Memo Hints at More Aggressive Pursuit of Qui Tam Dismissals in FCA Cases

In a Department of Justice (DOJ) memo to government attorneys and leaked to the public last month, Michael Granston, Dire of the Fraud Section of the Commercial Litigation Branch of the DOJ, set out to "provide a general framework for evaluating w to seek dismissal under Section 3730(c)(2)(A) [of the False Claims Act (FCA)] and to ensure a consistent approach to this iss across the Department."

Acknowledging the substantial increases in the number of FCA actions initiated by whistleblowers in recent years, as well as t costs associated with those actions, the Director seemed to urge attorneys to rely on a liberal interpretation of the aforementio section of the FCA with more frequent *qui tam* dismissals as the goal.

Gov't has the right to move for dismissal, but interpretations of key provision differ

Although Section 3730(c)(2)(A) of the FCA states that "[t]he Government may dismiss [a *qui tam*] 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 t court has provided the person with an opportunity for a hearing on the motion," that provision has been subject to differing interpretations.

For instance, the D.C. Circuit Court has interpreted it as giving the government the "unfettered right" to dismiss a whistleblowe action. But the 9th and 10th Circuits, for example, have required the government to demonstrate a logical connection between dismissal of the *qui tam* action and something specific the government seeks to achieve via that dismissal.

Is Director suggesting means for making dismissal more likely?

Pointing to seven grounds for dismissal that had been used in the past to successfully dismiss *qui tam* cases, Granston's mem suggested that DOJ attorneys should use one or more of those when the case allows, and then present the argument that the case should be dismissed — and that either interpretation of the aforementioned section of the FCA would be satisfied in the process.

Additionally, the Director put forward the possibility of seeking partial dismissal if that should be the best course, as well as the use of case-specific grounds for dismissal beyond Section 3730(c)(2)(A). Granston highlighted the fact that successful dismis don't always happen at the outset of the litigation; he also gave a nod to voluntary dismissal when he urged attorneys to main communication between whistleblowers and defendant as a means of achieving that.

It's hard to see the memo as anything other than a sign that the DOJ will look toward dismissal more often in whistleblower ca The Director highlighted *qui tam* dismissal as "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent."

Memo lists 7 grounds for dismissal

Outlined in the memo are the seven grounds for dismissal that have successfully been used by the DOJ in the past:

"Curbing Meritless Qui Tams"; "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 a National Security Interests"; "Preserving Government Resources"; and "Addressing Egregious Procedural Errors."

DOJ plays the role of “gatekeeper”

Illuminating how the Director sees the DOJ’s purpose at the intersection of the FCA and the relators, the memo stated: “The Department plays an important gatekeeper role in protecting the False Claims Act, because in *qui tam* cases where we decline to intervene, the relators largely stand in the shoes of the Attorney General. That is why the FCA provides us with the authority to dismiss cases.”

This article is provided for educational purposes only and is not offered as, and should not be relied on as, legal advice. Any individual or entity reading this information should consult an attorney for their particular situation. For more information/questions regarding any legal matters, please email info@nelsonhardiman.com or call 310.203.2800.