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The DOJ's "Granston Memo," and Its Implications for Future Dismissals of False Claims Act Cases

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The recent leak of an internal U.S. Department of Justice (DOJ or Department) memorandum setting forth considerations for dismissal of civil cases brought under the False Claims Act (FCA)[1] offers helpful guidance not only to DOJ lawyers handling qui tam cases, but also to defense counsel representing companies alleged to have violated the FCA. The memorandum, dated January 10, 2018, and authored by Michael D. Granston, Director of the DOJ Commercial Litigation Branch, Fraud Section, is addressed to all attorneys in that branch as well as to all Assistant U.S. Attorneys handling FCA cases across the country. The Granston Memo observes that the dramatic increase in the filing of qui tam suits has not been mirrored by a proportional increase in the government's intervention in those cases. For a variety of reasons—among them, the resources DOJ expends on monitoring and discovery even in instances where DOJ does not intervene, and the potential for adverse precedent—the Granston Memo directs that, despite DOJ's historical reluctance to do so, its lawyers should consider affirmatively seeking dismissal, as the FCA permits under 31 U.S.C. § 3730(c)(2)(A).

Although some have questioned whether the Granston Memo heralds a sea change from past DOJ policy and practice,[2] we read the Memo's reference to past practice (when, as the Memo observes, DOJ used its section 3730(c)(2)(A) dismissal authority "sparingly"[3]) in clear contrast to the Memo's exhortation to DOJ lawyers to more actively consider seeking dismissal under section 3730(c)(2)(A): "[W]hen evaluating a recommendation to decline intervention in a *qui tam* action," the Memo instructs, "attorneys should also consider whether the government's interests are served, in addition, by seeking dismissal pursuant to 31 U.S.C. 3730(c)(2)(A)."[4] Thus, we anticipate more vigorous assertion of DOJ authority to dismiss qui tam cases, which will benefit health care providers, government contractors of various kinds, and others likely to find themselves in the qui tam plaintiff's cross-hairs. Naturally, if this predicted development comes to pass, it would reduce the expense of defending FCA suits of questionable merit after the government's declination, and would also lighten the dockets of courts that bear the administrative costs of managing FCA cases, often for years after declination.

Below we review the Granston Memo's non-exhaustive list of seven factors for consideration by DOJ lawyers making declination and dismissal decisions. We also consider the Memo's implications for defense counsel and their clients defending against FCA claims. But first, as a backdrop to that discussion, we begin with the context in which the Granston Memo arises: the significant increase in FCA litigation in recent years.

Backdrop to the Granston Memo: Another Banner Year for DOJ's FCA Recoveries

In fiscal year 2017, DOJ "obtained more than $3.7 billion in settlements and judgments from civil cases involving fraud and false claims against the government," making it "the eighth consecutive year that the department's civil health care fraud settlements and judgments have exceeded $2 billion."[5] More than half of the recovery ($2.4 billion) "involved the health care industry, including drug companies, hospitals, pharmacies, laboratories, and physicians."[6] And as much as $900 million was recovered from the drug and medical device industry alone.[7] Other notable FCA recoveries included settlements and judgments totaling over $543 million in the areas of housing and

mortgage fraud and over $260 million in recoveries related to various procurement fraud schemes.[8]

The role of whistleblowers in these recoveries is not just "valuable" from the government's perspective;[9] judging from the share of the recovery attributable to qui tam suits, they are in fact indispensable. "Of the $3.7 billion in settlements and judgments reported by the government in fiscal year 2017, $3.4 billion related to lawsuits filed under the *qui tam* provisions of the False Claims Act."[10] The incentive from bounties for such active whistleblower activity is well known. And in fiscal year 2017, the government paid $392 million to the individuals who exposed fraud and false claims through qui tam complaints. As many as 669 qui tam suits were filed in 2017—an average of more than 12 new cases every week.[11]

While these recoveries illustrate the value to the government of private plaintiffs "standing in the shoes" of the Attorney General in meritorious suits, they do not reveal the burden on the government (to say nothing of the burden on defendants) from non-meritorious qui tam suits. The Granston Memo recognizes this problem by noting that "[e]ven in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate."[12] What is more, if the cases are frivolous or defective, they could "generate adverse decisions" that could affect DOJ's ability to enforce the FCA.[13] This stated rationale is also consistent with the Department's responsibility to protect the public fisc through enforcement of the FCA. From the perspective of plaintiffs, however, resource allocation decisions could potentially lead DOJ to seek dismissal of certain suits—notwithstanding their merit—because the potential recovery is relatively small compared to other higher value suits of similar merit.

