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# FCA Memo No Proof Of New DOJ Direction On Dismissals

By **Daniel Wilson**

Law360, Nashville (January 25, 2018, 10:07 PM EST) -- A recently leaked memo setting out circumstances for when U.S. Department of Justice attorneys should use its rarely invoked authority to ask for "meritless" qui tam False Claims Act cases to be dismissed could foreshadow a more aggressive DOJ approach to dismissals, but proof will only come from seeing its future actions, attorneys said.

FCA defense attorneys and their clients have long clamored for the DOJ to use its existing authority to seek to dismiss qui tam FCA suits filed by whistleblowers more actively when it believes those suits lack merit instead of just declining to intervene, arguing they have been forced to expend time and resources fighting cases they shouldn't have to fight.

So the interest among attorneys was palpable when reports of an October speech given by DOJ civil fraud director Michael Granston seemed to indicate that the department would take a more aggressive approach toward seeking dismissal of unmeritorious suits, mindful of the potential burdens on the government, industry and the courts.

A DOJ representative **argued in November**, however, that more been drawn into the speech than intended, telling Law360 that Granston's comments should have been taken only as an affirmation of the DOJ's existing authority to ask courts to dismiss unmeritorious cases.

They pointed to a transcript of the speech, indicating that Granston had said that the DOJ would *continue* — their emphasis — "to look critically at qui tam cases to determine whether there are matters that should be dismissed," and noted that Granston had made reference in particular to "clearly meritless" cases.

That response damped down some of the discussion surrounding the speech, but the conversation came back to life Wednesday when an internal DOJ memo, written by Granston and laying out a "non-exhaustive" list of seven factors DOJ attorneys can use as basis for seeking dismissal of qui tam suits, was publicly leaked.

Several of the lines in the memo have drawn the interest of FCA attorneys as another possible hint the DOJ may at least be nudging, if not outright directing, its attorneys to more frequently use its authority to ask qui tam cases to be dismissed.

For example, it notes that while historically the DOJ has been circumspect with its use of that tool, in order to avoid discouraging relators from filing "potentially worthwhile" cases, it "remains an important tool to advance the government's interest, preserve limited resources, and avoid adverse precedent."

The memo also specifically states that "when evaluating a recommendation to decline intervention in a qui tam action, attorneys should also consider whether the government's interests are served, in addition, by seeking dismissal pursuant to [the relevant False Claims Act clause]."

**Many FCA Defense Attorneys React Positively**

"The fact is that there's a memo does suggest that there might be a change [in policy]," said Fredrikson & Byron PA shareholder David Glaser, who first reported on Granston's October speech. "[And] it's a really good change. ... As a defense lawyer, this is not in my personal interest; this cuts down on the amount of work we can do. And I'm still thrilled to see it because it's better for society. Why should courts be taking their time and why should my clients have to pay a bunch of money if there's a bad case that's out there?"

A potential policy change could even come with a silver lining for relators and their attorneys, Glaser said, by stopping them from putting too many resources into a case that is unlikely to succeed.

Wiley Rein LLP partner Roderick Thomas also welcomed the potential for meritless cases to be tossed out early, saying it could mean, for example, that relators could no longer "roll the dice to extract settlements" from a defendant.

He said relators with truly meritorious cases may find that the DOJ can give them more support and resources if it can expend fewer resources on monitoring meritless disputes.

And if nothing else, the memo should bring more certainty to the parties on both sides of FCA disputes by laying out a clear, consistent policy across both DOJ headquarters and U.S. attorneys' offices for what should be factored in to dismissal considerations, he said.

"This memo is a clear articulation of the multiple factors that would support a dismissal, and we're hopeful that this will have an impact on litigation," Thomas said. "I've always viewed that there needs to be a leveling of the playing field, given the prevalence of cases that lack merit."

**But Some Have Reservations**

Several defense attorneys said that they will remain unconvinced of any actual policy change until they see hard numbers showing an uptick in qui tam cases being dismissed at the DOJ's request.

