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FCA Relator Pursuit Of DOJ's Declined Cases Is Vital

By **Jacklyn DeMar and Renée Brooker** (July 23, 2021, 4:37 PM EDT)

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In a recent Law360 guest article, "**DOJ Should Weigh Dismissing Every Nonintervened FCA Suit**," the authors suggested that relators litigating declined cases drain scarce resources pursuing meritless cases, and that the U.S. Department of Justice should consider dismissing all False Claims Act cases when it makes its initial declination decision.[1] The narrative woven through the article is both false and dangerous, and should be rejected.

The FCA's qui tam provisions provide that a private person, known as a relator, may bring a claim on behalf of the government against a person or corporation that the relator alleges has defrauded the government by submitting false claims in order to receive government funds.

After the relator reports the alleged fraud to the government and files their complaint under seal, the government is required to decide whether it will intervene and take over primary responsibility for the litigation, or decline to intervene, in which case "the person who initiated the action shall have the right to conduct the action."[2] Importantly, the government is authorized to intervene at a later date for good cause shown.[3]

If the government recovers taxpayer funds as a result of the qui tam action, the FCA expressly provides that the relator gets a share of the recovery as an incentive for relators to take on the great risks associated with coming forward with fraud allegations, and a higher percentage if the case is nonintervened and the relator shoulders the litigation on behalf of the U.S.

The purpose of the FCA qui tam provisions is to support the act's broad remedial purpose of combating fraud against the government by empowering private citizens with knowledge of fraud to come forward with that information and to proceed with the case on the government's behalf if the government is unable or unwilling to do so.[4] Congress has continuously reinforced the immense value it places on relator driven cases since the 1986 amendments to the FCA, which were designed to revitalize the act.[5]

The qui tam provisions explicitly contemplate the relator moving forward with the case when the government declines to intervene, and the 1986 amendments were enacted after Congress determined that "only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."[6] Congress' goal was not only to encourage relators to come forward, but also to empower them to litigate if the government was unable or unwilling to do so.[7]

The authors of the recent article assert that, pursuant to internal DOJ guidance set forth in the so-called Granston memo, "the government should adopt a policy that mandates dismissal review at the declination stage." However, such a policy would be contrary to the very purpose of the Granston memo — to require judiciousness in using the government's dismissal authority.

Even before the Granston memo was issued in 2018, DOJ lawyers did, in fact, consider whether various factors lead to the conclusion that they should seek dismissal of a particular case, and they continue to do so today. The Granston memo states that it is "intended to provide a general framework for evaluating when to seek dismissal under section 3730(c)(2)(A) and to ensure a consistent approach to this issue across the Department."

The memo goes on to list seven nonexhaustive factors for DOJ attorneys to consider when weighing whether to seek dismissal including (1) curbing meritless qui tams; (2) preventing parasitic or opportunistic qui tam actions; (3) preventing interference with agency policies and programs; (4) controlling litigation brought on behalf of the United States; (5) safeguarding classified information and national security interests; (6) preserving government resources; and (7) addressing egregious procedural errors.[8] The memo does not advise DOJ attorneys to consider dismissal any more often than they had previously.

In the above-referenced article, the authors observe that there has been a notable increase in statutory dismissals since the Granston memo was issued, and that "the DOJ has moved to dismiss at least 50 FCA cases over the relator's objection, which far exceeds the DOJ's historical rate — averaging fewer than two dismissal motions per year from 1986-2017."[9]

First, the dismissal of 50 cases of the thousands of cases filed over the same time period is hardly notable.

Second, 11 of the 50 cases involved similar allegations against a collection of defendants brought by a single relator entity, National Health Care Analysis Group, and its subsidiaries, established for purposes of filing qui tam litigation.[10] So, that figure is, more fairly, 40 rather than 50 cases over that period.

Third, considering there was no formal guidance for DOJ attorneys about what to consider when contemplating using the DOJ's dismissal authority prior to the 2018 Granston memo, it should come as no surprise that there has been an uptick in how many times the DOJ has sought dismissal. That does not mean that DOJ attorneys had not weighed dismissal when weighing declination. Rather it may simply reflect DOJ attorneys using a consistent approach, in line with the stated goal laid out in the Granston memo.

Next, the article asserts that declined cases are often meritless and result in only a small fraction of recoveries under the FCA, noting that "[i]n 2020, less than 12% of FCA recoveries in qui tam cases came from declined cases, as opposed to intervened cases. ... And since 1986, declined cases have led to just 6.4% of all FCA recoveries in qui tam cases."[11] The upshot, according to the article, is that declined cases lack merit.

These assertions are unverifiable, because the DOJ statistics do not delineate cases that the DOJ initially declined and subsequently intervened before they were resolved favorably for the government. Even with the limitations of this data, the DOJ reported in 2020 that declined cases are responsible for recovering approximately $3 billion since the 1986 amendments revitalized the FCA.[12] That is a significant amount of taxpayer funds, and a conservative number because it does not give a complete picture of the value of declined cases.

