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First Circuit Articulates New Standard for Government Dismissals of Qui Tam False Claims Act Suits

By Patrick F. Linehan, Paul R. Hurst and Caitlin Conroy*

In a recent decision, the U.S. Court of Appeals for the First Circuit set forth a slightly different legal standard for assessing government motions to dismiss qui tam actions, but affirmed the generally accepted principle that the government has broad—though not completely unfettered—authority to end qui tam False Claims Act actions.

The U.S. Court of Appeals for the First Circuit has added its voice to the split among circuit courts regarding the appropriate standard for deciding government motions to dismiss qui tam False Claims Act ("FCA") actions after it has declined to intervene. In affirming the district court's grant of the government's motion to dismiss in *United States ex rel. Borzilleri v. Bayer HealthCare Pharms., Inc.*,[1] the unanimous three-judge panel, in a precedential decision, held that district courts must grant government motions to dismiss qui tam FCA complaints unless the relator "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."[2]

In so holding, the First Circuit has set forth a slightly different legal standard for assessing government motions to dismiss qui tam actions, but affirms the generally accepted principle that the government has broad—though not completely unfettered—authority to end qui tam FCA actions.

THE FCA'S SILENCE ON THE SCOPE OF THE GOVERNMENT'S DISMISSAL AUTHORITY HAS RESULTED IN A CIRCUIT SPLIT

The FCA provides that the government may dismiss a qui tam action over the objections of the relator "if the [relator] has been notified by the

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[1] No. CV 14-031 WES (D.R.I. Oct. 21, 2019).

[2] *Borzilleri v. Bayer Healthcare Pharms., Inc.*, No. 20-1066 (1st Cir. Jan. 21, 2022).

[g]overnment of the filing of the motion and the court has provided the [relator] with an opportunity for a hearing on the motion."[3] The statute, however, is silent on the nature of the required hearing, the government's burden (if any) in seeking dismissal, and what a court must consider in evaluating the government's motion.

Absent express guidance from Congress, for years, circuit courts have grappled with the appropriate standard to evaluate a government motion to dismiss a qui tam complaint, which has resulted in a circuit split.

On one end of the spectrum are the U.S. Courts of Appeals for the Ninth and Tenth Circuits, which apply a more stringent standard—the so-called *Sequoia Orange* or "valid government purpose" standard. Under this standard, the district courts must conduct a multi-step analysis. First, the government must identify "a valid government purpose" for the dismissal, and then must demonstrate that there is "a rational relation" between dismissal and accomplishment of the identified purpose.[4] Once the government has met its burden, the burden shifts to the relator to demonstrate that the "dismissal is fraudulent, arbitrary and capricious, or illegal."[5]

On the other end of the spectrum is the U.S. Court of Appeals for the D.C. Circuit, which held that, under Section 3730(c)(2)(A), the government has an "unfettered right to dismiss an action" and that the purpose of the required hearing is merely to afford the relator "a formal opportunity to convince the government not to end the case."[6] In applying this more lenient standard, however, the D.C. Circuit did leave open the possibility that a court could potentially deny a government motion to dismiss upon a showing of "fraud on the court."[7]

Finally, the U.S. Courts of Appeals for the Third and Seventh Circuits have offered yet another position—looking instead to Federal Rule of Civil Procedure ("FRCP") 41 for guidance. These circuits have held that, consistent with Rule 41(a)(1), where the government seeks dismissal before the defendant has responded to the complaint, the relator is merely afforded an opportunity for a hearing, and judicial inquiry is not necessary. Where the government seeks

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[3] 31 U.S.C. § 3730(c)(2)(A).

[4] *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (internal quotation marks omitted).

[5] *Id.*; *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir. 2005).

[6] *Swift v. United States*, 318 F.3d 250, 252–53 (D.C. Cir. 2003).

[7] *Id.* at 253.

dismissal after the defendant has responded, consistent with FRCP 41(a)(2), the hearing could "serve to air what terms of dismissal are 'proper.' "[8]

Although these standards vary, as noted by the U.S. District Court of Massachusetts and as the government pointed out in its motion to dismiss in *Borzilleri*—even under the more stringent "valid government purpose" standard, adopted by the Ninth and Tenth Circuits, "the [g]overnment's quest to dismiss" is not necessarily "particularly arduous."[9] Courts applying the more stringent standard have held that avoiding the cost of continued litigation, for example, represents a "valid government interest."[10]

As discussed in greater detail below, the First Circuit declined to adopt any of these standards wholesale.

THE GOVERNMENT'S MOTION TO DISMISS AND THE DISTRICT COURT'S DECISION IN *BORZILLERI*

In 2014, Dr. John Borzilleri, a physician and professional healthcare investment fund manager, filed a qui tam FCA complaint, in the U.S. District Court for the District of Rhode Island, against several pharmaceutical companies and pharmacy benefit managers, alleging that defendants colluded to defraud Medicare Part D. Specifically, Borzilleri alleged that defendant drug manufacturers, responsible for setting drug prices, colluded with defendant pharmacy benefit managers, responsible for administering access to drugs for many Americans, to drive up the price of multiple sclerosis therapeutics through "service fee" contracts. In 2015, Borzilleri filed a nearly identical qui tam FCA action in the U.S. District Court for the Southern District of New York.[11]

In 2018, the government declined to intervene. Following the government's declination, defendants moved to dismiss the action. The government filed its own motion to dismiss a month later. In its motion to dismiss, the government

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[8] *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 849–51 (7th Cir. 2020); *Polansky v. Exec. Health Res. Inc*, 17 F.4th 376, 390 (3d Cir. 2021).

