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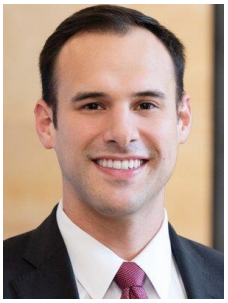
It's Not You, It's Me: Breaking Up With Mass. FCA Prosecutors

By **Jonathan York and Scott Memmott** (August 1, 2023, 5:32 PM EDT)


Jonathan York

Delving into the romantic world of health care fraud, this article highlights developments in the District of Massachusetts that may make the prospects of an amicable breakup in a federal civil False Claims Act case with Boston federal prosecutors more remote.

On May 24, the U.S. Attorney's Office for the District of Massachusetts issued a routine press release to announce it had reached an agreement with Massachusetts Eye and Ear Infirmary to resolve allegations of FCA violations. The settlement agreement included language that should catch the attention of stakeholders in the health care and life sciences industries.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Gone is the typical defense-friendly but most often entirely valid qualification that entering into the settlement is "[not] an admission of liability by [defendant], which expressly denies and disputes the allegations set forth in" the FCA complaint, but rather is a logical, rational business decision to "avoid the delay, uncertainty, inconvenience, and expense of protracted litigation."

In its place, Massachusetts Eye and Ear agreed to "admit, acknowledge, and accept responsibility for" certain facts constituting covered conduct that established the company's alleged violation of the FCA.

Such factual admissions have become a staple in FCA cases in the District of Massachusetts and were first broadcast by representatives from the U.S. Attorney's Office at the Boston Bar Association White Collar Crime Conference in May 2022.

In doing so, the District of Massachusetts has become one of at least two jurisdictions — the Southern District of New York being the other — that require defendants to admit to and accept responsibility for a core set of facts that give rise to the allegations in order to resolve FCA matters short of litigation.

FCA cases going back to at least the settlement with Steward Health Care System LLC in June 2022 demonstrate the extent to which the U.S. Attorney's Office has implemented its new policy and indicate that defendants have been unsuccessful in attempting to negotiate this language out of settlement agreements.

Because an FCA no-fault divorce appears no longer available in the District of Massachusetts, moving on from a toxic case will come with some additional baggage for defendants.

As with all breakups, there are two sides to every story. FCA defendants argue that FCA investigations and litigation are tremendously disruptive, expensive, almost always frivolous and typically drag out for years.

Regardless of whether any allegations raised in an FCA complaint or investigation have any merit, defendants will often balance the cost of fully litigating a case versus the burden that litigation places on the organization and will make a resource- and expense-based business decision as to how to proceed. This is especially true for younger companies that may not have the means to effectively engage in full-fledged litigation of unpredictable outcome and duration.

At the end of the day, defendants just want to move on from their relationship with the U.S. Department of Justice and its qui tam relators and get on with their lives without admitting or denying the allegations in the complaint.

On the other hand, the U.S. Attorney's Office wants commitment despite the breakup. By requiring FCA defendants to admit, acknowledge and accept responsibility for the alleged core conduct, federal prosecutors believe they are holding defendants accountable and layering on additional pain in exchange for the separation in the hope defendants will make real changes to how they operate and avoid recidivism.

This and other initiatives indicate that the U.S. Department of Justice continues to be frustrated dealing with repeat players and has seen too many companies resolve FCA cases only to reappear in a new qui tam complaint a short time later.

Pop star Neil Sedaka once famously warned the world in the early 1960s that "breaking up is hard to do," but it's even harder in the present-day District of Massachusetts.

The requirement to admit certain facts and accept responsibility for them tees up the possibility of significant follow-on litigation and may change the entire decision-making calculus of corporate defendants as to whether to settle FCA cases, particularly those that are questionable on the merits or entirely fanciful.

The U.S. Attorney's Office brushes aside concerns that third-party plaintiffs will emerge to leverage this development to their advantage in securities, product liability and other actions against a settling FCA defendant by observing that defendants are not being asked to admit to liability, only to take responsibility for underlying facts.

But detailed recitations of facts, such as the four full pages in the Steward Health settlement agreement, give the plaintiffs bar plenty of valuable material with which to work even prior to engaging in civil discovery and provide a fast track to a successful motion for summary judgment.

