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DOJ Issues Memorandum Urging Government Lawyers to Dismiss 'Meritless' False Claims Act Cases

The Department of Justice recently issued an internal guidance memo to DOJ attorneys regarding the dismissal of meritless False Claims Act (FCA) cases. Michael Granston, the Director of DOJ's Civil Fraud Section, first made headlines in October 2017 when he publicly acknowledged the burden imposed by meritless FCA cases and suggested that DOJ would review its historic practice of not seeking to dismiss *qui tam* cases where it declines to intervene. DOJ's recent memo formalizes that suggested approach and signals the important institutional interest DOJ has in in dismissing cases that will unnecessarily consume scarce resources and could create adverse legal precedent.

The stated purpose of the memo is to provide a "general framework for evaluating when to seek dismissal" and to "ensure a consistent approach to this issue across the Department."[1] While its full impact remains to be seen, in the interim it provides companies with a roadmap for making presentations by laying out the factors DOJ will consider in deciding whether to intervene or seek dismissal of *qui tam* actions.

Background on the FCA

The False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq., imposes liability on those who defraud government programs.

The FCA was enacted in 1863, but used sparingly until 1986, when amendments to the statute strengthened several key provisions related to damages and made it easier for the government and private persons to file suit. Under the FCA, private persons, also called the relator, may file lawsuits on behalf of the government. These suits.also referred to as *qui tam* actions, are filed under seal with notice given to the Attorney General and the U.S. Attorney in the district in which the action has been filed. The government is required to investigate and uses the information provided by the relator as the lead for its investigation. Most often these days, the government will at some pointy issue a Civil Investigative Demand (CID) to the defendant, pursuant to which the government can conduct depositions, obtain documents, and obtain responses to interrogatories.

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Following an investigation, the government may intervene in the *qui tam* action or decide to not intervene. If the government declines to intervene, the relator may proceed with the action on his or her own.[2]

Factors in Dismissing *Qui Tam* Actions

Under 31 U.S.C. § 3730(c)(2)(A), the Attorney General is authorized to dismiss a *qui tam* action over the relator's objection.[3] As the memo notes, the FCA does not provide a standard of review for evaluating the government's request for dismissal and courts have split on the standard.[4] DOJ has consistently argued that the appropriate standard for dismissal is outlined in *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), holding that the United States has an "unfettered right" to dismiss a *qui tam* action.[5] In contrast, the Ninth Circuit has adopted a "rational basis test" standard for dismissal. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (holding that the United States must identify a "valid government purpose" that is rationally related to dismissal).[6] In jurisdictions where the standard is "unresolved," the memo suggests that attorneys should identify "the government's basis for dismissal and to argue that it satisfies any potential standard for dismissal under section 3730 (c)(2)(A)."[7]

In addition to not providing a standard of review for dismissal, the FCA also does not provide "specific grounds for dismissal."[8] DOJ's memo seeks to fill this gap by providing a "non-exhaustive" list of seven factors for dismissal based on a review of DOJ dismissals of *qui tam* actions since 1986.[9] Generally, the memo encourages dismissal to "advance the government's interests, preserve limited resources, and avoid adverse precedent."[10] Specifically, the factors are: (1) curbing meritless *qui tams*, (2) preventing parasitic or opportunistic *qui tam* actions, (3) preventing interference with agency policies and programs, (4) controlling litigation brought on behalf of the United States, (5) safeguarding classified information and national security interests, (6) preserving government resources, and (7) addressing egregious procedural errors.[11] Not included in this list of factors are any references to the burdens defendants face in defending against meritless FCA cases, which can be substantial. A study of the sample cases cited in the memo provides potentially helpful arguments for dismissal of FCA actions.

1. Curbing Meritless Qui Tams

The first consideration for dismissal is where a *qui tam* action lacks merit because "relator's legal theory is inherently defective, or the relator's factual allegations are frivolous."[12] With regard to a defective legal theory, the memo cites several cases, including *United States ex rel. Berg v. Obama*, 383 F. App'x 7 (D.C. Cir. 2010) (per curiam), in which a relator brought suit against President Obama, seeking to recover Obama's Senate salary on the theory that Obama had fraudulently represented that he was a United States citizen.[13] DOJ moved to dismiss the suit, explaining that the government had reviewed the relator's allegations and determined that they lacked merit.[14] The D.C. Circuit Court of Appeals found that the district court properly dismissed Berg's *qui tam*, citing the "unfettered" right standard in *Swift*.[15]

