False Claims Act Alert

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False Claims Act Suit Dismissed Based on Granston Memo Considerations

October 19, 2018

Key Points

- DOJ is implementing the Granston memo policy in seeking dismissal of FCA *qui tam* actions when it is in the government's interest, particularly when protecting its resources, discretion and litigation priorities.
- DOJ also recognizes the potential detrimental impact that FCA litigation may have on private companies' willingness to enter into Cooperative Research and Development Agreements, given existing difficulties with negotiating intellectual property rights under such arrangements.

Earlier this year, the Department of Justice (DOJ) provided some relief to defendants facing abusive False Claims Act (FCA) *qui tam* actions when it issued the Granston memo, which provided guidance for DOJ attorneys evaluating the appropriateness of dismissal under 31 U.S.C. § 3730(c)(2)(A), as opposed to the DOJ merely declining to intervene in an action. Since the memo's release, practitioners have closely followed the DOJ's implementation of this policy and courts' reaction, particularly after the DOJ formally incorporated the policy into the DOJ Justice Manual (formerly known as the United States Attorneys' Manual) at Section 4-4.111 in September 2018.

On October 10, 2018, the United States District Court for the District of Idaho granted the DOJ's motion to dismiss a *qui tam* suit, *United States ex rel. Toomer v. TerraPower, LLC*, No. 4:16-cv-00226-DCN, brought by a relator against TerraPower, LLC and Battelle Energy Alliance, LLC (BEA). The court accepted the DOJ's argument that continued litigation was contrary to the government's interests because "the benefits of terminating the suit outweigh any benefits of allowing it to go forward," under 9th Circuit precedent that dismissal under § 3730(c)(2)(A) requires identification of a valid government purpose and a rational relation between dismissal and accomplishment of that purpose.[1] This dismissal highlights the DOJ's current emphasis on seeking to dismiss *qui tam* actions based on the government's interest rather than merely declining to intervene, in accordance with Section 4-4.111.

BEA manages and operates the Idaho National Laboratory on behalf of the U.S. Department of Energy (DOE). BEA entered into Cooperative Research and

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Development Agreements (CRADAs) in 2011 and 2012 with TerraPower for nuclear energy and science innovation work at the laboratory. Subsequently, the relator sued TerraPower and BEA, alleging, among other things, that TerraPower failed to disclose a subject invention to the DOE as required under the CRADAs, failed to provide a sworn statement regarding the invention's relationship to a CRADA when filing for a patent for the invention, and "improperly claimed some key Generated Information associated with the CRADAs and the Subject Inventions" as proprietary information and background intellectual property.[2]

The DOJ sought, and was granted, dismissal on the grounds that further litigation was not in the government's interest because: (1) it had not lost any property rights or suffered damages, since the U.S. Patent Office rejected TerraPower's patent application twice; (2) litigation would waste substantial government time and resources; (3) litigation would impair or delay current work with BEA and TerraPower, and discourage other contractors from collaborating with DOE in the future; and (4) the relator failed to state viable FCA claims.

Each of these reasons echoes one or more of the non-exhaustive factors for dismissal found in Section 4-4.111 of the Justice Manual. In particular, the dismissal emphasized the government's interests in protecting its resources, the exercise of its discretion, and its litigation priorities, rather than the question of merit. Moreover, the DOJ and the court explicitly raised the potential chilling effect that the FCA litigation could have on future CRADAs with the DOE, recognizing that the specter of *qui tam* actions may cause private companies to further balk at entering into such contractual arrangements given that intellectual property rights, such as patent ownership and licensing, are common stumbling blocks.[3]

The dismissal highlights the increasingly important role of potential government dismissal of FCA *qui tam* suits. Consistent with D.C. Circuit precedent, the DOJ should have unfettered discretion to dismiss FCA lawsuits that do not advance the government's interest. However, given 9th Circuit prior precedent, now that the Granston memo has been incorporated into the Justice Manual, the DOJ's grounds to seek dismissal are further fortified where a court has found that the government must show a legitimate government interest in support of dismissal.

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[1] Since the Granston memo was issued, only a small number of cases have addressed dismissal under Section 3730(c)(2)(A). *See, e.g., United States ex rel. Stovall v. Webster Univ.*, No. 3:15-cv-03530, 2018 WL 3756888, *1 (D.S.C. Aug. 8, 2018) (granting the government's motion to dismiss a claim by a relator against Webster University on the grounds that further litigation would "unnecessarily expend the limited resources of the Court, the Department of Justice, and the United States Department of Veterans Affairs.") There is an unresolved circuit split between the 9th and District of Columbia Circuits regarding the standard for dismissal; in contrast to the 9th Circuit, the D.C. Circuit has held that the government has "an unfettered right to dismiss an action." *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003).

[2] The relator also brought suit against BEA for employment retaliation in connection with his attempts to rectify the alleged FCA violations. The court did not dismiss the relator's retaliation claims.

[3] *See* Matthew W. Sagal, Gene Slowinski, Kenneth Freese, and Steven Ferguson, *Intellectual Property and Other Contractual Issues in Cooperative Research and Development Agreements (CRADAs): Part I*, 44(1) les Nouvelles 41 (Mar. 2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3338157.