

Expert Analysis

DOJ Increasingly Pursuing Both Monetary and Non-monetary Relief in Civil Enforcement Actions

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In a significant but largely overlooked development, the Department of Justice recently signaled that it would increasingly pursue “innovative, non-monetary measures” when settling civil fraud cases. In addressing the American Bar Association June 7, Stuart F. Delery, acting assistant attorney general, said DOJ expects cases in which “obtaining only a monetary recovery will not adequately redress the wrong.”¹

Responding specifically to the charge that qui tam lawsuits represent merely a “cost of doing business” and that qui tam settlements could be viewed as just another “regulatory burden,” Delery said DOJ’s civil fraud settlements will increasingly include “non-monetary remedies and other measures to help prospectively reduce fraud.”

By way of example, Delery cited the recent \$1.5 billion criminal-civil health care fraud settlement with Abbott Laboratories, which included such terms as a period of probation, an “agreed statement of facts,” a corporate integrity agreement and a requirement that the company institute additional compliance measures.² Although Delery acknowledged that demands for non-monetary relief could prolong or even prevent settlement discussions, he described DOJ’s emerging view “that we owe it to taxpayers to do our best to implement measures to fully explain the conduct that led to the resolution, and to deter future bad acts.”

In fact, the Abbott Laboratories settlement did not break much new ground, as it resolved not only civil but criminal charges against the company, and corporate criminal resolutions routinely include recitations of fact and a range of compliance measures. But Delery’s emphasis on the importance of pursuing non-monetary relief in civil fraud settlements, including admissions of fact that help “explain the conduct that led to the resolution,” is new and echoes remarks made earlier this year by Preet Bharara, the U.S. attorney in Manhattan.

Speaking in March at the ABA’s 26th Annual National Institute on White Collar Crime in Miami, Bharara said his office did not view civil fraud settlements in monetary terms alone and would insist on non-monetary relief that furthers the public interest

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in combating fraud, including the public interest in deterrence, reforming behavior and "improv[ing] public understanding of the truth." He emphasized that his office will usually require admissions of misconduct in a civil fraud settlement and is prepared to litigate if settlement terms are not satisfactory.

Recently settled civil fraud cases by the Bharara's office and other offices reveal a trend toward including admissions in civil fraud settlements, a trend that was apparently underway before Delery's remarks. For example, the Manhattan U.S. attorney's office has obtained admissions of wrongdoing in civil fraud cases brought against importers, health care providers, mortgage lenders and financial institutions.³

Similarly, in March, Colorado U.S. Attorney John Walsh (currently co-chair of DOJ's newly established Residential Mortgage-Backed Securities Task Force) announced that his office secured admissions of misconduct in the settlement of a civil fraud lawsuit alleging the existence of a fraudulent foreclosure rescue scheme.⁴

It has long been commonplace for parties to settle civil cases — including civil enforcement actions — by agreeing to pay money while simultaneously maintaining innocence and denying fault or liability. Indeed, the Securities and Exchange Commission has vigorously — and, so far, successfully — defended its long-standing practice of settling with defendants who "neither admit nor deny" the allegations of the complaint.

DOJ's promise to "increasingly" pursue admissions of misconduct and other non-monetary relief in civil fraud settlements therefore represents a potential game-changer for defendants. To cite just a few examples, individuals who admit wrongdoing in a civil settlement could conceivably face exposure to criminal charges; health care providers run the risk of administrative sanctions or even debarment; and public companies could face increased exposure to class-action lawsuits. The third scenario is precisely what happened recently in a securities fraud class action, where the judge denied in part the defendant's motion to dismiss, citing admissions made by the defendant in its earlier civil settlement with the SEC.⁵

Deciding whether to litigate or settle a civil enforcement action is a difficult exercise. With DOJ increasingly requiring admissions of fact to settle civil enforcement actions, that exercise will become even more challenging. The collateral consequences of settlements that include admissions of misconduct may not be known at the moment, but they may be expected to be substantial. Defendants can no longer merely weigh the risks of litigating against the benefits of settling; the risks of settling are becoming more obvious. If DOJ insists upon admissions of misconduct in settling civil fraud cases, more defendants may conclude that the cost of litigating — often cited as the most compelling reason to settle — could be lower than the costs of settling.

NOTES

¹ See Stuart F. Delery, Acting Assistant Attorney General, Speech at the American Bar Association's 9th National Institute on the Civil False Claims Act and *Qui Tam* Enforcement (June 7, 2012), available at <http://www.justice.gov/iso/opa/civil/speeches/2012/civ-speech-1206071.html>.

² See Press Release, U.S. Dep't of Justice, Abbott Labs to Pay \$1.5 Billion to Resolve Criminal & Civil Investigations of Off-label Promotion of Depakote (May 7, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-civ-585.html>.

- ³ See, for example, Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Manhattan U.S. Attorney Settles Civil Fraud Lawsuit Against Jewelry Companies Engaged in a Decade-Long Customs Fraud Scheme (Aug. 31, 2011), available at <http://www.justice.gov/usao/nys/pressreleases/August11/noblejewelrysettlementpr.pdf>; Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Manhattan U.S. Attorney Recovers More Than \$13 Million in Medicare False Claims Act Lawsuit Against Beth Israel Medical Center (Mar. 1, 2012), available at <http://www.justice.gov/usao/nys/pressreleases/March12/bethisraelsettlementpr.pdf>; Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Manhattan U.S. Attorney Recovers \$1.2 Million from Lender in Civil Mortgage Fraud Case (Dec. 2, 2011), available at <http://www.justice.gov/usao/nys/pressreleases/December11/cambridgesettlementpr.pdf>; and Press Release, U.S. Attorney's Office, S. Dist. of N.Y., Manhattan U.S. Attorney Sues Flagstar Bank for Fraudulent Mortgage Lending Practices and Settles for \$132.8 Million and Other Concessions (Feb. 24, 2012), available at <http://www.justice.gov/usao/nys/pressreleases/February12/flagstarbanksettlementpr.pdf>.
- ⁴ See Press Release, U.S. Attorney's Office, Dist. of Colo., National Foreclosure Rescue Scheme Permanently Enjoined (Mar. 21, 2012), available at http://www.justice.gov/usao/co/press_releases/2012/March2012/3_21_12.html.
- ⁵ *Richman v. Goldman Sachs Group*, No. 10 Civ. 03461, 2012 WL 2362539 (S.D.N.Y. June 21, 2012).



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