GRANSTON GUIDANCE: LEAKED MEMORANDUM ENCOURAGES DOJ ATTORNEYS TO SEEK DISMISSAL OF MERITLESS FCA QUI TAM SUITS

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A recently leaked U.S. Department of Justice ("DOJ") memorandum asks government attorneys to consider seeking the outright dismissal of "meritless" *qui tam* actions filed under the False Claims Act ("FCA"). [1] The eight-page memorandum, which was authored by Director of the Commercial Litigation Branch of the Fraud Section, Michael Granston, suggests seven factors that government attorneys should consider in deciding whether or not to seek dismissal pursuant to 31 U.S.C. § 3730(c)(2)(A). [2] While the factors themselves do not represent new law, Granston's issuance of the memorandum may indicate a shift in the DOJ's enforcement strategy with respect to the FCA. The potential policy shift is good news for companies that contract with the government, particularly in the healthcare and defense industries. If heeded, Granston's suggestions will result in fewer meritless and questionable FCA suits proceeding to litigation.

Moreover, this guidance provides an additional strategic argument that defendants may employ at the conclusion of the government's intervention and investigation. Specifically, should the government decline to intervene, defendants may petition the U.S. Attorney to seek dismissal based on one or more of the factors outlined by Granston before companies incur the costs of civil discovery and summary judgment. Obviously this policy is not binding upon the government and may constitute merely persuasive authority for a court, but it certainly provides another arrow in the quiver of defense counsel.

BACKGROUND

FCA *qui tam* complaints are a significant source of government fraud referrals to both U.S. Attorneys and the Fraud Section of DOJ. Under the *qui tam* provisions of the FCA, a private person (or "relator") files suit on behalf of the government. The government then has the option to intervene, usually after conducting its own basic investigation. If the government intervenes and obtains a judgment, the relator stands to benefit financially from the victory. [3] If the government chooses not to intervene, the relator may still proceed with the case on an individual basis.

Beyond not intervening, however, the government also may seek a complete dismissal of the suit pursuant to 31 U.S.C. § 3730(c)(2)(A). Granston acknowledges in the recently-leaked memo that, while nearly 600 new FCA cases are filed each year, the DOJ's intervention in FCA cases has remained static and the Government's use of dismissal pursuant to the statute has been rare. [4] "[W]e have been circumspect with the use of this tool to avoid

precluding relators from pursuing potentially worthwhile matters, and to ensure that dismissal is utilized only where truly warranted." [5]

In the memorandum, however, Granston advocates for the judicious use of the DOJ's dismissal power and notes the important "gatekeeper role" that the Government plays in exercising its authority to dismiss cases entirely. [6] Granston notes that the DOJ's position is that it holds "unfettered discretion" to dismiss FCA cases pursuant to the statute. [7]

FACTORS TO CONSIDER IN WEIGHING DISMISSAL

Granston gives three reasons for why he encourages the dismissal of weak FCA cases: to advance the government's interests, to preserve its limited resources, and to avoid potentially adverse precedent. [8] He suggests the consideration of seven non-exclusive factors for evaluating *qui tam* actions for possible dismissal. Granston advises prosecutors to argue one of the seven bases for dismissal and note that, under either a "rational basis" or "unfettered discretion" standard, both are met pursuant to § 3730(c)(2)(A).

Claims Lacking in Merit

. Government attorneys should move to dismiss where a complaint in a *qui tam* action is facially lacking in merit. A complaint may lack merit because the relator's legal theory is "inherently defective," or because "the relator's factual allegations are frivolous." [9] The government need not immediately move to dismiss a complaint, however. [10] Instead, Granston suggests that the government might wait to investigate the complaint to determine whether the claims are truly lacking in merit. Typically, however, the DOJ would only investigate until it decided to decline intervention. Granston suggests that in the event that a case lacks merit, but the DOJ chooses not to seek dismissal, the DOJ relator should be advised that dismissal may be considered later if the relator cannot produce additional support to back his or her claim. In doing so, the DOJ preserves resources while placing the burden on the relator to gather additional supporting evidence.

Parasitic qui tam Actions

. The government should consider dismissing *qui tam* actions that duplicate pre-existing government investigations and add no useful information to the investigation. Granston refers to such actions as "parasitic" or "opportunistic" *qui tam* actions. [11] The critical inquiry at this stage is: would the relator receive an unwarranted windfall at the expense of taxpayer dollars for providing merely duplicative information? In its 1986 amendments to the FCA, Congress weighed "the significance of the information provided" and whether or not the government was already aware of the information in determining how much to award various relators. [12] In short, if the complaint does not provide assistance in a pre-existing investigation, it should be considered duplicative and be dismissed. [13]

Actions that Threaten Agency Policy or Programs

. A *qui tam* action should be dismissed where a government agency has determined that an action threatens to interfere with that agency's policies or programs. [14] Granston also recognizes a potential harm caused by the combination of the first and third factors: a meritless claim which raises a risk of economic harm that may cause a government supplier to exit the government program. [15] He suggests that cases of this sort should also be dismissed.

Actions that Interfere with Other FCA Cases

. The government should file a motion to dismiss to "protect the Department's litigation prerogatives." [16] For example, the government may seek to dismiss a particular case in order to avoid its interference with a separate case where it has chosen to intervene.

