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Government Investigations/White Collar Alert

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First Circuit adds to circuit split over government's dismissal of False Claims Act litigation

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The court's ruling offers a new standard of review for the government's dismissal of FCA whistleblower claims, but does not eliminate discord over the question of what type of hearing is appropriate.

What's the Impact?

- The First Circuit's new standard may aid dismissal of meritless qui tam actions, particularly those brought by unfit whistleblowers
- The ruling also clarifies that the courts should not be obligated to expend resources on assessing the government's diligence in investigating qui tam allegations before moving to dismiss

On January 21, 2022, the U.S. Court of Appeals for the First Circuit issued its opinion in *United States ex rel. Borzilleri v. Bayer Healthcare Pharmaceuticals, Inc.*,[1] which announced a new standard for evaluating government motions to dismiss False Claims Act ("FCA") cases over

[1] No. 20-1066, 2022 WL 190264 (1st Cir. Jan. 21, 2022).

whistleblower objections. Although this opinion adds to the existing circuit split over the nature of the hearing a court must provide when the government moves to dismiss an FCA suit, the standard the First Circuit adopted should help to facilitate the dismissal of meritless or parasitic qui tam actions, especially those brought by whistleblowers who, in the government's estimation, are "not appropriate advocate[s] of the United States' interests."

The government's authority to dismiss *qui tam* actions over relators' objections

The False Claims Act imposes liability on anyone who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval to the United States government. The FCA's *qui tam* provisions allow a private person, known as a "relator," to sue on behalf of the United States. *Qui tam* complaints are filed under seal and remain so for at least sixty days (and typically much longer) to allow the government time to investigate the relator's complaint and decide whether to intervene and assume primary responsibility for the litigation. If the government takes over the case, the relator may receive up to twenty-five percent of any proceeds from the action. If the government declines to intervene, the relator may pursue the litigation on behalf of the government and is eligible to receive up to thirty percent of any recovery.

When the government declines to intervene, the claims pursued by the relator still belong to the United States, which remains the "real party in interest." Thus, under 31 U.S.C. § 3730(c)(2)(A), the FCA allows the government to dismiss a *qui tam* action "notwithstanding the objections" of the relator if the relator "has been notified by the [g]overnment of the filing of the motion and the court has provided the [relator] with an opportunity for a hearing on the motion." The FCA is silent on the standard of review that courts should use when considering a motion to dismiss a *qui tam* suit over a relator's objection. As a result, courts have adopted different approaches in determining the nature of the hearing that a relator must receive, which party bears the burden of proof, and what factors courts must consider in ruling on the government's motion.

The government's authority to dismiss a *qui tam* suit over a relator's objection has received heightened attention since January 2018, when the Department of Justice issued the so-called "Granston Memo," which recommended that when DOJ declines to intervene in a *qui tam* action, it should also consider whether the government's interests would be served by seeking dismissal of the suit under § 3730(c)(2)(A).[2] While acknowledging that DOJ has historically used its dismissal authority "sparingly," the Granston Memo also recognized that DOJ has seen record increases in *qui tam* filings in recent years, with annual totals exceeding 600 new matters. The memo noted that even in non-intervened cases, the government often spends significant resources monitoring these cases and responding to discovery requests as a third-party participant. It also noted that if cases lack substantial merit, they can generate adverse decisions that affect the government's ability to enforce the FCA. The memo identified various factors the

[2] Memorandum from Michael D. Granston, Dir., Commercial Litigation Branch, Fraud Section, U.S. Dep't of Justice, to Attorneys, Commercial Litigation Branch, Fraud Section, U.S. Dep't of Justice (Jan. 10, 2018).

government should consider in exercising its dismissal authority, including preserving government resources, avoiding adverse court decisions, preventing interference with agency policies and programs, preventing parasitic *qui tam* actions that duplicate pre-existing government investigations and add no useful information to those matters, and, as highlighted by the First Circuit's decision, addressing misconduct by relators that frustrates the government's investigatory efforts.

