LATHAM&WATKINS

Client Alert Commentary

Latham & Watkins White Collar Defense & Investigations Practice February 1, 2018 | Number 2276

Government Gatekeeper? DOJ Memo Encourages Dismissal of Meritless False Claims Act Cases

Leaked DOJ memo instructs government attorneys to consider dismissing certain False Claims Act qui tam actions.

On January 10, 2018, Michael D. Granston, Director of the Commercial Litigation Branch of the Department of Justice's (DOJ) Fraud Section, issued an internal memorandum encouraging DOJ attorneys to consider using the government's authority to dismiss False Claims Act (FCA) *qui tam* cases that "lack substantial merit."[1] The confidential memo, recently leaked to the press, sets forth seven factors for government lawyers to consider when evaluating whether to seek dismissal of a *qui tam* case.

However, whether DOJ attorneys will in fact regularly dismiss *qui tam* cases remains to be seen. Even a small shift in DOJ's willingness to exercise its rarely invoked dismissal authority would be a welcome (and long overdue) development for FCA defendants. Declined *qui tam* cases rarely result in any recovery for the government, yet FCA defendants suffer significant financial and reputational harm by having to litigate a government fraud suit. If the memo amounts to a real policy change, DOJ may finally begin playing what it has identified as its "important gatekeeper role" in FCA actions.[2]

The Rise of Declined False Claims Act Cases

One unique aspect of the FCA is its *qui tam* provisions, which authorize whistleblowers, known as relators, to file an FCA suit on behalf of the government.[3] Relators receive a share of any recovery, thus acting as private bounty hunters.[4] Even if the government investigates and declines to intervene in a *qui tam* law suit, the FCA authorizes relators to prosecute the litigation on their own, entitling them to a larger share of any recovery.[5]

In part because of the considerable financial incentive to file suit, the number of FCA cases filed by *qui tam* relators has skyrocketed in recent years.[6] But the value (and legality)[7] of declined FCA *qui tam* suits has been hotly debated. Despite the explosion in the number of *qui tam* suits filed since the *qui tam* provisions' expansion in 1986, the rate of government intervention "has remained relatively static."[8]

Even though the vast majority of FCA cases filed are non-intervened *qui tams*, non-intervened cases only account for approximately 4.5% percent of the monies recovered under the FCA in the past 10 years.[9] While the government's official position is that declining to intervene is not a statement on the merits of a *qui tam* action, courts (either explicitly or implicitly) often interpret it as such.[10]

Nevertheless, relators frequently continue to prosecute declined actions,[11] forcing government contractors to face reputational harm and expend tremendous resources litigating cases with little or no validity. Defendants often spend hundreds of thousands if not millions of dollars on discovery alone. And although

defendants often prevail in these suits, they are not reimbursed for the costs and fees required to do so. This dynamic leads many defendants to settle FCA cases — even those without merit.

The Government's Rarely Exercised 31 U.S.C. § 3730(c)(2)(A) Dismissal Authority

In addition to the government's power to intervene and take over the prosecution of a *qui tam* action, the government can unilaterally "dismiss [a *qui tam*] action notwithstanding the objections" of a relator.[12] The relator must only be "notified by the Government of the filing of the motion" and "provided with an opportunity for a hearing on the motion."[13]

The statute does not set forth a standard by which the court is to review the government's dismissal motion.[14] As the memo recognizes, there is a circuit split in the standard of review that courts apply to relator challenges to dismissals. The Ninth Circuit requires the government to identify a "valid government purpose" that is rationally related to dismissal.[15] The D.C. Circuit, on the other hand, provides the government an "unfettered right" to dismiss a *qui tam* action.[16]

Despite DOJ's broad discretion to dismiss *qui tam* suits, the government has historically used the power "sparingly,"[17] preferring instead to decline intervention without affirmatively moving for dismissal.

Seven Factors for Evaluating When to Seek Dismissal of Qui Tam Actions

The memo explains that DOJ "plays an important gatekeeper role in protecting the False Claims Act, because in *qui tam* cases where [DOJ] decline[s] to intervene, the relators largely stand in the shoes of the Attorney General. That is why the FCA provides [DOJ] with the authority to dismiss cases."[18] The memo further emphasizes the "significant government resources" expended in declined *qui tam* cases in monitoring cases and participating in discovery.[19] Unmeritorious cases may also "generate adverse decisions that affect the government's ability to enforce the FCA."[20]

The memo sets forth seven factors for government attorneys to use as the basis for dismissal of *qui tam* actions, noting this list is "non-exhaustive."[21] Helpfully for defendants, the memo provides examples of cases the government has dismissed under each factor. The memo further instructs that the bases for dismissal described in the seven factors should be asserted separately and in addition to other bases for dismissal such as the first to file and public disclosure bars.[22]

The seven factors and the analysis to determine whether they apply are:

1. **Meritless *Qui Tams***: Does the case lack merit, either on its face because of a defective legal theory or frivolous factual allegations, or as a result of the government's investigation of the relator's allegations?
2. **Parasitic or Opportunistic *Qui Tams***: Does the action duplicate a pre-existing government investigation, adding no useful information to the investigation?
3. **Actions Interfering with Agency Policies and Programs**: Will the case interfere with an agency's policies or the administration of its programs?
4. **Controlling Litigation Brought on Behalf of the United States**: Would the case create unfavorable precedent?
5. **Safeguarding Classified Information and National Security Interests**: Does the case involve classified information, particularly in the contexts of intelligence agencies or military procurement contracts?

