



White Collar, Government & Internal Investigations / Health Care Litigation ADVISORY ■

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DOJ to Dismiss False Claims Act Lawsuit After Supreme Court Review

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In January 2018, the Department of Justice (DOJ) issued the Granston Memo, which explained when the government should exercise its statutory authority to dismiss False Claims Act (FCA) cases. Since that time, the DOJ has not sought to dismiss many FCA cases, as [recently discussed by Alston & Bird attorneys](#). But the government recently announced in a Supreme Court filing that it would move to dismiss an important FCA case dealing with a drug manufacturer's alleged missteps in the drug approval process, concluding that "allowing this suit to proceed to discovery (and potentially a trial) would impinge on agency decisionmaking and discretion and would disserve the interests of the United States."

The issue on appeal is the application of the Supreme Court's *Escobar* opinion on pleading requirements. The drug manufacturer has asked the Supreme Court to grant certiorari to review a Ninth Circuit ruling holding that the whistleblower in the case had adequately alleged materiality even though the government apparently decided to continue to pay claims *after* learning of the alleged fraud. Several other courts of appeals have barred whistleblower cases under the FCA in similar contexts. The DOJ declined to intervene in the case. In an amicus brief, however, the DOJ largely supported the Ninth Circuit's analysis of *Escobar's* materiality requirement.

Even though it supported the whistleblower's position, the government said that it would move to dismiss the case on remand because "continued prosecution of the suit is not in the public interest." The decision to dismiss was based on a "thorough investigation of [the whistleblower's] allegations and the merits thereof." In addition, the government feared that continued litigation would impose "burdensome discovery" on the Food and Drug Administration regarding whether the alleged statutory violations were, in fact, material to the government's decision to pay. That would "distract from the agency's public-health responsibilities."

This important amicus brief—filed in an eight-year-old case challenging a key Ninth Circuit ruling—indicates that the government is serious about applying the Granston Memo and invoking its statutory authority to dismiss cases. Although the government moved to dismiss relatively few cases in 2018, this may be a sign that there will be more dismissals in the future. The case also highlights the DOJ's unwillingness to ensnare agencies in extensive discovery on materiality issues in FCA cases in which it has declined to intervene. This development and the considerations it engenders may support defendants' efforts to convince the government to dismiss FCA cases.

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