The memo also cites examples where a case lacks merit based on the government's own investigative findings, noting in particular *United States ex rel. Stierli v. Shasta Services Inc.,* 440 F. Supp. 2d 1108 (E.D. Cal. 2006).[16] In that case, the relator sued the winner of a California Department of Transportation (CalTrans) construction project, alleging a fraudulent bid. After an initial investigation of almost seven months, both the federal and state governments declined to intervene. Seemingly content to allow the relator to pursue the claims, however, the federal government opposed the defendant's request for an order compelling arbitration; the case proceeded to discovery and the federal government actively participated in settlement discussions. Almost two years after the suit was filed, the federal government ultimately joined the State of California and the defendant in seeking to dismiss the case, because "the United States has found no evidence that defendant defrauded either real party in interest, the federal government or the State of California."[17] Moreover, the government's motion argued that the relator's suit did not preserve the public fisc, created

additional expenses for the state, "and simultaneously punished a company that CalTrans does not contend harmed the state."[18]

Stierli is interesting also for other reasons, including the timing of the government's motion to dismiss. As noted above, the government allowed the meritless suit to play out, seeking dismissal only once it started to incur discovery costs of its own that diverted resources from cases with merit.[19] This suggests that *qui tam* defendant may find it effective to point out early discovery burdens the government will incur. Additionally, *Stierli* is a good example of the fact-driven analysis of FCA cases. In conjunction with the strengthened materiality requirement outlined in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), this factor will be helpful in cases where agencies continued to conduct business with the defendant after an investigation into the alleged prohibited behavior.

2. Preventing Parasitic or Opportunistic Qui Tam Actions

Under the memo, DOJ will also "consider moving to dismiss a *qui tam* action that duplicates a pre-existing government investigation and adds no useful information to the investigation."[20] One of the cases cited is *United States ex rel. Amico, et al. v. CitiGroup Inc., et al.*, No. 14-cv-4370 (CS) (S.D.N.Y. August 7, 2015), in which relators filed a *qui tam* alleging fraud in connection with the marketing and sale of residential mortgage-backed securities. By the time the suit was filed, DOJ had been investigating the conduct for some time and was engaging in settlement negotiations.[21] In presenting arguments to DOJ for dismissal, a citation to this factor would be helpful in cases of serial relators or where multiple *qui tam* actions allege the same behavior.

3. Preventing Interference with Agency Policies and Programs

DOJ states that dismissal should be considered where a *qui tam* action "threatens to interfere with an agency's policies or the administration of its programs" and that it "has recommended dismissal to avoid these effects."[22] Included in this factor are "instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exist the government program or industry."[23] The memo cites *United States ex rel. Harman v. Trinity Indus., Inc.*, 872 F.3d 645 (5th Cir. 2017). There, the government declined to intervene and the Fifth Circuit reversed a jury's verdict for relator, finding that the manufacturer's alleged failure to disclose changes to its highway guardrails was not material and, therefore, did not support a FCA claim.[24] The relator argued that the defendant failed to disclose to the Federal Highway Administration (FHWA) small changes made to its guardrail design after initial approval, and that those changes rendered false all subsequent certifications and invoices submitted by the defendant. The Fifth Circuit reversed the over $660 million jury verdict in large part due to an authoritative memorandum issued by FHWA in which the agency stated that it had carefully considered the guardrail design changes made by the defendant and that it considered "past, present, and future" invoices submitted for new guardrails fully eligible for federal reimbursement.[25]

The government did not seek dismissal of the case, even though its own agency concluded before trial that the claims were unfounded and that the defendant was entitled to the payments it received. Based on this new memo, defendants have a potent argument to the government that it should exercise its right to move to dismiss where there is evidence of actual approval (and payment) by the government of conduct that a relator alleges to be fraudulent.

4. Controlling Litigation Brought on Behalf of the United States

Another factor to be considered is where DOJ is litigating a similar case. The memo notes that dismissal should be considered when necessary to protect ongoing litigation. The memo cites *In re Natural Gas Royalties Qui Tam Litigation*, MDL Docket No. 1293 (D. Wyo. October 9, 2002), where the government sought to dismiss declined claims to avoid interference with its litigation of intervened claims.[26] (The case involved separate *qui tam* actions in multiple

districts against more than 300 defendants).[27] Where there are multiple cases, therefore, a defendant may have the opportunity to advocate for a dismissal of one or more of the cases. This may be an effective argument particularly when the simultaneous discovery in multiple cases will impact government resources.

