

Atlanta False Claims Lawyers Wary But See Little Threat in DOJ Whistleblower Memo

An internal Justice Department memo that spells out specific, new criteria for federal prosecutors to use in determining whether to dismiss a whistleblower case may be more defense-oriented but, while a reason for caution, raises no immediate alarms.

By **R. Robin McDonald** | January 25, 2018 at 04:00 PM



(l-r) Paul Monnin, John Floyd, Michael Sullivan, Marlan Wilbanks and Michael Moore

Atlanta lawyers with broad knowledge of civil fraud cases brought on behalf of the federal government under the False Claims Act sounded no alarms that meritorious whistleblower claims would be threatened by the U.S. Department of Justice's new criteria for dismissing those claims in cases where the government declines to intervene.

But several did caution that whistleblower cases now may face a higher level of scrutiny and said that, on occasion, the government gets its intervention decision wrong.

The attorneys were reacting to an internal Justice Department [memo, obtained Wednesday by Daily Report affiliate The National Law Journal](#), that laid out specific, new criteria for federal prosecutors to use in determining whether to dismiss a whistleblower case once the government has decided not to intervene.

Some of the attorneys who reviewed the memo at The Daily Report's request were already aware of the memo or familiar with the issues relating to the ultimate merit of whistleblower claims that it sought to address.

[Michael Moore](#)—who as a former U.S. attorney in Macon intervened in whistleblower cases and who now represents whistleblowers as a partner at Pope McGlamry in Atlanta—said that, while the memo may appear on its face to be a seismic shift in policy for the DOJ, in reality it is “a formalization of the policy that has been in place for some time.”

In the past, he said, whistleblower lawyers often filed false claims lawsuits and then waited for the government to intervene. “If the government did, then the whistleblower and the lawyers would sit back and wait on a big payday,” he said. “If the government declined to pursue the matter, then that was often the end of the case.”

But, he explained, “One of the problems with that approach was that qui tam lawyers weren’t spending the necessary time and resources to fully investigate the claims. There was such a rush to the courthouse so that your client could be the first whistleblower to report the fraud and thereby the recipient of the largest part of the reward, that the substance and merits of the claim weren’t always investigated as well as they should be.”

But, Moore also observed that the DOJ’s decision to spell out specific criteria for prosecutors to consider in evaluating the viability of whistleblower cases “is a reminder for lawyers who do this kind of work that our cases will be scrutinized more closely.”

Calling the memo “a welcome policy change,” Paul Monnin, a partner at Alston & Bird and a former federal prosecutor in Atlanta, suggested that the Jan. 10 memo “is changing the radio dial a little bit ... to be more defense-oriented” by creating specific criteria that defendants facing a whistleblower suit may now rely on to dismiss a case.

The memo, he said, is a “playbook” for dismissing a meritless case “based on factors the government says it will respect.”

“It’s a new procedure that is more defense-friendly than it has been before,” he reflected. But, he said, “It’s highly unlikely that as a result of this policy we are going to be seeing a rampant dismissal of qui tam cases.”

Marlan Wilbanks of Wilbanks & Gouinlock who has secured multimillion-dollar judgments in a number of whistleblower cases, including several major cases in which federal prosecutors declined to intervene, isn’t so sure. Wilbanks suggested that, while the government has the legal right to dismiss a whistleblower case, “That right should only be exercised in very specific circumstances.”

“I believe in the vast majority of FCA cases that our judges and judicial system are competent to make the decision as to which cases do and do not have merit,” he said. “More importantly, sometimes the government and their client agencies get it wrong.”

[In a whistleblower case](#) in which Wilbanks teamed up with Butler, Wooten & Peak that has successfully recouped more than \$160 million from banks that illegally tacked legal fees on to guaranteed government home loans, the lawyers said the government agency representative was adamant that the case lacked merit. “She opined that we would not even be able to recover the money that would be expended in prosecuting the case,” Wilbanks said. But, he said, she was “dead wrong.”

Wilbanks worries that DOJ lawyers “have to follow the positions and whims of their client agencies” which, he said, “at times do not want to put in the work necessary to prosecute the cases, and at times they are embarrassed that frauds went on for many years that they did not detect or stop.”

John Floyd, a partner at Atlanta’s s Bondurant, Mixson & Elmore who has represented whistleblowers and defended those named as defendants in federal false claims suits, said the memo reflects “a discussion going on about the government’s failure to dispose of clearly meritless cases for some time.”

“If the case is viable, that’s not the kind of case we are talking about in this memo,” Floyd said. “I don’t mean to suggest that this is an insignificant development. I think it is. ... But the idea that this suddenly, dramatically upends everything I think it goes a bit too far.”

Michael Sullivan, a partner at Finch McCranie who from 1995 to 1998 served as a federal prosecutor in [the independent counsel investigation](#) of the U.S. Department of Housing and Urban Affairs, said that, should the DOJ use the new memo to dismiss cases simply because it had elected not to intervene, “It would be extremely short-

sighted, because the DOJ has recovered millions of dollars in cases where they have not intervened.”

Sullivan expressed confidence in Michael Granston, the director of the U.S. Justice Department’s fraud division and the memo’s author. “I don’t think it’s necessarily a bad thing to lay out the standards for what the Department of Justice would consider before moving to dismiss a declined case,” he said.

The question, he said, is whether someone “is going to take this memo now and run with it and misuse it by dismissing meritorious cases. That would be a tremendous loss for the public, because a lot of fraud would go undeterred. ... The big picture question is are they going to use this sparingly and selectively, or is this going to be used like a meat axe to deal with non-intervened cases?”