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The Aftermath of the DOJ Granston Memo

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The Director of the Civil Fraud Section of the Department of Justice (DOJ), Michael Granston, issued a memo in January 2018 noting the recent increase in qui tam lawsuits filed under the False Claims Act (FCA). The Granston Memo expresses that the DOJ, having committed extensive resources to reviewing or monitoring these qui tam actions, wishes to be more judicious with the use of its resources.[1] Recent DOJ motions to dismiss echo the government's sentiments reflected in the Granston Memo, and depict its recent push to dismiss unwarranted qui tam actions. For example, in December 17, 2018, the DOJ moved to dismiss 11 qui tam actions brought by National Healthcare Analysis Group (NHCA) against defendants in seven judicial districts. The DOJ argued that the relator's allegations "lack[ed] sufficient merit to justify the cost of investigation and prosecution" and were "contrary to public interest."

The Granston Memo encourages prosecutors to seek the dismissal of qui tam law suits pursuant to its authority under 31 U.S.C. § 3730(C)(2)(A) when it is in the government's best interest to do so, something it has heretofore rarely done. Section 3730(C)(2)(A) allows the government to dismiss a qui tam action despite the relator's objection. Over the years, the courts have developed two standards of review for such claims. The D.C. Circuit in *Swift v. United States* found that the government had "unfettered discretion" to dismiss complaints under § 3730(C)(2)(A). The Ninth Circuit created a different standard of review in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* stating that the government must: 1) identify a valid government purpose for dismissal, and 2) show a rational relation between the dismissal and accomplishment of the valid government purpose. The Granston Memo advises prosecutors to consider filing a motion for dismissal if such dismissal would:

- Curb "meritless" qui tam actions;
- Prevent "parasitic or opportunistic qui tam actions;"
- Prevent "interference with agency policies and programs;"
- Control "litigation brought on behalf of the United States;"
- Safeguard "classified information and national security interests;"
- Preserve "government resources;" or
- Address "egregious procedural errors."

Using these factors, the DOJ sought to dismiss a number of qui tam actions in 2018.

In *U.S. ex rel. Maldonado v. Ball Homes, LLC*, the court dismissed the qui tam suit, stating that the government had a "valid interest in reining in weak qui tam actions." The court, citing to the *Swift* standard, stated that "the government has virtually unfettered discretion to dismiss a False Claims Act case."

The United States District Court for the District of South Carolina also granted the government's motion to dismiss pursuant to § 3730(C)(2)(A). In *U.S. ex rel. Stovall v. Webster University*, the government, listing a Granston Memo factor, argued that further litigation would "unnecessarily expend the limited resources" of the government. The court found that the government had the right to determine the best use of its resources and also found that dismissal was appropriate under the *Swift* and *Sequoia* standards.

Similarly, United States District Court for the District of Idaho in *U.S. ex rel. Toomer v. TerraPower, LLC* granted the DOJ's motion to dismiss a qui tam action pursuant to its authority under § 3730(c)(2)(A). Using the "Preserving Government Resources" factor in the Granston Memo, the DOJ argued that "the benefits of terminating the suit outweigh[ed] any benefits of allowing it to go forward."

Lastly, in *Gilead Sciences, Inc. v. U.S. ex rel. Campie*, the Solicitor General submitted an amicus brief to the Supreme Court in support of the motion to dismiss the qui tam law suit. The DOJ's brief stated that the government may dismiss qui tam law suits "whenever the government concludes that continued prosecution of the suit is not in the public interest." The government further argued that the "burdensome discovery" in this suit will distract the FDA from its public health responsibilities. These arguments portray two of the factors listed in the Granston Memo.

Although the DOJ has received some favorable outcomes, there still remains a circuit split in § 3730(c)(2)(A) decisions. In June 2018, the United States District Court for the Northern District of California denied the DOJ's motion to dismiss in *U.S. v. Academy Mortgage Corporation*. Here, the government argued that "the dismissal would permit it to achieve a valid government purpose by conserving resources that litigation would otherwise consume." The court found that the government did not conduct a "minimally adequate" investigation and so could not meet the first prong of the *Sequoia* standard.

A review of the cases shows that the DOJ often relies on the "preservation of government resources" as a basis for dismissal. It has also argued that qui tam cases should be dismissed for lack of merit, and for being against public interest.

DOJ Recoveries Continue

Despite the gradual rise in qui tam suit dismissals, it is important to note that the DOJ still actively pursues FCA claims. In Fiscal Year 2018, the DOJ recovered more than $2.8 billion under the FCA. $2.5 billion of that amount involved the health care industry. While the DOJ has increased its exercise of authority under § 3730(c)(2)(A), it is still unclear if the FCA suit dismissals will have a larger impact on the health care industry.

[1] The Granston Memo was incorporated into the DOJ Justice Manual at Section 4-4.111 in September 2018.