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How Cos. Can Take Advantage Of DOJ False Claims Act Memo

By **Aileen Fair and Harry Sandick** (January 26, 2018, 4:31 PM EST)

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A rarely used procedure allowing the government to dismiss a False Claims Act suit over the objections of a qui tam relator is the subject of a recent U.S. Department of Justice memorandum made public on Jan. 24.

Under the FCA, an individual with unique, firsthand knowledge of alleged fraud may file suit under seal on behalf of the government.[1] The individual — the qui tam relator — must provide the government with the complaint and supporting evidence, allowing the government to decide whether to intervene and take over the action, or decline intervention, in which case the relator proceeds "in the shoes of the Attorney General."[2] FCA litigation has exploded in recent years, targeting health care companies, defense contractors, and others with an estimated 600 new matters filed every year.[3] Many of these linger in the federal court system for extended periods of time, forcing defendant companies to expend substantial resources to respond to allegations that may be opaque, unfounded or ill-informed.

While the number of cases filed by qui tam relators has grown, the rate of intervention "has remained relatively static,"[4] indicating that the increase in FCA cases may not reflect an increase in fraud on the government — or even an increase in employees' willingness to report it — but rather, an increase in meritless claims. A memorandum written by the director of the Fraud Section within the Commercial Litigation Branch of the Department of Justice was recently made public, and it encourages U.S. attorneys investigating such suits to consider, instead of declining intervention, to dismiss such suits entirely under 31 U.S.C. § 3730(c)(2), a procedure that has been used "sparingly" until now.[5] This article discusses the factors identified in the DOJ memorandum that should guide government lawyers who are deciding when the DOJ should move for dismissal, and also considers how counsel for companies that have been sued for FCA violations might take advantage of the DOJ's newfound willingness to seek dismissal of some FCA lawsuits.

The Seven Factors for Consideration Identified in the DOJ Memorandum

The DOJ memorandum identifies a "non-exhaustive list of factors that the Department can use as a basis for dismissal, along with citations to cases where the government has previously sought dismissal based on these factors."[6] The factors are: (1) curbing meritless qui tams; (2) preventing parasitic or opportunistic qui tam actions; (3) preventing interference with agency policies and programs; (4)

controlling litigation brought on behalf of the United States; (5) safeguarding classified information and national security interests; (6) preserving government resources; and (7) addressing egregious procedural errors.

The DOJ memorandum makes clear that these factors are not mutually exclusive — more than one may counsel in favor of dismissal. It also explains that when multiple grounds support dismissal (such as more traditional defenses like the first-to-file bar or the public disclosure bar), these other grounds should be asserted in the alternative. The DOJ retains the option of moving to dismiss certain claims or defendants while preserving others, if a portion of the action has possible merit. It is also appropriate for DOJ attorneys to consult with both the government agencies that are implicated by the action and with the relator's counsel to ensure that dismissal is appropriate. Finally, the DOJ memorandum explains that while some circuits give the government "unfettered" discretion to dismiss an FCA action, the Ninth and Tenth Circuits require the government to show a rational basis, which may change the decision-making process.

Some of the factors identified in the DOJ memorandum are self-explanatory — e.g., a procedurally defective action should be dismissed — but others are worthy of a closer look.

Curbing Meritless Claims

The DOJ acknowledges that historically, the government has investigated a qui tam action only to the point where it determines whether to intervene, which may allow meritless cases to proceed following the government's declination.[7] Allowing such actions to proceed, however, requires the government to "expend[] significant resources in monitoring" the case or otherwise participate in discovery.[8] Such meritless cases may also create adverse precedent that negatively affects the government's efforts in future matters that may otherwise be meritorious.

Preventing Relators From Receiving Unwarranted Recoveries

The FCA mandates that a court dismiss an action if substantially the same allegations have been publicly disclosed, unless the relator is the original source of the information.[9] Congress intended the so-called "public disclosure" bar to prevent "parasitic" lawsuits,[10] and defendants commonly raise this defense in motions to dismiss where a relator's complaint is based on public investigations, reports, or news media.

The DOJ memorandum echoes the same reasoning, emphasizing that the government must consider whether a relator "would receive an unwarranted windfall at the expense of the public fisc" where a relator's belated allegations provide "no assistance to the government in its pre-existing investigation."[11] Importantly, the DOJ memorandum provides that the government should move for dismissal when the allegations in a qui tam complaint are redundant of a government investigation, even where that investigation is not "publicly disclosed" as is otherwise required under the statute.[12]

Protecting Government Interests

While the FCA is the government's "primary litigative tool for combating fraud,"[13] the DOJ memorandum recognizes that certain FCA litigation may actually be harmful to the government's interests by interfering with a government agency's policies or administration of its programs. The DOJ memorandum cites several cases in which the government successfully moved to dismiss a qui tam action because the case would interfere with the implementation of new regulations, negatively affect

an agency's ability to collaborate with private sector partners, or risk causing a critical supplier to exit the government program or industry.[14] Similarly, the DOJ memorandum emphasizes that the government should not hesitate to "control[] litigation brought on behalf of the United States."[15] In cases in which a qui tam action may interfere with government litigation or settlement proceedings, or presents a risk of creating unfavorable precedent, the DOJ advises its attorneys to consider dismissal.

