WHISTLEBLOWER'S DISMISSAL WITH PREJUDICE NOT THE END OF THE ROAD FOR QUI TAM ACTION

The Fifth Circuit ruled that a whistleblower's voluntary dismissal with prejudice cannot affect the Government's ability to pursue related litigation. When the Government has not yet intervened, and thus is not a yet a party, a case cannot be dismissed with prejudice as to the Government by a whistleblower.

BACKGROUND

In *Vaughn, ex rel. v. United Biologics, L.L.C.*[1], the four Vaughn relators brought a *qui tam* action alleging that defendant violated the False Claims Act ("FCA") and the Anti-Kickback Statute ("AKS") by improperly billing for unnecessary and unapproved medical treatments and paying illegal kickbacks to contracting physicians. The Vaughn relators sued in the Southern District of Texas, and the Government declined intervention.

Subsequently, a second *qui tam* action against the same defendant and for related claims was unsealed in the Northern District of Georgia. The Vaughn relators chose to join their efforts with the second action's relator. Simultaneously, the defendant moved for early summary judgment. While the motion was pending, the Vaughn relators moved to voluntarily dismiss their original action with prejudice to themselves and without prejudice to the Government.

The court ordered the Government to explain its intervention decision in order for the court to determine whether it should dismiss with prejudice as to the Government. The Government resisted, providing a full explanation to protect future litigation in the Georgia action, but consented to the dismissal without prejudice.

On appeal, the defendant challenged the court's decision not to dismiss the case with prejudice as to the Government.[2]

ANALYSIS

The Government holds protected interests regardless of intervention and cannot be voluntarily dismissed with prejudice by a whistleblower. Only a final judgment on the merits binds it. The Fifth Circuit affirmed the lower court.

The Fifth Circuit affirmed that a relator's voluntarily dismissal only requires the Government to explain its consent to the dismissal—not its intervention determination. Any more detailed explanation could harm the Government's ability to pursue future actions.

The Fifth Circuit thus held the district court did not abuse its discretion by granting the voluntary dismissal despite the pending motion for three reasons. First, the defendant's pending motion for summary judgment did not preclude dismissal. The defendant filed the motion early in the litigation and before any extensive discovery by the parties. Second, dismissal did not strip the defendant of any viable defenses in the Georgia litigation. Third, by dismissing the Vaughn relators *with* prejudice, the court prevented any possibility that they could refile their case if they were unsatisfied with the outcome in the Georgia litigation.

PRACTICAL TAKEAWAYS

Although the Government and relators have related interests in FCA actions, it is important for defendants to understand that binding decisions on the whistleblowers will not always bind the Government. Defendants should work closely with experienced counsel who can navigate the unique challenges of FCA litigation.

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[1] *Vaughn, ex rel. v. United Biologics, L.L.C.*, No. 17-20389 (5th Cir. Oct. 16, 2018).

[2] The three appealable issues were: (1) the court erred when it dismissed the Government without prejudice; (2) the consent to the Vaughn relators' motion to dismiss failed to satisfy FCA requirements; and (3) the court erred in granting the Vaughn relator's motion to dismiss under Rule 41(a)(2). Even so, this article will focus only on the arguments surrounding whether it was appropriate to dismiss the Government without prejudice.

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