Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Dismissing FCA Cases: The Granston Memo In Action

By **Jeffrey Belkin and Michael Mortorano** (September 28, 2018, 1:31 PM EDT)

Jeffrey Belkin

Michael Mortorano

While the False Claims Act can be a financial boon for the federal government, meritless qui tam suits create enormous headaches. The government's decision to decline intervention in these suits often, but not always, results in a qui tam relator dismissing its case. Some relators, perhaps motivated by the FCA's private bounty, continue to press on with claims in the name of the government, despite the government's signal that the claim is not worth pursuing on its own. These suits are not just a plague on defendants, who face protracted litigation after being accused of fraud. They also seriously tax the government, both in the U.S. Department of Justiceand at the courts, whose resources are continually expended notwithstanding the DOJ's decision to decline intervention. The solution to this shared problem may be convincing the government to seek dismissal under a little-used FCA provision,[1] which received renewed relevance earlier this year after the leak of a DOJ memorandum from Michael Granston, director of the DOJ Civil Fraud Section.[2]

The Granston memo advised DOJ attorneys that, in tandem with their decisions to decline intervention in qui tam suits, they should consider proactively seeking dismissal under 31 U.S.C. § 3730(c)(2)(A). This section provides that the government may dismiss qui tam actions "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." As the Granston memo recognized, this provision has been invoked "sparingly" but remains an "important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent."

Since the release of the Granston memo, only a small number of cases have explored this form of dismissal, and the results have been mixed. These mixed results stem in large part from an unresolved circuit split between the Ninth and District of Columbia Circuits. For instance, consider two cases decided on the same day on opposite sides of the country. In Kentucky, one judge followed the D.C. Circuit standard and permitted dismissal because the government enjoys "unfettered discretion" when deciding to dismiss FCA cases; meanwhile, in California, another judge seemingly required the government to show good cause and denied dismissal.[3] In another case pending in Massachusetts, perhaps because of this uncertainty, the government invoked Section 3730(c)(2)(A) when moving to dismiss without actually relying on that ground for dismissal.[4]

Moreover, in South Carolina, the court in United States ex rel. Stovall v. Webster University[5] acknowledged a circuit split in authority but found dismissal appropriate under either legal standard. On the one hand, the court recognized that the "government's decision to dismiss [was] essentially 'unreviewable.'"[6] However, even under the stricter Ninth Circuit standard, the Webster University court agreed that the government's "interest in preserving scarce resources by avoiding the time and expense necessary to monitor this action" was sufficient to justify dismissal.

Most recently, the Mississippi federal court in United States ex rel. Vanderlan v. Jackson HMA LLC[7] took another approach that defendants might persuade other courts to follow: Stay the case until the government affirmatively decides whether to dismiss. There, after the government declined to intervene, the defendant moved to dismiss the qui tam action. Rather than rule on the motion, the court requested an update from the parties — including the government. After the government noted it was still deciding "whether to file a statement of interest or to seek dismissal of this case," the court stayed the case instead of ruling on the defendant's pending motion to dismiss, finding that it would be "imprudent" to do so if "the possibility that the Government may invoke § 3730(c)(2)(A)" was still present.[8]

Defendants facing FCA claims can glean several lessons from the Granston memo and the cases exploring Section 3730(c)(2)(A) dismissals. While FCA defendants may not be aware of a previously sealed qui tam action until after the government declines to intervene, defendants can still attempt to persuade the government that dismissal is in the government's best interests. Moreover, courts may be an ally of defendants in pressing the government to fully address the dismissal question before extensive briefing on Rule 12 motions is needed. With the assistance of experienced counsel, and before a qui tam relator presses forward with protracted litigation, defendants should seize on the opportunity to reduce their exposure to FCA claims by keeping these points in mind:

- Act early. The case for dismissal is strongest immediately after the government declines intervention. As a qui tam case proceeds into discovery, the government's interest in dismissing the case wanes, and the arguments against dismissal become stronger. Given that a defendant typically has not been served with the complaint by the time the government notifies the court of nonintervention, there is often a substantial period of time before a Rule 12 motion might be due. During that window, defendants may seek to formally request dismissal by the DOJ, using the Granston factors, well before any Rule 12 motion deadline.

