



## TAKING THE GRANSTON MEMO TO THE NEXT LEVEL: EARLY AND CLOSE COORDINATION WITH AGENCIES ON QUI TAM ACTIONS

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Under the False Claims Act (FCA), in addition to the government’s powers to intervene and take over the litigation of a *qui tam* action and to settle such an action, the government has the power to unilaterally “dismiss [a *qui tam*] action notwithstanding the objections” of a relator. 31 U.S.C. § 3730(c)(2)(A). In early 2018, Michael Granston, a longtime career DOJ lawyer who at the time was the Director of the Main DOJ office in Washington that supervises FCA investigations and litigation nationwide, issued a memorandum to DOJ lawyers handling FCA matters that described factors for evaluating whether to exercise the government’s unilateral dismissal authority.<sup>1</sup> Most observers understood the Granston Memo as encouraging DOJ lawyers to consider dismissal more often than DOJ generally had done in the past. And in the nearly two years since the Granston Memo was issued, DOJ has made greater use of its dismissal authority, moving to dismiss a few dozen *qui tam* actions in that timeframe.

The increased use of DOJ’s dismissal authority is a welcome development not only for companies facing meritless *qui tam* actions but also for courts facing crowded dockets and for DOJ itself, as well as all of its client agencies throughout the government. The impetus for the Granston Memo, in fact, was concern with the government’s own interests. The Memo opens by noting the “record increases” in the number of *qui tam* actions filed in recent years—and the lack of a corresponding increase in the rate of government intervention—and laments that “[e]ven in non-intervened cases, the government expends significant resources in monitoring these cases and sometimes must produce discovery or otherwise participate.” Memo at 1. Dismissing more cases is a way for DOJ to reduce the backlog of cases and devote its resources to those it believes are deserving.

But while the Granston Memo was a step in the right direction, the lessons of the past two years point to refinements that would further the public interest while helping the government protect its own interests. Most notably, it has become clear that the federal agencies whose regulatory programs or contracts are at issue in *qui tam* actions—DOJ’s clients—have a strong stake in the appropriate use of the government’s dismissal authority because it is those agencies that will get dragged into discovery in declined actions. To be sure, DOJ attorneys will have to devote resources to litigating those discovery issues, but discovery consumes even more client agency resources, as it’s the agency’s documents that need to be searched and produced and the agency’s personnel who need to be deposed. And it’s the agency’s equities that are at stake when sensitive information is produced and important programs are disrupted.

The Granston Memo recognizes these client-agency equities and encourages DOJ attorneys to “consult closely with the affected agency as to whether dismissal is warranted.” Memo at 8. But the Memo does

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<sup>1</sup> Michael Granston, Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (Jan. 10, 2018), <https://www.fcadefenselawblog.com/wp-content/uploads/sites/561/2018/01/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf>.

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not specify when or how that consultation should occur. And recent litigation involving the government's dismissal authority has reinforced the importance of early and thorough consultation.

The Supreme Court's 2016 *Escobar* decision clarified that the FCA's materiality requirement turns on factual questions—such as how the agency responded to the defendant's alleged violations and how that agency typically responds in similar situations. *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989, 2003-04 (2016). If a *qui tam* action gets past the pleading stage, answering those questions requires discovery from the agency. There is no way to find out whether the agency knew about the underlying conduct at the time and continued paying the defendant's claims—presumably because it believed it was receiving the benefit of its bargain notwithstanding the alleged violation—except to take discovery of the knowledgeable agency personnel. Likewise, there is no way to know whether the agency normally denies payment in similar circumstances without taking discovery about the circumstances the agency has confronted and how it has responded.

In addition, all agree that the FCA, with its draconian remedies, is not a vehicle to litigate ordinary breach of contract claims. *See, e.g., U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 378 (4th Cir. 2008) (FCA's reference to "false or fraudulent claim" "surely cannot be construed to include a run-of-the-mill breach of contract action that is devoid of any objective falsehood. . . . To hold otherwise would render meaningless the fundamental distinction between actions for fraud and breach of contract.") (internal citation omitted). In contracts for complex goods or services, conflicts routinely arise. Experts may disagree about how best to test whether a part satisfies contractual specifications. The contracting agency may prioritize timely delivery and may be unconcerned about a slight departure from specifications or may view an additional layer of confirmatory testing as causing delay for no good reason. And the contracting agency often has extensive expertise and involvement in the design or production process. If the agency views the issue as the kind of routine disagreement or debate that contracting parties work through cooperatively, that fact will come out in discovery and the *qui tam* action will fail.

