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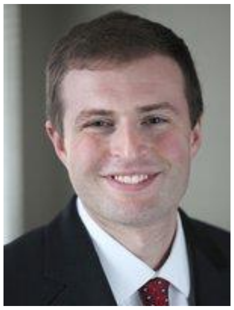
Limits Of DOJ's Qui Tam Dismissal Authority Are Unsettled

By **Jason Crawford, John Brennan and Keith Harrison** (July 2, 2019, 2:04 PM EDT)



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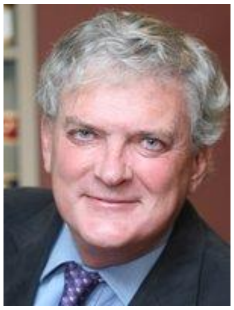

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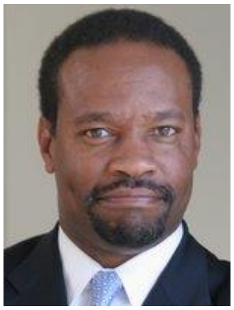

Keith Harrison

On June 24, 2019, in a speech at the American Health Lawyers Association Annual Meeting, the director of the U.S. Department of Justice's Civil Fraud Section, Michael Granston, announced that at least 30 False Claims Act cases have been dismissed since the DOJ adopted guidance encouraging its lawyers to seek dismissal of nonintervened qui tam cases that "lack substantial merit." This uptick in the number of dismissals granted under the DOJ's 31 U.S.C. Section 3730(c)(2)(A) authority is a notable departure from the past when this provision was used in less than 1% of all cases.[1]

The 18 months since the release of the so-called Granston memo have not been without setbacks, however. Last month, the U.S. District Court for the Southern District of Illinois rejected the government's request that the court alter an order denying the DOJ's motion to dismiss in United States ex rel CIMZNHCA v. UCB.[2]

The ruling is notable because CIMZNHCA is one of the 10 lawsuits brought by the National Healthcare Analysis Group that the DOJ moved to dismiss at the end of 2018.

All 10 NHCA suits are based on nearly identical allegations about purported violations of the Anti-Kickback Statute. But the law surrounding the government's use of its dismissal authority is still unsettled, as demonstrated by the fact that even within the small sample of similar NHCA cases, courts have reached different decisions. This article provides an overview of the rise in Section 3730(c)(2)(A) motions and analyzes the NHCA actions as a case study on the government's efforts to curb meritless qui tam suits.

Background

Even though Section 3730(c)(2)(A) was added to the FCA as part of the seminal 1986 amendments to the statute, the provision was largely overlooked until January of 2018 when the DOJ adopted the guidance set forth in the Granston memo. The Granston memo lists factors that attorneys in the DOJ's Civil Fraud Section and assistant U.S. attorneys handling FCA cases should consider when weighing whether to use their Section 3730(C)(2)(A) authority to dismiss meritless qui tams.

Among the factors DOJ attorneys are instructed to consider are whether: The factual allegations are frivolous; the DOJ's costs are expected to exceed any expected gains; the case could interfere with an agency's existing policies or the administration of the agency's programs and whether dismissal would prevent an "unwarranted windfall" to the relator.

The Granston memo acknowledged that the DOJ had only used its dismissal statutory authority sparingly in the past but recognized that DOJ attorneys had a responsibility to act as a gatekeeper. The principles from the Granston memo have since been added to Section 4-4.111 of the DOJ's Justice Manual which sets forth internal guidance for all DOJ attorneys.

Standards for Dismissal

A wave of Section 3730(C)(2)(A) motions since the release of the Granston memo has resulted in several rulings within the past year with courts coalescing around two standards of judicial review — i.e., the Swift and Sequoia Orange standards. The ruling of the U.S. Court of Appeals for the District of Columbia Circuit in Swift v. U.S. recognizes that the United States is the real party of interest in every FCA case, even when the government declines intervention, such that the DOJ's right to dismiss is essentially unfettered.[3]

In contrast, the U.S. Court of Appeals for the Ninth Circuit's standard, established in Sequoia Orange v. Baird-Neece Packing Corp., requires that courts conduct a limited judicial review to ensure the government's decision to dismiss is not fraudulent, arbitrary or an abuse of power. Under the Sequoia Orange standard, courts require that the DOJ: (1) identify a valid purpose for dismissal and (2) show a "rational relation" between the dismissal and accomplishing that purpose.[4]

The rational relation standard had previously been considered a low hurdle for the DOJ because no court had denied a motion filed under Section 3730(C)(2)(A). But this assumption was called into question in 2018 when the U.S. District Court for the Northern District of California found that the DOJ had not met the Sequoia Orange standard.

