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Making The Granston Memo Work For FCA Defendants

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It has been a little over a year since the leaking of the infamous Granston memo, an internal U.S. Department of Justice memorandum that provides guidance to government attorneys on when to exercise their authority to invoke Section 3730(c)(2)(A) of the False Claims Act, a previously rarely used provision that permits the government to dismiss cases even over the relator's objections. The Granston memo initially generated a lot of industry buzz about what it would mean for the future of FCA litigation.

Since then, the DOJ has incorporated the Granston memo policy into the DOJ Justice Manual and has already put the policy into practice. After the leaking of the memo, the DOJ filed at least 18 motions to dismiss based on Section 3730(c)(2)(A) in 2018 — a marked increase over prior years. These motions shine a light on what defense counsel should do and how to do it in cases that merit Granston memo consideration.

What's a Defendant To Do?

Although it's still early, one thing is clear: DOJ dismissals are increasing, and the DOJ seems more receptive than before to defendants' arguments in favor of dismissal. The Section 3730(c)(2)(A) motions filed over the course of the past year or so provide some insight into what considerations the DOJ might find most persuasive.

For example, in every recent motion of which we are aware, the government expressed concern about the cost of monitoring litigation and/or participating in discovery in ongoing litigation.[1] These concerns are amplified, according to the government, where relators or their counsel have initiated multiple related actions.[2] In many cases, the government also specifically noted that it felt relators' theories of FCA liability were unsound,[3] such that the benefits of further litigation over liability were less likely to outweigh the costs.

This past year's dismissal motions also reflect that the government is more likely to consider dismissal where the government's own administrative investigations and agency penalty negotiations are in tension with relators' need to score a court victory[4] or where relators otherwise demonstrate that they should not be entrusted with advancing the government's litigation interests.[5]

Defendants should evaluate their cases — the earlier the better — to determine whether or not their cases are ripe for a government dismissal request. Besides those considerations mentioned directly above, defendants should also keep these points in mind:

Focus on the Government's Dismissal Incentives in Addition to What a Judge Would Consider

Any presentation to the DOJ on dismissal should obviously emphasize the Granston memo's stated justifications for dismissal: (1) curbing meritless actions, (2) preventing parasitic or opportunistic actions, (3) preventing interference with agency policies and programs, (4) controlling litigation brought on behalf of the federal government, (5) safeguarding classified information and national security interests, (6) preserving government resources and (7) addressing egregious procedural errors. Although this list is not exhaustive, the DOJ is certainly paying close attention to these factors.

But, we've also learned from these recent dismissals that the government is also persuaded to seek dismissal for reasons other than those specifically set forth in the Granston memo. In that vein, defendants would be well served to put themselves in the shoes of the government and ask some pointed questions, for example:

- Does the relator's legal theory run contrary to common industry practice?
- Is the relator — or relator's counsel — one that is notorious for and in the business of bringing meritless FCA cases in an effort to extract settlements?
- Does the relator have any actual knowledge of the allegations or is the lawsuit merely a fishing expedition?
- And, importantly, does the case run contrary to the public interest?

Given the nature of FCA cases, the effect of relator's legal theory on the public interest should be carefully considered — particularly where the theory of recovery is a novel one. In other words — are there broader implications for public hospitals, government programs, access to healthcare in underserved areas, etc.?

Start Dismissal Discussions Early

Because the government is focused on preserving resources, defendants should start dismissal discussions with the government early. Defendants would likely be in the strongest position to persuade the government soon after they become aware of the suit and before the government expends any more time than it should in evaluating the case. As with all things, setting expectations early — both on your part and the government's — is critically important.

Partial Dismissal Is Better Than No Dismissal.

Asking the government to consider a dismissal need not be an all-or-nothing proposition. To the extent that there are certain claims or theories that would be particularly persuasive to the government's dismissal motion, defendants should not shy away from making those arguments even if they do not necessarily get rid of an entire action. Narrowing the field for future discovery would ultimately be more cost effective to the defendants — and the government — in the long run.

The Government Wants to Dismiss. Now What?

One interesting outgrowth of the government's new attention to its dismissal power is the accelerated development of caselaw on the appropriate standard governing such dismissals. As noted in the Granston memo itself, courts have advanced two competing standards of review where the government seeks dismissal under 31 U.S.C. Section 3730(c)(2)(A).