Cases that Risk National Security Harm

. In the interest of national security, the government should strive to safeguard classified information by seeking to dismiss cases that involve intelligence agencies or military contracts. [17]

Cases Where Costs Will Exceed Gain

. The Department should file a motion to dismiss where the government's costs would exceed any expected gain. [18] According to Granston, this cost calculation should include the "opportunity cost" of utilizing resources on other matters of higher priority with a surer probability of recovery. [19]

Where Claim May Frustrate an Investigation

. The government may seek to dismiss a claim where pursuance of a relator's action may frustrate a proper government investigation. [20]

Granston concludes the memorandum by noting that the aforementioned factors are not intended to be mutually exclusive. Several may serve as the basis for dismissal in a single case. [21] Granston reminds prosecutors that seeking only partial dismissal of a claim is legitimate under the FCA. [22] He further emphasizes that the timing of dismissal is important. Most frequently, prosecutors seek dismissal at or near the time of declination. However, in certain circumstances, such as when there has been "an intervening change in the law or evidentiary record," dismissal may be warranted later. [23] Granston warns that waiting too long could make a court less inclined to grant dismissal due to the expenditure of resources by the court and the respective parties. Therefore, when possible, the government should communicate to the relator that it is considering declination or dismissal. In many cases, relators will voluntarily dismiss their cases, saving the government additional resources and money. [24]

TAKEAWAYS

It remains to be seen whether the guidance provided in the Granston memorandum will have a statistical impact on the total number of FCA cases that federal prosecutors seek to dismiss. Whether or not the Granston memo signals a permanent shift in the DOJ's approach to FCA enforcement depends on the willingness of federal prosecutors to go one step beyond non-intervention by pursuing dismissal. As noted above, the timing of this step is critical and may require additional monitoring of the case, which translates to the expenditure of additional government resources. There is at least some danger that, given the Granston guidance, a court may interpret DOJ's refusal to dismiss a case as impliedly recognizing some merit in the case. In reality, however, it is possible that the government was simply either unwilling or unable to seek full dismissal of the case.

Defense counsel should consider using this guidance as a basis to encourage dismissal following a non-intervention decision. The costs of defending a meritless or questionable FCA claim through summary judgment frequently are extraordinary. The Granston memo may afford clients relief from the use of a statute that, in some instances, has become draconian and has been abused in the simple hope of encouraging and extorting a settlement to avoid the high costs of litigation.

Notes:
[1] 31 U.S.C. § 3729 et seq.
[2] "The Government may 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." U.S. Dept. of Justice, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, January 10, 2018, *available at* https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.
[3] Should the government choose to intervene in an action, the relator will receive between 15-25% of the government's ultimate recovery. If the relator independently pursues a claim, he or she will receive 25-30% of the government's recovery. 31 U.S.C. § 3730(d)(1); 31 U.S.C. § 3730(d)(2).
[4] *Id* at 1.
[5] *Id* at 2.
[6] *Id*.
[7] The Circuits are split on how courts interpret the DOJ's authority to dismiss cases under the statute. The governing statute does not provide a standard for dismissal. The D.C. Circuit follows the "unfettered discretion" standard, while the Ninth and Tenth Circuits follow the "rational basis" standard. *Compare Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), with *Sequoia Orange Co. v. Baird-Neece Packing Corp*., 151 F.3d 1139, 1145 (9th Cir. 1998).
[8] U.S. Dept. of Justice, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, January 10, 2018 *2, *available at* https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.
[9] *Id*. at 3.
[10] *Id*.
[11] *Id*. at 4.
[12] *See* 132 Cong. Rec. 29, 322 (1986)(citing S. Rep. No. 99-345, at 28 (1986)).
[13] *See*, *e.g., United States ex rel. Amico, et al. v. Citi Group, Inc., et al.*, No. 14-cv-4370(CS)(S.D.N.Y. August 7, 2015); *United States ex. Rel. Toomer v. TerraPower*, No. 4:16-cv-00226-BLW (D. Idaho)(Under Seal)(dismissing FCA claim that defendant's invention constituted government property because this allegation may have hindered the Department of Energy's ability to work effectively with private sector partners).
[14] *See, e.g., United States ex. Rel. Ridenour v. Kaiser-Hill Co., LLC,* 397 F.3d 925 (10th Cir. 2005)(dismissing an FCA action because litigation would delay clean-up and closure of nuclear weapon manufacturing facility by taking Department of Energy resources away from the project).
[15] U.S. Dept. of Justice, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)*, January 10, 2018 *5, *available at* https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf
[16] *Id*.
[17] *Id*.
[18] *Id*. at 6.
[19] *Id*. at n. 4.
[20] *Id*. at 7.

[21] *Id*.
[22] *Id*. at 8. *See also*, *Juliano v. Fed. Asset Disposition Ass'n*, 763 F. Supp. 348, 351-53 (D.D.C. 1990)("The [FCA] nowhere states that federal prosecutors are confined to proceed in an all or nothing manner, being forced to take or leave the qui tam plaintiff's charges wholesale.").
[23] *Id*.
[24] Since January 1, 2012, more than 700 *qui tam* cases have been dismissed by relators. *See* Granston memo at 8.

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