In United States ex rel Thrower v. Academy Mortgage Corp., the relator had amended his pleadings after the DOJ had already completed its investigation of the allegations in the initial complaint.[5] Without reopening the investigation, the government moved to dismiss, citing the costs of the litigation.

The district court denied the motion and reasoned that the DOJ could not invoke the litigation costs as a valid purpose for dismissal when the government had not investigated the newly added allegations and therefore could not assess the potential proceeds from the amended complaint. The government has since appealed the district court's ruling to the Ninth Circuit.

The NHCA Lawsuits

Against the backdrop of the Thrower decision, the motions to dismiss in the NHCA lawsuits included lots of detail about the DOJ's investigation of the allegations so as to avoid the risk that a court might find the DOJ's investigation insufficient. Indeed, according to the briefing, the DOJ's Civil Fraud Section invested more than 1,500 hours looking into the allegations in the eleven NHCA complaints, with AUSAs from across the country and attorneys from the U.S. Department of Health and Human Services Office of the Inspector General, or HHS-OIG, also dedicating significant time to the investigation.

The government's briefing left little doubt that the DOJ believes that the Swift standard more accurately comports with the deference due to the government's exercise of its prosecutorial discretion. Nonetheless, the DOJ set forth reasons in its motions as to why the cases should be dismissed regardless of whether the Sequoia Orange or Swift standard is applied.

The Section 3730(C)(2)(A) motions in the NHCA lawsuits also included a detailed description of the relators behind the lawsuits, explaining that the corporate entities that filed the actions were all "shell-companies" that had been created to bring eleven separate lawsuits across eight judicial districts against 38 companies.[6] The government further explained that the NHCA was spearheaded by a New Jersey lawyer who scoured Medicare claims data for indications of fraud in billing patterns and who founded NHCA with the support of a Wall Street angel investor.[7]

To identify individuals with inside knowledge, the NHCA assembled a database with contact information collected from publicly available sources for some 70,000 workers at various health care companies. Once it had identified unusual billing patterns from claims data, the NHCA would reach out to individuals at the target company under the guise of conducting a qualitative research study on the effectiveness of the pharmaceutical industry's investment in nurse educators.

The NHCA offered to pay each witness for their participation in a standardized interview session, but the witnesses were not told that the information they provided would be used in FCA lawsuits. These study participants were then named as cooperating witnesses in the qui tam complaints alleging that their employers had violated the Anti-Kickback Statute by engaging in "white-coat marketing" and providing free nurse and reimbursement-support services.

Application of the Granston Memo Factors

The DOJ determined that the NHCA's sweeping allegations were based on information obtained under false pretenses.[8] Moreover, after consulting with subject matter experts at HHS-OIG, the DOJ concluded that the Anti-Kickback Statute allegations conflicted with the policy and enforcement prerogatives of the federal government's health care programs.[9]

Namely, the NHCA suits generally alleged that the provision of information and instruction to patients, which arguably could be considered educational, constituted illegal kickbacks to physicians. But these allegations were inconsistent with government-issued industry guidance where HHS-OIG has advised that product support services — such as access to a toll-free patient-assistance line or instructions on how to store medication — do not constitute "remuneration" for purposes of the Anti-Kickback Statute.[10] In sum, the DOJ disagreed with the NHCA's theory of Anti-Kickback Statute liability and disapproved of the tactics the NHCA had used to collect the information.

On Dec. 17, 2018, the DOJ filed motions to dismiss in all of the pending NHCA cases. Drawing upon factors from the Granston memo, the DOJ argued that allowing the relators to go forward would impose costs and burdens on the government and waste judicial and governmental resources. The DOJ further argued that the time needed to monitor these nonintervened cases and facilitate discovery requests would divert DOJ resources from meritorious matters. Lastly, in most of the cases, the DOJ argued that dismissal was appropriate so as not to undermine common industry practices that HHS-OIG has determined are beneficial to federal health care beneficiaries.

A Split Decision

Following the government's motion, several of the NHCA cases were voluntarily dismissed, but in others the relators opposed the government's motion to dismiss. These contested motions have in turn led to a split among the district courts that have grappled with nearly identical complaints.

