

Washington Legal Foundation Webinar Series:

New Directions of FCA Enforcement? Reading DOJ's Tea Leaves on Intervention, Dismissal & Agency Guidance

Live Webcast

Wednesday, April 25, 2018

1:00 p.m. — 2:00 p.m. EDT

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New Directions of FCA Enforcement

■ Introduction

- Three recent Justice Department initiatives in FCA enforcement
 - Granston Memo
 - Brand Memo
 - DOJ Opioid Initiative

The Granston Memo



U.S. Department of Justice
Civil Division

Washington, DC 20530

January 10, 2018

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MEMORANDUM

TO: Attorneys
Commercial Litigation Branch, Fraud Section

Assistant U.S. Attorneys Handling False Claims Act Cases
Offices of the U.S. Attorneys

FROM: Michael D. Granston *M D G*
Director
Commercial Litigation Branch, Fraud Section

SUBJECT: Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)

Introduction

Over the last several years, the Department has seen record increases in *qui tam* actions filed under the False Claims Act (FCA), 31 U.S.C. § 3729 et seq., with annual totals approaching or exceeding 600 new matters. Although the number of filings has increased substantially over time, the rate of intervention has remained relatively static. Even in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate. If the cases lack substantial merit, they can generate adverse decisions that affect the government's ability to enforce the FCA. Thus, when evaluating a recommendation to decline intervention in a *qui tam* action, attorneys should also consider whether the government's interests are served, in addition, by seeking dismissal pursuant to 31 U.S.C. § 3730(c)(2)(A).

Historically, the Department has utilized section 3730(c)(2)(A) sparingly, in large part because the statutory text makes clear that relators can proceed with certain *qui tam* actions following the government's declination. Moreover, a decision not to intervene in a particular case may be based on factors other than merit, particularly in light of the government's limited resources.

The Granston Memo: History of DOJ Dismissals of *Qui Tam* Cases

■ Legal Basis

■ Section 3730(c)(2)(A):

“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.”

- No statutory dismissal standard.
- No specific grounds for dismissal.

The Granston Memo: History of DOJ Dismissals of *Qui Tam* Cases (Cont'd.)

■ Two standards

- *US ex rel. Sequoia Orange* (9th Cir. 1998)
 - U.S. must identify a “valid government purpose” that is rationally related to dismissal.
- *Swift v. US* (D.C. Cir. 2003)
 - U.S. has an “unfettered right” to dismiss a *qui tam* action

■ Practical impediments

- *US ex rel. Ridenour* (10th Cir. 2005)

The Granston Memo

- **What does the Granston Memo really say?**
 - List of precedents
 - Not exhaustive list of cases or reasons to dismiss
 - Seven bases for dismissal —
 - Curbing Meritless *Qui Tams*
 - Preventing Parasitic or Opportunistic *Qui Tam* Actions
 - Preventing Interference with Agency Policies and Programs
 - Controlling Litigation Brought on Behalf of the United States
 - Safeguarding Classified Information and National Security Interests
 - Preserving Government Resources
 - Addressing Egregious Procedural Errors

The Granston Memo (*Cont'd.*)

