

PG Bulletin

April 22, 2021

District Court SEES a Lack of Good Cause to Intervene After Prior Declination

Matt Hubbell (K&L Gates LLP)

Sarah D. E. Staples (K&L Gates LLP)

This article is brought to you by AHLA's Fraud and Abuse Practice Group.

Courts often give the government wide latitude to intervene in qui tam suits based on an assertion of “good cause,” as required under the False Claims Act (FCA),¹ after an initial declination of intervention. However, a recent ruling by Judge Waverly Crenshaw in the Middle District of Tennessee disrupted that pattern by requiring the government to produce detailed evidence of good cause. The court ultimately found the government’s evidence insufficient to support its late intervention. This case may serve as a blueprint for defendants going forward in response to a government motion to intervene following an initial declination of intervention.

In *United States ex rel. Odom v. Southeast Eye Specialists, PLLC, et al.*, a relator filed a qui tam complaint under seal in April 2017.² The complaint primarily accused the defendant ophthalmology practice and affiliated surgery centers (collectively, SEES) of violating the FCA by engaging in the routine co-management of surgery patients in violation of the Anti-Kickback Statute.³ After six extensions of the seal period and over two years of investigation, the Department of Justice (DOJ) and the state of Tennessee filed a notice declining intervention on the grounds that their “investigation ha[d] not been completed” and, therefore, they were “not able to decide whether to proceed with the action.”⁴ Then, in February 2020, approximately six months after their original declination and after defendants had already filed their motion to dismiss the relator’s complaint, DOJ filed a motion to intervene.⁵ In support of its motion, DOJ claimed that it had “good cause” to intervene based on a “finding of false claims to Medicare that were tainted by kickbacks . . . and because Relators . . . assent.”⁶

The defendants vigorously opposed this motion, arguing primarily that relator’s consent to intervention by the government and the government’s failure to complete its investigation by the original deadline did not amount to “good cause.” Finally, the defendants asserted that merely referencing other cases where courts allowed late intervention did not establish “good cause” in the present case.⁷ Judge Crenshaw originally referred the matter to the magistrate judge for a report and recommendation.⁸ The magistrate judge eventually recommended that the government’s motion be granted,⁹ to which SEES objected.¹⁰ Upon receipt of defendant’s objection, Judge Crenshaw issued an order calling the parties to appear for oral argument in September 2020.¹¹

Copyright 2021, American Health Law Association, Washington, DC. Reprint permission granted.

During oral argument, Judge Crenshaw repeatedly asked the government to explain what, if any, new information emerged during the six months between the government's declination to intervene in August 2019 and its subsequent motion to intervene in February 2020. The government claimed that it had expeditiously investigated the matter during the preintervention decision period.¹² The government further argued that, while it had been unable to reach a decision at that time, it continued to investigate to make a decision as quickly as possible thereafter.¹³ The government also argued that it was not even required to produce evidence of good cause, to no avail:

[Government Counsel]: In addition, the Reply brief argues that the U.S. has somehow failed to submit documentation in support of our good cause motion. But nothing in the False Claims Act or the Tennessee Medicaid False Claims Act requires the Government to submit documentation in support of such a motion.

THE COURT: Well, I do.¹⁴

To resolve the good cause issue, Judge Crenshaw ordered the government to produce detailed affidavits by the leading investigators on the case.¹⁵ The court ordered the affidavits to attest to: (1) a chronological history of the case, from day one to the present; (2) a description of the progression of the investigation, including significant events and milestones that might lead the government to intervene; (3) the specific and particular progression of the investigation from 9 August 2019 to 10 February 2020 (the post declination period); (4) each investigative tool used by the government in chronological order; and (5) any and all evidentiary findings made during the post declination period.¹⁶ The court likened the production to the Title III affidavits required for approval of a wiretap.¹⁷

During final oral argument on defendant's objections to the report on 24 February 2021, Judge Crenshaw formally denied the government's motion to intervene.¹⁸ At the hearing, the government asserted that it had satisfied the good cause requirement, as evidenced by the affidavits. First, the government claimed that it had diligently investigated claims during the post declination period, with interviews of former patients and a former employee providing new information. The government also noted that its review of claims data provided by the state provided new evidence of wrongdoing. Defendants responded by arguing that the government failed to uncover any *new* facts during the post-declination period; instead, defendants asserted that the government only took additional investigative steps with information to which they *already* had access. Defendants highlighted that the record indicated significant periods of inactivity in the investigation, suggesting this "new" information could have been uncovered prior to the original deadline. Finally, the defendants argued that the government's serial decisions to prolong the seal period allowed for one-sided discovery and prelitigation/litigation tactics, effectively depriving the defendants of due process.

