

Third Circuit Says the FCA Does Not Guarantee A Hearing When DOJ Seeks to Dismiss Declined FCA Cases

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The Court of Appeals for the Third Circuit recently weighed in on a relator's right to a hearing where the government moves to dismiss a declined *qui tam* case, holding that the False Claims Act (FCA) does not guarantee a relator an in-person hearing before their declined FCA cases may be dismissed. *United States and State of Delaware ex rel. Chang v. Children's Advocacy Center of Delaware*, [No. 18-2311](#) (3rd Cir. Sept. 12, 2019).

As [previously discussed on this blog](#), we have observed the Department of Justice (DOJ) increasingly exercise its authority to dismiss declined *qui tam* suits under [Section 3730\(c\)\(2\)\(A\) of the FCA](#) following the release of the "Granston Memo" and its incorporation into the Justice Manual. The [Granston Memo](#), issued by DOJ Civil Fraud Director Michael Granston in early 2018, instructed DOJ litigators to consider dismissal of *qui tam* actions under Section 3730(c)(2)(A), where it would be in the federal interest to do so, for example, to preserve limited governmental resources, to curb meritless claims, or to avoid adverse precedent.

Not surprisingly, as the DOJ has been using its authority to dismiss FCA suits more often, realtors have opposed these motions. In *Chang*, the government (both the United States, under the FCA, and Delaware under the state FCA) moved to dismiss relator's complaint, which alleged that the Children's Advocacy Center of Delaware misrepresented material information about its work when applying for state and federal funding. Both government entities sought dismissal under Section 3730(c)(2)(A) of the federal FCA and its Delaware analogue, asserting that their investigations found relator's allegations to be "factually incorrect and legally insufficient." Relator opposed the motions, but did not request oral argument or a hearing. Without conducting an in-person hearing or issuing a supporting opinion, the District Court granted the motions to dismiss. Relator appealed.

Relator Chang argued on appeal that the FCA guarantees realtors an automatic in-person hearing because the plain language of the FCA (and the Delaware FCA) provides relators an "opportunity for a hearing" when the government moves to dismiss. The Third Circuit panel disagreed however, and instead, held that an opportunity for a hearing "requires that relators avail themselves of the 'opportunity.'" Because Chang never expressly requested a hearing and his opposition did not demonstrate that the governments' motions were "arbitrary or capricious," the Third Circuit affirmed the District Court decision granting the motions to dismiss without holding a hearing.

Moreover, despite requests from the parties, the Third Circuit declined to address a circuit split over the standard that applies to DOJ's authority to dismiss *qui tam* suits under FCA Section 3730(c)(2)(A). The Court of Appeals for the D.C. Circuit in *Swift v. United States*, [No. 01-5312](#) (D.C. Cir. 2003) held that the government has an "unfettered right" to dismiss *qui tam* cases. By contrast, the Ninth and Tenth Circuits and the Eastern District of Pennsylvania have applied the "rational relation" standard, which requires that the government show (1) "a valid government purpose" and (2) "rational relation between dismissal and accomplishment of the purpose," before the court can grant dismissal. See *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, [No. 96-15024](#) (9th Cir. 1998). Under *Sequoia Orange*, if the government meets the "rational relation" standard, the burden shifts to the relator to establish that dismissal is "fraudulent, arbitrary and capricious, or illegal." The panel in *Chang* opted not to take a side in this split because, according to the court, relator failed even the more restrictive "rational relation" standard.

While the Third Circuit declined to weigh in on the circuit split, this decision reaffirms the strength of the government's dismissal power under Section 3730(c)(2)(A) of the FCA as well as the challenge that relators face when attempting to oppose such a motion. We will continue to monitor both this circuit split and the evolving legal landscape surrounding DOJ's requests to dismiss declined *qui tam* cases.

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