Attys React To DOJ's New Memo On FCA Dismissals

Law360, New York (January 25, 2018, 7:18 PM EST) -- A newly unveiled U.S. Department of Justice memo discusses circumstances in which the government should consider dismissing False Claims Act cases brought by whistleblowers.

Here, attorneys offer their perspectives on the significance of the memo, which was authored by Michael Granston, director of the DOJ's civil fraud section.

Tenley E. Armstrong, Lightfoot Franklin & White LLC

“This memo is welcome news to the defense bar and industries that are increasingly the targets of FCA prosecutions. It provides a roadmap for how savvy defense lawyers can steer motion practice and discovery in nonintervenor FCA cases to make a case unattractive to the DOJ. Preserving good case law on the FCA and conserving the DOJ’s valuable resources necessitates a reminder to prosecutors to pare down nonintervenor qui tam cases and a shot across the bow to the relators’ bar to self-police in selecting claims.”

Nic Bourtin, Sullivan & Cromwell LLP

“An FCA relator stands in the shoes of the government. For this reason, the FCA requires the DOJ to determine not only whether to intervene in an FCA case, but whether the case should proceed at all. The DOJ’s memo reaffirms what should have been obvious, but perhaps was not being emphasized sufficiently by DOJ lawyers: Frivolous qui tam lawsuits are in no one’s interest — not the defendants, whose shareholders must foot the bill to defend baseless lawsuits; not the courts, whose limited resources are

further strained; and not the government, whose own resources are wasted and whose policies and programs may be impeded."

George B. Breen, Epstein Becker Green

"What ultimate import this memo will have — as measured through affirmative efforts to seek dismissal of FCA cases — remains to be seen. But defendants in FCA actions ought to actively be promoting arguments to government counsel — in the right circumstances — that not only does the matter not merit intervention, the interests of justice calls for the proper exercise of authority: case dismissal."

Edgar Bueno, Morris Manning & Martin LLP

"This is a welcome policy change, but there won't be an immediate seismic change. The DOJ's civil fraud section doesn't do things quickly when it comes to policy. There's likely a pipeline of cases that may be handled under previous guidelines. The most dramatic effect will be on local offices handling cases on a daily basis. This will give the assistant U.S. attorney the ability to move to dismiss weak cases so they don't burden caseloads; they will be able to devote more time to higher-priority cases."

Justin Chiarodo, Blank Rome LLP

"I would manage expectations about the memo's impact — it largely reflects a restatement of longstanding considerations regarding FCA dismissals. This is more about quality control and protecting against adverse decisions post-Escobar than reflecting a sea change in policy. The timing is also interesting, given that over a billion dollars in FCA jury verdicts have been overturned in recent

months. These decisions can impact the DOJ's ability to successfully pursue False Claims Act recoveries. Make no mistake, the DOJ does not want to deter whistleblowers coming forward; to the contrary, statistics over the last decade confirm qui tam relators remain the key engine behind these cases."

Jeff Coopersmith, Davis Wright Tremaine LLP

"The DOJ's memo encouraging government motions to dismiss FCA cases is potentially a very significant development. In the past, the DOJ has moved to dismiss only rarely and seemed content to let relators proceed after declinations. Particularly in cases where the defense persuades the DOJ not to intervene, it is often frustrating to have to explain to clients why that does not end the case. Going forward, defense counsel will want to use the factors identified in the memo to urge the government to seek dismissal of the case at the earliest possible time. If possible, defense counsel will want to urge the government to move for dismissal at the time of declination, or otherwise after the government's declination is disclosed, or later based on developments in discovery."

Matt Curley, Bass Berry & Sims PLC

"Where this memo may have its most significant impact is in cases where the DOJ has concerns about the consequences flowing from the failure of the allegations in a declined qui tam to meet Escobar's demanding materiality standard. While the body of case law applying Escobar continues to develop, look for the DOJ to use its authority to head-off possible unfavorable decisions on the issue of materiality."

Justin Danilewitz, Saul Ewing Arnstein & Lehr LLP

"The memo's sixth factor — 'preserving government resources' — may well result in the dismissal of some meritorious FCA claims simply because the DOJ views the opportunity cost of not dismissing as too high, in comparison to other, more worthy qui tam cases. This could undercut plaintiffs even in otherwise meritorious cases."