- Request a stay. Once served with the complaint, consider moving for a stay of any Rule 12 deadline until the government has an opportunity to submit a statement of interest, or suggesting to the court that its resources would be best preserved if the government first weighs in on whether it will seek dismissal.

- Remember your two audiences. A defendant's motion to dismiss the relator's complaint is not just an opportunity to convince the judge that the relator failed to meet its pleading burden. This key pleading also presents an opportunity to advocate to the DOJ why the relator's complaint is more headache than it is worth. Perhaps the relator's weak facts could make bad law (at least, for the DOJ) by closing off a legal theory of recovery in future cases. Maybe the discovery needed to prove the elements of the case, such as falsity or materiality, would seriously tax government resources and personnel. The defendant may even have ongoing critical or sensitive contracts with the government. Whichever the factor, the filing of a Rule 12 motion could add more pressure on the government to decide to dismiss, and a court may have an incentive to save scarce judicial resources by informing the parties that it will not address a Rule 12 motion until the DOJ has indicated its decision on voluntary dismissal.

- Something is better than nothing. Consider advocating for partial dismissal. Dismissal may be especially appropriate for certain portions of claims, such as facts subject to a legal defense like the public disclosure bar.

After the government declines to intervene in a relator's qui tam action, defendants may find themselves frustrated with the continued tax on their resources by private litigants. The government too may share that same frustration. In the appropriate case, an application to the DOJ for Section 3730(c)(2)(A) dismissal, followed by a request to the court to stay Rule 12 considerations, may be the common solution for defendants, the government, and the courts.

Jeffrey A. Belkin is a partner and Michael J. Mortorano is a senior associate at Alston & Bird LLP.

[1] 31 U.S.C. § 3730(c)(2)(A).

[2] Michael D. Granston, Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (Jan. 10, 2018).

[3] Compare U.S. ex rel. Maldonado v. Ball Homes, LLC, No. 5:17-cv-00379, 2018 WL 3213614, at *4 (E.D. Ky. June 29, 2018) (recognizing circuit split, but granting dismissal under 31 U.S.C. § 3730(c)(2)(A) where court "concluded that the government has virtually unfettered discretion to dismiss a False Claims Act case"), with United States v. Acad. Mortg. Corp., No. 16-cv-02120, 2018 WL 3208157, at *3 (N.D. Cal. June 29, 2018) (denying government's motion to dismiss under 31 U.S.C. § 3730(c)(2)(A) where the government failed to previously intervene and "the complaint has not been fully investigated," and likening the "criteria for granting the Government's motion to dismiss … with the 'good cause' requirement"). In United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998), the Ninth Circuit adopted the lower court's analysis for dismissals under 31 U.S.C. § 3730(c)(2)(A): "'A two step analysis applies here to test the justification for dismissal: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose.' … If the government satisfies the two-step test, the burden switches to the relator 'to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.'"

[4] See Mot. to Dismiss Relator's Compl. at 2 n.2, United States v. Purdue Pharma, L.P., No. 1:16-cv-10947 (D. Mass. Aug. 24, 2018) (citing 31 U.S.C. § 3730(c)(2)(A) and noting that the action can be "dismissed in its entirety because [the government] has the unilateral right to dismiss this or any other qui tam action, even over the relator's objection"—but relying on other grounds for dismissal).

[5] No. 3:15-cv-03530, 2018 WL 3756888 (D.S.C. Aug. 8, 2018).

[6] Id. at *1-3 (quoting Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003)).

[7] No. 3:15-cv-00767, 2018 WL 4401712 (S.D. Miss. Sept. 14, 2018).

[8] Id. (noting "[s]uch a step [by the government] would substantively change the legal issues before the Court").