AHLA PG Briefing

"Rational Relationship" or "Unfettered Discretion"? The Government's Authority to Dismiss a False Claims Act Qui Tam Action

Health Care Liability and Litigation Practice Group • April 12, 2019

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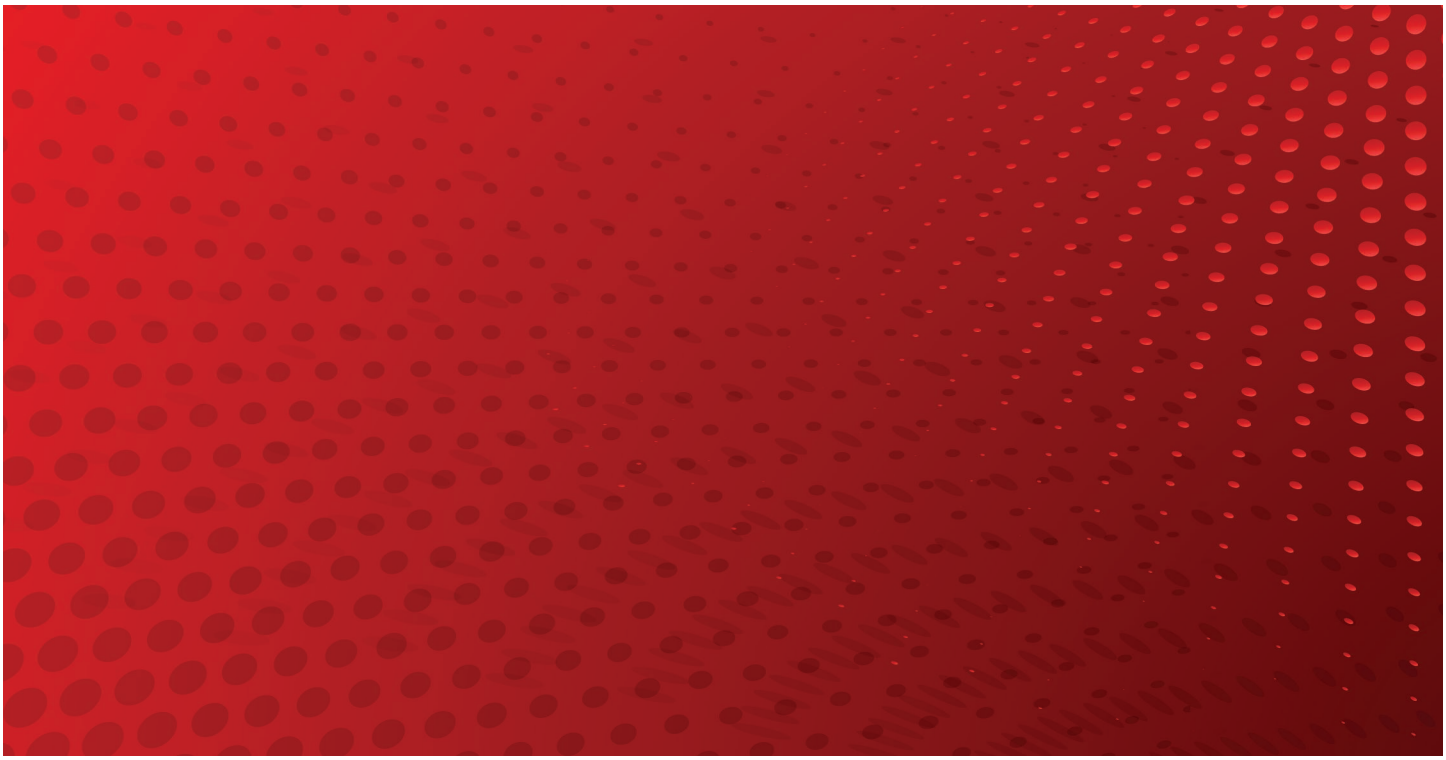

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Printed in the U.S.A.

Since its publication in January 2018, the Department of Justice's (DOJ) Memorandum officially entitled "Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)"[1] and commonly referred to as the "Granston Memo" after its author Michael Granston, Director of the DOJ's Civil Fraud section, has been the subject of countless articles and a frequent topic at False Claims Act (FCA) seminars nationwide. The Granston Memo was meant to provide guidance to DOJ attorneys handling FCA cases as to the factors that should be considered when deciding whether to seek dismissal of an FCA qui tam case under 31 U.S.C. § 3730(c)(2)(A). That section states:

> The Government may dismiss [a *qui tam*] action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

This briefing is *not* intended to focus on the Granston Memo other than by way of necessary background, as there has already been more than enough ink spilled on that topic. Instead, this briefing focuses on the dismissal provision of the FCA itself and the split that has formed among federal courts on how much discretion the government has in dismissing a qui tam action over the relator's objection.

Intervention, Declination, or Dismissal?