John Dodds, Morgan Lewis & Bockius LLP

“The government has always had the legal authority to seek dismissals, but has rarely exercised that right. Because of the continuing uptick in the number of filed cases, the DOJ is now directing prosecutors to actively use that authority by taking a close look at the filed cases and seeking dismissal of cases that are meritless, drain government resources or present risks for the government. This may encourage more care by relators and their counsel in choosing what cases to file, but its real effect won’t be known until we see how actively prosecutors execute this directive.”

Glen Donath, Clifford Chance US LLP

"While time will tell whether the memo drives the DOJ to move to dismiss a greater number of qui tam complaints, the very fact that the memo was issued is highly significant. Historically, the DOJ has been very reluctant to move to dismiss even frivolous complaints under the belief that every relator is entitled to its day in court. However, the memo suggests that when the government receives a qui tam complaint that lacks merit, the proper recourse is not simply to decline to intervene but rather to move to dismiss the complaint.

At a minimum, this memo will provide defense counsel with stronger arguments in favor of advocating outright dismissal of frivolous qui tam actions at a much earlier stage of litigation."

Laurence J. Freedman, Mintz Levin Cohn Ferris Glovsky and Popeo PC

"This policy memo is a remarkable and significant development. The qui tam provisions in many respects have become unmoored from the singular purpose of the provisions — to identify fraud unknown to the U.S. Recognizing DOJ's authority to dismiss cases is essential to serving this purpose. DOJ has been judicious in its use of this power to a fault, to its detriment, and to the extreme detriment of companies accused of fraud by relators when the U.S. knows it has not been defrauded. There is no prior written policy on this issue, and now this memo rightly requests that all federal attorneys handling qui tam matters should consider seeking dismissals, concurrent with recommendations to decline matters, and it sets out a deeply thoughtful framework of seven factors that should drive that decision."

Asher Funk, Polsinelli PC

"The proliferation of qui tam cases has burdened health care providers, who are sometimes forced to defend actions that are meritless, opportunistic or attempt to convert innocent mistakes into fraud actions. It is refreshing to see the DOJ seriously consider its gatekeeper role and provide a framework for deciding when to dismiss cases. The DOJ's admission that relators voluntarily dismissing hundreds of cases has reduced the number of instances where the DOJ would otherwise need to exercise its authority is also interesting, as it shows the DOJ's power to curtail potentially weak qui tam cases though declination and pointed communication with relators, even without having to formally seek dismissal."

Terance Gonsalves, Steptoe & Johnson LLP

"The DOJ memo won't stem the ever growing tide of qui tam complaints filed each year, but it could lower the number of qui tam lawsuits companies must defend. In particular, companies may face fewer qui tam complaints that lack any merit or those brought by parasitic relators. But more likely, the DOJ may very well continue to seek dismissal only in rare circumstances, and the memo will have little impact on the overall number of qui tam complaints companies must face each year."

Reuben Guttman, Guttman Buschner & Brooks PLLC

"While the memo does little more than remind line attorneys of the existing provisions of the law, the memo's implicit concern that the filing of 600 new cases annually may be taxing the DOJ's resources does not seem reasoned. Spread over 93 U.S. attorneys' offices, this equates to less than seven new cases per office each year. To the extent that success under the statute is generating more cases to investigate, the answer is to use monies generated from recoveries to place more government resources into case investigation. Cases should be diligently investigated, agencies should fully cooperate with relators counsel in nonintervened matters, and yes — every now and then — there may be a case that is so completely without basis that the government should seek dismissal."

Frederick Herold, Dechert LLP

“It remains to be seen exactly where the DOJ will draw the line between not intervening and moving to dismiss litigation outright. We are optimistic that the Granston Memo will encourage prosecutors to more actively dismiss cases that lack merit, which will save enormous litigation and discovery costs for government contractors and agencies and ease the burden on courts inundated with FCA litigation. We are hopeful that this guidance, coupled with the Supreme Court’s 2016 decision in Escobar and other developments in the case law, may put a damper on the explosion of FCA litigation that we’ve seen over the two past decades."

Philip Hilder, Hilder & Associates PC

“This decision chips away power from whistleblowers. Though the DOJ has the authority to dismiss, the government traditionally allows whistleblowers to fully prosecute the case if the government doesn’t intervene. If a case is not meritorious, the court will dismiss. Dismissal of a case early, without a full investigation, harms a powerful tool that citizens have to root out fraud. I am afraid the DOJ may be nixing worthy cases before they fully develop."

