FCA itself establishes the amount of damages that may be awarded against a party (corporate or individual) who finds itself subject to its application. Under the FCA, a party who is found to have violated the Act is subject to treble damages plus civil penalties for each submission that contains or stems from a false claim.[24] The FCA contains a "safe harbor" provision, however, that

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[22] 31 U.S.C. § 3730(b)(5).
[23] 31 U.S.C. § 3730(e)(4)(A).
[24] 31 U.S.C. § 3729(a)(1).

reduces the potential damages assessment to twice the amount of damages that the United States sustains, so long as the corporation discloses the misconduct prior to a government investigation, so long as other conditions of cooperation are met.[25] These FCA provisions, however, only set the outer limits of liability. To obtain the benefit of further reductions, a party must look to the guidelines of the Department of Justice ("Department" or "DOJ").

A. Liability of Corporate Officers and Employees

On September 9, 2015, the DOJ issued policy guidelines to all Assistant Attorneys General and all United States Attorneys that changed the way corporate fraud investigations were to be pursued by the Department. Traditionally, the DOJ tended to go after the corporation to recover damages for false claims, and went after responsible corporate officer or employee only when the conduct was outrageous or egregious. The guidelines changed that and specifically directed DOJ attorneys to combat corporate misconduct by focusing their investigative efforts, not only on the corporation itself, but upon the individual corporate officers and employees who perpetrated the wrongdoing. Noting the goals of deterring future illegal activity; incentivizing changes in corporate behavior; ensuring that the proper parties are held responsible for their actions; and promoting the public's confidence in our justice system, the guidelines set out six principles that all DOJ attorneys and agents must follow when pursuing corporate wrongdoing:

1. A corporation cannot qualify for any cooperation credit unless it provides to the Department all relevant facts relating to the individual[s] responsible for the misconduct;

2. Criminal and civil corporate investigations should focus on individuals from the inception of the investigation;

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another;

4. Absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;

5. Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and

6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.

In addition to the oft-repeated requirement that the DOJ attorney's investigation include a focus on individual's responsible for the misconduct, the guidelines also set a standard regarding how a settlement must be structured to include the issue of corporate officer or employee liability. The guidelines mandate that that any settlement agreements with a corporate defendant may not

[25] 31 U.S.C. § 3729(a)(2).

contain a waiver of liability for corporate officers or employees responsible for the misconduct, absent some "extraordinary circumstances" (i.e., a declination by the Civil DOJ attorney) and a "clear plan" as to how the issue of any outstanding individual liability matters are to be preserved.

The six principles were instituted to ensure that corporate investigations are handled consistently across the Department, and the policy guidelines directed that certain criminal and civil provisions in the United States Attorney's Manual (USAM 9-28.000 and USAM 4-4.000) be revised to institute these principles. The 2015 guidelines left open, however, the application of the first principle regarding the cooperation credit to be extended to a corporate target – is credit to be issued on an all-or-nothing proposition (the company must affirmatively identify all individuals who had a hand in the conduct), or if cooperation credit can be extended to a company in various degrees depending on the level of cooperation. On November 29, 2018, Deputy Attorney General Rod Rosenstein answered the question with a definite, "It depends."

B. Cooperation Credit

At the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act, Deputy Attorney General Rosenstein noted that past corporate criminal prosecutions often failed to bring about the desired deterrent impact because they end up penalizing "innocent employees and shareholders without effectively punishing the human beings responsible for making corrupt decisions." To address this shortcoming, Deputy Attorney General Rosenstein announced that cooperation credit would not be extended in a criminal case without the corporation first undertaking a good faith effort to identify "the individuals who play significant roles in setting a company on a course of criminal conduct. We want to know who authorized the misconduct, and what they knew about it." Accordingly, because the "most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes," the extension of cooperation credit to a corporation would remain an all-or-nothing requirement in criminal investigations.

