Client Update

DOJ Creates Potential Opening for Early Dismissal of False Claims Act Suits

The Department of Justice (the "DOJ") recently released a memorandum outlining circumstances under which it may seek early dismissal of actions brought under the False Claims Act (the "FCA"). Companies subject to FCA litigation brought by relators may be able to use this memorandum to encourage the DOJ to shut down the litigation (ideally, at an early stage).

FCA suits can be brought by federal prosecutors or by relators, private individuals who file suits in the name of the government alleging that a company engaged in misconduct that resulted in false reimbursement claims submitted to the federal government. FCA claims filed by relators are placed under seal so the allegations are kept confidential while the DOJ conducts an investigation. The DOJ must decide whether to (i) intervene and take over the litigation—typically because the DOJ believes that the relator has a strong case and the DOJ wants to lead the litigation itself—or (ii) decline intervention, at which point the relator will lead the litigation. Historically, the DOJ's decision to decline intervention was often the death knell of the case—or at least was perceived as a signal that the case was weak. That, however, is often no longer the case. Over the last three years, relators acting alone in cases where the DOJ has not intervened have obtained settlements and judgments worth more than one billion dollars.

The DOJ memorandum aims to impose limitations on this flurry of nonintervention cases by encouraging prosecutors to act as FCA "gatekeepers." The DOJ has authority under some circumstances to petition the court to dismiss an FCA action. The memorandum explains that the DOJ may want to terminate nonintervention cases because they can impose significant burdens on the DOJ. Prosecutors may have to expend extensive resources monitoring the litigation and may have to become active participants as well, such as by responding to discovery requests. Additionally, these cases may result in negative precedent that impacts the DOJ's ability to pursue those FCA cases that it chooses to litigate.

The memorandum outlines multiple non-exhaustive factors which prosecutors may cite as a basis for dismissal:

- *The case is meritless*. Prosecutors may consider dismissal where the case is frivolous on its face because the allegations do not amount to an FCA violation. Prosecutors could reach a similar conclusion based on the results of their investigation. If prosecutors believe that a case is meritless but want to give the relator an opportunity to develop her case, the relator may be given a deadline to come forward with evidence to substantiate her claim. Failure to meet that deadline could result in dismissal.
- *The case is opportunistic*. An FCA action may be duplicative of a government investigation already underway and the relator's allegations may not substantially advance the government's investigation. If so, the relator would receive an unwarranted bounty at the government's expense.
- *The case interferes with government policies and programs*. An FCA action may interfere with important government policy objectives, such as distracting government personnel involved in environmental cleanup. Alternatively, a case might result in a critical government supplier exiting the relevant program or industry.
- *The case interferes with the DOJ's litigation objectives*. An FCA action may hinder the DOJ's litigation strategy for a variety of reasons, including (i) the case makes it more difficult to pursue related cases where the DOJ has intervened; (ii) the government is concerned about unfavorable precedent; or (iii) the relator's unwillingness to dismiss a nonintervened claim is hindering the government's ability to settle an intervened claim.
- *The case risks disclosure of classified information or compromising national security*. In some matters involving military or intelligence procurement contracts, an FCA action may pose an unacceptable risk of national security being compromised.
- *The case unnecessarily burdens government resources*. An FCA case may result in the government incurring far greater costs (*e.g.*, monitoring or participating in the litigation) than the government expects to recover.
- *The relator committed egregious misconduct*. The relator may be acting in a highly inappropriate manner, such as by interfering with the government's ability to investigate the matter or by failing to satisfy basic procedural requirements.

Prosecutors can also take steps short of seeking full dismissal of a relator's case. Prosecutors may seek dismissal of some defendants or claims. Alternatively, prosecutors can take a pro-defendant position on a key issue in the case, *e.g.*, by submitting a declaration that any alleged falsity was immaterial (meaning that it would not have impacted the government's reimbursement decision).

HOW CAN DEFENSE COUNSEL USE THE DOJ MEMORANDUM TO THEIR ADVANTAGE?

While the DOJ memorandum is addressed to prosecutors, it is a highly valuable tool for defense counsel. In appropriate cases, defense counsel can use the criteria outlined in the memorandum as the basis for a submission to the DOJ explaining why the DOJ should end the case.

Although the DOJ memorandum lists a variety of factors that may lead to dismissal, counsel may want to focus on reasons that the FCA claim is meritless. Other arguments, standing alone, may be less compelling if the defendant does not show that the underlying claim is deficient. The memorandum unsurprisingly lists meritless allegations as the first factor for prosecutors to consider and references it several times. For example, counsel could argue:

- *The alleged false statements are true.* The FCA complaint may rest on a blatant mischaracterization of the company's practices. If the company can convince prosecutors that it did not make any false statements, then the foundation for the FCA action falls apart.
- *The alleged false statements are immaterial.* In 2016, the Supreme Court held that all FCA actions must satisfy a "rigorous" materiality standard. The plaintiff must prove that the allegedly false statements were "material," *i.e.*, that the government would not have provided reimbursement had it known that the company's statements were false. FCA defendants have subsequently won several high-profile cases on the materiality issue, either because they successfully established that government knew about the alleged falsities and continued providing reimbursement or because the company at most had committed paperwork violations that did not diminish the value of the goods or services that were reimbursed by the government.

There are several additional steps that defense counsel should take to maximize the likelihood of the DOJ being receptive to their arguments about early dismissal. Where possible, defense counsel should proactively cooperate with the government investigation, making relevant documents available for review and witnesses available for interview by government investigators. The DOJ is unlikely to invoke its discretionary authority to close down an FCA action if it believes that the company is being uncooperative or if it is possible that the company is still hiding something from government investigators. A submission is likely to be enhanced by a detailed description of the ways that the company cooperated with the government.

A strong compliance program is also a factor that company counsel should emphasize in a DOJ submission. Over the past decade, the DOJ and the Inspector General for the Department of Health and Human Services (which plays a major role in overseeing healthcare companies) have emphasized the importance of compliance programs that contain mechanisms for monitoring, auditing and investigating each business function (as well as third-party contractors) to identify potential activities that could lead to FCA violations. If a company convinces the DOJ that it takes compliance seriously and has a robust program in place (in practice, not just on paper), the DOJ may be more receptive to the argument that the company is a responsible actor and that litigation serves no remedial purpose. By contrast, if the DOJ does not see evidence of a strong compliance program, it may not be as willing to exercise discretionary authority to protect the company against an FCA claim.

Even if the DOJ rejects a company's request to terminate FCA litigation, a company's efforts may be time well spent. As the party in interest in every FCA case, the DOJ has the authority to

reach a settlement with the company (subject to court approval)—if necessary over the relator's objection. Even if the DOJ believes that the case does not warrant early dismissal, the DOJ may be receptive to a favorable early settlement. The DOJ typically settles FCA cases for double damages (twice the amount of false claims incurred) instead of treble damages that would be imposed after judgment. Moreover, as part of a negotiated settlement, the DOJ may be willing to limit the scope of liability, *e.g.*, to a particular time frame or a limited number of facilities. An early settlement not only avoids the risk of an outsized FCA judgment, but it also eliminates the extensive litigation costs and adverse publicity that result from protracted FCA litigation.

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Please do not hesitate to contact us with any questions.

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