The Circuit split over § 3730(c)(2)(A)

As noted, since the FCA does not identify the standard of review courts should use in considering a motion to dismiss under § 3730(c)(2)(A), circuit courts have adopted different approaches to the issue. In *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, the Ninth Circuit adopted a two-step standard that requires the government to identify a "valid government purpose" that is rationally related to dismissal of the *qui tam* action. Once the government satisfies this burden, the relator must show that dismissal is "fraudulent, arbitrary[,] and capricious, or illegal."[3] The Tenth Circuit adopted the *Sequoia Orange* standard in *Ridenour v. Kaiser-Hill Co.*, and further held that, to establish a rational relation to a valid government purpose, "[t]here need not be a tight fitting relationship between the two; it is enough that there are plausible, or arguable, reasons supporting the agency decision."[4]

The D.C. Circuit declined to adopt the *Sequoia Orange* standard. Instead, in *Swift v. United States*, the D.C. Circuit held that the government enjoys an "unfettered right" to dismiss a relator's *qui tam* action and that the purpose of the § 3730(c)(2)(A) hearing "is simply to give the relator a formal opportunity to convince the government not to end the case."[5]

Finally, in *United States ex rel. CMIZNHCA v. UCB, Inc.*, the Seventh Circuit held that motions to dismiss under § 3730(c)(2)(A) should be evaluated under the voluntary dismissal framework of Rule 41(a) of the Federal Rules of Civil Procedure.[6] Rule 41(a)(1) provides that the plaintiff may dismiss an action without court order by filing a notice of dismissal before the defendant has served an answer or a motion for summary judgment, or by stipulation of dismissal signed by all parties. Under Rule 41(a)(2), once the defendant has served a responsive pleading, the matter may be dismissed at the plaintiff's request "only by court order, on terms that the court considers proper." The Seventh Circuit held that, in the *qui tam* context, if the government moves to dismiss before the defendant has responded, Rule 41(a)(1) simply requires that the relator receive a hearing, even if that hearing would "serve no great purpose" in most cases. On the other hand, if the defendant has already responded to the suit, the hearing would be an opportunity for the court to determine what terms of dismissal are "proper," in accordance with Rule 41(a)(2).

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[3] 151 F.3d 1139 (9th Cir. 1998).

[4] 397 F.3d 925 (10th Cir. 2005).

[5] 318 F.3d 250 (D.C. Cir. 2003).

[6] 970 F.3d 835 (7th Cir. 2020).

The Third Circuit adopted the *CMIZNHCA* standard in *Polansky v. Executive Health Res. Inc.*[7] The Second and Fifth Circuits avoided the question by holding that even under the most stringent, *Sequoia Orange* standard, the government's motion to dismiss was properly granted.[8]

The First Circuit adopts a new standard

In *United States ex rel. Borzilleri v. Bayer Healthcare Pharmaceuticals, Inc.*, a professional healthcare investment fund manager filed a *qui tam* action alleging that several pharmaceutical companies and pharmacy benefit managers had violated the False Claims Act in connection with the Medicare prescription drug program. The government declined to intervene in the litigation and later moved to dismiss under § 3730(c)(2)(A). In seeking dismissal, the government stated that (1) the continued litigation of the relator's suit would likely require the government to spend substantial resources, both to monitor the case and to respond to discovery as a third party; (2) the government had carefully investigated the relator's claims and concluded that many aspects of his allegations were unsupported; and (3) the relator's actions, including allegations that he used the *qui tam* process to leverage his financial interests through securities trading, convinced the government that he was not an appropriate advocate of the United States' interests.

As support for its position that "Relator's conduct provide[s] an additional basis for the Government's decision" to move to dismiss, the United States advised the district court that:[9]

- The investigation was frustrated by "the Relator's lack of programmatic or insider knowledge, and frequent changes of counsel."
- The Relator "rebuff[ed]" the "United States' request on . . . a straightforward procedural matter."
- "Sufficient allegations have been raised . . . that Relator used the filing or unsealing of his qui tam complaints to engage in, or further, at least some trading activity for his own or his former investment funds' benefit, and the Government considers his answers to direct questions on this topic to be evasive."
- The Relator chose "to cavalierly discard well-established prohibitions on the disclosure of privileged material" and "disregard[ed] the sanctity of privileged communications."

And concluded that:

> Relator's behavior . . . leads the Government to conclude that the already significant burden of monitoring ongoing litigation and participating in discovery will likely be heightened by Relator's demonstrated disregard for basic procedural principles where doing so will further his personal interests. Rather than attempt to address further procedural violations by Relator, either in real time or after the fact, this

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[7] 17 F.4th 376 (3d Cir. 2021).