While civil investigations, likewise, contain a desired goal of deterrence, Deputy Attorney General Rosenstein recognized that the primary goal of an affirmative civil enforcement case is to recover money. The goal of restitution to the government would otherwise be frustrated if the DOJ civil attorneys were unable to settle or resolve civil FCA investigations against a corporation merely because they had to pursue civil cases against every individual employee who may be liable for the company's misconduct. Thus, DOJ attorneys are allowed discretion in awarding cooperation credit without the need to agree about every employee with potential individual liability. First, "a company must identify all wrongdoing by senior officials, including members of senior management or the board of directors," if it is to receive any cooperation credit. Second, to earn "maximum credit," a target company must "identify every individual person who was substantially involved in or responsible for the misconduct." Finally, civil DOJ attorneys may offer "some credit" based on a discretionary scale, if a corporation target fails to identify every individual involved, so long as it "meaningfully assists the government's civil investigation."

To assist DOJ civil attorneys in exercising their discretion, Assistant Attorney General Joseph "Jody" Hunt issued the Civil Division's Guidelines For Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters on May 3, 2019.[26] The guidelines identify various factors that DOJ civil attorneys may take into consideration, and the credit that may be extended to companies who (1) voluntarily self-disclose misconduct that could serve as the basis for False Claims Act (FCA) liability, (2) take other steps to cooperate with FCA investigations and settlements, or (3) take adequate and effective remedial measures to address past misconduct and prevent future occurrences, "Maximum credit" may be extended to an entity that makes a timely self-disclosure that includes identifying all individuals substantially involved in or responsible for the misconduct, provide full cooperation with the government's investigation, and take remedial steps designed to prevent and detect similar wrongdoing in the future. "Partial credit" may be extended to an entity that does not qualify for maximum credit, but provides "meaningful assistance" to the government's investigation. The guidelines specify that the factors are not mandatory and that a corporation does not have to satisfy all of them to qualify for some cooperation credit.

An attorney reading the 2019 guidelines may notice the apparent absence of the general requirement imposed by Deputy Attorney General Rosenstein, that a corporate defendant must identify all senior officials responsible for the misconduct if it is to receive any cooperation credit. But the failure to list that requirement within the enumerated principles should not be seen as a waiver. Significantly, the explanatory section of the 2018 guidelines specifically note that "the Department will not award any credit to an entity or individual that conceals involvement in the misconduct by members of senior management or the board of directors…[.]" Thus, the availability of cooperation credit is still contingent upon the identification of all senior officials known by the corporation to be responsible for the misconduct.

IV. Strategic Considerations for Defendants in Multi-Defendant FCA Lawsuits

For corporate defendants, multi-party FCA cases present both opportunities and complications at every stage. The ultimate questions are whether a company should stay close to the other defendants or distance itself from them, and to what degree it should do so. These can be difficult decisions for a company to make. They require assessments of what is in the company's best interest in both the short- and long-terms, and given the nature of investigations, these decisions usually must be made based on imperfect or incomplete information. The stakes in an FCA case are often high—if a corporate defendant miscalculates and loses at trial, the damages can be substantial, as discussed above. As a result, this is a strategic decision that can and should be reevaluated at each stage of the legal proceeding.

A. Before a Lawsuit is Filed

The first time these questions arise may be before the government is actively investigating the case or even before a *qui tam* relator has filed a suit. These questions can arise as soon as a company learns of its potential exposure. If a whistleblower, compliance officer, or auditor raises a concern internally, a company will often conduct an internal investigation to determine whether

[26] *Available at*, https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.112; *see also* DOJ Press Release: "Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual" (May 7, 2019) https://www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual.

there is any substance to the concern and learn the extent of the problem.

Once a company knows it has violated the FCA, or even that the government could conclude it has violated the FCA, it faces the dilemma of whether to disclose the misconduct to the government. For government contractors, there may be a mandatory obligation to disclose credible evidence of an FCA violation under Federal Acquisition Regulation 52.203-13. In other situations, companies must decide whether to voluntarily disclose FCA violations.