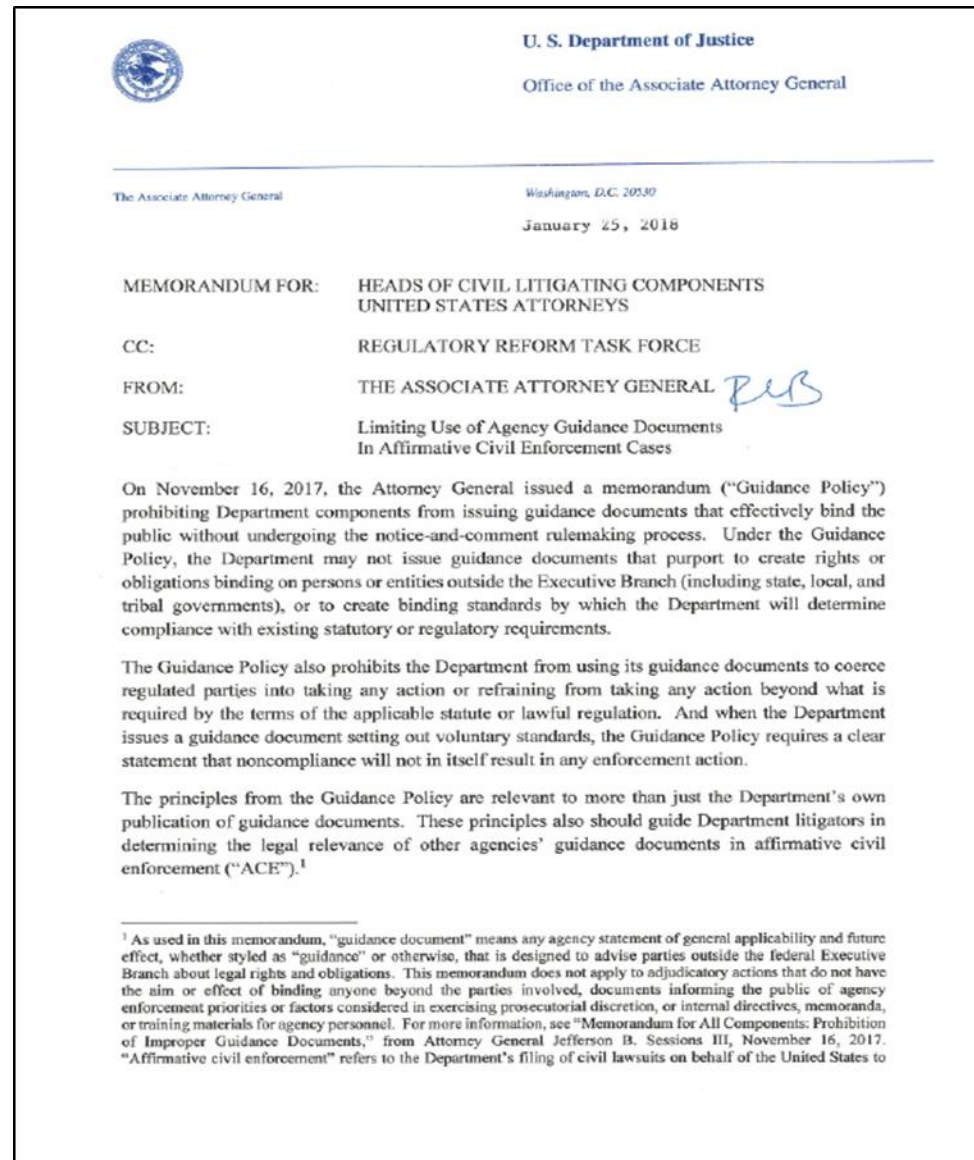
■ Practical Effects?

- Promotes serious consideration of nonmeritorious *qui tams*
- Signals DOJ agreement that *Trinity Indus. qui tam* case exemplifies interference with agency policies and lack of merit
- Provides road map for defendants in intervention discussions
- Encourages dismissal of serial relator suits

■ Practical drawbacks —

- Not mandatory
- DOJ gets 3% of every FCA recovery
- Relators' argument: no dismissal means DOJ thinks case is meritorious

The Brand Memo



The Brand Memo

- **Initial memorandum (issued Nov. 16, 2017) by AG Sessions**
 - Prohibits improper DOJ guidance documents “that effectively bind private parties without undergoing the rulemaking process.”
- **Brand Memo (issued Jan. 25, 2018)**
 - Extends that prohibition beyond DOJ’s own guidance documents:
 - To “determining the legal relevance of other agencies’ guidance documents in affirmative civil enforcement (“ACE”)” using the same principle
 - “Department litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law in ACE cases”
 - Specifically applies to FCA actions:
 - “[T]his memorandum applies when the Department is enforcing the False Claims Act, alleging that a party knowingly submitted a false claim for payment by falsely certifying compliance with material statutory or regulatory requirements.”

The Brand Memo (Cont'd.)

■ Questions —

- What is “agency guidance”?
- What is the difference between “agency guidance” and regulations?
 - See *Aseracare* (N.D. Ala.) (pending in 11th Cir.)
 - FHA cases
- What about contract provisions that incorporate agency guidance?
 - See *US ex rel. Purcell v. MWI* (D.C. Cir. 2015)
- Can defendants enforce it?

