A Year Of The Granston Memo Policy In Practice

By Jaime Jones and Naomi Igra

In January 2018, the legal community was buzzing with news of a leaked U.S. Department of Justice document now known as the "Granston memo." In the memo, Michael Granston, director of the DOJ's Civil Fraud Section, explains that the DOJ should seek dismissal of whistleblower actions brought under the False Claims Act if the suits do not serve the federal government's interests. The Granston memo generated a flurry of questions about how DOJ lawyers would — or would not — act on the principles the memo outlined, and what the proposed policy might mean for the future of False Claims Act litigation. A year later, answers to those questions are beginning to emerge and offer a glimpse of what to expect in 2019.

The Granston memo articulates guidance on when the DOJ should exercise its authority under a rarely used provision of the False Claims Act, Section 3730(c)(2)(A). That section provides that the government "may dismiss" a False Claims Act case over the objections of the whistleblower who filed the suit.

The Granston memo starts from the premise that the DOJ plays an important "gatekeeper role" in False Claims Act litigation. In that role, the memo indicates that the DOJ will evaluate whistleblower actions for possible dismissal according to seven considerations: (1) curbing meritless actions, (2) preventing parasitic or opportunistic actions, (3) preventing interference with agency policies and programs, (4) controlling litigation brought on behalf of the federal government, (5) safeguarding classified information and national security interests, (6) preserving government resources and (7) addressing egregious procedural errors.

As 2018 ended and the anniversary of the Granston memo approached, the DOJ was actively putting the Granston memo policy into practice. The memo's guidelines were incorporated into the updated United States Attorneys' Manual, now called the Justice Manual. By including the Granston memo principles and guidelines in the manual, the DOJ signaled the significance of the policy and the expectation that it will become a matter of practice in the field.

The Granston memo has already led to a series of significant filings in cases across the country. Many of those filings hit court dockets in the final months of 2018, setting the stage for an eventful 2019.

In November 2018, the U.S. solicitor general announced in a U.S. Supreme Court brief that the DOJ would seek dismissal of a case that the U.S. Court of Appeals for the Ninth Circuit had resurrected after the defendant won motions to dismiss in the Northern District of California. The solicitor general argued that the Supreme Court should deny the defendant's petition for certiorari but also stated that the DOJ would move to dismiss upon remand to district court. The government cited its "thorough investigation" of the relator's allegations, as well as the anticipated burden and distraction of discovery, and the risk that the case could "impinge on agency decision-making." These reasons echo Granston memo concerns about "curbing meritless actions," "preventing interference with agency policies and programs" and "preserving government resources." The Supreme Court has since denied cert and the case will head back to district court.

Also in November, the DOJ filed a motion for a stay and expedited appellate proceedings in United States ex rel. Thrower v. Academy Mortgage Corp. In that case, filed in the U.S. District Court for the Northern District of California, the relator alleged that the defendant obtained government insurance on loans by falsely certifying that it complied with the U.S. Department of Housing and Urban Development's regulations. The DOJ moved to dismiss the action. It argued in part that the case did not warrant further expenditure of government resources in light of other mortgage-origination cases, consistent with the Granston memo concern for preserving government resources.

In what the DOJ called the "first ruling of its kind," the district court denied the government's motion in part because it found that the government had not conducted an adequate investigation of the whistleblower's

claims. The DOJ wants that decision reversed. Initially, it asked the Ninth Circuit to review the decision as soon as possible to prevent “irreparable harm” to the federal government. The government shutdown put the brakes on the briefing temporarily, but the case is likely to move quickly once it gets going again.

As Academy Mortgage unfolds, it is bound to highlight a circuit split over the standard that applies when the government moves to dismiss a whistleblower action under Section 3730(c)(2)(A). The U.S. Court of Appeals for the District of Columbia Circuit has held that the DOJ has an “unfettered right” to dismiss whistleblower actions. The U.S. Court of Appeals for the Fifth Circuit has signaled agreement with that standard. In contrast, the Ninth Circuit and the U.S. Court of Appeals for the Tenth Circuit have held that the government must have a valid purpose for dismissal and show a rational relationship between dismissal and the accomplishment of that purpose. The difference between the two standards can be outcome-determinative. The DOJ lost its motion to dismiss in Academy Mortgage under the Ninth Circuit’s standard but would have won under the D.C. Circuit standard.

