

The Granston Memo in Tension: Third Circuit Allows DOJ's Dismissal of FCA Claim without a Hearing; Sen. Grassley Wants DOJ to Pump the Brakes

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by Sam Bolstad

The Department of Justice can move to dismiss a whistleblower's claim under the False Claims Act without first holding an in-person hearing, the Third Circuit recently ruled in Chang v. Children's Advocacy Center of Delaware, No. 18-2311 (3d Cir. Sept. 12, 2019).

The FCA requires that a *qui tam* relator have "an opportunity for a hearing" if the DOJ moves to dismiss. 31 U.S.C. § 3730(c)(2)(A). But in a precedential opinion authored by Judge David J. Porter, the Third Circuit panel held that an "opportunity" does not equate to a guaranteed hearing. The court joined other jurisdictions in holding that the FCA does not require a hearing "unless the relator expressly requests a hearing or makes a colorable threshold showing of arbitrary government action." Here, the relator never requested a hearing, and the court characterized the relator's filing opposing dismissal as failing to demonstrate arbitrary government action.

The court declined to weigh in on a putative circuit split as to whether a court must approve the DOJ's dismissal of a *qui tam* action. The D.C. Circuit has held that the DOJ has "an unfettered right" to dismiss a *qui tam* action, and need not seek court approval. *Swift v. United States*, 318 F.3d 250, 252–53 (D.C. Cir. 2003); *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008). On the other hand, the Ninth and Tenth Circuits require the government to prove to the court that there is (1) "a valid government purpose" for the dismissal, and (2) "a rational relation between dismissal and accomplishment of the purpose." *Id.* at 1145. If the government meets these prongs, "the burden switches to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145–46 (9th Cir. 1998); *United States ex rel. Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925, 934–35 (10th Cir. 2005). The Third Circuit found that the relator's showing fell short even under the stricter standard of the Ninth and Tenth Circuits.

The Third Circuit's ruling lends further support to the DOJ's recent and increasing trend

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towards dismissing those *qui tam* actions that it declines to join. The trend finds its roots in the Granston Memo, authored in January 2018, which has since been adopted as formal DOJ policy. With the Granston Memo, the DOJ encouraged prosecutors to dismiss declined *qui tam* actions, due to the purported waste of DOJ resources and risk of engendering unfavorable precedent in weak cases. Per the Memo: “Even in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate. In cases that lack substantial merit, they can generate adverse decisions that affect the government’s ability to enforce the FCA.”

Regardless of whether a court needs to approve a dismissal, Senator Chuck Grassley wrote a letter to Attorney General Barr on September 4, 2019, expressing concern that the DOJ was too eager to dismiss FCA claims. Senator Grassley alleged that the DOJ had moved to dismiss multiple cases “without first conducting cost-benefit analyses or other evaluations of the merits of a case.” He also asked Attorney General Barr to consider whether the Granston Memo creates “perverse incentives for alleged fraudsters to engage in abusive litigation tactics to prompt a case’s dismissal.” Grassley’s defense of FCA *qui tam* actions comes as no surprise; he was one of the primary authors behind the 1986 amendments that revived the FCA and authorized *qui tam* actions. Given Attorney General Barr’s previously documented hostility to FCA actions—in 1989 he argued the *qui tam* provisions of the FCA were “patently unconstitutional”—it is not clear how the Attorney General will respond to Senator Grassley’s letter.

For the moment, at least, the table appears set for the DOJ to continue dismissing declined *qui tam* actions, as highlighted by the recent decision of the Third Circuit (and a recent decision of the Eighth Circuit, as previously reported here by this blog). Defendants that are embroiled in these claims should remain cognizant of the opportunity, under the right circumstances, for an early exit with the support of the DOJ.