

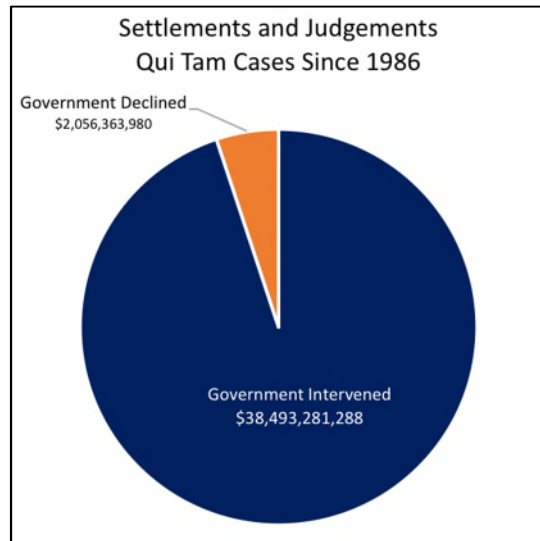
CLIENT ALERT

Recent Cases Up the Ante on DOJ's Intervention Decisions

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Given that 95% of recoveries in *qui tam* False Claims Act suits since 1986 have been in cases that the Government has intervened in or otherwise pursued, the Department of Justice's decision whether to intervene has always been critical. Two recent cases illustrate just how important this decision has become.

In *United States ex rel. Folliard v. Comstor Corporation*, the district court granted a motion to dismiss, in part for failure to plead "heightened materiality" under *Universal Health Services, Incorporated v. United States ex rel. Escobar*. No. 11-731, 2018 WL 1567620 (D.D.C. March 31, 2018) (citing 136 S. Ct. 1989 (2016)). The court noted that "demonstrating materiality would seem especially crucial here where the government declined to intervene after almost five years of investigation, and has also declined to intervene in similar cases brought by this relator alleging similar fraudulent activity by other companies selling products under GSA contracts to the government." *Id.* at *19 (citing *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017)). If the logic in *Folliard* and *Petratos* takes hold in the wake of *Escobar*, the government's intervention decision may become a referendum of sorts on whether the falsity alleged by the relator was material to the government's decision to pay.



In *United States ex rel. Drennen v. Fresenius Medical Care*, the district court rejected a magistrate judge's recommendation to allow DOJ to add new claims to its complaint in intervention—which came four and a half years after DOJ initially declined the case and one year after the close of fact discovery in relator's case. No. 09-10179, 2018 WL 1557253 (D. Mass. Mar. 30, 2018). The court allowed DOJ to intervene in the case, but ruled that permissive intervention under 31 U.S.C. § 3731(c) is akin to "getting on a moving train." *Id.* at *3. As such, the court held, DOJ would not be allowed to add additional FCA claims or common-law claims—which is consequential, since only the government may bring those claims.

These cases illustrate two potential consequences of DOJ's decision to decline intervention in a *qui tam* case. First, it may later be cited by the court as evidence that the government does not act when presented with violations of the sort alleged by the relator. Where the government "pays a particular

claim in full despite its actual knowledge that certain requirements were violated,” that is “very strong evidence that those requirements are not material.” *Escobar*, 136 S. Ct. at 2003. Second, should DOJ later try to intervene for good cause under 31 U.S.C. § 3731(c), it may be left with “the case as it stands.” *Drennen*, 2018 WL 1557253 at *3. These courts’ willingness to enforce established limits on the FCA will avert unfair burdens on defendants, but it may also cause DOJ to think twice before declining a case.

Contacts:



Andy Liu

202.846.9802

aliu@nicholsliu.com



Jason C. Lynch

202.846.9834

jlynch@nicholsliu.com