AHLA PG Alert

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DOJ Memo Makes It Easier for Government to Dismiss Meritless False Claims Act *Qui Tam* Cases

Scott R. Grubman (Chilivis Cochran Larkins & Bever LLP, Atlanta GA)

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At a health care compliance conference in October 2017, Michael Granston, the director of the Department of Justice's (DOJ) Civil Fraud Section, announced that the DOJ would begin taking a more liberal approach in exercising its right to dismiss *qui tam* actions brought under the False Claims Act (FCA) where appropriate. The FCA expressly permits the government to dismiss a *qui tam* action "notwithstanding the objections of the person initiating the action" by filing a motion with the court and providing the *qui tam* relator with the opportunity to be heard. 31 U.S.C. § 3730(c)(2)(A).[1] However, up until now, the DOJ has exercised its right to dismiss a *qui tam* only in very rare circumstances. Accordingly, Director Granston's sudden announcement in October 2017 surprised most all FCA practitioners, plaintiff and defense attorneys alike.

More recently, on January 10, 2018, Director Granston followed up by issuing a memorandum to all DOJ attorneys and Assistant U.S. Attorneys handling FCA matters, which provides specific guidance as to the factors that should be considered in evaluating dismissal pursuant to Section 3730(c)(2)(A). Although this memo was marked "privileged and confidential" and "for internal government use only," the memo has since been widely distributed on various publicly available websites.

The Granston memo begins by noting that, even where the DOJ declines to intervene in (or take over) a *qui tam* action, "the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate." Further, the memo notes, "[i]f the cases lack substantial merit, they can generate adverse decisions that affect the government's ability to enforce the FCA." Based on this, the Granston memo instructs DOJ attorneys to consider whether dismissal would serve the government's interests when evaluating a recommendation to decline intervention in a *qui tam* action. According to the memo,"[w]hile it is important to be judicious in utilizing section 3730(c)(2)(A), it remains an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent."

Although, as the Granston memo notes, the FCA itself does not set forth specific grounds for dismissal under Section 3730(c)(2)(A), the memo provides a "non-exhaustive list of factors" that DOJ attorneys can use as a basis for dismissal. Those factors, which the memo points out are also not mutually exclusive, include:

- Curbing meritless *qui tams* (where the complaint is facially lacking in merit);

- Preventing parasitic of opportunistic *qui tam* actions (where a *qui tam* action duplicates a pre-existing government investigation and adds no useful information to the investigation);
- Preventing interference with agency policies and programs (where an agency has determined that a *qui tam* action threatens to interfere with the agency's policies or the administration of its program and has recommended dismissal to avoid these effects);
- Controlling litigation brought on behalf of the United States (when necessary to protect the DOJ's litigation prerogatives);
- Safeguarding classified information and national security interests (particularly in cases involving intelligence agencies or military procurement contracts);
- Preserving government resources (when the government's expected costs are likely to exceed any expected gain); and
- Addressing egregious procedural errors (where there are problems with the relator's action that frustrate the government's efforts to conduct a proper investigation).

The memo also goes on to discuss a split in authority regarding the deference that courts should afford the DOJ's dismissal decision under Section 3730(C)(2)(A): some courts, such as the D.C. Circuit, have adopted an "unfettered discretion" standard, while other courts, such as the Ninth and Tenth Circuits, have adopted a "rational basis" test. The Granston memo states that, although the DOJ believes that the D.C. Circuit's approach is correct, even the latter approach was intended to be "a highly deferential one." The memo also notes that:

- Dismissal under Section 3730(c)(2)(A) does not require an "all or nothing" approach, and that in certain circumstances, it may be appropriate for the DOJ to seek only partial dismissal of some defendants or claims;
- DOJ attorneys should consult closely with the affected agency as to whether dismissal is warranted;
- Although dismissal under Section 3730(c)(2)(A) "will often be filed at or near the time of declination, there may be cases where dismissal is warranted at a later stage, particularly where there has been a significant change in the law or evidentiary record";
- DOJ attorneys planning to recommend declination or dismissal should consider advising the relator of the perceived deficiencies in their cases as some relators might choose to voluntarily dismiss the action once they are advised that the government is considering dismissal.

Although it is still too early to predict the exact impact that the Granston memo will have in practice, the memo seems to represent a significant shift in the DOJ's policy with regards to permitting FCA relators to pursue declined *qui tam* actions on behalf of the United States. Certainly, FCA defense lawyers will carefully study the factors laid out in the Granston memo when attempting to convince the DOJ to dismiss a potentially meritless *qui tam*.

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[1] As the Granston memo points out, pursuant to DOJ policy, in *qui tam* cases that are "jointly handled" (handled by both "main Justice" in Washington, D.C. and a local U.S. Attorney's Office), as well as in "monitored" cases (cases that are handled mainly by the U.S. Attorney's Office with oversight by main Justice), dismissal under Section 3730(c)(2)(A) requires the prior approval of the Assistant Attorney General. For "delegated" cases (cases delegated by main justice to be handled by the U.S. Attorney's Office with limited oversight), such authority is generally vested in the U.S. Attorney "unless dismissal would present a novel issue of law or policy, or for any other reason raises issues that should receive the personal attention of the Assistant Attorney General."

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