Judge Crenshaw rejected the government’s arguments, noting that the affidavits themselves admitted that the government’s post declination interviews did not add any new facts to the case. The judge also highlighted that the claims data would have been readily available to the government for review prior to its original deadline. Finally, the court found that the government provided no information in the affidavits to show how the claims data supported the allegations against the defendants.¹⁹ Key to Judge Crenshaw’s ruling was the government’s inability to point to any truly *new* information or facts that emerged *after* its August 2019 declination. In the court’s view, the required “good cause” for the government to intervene must arise post declination.

Takeaways

In light of this ruling, defendants should carefully scrutinize the government’s assertions of good cause in support of intervention motions that follow a previous declination. First, has the government offered substantive and new evidence as the basis of their motion or just a pro forma assertion of good cause? *When* did the evidence upon which the government’s claim is based come to light? If the evidence was previously known, or even previously available to the government, defendants could argue that it does not meet the standard of good cause because the government could have intervened previously on that basis. Simply reviewing evidence that was previously available—such as government claims data—is not sufficient to establish good cause. Further, a government assertion that its investigation was not complete at the time of declination does not support good cause if the government failed to conduct the investigation diligently in the first place during the seal period. After all, the FCA provides a seal deadline to limit, not expand, the investigative period. Nor is it sufficient to simply gather more, but not new, evidence from witnesses. Finally, the relator’s consent to intervention is not itself sufficient to establish good cause. This makes sense given that the court—not the relator—must make the good-cause determination under the FCA, and the intervention decision is essentially about the government’s position in the litigation rather than the relator’s consent.

Under this precedent, defendants can press the court to look behind the curtain at the government’s investigative activities, especially where there has been an extended seal period. A searching court-ordered inquiry may disclose that the government was dilatory in completing its investigation, that the government improperly used CID tools for discovery purposes after it had already decided to decline intervention, or that the government engaged in other procedural gamesmanship designed to disadvantage the defendant. In addition to scrutinizing the government’s good-cause showing, defendants should develop evidence of undue prejudice caused by late intervention, including the time and expense of starting the case over again due to the government’s late intervention.

¹ See 31 U.S.C. § 3730(c)(3).

² See Complaint, *United States, ex rel. Odom v. Se. Eye Specialists, PLLC*, No. 3:17-cv-00689 (M.D. Tenn. Apr. 7, 2017).

³ See generally, *id.*

⁴ See Joint Notice of the United States and the State of Tennessee that They Are Not Intervening at this Time, *Odom*, No. 3:17-cv-00689, at 1 (M.D. Tenn. Aug. 8, 2019).

⁵ See United States' Motion to Intervene, Add Two Defendants, and Stay the Suit for 90 Days, *Odom*, No. 3:17-cv-00689 (M.D. Tenn. Feb. 10, 2020).

⁶ See United States' Memorandum of Law Supporting Its Motion to Intervene, Add Two Defendants, and Stay the Suit for 90 Days, *Odom*, No. 3:17-cv-00689, at 1, 3 (M.D. Tenn. Feb. 10, 2020).

⁷ See Defendants' Response in Intervention to United States' Motion to Intervene, *Odom*, No. 3:17-cv-00689 (M.D. Tenn. Feb. 19, 2020).

⁸ See Order, *Odom*, No. 3:17-cv-00689 (M.D. Tenn. Feb. 28, 2020).

⁹ See Report and Recommendation, *Odom*, No. 3:17-cv-00689 (M.D. Tenn. July 31, 2020).

¹⁰ See Defendants' Objections to Magistrate Judge's Report and Recommendation on Motions to Intervene, *Odom*, No. 3:17-cv-00689 (M.D. Tenn. Aug. 14, 2020).

¹¹ Order, *Odom*, No. 3:17-cv-00689 (M.D. Tenn. Aug. 20, 2020).

¹² Transcript of Proceedings, *Odom*, No. 3:17-cv-00689, at 6–9 (M.D. Tenn. Sept. 30, 2020).

¹³ See *id.*

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 23–25.

¹⁷ *Id.* at 25.

¹⁸ Oral Argument, *Odom*, No. 3:17-cv-00689 (M.D. Tenn. Feb. 26, 2021). K&L Gates LLP attorney Sarah D.E. Staples attended oral argument and took notes.

¹⁹ See *id.* No. 105.