Ninth Circuit Decision Impacts Settling FCA Defendants

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The False Claims Act (FCA) contains a number of provisions designed to prevent follow-on or parasitic lawsuits. One such provision is the government action bar, which prohibits a person from bringing an FCA action "based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party."[1] In a 2-1 decision, the Ninth Circuit recently held that the government action bar prohibited a subsequent suit based on allegations that were made in a previously settled suit in which the government intervened, settled some of the claims, and dismissed the case, even though the previously-settled suit was no longer active.[2] The Ninth Circuit's decision is a big win for settling FCA defendants concerned about future suits based on similar allegations. Under the Ninth Circuit's decision, as long as the government intervenes and settles some of the claims, then the government action bar would prohibit any future relator from bringing a later suit based on the same allegations. It should be noted, however, that the government continues to take an active stance against the Ninth Circuit's decision, urging other courts to instead hold that the government action bar only applies while the government remains a party to an active suit.

Case Summary

In *United States ex rel. Bennett v. Biotronik, Inc.*, the relator brought an FCA suit based on allegations in a previously settled suit in which the government intervened and settled the case. Upon settlement, the entire first suit was dismissed—with prejudice as to the "covered conduct" and without prejudice with respect to all other conduct.

The defendant moved to dismiss the case under the government action bar. The relator argued that the bar should not apply for two reasons. First, the relator argued that the statutory language of the government action bar, which is written in the present tense, should not prohibit his subsequent suit because the first suit was no longer pending and therefore the government no longer "is" a party to it.[3] Second, the relator argued that the government action bar does not apply to the claims in the first suit, which the government did not settle and which were dismissed without prejudice.[4] The district court rejected both arguments, and the Ninth Circuit affirmed.

As to the relator's first argument, the Ninth Circuit explained that the government is and remains a "party" to an action even after the suit is concluded. The court explained that such a reading is consistent with both common sense and the statutory language of the government action bar.[5] Had Congress intended a different interpretation, the court reasoned, it could have used the word "pending" as it did in other sections of the FCA—but it did not.[6]

As to the relator's second argument, the Ninth Circuit again disagreed, explaining that the government action bar precluded the *entire* second suit, even though the government had intervened in the first suit and settled only the claims "related to certain 'covered conduct.'"[7] The court reasoned that "[t]here is nothing in the FCA which indicates that, upon joining and settling a

lawsuit, the government becomes a party to the suit with respect only to those claims which it settles, but it is not a party to the suit with respect to those claims which it does not settle."[8]

The dissenting judge stated he was "most impressed" by the position of the United States in its amicus brief.[9] That brief argued that the interpretation of the statute hinges on the words "are" and "is," which would lead the dissenter to conclude that the statute refers to the present tense.[10] In addition, the majority's interpretation of the government action bar would discourage relators from bringing forward evidence of fraud following a settled case, and there is "no reason to read the government-action bar to preclude a relator who is an original source, not parasitic, from proceeding on claims that were not resolved before the government was dismissed as a party."[11]

The Government's Position

Following *Biotronik*, the government has urged at least one other court not to follow the Ninth Circuit. In March, the government filed a Statement of Interest in a case pending in the District of Massachusetts, and it made the same arguments about the government action bar made in its amicus brief in *Biotronik*. The government expressly urged the district court not to follow the Ninth Circuit's decision.[12]

Conclusion

Under *Biotronik*, the government action bar protects FCA defendants from future relators where the government has previously settled related conduct, even if the conduct at-issue was not part of the release. While it does not eliminate the risk that the *government* might later pursue a case as to the unreleased conduct, the Ninth Circuit's decision in *Biotronik* does mean that another relator cannot later bring a suit regarding alleged conduct that the government might have been unwilling to release. We will continue monitoring this area of the law and will report any developments.

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[1] 31 U.S.C. § 3730(e)(3).
[2] *See United States ex rel. Bennett v. Biotronik, Inc.*, 876 F.3d 1011 (9th Cir. 2017).
[3] *Id*. at 1015.
[4] *Id*.
[5] *Id*. at 1016.
[6] *Id*. at 1018.
[7] *Id*. at 1020.
[8] *Id*.
[9] *Id*. at 1021 (Siler, J., dissenting).
[10] *Id*. at 1022.
[11] *Id*.
[12] *United States ex rel. Herman v. Coloplast Corp., et al*., No. 11-cv-12131. [need to cite pleading – Dkt. 333]