Disputes Heating Up Over Gov't Qui Tam Dismissal Authority

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Since the beginning of the Trump administration, and particularly in the last six months, the U.S. Department of Justice has been exercising its authority to dismiss qui tam False Claims Act cases with increasing frequency.[1] As relators have challenged the government's efforts, disputes over the scope of the government's dismissal authority have arisen in at least a dozen cases in seven districts around the country, and one of the disputes has already reached the U.S. Court of Appeals for the Ninth Circuit.

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These fights not only reflect the key considerations driving government dismissal motions, but also raise fundamental legal issues about control over qui tam litigation — issues that are now likely to be decided by many courts of appeal and, perhaps as early as next year, by the U.S. Supreme Court.

Those issues include:

1. How deferential should courts be in acting on government motions to dismiss pursuant to 31 U.S.Code Section 3730(c)(2)(A)? The government argues it has "unfettered discretion" to dismiss. The U.S. Court of Appeals for the District of Columbia Circuit endorsed that test in Swift v. United States,[2] and the U.S. Court of Appeals for the Fifth Circuit and the U.S. Court of Appeals for the Eighth Circuit have expressed sympathy for it.[3]

Relators instead rely on a formula adopted by the Ninth Circuit in United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,[4] which requires the government to establish that its exercise of dismissal authority is "rationally related to a legitimate governmental purpose."[5] If the government does so, "the burden switches to the relator 'to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.'"[6]

2. Under the Sequoia Orange test, what kind of evidentiary showing, if any, must the government make to establish that dismissal would advance a legitimate governmental purpose?

3. If the government moves to dismiss after the court has denied the defendant's motion to dismiss for failure to state a claim, finding the allegations of the complaint legally sufficient to proceed, how should that affect the court's resolution of the government's motion, particularly if it rests in part on the government's determination that the claims are meritless?

4. Under the Sequoia Orange test, what must a relator establish to show that the government's dismissal effort is "fraudulent, arbitrary and capricious, or illegal"?

The Granston Memo and the Current Crop of Dismissal Fights

Subsection 3730(c)(2)(A) provides:

The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

On Jan. 10, 2018, Michael Granston, the director of the fraud section of the Justice Department's Civil Division, issued a memorandum that provides government attorneys with a framework to evaluate when to seek dismissal of qui tam suits pursuant to the 31 U.S.C. Section 3730(c)(2)(A). The Granston memo explained that the DOJ considers dismissal "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent."[7]

The Granston memo identified seven nonexclusive circumstances in which Justice Department attorneys should consider moving to dismiss:

- When the relator's claims lack merit because the "relator's legal theory is inherently defective," or because "the relator's factual allegations are frivolous,"
- When the action "duplicates a pre-existing government investigation and adds no useful information,"
- When "an agency has determined that a qui tam action threatens to interfere with the agency's policies or the administration of its programs and has recommended dismissal to avoid these effects,"
- When "necessary to protect the Department's litigation prerogatives," such as to avoid interference with similar claims in which the government has intervened,
- When necessary to safeguard classified information or national security interests,
- When "the government's expected costs are likely to exceed any expected gain" and
- When "problems with the relator's action [would] frustrate the government's efforts to conduct a proper investigation."

The Justice Department formally incorporated Granston memo criteria into the Justice Manual — formerly known as the U.S. Attorneys' Manual — at Section 4-4.111 in September 2018.[8]

Since issuance of the Granston memo, the Justice Department appears to be increasing the frequency with which it seeks to dismiss qui tam cases it determines to be ill-advised.

At the end of November 2018, the Supreme Court requested the government to respond to the petition for certiorari in Gilead Sciences Inc. v. United States ex rel. Campie. In it's brief, the U.S. solicitor general not only responded to the question presented but also announced that, if the case were remanded, the government would move to dismiss based on two of the considerations described in the Granston memo: A determination, following a "thorough investigation," that the claims were unfounded and a concern about discovery burdens the government would shoulder if the case were to proceed, particularly concerning government knowledge and materiality.[9]

The Supreme Court's denied the certiorari petition. The case has returned to the district court, where the Justice Department will presumably file the promised motion to dismiss.

