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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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Qui Tam Dismissals After the "Granston Memo" Highlight the Circuit Split Over the Impact of Relator Objections

By Mark D. Colley, Tirzah S. Lollar, Kathleen C. Cooperstein, and Craig A. Schwartz*

Michael Granston of the Department of Justice authored a memo last year in which he encouraged the Department to make use of the False Claims Act provision permitting dismissal over relator objections, when appropriate. The authors of this article discuss court decisions issued after the "Granston Memo."

It has now been almost a year since a memo authored by Michael Granston[1] of the Department of Justice ("DOJ") was leaked, in which he encouraged DOJ to make use of the False Claims Act ("FCA") provision permitting dismissal over relator objections, when appropriate. That memo was met with jubilation by some and measured skepticism by others. Meanwhile, the FCA bar has spent much of the past year waiting to see whether (and in some cases no doubt trying to ensure that) it will have an appreciable effect on DOJ's behavior. Until recently, the skeptics have carried the day, with only four post-Granston Memo dismissal decisions this year, three of which granted the DOJ's motions. But good news could be on the horizon, as DOJ seems to have finally overcome its inertia at the end of 2018 by filing motions in seven different district courts to dismiss 11 *qui tam* complaints that alleged Anti-Kickback Statute violations against pharmaceutical companies and commercial outsourcing vendors based on allegations about nurse and reimbursement support programs.

THE GRANSTON MEMO IN THE COURTS

The Granston Memo experience draws attention to a circuit split that was cast into sharp relief with dueling decisions in June, issued the same day and

* Mark D. Colley (mark.colley@arnoldporter.com) is a partner at Arnold & Porter focusing on substantial bid protests, contract claims and disputes, federal court litigations, and government audits and investigations. Tirzah S. Lollar (tirzah.lollar@arnoldporter.com) is a partner at the firm focusing her practice on white collar defense and government investigations, including trial work. Kathleen C. Cooperstein (kathleen.cooperstein@arnoldporter.com) is an associate at the firm working on white collar litigation, most frequently relating to the False Claims Act. Craig A. Schwartz (craig.schwartz@arnoldporter.com) is an associate at the firm advising clients in matters at the intersection of government contracts, national security, and international trade.

[1] https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.

involving the same Department of Housing and Urban Development ("HUD") Federal Housing Administration program. A district court in California refused to grant the government dismissal because it found that the government had not sufficiently investigated the underlying allegations in order to make a reasonable decision whether continued litigation would merely waste resources.[2] In contrast, a district court in Kentucky held the opposite, granting dismissal and noting that the statutorily mandated hearing prior to granting such motions was merely to give the relator an opportunity to "convince the government not to end the case"—not to allow courts to override DOJ's judgment in deciding to dismiss.[3] The contrasting results in the two June cases can be traced back to 1998, when the U.S. Court of Appeals for the Ninth Circuit implemented a specific analytical framework to determine when a *qui tam* action could be dismissed over the relator's objection.[4]

Sequoia Framework

The Ninth Circuit held in *Sequoia* that the government must show (1) a valid government purpose and (2) a rational relation between that purpose and the requested dismissal. The *Sequoia* framework drove the district court in California to deny DOJ's motion to dismiss in *Academy Mortgage*. That framework has also been embraced by the U.S. Court of Appeals for the Tenth Circuit.[5] The U.S. Court of Appeals for the Second Circuit, however, reads *Sequoia* to mean that, although the relator must be given a hearing prior to dismissal, the court need not determine that the government's decision to dismiss is actually "reasonable."[6]

The *Swift* Approach

The *Sequoia* test conflicts with a more lenient approach that the U.S. Court of Appeals for the District of Columbia Circuit adopted in *Swift v. United States*.[7] The *Swift* decision rejected *Sequoia* and held that government requests to dismiss are free from judicial constraint, just as decisions not to prosecute are unreviewable. The *Swift* view has been given favorable (but not binding) treatment in the U.S. Courts of Appeals for the Fourth and Fifth Circuits, albeit

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[2] *U.S. v. Academy Mortgage Corp.,* No. 16-cv-02120 (N.D. Cal. June 29, 2018).

[3] *U.S. ex rel. Maldonado v. Ball Homes, LLC*, No. 5:17-cv-379 (E.D. Ky. June 29, 2018).

[4] *U.S. ex rel. Sequoia Orange Co. v Baird-Neece Packing Corp*, 151 F.3d 1139 (9th Cir. 1998).

[5] *U.S. ex rel. Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925 (10th Cir. 2005).

[6] *U.S. ex rel. Stevens v. State of Vt. Agency of Nat. Res.*, 162 F.3d 195 (2d Cir. 1998).