As Granston memo cases move forward, they are likely to deepen the current circuit split and lead the DOJ to push for the “unfettered right” standard in undecided circuits, and to argue for a deferential interpretation of the Ninth Circuit standard where it applies. If the DOJ continues to lose cases under the Ninth Circuit standard, it will almost certainly seek Supreme Court review. Likewise, relators whose cases are dismissed under the “unfettered right” standard will likely begin petitioning for certiorari with the hope that the Supreme Court will endorse the Ninth Circuit’s standard.

Against this backdrop, the DOJ closed out 2018 with a fresh wave of motions to dismiss consistent with Granston memo principles. On Dec. 17, the DOJ submitted 10 motions to dismiss across seven jurisdictions — the Eastern District of Pennsylvania, the District of Massachusetts, the Western District of Washington, the Northern District of Texas, the Eastern District of Texas, the Northern District of Illinois, and the Southern District of Illinois. The motions attack complaints that allege, among other things, that drug companies violated the Anti-Kickback Statute by using independent contractor nurses as “undercover sales representatives.” The complaints are backed by the National Health Care Analysis Group, a partnership that the DOJ describes as consisting of “investors” and former bankers. They assert nearly identical claims against 38 defendants, including major pharmaceutical manufacturers.

The DOJ sought dismissal in all of the cases for reasons consistent with the Granston memo. The DOJ’s motions explain that the National Health Care Analysis Group operates like a professional plaintiff and filed the complaints “through shell company relators.” The motions also assert that the DOJ’s own investigation concluded that the allegations “lack sufficient factual and legal support” and that “further expenditure of government resources is not justified.” The DOJ also argues that the suits infringe on “enforcement prerogatives” of federal healthcare programs. In other words, the DOJ argues that dismissal would serve Granston memo goals such as “curbing meritless actions,” “preventing parasitic or opportunistic actions,” “preventing interference with agency policies and programs,” and “preserving government resources.”

The DOJ’s briefs in the National Health Care Analysis Group cases note that any dismissal of federal claims would be without prejudice to the states, many of which have their own versions of the False Claims Act. It is unclear how whistleblowers who bring claims under both federal and state law will fare in court after their federal claims are dismissed. Relators may find it difficult to show that their state law claims are plausible if the DOJ says that the allegations were investigated and proved to be meritless. And federal courts may be reluctant to retain supplemental jurisdiction over state law claims once federal claims have been dismissed. As more Granston dismissals hit federal dockets, they could shine a new spotlight on supplemental state law claims and challenge courts to evaluate the viability of those claims standing on their own.

Countless companies facing whistleblower actions are sure to ask the DOJ for dismissal in 2019 but not every case will be an equal contender. Situating a case for dismissal may require strategic positioning early on. As the Granston memo explains, the DOJ will consult with affected agencies and seek their recommendations. A company’s interactions with those agencies, and need for discovery from them, could be critical to the long-term fate of any related whistleblower action. Companies should thoroughly

document agency interactions to show the DOJ the extent of agency awareness of the issues under investigation, the number of agency employees who will be called as witnesses if the case is litigated, the scope of internal agency decision-making that could be exposed through discovery and the potential ramifications on broader agency goals in the event of adverse precedent. In this area, as in so many, regulatory and litigation strategies are intertwined, and alignment of those strategies may be more important than ever.

Although it has been a year since the Granston memo made headlines, the story is still unfolding as the DOJ actively implements the policy it announced. With the DOJ set to continue litigating motions to dismiss in 2019, the impact of the Granston memo is bound to be just as newsworthy on its second anniversary as it is today.

Jaime L.M. Jones is a partner and Naomi A. Igra is an associate at Sidley Austin LLP.

Article Link: https://www.law360.com/articles/1124045/a-year-of-the-granston-memo-policy-in-practice