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August 10, 2021

The Fifth Circuit Weighs in on Government Dismissal of *Qui Tam* Actions—Is Congress Next?

by Steven A. Wood

The United States Court of Appeals for the Fifth Circuit has recently become the latest appellate court to confront the question of what standard should govern the United States Government's motion to dismiss a *qui tam* action under 31 U.S.C. § 3730 (c)(2)(A). In *United States ex rel. Health Choice Alliance LLC v. Eli Lilly & Co.*, No. 19-40906, 2021 WL 2821116 (5th Cir. July 7, 2021), the court affirmed dismissal of the relator's action in a case factually similar to *United States v. UCB, Inc.*, 970 F.3d 875 (7th Cir. 2020). In *Health Choice,* as in *UCB*, investors created an LLC for the sole purpose of bringing a *qui tam* action against pharmaceutical industry defendants alleging fraud in connection with the provision of certain drug and insurance education services.

In *Health Choice*, the Fifth Circuit held that the Government's motion to dismiss the relator's action was rightly granted over the relator's strenuous objection. In coming to this result, the court did not expressly embrace either of the (c)(2)(A) standards crafted by other courts of appeals. In fact, all three members of the panel agreed only on the result, not necessarily on the reasoning, indicating that jurisprudential divergence on this issue continues. As the law on this issue continues to develop, a recent announcement from key senators indicates that Congress may intercede in an effort to settle disagreements over the appropriate standard, although it remains to be seen whether the proposed legislation provides a useful solution. Finally, *Health Choice* suggests an alternative that would relieve the Government of the burden of contested (c)(2)(A) motion practice where the *qui tam* cases lack merit.

United States ex rel. Health Choice Alliance LLC v. Eli Lilly & Co.—The Facts

The relators in this case, Health Choice Alliance and Health Choice Group, were limited liability companies created by the National Health Care Analysis Group for the sole purpose of filing *qui tam* actions against pharmaceutical companies alleging fraud and violations of various federal statutes including the False Claims Act. The two cases at issue in this appeal, one brought against Eli Lilly, the other against Bayer Corporation, were among eleven similar cases filed in various district courts by related entities against pharmaceutical manufacturers and distributors alleging violations of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b).[1] In each of these cases, the relators alleged that the defendants provided free product education services (nurse educator and insurance reimbursement assistance) in an unlawful effort to induce health care providers to prescribe the defendants' products. A little more than four months after the filing of the *qui tam* complaint under seal, the United States Government declined to intervene in the case.

[1] The Anti-Kickback Statute provides for civil and criminal penalties for, among other things, the knowing and willful payment of "remuneration" to induce patient referrals or the generation of business involving any item or service payable by a Federal health care program. 42 U.S.C. § 1320b.

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The defendants moved to dismiss the complaints arguing, among other things, that the pleadings failed to meet the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure and the complaints failed to state a plausible claim for relief. These motions were granted in part and denied in part leading relators to amend their complaints. About one year after the United States declined to intervene, federal prosecutors notified relators that the Government was intending to move for dismissal under 31 U.S.C. § 3730 (c)(2)(A). In subsequent discussions with the relators, government lawyers raised several concerns about the actions including that they lacked proof, they would impose a discovery burden on the government, and relators' legal theories might conflict with federal health care program policy objectives.

The government moved for dismissal, supporting the motions with a declaration and various exhibits which revealed information about the relators' organizational structure, ownership, objectives, and methods. The relators were special purpose entities expressly created by a group of investors and speculators for the purpose of bringing a series of *qui tam* cases. In paid interviews of various industry employees, they represented that they were conducting a "research study" to gain a better understanding of the pharmaceutical industry and that they had "no bias one way or the other."[2] In truth, they were attempting to collect statements supporting their *qui tam* claims. The motions were fully briefed and on April 24, 2019 the magistrate judge assigned to the case heard extended oral argument on the government's motions.[3] The magistrate's report and recommendation proposed granting the government's motion and the district court adopted the recommendation.

The Fifth Circuit's Analysis—Which Standard Applies and Was It Met

On appeal, the court noted that varying standards have been established for government motions to dismiss under 3730(c)(2)(A), and that the Fifth Circuit had yet to adopt a particular standard. The first court to do so required the government to meet a two-part test: (1) identification of a valid government purpose, and (2) a rational relation between dismissal and accomplishment of the purpose. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998). The second standard, announced in *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), rejected the *Sequoia Orange* test, holding that the decision to dismiss is akin to the exercise of prosecutorial discretion, a matter not subject to judicial review for separation of powers reasons. The Fifth Circuit also noted that the Seventh Circuit recently considered the issue and rejected both *Swift* and *Sequoia Orange* in favor of its own approach which rests largely on application of Rule 41 of the Federal Rules of Civil Procedure. *See United States v. UCB, Inc.*, 970 F.3d 875 (7th Cir. 2020).