Stephen L. Hill Jr., Dentons

"The DOJ's effort to get consistent policy and movement toward dismissal, when merited, is a step in the right direction. However, there should also be a policy that encourages efforts, including communications with defense counsel, that focus on collecting information that could be used to conclude declination and dismissal. The relator and agency representatives are not going to provide that information, and if the purpose is to save resources by

avoiding meritless actions, every rock should be turned over. Defense counsel have and will provide relevant information if only asked."

Thomas C. Hill, Pillsbury Winthrop Shaw Pittman LLP

“As a defense lawyer who increasingly has to defend clients against baseless and even frivolous qui tam actions, this new DOJ policy is certainly welcomed. Too often we have seen the DOJ decline to intervene but not seek dismissal, requiring costly efforts on behalf of clients to get nonmeritorious cases dismissed. Giving the DOJ more flexibility and guidance to seek dismissal of these cases is a real positive. In particular, the first two factors that DOJ lawyers are now directed to consider in deciding whether to seek dismissal — curbing meritless qui tams and preventing parasitic or opportunistic qui tam actions — have been of continuing concern in our FCA practice."

Alex Hontos, Dorsey & Whitney LLP

"The memo is significant, breathing life into a lesser-known power of the government under the FCA — the dismissal of an ill-founded qui tam over the objection of the relator. Historically, if the government declined to intervene, it let the case continue. This let many cases of dubious merit make it to judicial decision, the vast majority of which were dismissed before trial. The DOJ thus faced a body of difficult FCA precedent, which has hurt the DOJ's efforts to intervene, and prevail, in what it believes are meritorious fraud cases."

Cleveland Lawrence III, Sanford Heisler Sharp LLP

"Given the DOJ's limited resources, the government cannot join every meritorious whistleblower lawsuit. So it is extremely important to preserve whistleblowers' rights to pursue their lawsuits with private counsel if the government declines to join. However, it is also extremely important that the DOJ preserve its resources by seeking dismissal of whistleblower cases when appropriate, especially when a meritless case will create bad law, which is rare. Obviously, the DOJ cannot wield this power indiscriminately. But since the FCA guarantees relators the right to oppose dismissal of their complaints, I am cautiously optimistic that this memo reflects the DOJ's willingness to have open, transparent dialogue with relators and their counsel regarding its view of our qui tam lawsuits, which is essential to the public-private partnership the FCA promotes."

Michael Licker, Foley Hoag LLP

"The memo marks a clear DOJ policy shift. While the DOJ had previously been content in most declined cases to permit a relator to go forward, it now appears that it will take a more active role in policing claims. This is not a surprising shift given the increasing number of whistleblower suits. The government is likely attempting to address the risk of a court creating bad precedent for the government in meritless cases in which the government does not intervene. If this new policy is acted upon, it will be a big victory for FCA defendants facing meritless claims and will also cause relators to think twice before investing resources in questionable claims."

Craig Margolis, Vinson & Elkins LLP

"I frankly don't think that defense counsel should hold their breath awaiting DOJ motions to dismiss relator qui tam cases. While it's heartening to see the DOJ recognize that relator-initiated cases can be frivolous and harmful to the government's interests, the vast majority of DOJ recoveries still stem from whistleblower cases. At the risk of being cynical, it is highly doubtful that the DOJ will bite too firmly on the hands that feed it. But, ultimately, the stats will show whether 2018 will be the year the government gets serious about kicking worthless cases."

Brian J. Markovitz, Joseph Greenwald & Laake PA

"This is a very disappointing development. The process unfortunately could lend itself to political influence, which should not be what the Justice Department is about."

David Marshall, Katz Marshall & Banks LLP

"What concerns me is that the memo effectively directs DOJ lawyers to do more to restrict the rights of qui tam relators to prosecute their actions in the manner that the FCA specifically allows after a government decision not to intervene. The rise in qui tam actions is a good thing, as it means individuals are stepping forward to help taxpayers recover money lost to fraud. This does not justify the DOJ's more frequent use of what has historically been seen as an extraordinary measure that blocks whistleblowers in

these efforts. As the memo acknowledges, the qui tam bar already uses voluntary dismissal to significantly limit the number of meritless cases proceeding beyond a decision not to intervene."