In mid-December 2018, the Justice Department moved to dismiss eleven cases brought with the substantial involvement of an organization called National Healthcare Analysis Group. The organization was apparently formed to develop a basis for asserting qui tam claims against pharmaceutical companies on a particular theory of Anti-Kickback Statute liability. Those motions have prompted vigorous oppositions from the relators in eight of the cases. Replies from the government are due over the next few weeks.

Also in December 2018, the government moved to dismiss a pair of qui tam suits brought by a single relator in two districts against a number of pharmaceutical companies. The relator who, according to the government, has faced allegations of short-selling the stock of companies he had named as defendants, has filed lengthy responses, both defending the merits of his allegations and questioning the government's motives for seeking dismissal.

This recent wave of government dismissal motions suggests the government is most likely to act when at least two of the following considerations are present:

It concludes the relator's claims lack legal or factual support,

- The relator is pressing an industry-wide theory of wrongdoing rather than targeting particular companies about which the relator has genuinely novel information,
- The relator is pursuing qui tam litigation as a business opportunity,
- The government's litigation costs and discovery burdens would be substantial,
- The relator — and relator's counsel — are not cooperating with the government in ways the government considers important to advance its investigation or the litigation or
- The relator's claims stand in tension with goals of the government program at issue.

Key Issues in Dispute

In these cases, the government and relators are fighting over four key issues about the scope of the government's dismissal authority:

Degree of Judicial Deference

The courts of appeals have been divided for nearly two decades over whether the government possesses "unfettered discretion" to dismiss qui tam cases under 31 U.S.C. Section 3730(c)(2)(A),[10] or instead must demonstrate that its exercise of dismissal authority is "rationally related to a legitimate governmental interest."[11]

The government contends that its exercise of qui tam dismissal power is akin to an exercise of prosecutorial discretion and so is virtually immune from judicial scrutiny.[12] Relators, relying on the statute's reference to a hearing and some legislative history the Ninth Circuit found persuasive in Sequoia Orange, argue that the government must not only offer a legitimate public purpose for dismissal but also supply evidence supporting the basis for its determination.

The current group of cases testing the government's authority will no doubt deepen the longstanding circuit split on this threshold issue, as the cases arise in four circuits that have yet to address the issue — the First, Second, Third and Seventh — and in one — the Fifth — that has discussed it only in dictum.[13]

Rationally Related to a Legitimate Governmental Purpose

Many of the current fights over government dismissal efforts have focused on whether the government's reasons for seeking dismissal were legitimate and were adequately supported by evidence, not merely by assertion.

The government has emphasized that a motion to dismiss under subsection 3730(c)(2)(A) "constitutes a determination by the United States as a matter of its prosecutorial discretion that" the relator's pursuit of the case is "contrary to the United States' interests on whose behalf [the relator] is supposed to be pursuing the case" and that thus "[i]t makes no difference whether further litigation would prove that the complaint has merit."[14]

In the government's view, "[t]he government's authority to dismiss qui tam suits is not limited to circumstances where the defendant is entitled to dismissal on legal or factual grounds, but may be exercised whenever the government concludes that continued prosecution of the suit is not in the public interest."[15]

Among the interests the government has offered are reducing "litigation costs," "preserving scarce government resources and protecting important policy prerogatives of ... federal government[] ... programs."[16]

In several cases, the Justice Department has also defended dismissal based on its conclusion that the relator "is not an

appropriate advocate of the United States' interests" because of inadequate cooperation with the government or alleged misconduct.[17]

Relators have challenged the accuracy or adequacy of the government's analysis leading to its conclusions that their claims lack merit.[18] Perhaps encouraged by Judge Edward Chen's decision in Academy Mortgage, they have pushed for discovery requiring the government to lay before the court evidence showing the scope of its factual investigation.[19] And they have challenged not only the accuracy but also the legal relevance of the government's assertions that their conduct outside the context of the litigation itself supports dismissal.[20]

These efforts seem unlikely to succeed given the broad discretion with which the statute entrusts the government and the fact that the United States remains the real party in interest for all FCA claims.

But as the Academy Mortgage case illustrates, some judges may find these arguments compelling. And even if most courts rule in favor of the government, if they do so only after demanding a substantial evidentiary showing, the burden of making that showing itself may discourage the government from exercising its dismissal authority.

