Thursday, May 16, 2019

In a memo leaked last year (the Granston Memo), the U.S. Department of Justice (DOJ) instructed its prosecutors to more seriously consider dismissing meritless whistleblower False Claims Act (FCA) cases when it is in the government’s best interest to do so. See “Leaked DOJ Memo Indicates New Government Focus On Dismissing Meritless False Claims Act Cases,” Health Care Law Today (January 29, 2018). A Pennsylvania federal judge recently provided important additional guidance on the limitations to DOJ’s dismissal authority, specifically rejecting the notion that the government’s right to dismiss is “unfettered.” United States v. EMD Serono, Inc., Civil Action No. 16-5594, 2019 U.S. Dist. LEXIS 57150 (E.D. Pa. Apr. 3, 2019).

Although DOJ has incorporated the Granston Memo’s policy into its practices in the year since its release, there has not been a spree of dismissals. This may be due in part to the restrictions that many courts — now including the Eastern District of Pennsylvania — have imposed on the government’s discretion to dismiss cases.

The EMD Serono case involved allegations that pharmaceutical companies and marketing consultants had violated the Anti-Kickback Statute in marketing to prescribers. The Court granted DOJ’s request to dismiss the case but held that dismissal is only appropriate where the government has a valid governmental interest and shows that dismissal is rationally related to accomplishing that interest. Once the government satisfies this test, the relator must show that dismissal is fraudulent, arbitrary and capricious, or illegal in order to avoid such an outcome. This “rational relationship” approach applies the same standard created by the Ninth Circuit in United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998), and followed by the Tenth Circuit. It is different from the “unfettered right to dismiss the action” standard adopted by the DC Circuit.

The Court in EMD Serono specifically noted that § 3730(c)(2)(A) mandates a hearing before a court can dismiss an FCA action over a relator’s objection. The Court found that if indeed the government’s right to dismiss is unfettered, and virtually unreviewable by the court, such an approach would render the required pre-dismissal hearing meaningless. The Court held that the rational relationship test, on the other hand, achieves a balance between allowing the government to dismiss cases while providing courts with the ability to ensure legitimate actions are not improperly disposed. The Court in EMD Serono held that dismissing the case to conserve costs was rationally related to a valid governmental interest in preserving resources for other cases and programs — and specifically that the government, like any other plaintiff in a civil case, “has the option to end litigation it determines is too expensive or not beneficial.” The Court further ruled that the relator’s claim, that DOJ sought to dismiss because it dislikes corporate relators, was insufficient to establish that the dismissal was arbitrary and capricious.

The Court’s ruling is particularly noteworthy given that the Third Circuit has not previously addressed the proper level of judicial review for proposed DOJ dismissals. Based on other cases, DOJ frequently cites similar cost concerns and the preservation of resources as a reason for dismissal. While it is clear that DOJ has the authority to seek dismissal of whistleblower claims based on considerations such as cost concerns and preservation of resources, this power is not without its limitations — at least in the Ninth and Tenth Circuits, and now the Eastern District of Pennsylvania.
Government enforcement attorneys have engaged DOJ in discussions regarding voluntary dismissals in a number of cases and continue to assess the practical impact of the Granston Memo for FCA defendants. Based on this experience, the question arises whether the prospect of a hearing in connection with a request for dismissal under § 3730(c)(2)(A) will cause DOJ to be less inclined to move to dismiss, knowing it will have to justify its position to a judge. While each case is different, we believe the hearing requirement is unlikely to change DOJ’s approach, given that it is only required to show a rational relationship between a valid governmental interest and dismissal. The major task remains convincing DOJ that a particular case should be dismissed; with that accomplished, we believe DOJ is unlikely to be dissuaded by a hearing.

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