Protecting Government Resources

Finally, the DOJ memorandum recognizes that in some cases, the "government's expected costs are likely to exceed any expected gain,"[16] and that the government should move to dismiss in such cases. In a nonintervened qui tam action, the relator assumes primary responsibility for litigation, but the DOJ notes that there are nonetheless costs associated with such matters, including "the opportunity cost of expending resources on other matters with a higher and/or more certain recovery."[17]

Commentary

The policy announced in the DOJ directive is a sensible clarification of government policy concerning the FCA and offers much-needed guidance in an area that is in need of reform. If followed, it could deter qui tam relators from filing meritless FCA claims, which waste the resources of the government and the companies that do business with the government, while also diverting valuable resources that could be better spent elsewhere. As the memo makes clear, there has been a significant increase in FCA lawsuits and yet interventions by the DOJ have not increased, which suggests that many recent lawsuits should not have been filed. Although the voluntary dismissal of actions may continue to be infrequent, when the DOJ gives a close look at a case and concludes that it lacks merit, it should not hesitate to do justice and move for its dismissal. The requirement that the government consult with relators and affected agencies will also help ensure that the government exercises its right to dismiss only in appropriate cases.

How can companies take advantage of the DOJ directive? In many instances, a company has no reason to suspect that a sealed qui tam complaint is pending, and therefore the government's decision about whether to intervene, decline to intervene, or dismiss will be one in which company counsel will have no visibility. In other cases, however, company counsel will be alerted to the likelihood of a sealed qui tam complaint by the issuance of a subpoena or a civil investigative demand that calls for the production of documents in connection with a particular set of issues. In those instances, there may be steps that company counsel can take to advocate to the government in favor of dismissal.

First, to the extent that the government's investigation appears to be based on inaccurate information or an untenable legal theory — such as a relator's incomplete or inaccurate knowledge of the underlying events — the target company should present evidence demonstrating the error and encourage the government to dismiss any FCA complaints under seal. Counsel's ability to do so will be facilitated in those cases in which the government is appropriately transparent (to the extent permitted) early in the investigation regarding potential concerns or claims. Should the government conclude at the end of this investigation that the "relator's legal theory is inherently defective, or the relator's factual allegations are frivolous,"[18] it logically follows that the case should be dismissed — not sent back for civil litigation after a delay of several years, in which case the defendant is forced to defend its position again. The DOJ memorandum identifies a number of such errors; for example, a reverse false claim violation is presented, but without there being an actionable obligation owed by the defendant. See, e.g., United States ex rel. Hoyte v. American National Red Cross, 518 F.3d 61, 65 (D.C. Cir. 2008) (dismissing claim without underlying obligation to pay government based on government's "virtually

'unfettered' discretion"). In other cases, the relator's theory of liability may simply be based on facts that are incorrect, and the defendant company should, in the course of its cooperation with the government, demonstrate why any alleged wrongdoing did not occur.

Second, there are some instances in which a qui tam lawsuit will create adversity and interfere with more important governmental objectives. For example, one case cited in the DOJ memorandum involved an allegation that an invention really belonged to the government and not a private sector partner. See United States ex rel. Toomer v. TerraPower, No. 4:16-cv-00226-BLW (D. Idaho). In that case, the government elected to dismiss the action based on a concern that the allegation would interfere with the U.S. Department of Energy's ability to work with private business. In another example, the government recognized that serious economic harm could arise from a particular case, possibly leading a critical government supplier to exit the industry. Similar situations may arise where government agents who have expertise in the relevant matters — such as U.S. Food and Drug Administration officials or contract administrators — have already scrutinized and approved the conduct in question, either expressly or through their actions. In such cases, the DOJ officials reviewing that conduct would be well served to defer to those officials' expertise and move to dismiss the qui tam action, pursuant to the DOJ memorandum. To the extent that a company can explain to the government attorneys why a qui tam action will cause broader harms to the government or to society at large or represent a reversal of standing government practices and policies, such arguments may now have greater traction than they had before.

Finally, some companies may already have made a voluntary disclosure of the alleged misconduct during a separate government investigation and may be subject to fines or remedial action prior to the filing of the qui tam lawsuit. In that case, the defendant should not be required to litigate the action with a relator and should inform the government of the overlapping investigations and the relator's "unwarranted windfall at the expense of the public fisc" if the case is not dismissed.[19]

Time will tell whether government attorneys will seek dismissals more often than they have in the past, but the DOJ memorandum represents a worthwhile effort to reaffirm that the government's interest is not in getting the highest dollar amount for a particular FCA lawsuit, but in seeing that the result is fair and consistent with the government's financial and other interests, as well as its interest in doing justice.

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[1] 31 U.S.C. § 3730(b)(1).

[2] Memorandum from Michael D. Granston regarding Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A), dated January 10, 2018 (the "DOJ Memorandum") at 2.

[3] Id. at 1.

[4] Id.

[5] Id.

[6] Id. at 3.

[7] Id. at 4.

[8] Id. at 1.

[9] 31 U.S.C. § 3730(e)(4).

[10] Schindler Elevator Corp. v. United States ex rel. Kirk, 563 U.S. 401, 412 (2011).

[11] DOJ Memorandum at 4.

[12] 31 U.S.C. § 3730(e)(4).

[13] Senate Report No. 99-345 (1986) at 2.

[14] DOJ Memorandum at 5.

[15] Id.

[16] Id. at 6.

[17] Id. at 6 n.4.

[18] Id. at 3.

[19] Id. at 4.