Significance of Denial of a 12(b)(6) Motion

In two of the cases supported by National Healthcare Analysis Group, the relators have gone so far as to argue that the government cannot rely on the legal inadequacy of their allegations as a basis for dismissal because the district court's earlier denial of the defendant's 12(b)(6) motion represents binding "law of the case."[21]

The "scope and reach of federal statutes," the relators argue, "are not subject to the whims of the Executive Branch."[22]

This argument misses the mark for at least two basic reasons: A determination of legal sufficiency for purposes of Rule 12(b)(6) says little about the ultimate merit of the claims. Also, as many courts, including the Ninth Circuit in Sequoia Orange, have recognized, the government is free to seek dismissal of even meritorious claims based on other public goals.[23]

"Fraudulent, Arbitrary and Capricious, or Illegal"

In Sequoia Orange, the Ninth Circuit held that even if the government's asserted bases for dismissal are rationally related to a legitimate government purpose, a relator may still defeat dismissal if it can establish that the government's action was "fraudulent, arbitrary and capricious, or illegal."[24] And even while holding that the government possesses "unfettered discretion" to dismiss qui tam suits, the D.C. Circuit in Swift acknowledged a concession by the government of a possible exception for fraud on the court.[25]

A number of relators in the current round of disputes have accused the government of engaging in misconduct they consider sufficient to meet the Sequoia Orange test.

The Academy Mortgage relator argued that the government's stated bases for dismissal were pretextual and that the "[g]overnment's true motivation for filing the motion is retaliation for Relator not filing the amended complaint under seal, as the Government (improperly) demanded."[26] If Judge Chen did not adopt the relator's labels of pretext and arbitrariness, he accepted the relator's account of the facts as sufficient to justify denial of the government's motion.

In the pair of cases brought in Rhode Island and the in Southern District of New York by John Borzilleri, Borzilleri charges the government with acting arbitrarily because of what he considers its inadequate investigation, its unreasonable view of the governing regulations and the supposed conflicts of interest of government officials.[27]

Whether other courts will embrace the Sequoia Orange exception for "fraudulent, arbitrary and capricious, or illegal" conduct by the government remains to be seen. It has little, if any, basis in the FCA itself. And genuine fraud or illegality are a far cry from the inadequate investigation that Judge Chen apparently thought sufficient to reject the government's motion in Academy Mortgage. The government will certainly press to keep any such exception extremely narrow.

Conclusion

The 1986 amendments that substantially revised the FCA were designed both to encourage more qui tam suits and to give the government greater control over the resulting litigation.[28] The current fights over the government's dismissal authority reflect the tension between those two goals. The Supreme Court's intervention will soon be needed to ensure a nationally uniform resolution of that tension.

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[1] In a January 2018 speech, Deputy Associate Attorney General Stephen Cox stated that "since 2017, the Department has moved to dismiss about two dozen cases." Deputy Associate Attorney General Stephen Cox Delivers Remarks at the 2019 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 28, 2019), https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-2019-advanced-forum-false.

[2] Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003).

[3] See Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753 (5th Cir. 2001); United States ex rel. Rodgers v. Ark., 154 F.3d 865, 868 (8th Cir. 1998).

[4] United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1146 (9th Cir. 1998).

[5] See also Ridenour v. Kaiser-Hill Co., 397 F.3d 925 (10th Cir. 2005).

[6] Sequoia Orange, 151 F.3d at 1145 (quoting United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325, 1347 (E.D. Cal. 1995)).

[7] For a fuller description of the Granston Memo see https://www.wilmerhale.com/en/insights/client-alerts/2018-01-25-justice-department-issues-guidance-on-dismissing-qui-tam-false-claims-act-cases-over-relators-objections.

[8] Even before the Granston memo appeared in January 2018, the Justice Department was engaged in one of the most contentious fights over its dismissal authority — and one in which its efforts have so far been rebuffed. In United States ex rel Thrower v. Academy Mortgage Corp., the relator alleged that Academy Mortgage made false representations as a participant in the U.S. Department of Housing and Urban Development's direct endorsement lending program, a program that has generated many FCA suits and recoveries.