Robert J. McCully, Shook Hardy & Bacon LLP

“It is highly significant that the DOJ recognizes that there are meritless and parasitic qui tam actions included in the record numbers of new FCA cases filed, as well as cases that the agencies do not want to see pursued because they run contrary to the agency’s administration of its programs or involve alleged false statements of no materiality. It is even more significant that the DOJ is reclaiming for itself the role of gatekeeper in protecting the FCA's purpose, which has always been the recovery of damages when the government has suffered real fraud, as opposed to the all-too-common current situation, where settlements are reached simply to avoid extraordinary litigation and discovery costs. The stated policy is important — putting the policy into action will be the more significant event.”

Jason Mehta, Bradley Arant Boult Cummings LLP

"In many ways, the DOJ’s new guidance reflects the reality of the exploding docket of qui tam lawsuits. The memorandum offers practical but longstanding suggestions for attorneys on when to dismiss whistleblower lawsuits. By issuing this guidance, the DOJ is not just affirming its core principles, but also sending a warning signal to potentially frivolous whistleblowers. In the end, time will tell the practical import of the guidance, but the message is clear: The real party in interest in these lawsuits is the U.S., and as such, the U.S. will move to dismiss cases that it perceives not to be in its best interest."

Daniel R. Miller, Berger & Montague PC

“This memo represents a shift in DOJ policy. The memo notes that the department has utilized its dismissal powers ‘sparingly’ in the past, while also noting the significant uptick in FCA filings over the past several years. These two observations are followed by a list of factors to be considered when considering dismissal. Putting these three observations together, I believe the memo represents an implied suggestion to use the dismissal option less sparingly."

Stephen A. Miller, Cozen O’Connor

"This memo should spur prosecutors to take decisive action on qui tam complaints. When their investigation reveals that a complaint lacks merit, the memo encourages prosecutors to shut down the complaint rather than throw up their hands and allow the relator to extract an in terrorem settlement from a corporation."

Gabriel M. Nugent, Barclay Damon LLP

"The memo signals a clear policy shift by the DOJ. Although the memo recommends case-by-case review involving seven factors, it will drive wider use of the DOJ’s dismissal powers. FCA defense counsel will now make the seven-factor dismissal analysis standard for nonintervention presentations, raising the stakes for qui tam relators and their counsel, who will now face the prospect of outright dismissal. As dismissals increase, this shift may discourage relators with marginal or novel claims from seeking federal intervention, reducing the number of federal cases filed, perhaps driving relators to state attorneys general for intervention requests."

Jason R. Parish, Buchanan Ingersoll & Rooney PC

“At long last, the DOJ is waking up to the reality that a large number of qui tam cases lack merit. These cases clog the courts, waste taxpayer dollars and often conflict with the government’s interests. The DOJ should move quickly to implement these standards and stem the flow of meritless qui tam litigation.”

Lesley Reynolds, Norton Rose Fulbright US LLP

“The DOJ guidance comes at a time when companies are facing increasing amounts of litigation being pursued by relators in declined qui tam cases. It remains to be seen, however, how often the DOJ will utilize this policy, particularly in light of the continued increasing FCA recoveries.”

Robert T. Rhoad, Sheppard Mullin Richter & Hampton LLP

"The memo is a welcome shift in policy, but begs the larger question of whether the previous policy was not to dismiss unmeritorious FCA cases and, if so, why not? Perhaps that’s water under the bridge. To be sure, it is a move in the right direction and promises to inure to the mutual benefit of both taxpayers and entities subject to the FCA. Whether this welcome shift in policy actually leads to more dismissals in FCA cases will ultimately be borne out by the actual statistics. In other words, the proof will be in the pudding."

Anne Robinson, Latham & Watkins LLP

"The memo provides FCA defendants a new roadmap for DOJ presentations: Defendants can use the seven factors to urge the DOJ to not only decline intervention but seek dismissal. If the DOJ does begin using its dismissal power regularly, government contractors may be spared the high costs of litigating — and sometimes settling — meritless qui tam suits. The government might now dismiss cases when a contractor has already disclosed the conduct to a government agency — just one example of a qui tam suit that does not provide new and meaningful information to the government, yet is not barred by the narrow first-to-file and public disclosure bars."

Harry Sandick, Patterson Belknap Webb & Tyler LLP

"The directive is a positive step that could deter qui tam relators from filing meritless FCA lawsuits, which waste the resources of the government and the companies that do business with the government. We are seeing a significant increase in FCA lawsuits, and yet interventions have not increased. Although the voluntary dismissal of actions will be rare, when the DOJ looks at a case and concludes that it lacks merit, it should not hesitate to do justice and move for its dismissal."

