On the WLF Legal Pulse

Timely commentary from WLF's blog

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

April 22, 2019

Does DOJ's *Qui Tam* Dismissal Policy Go Far Enough?

by Stephen A. Wood

The False Claims Act confers upon the U.S. Department of Justice the express authority to seek dismissal of cases brought under the *qui tam* provisions of the Act. Historically, the Department has exercised its dismissal prerogative exceedingly rarely, usually when the *qui tam* action disserved the DOJ's or the affected agency's interests in a significant way. In 2018, the DOJ adopted a policy on dismissal of *qui tam* cases that attempts to standardize the use of this authority across the Department, identifying specific criteria by which to evaluate cases for dismissal. These criteria by and large involve various circumstances that threaten or at least challenge government interests in some way. In light of the significant numbers of *qui tam* cases that fail to make it past summary judgment, however, and the burdens associated with those cases, borne not just by federal agencies, but other involved parties and the courts, the DOJ should do more to seek dismissal of cases that lack merit. In this sense, the DOJ's policy on dismissals, although a step in the right direction, falls short of fostering a gatekeeping function that serves interests beyond those of the DOJ and other executive agencies. A look at a recent example of the DOJ's failure to pursue dismissal in a case where the evidence reflected lack of merit illustrates the costs of failing to dismiss and should inspire a new, more aggressive approach to the use of this authority.

The Department's implementation of this policy has resulted in a modest uptick in dismissal motions. Those who follow developments in this area are no doubt aware that in some instances courts have denied these motions, questioning, for example, the thoroughness of the government's investigations and even its motives. These decisions have triggered reflection and coverage by legal commentators and reporters. *See, e.g.*, https://wlflegalpulse.com/2019/04/09/governments-authority-to-unilaterally-dismiss-qui-tam-fraud-suit-faces-court-test/. At the heart of these disputes is the particular legal standard by which these motions should be decided. While a highly deferential standard seems most consistent with the statute and best serves the DOJ's role as gatekeeper, whatever the outcome of these disputes, the DOJ can and always should make a clear and factually supported case that its basis is rational and not arbitrary.

The Granston Memo—Justice Department as Enforcement Gatekeeper

In January 2018, word began to circulate that the Justice Department had adopted a new internal policy set forth in a memorandum pertaining to *qui tam* cases. Named after the apparent author of the memorandum, Michael Granston, Director of the Commercial Litigation Branch, Fraud Section, the "Granston Memo" set forth guidance on government dismissal of *qui tam* cases under

---

Stephen A. Wood is a Principal with Chuhak & Tecson, P.C. in the firm's Chicago, IL office. He is the *WLF Legal Pulse*'s Featured Expert Contributor on the False Claims Act.

its statutory authority. The news was welcome by members of the defense bar and those industries most often targeted by *qui tam* relators and their counsel. And it seemed long overdue. Inasmuch as the vast majority of whistleblower-initiated, non-intervened cases never make it past summary judgment, suggesting statutory incentives were causing large numbers of nonmeritorious cases to be filed, a proactive government dismissal strategy seemed in the interest of all stakeholders—the executive branch, the judiciary, contractors, and even relators.

The relevant provision of the False Claims Act permitting the government to dismiss any *qui tam* action is brief: "The Government may dismiss the action 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." 31 U.S.C. § 3730 (c)(2)(A). The statute contains no particular guidance regarding when or why dismissal may be appropriate. Similarly, the statute fails to elaborate on the purpose of the hearing to be afforded the relator, or what burden the government must meet to obtain an order of dismissal.

The Granston Memo was intended as a confidential internal DOJ policy memorandum. The subject line was "Factors For Evaluating Dismissal Pursuant to 31 U.S.C. § 3730 (c)(2)(A)." The Memo sets forth seven criteria that, alone or in combination, may warrant dismissal:

1. Curbing meritless *qui tams*
2. Preventing parasitic or opportunistic *qui tam* actions
3. Preventing interference with agency policies and programs
4. Controlling litigation brought on behalf of the U.S.
5. Safeguarding classified information and national security interests
6. Preserving government resources
7. Addressing egregious procedural errors

The Memo notes that the government's dismissal authority serves to "advance government interests, preserve limited resources, and avoid adverse precedent." Even in non-intervened cases, the government expends significant resources monitoring case progress, responding to inquiries and discovery, and even participating when necessary to protect its interests. The government, the Granston Memo continues, stands as a gatekeeper safeguarding the False Claims Act. Thus, the Memo serves to provide some degree of consistency across the DOJ regarding the evaluation of *qui tam* cases for possible dismissal. Today, the policy and criteria set forth in the Memo have been incorporated into the Justice Manual (formerly the U.S. Attorneys' Manual) at § 4-4.111.