The government moved to dismiss, citing the monitoring and discovery burdens continued litigation would impose on the government — including anticipated Touhy requests for HUD documents and testimony — and the complaint's lack of specificity and borrowing of allegations from prior suits brought by the United States. United States ex rel. Thrower v. Academy Mortgage Corp., No. 3:16-02120 (N.D. Cal.) Dkt. 60 (July 19, 2017).

The relator contended that it was entitled to an evidentiary hearing and that the government bore the burden of supporting the legitimacy of its reasons with evidence. United States ex rel. Thrower v. Academy Mortgage Corp., No. 3:16-02120 (N.D. Cal.), Dkt. 68 (Sept. 25, 2017). Judge Chen agreed with the relator, holding that "to establish a colorable claim to obtain an evidentiary hearing on the Government's motion to dismiss, a relator must present 'some evidence' that the Government's decision to dismiss was unreasonable, not a result of a full investigation, or based on arbitrary and improper considerations." United States ex rel. Thrower v. Academy Mortgage Corp., No. 3:16-02120, 2018 WL 1947760, at *4 (N.D. Cal. Apr. 25, 2018).

After receiving the relator's evidentiary submissions, the court denied the government's motion, concluding the evidence "showed that the Government performed only a limited investigation of the original complaint and appears not to have investigated the amended complaint at all." United States ex rel. Thrower v. Academy Mortg. Corp., No. 3:16-02120, 2018 WL 3208157, at *1 (N.D. Cal. June 29, 2018). The decision is now on appeal to the Ninth Circuit.

[9] Brief for the United States, Gilead Sciences Inc. v. United States ex rel. Campie, No. 17-936 (Nov. 2018), at 15.

[10] Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003).

[11] United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1147 (9th Cir. 1998).

[12] See, e.g., United States ex rel. SMSPF LLC v. EMD Serono Inc., No. 16-5594 (E.D. Pa.), Dkt. 23-1 (Dec. 17, 2018); United States ex rel. HealthChoice Alliance LLC v. Eli Lilly & Co., No. 5:17-CV-123-RWS-CMC (E.D. Tex.), Dkt. 192 (Dec. 17, 2018).

[13] U.S. Court of Appeals for the First Circuit: United States ex rel. Borzilleri v. Bayer Healthcare Pharm., 14-cv-00031-WES-LDA (D.R.I.); U.S. Court of Appeals for the Second Circuit: United States ex rel. Borzilleri v. AbbVie, 15-cv-7881 (JMF) (S.D.N.Y.); U.S. Court of Appeals for the Third Circuit: United States ex rel. SMSPF LLC v. EMD Serono Inc., No. 16-5594 (E.D. Pa.); United States ex rel. NHCA-TEV LLC v. Teva Pharm. Prods., No. 2:17-cv-02040-JD (E.D. Pa.); U.S. Court of Appeals for the Seventh Circuit: United States ex rel. CIMZNHCA LLC v. UCB Inc., No. 3:17-cv-00765-SMY-DGW (S.D. Ill.); U.S. Court of Appeals for the Fifth Circuit: United States ex rel. HealthChoice Alliance LLC v. Eli Lilly & Co., No. 5:17-CV-123-RWS-CMC (E.D. Tex.); United States ex rel. Health Choice Grp. LLC v. Bayer Corp., No. 5:17-CV-126-RWS-CMC (E.D. Tex.).

[14] United States ex rel. Thrower v. Academy Mortg. Corp., No. 3:16-02120 (N.D. Cal.), Dkt. 60 (July 19, 2017) at 8.

[15] Brief for the United States, Gilead Sciences Inc. v. United States ex rel. Campie, No. 17-936 (Nov. 2018), at 15.