Mark J. Silberman, Benesch Friedlander Coplan & Aronoff LLP

"Addressing this issue is long overdue. The unwillingness of the government to dismiss meritless cases brought in its name has long been the bane of those defending baseless allegations. If actually implemented, this could return the FCA into being a proper tool to remedy fraud against the government and away from being a 'lottery-ticket' retirement plan for opportunistic attorneys and all-too-eager, would-be relators. Dismissing unfounded cases would serve the interest of the government and proper whistleblowers. One thing that must be incorporated is a formalized process by which those subjected to ongoing meritless FCA actions can petition the government to perform this evaluation. The most destructive cases are not those never brought — it is those cases that should never have proceeded and are allowed to linger."

Jeremy Sternberg, Holland & Knight LLP

“The memo provides a framework to drive the DOJ’s evaluation of dismissals of qui tams. Importantly, many assistant U.S. attorneys handling qui tams have historically not had a level of comfort in even considering such a dismissal. In fact, many have instinctively felt that there was little reason to dismiss a qui tam because the relator might just achieve a resolution that would benefit the government. The memo now provides a useful rubric by which defendants can have a conversation with the government about possible dismissal. The memo also recognizes that there is a growing body of nonintervened qui tams that are not only weak, but have started to create bad case law that may hinder the government’s mission of enforcing the FCA.”

Cristian Stevens, Armstrong Teasdale LLP

"This memo essentially expresses the DOJ's desire to see more FCA qui tam actions dismissed by the government, or by relators after discussions with the government, and for the dismissals to be made earlier in the process. The primary significance of the memo is that DOJ attorneys will dismiss more of these cases. The secondary significance is that this will be a message to plaintiffs' counsel that the DOJ is more closely scrutinizing FCA cases, is less likely to intervene and is more likely to dismiss cases of questionable merit. This will have the indirect result of fewer FCA cases filed by relators, particularly when they are of marginal merit."

Shayne Stevenson, Hagens Berman Sobol Shapiro LLP

"The DOJ should not break from its traditional approach. As in every area of law, there are outlier cases that do not belong in federal court. And courts know what to do with those cases. Greater use of dismissals, and the threat of dismissals, will deter whistleblowers and lead to fewer fraud recoveries for taxpayers. Let's not forget that several billion dollars have been recovered in FCA cases that the DOJ sometimes treated with skepticism and declined to take on. The whistleblowers in those cases marched ahead without the government forcing them to dismiss because of this disagreement on the merits. This is as Congress intends."

David Wilson, Thompson Hine LLP

"The memo is a welcome development for companies who have faced a rising tide of FCA cases in recent years, some of which have little or no merit. The principles laid out in the memo should enable the DOJ to allocate its resources more effectively and, if followed, have the potential to save companies from expending substantial resources defending against frivolous cases. The rational guidance in the memo has the potential to weed out cases where the DOJ sees no merit but relators put companies through expensive and distracting discovery and hold them up for nuisance value settlements. No one is saying that the government and relators should not bring cases where warranted by the facts and the law."

Jesse Witten, Drinker Biddle & Reath LLP

“The memo is a long-overdue exercise of good government. While many qui tam actions have merit, others are frivolous or are filed for improper reasons. The memo does not explicitly encourage DOJ lawyers to dismiss qui tam actions, but that is the obvious implication. The Trinity Industries Inc. case illustrates why the memo was necessary. In Trinity, the U.S. Department of Transportation provided a statement that the relator’s claims were unfounded and that the defendant was entitled to the payments it received. Nonetheless, the district court allowed the case to proceed and the relator obtained a $663 million judgment. The Fifth Circuit reversed, relying on the DOT statement. It would have been far better if the government had dismissed the case at the outset."

John Zach, Boies Schiller Flexner LLP

"The memo confirms and expands upon prior rumblings that the DOJ is seeking to more aggressively exercise its ability to cull FCA cases it views as meritless. The memo abandons the DOJ's prior laissez-faire approach and instead instructs prosecutors to stand as emboldened gatekeepers. This raises significant hurdles for plaintiffs bringing FCA claims — they must now convince the DOJ of the bona fides of their case at the outset. The memo further states that prosecutors should advise plaintiffs when dismissal is being considered, so plaintiffs may find themselves, in effect, trying to prove up their case to the DOJ just to get out of the gate. For defendant businesses, this is welcome news and may signal a reeling in of FCA cases going forward."

--Editing by Alyssa Miller.