The Department of Justice's Power to Dismiss Whistleblower Suits

INTRODUCTION

On February 5, 2021, Congress passed President Joe Biden's $1.9 trillion COVID-19 relief package, adding to the $2 trillion already appropriated via the Coronavirus Aid, Relief, and Economic Security (CARES) Act.[1] The CARES Act provided the U.S. Department of Health and Human Services (HHS) approximately $253 billion in budget, and more is now on the way to HHS. As with any large government spending, the federal government will intensify its scrutiny of the health care industry for False Claims Act (FCA) violations.[2] Even so, the health care industry justifiably fears another group more than the government: whistleblowers, also known as relators.

Since the early 2000s, health care-related whistleblower cases have been steadily on the rise and constitute a majority of the FCA cases filed in the United States.[3] Despite their prevalence, in *qui tam* suits (*i.e.,* whistleblower suits brought by citizens on behalf of the government) where the federal government declined to intervene, whistleblowers typically fail to obtain significant recoveries.[4] Since 1986, out of $35.5 billion in total recoveries from *qui tam* suits, the government netted less than 0.1% from cases where it declined to intervene.[5]

Health care industry leaders and other frequent targets of *qui tam* suits should push the U. S. Department of Justice (DOJ) to exercise its authority to dismiss *qui tam* cases in light of increasing costs from defending meritless FCA cases. This is especially so given the rise in underwriting for FCA cases through litigation funding.

LITIGATION FUNDING OF *QUI TAM* CASES IS ON THE RISE

Financiers use litigation funding agreements to make non-recourse cash payments to relators in return for a share of any future recovery. The use of litigation funding agreements in *qui tam* cases has been on the rise, and DOJ has voiced concern over whether these agreements unduly shift control of FCA lawsuits to third parties.[6] Despite its apprehension, DOJ has not yet indicated whether it will more frequently move to dismiss meritless *qui tam* cases.

The Eleventh Circuit recently ruled in *Ruckh v. Salus Rehabilitation, LLC*, 963 F.3d 1089 (11th Cir. 2020), that litigation funding agreements are not *per se* prohibited by the FCA and did not deprive the relator of Article III standing. The Eleventh Circuit's approval of litigation funding will certainly fuel the rise in *qui tam* cases regardless of merit. Litigation funding agreements pose an especial threat to health care industries already struggling to control costs. Given that health care-related *qui tam* cases make up the majority of FCA cases and recoveries, rise in litigation funding will only increase a whistleblower's appetite to continue litigating meritless cases in hopes of obtaining a settlement. Therefore, the health care industry should anticipate a significant rise in costs from defending *qui tam* cases.

Since 2015, several Senate members have advocated for regulating third-party funding in federal courts.[7] Unfortunately, regulating third-party funding has not yet been entertained by Congress. Awaiting legislative relief does not seem to be a good strategy; instead, for more immediate relief, the health care industry should advocate for the government to adopt a policy of more robustly dismissing *qui tam* cases under 31 U.S.C. § 3730(c)(2)(A).

CIRCUIT SPLIT ON DOJ'S STATUTORY AUTHORITY TO DISMISS *QUI TAM* CASES

Congress, in drafting the FCA, vested DOJ with the power to dismiss a *qui tam* suit over the relator's objections.[8] Despite its seemingly unconstrained power, the government rarely moves to dismiss a *qui tam* case. Instead, it opts for a hands-off approach after declining to intervene, allowing the whistleblowers to continue litigating their cases.

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[1] The Federal Response to COVID-19, COVID-19 Spending, USAspending, https://www.usaspending.gov/disaster/covid-19.

[2] Sean Bosack & Nina Beck, *Qui Tam Actions: Managing Risk in the Wake of COVID-19*, ABA (Sept. 1, 2020), https://www.americanbar.org/groups/litigation/committees/corporate-counsel/articles/2020/summer2020-qui-tam-actions-managing-risk-in-the-wake-of-covid-19/.

[3] Jeff Overley & Daniel Wilson, *Raucous 2021 Awaits FCA Litigants After Low-Key Year*, Law360 (Jan. 22, 2021), https://www.law360.com/articles/1345411/raucous-2021-awaits-fca-litigants-after-low-key-year.

[4] Civil Division, U.S. Department of Justice, *Fraud Statistics - Overview October 1, 1986 - September 30, 2020*, https://www.justice.gov/opa/press-release/file/1354316/download.

[5] *Id.*

[6] Stephen Cox, Deputy Assoc. Att'y Gen., U.S. Dep't of Justice, Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement (Jan 27, 2020), https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced.

[7] News Release, Chuck Grassley, United States Sen. for Iowa, Grassley Leads Lawmakers in Introducing Bill to Improve Transparency of Third Party Financing in Civil Litigation, (Feb. 13, 2019), https://www.grassley.senate.gov/news/news-releases/grassley-leads-lawmakers-introducing-bill-improve-transparency-third-party.

[8] 31 U.S.C. § 3730(c)(2)(A).

