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False Claims Act Update: District Court Rejects DOJ Motion to Intervene for Lack of "Good Cause"

By Michael Wagner, Krysten Rosen Moller, and Nicholas Baer on March 29, 2021

False Claims Act

When the United States government decides to intervene in False Claims Act litigation after initially declining intervention, it is not "déjà vu all over again." Instead, as one court has recognized, the "government is getting on a moving train,"[1] and it can only be permitted to "intervene at a later date" if it can show "good cause" for doing so. *See* 31 U.S.C. § 3730(c)(3).

On February 24, 2021, a Tennessee federal district court offered a pointed reminder of this principle when it denied a government motion to intervene in a *qui tam* suit after DOJ originally had declined to intervene six months earlier. *See U.S. ex rel. Odom v. Southeast Eye Specialists*, No. 3:17-cv-00689 (M.D. Tenn. Feb. 24, 2021). In so ruling, the court vacated a magistrate judge's Report & Recommendation ("R&R"), which found that DOJ had established "good cause" for intervention. Although motions to intervene pursuant to Section 3730(c) are often granted, the recent order issued in *U.S. ex rel. Odom v. Southeast Eye Specialists* illustrates that the "good cause" showing is not a hollow requirement and that it can serve as a meaningful constraint on belated attempts by DOJ to intervene to pursue a case after initially declining to do so.

Case Background

Southeast Eye Specialists involves allegations that the defendants, an ophthalmology practice and affiliated surgery centers, defrauded Medicare by engaging in an improper patient referral scheme in violation of the Anti-Kickback Statute and the FCA. The relators filed a complaint under seal on behalf of the United States and Tennessee in 2017, prompting DOJ to investigate the allegations. By statute, DOJ has sixty days to investigate a matter while the case is under seal before making an intervention decision. *See* 31 U.S.C. § 3730(b)(4). As in many FCA cases, DOJ sought and obtained multiple extensions of the sixty-day seal period (which are also permitted "for good cause shown," *id.* § 3730(b)(3)). At the conclusion of its sixth and final extension—more than two years after the original deadline—DOJ declined to intervene,

[1] *U.S. ex rel. Drennen v. Fresenius Med. Care Holdings, Inc.*, 2018 WL 1557253, at *3 (D. Mass. Mar. 30, 2018).

explaining it had not finished investigating and was "not able to decide whether to proceed with the action." ECF 41.

Where DOJ declines to "proceed with the action, the [relator] shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). That is what happened here for six months until DOJ filed a motion to intervene. The provision authorizing such intervention provides: "When a person proceeds with the action, the court . . . may nevertheless permit the Government to intervene at a later date upon a showing of good cause." *Id.* In attempting to satisfy this standard, DOJ explained that it had "interviewed additional witnesses, continued reviewing the documents [], and obtained and analyzed new high-level Medicare claims data"; noted that relators consented to the intervention; and claimed that "intervention at this early stage . . . will not prejudice the defense." ECF 66. The magistrate judge concluded that DOJ demonstrated "good cause," noting that the standard is interpreted broadly and that courts seldom second-guess the decision "[o]nce the Government has asserted the discovery of new information supporting intervention." R&R, *Southeast Eye Specialists*, 2020 WL 4431464, at *4 (M.D. Tenn. July 31, 2020).

The defendants objected to the R&R on three grounds. First, the defendants argued that the magistrate judge incorrectly concluded that DOJ had demonstrated good cause by detailing new and significant evidence, when all it pointed to was mere additional investigative activity. In support of this point, the defendants noted that courts have required the government to show "discovery of new and significant evidence" that "alter[s]" the government's view of the case to justify late intervention. *See, e.g.*, *U.S. ex rel. Hall v. Schwartzman*, 887 F. Supp. 60, 62 (E.D.N.Y. 1995) ("the subsequent discovery of new and significant evidence which has altered [the government's] view of the magnitude of the alleged fraud . . . are precisely the circumstances which Section 3730(c)(3) was intended to address"). Second, the defendants argued that the R&R placed undue emphasis on relators' consent to intervention. Third, by the same token, the defendants argued that the R&R did not give *enough* consideration to the prejudice that late intervention would cause defendants. According to the defendants, the R&R focused narrowly on the fact that formal discovery had not started and that only six months had lapsed between the intervention deadline and DOJ's motion, and thus did "not fully account for the history of this action," which had stretched on for years. Def.'s Objections, ECF 86, at 13-14.

The district court agreed with defendants, and on February 24, 2021, issued an order denying DOJ's motion to intervene and vacating the R&R. As discussed below, the order is significant for several reasons.

Takeaways

First, the order in *Southeast Eye Specialists* shows that at least some courts may be willing to perform a more searching review of DOJ's claims of "good cause." Here, the court found DOJ's motion unsupported by "new and significant evidence," noting that the additional investigative activity described in DOJ's "tepid submission" was "unremarkable" and "fell way short" of demonstrating new evidence.[2] The case is a reminder that requests for late intervention—like requests to extend the original intervention deadline—are not to be granted automatically and

[2] Jeff Overley, "DOJ Suffers Rare Rejection of Late FCA Case Takeover," Law360 (Feb. 26, 2021), https://www.law360.com/articles/1359646/doj-suffers-rare-rejection-of-late-fca-case-takeover.

require a legitimate showing of "good cause." 31 U.S.C. § 3730(b)(3). *See, e.g., U.S. ex rel. Brasher v. Pentec Health, Inc.*, 338 F. Supp. 3d 396 (E.D. Pa. 2018) (denying the government's requested extension to the seal period for lack of "good cause" after ten extensions had already been granted over five-year period). In both contexts, courts may apply the "good cause" standard with teeth to guard against untimely government intervention.

Second, the order is also instructive because it shows that courts do not automatically equate a relator's consent with "good cause." DOJ's motion asserted that relators' consent to intervention meant that "the intent of the good cause requirement [was] clearly satisfied." ECF 66. Similarly, the R&R noted that relators' consent "weighs heavily in favor of allowing" intervention. 2020 WL 4431464, at *5. However, as the court in this case and other recent cases (cited by the defendants in *Southeast Eye Specialists*) have recognized, a relator's consent to intervention is not dispositive, and fairness to the defendant is at least one consideration in the "good cause" calculus. *See, e.g., U.S. ex rel. Drennen v. Fresenius Med. Care Holdings, Inc.*, 2017 WL 1217118, at *5 n.2 (D. Mass. Mar. 31, 2017) (explaining that basing "good cause" on relator's consent "would virtually eliminate the 'good cause' requirement since a relator may assent for any reason or no reason at all"). Indeed, the relator's consent arguably should not even be a factor at all. The relator's "consent," or lack thereof, sheds little to no light on the question of whether there is "good cause" for late intervention. From a fairness standpoint, the more important question is whether the defendant consents, given that the defendant—not the relator—is the one who will need to deal with the burden and expense of adding new litigants.

The order is a reminder that the "good cause" standard should not be taken for granted. Although the determination is likely to be fact specific and dependent on the nature of the case and DOJ's timing, Section 3730(c)(3) holds DOJ to a standard that requires something more than generalized, conclusory claims about the good cause to intervene after initial declination, and that requires consideration of the interests of the defendant.

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