Background on the Authority of the Unites States to Intervene or Decline to Intervene, and to Dismiss Qui Tam Suits

In order to bring a qui tam action in the government's name, a private party—the "relator"—must comply with two threshold requirements. First, the relator must serve on the government a "copy of the complaint and written disclosure of substantially all material evidence and information" the relator possesses.[14] Second, in order to avoid untimely disclosure to the public, the complaint must also be filed *in camera* with the court, where it "shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders."[15] This provides the Department with time to investigate the claim and evaluate whether to intervene (i.e., "proceed with the action, in which case the action shall be conducted by the Government") or to decline to intervene (i.e., "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").[16] If the United States declines to intervene, the complaint and docket are unsealed, and the relator serves the complaint on the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure. The relator, on behalf of the government, then litigates the case against the defendant. However, the United States retains the right to intervene at some later point in the litigation.

Separate from its authority to intervene or decline to intervene, the FCA grants the United States authority to dismiss a qui tam suit. Section 3730(c)(2)(A) states that the United States, as the real party in interest, retains the power to "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."[17] As the Granston Memo notes, DOJ has historically underused section 3730(c)(2)(A) as a control mechanism for a variety of reasons: because the FCA permits relators to continue to pursue an action even when DOJ declines to intervene, or because a decision not to intervene may be based on resource constraints rather than the merits of a claim.[18]

Notably, section 3730(c)(2)(A) does not articulate any standard for a court to evaluate the government's motion to dismiss. While the government cannot unilaterally dismiss qui tam actions without leave of the court, the standard for dismissal under section 3730(c)(2)(A) is not the familiar

standard for dismissal under Federal Rule of Civil Procedure 12(b)(6). In light of this silence, courts have developed two different standards to determine whether dismissal is appropriate under section 3730(c)(2)(A).

First, the Ninth Circuit has adopted a two-step "rational relation" test.[19] Under this test, the government must identify: (1) a valid government purpose for dismissal; and (2) a rational relationship between dismissal and the purpose that dismissal is designed to achieve. If the government satisfies this test, "the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal."[20]

Second, the D.C. Circuit has instead adopted a much more permissive standard, recognizing the government's virtually "unfettered right to dismiss."[21] In *Swift v. United States*, the D.C. Circuit likened the government's decision to dismiss with prosecutorial discretion in enforcing federal laws, holding that the FCA did not give the Judicial Branch oversight authority over the Executive Branch's decision to dismiss a qui tam case.[22] The *Swift* court declined to decide whether there are any exceptions that would warrant review of the government's decision to dismiss.[23] Further, although the FCA provides the relator a right to a hearing on a government motion to dismiss, it provides the relator no right to block a dismissal. Thus, the *Swift* court concluded that the purpose of the hearing (as referenced in section 3730(c)(2)(A)) is simply to provide the relator a formal opportunity to convince the Department not to dismiss the case.[24]

Of course, even under the Ninth Circuit's slightly more stringent approach, the rational relationship test is easily satisfied, as the government is required to articulate merely a single valid reason for dismissal. Thus, it is not uncommon for courts—even without deciding which standard to adopt—to conclude that the government satisfies even the higher showing required in the Ninth Circuit.[25]

The Granston Memo reiterates the Department's litigation position that the "appropriate standard for dismissal . . . is the 'unfettered' discretion standard adopted by the D.C. Circuit rather than the 'rational basis' test," while maintaining that even the Ninth Circuit's standard is "highly deferential" to the government.[26] At the same time, the Granston Memo suggests that "the prudent course" would be for government lawyers to articulate a reason for dismissal, and argue that dismissal is warranted under either standard.[27] This approach is likely to ratchet up the analysis to the higher rational relation test. And, in the compilation of seven considerations for dismissal now set forth in the Granston Memo, DOJ attorneys and defense counsel will find the kind of justifications for dismissal likely to satisfy the test. It is to those factors that we now turn.

