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DOJ Denies Claims Of Change To FCA Dismissal Policy



By [Daniel Wilson](#)

Law360, Nashville (November 17, 2017, 9:47 PM EST) -- The U.S. Department of Justice has not taken a more aggressive stance toward seeking to throw out of court whistleblower False Claims Act suits that it deems unmeritorious, it indicated Friday, as the author of a report highlighting the purported policy change stood by his view.

In a recent article, health care industry news and information site RACmonitor reported on an Oct. 30 conference speech given by Michael Granston, director of the civil fraud section of the DOJ's civil division and the government's chief FCA lawyer. Granston had indicated that when the DOJ deems that a qui tam FCA case brought by an outside relator lacks merit, it will seek to dismiss that suit, mindful of the burdens on the government, industry and the courts.

That would be a significant policy shift for the DOJ, which typically just declines to intervene in cases it doesn't wish to pursue — a stance it also takes for cases where it simply lacks the resources to participate — the article noted.

But the DOJ has indicated the speech should be taken merely as an affirmation of its already existing power to ask courts to dismiss unmeritorious FCA suits.

According to an excerpt of the speech the DOJ provided to Law360, Granston noted the vast majority of health care fraud FCA recoveries for the government come from qui tam cases, but that even when it doesn't intervene in a case, the department can still spend "significant" time on them, both in initial investigations and in later monitoring if the case moved forward.

"While qui tam cases will always remain a significant staple of the government's False Claims Act efforts, we are mindful of the need to maximize the use of the government's limited resources," Granston said. "We will therefore continue to look critically at qui tam cases to determine whether there are matters that should be dismissed."

"While the qui tam provisions were designed to provide relators with a vehicle to proceed without the government's involvement, clearly meritless cases can serve only to increase the costs for the government and health care providers alike," he added.

While perhaps on the surface a restatement of the government's long-held stance of using its limited litigation resources wisely, the mention of the DOJ using its FCA dismissal authority immediately made [Fredrikson & Byron PA](#) shareholder David M. Glaser's "ears [perk] up," he told Law360 Friday. Glaser, a long-time FCA attorney, is the author of the RACmonitor article and was in attendance at Granston's speech.

"If, in fact, the department believes they've been doing this for years, that comes as a surprise to me, but I welcome the fact that they're doing it," he said.

He stood by his view that a DOJ official making specific reference to the use of its FCA dismissal authority was significant, regardless of whether Granston's speech marks a formal or recent policy change or not.

"In the late 1990s, immediately after the DOJ intervened to dismiss a case against one of our clients, we were told that would not happen again because the DOJ was no longer willing to intervene to dismiss a qui tam case — they would leave the decision to the relator and the courts," Glaser said. "I was certainly excited to hear that is no longer the case. Whether that position changed recently or some time ago, it is clearly the right result."

Several attorneys had told Law360 in 2014 that the DOJ's FCA dismissal power had only been used sparingly — to the disappointment of some FCA defense attorneys — since sweeping 1986 changes to the FCA intended to encourage qui tam suits, and that it was typically used due to technical issues, such as triggering the statute's public disclosure bar.

For the record, the DOJ has moved to dismiss at least one qui tam FCA case each year going back to 2010, for both technical and merits-based reasons.

--Additional reporting by Jeff Overley. Editing by Nicole Bleier.

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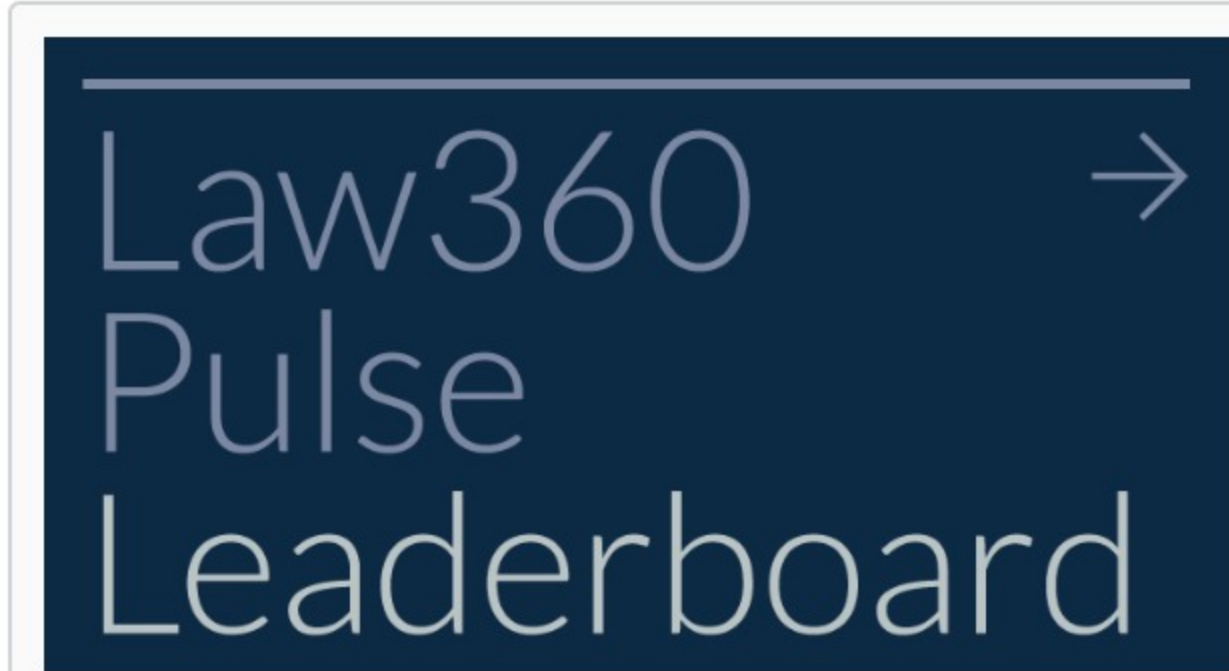
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