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Justice Department Issues Guidance on Dismissing Qui Tam False Claims Act Cases Over Relators' Objections

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On January 10, the head of the Justice Department's Civil Frauds Section issued an internal memorandum instructing all Department attorneys handling False Claims Act (FCA) cases to consider whether, when declining to intervene, the government should go further and move to dismiss meritless cases over relators' objections.[1] While the impact of the memo will only become clear in the coming months and years, it appears to mark a significant initiative by the Justice Department to articulate standards for the government's rarely exercised authority to compel the dismissal of qui tam actions, thus providing important grounds for defendants facing FCA claims to argue for the Department's help.

Seven Criteria for Dismissing Cases

The FCA expressly empowers the government to dismiss qui tam actions over a relator's objections so long as the government gives the relator notice and the court holds a hearing on the motion. *See* 31 U.S.C. § 3730(c)(2)(A).[2] Courts have held that the government has either "unfettered" discretion or, at most, the standard of review for government decisions to dismiss over a relator's objections is extremely deferential.[3]

The January 10 memorandum identifies seven non-exclusive circumstances in which Justice Department attorneys should consider moving to dismiss:

- when "a *qui tam* complaint is facially lacking in merit—either because relator's legal theory is inherently defective, or because the relator's factual allegations are frivolous";
- when "a *qui tam* action duplicates a pre-existing government investigation and adds no useful information to the investigation";
- when "an agency has determined that a *qui tam* action threatens to interfere with the agency's policies or the administration of its programs and has recommended dismissal to avoid these effects";
- when "necessary to protect the Department's litigation prerogatives";
- when necessary "to safeguard classified information";

- when “the government's expected costs are likely to exceed any expected gain”; and;when “problems with the relator's action [would] frustrate the government's efforts to conduct a proper investigation.”

For cases in which a U.S. Attorney's office and the Civil Division collaborate, the Assistant Attorney General for the Civil Division must approve dismissal motions. For cases in which a U.S. Attorney's office handles the case alone, the U.S. Attorney may approve seeking dismissal “unless dismissal would present a novel issue of law or policy."

Implications

The January 10 memo is significant for several reasons.

First, the memo likely will lead to an increase in the number of cases in which the Department exercises its power to dismiss cases in which it has chosen not to intervene. The memo recognizes that the government has an interest in “curbing meritless qui tams.” It begins by noting that while the last several years have witnessed “record increases in *qui tam* actions filed . . . the rate of interventions has remained relatively static.” It instructs Department attorneys that the Department's authority to dismiss cases gives it “an important gatekeeper role,” a role that is appropriate given the fact the statute otherwise empowers private persons to represent the interests of the United States. That the memo entrusts the head of the Civil Division or, in some cases, the U.S. Attorneys with authority to approve motions to dismiss, rather than requiring approval by the Deputy Attorney General, also marks a break with Department practice that is likely to increase the frequency of use of the government's dismissal authority under subsection 3730(c)(2)(A).

As important, by articulating standards that should be employed by Department attorneys in considering whether to use the power to dismiss qui tam actions, the memorandum affords defense counsel criteria with which to advocate for its use in specific cases. This will both structure the dialogue and give increased credibility to arguments that line up with the rationales it sets forth. At the same time, it will give relators' counsel criteria against which to argue against use of the government's dismissal authority. As such, it is like to usher in a new era in which dialogue about use of the government's authority is more principled and perhaps more common.

Second, the memo recognizes that a qui tam complaint's meritlessness may itself suffice to warrant dismissal. Although its first criterion for dismissal refers to facial meritlessness, the memo goes on to state that “[i]n 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.” Thus, even some cases that not facially meritless may be selected for dismissal if evidence available to the government shows them to be groundless. Thus, if a defendant can promptly marshal such evidence and present it to the government, the government may be willing to dispose of the case.

Third, the memo recognizes that there is a substantial class of cases in which claims that may not be obviously without merit nevertheless should not proceed. These include cases the conflict with the government's interests in a number of contexts, including interference with agency policies,

disruption of classified programs or damaging disclosure of classified information, interference with government processes, including investigations, and an important additional category: when the government's costs (presumably viewed broadly) are likely to exceed any gain.

Fourth, the memo in effect establishes a discretionary government-knowledge bar that may provide a basis for dismissal in many cases when the public-disclosure bar would not apply. As many courts have held, for the public-disclosure bar to warrant dismissal, the qualifying disclosures must have been made to the public, not just to the government.[4] But the memo's second criterion recognizes a qui tam claim's overlap with an ongoing government investigation, even one that has not been publicly revealed, may justify dismissal.

Fifth, the memo expressly recognizes that the Justice Department should defer to a client agency's recommendations about dismissing an action that may interfere with the agency's policy or programmatic priorities. While the Department has always consulted with client agencies in FCA cases, it has sometime resisted giving greater weight to agency recommendations than to its own judgments about the possibility of recovering money for the Treasury.

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For a comprehensive review of FCA developments during the past year, please read our 2017 FCA Year-in-Review report, available here.

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[1] The memorandum, available here, is marked “Privileged and Confidential; For Internal Government Use Only.” The *National Law Journal* published it on January 24. See C. Schneier, DOJ Memo Urges Government Lawyers to Dismiss 'Meritless' FCA Cases, *National Law Journal* (Jan. 24, 2017).

[2] Subsection 3730(c)(2)(A) provides:

(A) 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.

[3] *See Hoyte v. Am. Nat. Red Cross*, 518 F.3d 61, 63, 65 (D.C. Cir. 2008) (government's right to dismiss “unfettered”); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (similar); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998) (similar). *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998) (“rationally related to a legitimate government purpose.”).

[4] *See Cause of Action v. Chicago Transit Authority*, 815 F.3d 267, 274-277 (7th Cir. 2016) (collecting decisions and suggesting Seventh Circuit should re-consider its minority view to the contrary).

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