The FCA permits private whistleblowers (known as "relators") to bring suits under the FCA on behalf of the relator and the United States.[2] After an investigation, the government must decide whether to take over (or "intervene" in) the lawsuit, decline the action but let the relator move forward on its behalf, or seek dismissal

[1] *Available at* https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.
[2] 31 U.S.C. § 3730(b)(1).

of the action.[3] The third option, referred to by many in the industry as the "nuclear" option has always been used sparingly, although many FCA practitioners—particularly on the defense side—viewed the Granston Memo as an indication that the DOJ might begin to utilize this option more frequently. According to the Granston Memo, "[w]hile it is important to be judicious in utilizing section 3730(c)(2)(A), it remains an important tool to advance the government's interest, preserve limited resources, and avoid adverse precedent."[4]

The dismissal provision contained in Section 3730(c)(2)(A) is silent as to whether a court can reject a government's attempt to dismiss a qui tam action under that section, or whether the government has unfettered discretion to do so. On the one hand, in support of the argument that the government has unfettered discretion to dismiss a qui tam action, the provision in question states that the government "may" dismiss such an action "notwithstanding the objections" of the relator so long as the relator is provided with a hearing.[5] The plain language of the provision does not contain a mechanism by which a court can reject such dismissal or a standard that should be applied by a court in evaluating a dismissal. This stands in contrast to another section of the FCA governing when the government can settle a qui tam action over the relator's objection. That section (which appears right after the dismissal section) also provides for a hearing, but expressly states that the court must determine that "the proposed settlement is fair, adequate, and reasonable under all the circumstances."[6] If Congress wanted to impose a limit on the government's ability to dismiss a qui tam action, the argument goes, then it could have used the same language in the dismissal section as it did in the settlement section.

On the other hand, many—mainly on the relator's side—argue that the fact that the FCA requires a hearing before the government can dismiss a qui tam action over the relator's objection strongly negates the idea that the government has

[3] *Id.* §§ 3730(b)(4) and (c).
[4] Granston Memo, *supra* note 1, at 2.
[5] 31 U.S.C. § 3730(c)(2)(A).
[6] *Id.* § 3730(c)(2)(B).

unfettered discretion to do so. Why, the argument goes, would the statute provide for a hearing in court if the court was powerless to do anything about the government's dismissal decision? As the Granston Memo itself notes, courts have taken differing views on how much discretion the government has in the dismissal process, although the memo itself does not stake out a position on that topic.[7]

The "Rational Relationship" Test

The first time a federal circuit court weighed in on this question directly was in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*[8] The district court below had granted the government's motion to dismiss under Section 3730(c)(2)(A), finding that the reasons offered by the government for the dismissal were "rationally related" to "legitimate government purposes."[9] The relator appealed, arguing that "the district court could not dismiss on the government's motion unless the court found the cases lacked merit."[10] On appeal, the Ninth Circuit affirmed the district court and adopted its "rational relationship" test. The Ninth Circuit held that the legislative history of the FCA's 1986 Amendments (which contained the dismissal provision in question) supported the district court's view.[11] Specifically, the Ninth Circuit cited a Senate Report that stated that the 1986 Amendments "provides qui tam plaintiffs with a more direct role . . . in acting as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason."[12] According to the Ninth Circuit in *Sequoia*, that statement from the

[7] Granston Memo, *supra* note 1, at 3.
[8] 151 F.3d 1139 (9th Cir. 1998).
[9] *Id.* at 1143.
[10] *Id.*
[11] *Id.* at 1144.
[12] *Id.* (citing S. Rep. No. 99-345, at 25-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5291).

Senate reflected a congressional intent "to ensure suits are not dropped without legitimate governmental purpose."[13]

The Ninth Circuit in *Sequoia* went on to adopt the two step analysis applied by the district court below: "(1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of that purpose. If the government satisfies the two-step test, the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal."[14]

Seven years later, in 2005, the Tenth Circuit adopted the Ninth Circuit's rational relationship test in *Ridenour v. Kaiser-Hill Co., L.L.C.*[15] In adopting the rational relationship test, the Tenth Circuit held that the test "recognizes the constitutional prerogative of the Government under the Take Care Clause,[16] comports with legislative history, and protects the rights of relators to judicial review of a government motion to dismiss."[17]

The D.C. Circuit's Unfettered Discretion View

In adopting the Ninth Circuit's rational relationship test, the Tenth Circuit in *Ridenour* declined to adopt the view taken two years earlier by the D.C. Circuit in *Swift v. United States*.[18] In *Swift*, the district court below had applied the rational relationship test from *Sequoia*.[19] On appeal, however, the D.C. Circuit rejected application of this test, noting that the actual language of the statutory provision

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[13] *Id.* at 1145. The court in *Sequoia* also cited another statement in the Senate Report for the 1986 FCA Amendments, which stated that a hearing was appropriate "if the relator presents a colorable claim that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary or improper considerations." *Id.* (quoting S. Rep. No. 99-345, at 26).
[14] *Id.*
[15] 397 F.3d 925 (10th Cir. 2005).
[16] The Take Care Clause appears in Article II, Section 3 of the United States Constitution, and requires that the President (and, therefore, the Executive Branch) "take Care that the Laws be faithfully executed."
[17] *Ridenour*, 397 F.3d at 936.
[18] 318 F.3d 250 (D.C. Cir. 2003).
[19] *Id.* at 252.

