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At The Intersection Of Escobar, Touhy And Gov't Dismissal

By **Derek Adams** (March 7, 2019, 6:25 PM EST)

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At the Federal Bar Association's 2019 Qui Tam conference, held last week in Washington, D.C., Michael Granston, director of the U.S. Department of Justice, Civil Fraud Section and author of the well-known Granston memo, spoke to the audience and cautioned against using discovery as a tactic to solicit DOJ dismissal. He noted that preserving government resources is evaluated in light of many other factors and warned that using excessive discovery to encourage dismissal will not work.

While practitioners debate the import of the U.S. Supreme Court's decision in Universal Health Services Inc. v. United States, ex rel. Escobar,[1] its most significant practical effect on False Claims Act litigation has been increased discovery requests to the government.

In Escobar, the Supreme Court provided guidance for evaluating materiality under the FCA and signaled an increased emphasis on government action. The Supreme Court cautioned that,

> if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material ... [o]r, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.[2]

Guided by Escobar, numerous courts have granted motions to dismiss, motions for summary judgment or have vacated judgments in FCA cases, citing a failure to plead or establish materiality because of government inaction.[3] Accompanying this development has been an increase in discovery requests by defendants, hoping to establish that the government knew about the alleged fraud or similar conduct, and yet continued paying claims. This increased discovery has created new burdens on government agencies, resulting in additional expense and unwanted distraction from critical agency missions and objectives.

In January 2018, Granston provided department attorneys with a framework for evaluating when to seek dismissal under 31 U.S.C. § 3730(c)(2)(A) in nonintervened cases. The Granston memo identified a number of factors for department attorneys to consider, including preventing interference with agency policies and programs, and preserving government resources, noting that "the government expends

significant resources in monitoring [nonintervened] cases and sometimes must produce discovery or otherwise participate."

Following the Granston memo, there has been an uptick in the department's dismissal of qui tam actions, and it frequently identifies anticipated government burden as a justification for dismissal. For example, in its brief in Gilead Sciences Inc. v. United States ex rel. Campie, the government informed the Supreme Court that, if the case were remanded to the district court, the government would dismiss because, in part,

> both parties might file burdensome discovery and Touhy requests for FDA documents and FDA employee discovery (and potentially trial testimony), in order to establish 'exactly what the government knew and when,' which would distract from the agency's public-health responsibilities.[4]

Likewise, the DOJ recently moved to dismiss 11 qui tam actions brought by a professional relator, Health Choice Group LLC, alleging that pharmaceutical companies and commercial vendors violated the Anti-Kickback Statute[5] by providing certain nurse and reimbursement support services for free. In its motions to dismiss, the DOJ pointed to the nationwide nature of the relator's allegations and the associated time and costs that would be incurred in discovery, for example "collective, reviewing, processing, and producing documents from among multiple federal healthcare programs, as well as voluminous prescription drug event data and patient health information for potentially thousands of beneficiaries … preparing numerous agency witnesses for deposition and filing statements of interest … ."[6]

Because the DOJ's dismissal of qui tam actions is the holy grail for FCA defendants, this creates an incentive for excessive discovery by defendants in nonintervened cases, hoping that the department would prefer to dismiss rather than engage in costly and time-consuming discovery. Granston's comments at last week's conference should serve as a warning to defendants engaged in this practice. Time will tell whether defendants will heed this message, and whether the DOJ will carve back its emphasis on preserving agency resources when seeking to dismiss qui tam actions.

The breadth of discovery in nonintervened cases and the DOJ's accompanying desire to dismiss may also vary depending on where the case is brought. In nonintervened FCA cases, the government is not a party to the litigation and therefore Federal Rule of Civil Procedure 26 does not apply. Rather, defendants must issue Rule 45 third-party subpoenas and follow the relevant agency's Touhy[7] regulations. If an agency refuses to produce the requested materials, what comes next varies from circuit to circuit.