The Seven Granston Considerations

The Granston Memo's seven non-exhaustive factors for consideration in determining whether to seek dismissal are distilled from the government's review of cases over the past 30 years, and the basis for dismissal on which the government relied in those cases.

1. ***Curbing Meritless Qui Tams***. The Granston Memo suggests that DOJ consider moving to dismiss a qui tam complaint where the complaint lacks facial merit "either because relator's legal theory is inherently defective, or the relator's factual allegations are frivolous."[28] This factor may overlap with a defendant's motion to dismiss pursuant Fed. R. Civ. P. 12(b)(6), where the relator has failed to state a claim upon which relief can be granted. But even where the complaint is facially meritorious, the Memo notes, investigation may reveal the lack of merit. Under those circumstances too, the Memo advises, a motion to dismiss under section 3730(c)(2)(A) may be appropriate.
2. ***Preventing Parasitic or Opportunistic Qui Tam Actions***. The Granston Memo suggests that DOJ consider moving to dismiss a qui tam complaint where a qui tam action "duplicates a pre-existing government investigation and adds no useful information to the investigation."[29] The FCA encourages genuine whistleblowers to disclose significant, new, nonpublic information, by incentivizing their behavior and allowing a tipster to collect a percentage of the recovery. These

tips in turn assist the government in ferreting out fraud, waste, and abuse. This objective is not met where a late-to-the-party whistleblower contributes no new information (and perhaps bore less risk than the original whistleblower). Further, the derivative whistleblower "would receive an unwarranted windfall at the expense of the public fisc."[30]

3. ***Preventing Interference with Agency Policies and Programs.*** The Granston Memo suggests that DOJ consider moving to dismiss a qui tam complaint "where an agency has determined that a *qui tam* action threatens to interfere with an agency's policies or the administration of its programs, and has recommended dismissal to avoid these effects."[31] For government contractors, "there may be instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exit the government program or industry."[32]
4. ***Controlling Litigation Brought on Behalf of the United States.*** The Granston Memo suggests that DOJ consider moving to dismiss a qui tam complaint where the litigation interferes in some way with the prerogatives of the United States. For example, intervention and dismissal may be warranted to avoid hampering the United States' ability to resolve a matter through settlement. Or, dismissal may be warranted "to avoid the risk of unfavorable precedent."[33] DOJ could seek to dismiss on this basis for any number of reasons, including, for example, development of "negative" precedent relating to the heightened standard of materiality and scienter for FCA claims established in *Universal Health Services, Inc. v. Escobar*, 136 S. Ct. 1989 (2016).
5. ***Safeguarding Classified Information and National Security Interests.*** The Granston Memo suggests that DOJ consider moving to dismiss a qui tam complaint where litigation poses the risk of disclosure of classified information. For contractors engaged in classified work on behalf of the United States, reliance upon this factor may be particularly compelling.
6. ***Preserving Government Resources***. The Granston Memo suggests that DOJ consider moving to dismiss a qui tam complaint "when the government's expected costs are likely to exceed any expected gain." [34] This consideration could result in the dismissal of some meritorious FCA claims simply because DOJ views the benefits of prevailing in the suit as insufficient in comparison to more valuable qui tam cases. For example, in a recent intervenor filing on January 31, 2018 before the Tenth Circuit, DOJ described its power to "dismiss even a meritorious *qui tam* suit simply because the government has separately resolved the claims at issue and wishes to prevent duplicative litigation, or because the suit might divert government resources from other projects or risk disclosure of sensitive information."[35] The government's ability to dismiss even indisputably meritorious suits is likely to be a source of continued litigation.
7. ***Addressing Egregious Procedural Errors.*** Finally, the Granston Memo suggests that DOJ consider moving to dismiss a qui tam complaint when the relator's actions frustrate the government's investigation efforts, such as—in one case the Memo cites—where the relator fails to serve the complaint on a defendant, despite the government's request, or to disclose material facts.

