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DOJ Follows Through on a 2018 New Years' Resolution: Rein In Qui Tam Actions

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Along with most of us, last January DOJ set its own goals for 2018: new policies related to False Claims Act ("FCA") enforcement. One such "resolution" for 2018 was the DOJ Civil Fraud section's instruction to its attorneys and all AUSAs handling FCA cases to routinely consider whether declined *qui tam* actions should be dismissed under the Department's authority in Section 3730(c)(2)(A) of the FCA, which it had rarely used from 1986 through 2017. Known as the "Granston Memo" (which we discuss here) and now codified in the Justice Manual, the central theme of the instruction is that seeking dismissal of *qui tam* actions may be in the government's interest to "preserve limited resources and avoid adverse precedent."

Throughout the year, we tracked DOJ's use of this authority, and DOJ did seem to be seeking dismissals more frequently in district court cases when it was not in the federal interest for litigation to proceed. But the end of 2018 brought two dramatic developments. As we discussed previously, in response to the Supreme Court's request for the Solicitor General's views on a certiorari petition in a Ninth Circuit case regarding the "materiality" standard, the Solicitor General declared that it agreed with the relator that materiality had been adequately pleaded but that, if remanded, DOJ would exercise its dismissal authority under the FCA.

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Then, this week, DOJ filed motions in district courts seeking to dismiss eleven declined cases, filed in seven different jurisdictions, and involving thirty-eight different defendants. The cases involve a theory of liability under the FCA that pharmaceutical assistance services provided by manufacturers to patients and their physicians regarding the proper administration of drugs and related support are actually illegal promotional activity or "white coat marketing" and therefore unlawful kickbacks. The cases were clones of each other, and were filed by an LLC formed for the purpose of filing these actions. DOJ asserted that dismissal is appropriate on the basis of the governmental purposes of "preserving scarce government resources" and "protecting important policy prerogatives of the federal government's healthcare programs." DOJ also stated that it extensively investigated the complaints, and concluded that the allegations lack sufficient factual and legal support.

DOJ, in these motions, indicated in some more detail the programmatic reasons why it is not in the federal government's interest for the cases to proceed:

> These relators should not be permitted to indiscriminately advance claims on behalf of the government against an entire industry that would undermine common industry practices the federal government has determined as, in this particular case, appropriate and beneficial to federal healthcare programs and their beneficiaries.

Of note, DOJ's position is that the legal standard should be the one articulated in the D.C. Circuit's opinion in *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), which is that United States has "unfettered discretion" to

dismiss cases under its authority in Section (c)(2)(A). But DOJ also notes that under the alternative standard established in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), which requires a "valid governmental purpose" and a "rational relationship" between dismissal and that purpose, that standard is easily met and the cases should be dismissed. Under the *Swift* standard, the district courts would have no role in reviewing DOJ's reasons for dismissal; under the *Sequoia Orange* standard, the relator would then have the burden to demonstrate that the dismissal is "fraudulent, arbitrary and capricious, or illegal."

The purpose of the FCA and its *qui tam* provisions is to protect the interests of the United States, and remedy instances of fraud involving federal funds. These actions by DOJ demonstrate DOJ's commitment to these principles, and to ensuring that litigation brought on behalf of the United States is for the benefit of its programs and Treasury. Best wishes to DOJ for "unfettered discretion" to dismiss in 2019!

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