crowell moring

CLIENT ALERT

If You Don't Ask, You Don't Get: Hearings Not Guaranteed in "Granston Memo" Dismissals

Sep.17.2019

On September 12, 2019, the U.S. Court of Appeals for the Third Circuit issued an opinion in *Chang, United States, and State of Delaware ex rel. v. Children's Advocacy Center of Delaware*, No. 18-2311 affirming a district court's dismissal of a *qui tam* complaint without conducting an in-person hearing. Both the United States and Delaware had moved to dismiss the case, asserting that their investigations revealed that relator Weih Chang's allegations were "factually incorrect and legally insufficient." Although Chang did not request a hearing in his opposition to the governments' motions, he argued on appeal that the False Claims Act (FCA) requires an in-person hearing before granting governmental motions to dismiss *qui tam* claims.

The parties presented the appeal as an opportunity for the Third Circuit to define the scope of the government's FCA dismissal authority at 31 U.S.C. § 3730(c)(2)(A). But the Court declined to adopt either the "essentially unfettered" right to dismiss standard established by the D.C. Circuit in *Swift v. U.S.,* or the "rational relation" standard used by the Ninth Circuit in *Sequoia Orange v. Baird-Neece Packing Corp.*, which requires that DOJ identify a valid purpose for dismissal and show a rational relation between the dismissal and accomplishing that purpose. Instead, the Third Circuit noted that even under the more onerous *Sequoia Orange* standard, the governments had identified a valid purpose advanced by dismissal—minimizing unnecessary or burdensome litigation costs—meaning that the burden shifted to Chang to demonstrate that dismissal was fraudulent, arbitrary and capricious, or illegal, and that he had failed to do so. In affirming the dismissal, the Third Circuit also rejected Chang's argument that the FCA requires an in-person hearing and cited both *Sequoia Orange* and *Swift* for the proposition that an in-person hearing is unnecessary unless the relator expressly requests one or makes a colorable threshold showing of arbitrary government action.

Since the release of the Granston memo in January 2018 there has been a significant uptick in § 3730 (c)(2)(A) motions. Many of those cases are now before the circuit courts, suggesting that the Supreme Court may need to provide further guidance on the standard for granting a governmental motion to dismiss an FCA claim in the coming years.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Gail D. Zirkelbach
Partner – Los Angeles
Phone: +1 213.443.5549
Email: gzirkelbach@crowell.com

Payal Nanavati
Associate – Washington, D.C.
Phone: +1 202.624.2580
Email: pnanavati@crowell.com