[8] *United States ex rel. Borzilleri v. AbbVie, Inc.*, 837 F. App'x 813 (2d Cir. 2020); *United States ex rel. Health Choice All. V. Eli Lilly & Co.*, 4 F.4th 255 (5th Cir. 2021).

[9] No. 1:14-cv-00031, ECF Nos. 166 and 117.

> behavior only provides an additional basis . . . on which to conclude that Relator's litigation on behalf of the Government should be brought to a close.

The relator objected to the dismissal of his case, alleging that the government had failed to investigate key aspects of his allegations.

The district court granted the government's motion to dismiss. In so doing, it declined to decide which of the competing standards applied, concluding that the government satisfied even the more stringent standard adopted by the Ninth Circuit. The First Circuit affirmed the district court's dismissal of the relator's action. In considering the appropriate standard for evaluating the government's motion to dismiss, the court rejected the Ninth Circuit's approach, which places the initial burden on the government to identify a rational relationship between dismissal and a valid government purpose. The First Circuit found that the statutory language did not support placing the onus on the government to justify its motion to dismiss or to show "that its motion is rational, reasonable, or otherwise proper." The court also disagreed with the Third and Seventh Circuits that Fed. R. Civ. P. 41(a) provides the appropriate framework for evaluating a motion to dismiss under § 3730(c)(2)(A).

The First Circuit concluded that while it is not the government's burden to justify its motion upon a relator's objection, it must still provide its reasons for seeking dismissal so that the relator has a chance to persuade the government to withdraw its motion. The First Circuit then held that a district court "should grant the government's motion to dismiss unless the relator, having failed to persuade the government to withdraw its motion, can show that the government's decision to seek dismissal of the *qui tam* action transgresses constitutional limitations or that, in moving to dismiss, the government is perpetrating a fraud on the court." The court explained that a decision to seek dismissal could violate constitutional limits if based on an unjustifiable standard, such as race or religion, if the decision was so arbitrary as to violate a substantive due process right and "shock the conscience," or if seeking dismissal was an abuse of government power and an "instrument of oppression."

Finally, the First Circuit rejected the relator's argument that a court must assess the government's diligence in investigating the allegations of the *qui tam* complaint before moving to dismiss the suit. The court noted that a "diligence" inquiry is not referenced or "even hinted at" in § 3730(c)(2)(A), and that a searching diligence inquiry would require the court to review investigatory decisions over which the government ordinarily retains broad discretion. The court also observed that assessing the government's diligence in investigating a complex FCA suit could result in a time-consuming mini-trial that might further tax the government's resources.

Turning to the merits of the relator's appeal, the First Circuit found that the government represented that it had conducted a multi-year investigation of the relator's allegations, including a review of tens of thousands of documents, interviews with over thirty witnesses, consultations with regulatory experts within the U.S. Department of Health and Human Services, and the retention of consulting experts. The relator's arguments that the government failed to thoroughly investigate his claims "ultimately constitute[d] no more than disagreements with the government's judgment about the contours of the investigation and its potential for success."

Since the relator failed to show the transgression of constitutional limits or fraud on the court, the First Circuit held that the district court properly granted the government's motion to dismiss.

What's ahead?

The government rarely exercises its authority to dismiss *qui tam* suits under § 3730(c)(2)(A). But given the ever-growing number of *qui tam* suits filed each year, it is important to both the government and defendants that a mechanism exists for dismissing actions that are meritless, duplicative, or opportunistic. Such cases may undermine the government's ability to enforce the FCA or interfere with other government programs or policies. They can also cause unwarranted financial and reputational damage to the defendants targeted by the relators, many of which will have already expended substantial resources defending against the government's investigation and convincing the government that it should not intervene in the case. The First Circuit's recent opinion in *Borzilleri*, while adding to the existing circuit split, adopts a less onerous standard of review that should help to facilitate the dismissal of *qui tam* suits in appropriate cases. Although *Borzelleri* held that a relator has a sufficient interest in the litigation that the government's right to dismiss is not entirely "unfettered," the First Circuit confirmed that the government does not have the burden to justify its dismissal decision beyond stating the reasons for its decision so that the relator may try to persuade the government to change its mind. The First Circuit also vindicated the government's interests in curbing *qui tam* litigation by relators who, *inter alia*, lack programmatic or insider knowledge, cavalierly disregard well-established principles, use confidential information to advance their case or interests, or otherwise act more out of their own self-interest than the government.

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