DOJ therefore needs to engage with its client agency at the outset of its investigation to learn what the agency knew at the time about the alleged conduct at issue, how the agency views that conduct, what if any action the agency has taken in response to that conduct, and how the agency has addressed similar conduct in the past. Before *Escobar*, some thought that materiality was a legal question that turned on whether, as a matter of law, the agency would have the authority to deny payment based on the alleged violation. In that world, discovery would rarely be needed on materiality. But *Escobar* holds with crystal clarity that being legally capable of influencing the agency's payment decision is insufficient and that materiality turns on real-world facts—facts that, as such, require discovery. *See* 136 S. Ct. at 2003-04.

Recent litigation confirms that proving—and defending as to—materiality will often require extensive discovery from the agency. In *U.S. ex rel. Polansky v. Executive Health Resources, Inc.*, No. 12-CV-4239-MMB (E.D. Pa.), the government's decision to decline intervention did not protect it from discovery. The government was ordered to produce over 42,000 pages of documents, including some the government had sought to withhold as privileged, and had to devote resources to litigating numerous discovery disputes with both the relator and the defendant. Eventually, the burdens and risks of discovery led the government to exercise its dismissal authority. *See* 2019 WL 5790061 (E.D. Pa. Nov. 5, 2019); *see also, e.g., U.S. ex rel. Simpson v. Bayer Corp.*, 376 F. Supp. 3d 392 (D.N.J. 2019) (noting that "discovery remains substantially incomplete" despite three years of discovery in which government was heavily involved).

*Escobar* has made it much more difficult for the government to avoid intrusive and burdensome discovery by using the *Touhy* process. Under agencies' *Touhy* regulations, agencies claim discretion concerning whether or to what extent to provide information in response to discovery requests when the agency is a non-party. *See U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Even before *Escobar*, courts rejected agencies'

assertions of discretion to decline to produce and granted motions to compel against the government in cases where the information at issue was germane to the defendant’s defense. Although the United States is technically a non-party when it declines to intervene in a *qui tam* action, see *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009), courts have recognized that in such cases the government is not a typical non-party but in fact stands to benefit directly and most substantially from any recovery. Thus, in granting motions to compel in these pre-*Escobar* cases, courts were clear that the government was the real party in interest and could not decline to produce documents germane to the defense while simultaneously standing to benefit from the action. See, e.g., *U.S. ex rel. Lewis v. Walker*, No. 3:06-CV-16, 2009 WL 2611522, at \*4 (M.D. Ga. Aug. 21, 2009); *Williams v. C. Martin Co. Inc.*, No. 07-6592, 2014 WL 3095161, at \*4 (E.D. La. July 7, 2014).

Now, after *Escobar* clarified the centrality of facts that will usually be uniquely in the agency’s possession, government efforts to avoid discovery should be even more resoundingly rejected. The government, as guardian of the public interest and not just a self-interested litigant, should not try to seek treble damages and penalties from a defendant while withholding information the Supreme Court has held is central to the case. And if the government does try, courts will likely have little patience for such efforts. See, e.g., *U.S. ex rel. Hartpence v. Kinetic Concepts Inc.*, No. 18-1885, 2018 WL 7568578, at \*3 (C.D. Cal. July 30, 2018); *Kinetic Concepts Inc. v. Noridian Healthcare Sols., LLC*, No. 18-00053, 2018 WL 5905395, at \*3 (C.D. Cal. June 29, 2018) (“Allowing the Government to use the deliberative process privilege to shield documents that may be directly relevant to materiality and damages would potentially permit the Government to benefit financially from a Relator’s pursuit of a False Claims Act case even when the Government itself decided to pay certain categories of claims, or was aware of the Defendant’s billing practices and knowingly paid the claims anyway.”).

