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MEDIA MENTION

Roderick Thomas Comments on DOJ Guidance in False Claims Act Cases

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Roderick L. Thomas, partner in Wiley Rein's White Collar Defense & Government Investigations Practice, was quoted extensively in a July 27 article in *The American Lawyer* on two recent U.S. Department of Justice (DOJ) memos providing guidance on False Claims Act (FCA) and whistleblower cases. These memos are now being used by defense counsel to bolster their arguments, according to the article.

Attorneys who have experience in this area differ about the consequences of what have become known as the Brand and Granston memos. Some corporate defense lawyers claim that the memos have not yet fell in their favor, although they acknowledge that they have tried to use them on behalf of their clients.

"There is a healthy skepticism as to whether there will be real change," Mr. Thomas noted about the memos' significance.

The Granston memo was written in January by Michael Granston, Director of the Civil Fraud Section of the DOJ. It outlines factors that government lawyers should consider when deciding whether or not to seek dismissal of FCA cases brought by qui tam relators on behalf of the federal government, according to *American Lawyer*. Although the Justice Department has rarely dismissed such cases, the Granston memo outlines the agency's statutory right to seek such dismissals as a means to advance the government's interests, safeguard resources, and avoid adverse rulings.

The other memo, also made public in January, came from then-Associate U.S. Attorney General Rachel Brand. The guidance, the article notes, said that the Justice Department "may not use its

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enforcement authority to effectively convert agency documents" from any department, not just itself, "into binding rules" and may not "treat a party's noncompliance with an agency guidance document as … establishing that the party violated the applicable statute of regulation."

The memos are "terrific opportunities for advocacy," said Mr. Thomas, although he expressed doubt they will result in "real change" for the whistleblower bar.

Mr. Thomas told *American Lawyer*: "We have seen a continued increase in qui tam actions based upon challenges to every stage of the procurement process, whether related to qualifications, proposals, certifications (implied or express), and performance, among others." That said, not all cases have merit, he noted.

"We continue to see fraud alleged where the issue more accurately is a quarrel that should lead to contractual remedies, if any. If the Granston memo is followed, we welcome the early termination of cases that lack factual or legal merit. Since the issuance of the memo, we now routinely argue the Granston factors, with the goal of not only obtaining declination, but also dismissal. Qui tam relators should not be permitted to 'roll the dice' by pursuing a meritless case." Mr. Thomas believes that counsel are "unlikely to see the full impact" of the Granston memo "if DOJ signals they might seek dismissal to relators' counsel, and they voluntarily dismiss to avoid a motion."

Turning to the Brand memo, Mr. Thomas thought the memo was a "welcome development" for defense lawyers. "Would-be relators and DOJ often scour for perceived requirements or terms beyond express contractual obligations to assign liability," he added. "Although implied certification remains a viable legal theory, the Brand memo laudably draws a line with guidance documents. The memo is a step in the right direction to foreclose liability theories that go beyond contractual, regulatory, and statutory obligations."

The article can be found here. (*subscription required*)