6. **Preserving Government Resources**: Are the government's expected costs, including responding to discovery and monitoring the litigation, likely to exceed any expected gains?
7. **Addressing Egregious Procedural Errors**: Is the relator frustrating the government's efforts to conduct a proper investigation?

Takeaways for FCA Defendants

FCA defendants seeking to take advantage of the memo's guideposts for dismissal should consider the following points:

- Rather than simply asking DOJ to decline intervention, FCA defendants should urge DOJ to seek dismissal of a *qui tam* action. Defendants should reframe their key arguments about the factual allegations and legal theories in the case to track one or more of the factors outlined in the memo. Presentations requesting dismissal can be bolstered by analogizing the case at hand to the case law included in the memo under each factor. Rather than pointing to the significant costs and reputational harm faced in litigating meritless suits, defendants generally will be better served by focusing on the memo's seven guideposts.

- There may be instances when an FCA defendant would benefit from seeking a traditional dismissal rather than a dismissal under 31 U.S.C. § 3730(c)(2)(A). A weak *qui tam* pleading may lead to a quick FRCP 12(b)(6) dismissal and make good law that will deter future FCA suits. The court may opt to rule on the papers without a hearing, whereas a motion to dismiss by the government will provide the relator an opportunity for a hearing in front of the judge.[23]

- Defendants should closely monitor further developments in case law ruling on government dismissal motions. If DOJ does begin dismissing more *qui tam* cases, there will be an attendant increase in case law reviewing those decisions — perhaps leading to a wider circuit split regarding the appropriate standard for dismissal. FCA defendants should keep in mind case law from the relevant circuit when evaluating the likelihood of dismissal.

If DOJ does begin using its dismissal power regularly, government contractors in some instances may be spared the high costs of litigating — and sometimes settling — meritless *qui tam* suits. The next few years will be telling as to the memo's practical effect: the government will keep statistics as to the number of *qui tam* complaints dismissed upon motion by the United States (and will hopefully include those in DOJ's annual fraud statistics).[24]

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Alice S. Fisher
alice.fisher@lw.com
+1.202.637.2232
Washington, D.C.

Anne W. Robinson
anne.robinson@lw.com
+1.202.637.2161
Washington, D.C.

Jason M. Ohta
jason.ohta@lw.com
+1.858.523.3968
San Diego

Amy E. Hargreaves
amy.hargreaves@lw.com
+1.858.523.5424
San Diego

David R. Hazelton
david.hazelton@lw.com
+1.202.637.2254
Washington, D.C.

Terra Reynolds
terra.reynolds@lw.com
+1.312.876.7640
Chicago

Kirstin Scheffler Do
kirstin.schefflerdo@lw.com
+1.312.876.7613
Chicago

Katie M. Dunne
katie.dunne@lw.com
+1.312.777.7133
Chicago

You Might Also Be Interested In

Tax Act Changes Deductibility of False Claims Act Payments

We've Got Washington Covered

False Claims Act Resource Center

SCOTUS Upholds Implied Certification for Some Cases But Imposes "Rigorous Materiality Requirement" for FCA Liability

Endnotes

[1] Memorandum from Michael D. Granston, Director, Department of Justice Commercial Litigation Branch, Fraud Section to Attorneys of the Department of Justice Commercial Litigation Branch, Fraud Section & Assistant U.S. Attorneys Handling False Claims Act Cases (Jan. 10, 2018) ("Memo"), https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf. A possible change in policy was first introduced in October 2017, when in a conference speech the Director suggested that DOJ would "continue to look critically at *qui tam* cases to determine whether there are matters that should be dismissed." Michael D. Granston, Director, Department of Justice Commercial Litigation Branch, Fraud

Section, Speech at the Health Care Compliance Association's Health Care Enforcement Compliance Institute (Oct. 30, 2017); *see also* David M. Glasser, *Developing Story: DOJ Will Dismiss Qui Tam Cases Lacking Merit* (Nov. 2, 2017), https://www.racmonitor.com/developing-story-doj-will-dismiss-qui-tam-cases-lacking-merit.

[2] Memo at 2.

[3] 31 U.S.C. § 3730(b)(1).

[4] 31 U.S.C. § 3730(d)(1)-(2).

[5] 31 U.S.C. § 3730(d)(2).

[6] The number of *qui tam* suits filed has mushroomed since the FCA's *qui tam* provisions were liberalized in 1986. In 1985, the year before the amendments, there were four *qui tam* decisions reported nationwide. In 2005, 406 were filed, and in 2015, 639 were filed. Civil Division, U.S. Dep't of Justice, Fraud Statistics – Overview: Oct. 1, 1986-Sept. 30, 2017, at 1-2 (2017) ("Fraud Statistics"), https://www.justice.gov/opa/press-release/file/1020126/download.

