Blog Post

Has the DOJ Signaled a More Critical Approach to FCA Cases?

January 31, 2018

Defendants have faced an ever increasing number of *qui tam* actions, yet the government has historically declined to seek dismissal of those actions where it declined to intervene. On January 10, 2018, the Director of the DOJ Civil Division Commercial Litigation Branch's Fraud Section issued a memorandum to all DOJ attorneys, including AUSAs, advising them that when declining to intervene in a *qui tam* action, they should also consider whether to seek dismissal under 31 U.S.C. § 3730(c)(2)(A), which provides that "...[T]he 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." ("Memorandum").

The Memorandum states that DOJ has limited resources that must be used judiciously, and that merely declining to intervene in a *qui tam* action does not eliminate the need to expend these valuable resources to monitor and sometimes participate in a *qui tam* action. As such, DOJ attorneys are urged to consider at least seven factors, in determining whether it is appropriate to also move to dismiss the *qui tam* complaint:

1. Whether the allegations in the complaint lack legal or factual merit;

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2. Whether the complaint is duplicative of an on-going government investigation into similar allegations, and will it result in an unwarranted payment to relator thus adversely impacting the treasury;
3. Whether the litigation adversely impacts a federal agency's policies and/or procedures (included in this factor, is a determination of whether the litigation will cause a significant supplier to exit the market thus harming the government);
4. Whether the complaint interferes with other government litigation and/or initiatives;
5. Whether the complaint jeopardizes national security and risks the exposure of classified materials;
6. Whether the cost of monitoring the litigation exceeds any possible recovery (including statutory penalties and multipliers); and
7. Whether the relator's actions "frustrated" the government's investigation into the allegations.

These seven factors are neither mutually exclusive, nor are they exhaustive. Indeed, the Memorandum specifically states that "the Department has often relied on multiple grounds for dismissal . . . [T]he factors identified in this memorandum [are not] intended to constitute an exhaustive list – there may be other reasons for concluding that the government's interests are best served by the dismissal of a *qui tam*action."

While it is still early to determine whether the Memorandum signals a DOJ policy shift, it does provide defendants with insight into DOJ's approach to *qui tam* actions. At the very least, the Memorandum establishes a general nationwide approach to exercising DOJ's statutory authority to seek dismissal of an FCA case when appropriate.

We leave you with two final points to consider in light of the Memorandum:

- Given the DOJ's renewed focus on its statutory authority to dismiss *qui tam* actions over relator's objections, defendants and defense counsel should conduct their own independent evaluation of these factors so as to determine whether to submit a formal dismissal request to DOJ which shall include their analysis of the relevant factors. In conducting the analysis, defendants should consider utilizing the rational basis test for assessing whether the government may move for dismissal. This recommendation is supported by the Memorandum, as it suggests that DOJ attorneys identify "the government's basis for dismissal" regardless of the jurisdiction. Defendants should be aware, however, that there is a split among the federal circuit courts regarding the dismissal standard under 31 U.S.C. § 3730(c)(2)(A). The Ninth and Tenth Circuits have adopted the 'rational basis' test, whereas the D.C. Circuit has adopted the 'unfettered discretion' standard.
- It remains uncertain how the Memorandum will impact the dynamics between relators' counsel and defense counsel. Specifically, it is conceivable that relators counsel will use DOJ's refusal to move to dismiss the action, as evidence that DOJ implicitly supports the allegations in the complaint and thus empowering plaintiff's counsel to be more aggressive in any potential settlement negotiations.

Should you have matters for which you may seek guidance, please contact the author of this blog.