The bottom line is that defendants will have to admit to and take responsibility for their conduct in order to resolve FCA matters in the District of Massachusetts as part of an apparently nonnegotiable term in any FCA settlement agreement.

What does that mean for stakeholders in the life sciences and health care industries? Understanding this precondition at the start of any FCA-related case is critical given the status of the Boston U.S. Attorney's Office as one of the preeminent and most prolific and effective field offices in the country when it comes

to health care fraud enforcement.

FCA practitioners know well the importance of successfully convincing the government to not pursue a case or, in the context of qui tam complaints, declining to intervene in an action.

Advocating for the government to be "just not that into you" takes on added significance given the requirement in the District of Massachusetts to admit and take responsibility for conduct as part of any government separation. Although typically an even more fraught relationship, at least there are no such commitment requirements for settlements with relators and their counsel.

Indeed, Boston federal prosecutors have signaled that the "will they or won't they" decision could be even more complicated going forward.

At this year's recent Boston Bar Association's White Collar Crime Conference, representatives from the U.S. Attorney's Office emphasized that data and technology are highly present and that prosecutors are focused on analyzing data to identify potential hot spots and outliers indicative of potential fraud and abuse.

This is coupled, more broadly, with the U.S. government's self-reported increase in the use of the Racketeer Influenced and Corrupt Organizations Act, cooperating witnesses and wiretaps in white collar cases outside the traditional context of insider trading and other financial crimes.

Although certainly a sentiment echoed by government enforcement officials in numerous other contexts, it is apparent the Boston U.S. Attorney's Office will be focused on initiating its own cases based on these data rather than relying entirely on whistleblowers, potentially with more extreme measures than those to which stakeholders have become accustomed.

If the U.S. Attorney's Office is armed with data and predetermined compliance concerns, and possibly evidence from cooperating witnesses or wiretaps, it will be a challenge for corporate defendants in the life sciences and health care industries to convince federal prosecutors that there just isn't a spark to light a full-blown FCA case going into a first date.

How should putative corporate defendants prepare to make a good first impression when the office comes knocking, "Love Actually"-style?

Stakeholders in the life sciences and health care industries should consider efforts to bolster and pressure test their compliance programs in advance. The emphasis by the Boston U.S. Attorney's Office on data-driven investigative efforts serves, in practice, as an external mechanism to test whether corporate compliance programs are properly designed and effective in practice.

Stakeholders that take prophylactic measures before a first date to make sure their compliance programs are working properly will not only preemptively identify areas of potential noncompliance, but also prepare internal data, analysis and, if necessary, remedial efforts to help respond to any concerns raised by federal prosecutors.

In the words of America's favorite hopeless romantic, "The Office's" Michael Scott, stakeholders may need "to be ready to be hurt again" if they are not adequately prepared to detect and remediate compliance issues in advance and to rebut concerns presented by the real office when prosecutors come calling.

Representatives from the U.S. Attorney's Office also told attendees at the BBA white collar conference that defense counsel should make their intentions clear when potential misconduct is discovered rather than waiting on federal prosecutors to make the first move. Playing hard to get while sitting on known compliance issues may negatively impact the ability to influence any potential future resolution.

Although not explicitly linked, the U.S. Attorney's Office's policy dovetails with the U.S. Department of Justice's broader focus on corporate compliance. From the government's perspective, bolstered and regularly tested compliance programs should obviate any need for stakeholders ever to get to the point where they have to consider whether to agree to a settlement agreement with federal prosecutors.

Stakeholders may have to carefully consider a voluntary self-disclosure to the U.S. Attorney's Office to head off any subsequent investigations and litigation that otherwise may result in a painful settlement agreement.

Mediocre relationship and romance puns aside, the Boston U.S. Attorney's Office's seemingly immutable policy only raises the stakes for FCA cases and underscores the need for effective and robust compliance programs and hyper-focused advocacy from the start of a case.

Because it is reasonable to anticipate that subpoenas and civil investigative demands will emanate from the U.S. Attorney's Office in the coming months, stakeholders in the life sciences and health care industries should be prepared to effectively respond to or preemptively head off any investigative efforts.

In other words, stakeholders should be taking the steps to work on themselves before diving into another ill-advised relationship with the U.S. Attorney's Office. The only alternative appears to be assuming an aggressive litigation posture resulting in a contested and protracted divorce proceeding.

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