As discussed above, under the new guidelines announced by the DOJ in May, a "proactive, timely, and voluntary self-disclosure" of misconduct not already known by the government is the "most valuable form of cooperation" that a company can perform.[27] This can result in a credit during resolution of the FCA case, with the government potentially settling at a lower damages multiplier than it otherwise would. However, before it gives this credit, the government may demand identification of individuals substantially involved in or responsible for the misconduct and disclosure of all relevant facts, including attributing facts to specific sources. The government will expect additional forms of cooperation and other remedial measures if it is going to offer "maximum credit" to the company in a settlement. And all of this is on top of potentially the most painful part of the disclosure—inviting the government to conduct a costly, disruptive, and potentially embarrassing investigation into the company's conduct.

If the company learns about the problem after the government initiates an investigation, then the company must wrestle with a different decision: whom its counsel should represent in the matter. In addition to the company, these cases often involve individual owners or employees, parent and subsidiary companies, joint venture partners or subcontractors, and even investors and insurers. Some of these entities will be sophisticated and well-funded and want their own counsel. But an individual owner may have a hard time separating personal interests from those of the company he or she built. Employees may not have the resources to pay for counsel, much less counsel with experience in FCA cases or the budget for a long investigation. Even parent or subsidiary companies, which often view themselves as add-ons with no real involvement in the case, may not think that separate counsel is worth the cost.

For those types of defendants, a joint representation, when permitted under the Rules of Professional Conduct, can allow one law firm to represent more than one defendant in an FCA case. The advantages of this arrangement are that it often results in a cohesive strategy, a better flow of information between defendants, and reduced legal fees overall. The disadvantage is that conflicts can arise at any stage during the proceeding, even if they do not exist on day one, and a divorce can be messy. To guard against the risk of disqualification, the company's counsel needs to state clearly in its engagement letter who it represents and identify which of those clients (*i.e.*, the company) it can continue to represent if a conflict arises.

Alternatively, the company can arrange for separate counsel to represent each defendant. The parties' counsel can then enter a joint defense agreement, which allows them to exchange privileged and confidential information without a waiver. They can divide up tasks and collaborate on developing legal theories, but each defendant has counsel guarding its interests. This approach is common when criminal investigations are pending.

[27] *Id*.

The company can even offer to pay for counsel for individual defendants or corporate affiliates with less resources. If the company does so, there is a greater likelihood that every defendant will have high-quality counsel who know each other and can work together. At the same time, each additional law firm will want to review documents, conduct research, and analyze each new development. While eliminating conflicts and protecting everyone's interests, this could drive up legal fees for the company in the short term.

B. After a Lawsuit is Filed

If the investigation turns into litigation, the company has additional strategic options. It may convince the government to dismiss some of the defendants before the case becomes unsealed. Once the complaint is formally served, the company might have an opportunity to win an early dismissal of some of the secondary defendants, such as individual owners or corporate family members, whose role in the alleged misconduct is not clearly set forth in the complaint. As discussed above, some jurisdictions require a plaintiff to allege specific facts about each defendant's role. In the absence of such allegations, the company can streamline the case by moving (or helping the other defendants to move) to dismiss the complaint or for partial summary judgment.

If the company is no longer aligned with the other defendants, however, it can pursue a different approach. Once litigation begins, the company can cross-claim against subcontractors, joint venture partners, or former employees who it may view as responsible for the problems. It can issue discovery requests to these other defendants as well, and be aggressive in enforcing indemnification clauses or other contractual provisions that might provide some relief if the company is unsuccessful in defending the FCA claims.

Finally, if the company pursues a settlement in an FCA case, it may have the leverage to negotiate a global settlement on behalf of all defendants—even one where only the company pays. This could ideally end the matter for everyone involved, which may be worth paying a premium. The government, however, may not agree to such a settlement. As discussed above, it may invoke its policy on individual accountability and insist on contributions from each defendant or demand future cooperation from the company in ongoing civil or criminal cases against individuals and other defendants.

V. Conclusion

Bringing and defending against FCA cases with multiple named defendants, particularly cases that name individuals and nontraditional defendants like the ones identified above, present unique opportunities and challenges for all parties to the case. This paper explores some of the strategic considerations for parties confronted with these opportunities and challenges. As more and more courts weigh in on the nuances of complex, multi-party FCA lawsuits, these strategic considerations may change.