Health Care Fraud Settlements: Relator's Perspective

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HEALTH CARE FRAUD SETTLEMENTS

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Intervened Cases: Relator Objects to Settlement

"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)

Grounds for Relator's Objection: Senate Report

- Although courts are generally deferential in the interest of settlement, they may reject a settlement if:
  - The settlement is unreasonable in light of existing evidence
    - Assertion that claims are potentially "worth more" is generally not enough (*e.g. U.S. ex rel. Runion v. Fairchild* (C.D. Cal. 1990))
  - The Government has failed to fully investigate allegations
    - *E.g. Gravitt v. General Electric Co.* (S.D. Ohio 1988), where government did not interview witnesses or take depositions, opposed relator's discovery, and did not work with relator in negotiating settlement
  - The Government's decision was based on arbitrary and improper considerations

Relator Has the Right to a Hearing

- The court may require that the relator be provided with discovery in order to properly assess the fairness and adequacy of settlement (*E.g. U.S. ex rel. McCoy v. California Medical Review* (N.D. Cal. 1990))

- Government does not have absolute right to settle: when the relator objects, judicial approval of settlement is required (*U.S. ex rel. Schweizer v. Océ N.V.* (D.C. Cir. 2012))

Declined Cases: Government Objects to Settlement

"[T]he Government shall…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"

31 U.S.C. § 3730(b)(4)(B)

- *but* -

"The action may be dismissed only if…the Attorney General give[s] written consent to the dismissal and their reasons for consenting"

31 U.S.C. § 3730(b)(1)

Government Has Right to Veto (except in 9th Cir)

- Most Courts of Appeals have held that Government has veto —relator's right to conduct the action does not include the right to settle
  - 5th Circuit: *Searcy v. Philips Elecs. N. Am. Corp.* (1997)
  - 6th Circuit: *United States v. Health Possibilities, P.S.C.* (2000)
  - 10th Circuit: *Ridenour v. Kaiser-Hill Co., LLC* (2005)
  - DC Circuit: *United States ex rel. Hoyte v. Am. Nat'l Red Cross* (2008)
  - Potentially 3d Circuit: *Rodriguez v. Our Lady of Lourdes Med. Ctr.* (2008) (recognizing majority position, but not ruling on matter)
- The Ninth Circuit has held that if Government does not intervene, it no longer has veto
  - 9th Circuit: *United States ex rel. Killingsworth v Northrop Corp.* (1994)

Court May Reject Settlement Agreement

- Court can refuse to dismiss case or approve settlement where the settlement agreement is unreasonable (*U.S. ex rel. Killingsworth v Northrop Corp.* (9th Cir. 1994))
- Court may refuse to dismiss case where the parties did not provide the court with terms of settlement of retaliation claim (*U.S. ex rel. Parikh v. Premera Blue Cross* (W.D. Wash. May 16, 2007))
- Court may also modify settlements to bring them into compliance with the statute (*U.S. ex rel. Sharma v University of Southern California* (9th Cir. 2000))

Relator's Share

- **Intervened**: 15-25% "depending upon the extent to which the person substantially contributed" (31 U.S.C. § 3730(d)(1))

- **Declined**: "an amount which the court decides is reasonable" between 25 and 30% (31 U.S.C. § 3730(d)(2))

- Senate Factors:
  1. The significance of the information provided to the Government
  2. The contribution of the person bringing the action to the result obtained
  3. Whether the information which formed the basis for the suit was known to the Government

- DOJ Guidelines 1996

Senate Factors: Case Examples

- *U.S. ex rel. Alderson v. Quorum Health Group* (M.D. Fla. 2001): 24% where relator's information "contributed decisively to nearly every aspect of the case," and US "possessed no awareness" of the fraud;

- *U.S. v. Johnson Pochardt v. Rapid City Regional Hosp.* (D.S.D. 2003): 24% where relator provided "large amount [of] detailed ... information" of which government had no knowledge and relator and counsel provided extensive assistance.

- *U.S. ex rel. Shea v. Verizon* (D.D.C. 2012): 20%; it was "doubtful that the Government would ever have become aware of the scheme or understood it without Relator's experience"

Relator's Share: Some Other Considerations

- Hardship faced by the relator (*e.g. U.S. ex rel. Thornton v. SAIC* (N.D. Tex. 1998); *Johnson Pochardt*; *Verizon; Alderson*)
- Relator failed to cooperate with government (*U.S. ex rel. Burr v. BCBS FL* (M.D. Fla. 1995)) or delayed reporting (*cf. U.S. ex rel. Coughlin v. Int'l Bus. Machs. Corp*. (N.D.NY 1998) *with Verizon*)
- Settlement vs. whether case went to trial (*cf. U.S. v. Covington Tech. Co.* (C.D. Cal. 1991) *with U.S. ex rel. Pedicone v. Mazak Corp.* (S.D. Ohio 1992) *and Verizon*)
- Recently, 8th Circuit rejected attempt by government to preclude relator's share by arguing that relator's allegations failed to meet 9(b) (*Roberts v. Accenture, LLP* (2013); *Rille v. PricewaterhouseCoopers LLP* (2014))

Attorney Fee Awards to Relator

"[Relator] shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant"

31 U.S.C. § 3730(d)(1), (2)

Attorney Fee Awards to Relator

- Fees are recoverable in addition to relator share
- Applies to successful relator whether case is intervened or declined.
  - Hourly fees are recoverable in addition to contingent fee (*e.g. U.S. ex rel. Cooper Health System* (D. Colo. 2011))
  - May be adjusted upwards or downwards
  - Includes fees for time spent on fee petition

Attorney Fee Awards to Defendant

Defendant may recover reasonable attorneys' fees and expenses from relator in declined case "if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."

31 U.S.C. § 3730(d)(4)

Attorney Fee Awards to Defendant

- Award of fees against relator is "reserved for rare and special circumstances" (*Pfingston v. Ronan Engineering Co.*, 284 F.3d 999 (9th Cir. 2002))

- Case may be clearly vexatious or frivolous when it completely lacks legal merit or evidentiary support (see, e.g., *U.S. v. Shasta Services Inc.*, 2006 WL 2585524 (E.D. Cal. 2006))