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Government dismissal under the False Claims Act: Policy change or much ado about nothing?

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A recently leaked internal Department of Justice memo authored by Michael D. Granston, director of the department's commercial litigation branch, discusses the circumstances under which DOJ attorneys may consider dismissing qui tam cases under the statutory authority granted to the United States under the False Claims Act.[1]

The memo, titled Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A), has generated much speculation concerning whether it indicates a decision and direction to utilize this dismissal authority more frequently or instead was merely intended to be a gentle reminder to DOJ attorneys that dismissal — in addition to declination — may sometimes be appropriate in qui tam cases.

Based on a review of cases in which the DOJ moved to dismiss qui tam cases since this dismissal authority was added to the FCA in 1986, the Granston memo identified the following list of "non-exhaustive" and "not mutually exclusive" factors that have, in the past, supported the DOJ's dismissal of such cases:

- Curbing meritless claims.
- Preventing parasitic or opportunistic qui tam actions.
- Preventing interference with agency policies and programs.
- Controlling litigation brought on behalf of the United States.
- Safeguarding classified information and national security interests.
- Preserving government resources
- Addressing egregious procedural errors.

At the same time, the memo advised that DOJ attorneys should be "judicious in utilizing Section 3730(c)(2)(A)" and acknowledged that the department has not frequently exercised the option of dismissal:

> Historically, the department has utilized Section 3730(c)(2)(A) sparingly, in large part because the statutory text makes clear that relators can proceed with certain qui tam actions following the government's declination. Moreover, a decision not to intervene in a particular case may be based on factors other than merit, particularly in light of the government's limited resources. *Accordingly, we 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* (emphasis added).

Given the DOJ's historical reluctance to use this authority, it remains to be seen whether the Granston memo will herald an increased rate of dismissal of qui tam cases. In this regard, we could see a difference in how this authority is wielded by DOJ leadership in Washington versus how it is wielded by the department's regional offices.

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In qui tam cases that are jointly handled or monitored by Washington, a decision to dismiss under Section 3730(c)(2)(A) must be approved by the assistant attorney general. In cases delegated to regional offices, that authority is vested in the local U.S. attorney unless dismissal "would present a novel issue of law or policy" or should otherwise "receive the personal attention of the assistant attorney general."[2]

It is fair to wonder whether an internal policy memo like the Granston memo — which enumerates several grounds for exercising the department's dismissal authority but also reaffirms that DOJ attorneys must be "judicious" in doing so — will significantly impact how DOJ field offices handle delegated qui tam cases.

In qui tam cases where the DOJ has decided not to intervene, the memo may supply defendants with support for the argument that the department should go even further by seeking dismissal.

The memo reminds DOJ attorneys that there may be grounds for dismissal other than Section 3730(c)(2)(A), "such as the first to file bar, the public disclosure bar, the tax bar, the bar on pro se relators, or Federal Rule of Civil Procedure 9(b)," and that it may be appropriate to pursue partial dismissal.[3]

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DOJ attorneys are advised to "consult closely with the affected agency as to whether dismissal is warranted under any of the factors set forth in this guidance" and not to limit consideration of dismissal to the period "at or near the time of declination," but to consider whether dismissal may be "warranted at a later stage, particularly when there has been a significant intervening change in the law or evidentiary record."[4]

The memo also reminds DOJ attorneys to "consider advising relators of perceived deficiencies in their cases as well as the prospect of dismissal" because relators confronted with this information "may choose to voluntarily dismiss their actions."[5]

Federal appeals courts disagree as to the precise scope of the DOJ's dismissal authority under Section 3730(c)(2)(A). The statute's text does not enumerate grounds for dismissal. Although it is generally agreed that the department's statutory authority to dismiss is broad, there is disagreement over whether that authority is unlimited.

The District of Columbia U.S. Circuit Court of Appeals has held that the government has a virtually unreviewable "unfettered right" to dismiss a qui tam action,[6] whereas the 9th Circuit has required the government to identify a "valid government purpose" that is rationally related to dismissal.[7]

The 2nd Circuit and the 10th Circuit seem to side with the 9th Circuit.[8] Not surprisingly, the DOJ has argued for application of the "unfettered discretion" standard in cases where it has sought dismissal, and the Granston memo urges DOJ attorneys to argue that the "valid government purpose" standard "was intended to be a highly deferential one."[9]

How this all plays out — and whether the memo signals a material change in DOJ practice or is merely a reiteration of long-standing department policy — will bear close scrutiny moving forward.

NOTES

[1] *See* 31 U.S.C. § 3730(c)(2)(A).

[2] Memorandum from Michael D. Granston, Dir., Commercial Litigation Branch, Fraud Section, U.S. Dep't of Justice, to Attorneys, Commercial Litigation Branch, Fraud Section, U.S. Dep't of Justice (Jan. 10, 2018) at 2, n.1.

[3] *Id.* at 8.

[4] *Id.* Regarding later-stage dismissals, the memo acknowledges that "if one waits until the close of discovery or trial, there is a risk that the court may be less receptive to the request given the expenditure of resources by the court and parties."

[5] *Id.*

[6] *See United States ex rel. Hoyte v. Am. Nat'l Red Cross,* 518 F.3d 61, 64-65 (D.C. Cir. 2008); *Swift v. United States,* 318 F.3d 250, 252 (D.C. Cir. 2003).

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

[8] Case law from the 2nd Circuit has indicated agreement with the 9th Circuit's view. *See United States ex rel. Stevens v. Vt. Agency of NaturalRes.,*162 F.3d 195, 201 (2d Cir. 1998), *rev'd on other grounds,* 529 U.S. 765 (2000); *United States ex rel. Piacentile v. Amgen Inc.,* No. 04-cv-3983, 2013 WL 5460640, at *2-3 (E.D.N.Y. Sept. 30, 2013); *United States ex rel. Pentagen Techs. Int'l Ltd v. United States,* No. 00-cv-6167, 2001 WL 770940, at *4 (S.D.N.Y. July 10, 2001). Decisions from the 10th Circuit also have approved the "valid government purpose" test, at least when the government seeks dismissal after the defendant has been served with the complaint, but have left open the question of which standard should apply when the defendant has not yet been served. *See Ridenour v. Kaiser-Hill Co.,* 397 F.3d 925, 935-36 (10th Cir. 2005); *United States ex rel. Wickliffe v. EMC Corp.,* 473 Fed. Appx. 849 , 852-53 (10th Cir. 2012). In deciding what constitutes a "rational relation to a valid government purpose," the 10th Circuit adopted the reasoning of the district court in *Sequoia* that "[t]here need not be a tight fitting relationship between the two; it is enough that there are plausible, or arguable, reasons supporting the agency decision." *Ridenour*, 397 F.3d at 937 (quoting *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.,* 912 F. Supp. 1325, 1341 (E.D. Ca. 1995)).

[9] Granston, *supra* note 2, at 7.

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