Some courts, following the U.S. Court of Appeals for the District of Columbia, recognize an "unreviewable" and "unfettered" right to dismiss on the part of the government — i.e., the Swift standard. They view Section 3730(c)(2)(A)'s hearing requirement as intended "simply to give the relator a formal opportunity to convince the government not to end the case."[6]

Other courts view Section 3730(c)(2)(A) as subjecting the government's dismissal actions to a very mild form of judicial review, wherein the government must identify "a valid government purpose" and "a rational relation between dismissal and accomplishment of the purpose." To defeat dismissal, the relator must then "demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal" — i.e., the Sequoia Orange standard.[7]

In 2018, another federal district weighed in on the Swift side of the split. In United States ex rel. Maldonado v. Ball Homes, LLC, the U.S. District Court for the Eastern District of Kentucky opined that "the Swift Court had the better view" and noted that the government could have satisfied the Sequoia Orange standard.[8]

On the other side, this past year also saw one major application of the Sequoia Orange standard — leading to a decision in favor of a relator. In United States v. Academic Mortgage Corp., a U.S. District Court for the Northern District of California found that not only had the relator presented sufficient evidence "that the Government's decision to dismiss was unreasonable, not a result of a full investigation, or based on arbitrary or improper considerations," but also that the government had failed to present evidence to the contrary.[9]

As the district court explained in a later opinion denying a stay of the case pending appeal, the government had named a legitimate basis for dismissal, namely, a desire to avoid litigation costs; however, "the Government's motion to dismiss was denied not because this concern was illegitimate, but because the Government failed to make even a cursory showing that it had considered the potential proceeds from the litigation, a central factor in the cost analysis."[10]

As the circuit split deepens over which standard should apply,[11] in our opinion, it is likely that the DOJ will choose to pursue U.S. Supreme Court review. In the meantime, FCA defendants who hope to draw a government motion to dismiss in districts following Sequoia Orange should be prepared that some investigative details will need to be provided and, thus, will likely become public. Defendants may also choose to work closely with the government to ensure the DOJ receives all the necessary information in support of such a dismissal.

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[1] See, e.g., United States ex rel. Maldonado v. Ball Homes LLC, No. CV 5: 17-379-DCR, 2018 WL 3213614, at *3 (E.D. Ky. June 29, 2018).

[2] See, e.g. United States ex rel. Chang v. Children's Advocacy Ctr. of Delaware, No. CV 15-442-GMS Doc. No. 56 at 7-8 (D. Del. May 14, 2018) (listing relator's past and present cases).

[3] See, e.g., United States ex rel. Stovall v. Webster Univ., No. 3:15-CV-03530-DCC, 2018 WL 3756888, at *3 (D.S.C. Aug. 8, 2018) (noting government contention that conduct alleged by relator did not even violate law regarding federal program participation, let alone rise to level of fraud on that program); United States ex rel. Vanderlan v. Jackson HMA LLC, No. 3:15-CV-767- DPJ-FKB, Doc. 81 at 14 (S.D. Miss. Nov. 5, 2018) (casting doubt on relator's contention that hospital's knowing failure to comply perfectly with Emergency Medical Treatment and Labor Act would render all its federal health care program claims fraudulent).

[4] United States ex rel. Sibley v. Delta Regional Medical Center, 4:17-cv-00053- GHD-RP, Doc. 61 at 9 (N.D. Miss. Nov. 5, 2018) (noting that former co-relator had gone on to litigate similar allegations against separate defendants in Vanderlan case and had actively sought to enjoin defendants from negotiating with Department of Health and Human Services).

[5] United States ex rel. Borzilleri v. Bayer Healthcare Pharms. Inc., No. 1:14-cv-00031-WES-LDA, Doc. 166 at 16-17 (D.R.I. Dec. 21, 2018) (noting that relator had refused to consolidate essentially duplicative cases and had allegedly engaged in unlawful securities trading by shorting his own interest in defendant company before publicly announcing his allegations).

[6] Swift v. United States, 318 F.3d 250, 252–53 (D.C. Cir. 2003).

[7] United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998); Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 936 (10th Cir. 2005).

[8] 2018 WL 3213614, at *3.

[9] No. 16-CV-02120-EMC, 2018 WL 3208157, at *1–2 (N.D. Cal. June 29, 2018), appeal docketed, No. 18-16408 (9th Cir. Sept. 27, 2018).

[10] United States v. Acad. Mortg. Corp., No. 16-CV-02120-EMC, 2018 WL 4794231, at *3 (N.D. Cal. Oct. 3, 2018).

[11] The U.S. Court of Appeals for the Tenth Circuit initially adopted the Sequoia standard where the defendant had already been served with a qui tam complaint. See Ridenour, 397 F.3d at 936. It later declined to adopt that same standard where the complaint had not yet been served finding instead that both the Sequoia standard and the Swift standard were met under the facts of that case. See U.S. ex rel. Wickliffe v. EMC Corp., 473 F. App'x 849, 853 (10th Cir. 2012). Other courts have similarly ruled, declining to take a position in the split and, instead, simply applying Sequoia Orange because even under that standard the case would be subject to dismissal. See, e.g., United States ex rel. Nicholson v. Spigelman, No. 10 C 33561, 2011 WL 2683161, at *1 (N.D. Ill. July 8, 2011) ("The Seventh Circuit has not entered the fray, and it is unnecessary to do so here, for even under the Ninth Circuit's standard, the government is entitled to dismissal.").