A recurring theme of the Memo is the protection of the government's interests and its ability to use the False Claims Act to police fraud on the federal government and to ensure that relators pursuing claims on their own do not erode the Act's utility as an anti-fraud weapon. What is missing from the Memo is the concept that as gatekeeper the DOJ may have a larger role to play. That is, it may not only serve to protect the executive branch from waste and needless burden, but the DOJ may perform the same function for society more generally. For meritless *qui tam* actions burden not only federal agencies, but everyone else they touch, including, most significantly, the defendants named in them. The DOJ thus needs to be more proactive, invoking § 3730(c)(2)(A), even in the later stages of litigation if necessary, to eliminate meritless claims from the court system, not only out of self-interest, but to serve a broader, welfare-maximizing gatekeeping mandate. A recent example out of the Fifth Circuit offers an object lesson in disastrous consequences caused by a passive approach.

United States ex rel. Harman v. Trinity Industries Inc.

United States ex rel. Harman v. Trinity Industries Inc., 872 F.3d 645 (5th Cir. 2017), is a rather extreme illustration of the effect of the government's failure to take action in the face of clear evidence of a lack of merit in a *qui tam* case. In *Harman*, the relator brought an action against the defendant-manufacturer of highway guardrail systems, claiming that the defendant had altered the design of its guardrail systems without approval from the relevant federal regulatory authority. These redesigned guardrails were installed throughout the country and were allegedly responsible for a number of accidents. Ten months after filing the action under seal, the government declined to intervene. A few months before trial, the Justice Department, responding to a *Touhy* request for deposition testimony of the regulatory agency, produced a memorandum from the agency stating that the redesigned guardrails remained eligible for reimbursement throughout the time period relevant to the litigation, despite the relator's claims of fraud that were well known to the government. With this memo, the Justice Department provided the following statement: "DOT believes that this should obviate the need for any sworn testimony from any government employees. If the parties disagree, please let me know at your earliest convenience." *Id.* at 650.

Based on this evidence, the defendant moved for summary judgment, which was denied by the district court "from the bench." The case proceeded to a trial that the district court cut short by way of mistrial for "gamesmanship and inappropriate conduct by both parties." Before the commencement of the retrial, the defendant petitioned the Fifth Circuit for a writ of mandamus. Although the writ was denied, the Court of Appeals issued a rather extraordinary admonition to the trial court:

> This court is concerned that the trial court, despite numerous timely filings and motions by the defendant, has never issued a reasoned ruling rejecting the defendant's motions for judgment as a matter of law. On its face, [Federal Highway Administration's] authoritative June 17, 2014 letter seems to compel the conclusion that FHWA, after due consideration of all the facts, found the defendant's product sufficiently compliant with federal safety standards and therefore fully eligible, in the past, present and future, for federal reimbursement claims. While we are not prepared to make the findings required to compel certification for interlocutory review by mandamus, a course that seems prudent, *a strong argument can be made that the defendant's actions were neither material nor were any false claims based on false certifications presented to the government*.

Harman, 872 F.3d at 650-51 (emphasis added).

Despite this extraordinary warning, the district court proceeded to a second trial of the claims which resulted in a jury verdict for the relator. Judgment was entered in favor of the relator/government in the amount of $663,360,750 consisting of damages trebled by operation of law, statutory penalties, and $19,012,865 in attorney's fees and costs. Publicity surrounding the verdict triggered inquiries from state attorneys general leading the federal regulator to seek independent expert testing of the guardrail design. This testing ultimately confirmed the consistency of the design, supporting the regulator's approval of reimbursement.