In short, after *Escobar*, the concern about preserving government resources applies at least as much, if not more, to DOJ’s client agencies than to DOJ itself. Agencies do not want their resources tied up with discovery in cases they believe are meritless. And yet the Granston Memo—a document written by DOJ for a DOJ audience—does not focus on the client agency’s equities. And the Memo does not even mention *Escobar*. But if *Escobar*’s impact on the need for discovery from agencies in declined *qui tam* actions was not yet clear two years ago, it is clear now.

With the benefit of nearly two years of experience under *Escobar* and the Granston Memo, the time is ripe for DOJ to refine the Memo to reflect agencies’ direct stake in whether the government dismisses or merely declines, as well as agencies’ unique knowledge about what allowing the relator to proceed with the action would likely entail. The fact that the agency whose contract or program is at issue is in the best position to know whether it believes it has been defrauded and how it has dealt with similar circumstances in the past means that the agency’s view of the merits of a *qui tam* action should receive deference from DOJ. But it also means that the agency will know better than anyone what discovery would entail—what its files contain, what its personnel would say if deposed, and how burdensome, distracting, and problematic discovery would be. As a result, DOJ should seek the agency’s input and give it great weight.

Recent litigation over the government’s dismissal authority has shown that is that there is virtue in making a dismissal decision early in the case. The Granston Memo noted that a decision to dismiss would often be made at the time of declination but that “there may be cases where dismissal is warranted at a later stage.” Memo at 8. And in some cases, the government has drawn the ire of the court by invoking its dismissal authority later, after allowing extensive litigation to occur. See, e.g., *Polansky*, No. 12-CV-4239-MMB (E.D. Pa. Sept. 25, 2019) (court scolded the government for telling the court it intended to dismiss the case, withdrawing that intention after the relator narrowed his claims, and then renewing its intent to dismiss after the relator’s narrowing proved less significant than advertised); cf. *Gilead Sci., Inc. v. U.S. ex rel. Campie*,

No. 17-936 (Nov. 30, 2018) (after *qui tam* action had been in active litigation for years, government told Supreme Court, in brief opposing certiorari, that it would move to dismiss the action if certiorari was denied). To avoid a repeat of the awkward situation the government has faced when choosing to dismiss a case later, DOJ should consult early and deeply with its client agency—both to learn whether the agency believes that the *qui tam* action is meritorious and to learn whether allowing the case to go forward after a declination would likely entangle the government in substantial discovery that the agency views as problematic. Waiting until discovery has already become problematic and then trying to dismiss the case to stop the bleeding is a risky and inefficient approach for the government itself as well as for the court and for the parties.

The recent HUD-DOJ Memorandum of Understanding (MOU) on Inter-Agency Coordination in FCA matters offers a good exemplar of how things should work.<sup>2</sup> The MOU states that “DOJ will confer with HUD in the event a party other than HUD, such as a *qui tam* relator . . . refers a matter to DOJ for potential FCA litigation,” specifying that such consultation will occur early, during the “investigative” phase. MOU at 3. And the MOU makes clear that “HUD will make known to DOJ whether and to what extent any alleged defects or violations . . . are material or not material to the agency” and that “HUD may recommend that DOJ seek dismissal of the case if HUD does not support the FCA litigation.” *Id.* The close partnership described by this MOU should be a model for other agencies and for DOJ.

The government’s job is to pursue justice and the public interest. It’s hard to see how the public interest is served when relators clog the courts and force companies to spend millions of dollars defending cases that the government has investigated and found to lack merit. It may have taken the government’s own ox being gored through intrusive discovery in meritless declined cases for the government to see the virtue of dismissing such cases, but this is a happy situation where the government can further the public interest while also protecting its own interests.

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<sup>2</sup> William Barr and Ben Carson, Memorandum Between the Department of Housing and Urban Development and the Department of Justice (Oct. 21, 2019), [https://www.hud.gov/sites/dfiles/SFH/documents/sfh\\_HUD\\_DOJ\\_MOU\\_10\\_28\\_19.pdf](https://www.hud.gov/sites/dfiles/SFH/documents/sfh_HUD_DOJ_MOU_10_28_19.pdf).