[7] 318 F.3d. 250 (D.C. Cir. 2003).

only in dicta.[8] Although the Kentucky court endorsed the *Swift* approach when granting DOJ's motion to dismiss in *Maldonado*, it also noted that dismissal would be appropriate even under the *Sequoia* test because of the government's interests in conserving resources and "reining in weak *qui tam* actions."

The Distinction

In both *Sequoia* and *Swift*, the government conceded that the FCA contentions were meritorious, and the courts treated the dismissal motions as analogous to prosecutorial discretion. But an important principle distinguishes the cases. In *Sequoia*, absent any textual support, the court approved a two part test (valid government purpose and rational relation between that purpose and dismissal) and relied on legislative history for support. In *Swift*, the court held that government decisions to seek FCA dismissal are unreviewable because the decision whether to bring an action on behalf of the United States is committed to the government's "absolute discretion."[9]

DISTRICT COURT DECISIONS

In August, a district court in South Carolina likewise granted a government dismissal motion notwithstanding relator objections.[10] Interestingly, as in *Maldonado*, the South Carolina court ruled that dismissal would be appropriate under either *Sequoia* or *Swift*, and did not cite *Speed Mining* as circuit-level authority.[11]

In the most recent addition to this set of post-Granston Memo cases, the district court in Idaho recently granted dismissal over the relator's objection, following the analytical framework established by its controlling circuit in *Sequoia*.[12] This case provides a helpful example of the sort of situation where the Department of Justice will seek dismissal despite a relator's wish to continue advancing the case. The relator had alleged that defendants, working under a cooperative research and development grant, failed to disclose a newly-developed invention to the government, as required. The government argued for dismissal because the benefits of dismissal outweighed any benefits of proceeding.

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[8] *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310 (4th Cir. 2008); *Riley v. St. Luke's Episcopal Hosp.*, 196 F.3d 514 (5th Cir. 2001) (en banc).

[9] *Swift v. U.S.*, 318 F.3d. at 253 (D.C. Cir. 2008) (rejecting as inapposite legislative history cited in *Sequoia,* which related to unenacted version of 1986 FCA amendments).

[10] *U.S. ex rel. Stovall v. Webster University*, No. 3:15-cv-03530 (D.S.C. Aug. 8, 2018).

[11] *Id.*

[12] *U.S. ex rel. Toomer v. Terrapower, LLC et al*, No. 16-cv-00226 (Oct. 10, 2018).

First, the government noted that it had not yet lost any property rights or suffered any damages, and retained the opportunity to lay claim to the new invention if and when it was ever declared patentable (proceedings on that question were still pending before the U.S. Patent and Trademark Office). This stands in somewhat ironic contrast to the many times the United States has maintained that actual damages or loss are not required in order to establish FCA liability. Here, the government did not disclaim liability, but rather said that the FCA case was not worth pursuing *at the time*. At the government's insistence, the case was dismissed with prejudice only as to the relator, not to the government's ability to reinstitute the case later if warranted.

Second, the government argued that continued litigation would "waste substantial government time and resources," given the inevitable involvement of government employees and contractors even if the United States did not intervene. Substantial government expenditures even absent intervention are, of course, frequently experienced in FCA cases litigated by relators, but here the government observed that these expenses would be wasted if the defendant never obtained a patent.

Third, the government was concerned that continuing with the FCA case would disrupt important continuing work and might discourage others from engaging in future collaborative pursuits. It is an encouraging sign for the government in at least one case to state publicly that dismissal is warranted because allowing meritless FCA cases to proceed has the adverse public impact of discouraging contractors from supporting important government needs.

Finally, the government, having investigated the FCA allegations, argued that they were not viable. "Curbing meritless qui tams" is the first reason for seeking dismissal discussed in the Granston Memo. The court ignored this argument, however, observing that the motion could be granted even if the FCA claims are viable. While this is consistent with the low bar established for granting such motions, it might be hoped that courts would be even more comfortable dismissing an FCA case where the government's own lawyers conclude it lacks merit.

Not surprisingly, the United States believes that its requests to dismiss False Claims Act cases should be approved over any relator objections without court scrutiny.[13]

CONCLUSION

While the Granston Memo may not have initially prompted a flood of DOJ dismissal requests, a more recent willingness to move for dismissal suggests that

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[13] *See U.S. ex re. Manchester v. Purdue Pharma, L.P.*, No. 1:16-cv-10947-MLW (D. Mass.) (pending U.S. motion to dismiss citing *Swift*).

defense counsel should consider promoting that course where it is possible to show persuasively why a case is not worth pursuing. This will not be simply a matter of balancing litigation cost versus potential recovery. The government will factor in its views of the case merits even if the court, whether following either the *Sequoia* or *Swift* analysis, may not scrutinize that issue. And, the one recent instance when the government's motion did not prevail turned on the government's failure to demonstrate an investigation of the merits. As the most recently filed motions work their way towards decision, all eyes will be turned towards the courts to discover the fate of Granston dismissals in the coming year.