As mentioned above, if the government initially declines a case it is permitted to, and often does, intervene at a later time, often after the relator has been litigating the case on her own. As the DOJ has repeatedly echoed, there are myriad reasons that the DOJ may initially decline to intervene, including resource issues, that have nothing to do with the merits of the case.[13]

The DOJ routinely intervenes for settlement purposes after a relator has committed substantial resources to litigate the case on her own for years. Those cases are included in the numbers reported by the DOJ as intervened. The authors' suggestion that the DOJ seek dismissal of more declined cases is inconsistent with the language of the FCA itself as well as the DOJ's long-stated view of what its declination decision means. Accepting the authors' recommendation would result in billions of dollars in losses to taxpayers.

The authors also contend that declined cases should be dismissed because they entail substantial cost to the parties involved. Surely, all types of litigation are costly, and no one understands how costly moving forward with a declined case is better than relators and their counsel.

Relators counsel almost exclusively work on a contingency fee basis, so that if the case is not successful and the relator does not obtain a share of the government's recovery, the relator does not recover and their attorney does not get paid. This is a compelling reason not to move forward with a case after the government declines, and relators and their counsel have no incentive to move forward

with cases that are meritless.

The authors take issue with the cost of discovery for the government, which is treated as a nonparty for discovery purposes in declined cases and bears the cost of monitoring and answering discovery.[14] Discovery requests must be relevant, proportional and not unduly burdensome.[15] However, under the guise of disproving materiality, FCA defense counsel are increasingly inundating government agencies with irrelevant discovery requests in order to induce the government to seek to dismiss cases on burdensomeness grounds.

For instance, in a recent case in the U.S. District Court for the Eastern District of New York, U.S. v. McKesson Corp., involving the improper repackaging and sale of a McKesson drug, the government filed a motion to quash a subpoena for hundreds of thousands of what it deemed nonresponsive documents, noting that "[i]t appears that McKesson is misusing discovery as a cudgel to extract from the government a dismissal of Relator's FCA claims pursuant to 31 U.S.C. § 3730(c)(2)(A)."[16]

If anyone is burdening the government with costs in declined litigation, it appears to be defendants. Those costs are ultimately borne by the taxpayers.

The bottom line is that the DOJ has used its dismissal authority judiciously — and continues to do so — just as Congress expected when it gave the DOJ this authority under the qui tam provisions. Any suggestion to the contrary is in derogation of the FCA, puts the fiscal well-being of important taxpayer-funded programs at greater risk and is therefore ill-considered.

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[1] Saleski, Courtney, et al., "DOJ Should Weigh Dismissing Every Nonintervened FCA Suit," Law360 (July 7, 2021)

[2] 31 U.S. Code §3730(c)(3)

[3] Id.

[4] S. Rep. No. 99-345 at 23-24 ("The Committee's overall intent in amending the qui tam section of the False Claims Act is to encourage more private enforcement suits.")

[5] 145 Cong. Rec. E1546 (daily ed. July 14, 1999) (statement of Rep. Howard Berman, D-Calif.) (with the 1986 amendments, "Congress wanted to encourage those with knowledge of fraud to come forward … [and] we wanted relators and their counsel to contribute additional resources to the government's battle against fraud").

[6] S. Rep. No. 99-345, at 2.

[7] Id. at 23-24.

[8] Granston Memo, at 3-7.

[9] Saleski, et al., at 3.

[10] U.S. ex rel. SAPF LLC, v. Amgen Inc., No. 16-cv-5203 (E.D. Pa.); U.S. ex rel. SMSPF LLC v. EMD Serono Inc., No. 16-cv-5594 (E.D. Pa.); U.S. ex rel. SMSF LLC v. Biogen Inc., No 1:16-cv-11379-IT (D. Mass.); U.S. ex rel. NHCA-TEV, LLC v. Teva Pharms., No. 17-cv-2040 (E.D. Pa.); U.S. ex rel. SCEF LLC v. Astra Zeneca PLC, No. 17-cv-1328 (W.D. Wash.); U.S. ex rel. Miller v. AbbVie Inc., No. 3:16-

cv-2111 (N.D. Tex.); U.S. ex rel. Carle, v. Otsuka Holdings Co., No. 17-cv-966 (N.D. Ill.); U.S. ex rel. CIMZNHCA v. UCB Inc., No. 3:17-cv-00765 (S.D. Ill.); U.S. ex rel. Health Choice Alliance LLC v. Eli Lilly & Co., No. 5:17-cv-123 (E.D. Tex.); U.S. ex rel. Health Choice Advocates LLC v. Gilead, et al., No. 5:17-cv-121 (E.D. Tex.); U.S. ex rel. Health Choice Group LLC v. Bayer Corp, et. Al. No. 5:17-cv-126 (E.D. Tex.).

[11] Id.

[12] DOJ Fraud Statistics, available at https://www.justice.gov/opa/press-release/file/1354316/download.

[13] Granston Memo, at 1 ("Moreover, a decision not to intervene in a particular case may be based on factors other than merit, particularly in light of the government's limited resources.").

[14] U.S. ex rel. Eisenstein v. City of N.Y ., 556 U.S. 928 (2009).

[15] Fed. R. Civ. P. 26(b)(1).

[16] Motion to Quash, U.S. et al. ex rel. Omni Healthcare Inc. v. McKesson Corp. et al., 1:12-cv-06440 (E.D.N.Y., July 14, 2021)
