

FEDERAL COURT REINFORCES GOVERNMENT'S RIGHT TO DISMISS FCA ACTIONS OVER WHISTLEBLOWER OBJECTION

The Eastern District of Texas affirmed the Government's right to dismiss FCA actions over a whistleblower's objections. The Court held that the Government may dismiss claims to avoid the costs of extended litigation.

THE UNITED STATES DECLINED TO INTERVENE

Health Choice Alliance, LLC filed an FCA action alleging that the defendants defrauded the United States and 31 different states by violating the Anti-Kickback Statute. The alleged kickbacks included "free nurse services, white coat marketing and reimbursement support services." The United States first declined to intervene and the complaint was promptly dismissed. But, when Health Choice tried to file a second amended complaint, the United States moved for dismissal with prejudice over Health Choice's objections.

COURT AFFIRMS GOVERNMENT'S RIGHT TO DISMISS

The Court affirmed the Government's right to dismiss a claim trumps whistleblower objections—though it declined to stake a definitive position on what test controls such motions in the Fifth Circuit.

COMPETING STANDARDS FOR GOVERNMENT DISMISSAL

Federal courts are split on how to analyze the Government's motions to dismiss FCA claims over whistleblower objections. The D.C. Circuit endorses the Government's right to an "unfettered discretion" to dismiss FCA actions after a hearing. Under this analysis, the Government's decision to dismiss is like its prosecutorial discretion: unfettered and unreviewable.

The Ninth and Tenth Circuits endorse some—even if light—judicial overview of Government motions to dismiss. Known as the *Sequoia Orange* standard, the Government must demonstrate:

1. A valid Government purpose justifying dismissal; and
2. How dismissal achieves a valid purpose.

If satisfied, the whistleblower bears the burden of showing that the Government's decision is "fraudulent, arbitrary and capricious, or illegal."

The Fifth Circuit—which includes the Eastern District of Texas—remains uncommitted to either standard. But the Eastern District of Texas avoided staking a position out on either by finding the Government satisfied the more stringent *Sequoia Orange* standard.

COURT HOLDS GOVERNMENT'S COST-BENEFIT ANALYSIS VALID PURPOSE JUSTIFYING DISMISSAL

Applying the more stringent standard, the Court determined that the Government's protection of public resources by dismissing actions unlikely to produce benefits to the Government satisfied the *Sequoia Orange* standard.

The Government moved to dismiss Health Choice's action because it determined the kickback claims were unlikely to lead to recovery and thus did not justify the Government expense to oversee the litigation. Health Choice challenged the Government's purported purpose arguing that the Government overstated the cost, underestimated the likelihood of success and provided no evidence supporting its cost-benefit analysis.

The Court sided with the Government. First, it held that the Government holds a "legitimate interest in preserving its resources." Thus, dismissal of an action when the Government's cost-benefit analysis determines little likelihood of recovery rationally relates to its valid interest.

Thus, Health Choice bore the burden of proving fraud, illegality or some arbitrary and capricious purpose underlying the motion. It failed to do so. The Court found that the Government's extensive, months-long investigation was valid. And even if Health Choice disagrees or believes recovery is both likely and significant—that belief is irrelevant. The FCA empowers the Government alone with that determination—not a whistleblower.

The Court, therefore, dismissed Health Choice's action with prejudice—barring it from refiling a whistleblower action. As is standard, the Government and 31 states' claims were dismissed without prejudice.

KEY TAKEAWAYS

Government dismissal over whistleblower objection was a pipedream just three years ago. But the DOJ's shifting position on dismissal of baseless claims has increased the frequency of such dismissals. Though far from a wave, the growing trickle of Government action against meritless claims is a powerful tool in the hands of experienced counsel. Early discussions with the Government can pay dividends and ultimately reduce hospital litigation costs. If you have any questions, please contact:

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