Akin Gump
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False Claims Act Alert

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Key Points

- Department of Justice (DOJ) has released a memorandum detailing seven nonexhaustive factors to be considered by its attorneys in making the important determination of whether to dismiss False Claims Act (FCA) *qui tam* actions in which DOJ has chosen not to intervene.
- DOJ's memorandum comes on the heels of several significant decisions reversing more than $1 billion in FCA *qui tam* judgments and resulting in precedent that will be used against DOJ in future cases.
- The memorandum serves as an important first step toward the appropriate enforcement of FCA *qui tam* claims.

Department of Justice Memorandum Provides Guidance for Evaluating Dismissal of *Qui tam* FCA Cases

Over the last four months, two federal courts have issued decisions in False Claims Act (FCA) *qui tam* cases in which Akin Gump Strauss Hauer & Feld LLP represented the defendants—United States ex rel. Harman v. Trinity Indus., Inc., 872 F.3d 645 (5th Cir. 2017) and United States ex rel. Ruckh v. CMC II, LLC, 2018 U.S. Dist. LEXIS 5148 (M.D. Fla. Jan. 11, 2018). In those cases, the courts collectively reversed more than $1 billion in FCA judgments and entered judgments, in full, for Akin Gump's clients. In both cases, the Department of Justice (DOJ) refused to intervene and participate as a party, and, the courts issued comprehensive decisions that will be cited against the government in future litigation. Also in both cases, a real risk existed that the defendants, which courts found to be providing valuable, nonfraudulent services, would exit the relevant marketplace, which ultimately would harm the government's interest, if appropriate relief was not granted.

On January 24, 2018, in part to stem the type of abusive FCA *qui tam* actions that are described above, DOJ released a memorandum providing DOJ attorneys with new guidance for evaluating the potential dismissal of actions in which DOJ has determined that it will not intervene. DOJ often declines to intervene in such cases, but the FCA allows *qui tam* relators to pursue those actions on the government's behalf. With a sharp uptick in FCA cases in recent years, the memorandum addresses when dismissal may be appropriate rather than the DOJ merely declining to intervene. The guidance in the memorandum empowers the DOJ to exercise its authority to dismiss *qui tam* actions more freely, where it has only done so sparingly in the past. Among other reasons highlighted in the memorandum, dismissing meritless FCA

qui tam actions preserves judicial resources and allows DOJ to ensure that resulting precedent effectively furthers the purpose of the statute. The guidance provides a first step toward the appropriate enforcement of FCA claims.

Background

On January 10, 2018, the Director of DOJ's Commercial Litigation Branch, Fraud Section issued a memorandum regarding the dismissal of FCA cases pursuant to 31 U.S.C. 3730(c)(2)(A) (the memorandum was not publicly released until January 24). The memorandum was sent to all attorneys in the Fraud Section of DOJ's Commercial Litigation Branch, as well as Assistant U.S. Attorneys handling FCA cases. The goal of the memorandum is to "provide a general framework for evaluating when to seek dismissal . . . and to ensure a consistent approach to [dismissal] across the Department."

Factors Supporting Dismissal

While the FCA empowers DOJ to dismiss FCA *qui tam* actions, it does not itself set forth specific grounds warranting dismissal. In issuing its memorandum, DOJ reviewed every dismissal since 1986 and emphasized seven factors historically prevalent in such dismissals.

Curbing Meritless *Qui tam* Actions

The first type of case identified by the memorandum for dismissal is an action that lacks merit due to defective legal theories or frivolous factual allegations. The memorandum notes that such actions may not be apparent until after the government completes an initial investigation of the claims.

Preventing Parasitic or Opportunistic *Qui tam* Claims

The second type of case warranting dismissal is an action that duplicates a current government investigation without adding any useful information. These so-called parasitic or opportunistic actions benefit the relator's counsel, but not the government, and thus do not serve the intended purpose of the statute.

Preventing Interference with Agency Policies and Programs

The third type of case for dismissal is an action that may interfere with an agency's policies or the administration of its programs. For example, the guidance cites Akin Gump case *United States ex rel. Harman v. Trinity Indus., Inc.*, 872 F.3d 645 (5th Cir. 2017), for the proposition that actions may both lack merit and raise a "risk of significant economic harm that could cause a critical supplier to exit the government program or industry."

Controlling Litigation Brought on Behalf of the United States

The fourth type of case identified by the memorandum is an action warranting dismissal when necessary to "protect the Department's litigation prerogatives," including interference with ongoing litigation, the risk of unfavorable precedent or creation of obstacles to settlement of intervened claims.

Safeguarding Classified Information and National Security Interests

The fifth type of case identified is an action warranting dismissal to safeguard classified information, especially in the intelligence agency and military contracts space.

Preserving Government Resources

The sixth type of case identified for dismissal is an action where costs are likely to exceed any expected gains, such as prohibitively high costs for monitoring or participating in extensive litigation or liability for defendant's litigation costs if the defendant prevails. Again, such actions are likely to benefit only relator's counsel and not the government and, as such, do not serve the purpose of the statute.

Addressing Egregious Procedural Errors

The seventh type of case identified by the memorandum is an action where "problems with the relator's action frustrate the government's efforts to conduct a proper investigation."

Practical Considerations

The memorandum also notes several practical considerations that may affect DOJ's decision to seek dismissal, including, but not limited to:

- other factors not included in the memorandum's nonexhaustive list of factors,
- alternative and independent legal bases for dismissal other than Section 3730(c)(2)(A),
- partial dismissal of some defendants or claims,
- consultation with the affected agency to determine whether dismissal is appropriate,
- timing of dismissal to minimize costs and safeguard information, and
- advising relators of any perceived deficiencies and the prospect of future dismissal.

Conclusion

Meritless *qui tam* actions harm not only the companies and individuals against whom they are directed, but also the interest of the United States, which the FCA is intended to protect. Meritless *qui tam* cases run the risk of developing case law contrary to the interests of FCA plaintiffs which, in turn, could be cited against DOJ when it wants to pursue what it believes to be a valid action. In seeking to protect the public, the court system and itself, DOJ's memorandum is a good first step. In the past, however, DOJ has promulgated other guidance, such as in the 1998 Holder Memo Regarding Guidance on the Use of the False Claims Act in Civil HealthCare Matters, that it never operationalized and that may have been promulgated more to forestall congressional action to amend the FCA than to achieve meaningful reform. DOJ's actual conduct going forward, in light of this memorandum, will be the key to determining the memorandum's import. If DOJ intends for this memorandum to constitute substantive reform and not be merely a public relations effort, two trends must become apparent over the coming year: (1) there will be an actual, tangible increase in the number of FCA actions that DOJ moves to dismiss; and (2) there will be a reduction in the number of *qui tam* lawsuits pursued because DOJ, when it declines, will have successfully persuaded the relator not to litigate the case. Hopefully, DOJ will enforce its memorandum, and all of its beneficial goals will be achieved.

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