In the Fourth and Eleventh Circuits, the defendant must move to compel and the agency's denial is governed by the Administrative Procedure Act's deferential "arbitrary and capricious" standard.[8] Under that standard of review, a federal court may only "order a non-party agency to comply with a subpoena if the government has refused production in an arbitrary, capricious, or otherwise unlawful manner."[9] As summarized by the U.S. Court of Appeals for the Fourth Circuit, an agency's "choice of whether or not to comply with a third-party subpoena is essentially a policy decision about the best use of the agency's resources."[10] It is hard to envision a situation where an agency's refusal to comply with a subpoena in a nonintervened FCA case cannot be justified based on preservation of agency resources.

In the District of Columbia and Ninth Circuits, however, the APA's deferential standard of review does

not apply. Rather, the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Court of Appeals for the Ninth Circuit hold that the federal rules of discovery apply, whether or not the agency is a party to the underlying action.[11] If an agency refuses to produce the subpoenaed discovery, the DOJ must seek a protective order and bears the burden to show that the subpoena requires disclosure of privileged material, is unduly burdensome or is otherwise improper.[12]

Which of these two vastly different standards will apply has significant ramifications in light of Escobar's guidance on materiality, and the DOJ's evaluation of agency expense and time that will be spent responding to discovery in nonintervened matters. The current circuit split also could encourage relators to file in circuits that follow the APA's agency-friendly standard, seeking to limit defendants' opportunity for third-party discovery — and the DOJ's incentive to dismiss — in nonintervened cases.

Conclusion

While not all sides agree that the Supreme Court's decision in Escobar altered the legal standards applicable under the FCA, it undeniably has had a significant effect on the practical and strategic considerations of defendants, relators and the DOJ when litigating FCA actions.

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[1] Universal Health Services Inc. v. United States, ex rel. Escobar, 136 S.Ct. 1989, 195 L.Ed.2d 348 (2016).

[2] Id. at 2003-2004.

[3] See e.g., United States ex rel. Petratos v. Genentech Inc., 855 F.3d 481, 485 (3rd Cir. 2017); United States v. Sanford-Brown Ltd., 840 F.3d 445, 447 (7th Cir. 2016); United States ex rel. Harman v. Trinity Industries Inc., 872 F.3d 645 (5th Cir. 2017).

[4] See e.g., Brief for the United States, Gilead Sciences Inc. v. United States ex rel. Campie, No. 17-936 (Nov. 2018), at 15 (internal citations omitted).

[5] 42 U.S.C. Section 1320a-7b(b).

[6] See United States' Motion to Dismiss Relator's Second Amended Complaint, United States ex rel. Health Choice Group LLC v. Bayer Corp et al., Case No. 5:17-CV-126 (E.D.TX., Dec. 17, 2018), at 15.

[7] United States ex rel. Touhy v. Ragen et al., 340 U.S. 462, 71 S.Ct. 416, 95 L.Ed. 417 (1951).

[8] 5 U.S.C. § 706 (2)(A); Comsat Corp. v. National Science Foundation, 190 F.3d 269, 277-278 (4th Cir. 1999); Moore v. Armour Pharmaceutical Co., 927 F.2d 1194, 1197-1198 (11th Cir. 1991). In U.S. E.P.A. v. General Elec. Co., the U.S. Court of Appeals for the Second Circuit initially adopted the arbitrary and capricious standard, but, on reconsideration, vacated and reserved the question for future

determination. 212 F.3d 689 (2nd Cir. 2000).

[9] Comsat Corp. v. National Science Foundation, 190 F.3d 269, 277 (4th Cir. 1999).

[10] Id. at 278. The U.S. Court of Appeals for the Eleventh Circuit applies this same standard.

[11] Linder v. Calero-Portocarrero, 251 F.3d 178, 180-181 (D.C. Cir. 2001); Watts v. S.E.C., 482 F.3d 501, 508-509 (D.C. Cir. 2007); Exxon Shipping Co. v. U.S. Dept. of Interior, 34 F.3d 774, 780 (9th Cir. 1994).

[12] Fed. R. Civ. P. 45(d)(3).