The *Health Choice* court turned first to the statutory requirement for a "hearing," noting that "[t]he meaning of the term 'hearing' holds the key to the question of the court's role in assessing the government's decision to dismiss under § 3730(c)(2)(A). . . . We are persuaded by Health Choice's argument that the term 'hearing' means what is says. It includes judicial involvement and action." Further, turning to both Black's Law Dictionary and Webster's for guidance, the appellate court concluded that the word involved "something to be decided," contrary to the government's argument that the hearing was not substantive. "[A] hearing that leaves nothing for the court to decide or do is inconsistent with the notion that the function of federal courts is to decide actual cases and controversies."

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[2] *See United States ex rel. Health Choice Group, LLC v. Bayer Corp.*, 5:17-cv-00126-RWS-CMC, United States' Mot. Dismiss, ECF No. 116 at 6. It is worth noting that the Government sought dismissal of the action with prejudice as to the relator, but without prejudice as to the government. This is standard operating procedure for the Department of Justice in *qui tam* cases when dismissal is sought by defendants. Whatever the Government's rationale for such an inconsistent prayer for relief, the request likely violates established principles of *res judicata*.

[3] The relators were represented at the hearing by Kenneth W. Starr, former federal judge and Solicitor General of the United States, and currently Of Counsel to the Lanier Law Firm.

Yet, despite its apparent rejection of the *Swift* standard, the appellate court concluded that the relator had received everything required under the statute, and the district court properly granted the government's motion. At a two-hour hearing before a magistrate judge, the parties argued the merits of the government's motion. What's more, relators represented that they had a witness prepared to testify, but chose not to present live testimony because the Government's proof, consisting of affidavits, had been "thoroughly rebutted." Taking its measure of the record, the appellate court concluded that relators had been given a full opportunity to present their case. If they declined to put on evidence it was because they chose not to do so, not because the court precluded it.[4]

Lastly, the court rejected relator's argument that the Government had failed to meet its burden under 3730(c)(2)(A). The decision analyzed the Government's and relators' arguments in light of the *Sequoia Orange* standard. "Assuming without deciding" that the *Sequoia Orange* test applied, the court held that the Government's proof met that test. The Government explained relators' claims lacked merit, and the costs involved in monitoring the litigation were not justified. Furthermore, the patient-education services provided by the defendants actually benefitted federal health care programs and did not violate the Anti-Kickback Statute.[5] Having offered this evidence of valid purpose and rational relation between the purpose and dismissal, the burden shifted to the relator to show that the motion to dismiss was "fraudulent, arbitrary and capricious, or illegal." Relators argued unsuccessfully that the Government was motivated by a disdain for the relators' corporate structure and dislike for its primary witness. Relators also argued arbitrariness because the Government did not conduct a cost-benefit analysis, and delayed in bringing its motion in arguable contravention of stated department policy. These arguments were easily rejected by the court.

Judge Higginbothem wrote separately in a concurring opinion, noteworthy, for one, because he seems to assume that *Sequoia Orange* provides the more appropriate standard: "At a minimum, the statute compels the government to stand in open court and state for the record the reasons for its judgment that the case should not proceed. . . . [T]his statutory requirement . . . affords a measure of public accountability." Judge Haynes, the third member of the panel, concurred in the judgment only. One can only presume that he did not agree with the majority's analytical approach to affirming the district court's dismissal.

Takeaways from *Health Choice*

The *Health Choice* decision stops short of expressly adopting any particular standard for 3730(c)(2)(A) dismissals. That said, two of the three judges seem ready to embrace the *Sequoia Orange* rational-relationship standard. As with other courts, the statute's requirement of "a hearing on the motion" gave the Fifth Circuit pause leading two of the three judges to conclude that this requirement mandated some form of "judicial involvement and action." The opinion makes no mention of the very first clause of the section, which states: "The Government may dismiss the action notwithstanding the objections of the person initiating the action . . . ." This text logically and plainly states that whatever the relator's objections, the government may dismiss the action, subject to two procedural requirements—notice and an opportunity for a court hearing.

As several reviewing courts have now recognized, the statute is completely silent on the parameters of this "hearing" or what factors should control the Government's dismissal of a *qui tam* action. But these omissions are in fact significant in respect to judicial review. Even though the statute permits private parties to sue, such actions, not unlike criminal cases, are brought in the name of the United

[4] The *Health Choice* relators also made a constitutional due process argument for reversal that the court rejected on the same grounds. Relators were not denied due process because they had a full and fair opportunity to present arguments.
[5] The Government offered a strong burdens-of-litigation argument. Relators' claims implicated more than one million Medicare beneficiaries and literally tens of millions of prescriptions. The effort to monitor such a massive piece of litigation alone, to say nothing of responding to requests for discovery of the government, would have been huge.