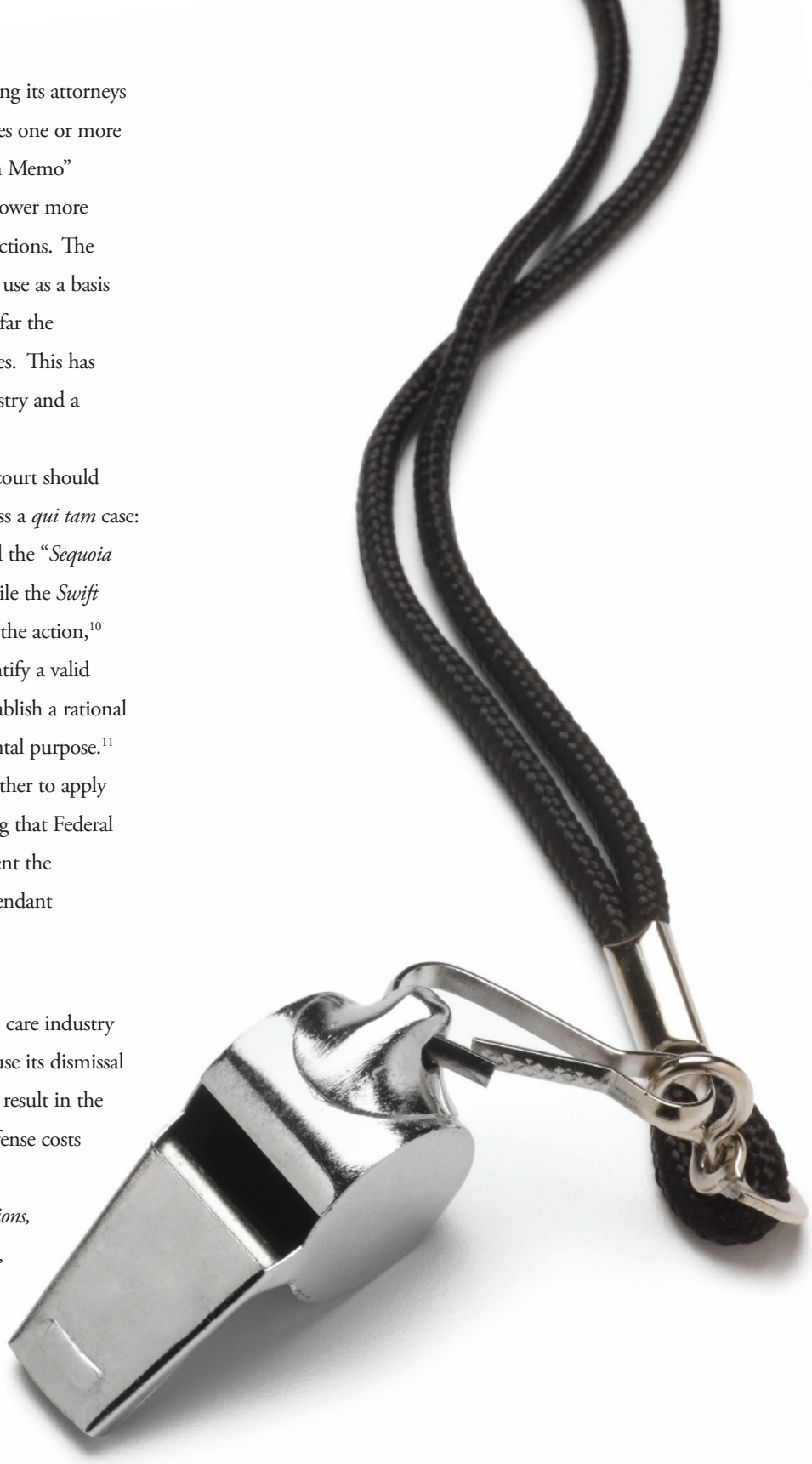
In 2018, DOJ issued an internal memo encouraging its attorneys to seek dismissal of *qui tam* cases where dismissal serves one or more important policy objectives.[9] The so-called "Granston Memo" acknowledged the need for DOJ to use its dismissal power more diligently given the record increases in FCA *qui tam* actions. The Granston Memo set forth seven factors that DOJ can use as a basis for dismissal to curb meritless *qui tam* cases, but thus far the government remains reluctant to dismiss meritless cases. This has resulted in increased expenses for the health care industry and a burden on the judiciary.

Circuits are currently split on the standard that a court should apply in evaluating the government's motion to dismiss a *qui tam* case: the "*Swift* Standard" adopted by the D.C. Circuit and the "*Sequoia Orange* Standard" adopted by the Ninth Circuit. While the *Swift* Standard grants DOJ an "unfettered right" to dismiss the action,[10] the *Sequoia Orange* Standard requires DOJ to (1) identify a valid governmental purpose to dismiss the case, and (2) establish a rational connection between the dismissal and that governmental purpose.[11] In a recent case, the Seventh Circuit side-stepped whether to apply either the *Swift* or *Sequoia Orange* Standard by holding that Federal Rules of Civil Procedure Rule 41 grants the government the unfettered right to dismiss a complaint before the defendant moves for summary judgment.[12]

CONCLUSION

Given the anticipated rise in FCA suits, the health care industry should more frequently appeal to the government to use its dismissal powers under 31 U.S.C. § 3730(c)(2)(A), which may result in the dismissal of meritless *qui tam* cases and reduce the defense costs incurred facing these ever-increasing claims.

If you have any questions regarding whistleblower actions, please contact Alan J. Bozer, Partner, at (716) 504-5700, abozer@phillipslytle.com, or the Phillips Lytle attorney with whom you have a relationship. ■



[9] DOJ, Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (Jan. 10, 2018) (hereinafter "Granston Memo"). This memorandum was authored by Michael Granston, Director of the Civil Fraud Section of the Commercial Litigation Branch.

[10] *See Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003).

[11] *See United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139, 1145 (9th Cir. 1998).

[12] *See United States ex rel. Cimznhca v. UCB, Inc.,* 970 F.3d 835, 856 (7th Cir. 2020).