[7] Courts have almost unanimously upheld the *qui tam* provisions against constitutional challenges, with the Supreme Court dismissing a standing challenge in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). However, some courts, and even the government itself, have been divided on the constitutionality issue. *See Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999), *rev'd*, 252 F.3d 749 (5th Cir. 2001) (panel's holding that *qui tam* provisions were unconstitutional where the government declines to intervene reversed by a divided *en banc* panel); Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 207, pp. 208-09 (July 18, 1989) https://www.justice.gov/olc/opinion/constitutionality-qui-tam-provisions-false-claims-act ("The Office of Legal Counsel believes that the *qui tam* provisions of the False Claims Act are patently unconstitutional. In our view, this is not even a close question.").

[8] Memo at 1.

[9] Fraud Statistics, *supra* note 6, at 1-2; *see also* Memorandum from the U.S. Department of Justice, U.S. Attorney's Office, E. Dist. Pa., *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits*, https://www.justice.gov/sites/default/files/usao-edpa/legacy/2012/06/13/InternetWhistleblower%20update.pdf ("[F]ewer than 25% of filed *qui tam* actions result in an intervention on any count by the Department of Justice."). Annual recoveries in non-intervened *qui tam* actions as a portion of overall recoveries in *qui tam* actions from 2012 to 2017 were as follows: 2017, 12.3%; 2016, 3.6%; 2015, 21.3%; 2014, 1.8%; 2013, 4.3%; 2012, 1.3%. Fraud Statistics, *supra* note 6, at 2. The larger percentages in 2015 and 2017 are due to a single outlier settlement in each year: a 2015 settlement in a non-intervened case against DaVita Healthcare Partners, Inc. accounted for US$450 million of the total US$512 million recovered in non-intervened *qui tam* suits; a 2017 settlement in a non-intervened case against Celgene Corporation accounted for US$260 million of the US$425 million total in 2017. *See* https://www.justice.gov/opa/pr/davita-pay-450-million-resolve-allegations-it-sought-reimbursement-unnecessary-drug-wastage; https://www.justice.gov/usao-cdca/pr/celgene-agrees-pay-280-million-resolve-fraud-allegations-related-promotion-cancer-drugs.

[10] *United States ex rel. Harman v. Trinity Indus.*, 872 F.3d 645, 665 (5th Cir. 2017) (dismissing the case for lack of materiality and noting that the federal government and eight out of nine states declined to intervene in the action); *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (emphasizing that DOJ declined to intervene in the suit and concluding that because "the expert agencies and government regulators have deemed these violations insubstantial ... we do not think it appropriate for a private citizen to enforce these regulations through the False Claims Act"); *United States ex rel. Jamison v. McKesson Corp.*, 649 F.3d 322, 331 (5th Cir. 2011) (noting that the government chose to intervene against only seven of the 450 named defendants and stating that the case against the others "presumably lacked merit"); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 766 n.37 (5th Cir. 2001) (Smith, J. dissenting) (citing dismissal and recovery figures showing that "the cases in which the government declines to intervene are generally the meritless cases").

[11] Several sizeable recoveries in non-intervened cases undoubtedly drive the recent surge in relators continuing to pursue FCA claims even where the government declines intervention. *See supra* note 9.

[12] 31 U.S.C. § 3730(c)(2)(A).

[13] *Id*.

[14] *Id.* By contrast, the settlement provision authorizes the government to settle a *qui tam* action over the relator's objection only if the court finds that the settlement is "fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B).

[15] *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998).

[16] *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). The only other Federal Circuit Court of Appeals that has addressed this issue has done so with mixed results. The Tenth Circuit Court of Appeals first adopted the *Sequoia* standard, though did so only where the defendant has been served with a *qui tam* complaint. *See Ridenour v. Kaiser-Hill Co., Ltd. Liab. Co.*, 397 F.3d 925, 936 (10th Cir. 2005). Subsequently, in a case in which the defendant had not been served with the relator's complaint, the Tenth Circuit declined to endorse either the 9th Circuit's *Sequoia* standard or the D.C. Circuit's more deferential *Swift* standard, holding that both standards were met under the facts of that case. *See United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App'x 849, 853 (10th Cir. 2012).

[17] Memo at 1.

[18] *Id*. at 2.

[19] *Id*. at 1; *see also id*. at 2 ("Section 3730(c)(2)(A) ... remains an important tool to advance the government's interest, preserve limited resources, and avoid adverse precedent"); *id.* at 6 ("The Department should also consider dismissal under section

3730(c)(2)(A) when the government's expected costs are likely to exceed any expected gain"); *id*. ("Examples of potential costs may include, among other things, the need to monitor or participate in ongoing litigation, including responding to discovery requests.").

[20] *Id*. at 1; *see also id*. at 5 ("[T]he Department should consider dismissing cases when necessary to protect the Department's litigation prerogatives"); *id*. (citing case law in which "the government moved to dismiss, in part, to avoid the risk of unfavorable precedent").

[21] *Id*. at 3.

[22] *Id*. at 7.

[23] 31 U.S.C. § 3730(c)(2)(A).

[24] Memo at 2 n.1.