[16] United States ex rel. SAPF LLC v. Amgen LLC, No. 16-5203 (E.D. Pa.), Dkt. 18-1 (Dec. 17, 2018), at 14; see United States ex rel. SMSPF LLC v. EMD Serono Inc., No. 16-5594 (E.D. Pa.), Dkt. 23-1 (Dec. 17, 2018); United States ex rel. NHCA-TEV LLC v. Teva Pharm. Prods., No. 2:17-cv-02040-JD (E.D. Pa.), Dkt. 30 (Dec. 17, 2018); United States ex rel. HealthChoice Alliance LLC v. Eli Lilly & Co., No. 5:17-CV-123-RWS-CMC (E.D. Tex.), Dkt. 192 (Dec. 17, 2018); United States ex rel. Health Choice Grp. LLC v. Bayer Corp., No. 5:17-CV-126-RWS-CMC (E.D. Tex.), Dkt. 116 (Dec. 17, 2018); United States ex rel. CIMZNHCA LLC v. UCB Inc., No. 3:17-cv-00765-SMY-DGW (S.D. Ill.), Dkt. 64 (Dec. 17, 2018).

[17] United States ex rel. Borzilleri v. Bayer Healthcare Pharm., 14-cv-000031-WES-LDA (D.R.I.), Dkt. 166 (Dec. 21, 2018); United States ex rel. Borzilleri v. AbbvVie, 15-cv-7881 (JMF) (S.D.N.Y.), Dkt.275 (Dec. 21, 2018); see United States ex rel. Thrower v. Academy Mortg. Corp., No. 3:16-02120 (N.D. Cal.), Dkt. 94 (May 31, 2018) ("Relator and her counsel demonstrated severe deficiencies in their prosecution of this case and in their reasons for questioning dismissal").

[18] See, e.g., United States ex rel. SMSPF LLC v. EMD Serono Inc., No. 16-5594 (E.D. Pa.), Dkt. 47 (Jan. 22, 2019), at 14-20; United States ex rel. Borzilleri v. AbbVie, 15-cv-7881 (JMF) (S.D.N.Y.), Dkt. 281 (Jan. 11, 2019), at 18-26.

[19] See, e.g., United States ex rel. HealthChoice Alliance LLC v. Eli Lilly & Co., No. 5:17-CV-123-RWS-CMC (E.D. Tex.), Dkt. 208 (Jan. 22, 2019), at 4-5; United States ex rel. SMSPF LLC v. EMD Serono Inc., No. 16-5594 (E.D. Pa.),

Dkt. 47 (Jan. 22, 2019), at 4-5; United States ex rel. Borzilleri v. AbbVie, 15-cv-7881 (JMF) (S.D.N.Y.), Dkt. 281 (Jan. 11, 2019), at 2, 10-12.

[20] See, e.g., United States ex rel. HealthChoice Alliance LLC v. Eli Lilly & Co., No. 5:17-CV-123-RWS-CMC (E.D. Tex.), Dkt. 208 (Jan. 22, 2019), at 2-3.

[21] United States ex rel. HealthChoice Alliance LLC v. Eli Lilly & Co., No. 5:17-CV-123-RWS-CMC (E.D. Tex.), Dkt. 208 (Jan. 22, 2019), at 4; United States ex rel. Health Choice Group LLC v. Bayer Corp., No. 5:17-CV-126-RWS-CMC (E.D. Tex.), Dkt. 122 (Jan. 22, 2019), at 2.

[22] United States ex rel. HealthChoice Alliance LLC v. Eli Lilly & Co., No. 5:17-CV-123-RWS-CMC (E.D. Tex.), Dkt. 208 (Jan. 22, 2019), at 4; United States ex rel. Health Choice Grp. LLC v. Bayer Corp., No. 5:17-CV-126-RWS-CMC (E.D. Tex.), Dkt. 122 (Jan. 22, 2019), at 2.

[23] See Sequoia Orange, 151 F.3d at 1143-44, 1147.

[24] 151 F.3d at 1145 (quoting United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co., 912 F. Supp. 1325, 1347 (E.D. Cal. 1995)).

[25] 318 F.3d at 256.

[26] United States ex rel. Thrower v. Academy Mortg. Corp., No. 3:16-02120 (N.D. Cal.), Dkt. 92 (May 17, 2018), at 1.

[27] United States ex rel. Borzilleri v. Bayer Healthcare Pharm., 14-cv-000031-WES-LDA (D.R.I.), Dkt. 171 (Jan. 11, 2018); United States ex rel. Borzilleri v. AbbVie, 15-cv-7881 (JMF) (S.D.N.Y.), Dkt. 281 (Jan. 11, 2019), at 2, 18-26.

[28] See, e.g., Sequoia Orange, 151 F.3d at 1144.