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DOJ's New Policy On FCA Dismissals Highlights Circuit Split

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In January 2018, the U.S. Department of Justice issued an internal memorandum outlining a new department policy for dismissing qui tam actions when the government declines to intervene. Seeking to manage the constant influx of new qui tam cases, the Granston memo directs DOJ attorneys to consider moving to dismiss such actions if they appear deficient, either on their face or following an investigation of the relator's claims. Although the department has long had the authority to dismiss qui tam actions under the False Claims Act, 31 U.S.C. § 3730(c)(2)(A), the Granston memo could spur greater use of the department's dismissal authority. Indeed, Acting Assistant Attorney General Jesse Panuccio recently recommended that the DOJ use its dismissal power "consistently, but judiciously." With the prospect of more dismissals under Section 3730(c)(2)(A), qui tam litigants should familiarize themselves with an outstanding circuit split over the extent of the government's dismissal authority under this section.

Some jurisdictions hold that the government has the unilateral power to dismiss a relator's complaint while other jurisdictions hold that the government can secure dismissal only by showing that a valid purpose exists. While even the latter standard is not especially high, at least one court has denied the government's dismissal attempts so it behooves litigants to understand the applicable standards.

The Government's Dismissal Authority

Section 3730(c)(2)(A) holds that the government may dismiss a qui tam action over the objections of the relator if the relator "has been

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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." Citing the need to "preserve limited resources" and "avoid adverse precedent," the Granston memo encourages DOJ attorneys to consider a list of nonexclusive factors in deciding whether to move for dismissal under this section. Those factors include protecting the DOJ's litigation priorities, preserving government resources, preventing interference with agency policies, and reducing duplicative or "parasitic" qui tam cases. The memo also urges attorneys to work with affected agencies to determine if their cases merit dismissal.

The Fifth, Eleventh and D.C. Circuits have held that the government has unilateral power under Section 3730(c)(2)(A) to dismiss a qui tam action. In contrast, the Ninth and Tenth Circuits have required the government to show a valid purpose for dismissal. Two recent cases decided after the release of the Granston memo highlight this circuit split.

Unilateral Power to Dismiss

In United States ex rel. Maldonado v. Ball Homes LLC,[1] the relator filed a complaint in the Eastern District of Kentucky accusing the defendants of submitting false information to the government to obtain loans insured by the Federal Housing Administration. The DOJ declined to intervene and then moved to dismiss several months later, arguing that the case was too weak to merit the use of any more government funds. The relator argued that the complaint should not be dismissed before he had an opportunity to conduct discovery into other similar false claims submitted by the defendant. The court granted the Government's motion without holding an evidentiary hearing and dismissed the case with prejudice as to the relator.

In granting dismissal, the court acknowledged that the circuit courts are divided over whether the government can unilaterally dismiss qui tam cases or must first show cause. As the Sixth Circuit has yet to address the issue, the Eastern District of Kentucky followed its own precedent and held that the DOJ "has virtually unfettered discretion to dismiss a qui tam action."[2] The court explained that the plain language of the FCA contains no requirement that the government put forth evidence or identify the reason for its motion to dismiss. The Fifth, Eleventh and D.C. Circuits also read the FCA to give the government "unilateral power to dismiss" a qui tam action over the objections of the relator.[3]

Valid Purpose Test

The Ninth and Tenth Circuits require the government to (1) identify a valid purpose for dismissal and (2) show a rational relationship between dismissal and that purpose.[4] The relationship must be "plausible" or "arguable."[5] If the government satisfies that test, the burden shifts to the relator to show that the dismissal is arbitrary, baseless, or unlawful.[6]

In United States v. Academy Mortgage Corp.,[7] the Northern District of California was bound by Ninth Circuit precedent to apply this valid purpose test. In Academy, the relator alleged that the defendant approved loans

for FHA insurance that did not comply with the government's rules for obtaining that insurance. The DOJ chose not to intervene and, seven months later, moved to dismiss the matter to preserve government resources. The relator responded that the DOJ failed to investigate her claims fully and thus could not argue that her case was a waste of resources. The court agreed, holding that the DOJ could not support an argument that dismissal would save resources when it never investigated the claims in the relator's amended complaint. The court thus determined that the government had failed the valid purpose test. Even if the government had met its burden to show a valid purpose, the court explained that the relator would have succeeded under the second prong of the test because the government's decision was not supported by an investigation into the merits and was thus baseless. For these reasons, the court refused to dismiss the relator's amended complaint.

What It Means for Qui Tam Litigants

Although this circuit split over the DOJ's authority predates the Granston memo, it has received little attention as the department has infrequently used its authority. The Granston memo suggests the government may now be more willing to dismiss actions over the objections of relators. Defendants should understand the controlling view of the government's dismissal authority in the applicable jurisdiction and approach the government accordingly.

In "unilateral power" jurisdictions defendants should emphasize the government's unfettered right to dismiss and point to specific factors favoring dismissal. Maldonado and Academy Mortgage provide some insight into the factors the DOJ and the courts might find most persuasive. In both cases, the DOJ argued that the relators would waste government resources. The Maldonado court agreed that even when it does not intervene, the government must expend significant resources to monitor and participate in qui tam actions. The DOJ also warned that the relator in Maldonado failed to make a strong showing of materiality under the FCA. In dismissing the action, the court acknowledged "that the government has a valid interest in reining in weak qui tam actions."[8] A defendant pitching dismissal to the DOJ should thus communicate any weaknesses in the relator's claims and argue that the case would be an unnecessary drain on government resources. Where applicable, defendants should also identify how the relator's case might conflict with agency policies and priorities or merely duplicate an existing qui tam case.

In "valid purpose" jurisdictions, defendants should go one step further and compile evidence supporting the fact that the government conducted a thorough investigation of the allegations. In denying the DOJ's motion to dismiss, the court in Academy Mortgage held that the government failed "to conduct a minimally adequate investigation," and thus could not assert a valid purpose for dismissal.[9] To prevent a similar outcome and persuade the DOJ that dismissal is achievable, defendants should remind the dovernment of all civil investigative demands, white papers, meetings and other communications with the defendant. The valid purpose test should not impose a high burden so long as the DOJ can show that it scrutinized the relator's claims before deciding they should be dismissed.

The Granston memo gives qui tam defendants an opportunity to pitch dismissal whenever the government declines to intervene. Even if the government decides against moving for dismissal under Section 3730(c)(2)(A), it could relay any concerns to the relator and push for a voluntary dismissal.

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[1] United States ex rel. Maldonado v. Ball Homes, LLC, No. CV 5: 17-379-DCR, 2018 WL 3213614 (E.D. Ky. June 29, 2018).

[2] Id. at *3.

[3] Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753 (5th Cir. 2001) (citing Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997)); see United States v. Everglades Coll., Inc., 855 F.3d 1279, 1286 (11th Cir. 2017); Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003).

[4] See Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 935 (10th Cir. 2005); U.S. ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998).

[5] Ridenour, 151 F.3d at 937 (quotation marks omitted).

[6] Sequoia Orange, 151 F.3d at 1145.

[7] United States v. Academy Mortgage Corp., No. 16-CV-02120-EMC, 2018 WL 3208157 (N.D. Cal. June 29, 2018).

[8] Maldonado, 2018 WL 3213614 at *3.

[9] Academy Mortgage, 2018 WL 3208157 at *3.