

# PUBLICATION

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## Justice Department Increasingly Supports Dismissal of Qui Tam Lawsuits

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**The False Claims Act (FCA) includes a provision that allows the government to file a motion to dismiss a whistleblower's qui tam lawsuit over the whistleblower's objection if the whistleblower "has been notified by the Government of the filing of the motion and the court has provided the [whistleblower] with an opportunity for a hearing on the motion."<sup>1</sup> The FCA does not specify a particular standard for courts to approve the government's request for dismissal.**

In January 2018, the United States Justice Department issued the so-called "[Granston Memo](#)" discussing the factors that the Department should consider when evaluating whether to seek the dismissal of a qui tam lawsuit. Since then, the government has been more actively seeking the dismissal of qui tam suits. However, federal courts have applied different standards to handling the government's requests for dismissal.

### Two Approaches to Evaluating the Government's Request for Dismissal

A Pennsylvania federal court recently issued a decision discussing the two primary approaches that have emerged from federal courts reviewing the government's requests for the dismissal of a qui tam suit.<sup>2</sup> The D.C. Circuit has ruled that the government has the "unfettered" right to dismiss qui tam lawsuits.<sup>3</sup> The Ninth and Tenth Circuits, however, have adopted a slightly more stringent "rational relationship" standard.<sup>4</sup> Under the rational relationship standard, the government must have a valid purpose for seeking dismissal of the qui tam lawsuit and there must be a rational relationship between dismissing the suit and achieving the government's purpose. If the government makes that showing, then the burden shifts to the whistleblower to show that the government's request for dismissal is fraudulent, arbitrary and capricious, or illegal. While the rational relationship standard is not difficult for the government to satisfy, it is not a foregone conclusion that the government's request for dismissal will be granted. The government's request for dismissal has been denied in some cases.<sup>5</sup>

### The *Polansky* Case

In *Polansky*, a Pennsylvania district court noted that the applicable appellate court, the Third Circuit, had not yet decided which standard to use when resolving the government's request for dismissal, and the district court declined to decide which standard should apply. Rather, the court determined that even if the more stringent rational relationship standard applied, the government's request to dismiss the qui tam suit was appropriate.

The government asserted that a continuation of the qui tam suit would impose a burden on the government's resources because the government would need to monitor the case, file briefs on case issues that arise, respond to written discovery requests from the parties to the suit, and prepare government officials for depositions. The government also wanted to avoid the production of documents following a recommendation from the court's special master that the government should produce documents, including material the government asserted was privileged. The court concluded that those factors presented a reasonable justification for seeking dismissal of the case and that a dismissal would accomplish the government's stated objective of preserving its resources.

Furthermore, the whistleblower did not show that the government's request for dismissal was fraudulent, arbitrary and capricious, or illegal. Although the government had opposed dismissal at an earlier stage of the lawsuit, later developments in the case justified the government's new position supporting dismissal. For

example, the whistleblower had declined the government's prior request to narrow his claims in the suit. Also, the government learned additional information from a deposition of the whistleblower that apparently led the government to change its position on dismissal. Finally, a special master appointed by the court had recommended that the government should produce additional documents in the case, including material the government claimed was privileged. Consequently, the court approved the government's request to dismiss the proceeding.<sup>6</sup>

### Takeaways for Providers

Providers that are defendants in qui tam suits should consult with their legal counsel on whether the particular circumstances of their case, in conjunction with the Justice Department policy set forth in the Granston memo, create an opportunity for the provider's counsel to contact Justice Department lawyers to discuss a government request for dismissal of the suit. The government's willingness to request the dismissal of a qui tam suit will remain an infrequent event, but there are early signs that a government-initiated dismissal is now more possible.

<sup>1</sup> 31 U.S.C. § 3730(c)(2)(A).

<sup>2</sup> *Polansky v. Executive Health Resources, Inc.*, 2019 WL 5790061 (E.D. Pa. Nov. 5, 2019). The case is now on appeal to the Third Circuit.

<sup>3</sup> *Swift v. United States*, 318 F.3d 250 (D.C. Cir.), *cert. denied*, 539 U.S. 944 (2003).

<sup>4</sup> *Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999); *Ridenour v. Kaiser-Hill Co., LLC*, 397 F.3d 925 (10th Cir.), *cert. denied*, 546 U.S. 816 (2005).

<sup>5</sup> See e.g. *United States v. Academy Mortgage Corp.*, 2018 WL 3208157 (N.D. Cal. June 29, 2018).

<sup>6</sup> The court also concluded that apart from the government's request to dismiss the suit, the whistleblower's case was legally defective and may be subject to dismissal on summary judgment.