"I don't want to rain on anyone's parade here, but to my mind it's a little too early to start celebrating that this is some kind of sea change in DOJ practices," said Douglas Baruch, head of Fried Frank Harris Shriver & Jacobson LLP's FCA practice. "It has the potential to be meaningful, but right now it's way too early to start applauding this."

For example, the memo "mostly just catalogues the very, very few instances over the years when the Justice Department has actually dismissed qui tam cases," and the fact it was intended for internal DOJ use and was not publicly announced by the department also indicates that it is not intended as a meaningful policy change, Baruch said.

Additionally, the memo might have a sting in the tail for FCA defendants, as relators could try to use it to argue that, because the DOJ had not moved to dismiss their case, it had tacitly backed their complaint as meritorious, according to Baruch.

Alston & Bird LLP government contracts practice co-leader Jeffrey Belkin, a former DOJ litigator, is another advocate of the "too early to tell" position, arguing for example that it does not indicate it is mandatory for DOJ attorneys to analyze whether to dismiss a qui tam case every time they decline intervention and instead uses qualified phrases like "should consider."

"Despite all the Chicken Little claims out there, it's a shift in direction but not a 180 or even a 90-degree turn, more of a 10-degree turn," he said.

But the memo should at least provide more consistency across DOJ offices in two particular circumstances that may warrant dismissal, Belkin said: responding to qui tam complaints that look viable on their face but turn out, after a DOJ investigation, to lack substance, and cases with a set of "bad or weak allegations" that could lead to a legal ruling making it harder to successfully enforce the FCA further down the road.

**Relators' Attorneys Have Mixed Views**

Attorneys who represent FCA plaintiffs also had mixed reactions to the memo. James Helmer, senior

partner at Helmer Martins Rice & Popham LPA, argued, for example, that the memo may undermine the congressional intent behind the sweeping 1986 amendments to the FCA that were meant to spur qui tam suits and address what he said was a "lack of ferocity" in pursuing FCA cases from the DOJ itself at the time.

While the DOJ in the qui tam FCA cases it has moved to dismiss since then — roughly a dozen, according to the memo — has seemingly had good reason for those requests, often made in "goofy cases ... that should be put out of their misery early," that doesn't mean the dismissal authority needs to be used more often, as the qui tam system already works "amazingly well," Helmer said.

"The defense bar has several weapons with which to have such cases dismissed without needing any help from DOJ," he said. "And much of the 'bad' law made in this area has not come from qui tam cases, goofy or otherwise, but rather from positions taken by the DOJ itself."

But Kirby McInerney LLP partner Randall Fox, similarly to Baruch, said he saw no sign of any sea change in the memo, noting for example that there was "a lot of language" indicating the rarity of the DOJ moving to dismiss qui tam suits, suggesting that it was more aimed at ensuring standards are applied consistently across branches of the Justice Department.

While the memo may dissuade some qui tam cases at the margins from being filed, relators and their counsel are unlikely to be discouraged from continuing to pursue cases they believe are solid, Fox said, suggesting FCA defendants "shouldn't get too excited" about a potential flurry of new motions to dismiss by the DOJ.

"Colloquially, you hear almost everybody who's a defendant in a qui tam suit say it's meritless," Fox said. "I don't think they're going to be seeing all those lawsuits subjected to motions to dismiss by the Justice Department."

**The DOJ's View**

The DOJ, for its part, continued to play down claims of any policy change; a DOD representative told Law360 on Thursday that the memo was intended to provide litigators with a "general framework for evaluating when to seek a dismissal ... and to ensure a consistent approach to this issue across the department." The official also pointed out that it includes no new factors for DOJ attorneys to consider, instead noting the factors that have been used historically in determining whether to make an FCA dismissal request.

"The memo also makes clear that it is important to be judicious in utilizing [the relevant FCA] Section 3730(c)(2)(A)," the official said. "One purpose of the memo is to ensure that relators are not precluded from pursuing potentially worthwhile matters, and that dismissal should be utilized only where truly warranted."

--Editing by Brian Baresch and Breda Lund.