Granston and Brand Memos in the Context of FCA Enforcement

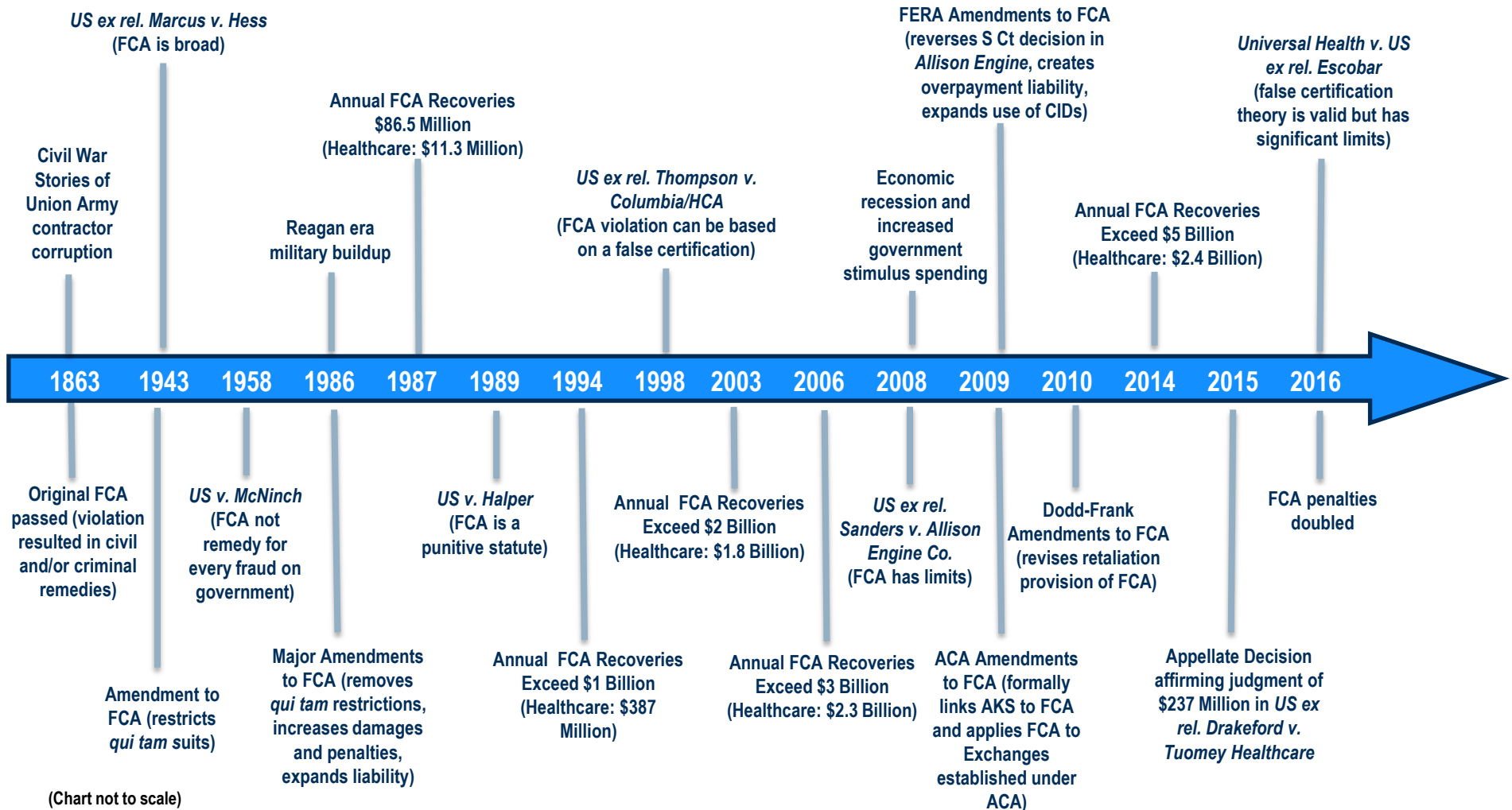
- **“Organizational” reasons for Granston and Brand Memos**
 - Delegation to US Attorneys (cases under \$10 million)
 - Increased need for policy guidance to DOJ attorneys
 - Specifically apply to pending and prospective FCA cases
 - Factors to raise in intervention and settlement discussions

Granston and Brand Memos in the Context of FCA Enforcement *(Cont'd.)*

■ Legal reasons for Granston and Brand Memos

- History of “false certifications” as a basis for falsity. See FCA History Flow Chart.
- *Escobar* decision
- Ramifications
 - Enhanced materiality standard
 - Notable cases:
 - *US ex rel. Harman v. Trinity Indus.* (5th Cir. 2017)
 - FDA cases. See *US ex rel. Spay v. CVS* (3d Cir. 2017); *US ex rel. Nargol v. DePuy* (1st Cir. 2017)
 - *US ex rel. Swoben v. United Healthcare Ins.* (C.D. Cal. 2017); *US ex rel. Poehling v. Unitedhealth Group* (C.D. Cal. 2018)
 - More discovery from government agencies (and possibly DOJ). See *US ex rel. Cal. v. Paramedics Plus* (E.D. Tex. 2018).
 - Increased focus on which legal documents can be the basis of a “false certification”

History of the Civil False Claims Act



(Chart not to scale)

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DOJ's Opioid Initiative

■ **Background**

- DOJ's effort to combat the opioid crisis at every level of the distribution system
- DOJ created the Prescription Interdiction & Litigation ("PIL") Task Force
- DOJ is using the FCA as part of this effort

DOJ's Opioid Initiative *(Cont'd.)*

- **First use of the FCA to address a public health crisis**
- **DOJ's efforts draw on familiar FCA enforcement from other areas:**
 - Maintenance of accurate records claims
 - Kickback claims
 - Overprescribing claims
 - Distribution chain

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