On appeal, the defendant argued that the relator failed to carry his burden under every element of a FCA violation. The court of appeals carefully weighed the arguments of both parties

on issues of falsity and scienter before addressing the dispositive element of materiality. In reversing the lower court's judgment and granting judgment as a matter of law for the defendant, the court of appeals noted that "[m]ateriality under the FCA has been a topic of increasing scrutiny since the Supreme Court's decision in [*Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016)]." *Id.* at 660. The court observed further that while the relator attempted to argue that defendant had kept the federal agency in the dark about certain accidents and other information bearing on the safety of the guardrail design, the Fifth Circuit rejected this as contrary to the unrebutted evidence:

> Here, the relevant inquiry is not what Trinity disclosed, but what FHWA knew at the time it issued the June 17, 2014 memorandum, no matter the source. By that point, FHWA had seen Harman's extensive PowerPoint presentation, FHWA officials had taken measurements and photographed the ET-Plus head units that Harman had presented to them, and FHWA had access to the allegations made in Harman's complaint and reiterated in the *Touhy* request. Even if Trinity deliberately withheld information from FHWA, it does not mean that the government's decision that the ET-Plus remained eligible for reimbursement was the product of ignorance—Harman's PowerPoint presentation and the allegations in his FCA suit informed FHWA of the 2005 changes. And still FHWA paid because it was not persuaded by the allegations.

Id. at 667. In conclusion the court of appeals stated that "[the jury's] determination of materiality cannot defy the contrary decision of the government, here said to be the victim, absent some reason to doubt the government's decision as genuine." *Id.* at 669. In a candid close to its analysis, the court noted that "the demands of materiality adjust tensions between singular private interests and those of government and cabin the greed that fuels it. As the interests of the government and relator diverge, this congressionally created enlistment of private enforcement is increasingly ill served." *Id.* at 669-670. The Fifth Circuit's acknowledgement that materiality is a necessary restraint on often unbridled ambitions of *qui tam* relators is a noteworthy outcome in itself.

***Harman's* Gatekeeping Takeaways**

Harman shines a harsh light on the government's performance as gatekeeper in *qui tam* cases. Prior to trial, the regulatory agency possessed all relevant information regarding the relator's claims and concluded there was no fraud, or at least, in the regulator's judgment, no material offense. In responding to the relator's *Touhy* requests, the Justice Department stated as much, although it took no formal steps to dismiss the case, perhaps believing the district court would take the appropriate action. Yet, the district court denied the defendant's motion for summary judgment, permitting the case to proceed to trial and an eventual $660 million verdict that in itself triggered additional, unnecessary regulatory scrutiny from the FHWA as well numerous states, scrutiny that consumed substantially more federal government resources.

The government's tepid response to the relator's *Touhy* request, indicating that the defendant's design complied with agency requirements, likely dispositive in the agency's view, without more, allowed the case to proceed to trial and beyond. Had the government invoked its § 3730(c)(2)(A) authority during discovery, supported by evidence that the claimed violations were not material, the outcome would almost surely have been different. Although the relator would have opposed the government's motion with many of the same arguments raised in opposition to the defendant's motion for summary judgment, the government's motion turned on an entirely different standard,

one that should have led to dismissal by the district court under prevailing authority. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001) (*en banc*) (The United States retains a unilateral authority to seek dismissal in declined *qui tam* actions "notwithstanding the objections of the person."). A pre-trial dismissal of the action would have spared the parties and the court the time and expense of not only a trial, but two trips to the court of appeals. It would also have saved the FHWA the cost of re-examining the defendant's conduct only to learn that the agency was correct in the first instance and there was no FCA violation.

In fact, it is entirely possible that *Harman* helped to precipitate the Granston Memo. Notably, the Memo cites the Fifth Circuit's opinion twice, first in the section concerned with preventing interference with agency policies and programs, and again in the concluding, "additional points" section of the Memo as an example of a circumstance where the government took action short of dismissal (issuing a declaration of immateriality) when for some reason the affected agency was opposed to dismissal. Regarding the latter point, there is no mention in the *Harman* opinion that the DOJ faced any internal agency obstacle to moving for dismissal. Curiously, the case is not cited in the discussion of the section on curbing meritless *qui tam* cases.

Yet, even if the policy-makers behind the Granston Memo were motivated in some degree by *Harman*, as an effort to establish department guidance aimed at avoiding such cases, the Memo comes up short. While avoidance of regulatory cost or waste of resources are worthy goals, they should not be the sole objectives of our public institutions charged with oversight of private enforcement. The chief goal should be to maximize public welfare. And if our public agencies are truly performing a civic service with respect to oversight of private enforcers, their efforts must transcend preservation of administrative resources or the avoidance of precedent unfavorable to the government.

