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Recent District Court Decisions Highlight Conflicting Stances on Dismissal of Frivolous FCA Claims

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On June 29, 2018, federal district courts in California and Kentucky issued conflicting decisions over the deference owed to prosecutors in seeking to dismiss frivolous False Claims Act (FCA) claims and the effect of the January 2018 Granston Memo, which recognized dismissal as an "important tool" to advance governmental interests, preserve limited resources and avoid adverse precedent.

In *United States et al. v. Academy Mortgage Corporation* (N.D. Cal.), the relator, an underwriter at Academy Mortgage Corporation (Academy), claimed that a mortgage loan originator violated the FCA by falsely certifying loans for government housing insurance. The government declined to intervene after the relator filed her initial complaint, which limited the alleged misconduct to a one-year period at the specific branch where the relator was employed. The relator next filed an amended complaint that included additional allegations and identified specific employees allegedly complicit in the fraud. This time, the government moved to dismiss the complaint under 31 U.S.C. § 3730(c)(2)(A), which authorizes the government to move to dismiss an FCA action even though it did not intervene in the litigation, as it remains the real party in interest.

In its motion to dismiss, the government argued that allowing the suit to continue would drain government resources and was not justified by a cost-benefit analysis. The government also argued that its conclusion that dismissal was appropriate was subject to deference.

The relator objected to the motion to dismiss on the ground that the government had failed to satisfy the Ninth Circuit's burden-shifting approach for adjudicating dismissal of *qui tam* actions, citing *U.S. ex rel., Sequoia Orange Company v. Baird-Neece Packing Corporation*. Under *Sequoia,* the initial burden is on the government to identify (1) a valid government purpose in dismissal; and (2) "a rational relationship between dismissal and accomplishment of the purpose." Once the government makes this showing, "the burden shifts to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." The relator argued that the government had failed to identify any governmental interest in dismissal and had insufficiently investigated the allegations in the amended complaint. The relator requested an evidentiary hearing to review the sufficiency of the government's investigation and the grounds for dismissal.

The district court denied the motion to dismiss. Applying *Sequoia*, the court held that the government had failed to meet its burden by "failing to conduct a minimally adequate investigation." The court

declined to define the precise parameters of an adequate investigation, but specifically criticized the government for only reviewing 1.5 years of an allegedly fraudulent scheme that, according to the amended complaint, lasted six years. The court further held that, even if the government *had* prevailed on the first step, the relator carried her burden by showing that the government's failure to fully investigate the claim rendered its motion to dismiss "fraudulent, arbitrary and capricious, or illegal."

On the same day as the *Academy Mortgage* decision, a district court in Kentucky explicitly rejected *Sequoia's* burden-shifting approach in favor of a more deferential standard and granted the government's motion to dismiss a different FCA claim.

In *United States ex rel. Maldonado v. Ball Homes, LLC*, the relator, a homeowner, claimed that the defendants, including a closing agent, loan originator and others, took part in a fraudulent scheme to obtain federally insured housing loans by submitting falsified documents to the Federal Housing Administration. As in *Academy*¸ the government declined to intervene and subsequently filed a motion to dismiss under 31 U.S.C. § 3730(c)(2)(A). The relator objected to the motion to dismiss and sought an evidentiary hearing. The court noted "two differing standards for evaluating government requests to dismiss *qui tam* actions," comparing the Ninth Circuit's *Sequoia* test with the approach of the D.C. Circuit in *Swift v. United States*.

In *Swift*, the D.C. Circuit Court of Appeals declined to adopt *Sequoia's* burden-shifting approach and held that the government's decision to dismiss a *qui tam* suit under 31 U.S.C. § 3730(c)(2)(A) constituted an exercise of prosecutorial discretion subject to substantial deference by the judiciary.

Though the *Maldonado* court acknowledged that neither the Supreme Court nor the Sixth Circuit have ruled on this question, it chose to apply *Swift's* deferential standard. "[I]n keeping with the plain language of 31 U.S.C. § 3730(c)(2)(A), the court held that "the government has virtually unfettered discretion to dismiss a False Claims Act case, save exceptional circumstances, such as a showing of fraud on the court." The court granted the government's motion to dismiss, noting that even under the more restrictive standard in *Sequoia*, the government met its burden by investigating the relator's complaint and determining that the *qui tam*case was not worth the investment of the government's resources.

These rulings suggest that courts following Ninth Circuit precedent will closely scrutinize the degree to which the government investigates a relator's allegations–including amended allegations–in deciding whether to grant the government's motion to dismiss *qui tam* suits under 31 U.S.C. § 3730(c)(2)(A). A failure to fully investigate may result in a denial of the motion to dismiss. However, courts adhering to D.C. Circuit precedent are far more likely to defer to the government's discretion in dismissing a *qui tam* suit, absent exceptional circumstances.

The government's appeal of the district court's decision in *Academy Mortgage* is pending. No appeal has been filed in *Maldonado.*

The cases are *United States v. Acad. Mortg. Corp.*, No. 16-CV-02120-EMC, 2018 WL 3208157 (N.D. Cal. June 29, 2018) and *United States ex rel. Maldonado v. Ball Homes, LLC,* No. 5:17-cv-379 (E.D. Ky. June 29, 2018).