States.[6] Whether to proceed with an enforcement action, either criminal or civil, is left to discretion of the executive branch and is typically unreviewable by the judicial branch. *See Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985) (decisions not to enforce are presumptively unreviewable). The presumption against judicial review may usually be rebutted only where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement authority. *Id.*; *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996) (whether to prosecute is special province of the executive; in the absence of clear evidence to the contrary, courts presume prosecutors properly discharge their duties). Because the False Claims Act is silent on how the Attorney General or his delegees should exercise their discretion in determining whether to dismiss a *qui tam* case, and because prosecutors are presumed to act properly absent clear contrary evidence, the decision to dismiss ought to be beyond the purview of the courts. As the Seventh Circuit in its recent decision noted: "If Congress wishes to require some extra-constitutional minimum of fairness, reasonableness, or adequacy of the government's decision under §3730(c)(2)(A), it will need to say so." *United States v. UCB, Inc.*, 970 F.3d at 853.

Particularly timely in light of *Health Choice* and other recent decisions is a press announcement on July 26, 2021. A bipartisan group of senators introduced legislation that will codify the *Sequoia Orange* standard and mandate a hearing on 3730(c)(2)(A) motions where the government must explain its rationale for seeking dismissal and the relator shall be given an opportunity to show that the government's reasons are "fraudulent, arbitrary and capricious, or contrary to law."[7] In addition, the bill also imposes an unusual burden-shifting scheme regarding the element of materiality, requiring defendants to offer clear and convincing evidence of non-materiality when the government (or relator) has established that element by a preponderance of the evidence.[8]

Lastly, Judge Higginbothem deserves credit for identifying an alternative to 3730(c)(2)(A) motion practice. In his concurrence, he pointed out what should be obvious to everyone, that the government could have saved everyone the trouble and avoided (c)(2)(A) litigation altogether by stating early in the case that "it was aware of, but never defrauded by, the practices alleged." By offering this sort of evidence in a case, the Government should be relieved of the burden of prosecuting a contested 3730(c)(2)(A) dismissal. And in most cases, one would expect this evidence to accomplish the same result by providing the defendant with exculpatory proof that would be dispositive.

As we have seen in the past, however, this may not always be the case, at least not immediately. In another Fifth Circuit case, *United States ex rel. Harman v. Trinity Industries Inc.*, 872 F.3d 645 (5th Cir. 2017), the relator brought an action against the manufacturer of highway guardrail systems, claiming that the defendant had altered the guardrail design without federal regulatory approval and that these redesigned guardrails were allegedly responsible for a number of accidents. A few months before trial, the Justice Department, in response to a *Touhy* request, produced a memorandum stating that the redesigned guardrails remained eligible for reimbursement throughout the time period relevant to the litigation. In other words, there was no material fraud. Despite this evidence, the district court denied the defendant's subsequent motion for summary judgment from the bench without opinion.[9] The case proceeded to a

[6] The relator has standing by virtue of a partial assignment by the United States Government. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773–74 (2000).

[7] *See* Press Release, Sen. Chuck Grassley, Senators Introduce Bipartisan Legislation to Fight Government Waste, Fraud (July 26, 2021), https://www.grassley.senate.gov/news/news-releases/senators-introduce-of-bipartisan-legislation-to-fight-government-waste-fraud.

[8] The proposed amendments would also permit the government to recoup the costs of responding to discovery requests in non-intervened cases unless the requesting party can show that the request was relevant, proportionate to the case, and not unduly burdensome.

[9] The defendant subsequently petitioned the Fifth Circuit for mandamus relief and although the appellate court denied the petition, it nonetheless openly questioned the district court's handling of the issue: "This court is concerned that the trial court . . . has never issued a reasoned ruling rejecting the defendant's [summary judgment] motions . . . a strong argument can be made that the defendant's actions were neither material nor were any false claims based on false

trial of the claims which resulted in a jury verdict for the relator in the amount of $663,360,750. On appeal, the court of appeals vacated the verdict and ordered judgment for the defendant on grounds of a lack of materiality. *Id.* at 667. It can only be hoped that *Harman* is an outlier and that, as Judge Higginbothem noted, when the government says there has been no fraud, false claim, or material violation, the relators and the courts will listen.

Notably, in closing, the *Harman* court stated that "the demands of materiality adjust tensions between singular private interests and those of government and cabin the greed that fuels it. As the interests of the government and relator diverge, this congressionally created enlistment of private enforcement is increasingly ill served." *Id.* at 669-70. This prudent counsel should guide the judgments not only of courts but of legislators who may be considering whether to amend the current law. In contested 3730(c)(2)(A) litigation like the sort in *Health Choice*, we see a dramatic divergence between the interests of government and private relators, in this case backed by Wall Street speculators motivated by one thing—money. Whatever happens with the proposed legislation and in future litigation, the courts' approach to (c)(2)(A) litigation must continue to defer to the Government's decisions in exercising its historic prerogative over statutory and regulatory enforcement.

certifications presented to the government." *Harman*, 872 F.3d at 650-51 (emphasis added).