But even if the government is expected to act first and foremost out of self-interest, it should have responded differently in *Harman*. Although the jury verdict and agency's re-examination of the defendant's design may not have been foreseeable at the time of the *Touhy* response, other costs surely were and a cost-avoiding regulator should have taken action to dismiss the case. For example, in nearly all declined cases, the government requests service of copies of all pleadings as well as copies of deposition transcripts, *see* 31 U.S.C. § 3730(c)(3), the obvious purpose of which is to permit the Department to monitor developments in the case. Monitoring informs efforts to mediate demands for discovery or trial testimony from the affected agency, enables the government to influence precedent, *see, e.g., United States ex rel. Spay v. CVS Caremark Corp.*, 913 F. Supp. 2d 125, 183 (E.D. Pa. 2012) (government filed a "statement of interest" in opposition to defendant's motion to dismiss declined *qui tam* complaint based on the public disclosure bar), and informs potential settlement discussions. And discovery of the government, always important in False Claims Act litigation, has taken on greater significance in light of the Supreme Court's pronouncements on materiality in *Escobar*, that information regarding the government's awareness of claimed violations and response thereto is potentially "strong evidence" of materiality. *See Escobar*, 136 S. Ct. at 2003. These monitoring efforts consume not insignificant resources at DOJ and at the affected agency as well.

Commentators have suggested that historically, the government rarely invokes its dismissal authority because it sees no reason to devote scarce resources to that function over affirmative enforcement. *See, e.g.*, David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. Rev. 1689,

1717 (2013). *Harman* demonstrates that this view can be quite shortsighted. Indeed, the DOJ should be encouraged to devote reasonable resources to screening *qui tam* cases on their merits, not merely to inform the department's intervention decision, but to determine, if reasonably possible, whether the litigation has a fair chance of surviving beyond the pleading stage. Admittedly, in some cases that determination may be difficult, and in those instances relators should be allowed to proceed if they so choose. Either way, it would almost surely help to foster a broader gatekeeping function if that goal were to be codified more explicitly in the False Claims Act itself.

Conclusion

As noted, historically, the DOJ has exercised its § 3730(c)(2)(A) authority sparingly. Perhaps there is an inherent bias against affirmative dismissals. Careers of professional public enforcers are made more on news of significant verdicts and settlements than on the number of dismissals obtained. And it may seem easier or less burdensome to leave responsibility for eliminating nonmeritorious cases to the judiciary. *See* Engstrom, *Public Regulation of Private Enforcement*, 107 NW. U. L. Rev. at 1704-05 (agencies may prefer active enforcement to passive dismissal where the latter task can be left to the judiciary). Too, dismissal efforts themselves may consume resources particularly to the extent relators object and oppose these efforts and courts demand proof that such dismissals are justified by more than government whim. *See, e.g., United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1147 (9th Cir. 1998) (government must show dismissal rationally related to legitimate government purpose).

Because these and other circumstances work against agency efforts at welfare-maximization, Congress ultimately may need to weigh in to clarify those circumstances where the government can or should seek dismissal. The government's dismissal authority is in need of clarification in any event because as drafted the provision has contributed to disagreement among the courts regarding the standard by which government motions to dismiss should be judged. *See id.; cf. Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) (government has "unfettered right" to dismiss *qui tam* action). Apart from that, Congress should consider some form of codification of the Granston dismissal criteria just as the current version of § 3730(c)(2)(C) codifies circumstances under which the actions of the relator can be limited. Such a provision would identify circumstances justifying dismissal, noting that lack of merit is one such circumstance, and it would make clear that dismissal may be sought at any time in the litigation. Such legislation would surely underscore the government's dismissal prerogative as central to its gatekeeping function. The following revision to § 3730(c)(2)(A) is one such proposal that will advance this purpose (new text underlined, current text to be removed is shown in strikeout):

> **(A**) The Government may dismiss the action or any claim therein notwithstanding the objections of the person initiating the action if the Government determines at any time that the action or claim is without merit, that the action or claim is subject to a dispositive affirmative defense, that the action or claim interferes with government programs or risks disclosure of classified or sensitive information or creates a national security risk, or otherwise interferes with Government priorities, and the person initiating the action 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.~~

