Whistleblower Defense Alert: DOJ Policy Regarding Dismissal of FCA Lawsuits

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CLIENT ALERT | 1.30.2018

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Although the government has always had the authority to move to dismiss relator cases, it almost never does, to the great frustration of numerous defendants that have had to incur the costs and inconvenience of meritless False Claims Act (FCA) claims. There is hope that this may change. Last week, a January 10, 2018, memorandum from Michael Granston was leaked to the press. Granston is the Department of Justice's (DOJ) longtime FCA guru and the current director of the Commercial Litigation Branch, Fraud Section. The memorandum is titled "Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)," and it encourages DOJ's civil fraud ranks to consider seeking dismissal of relator lawsuits under certain circumstances. Clients have asked for our thoughts about this memorandum, so we thought we would share them here.

DOJ attorneys have long complained that judges were creating "bad law" in non-intervened cases as a means to get rid of meritless or flimsy relator cases. In response, we've always reminded DOJ that it has the power to seek dismissal of these cases before any law is created. Rather than exercise this power, DOJ has increasingly filed statements of interest in non-intervened cases in order to try to influence the decisions that emerge from them. This has created an increased burden on the Department. As Granston explains:

Although the number of filings has increased substantially over time, the rate of intervention has remained relatively static. Even in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate. If the cases lack substantial merit, they can generate adverse decisions that affect the government's ability to enforce the FCA. Thus, when evaluating a recommendation to decline intervention in a qui tam action, 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).

Granston concedes that the DOJ has invoked this power only "sparingly" in the past, but notes that "it remains an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent," and help fulfill DOJ's "important gatekeeper role in protecting the False Claims Act." He identifies seven (non-exhaustive) factors that "should serve as a basis for evaluating whether to seek to dismiss future matters." Those factors are:

1. **Curbing Meritless Qui Tams**. Granston explains: "The Department should consider moving to dismiss where a qui tam complaint is facially lacking in merit—either because relator's legal theory is inherently defective, or the relator's factual allegations are frivolous. … In certain cases, even if the relator's allegations are not facially deficient, the government may conclude after completing its investigation of the relator's allegations that the case lacks merit. In such a case, the Department should consider dismissing the matter. …"
2. **Preventing Parasitic or Opportunistic Qui Tam Actions**. Granston explains: "The Department should consider moving to dismiss a qui tam action that duplicates a preexisting government investigation and adds no useful information to the investigation. …"
3. **Preventing Interference with Agency Policies and Programs**. Granston explains: "Dismissal should be considered 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. … Finally, 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. …"
4. **Controlling Litigation Brought on Behalf of the United States**. Granston explains: "[T]he Department should consider dismissing cases when necessary to protect the Department's litigation prerogatives," such as "interference with ongoing litigation," or "to avoid the risk of unfavorable precedent."
5. **Safeguarding Classified Information and National Security Interests**. Granston explains: "In certain cases, particularly those involving intelligence agencies or military procurement contracts, we should seek dismissal to safeguard classified information. …"
6. **Preserving Government Resources.** Granston explains: "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. … Examples of potential costs may include, among other things, the need to monitor or participate in ongoing litigation, including responding to discovery requests. …"
7. **Addressing Egregious Procedural Errors.** Granston explains: "The Department may also seek dismissal … based on problems with the relator's action that frustrate the government's efforts to conduct a proper investigation," like seal violations.

None of these are new, but to see them assembled as official DOJ policy is heartening. Whether this will actually result in DOJ action to dismiss meritless relator suits remains to be seen. DOJ was quick to temper expectations after Granston made a similar call to dismiss cases at a health care conference last November. Perhaps the issuance of this written memorandum suggests a real change in policy has taken hold. We expect this memorandum to be most useful in non-intervened actions that require the involvement of government witnesses or the production of a substantial number of government documents. But it is reasonable to expect to defense counsel to press the government to seek dismissal in all meritless cases in light of Granston's directive.