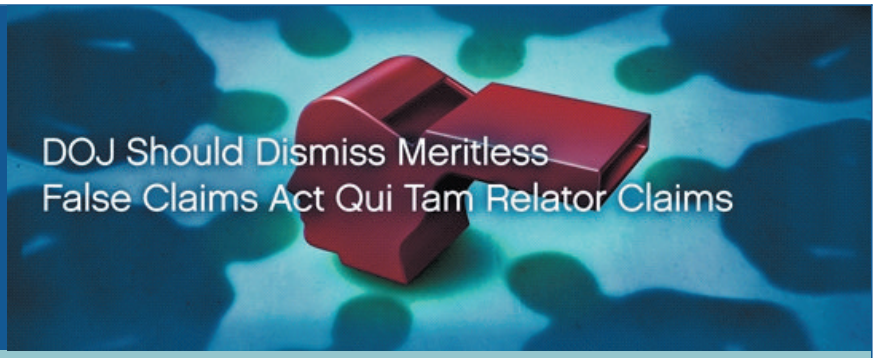
JONES DAY

COMMENTARY

NOVEMBER 2017



IN SHORT

The Situation: Despite recently acknowledging the significant burden imposed by frivolous False Claims Act claims and affirming its statutory grant of power to dismiss meritless claims brought by relators, DOJ has maintained that it has not formally changed its policy regarding FCA suits.

The Result: DOJ is speaking publicly about the government's power to dismiss frivolous FCA claims, indicating that it will look critically at the merits of qui tam relator claims and consider dismissing them.

Looking Ahead: DOJ should more frequently exercise its broad statutory authority to dismiss frivolous FCA qui tam relator claims. Lawyers and business leaders should consider looking for opportunities to coordinate defensive strategy with DOJ in an effort to invoke the government's power to dismiss qui tam relator claims.

The longtime director of the Department of Justice's Civil Fraud Section acknowledged, in a recent speech before the Health Care Compliance Association's ("HCCA") Health Care Enforcement Compliance Institute, the burden imposed by meritless False Claims Act ("FCA") qui tam claims, and he indicated that the Department of Justice ("DOJ") will look critically at qui tam cases to determine whether matters should be dismissed. He reportedly recognized that clearly meritless cases serve only to increase the costs for the government and health care providers as well as tax the resources of all parties involved.

While DOJ has since maintained that it has not shifted its policy regarding the dismissal of qui tam cases where the government has not intervened, the public acknowledgment of the need to dismiss frivolous cases is a notable move toward a potentially more appropriate use of the FCA.

Statutory Authority and Deference by Courts

DOJ's power to dismiss FCA relator claims brought by would-be "whistleblowers" is based in the statute's text. DOJ has the statutory authority to move to dismiss an action notwithstanding any objection from the qui tam relator, as long as the relator "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." DOJ retains its power to dismiss a qui tam action even when DOJ does not intervene in the action.

Moreover, courts afford extremely broad deference to DOJ's decision to dismiss a qui tam action. For example, in *Swift v. United States*, the court stated, "Reading § 3730(c)(2)(A) to give the government an unfettered right to dismiss an action is also consistent with the Federal Rules of Civil Procedure." In *U.S. ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.*, the court explained that "the decision to dismiss has been likened to a matter within the government's prosecutorial discretion in enforcing federal laws," and in *Ridenour v. Kaiser-Hill Co.*, the court held that the government need only show: "(1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose."

> An increase in such dismissals could result in significant savings for health care providers, government contractors, and other defendants.

DOJ's Approach

Notwithstanding the deference afforded to DOJ's decision to dismiss a qui tam case, DOJ rarely exercises this authority. Instead, as the litany of FCA qui tam cases demonstrates, DOJ generally has assumed a more passive approach by declining to intervene and allowing relators to proceed with litigation, often regardless of the case's merits. That practice has resulted in defendants being forced to litigate, and sometimes settle, meritless claims through costly litigation.

The recent reported statements from the HCCA's Health Care Enforcement Compliance Institute mark a significant development in DOJ's public discourse regarding its power to dismiss. The potential recognition that DOJ intends to take a critical look at the merits of qui tam cases hopefully indicates a shift by DOJ to more proactively dismiss meritless cases, and not simply decline to intervene.

An increase in such dismissals could result in significant savings for health care providers, government contractors, and other defendants who otherwise would be forced to defend FCA litigation that can often be lengthy and expensive. Certainly, a determination of frivolity will turn on fact-specific inquiries, the evidence proffered, and various applicable legal standards.

Yet, given DOJ's historical approach, industry would welcome any increase in the exercise of DOJ's discretion to dismiss frivolous qui tam cases.

THREE KEY TAKEAWAYS

1. Congress has given DOJ broad authority to dismiss meritless FCA qui tam cases, and DOJ has an obligation to exercise this authority.
2. Courts have consistently deferred to DOJ's decisions in these circumstances.
3. More dismissals of frivolous cases would likely result in significant savings for defendants.

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Robin Overby, an associate in the Washington Office, assisted in the preparation of this Commentary.

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