"at least suggests the absence of judicial constraint."[20] The D.C. Circuit went on: "[t]o this must be added the presumption that decisions not to prosecute, which is what the government's judgment in this case amounts to, are unreviewable."[21] Moreover, the D.C. Circuit held, "[r]eading § 3730(c)(2)(A) to give the government an unfettered right to dismiss an action is also consistent with the Federal Rules of Civil Procedure."[22] The D.C. Circuit in *Swift* also cited the Take Care Clause of the Constitution, but actually viewed this clause as supportive of the view that the government has unfettered discretion: "The decision whether to bring an action on behalf of the United States is therefore 'a decision generally committed to [the government's] absolute discretion'…"[23] According to the court in *Swift*, "[n]othing in § 3730(c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States."[24]

As to why the FCA calls for a hearing if the government has unfettered discretion, the D.C. Circuit held that the purpose of such a hearing is "simply to give the relator a formal opportunity to convince the government not to end the case."[25] And as to the legislative history cited by the Ninth Circuit in support of the rational relationship test, the D.C. Circuit in *Swift* noted that the section of the Senate Report cited by the Ninth Circuit related to an unenacted Senate version of the 1986 FCA amendment and, therefore, was not applicable.[26]

District Court Decisions

To date, the Ninth, Tenth, and D.C. Circuits are the only circuit courts that have ruled directly on this issue. Various district courts from outside of those circuits,

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[20] *Id.*
[21] *Id.* (citing various cases).
[22] *Id.*
[23] *Id.* at 253 (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (alterations in original).
[24] *Id.*
[25] *Id.*
[26] *Id.* The court in *Swift* went on to hold that even if the rational relationship test was the appropriate one, the government "easily satisfied it" in the case before the court. *Id.* at 254.

however, have attempted to weigh in. For example, in 2014, a district court judge in Massachusetts noted that he found the *Swift* rationale "more persuasive" than the *Sequoia* rationale, but concluded that which test applied did not really matter in that case as the government's motion to dismiss was appropriate under either standard.[27] In 2019, a district court judge in Minnesota also avoided answering the question conclusively, but noted that although there was no Eighth Circuit case that squarely confronted the question, "dicta in two of its FCA opinions hint that it might, if faced with the issue, agree with the *Swift* approach."[28]

Most recently, a district court judge in the Eastern District of Pennsylvania rejected the *Swift* rationale in favor of the rational relationship test adopted by the Ninth and Tenth Circuits. The court in *United States v. EMD Serono, Inc.* noted the circuit split and that the Third Circuit had yet to address the issue.[29] The court in *EMD Serono* went on to conclude that the reasoning adopted in the Ninth and Tenth Circuits was "more persuasive than that of the District of Columbia Circuit. The rational relationship standard accords with statutory interpretation and fosters transparency. It is consistent with the constitutional scheme of checks and balances."[30] According to the court in *EMD Serono*, if the government's right to dismiss was unfettered as the D.C. Circuit in *Swift* held that it was, then the hearing called for by the FCA "would be superfluous, rendering the requirement of a hearing a nullity."[31] The court went on to note:

> If the purpose of the hearing, as the District of Columbia Circuit read into the statute, is only to afford the relator an opportunity to convince the government to change its mind, what role does the judge play? Is the judge an observer, a mediator, or a participant in

[27] *Nesuti ex rel. U.S. v. Savage Farms, Inc.*, 2014 WL 1327015, at *1 (D. Mass. March 27, 2014).
[28] *U.S. ex rel. Davis v. Hennepin County*, 2019 WL 608848, at *5 (D. Minn. Feb. 13, 2019) (citing *U.S. ex rel. Zissler v. Regents of Univ. of Minn.*, 154 F.3d 870, 872 (8th Cir. 1998), and *U.S. ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998). As with other cases, the district court in *Davis* ultimately avoided the question by concluding that dismissal was appropriate under either the rational relationship test or the *Swift* standard.
[29] 2019 WL 1468934, at *3 (E.D. Penn. April 3, 2019).
[30] *Id.*
[31] *Id.*

> the debate? Certainly, if the government's right to dismiss is limitless, the judge is not an adjudicator. The judge has no decision to make if the government's right to dismiss is unchallengeable.[32]

The court in *EMD Serono* concluded that the rational relationship test "strikes a balance among the branches of government" and is "consistent with the notion of independent, co-equal branches of government."[33]

Conclusion

As with many emerging FCA issues, the split of authority regarding what level of discretion the government has in seeking dismissal under Section 3730(c)(2)(A) is growing deeper, perhaps setting the stage for the Supreme Court to eventually decide the issue. Until then, district courts outside of the Ninth, Tenth, and D.C. Circuits will have to decide for themselves which of the standards should apply, or simply avoid the issue altogether.

[32] *Id.* at *4.
[33] *Id.* Applying the rational relationship test, the court concluded that the government met the standard and had the right to dismiss the action. *Id.* at *5-*6.