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Whistleblower Defense Alert: Government Uses § 3730 Dismissal Power To Dismiss Seven Year Old FCA Case

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By: Joseph M. Brunner and Jacob D. Mahle

The United States District Court for the Eastern District of Pennsylvania recently endorsed a significant expansion to the Government's ability to dismiss a *qui tam* relator's False Claims Act (FCA) case. The initial complaint in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, E.D. Pa. No. 12-CV-4239, was filed on July 26, 2012. After the Government declined to intervene on June 27, 2014, the Relator proceeded on his own, and the parties spent five years engaged in significant discovery and motion practice. Then the district court granted the Government's motion to end the litigation in one fell swoop.

The *Polansky* Relator alleged that the Defendants defrauded Medicare by billing what should have been outpatient services (which are generally reimbursed at lower rates) as inpatient services (which are generally reimbursed at higher rates). After the Government declined to intervene, the district court denied the Defendant's motion to dismiss and the case entered into active discovery. As is often the case in FCA actions, discovery was contentious and protracted. The parties and district court spent considerable time and effort dividing claims into separate groups and selecting "bellwether" claims, which the Relator then tried to undo. The Defendants filed a motion for sanctions against the Relator for failing to produce documents, and a special master also issued a ruling requiring the Government to turn over documents withheld on privilege assertions.

In February 2019—while the motion for sanctions was pending—the Government gave the first indication that it would attempt to dismiss the case because of the burden on the Government's resources. The FCA does in fact give the Government the ability to dismiss a relator's *qui tam* action "notwithstanding the objections of the" relator. 31 U.S.C. § 3730(c)(2)(A). To avoid such a move the Relator agreed to limit the scope of his case, but when the Relator and the Government could not agree on what such a limited scope would look like, the Government filed a motion to dismiss the litigation on August 20, 2019, just ten days

before summary judgment briefs were due.

Reviewing the motion, the district court first noted that because the FCA does not articulate a standard of review for such motions, a circuit split has developed—a circuit split we have discussed in previous alerts. The "rational relationship" test, first articulated by the Ninth Circuit in *Sequoia Orange Co. v. Baird-Neece Packing Corp.*, requires the Government to identify a valid purpose supporting dismissal and a rational relationship between dismissal and accomplishing that purpose. 151 F.3d 1139 (9th Cir. 1998); *see also Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 935 (10th Cir. 2005) (adopting *Sequoia Orange* test). The D.C. Circuit in *Swift v. United States*, however, disagreed with this requirement and held that the Government has an "unfettered right" to dismiss an FCA action with no judicial review. 318 F.3d 250, 251 (D.C. Cir. 2003).

The district court reviewed both approaches and noted that the Third Circuit had expressly declined to adopt one or the other. *Chang v. Children's Advocacy Ctr. of Del.*, 938 F.3d 384, 387 (3d Cir. 2019). After reviewing the law and the facts of the case, the district court also declined to expressly adopt either approach because it held the Government was entitled to dismissal under either standard. The Government argued that it had an interest in preserving its resources by not expending time and energy on monitoring the litigation (even though it had already been monitoring it for years) and not responding to discovery requests (giving the Government a way to avoid complying with the special master's order to produce allegedly privileged documents). It also cast doubt on the Relator's potential for recovery, and argued that the burdens of continued litigation outweighed the possible benefits. The district court agreed that these arguments satisfied the *Sequoia Orange* rational relationship test and dismissed the case.

Since the publication of the Granston Memo in January of 2018, which encouraged government attorneys to invoke § 3730(c)(2)(A) and dismiss FCA actions "to advance the government's interests, preserve limited resources, and avoid adverse precedent," the Government has steadily been asserting its dismissal power. The Government's previous "Granston Memo" motions to dismiss came at early stages in litigation, such as after it declined to intervene, *see United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 17-CV-765, 2019 U.S. Dist. LEXIS 64267 (S.D. Ill. Apr. 15, 2019), or at the Rule 12(b)(6) stage, *see United States ex rel. Health Choice Alliance v. Eli Lilly and Co.*, No. 5:17-cv-00123, slip op. at 17 (Sept. 27, 2019). But the motion in *Polansky*, filed seven years into the litigation and after years of extensive discovery, is a significant expansion of the Government's authority. For FCA defendants, the district court's decision offers hope for curtailing protracted and expensive litigation—particularly where, as here, the relator's constant attempts to extend and frustrate the discovery process impose higher than normal costs.