Will DOJ Adopt Intervention-to-Dismiss Policy in Weak Whistleblower Cases?

According to statistics compiled by the Civil Rights Division of the U.S. Department of Justice (DOJ), whistleblower-initiated litigation is far more common now than it was three decades ago. A total of 30 *qui tam* False Claims Act (FCA) cases were brought in 1987; fast-forward nearly 30 years to 2016, when that same statistic leapt to more than 700.

If a statement by a DOJ official portends a policy change in the department when it comes to letting relators see their billing fr cases through, however, those numbers may someday experience a downward trend.

DOJ official makes noteworthy statement (but not via an official avenue)

Earlier this fall, the Health Care Compliance Institute held a meeting in Washington, D.C. at which Michael Granston, the direc of the commercial litigation branch of the fraud sector of the DOJ's civil division, announced a change in the government's approach to whistleblower cases. Granston said that when the government decides a *qui tam* False Claims Act case lacks me it will bring a motion to dismiss it.

Because that has not been the government's pattern (quite the contrary: the DOJ has tended to let relators proceed with case even when it declines to intervene), Granston's words are of interest to those in the healthcare industry, particularly those watching trends in billing fraud.

Overall, the government has decided to involve itself in roughly one-quarter of the whistleblower cases that allege fraudulent activity (this according to analysis by David Engstrom). And of those minority in which it has decided to intervene, the DOJ almost never files to dismiss. According to analysis by Brian McEvoy and Michael Besser of *Law 360*, the last decade has see nearly 5,500 *qui tam* cases initiated, but only 62 of them have included a motion to dismiss filed by the government.

Ridding the courts of tenuous FCA cases would require gov't tim and money

A direct explanation for why the government has not routinely sought to have less meritorious *qui tam* cases dismissed came nearly 10 years ago from Michael F. Hertz (a former DOJ official in the Civil Division). During the course of a 2008 judiciary hearing, he said that the DOJ "does not routinely devote the additional resources that would be needed to determine that a *qu tam* action is frivolous or move to dismiss on these grounds."

Understandably, the government would prefer to focus on False Claims Act cases that it believes are worthy of follow-through rather than devoting time and talent to quash frivolous or weak actions.

Qui tam litigation responsible for billions in judgments and settlements

Inarguably, False Claims Act cases brought by whistleblowers have done more than earned a paycheck for the relators themselves: they've also recouped billions for the government. The DOJ's fraud data reveals that over the past thirty years, around $38 billion has been awarded FCA plaintiffs in judgments and settlements. During that same time frame, whistleblowe have been given more than $6 billion for their efforts.

But the government bowing out of FCA litigation doesn't mean that litigation won't bear fruit. The DOJ's statistics on fraud reveal that over the last three decades, $600 million has moved from the defendants' side to the plaintiffs' in FCA cases brought by whistleblowers to which the government has not loaned its might. And those same cases have resulted in the government recouping nearly $1.6 billion.

Official's statement may signal future policy change for DOJ…bu it may not

It's clear that when it comes to uncovering billing fraud and recovering monies fraudulently drained from the government, the government has benefitted from letting whistleblower cases run their course, even when the relator is standing alone. So why announcement of a potential change in DOJ policy relating to these cases?

The rationale for a possible intervention-to-dismiss mindset is not clear, but if Granston's statement foreshadows a DOJ policy shift of the future (and this is questionable, in light of the fact that it was not made in the expected official capacity), large companies would likely be the ones celebrating the move. Even in FCA cases brought by whistleblowers that do not result in settlements or judgments, defendants (often companies) often must rack up substantial legal debt to mount a defense.