5. Safeguarding Classified Information and National Security Interests

In considering whether to seek dismissal, the memo states that DOJ should seek dismissal to safeguard classified information. Importantly, the memo notes that DOJ has a strong argument that "the *risk of disclosure*, alone, justifies dismissal," rather than requiring a certainty that continued litigation "*will* result in the disclosure of classified information."[28] This factor may be a fruitful one in FCA cases involving contracts with agencies in the U.S. intelligence community.

6. Preserving Government Resources

DOJ suggests that *qui tam* actions should be dismissed "when the government's expected costs are likely to exceed any expected gain," including the "opportunity cost of expending resources on other matters with a higher and/or more certain recovery."[29] In discussions with the government, it may be helpful to cite to this factor when there are multiple *qui tam* actions for similar behavior, or where any recovery would be relatively insignificant. As noted above, the DOJ dismissal factors make no reference to the burdens defendants face in defending against meritless FCA cases. That omission may be unsurprising, but when viewed through the lens of this new framework, defendant companies may be able to present equitable arguments in a way that also lends support to the factors DOJ's memo says it will consider (*e.g.*, by highlighting discovery costs defendants and the government will bear if a matter is litigated).

7. Addressing Egregious Procedural Errors

DOJ suggests seeking dismissal under this factor "based on problems with the relator's action that frustrate the government's efforts to conduct a proper investigation," including circumstances where the relator ignores requests from DOJ.[30] While the Memo focuses on procedural errors, there are, of course other prudential concerns—such as relator misconduct—that may cause the government to seek dismissal. Historically, the interactions between relators and the government rarely come to light, but any indication of squabbles between relators and the government may present opportunities for advocacy.

Conclusion

The Memo concludes by noting that the factors are not mutually exclusive and that consideration should also be given to "the first to file bar, the public disclosure bar, the tax bar, the bar on *pro se* relators, or Federal Rule of Civil Procedure 9(b)" as bases for obtaining the dismissal of declined *qui tam* claims. Further, the memo suggests that partial dismissal of some defendants/claims may sometimes be appropriate, and that dismissals may be "warranted at a later stage" in the proceedings even if DOJ permits the action to proceed initially. DOJ attorneys are directed to work closely with client agencies and "consider advising relators of perceived deficiencies in their cases as well as the prospect of dismissal so that relators may make an informed decision regarding whether to proceed with the action."[31]

Based on this memo, it seems likely that DOJ will look critically at questionable cases. Most importantly for practitioners, the presence of this memo provides a new vehicle to engage with government attorneys about dismissing *qui tam* actions.

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[1] Memo at 2.
[2] Memo at 1.
[3] "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A),
[4] Memo at 3.
[5] *Id*. at 7.
[6] *Id*. at 7.
[7] *Id*. at 7.
[8] *Id*. at 3.
[9] *Id*. at 2.
[10] *Id*. at 2.
[11] *Id*. at 3-7.
[12] *Id*. at 3.
[13] As part of his complaint, Berg urged that the Attorney General obtain "as quickly as possible" documents regarding President Obama's place of birth and citizenship, including his birth certificate. *Berg v. Obama*, No. 09-5362 (Doc. # 1 at 4-5).
[14] *Berg v. Obama*, No. 09-5362, 2010 WL 2129066, at *6 (D.C. Cir.) (citing Doc. #9 at 3).
[15] *Berg v. Obama*, 383 F. App'x 7 (D.C. Cir. 2010) (per curiam) (citing *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003)).
[16] Memo at 4.
[17] Joinder in Motions to Dismiss filed by the State of California and Defendant and Motion to Dismiss Federal False Claims Act Claims, No. 2:04-CV-1955-MCE-PAN (JFM), ECF No. 52 (April 17, 2006), at 2.
[18] *Id*. at 3-4.
[19] *Id*. at 4.
[20] Memo at 4.
[21] *Id*. at 4.
[22] *Id*. at 4.
[23] *Id*. at 5.
[24] *United States ex rel. Harman v. Trinity Indus., Inc*., 872 F.3d 645 (5th Cir. 2017).
[25] *Id*. at 651
[26] Memo at 5.
[27] *Id*. at 5.
[28] *Id*. at 6 (emphasis in original).
[29] *Id*. at 6.
[30] *Id*. at 7.
[31] *Id*. at 8.