The first ruling on a Section 3730(C)(2)(A) motion in a NHCA case, SMSPF LLC v. EMD Serono Inc., went the way of the government, with the U.S. District Court for the Eastern District of Pennsylvania granting the government's motion over the objections of the relator. Applying the Sequoia Orange standard, the court found that the DOJ had an interest in avoiding litigation costs in a case that lacked sufficient factual and legal support. The court further accepted the DOJ's conclusion that the case was unlikely to yield a recovery justifying the costs and burdens it would incur if the case were to proceed.[11]

Applying a different standard, but reaching the same result, a magistrate judge in the U.S. District Court for the Eastern District of Texas recommended that the court grant the DOJ's requests to dismiss in two separate cases pending in that district after applying the Swift standard and finding that the government possesses virtually "unfettered discretion" to dismiss qui tam actions.[12]

But the DOJ has not run the table in the NHCA cases. In the CIMZNHCA case, the court was far more skeptical of the DOJ's justification for dismissal. At the evidentiary hearing, the judge asked questions regarding the scope of the government's investigation, the details of its cost-benefit analysis and whether the government's motion was based on an animus towards the NHCA as a "professional relator."

Weighing the Swift and Sequoia Orange standards, the court reasoned that Congress would not have mandated that courts hold a hearing before granting a Section 3730(c)(2)(A) motion if courts were not expected to evaluate the merits of the DOJ's decision. Finding that the application of Swift would render "the hearing specifically provided for in the statute superfluous" the court applied the standard from Sequoia Orange.

After considering the government's stated reasons for seeking dismissal against the facts and evidence presented, the court concluded that the record did not support a rational relationship between the government's identified cost and policy considerations and dismissal of the action.[13]

Takeaways

The rise in the number of Section 3730(c)(2)(A) motions that the DOJ has filed since the adoption of the Granston memo has been a welcome development for defendants faced with the potential expense and distraction of litigating a frivolous qui tam action. But the ruling in CIMZNHCA is an important reminder that the DOJ's decision to file a motion to dismiss is not a fait accompli.

If an evidentiary hearing reveals that the government has not investigated swaths of a complaint then the court may be less inclined to accept representations about the cost-benefit analysis. Decisions like Thrower suggest that defendants will want to work closely with the DOJ in cases where the government has made a decision to dismiss so that the DOJ has sufficient information to clear the more rigorous "rational relation" standard.

As rulings on Section 3730(c)(2)(A) motions continue to percolate up through the courts of appeals, the Supreme Court may eventually need to weigh in on the contours of the government's dismissal authority. Until then, defendants faced with meritless qui tam suits should hope that a few district court losses do not curtail the DOJ's regular exercise of its dismissal authority.

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[1] False Claims Act: Greater DOJ Scrutiny of Frivolous Qui Tam Actions, 32 Nash & Cibinic Report ¶ 20 (April 2018).

[2] United States ex rel CIMZNHCA LLC v. UCB Inc. et al, 3:17-cv-00765, ECF 101 (S.D. Il., June 7, 2019).

[3] Swift v. United States., 318 F.3d 250, 252-53 (D.C. Cir. 2003).

[4] United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998); see also United States ex rel. Ridenour v. Kaiser-Hill Co., 397 F.3d 925 (10th Cir. 2005).

[5] United States ex rel. Thrower v. Academy Mortgage Corp. 16-cv-02120, ECF 91 (N.D. Cal. June 29, 2018).

[6] United States ex rel CIMZNHCA LLC v. UCB, Inc. et al, 3:17-cv-00765, ECF No. 64 (S.D. Il., Dec. 17, 2018) (noting that eleven qui tam complaints were filed but explaining that one of the actions was voluntarily dismissed prior to the filing of DOJ's §3730(c)(2)(A) motion).

[7] Id. citing J.C. Herz, Medicare Scammers Steal $60 Billion a Year. This Man is Hunting Them, Wired, Mar. 7, 2016.

[8] Id.

[9] Id.

[10] 81 Fed. Reg. 88368-01 at 88396 (Dec. 7, 2016).

[11] SMSPF LLC et al v. EMD Serono Inc. et al, 2:16-cv-05594, ECF 71 (E.D. Pa.Apr. 3, 2019).

[12] United States ex rel. Health Choice Alliance LLC v. Eli Lilly and Co. Inc. et al., 5:17-cv-00123, ECF 241(E.D. Tex. June 20, 2019); Health Choice Group LLC v. Bayer Corporation et al, 5:17-cv-00126, ECF 151 (E.D. Tex. Jun 20, 2019).

[13] Id. at ECF No. 83 (S.D. Il. Apr. 15, 2019).