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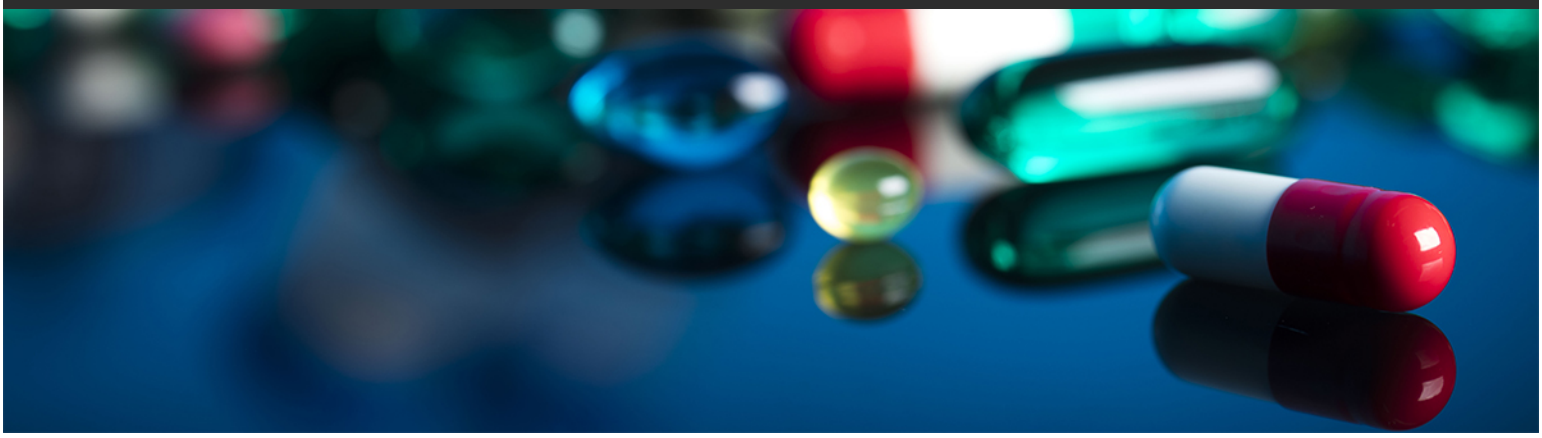

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Justice Department Outlines Factors That May Lead to Dismissal of More False Claims Act Cases

An internal memo made public last month indicates that the U.S. Department of Justice (DOJ) may be moving to dismiss more False Claims Act (FCA) cases when it deems them meritless, opportunistic, or otherwise not in the government's interest. The memo states that DOJ receives approximately 600 new whistleblower (or relator) cases each year, and that when DOJ attorneys recommend not intervening in a relator's suit, they should take the further step of considering whether the government's interests would be served by seeking a dismissal. The memo lists seven factors for DOJ attorneys to consider as a basis for dismissal as further discussed below.

Background

The federal FCA authorizes suits by the federal government, or by private whistleblowers on the government's behalf, to recover for fraudulent or false claims submitted to or paid by the government. The FCA is one of the government's most potent anti-fraud weapons. Violations of the FCA can result in a civil penalty of at least $10,957 or up to $21,916 per claim, together with treble the amount of damages sustained by the government, and the costs of investigating and prosecuting the action.

The FCA has been deployed more frequently in the health care industry than in any other sector of the economy. Of the $3.7 billion in settlements and judgments recovered in civil FCA cases in fiscal year 2017, $2.4 billion involved health care entities and individuals. Hospitals, home health agencies, health insurers, renal dialysis providers, drug and medical device manufacturers, and many others have been named as defendants in FCA suits brought by relators. Many of these cases never go to trial but end up in

settlements, sometimes where there may be merit to the case, but in some other cases, just to get rid of a frivolous suit for its "nuisance value."

The FCA requires that all suits filed by relators be filed under seal to give the Department of Justice (DOJ) the opportunity to review the complaint and determine whether DOJ should intervene and take over the case, or leave the relator to proceed with the suit. The FCA authorizes the Attorney General to dismiss an action over the relator's objection, but the DOJ does not take such a step very often.

DOJ's Memo

The DOJ memo lists seven factors for DOJ attorneys to consider as a basis for dismissal:

1. Where a relator's complaint is "facially lacking in merit – either because relator's legal theory is inherently defective, or the relator's factual allegations are frivolous."

2. Where a relator's suit "duplicates a pre-existing government investigation and adds no useful information to the investigation" – *e.g.*, where a relator belatedly commences an FCA suit that "piggybacks" on a government investigation already in progress.

3. Where a relator's suit "threatens to interfere with a government agency's policies or the administration of its programs," or raises the risk of significant economic harm causing a critical supplier to exit a government program or an industry.

4. When dismissal is necessary:

    - to protect DOJ's litigation prerogatives, *e.g.*, to avoid interference with the DOJ's ability to litigate claims in which it has intervened;
    - to avoid the risk of an unfavorable precedent;
    - to avoid having the case as an obstacle to settlement of claims where the government has intervened.

5. When dismissal is necessary to safeguard classified information, *e.g.*, where there is a risk of disclosure of military or state secrets in the course of litigation.

6. When the government's expected costs are likely to exceed any expected gain, such as where the government's costs of monitoring the litigation and responding to discovery requests exceed the potential amount of a recovery.

7. When there are "problems with the relator's action that frustrate the government's efforts to conduct a proper investigation."

Nothing in the memo indicates that DOJ will in any way be slackening its own enforcement efforts under the FCA or its involvement in substantive relator cases. The memo does observe that, while the number of relator FCA suits is steadily increasing, the rate of DOJ intervention has remained stable. In cases where the DOJ declines to intervene, it may previously have been content to let the defendant(s) fight it out with the relator(s). The memo, however, indicates that DOJ attorneys should consider if the government's interests are served by seeking dismissal of a relator FCA case at the same time that the government is evaluating whether to decline intervention in the action, taking into consideration the categories outlined in the memo and other appropriate criteria.

The considerable costs of litigating frivolous, defective, or opportunistic FCA suits are ultimately passed along to consumers and their health benefit plans, including Medicare and Medicaid. This memo appears to signal a tougher stance on such suits.

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