The degree to which the Granston Memo precipitates an increase in government-initiated dismissals is of course hard to predict, but the likelihood of such an increase seems high. Such "Granston Dismissals" will generate a growing body of case law expounding upon the bases for dismissal, and perhaps further refinement of the standards for dismissal under section 3730(c)(2)(A) that the Ninth and D.C. Circuits have articulated. The Granston Memo also likely heralds the advent of a civil analog to "declination presentations" that are a familiar feature of federal criminal defense practice. With the Granston Memo in their briefcases, defense counsel are likely to seek to persuade government lawyers of the reasons for dismissal. The plaintiff's bar, in turn, will inevitably scour the Memo for its own purposes, to avoid the pitfalls likely to trigger a "Granston Dismissal." Overall, the Memo is likely to have the effect of culling the herd of unmeritorious FCA suits, benefitting industry through savings in litigation costs and possible nuisance settlements.

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[1] 31 U.S.C. § 3729 *et. seq.*

[2] *See, e.g.,* Daniel Wilson, *FCA Memo No Proof of New Direction on Dismissals,* Law360 (Jan. 26, 2018), *available at*https://www.law360.com/articles/1005542/fca-memo-no-proof-of-new-doj-direction-on-dismissals (last visited Feb. 9, 2018).

[3] Granston Memo at 1.

[4] *Id.*

[5] Department of Justice, Office of Public Affairs, *Justice Department Recovers Over $3.7 Billion From False Claims Act Cases in Fiscal Year 2017* (Dec. 21, 2017), *available at* https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017 (last visited Feb. 9, 2018).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Granston Memo at 1.

[13] *Id.*

[14] 31 U.S.C. § 3730(b)(2).

[15] *Id.*

[16] *Id.* § 3730(b)(4)(A)-(B).

[17] *Id.* § 3730(c)(2)(A).

[18] Granston Memo at 1.

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

[20] *Id.* (quotation marks omitted); *see also Ridenour v. Kaiser-Hill, Co., L.L.C.*, 397 F. 3d 925, 936 n.17 (10th Cir. 2005) (while adopting *Sequoia* rational basis test where defendants had been served, declining to decide "whether § 3730(c)(2)(A) gives the judiciary the right to pass judgment on the Government's decision to dismiss an action where the defendant has not been served and where the Government did not intervene in the action").

[21] *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003).

[22] *Id.* at 252.

[23] *Id.* at 253.

[24] *Id.*

[25] *See e.g., United States ex rel. May v. City of Dallas*, 2014 WL 5454819, at *3 (N.D. Tex. 2014) (granting government's § 3730(c)(2)(A) motion to dismiss regardless of whether *Swift* or *Sequoia* approach is adopted); *United States ex rel. Levine v. Avnet, Inc.*, 2015 WL 1499519, at *4-5 (E.D. Ky. 2015) (while following *Swift*, finding that government also met *Sequoia* standard based on legitimate rationale of the preservation of scare resources that would otherwise be spent monitoring the case); *United States ex rel. Nicholson v. Spigelman*, 2011 WL 2683161, at *1-3 (N.D. Ill. 2011) (declining to decide whether *Swift* or *Sequoia* standard applied because the government satisfied higher burden since cost-benefit analysis that proceeding with a case alleging $320 in damages against a family owned pharmacy, a retired psychologist, and a non-profit shelter would be detrimental to the government's interests was not arbitrary and capricious); *United States ex rel. Wickliffe v. EMC Corp*., 473 Fed. App'x. 849, 853-54 (10th Cir. 2012) (declining to decide whether to follow *Sequoia* or *Swift* because the government met *Sequoia's higher burden* with a valid interest in ending duplicative litigation involving unresolved claims).

[26] Granston Memo at 7.

[27] *Id.*

[28] *Id.* at 3.

[29] *Id.* at 4.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 5.

[33] *Id.*

[34] *Id.* at 6.

[35] *United States ex rel. Polukoff v. St. Mark's Hosp.,* No. 17-4014, Brief for the United States of America as Intervenor Pursuant to 28 U.S.C. § 2403, at 11-12 (10th Cir. Jan. 30, 2018) (Docket No. 10532385) (citations omitted).