[9] *Nasuti ex rel. United States v. Savage Farms, Inc.*, No. CIV.A. 12-30121-GAO (D. Mass. Mar. 27, 2014), *aff'd sub nom. Nasuti v. Savage Farms Inc.*, No. 14-1362 (1st Cir. Mar. 12, 2015); Gov't Mot. to Dismiss at 12, *United States ex rel Borzilleri v. Bayer HealthCare Pharms., Inc.*, No. CV 14-031 WES (D.R.I. Oct. 21, 2019), *aff'd sub nom. Borzilleri v. Bayer Healthcare Pharms., Inc.*, No. 20-1066 (1st Cir. Jan. 21, 2022).

[10] *Id.*

[11] *See United States ex rel. Borzilleri v. AbbVie, Inc.*, No. 15-CV-7881 (JMF) (S.D.N.Y. July 16, 2019). The Southern District of New York granted the government's motion to dismiss the complaint and the Second Circuit, without adopting a legal standard for dismissal, affirmed. *United States ex rel. Borzilleri v. AbbVie, Inc.*, 837 F. App'x 813 (2d Cir. 2020).

urged the district court to adopt the DC Circuit's "unfettered discretion" standard, but asserted that the government could also establish that its request for dismissal was based on a "valid government purpose" and that there was a "rational relation" between the government's reasons for dismissal and that purpose under the Ninth Circuit's more exacting standard.[12] The government offered three reasons that dismissal was warranted, regardless of the applicable standard.

First, the government asserted that ongoing litigation would likely burden the government and require expenditure of sources that could better be applied elsewhere. For example, the government explained that the Center for Medicare & Medicaid Services' ("CMS") resources could be better spent on actually administering the Medicare Part D program, rather than responding to "vast" and "intrusive" discovery requests inevitable in this case.[13]

Second, the government explained that the burden of ongoing litigation was particularly unreasonable for the government to bear in this case, where, based on its own investigation, the government concluded that relator's claims were unsupported. Specifically, the government detailed its investigation efforts, which included issuing multiple Civil Investigative Demands "to a broad array of defendants" and third parties, reviewing and analyzing "tens of thousands" of responsive documents, and conducting "dozens of interviews."[14] According to the government, these efforts revealed that relator's allegations, "including the manner in which these [service] fees [were] collected, reported, or distributed, and their resulting impact on the bidding and reconciliation process" were either incorrect, unsupported, or unlikely to result in significant recovery.[15]

Third, the government argued that dismissal was appropriate where the relator's behavior gave the government concern that he would not pursue the government's interests in the case, but rather his own. This behavior included the relator's refusal, at the government's request, to dismiss its nearly identical complaint in the Southern District of New York, and the fact that the relator had been credibly accused of taking short positions in the stock of one or more defendants, and then making public statements about his allegations and the

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[12] Gov't Mot. to Dismiss at 13, *United States ex rel Borzilleri v. Bayer HealthCare Pharms., Inc.*, No. CV 14-031 WES (D.R.I. Oct. 21, 2019), *aff'd sub nom. Borzilleri v. Bayer Healthcare Pharms., Inc.*, No. 20-1066 (1st Cir. Jan. 21, 2022).

[13] *Id.* 13–14.

[14] *Id.* 14–15.

[15] *Id.* at 16.

unsealing of these cases in a manner designed to impact the price of various defendants' stock.[16]

The district court granted the government's motion to dismiss, but declined to decide the appropriate standard for dismissal because the government's motion would be granted under either the DC Circuit's more lenient "unfettered discretion" standard, or the Ninth Circuit's more stringent "valid government purpose" standard.

Specifically, the district court held that the "[g]overnment's desire not to expend more resources on this lawsuit, especially where it has declined to intervene because it 'does not believe that it is in the public interest to pursue this lawsuit,' is a valid and sufficient justification for the [g]overnment's dismissal."[17] Moreover, under the "valid government purpose" standard, the District Court concluded that the relator failed to demonstrate that the request for dismissal was "fraudulent, arbitrary and capricious, or illegal."[18] In so finding, the district court rejected the relator's contention that the government's investigation was inadequate, but also noted that "even a failure to adequately investigate would prove, at the most, mere negligence on the part of the [g]overnment"—not that dismissing the action was fraudulent, arbitrary and capricious, or illegal.[19]

FIRST CIRCUIT DECISION ESTABLISHES A NEW STANDARD

Relator subsequently appealed the dismissal asserting that dismissal was improper under either "the unfettered discretion" or the "valid government purpose" standard. The First Circuit affirmed the dismissal and set forth a new standard for the evaluation of government motions to dismiss.

The First Circuit held that Section 3730(c)(2)(A)'s requirement for a hearing has two purposes.

First, the hearing provides an opportunity for the relator to attempt to convince the government to withdraw its motion to dismiss.[20] As a result, to

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[16] *Id.* at 17.

[17] *United States v. Bayer HealthCare Pharms., Inc.*, No. CV 14-031 WES (D.R.I. Oct. 21, 2019), *aff'd sub nom. Borzilleri v. Bayer Healthcare Pharms., Inc.*, No. 20-1066 (1st Cir. Jan. 21, 2022) (quoting Gov't Mot to Dismiss at 15).

[18] *Id.*

[19] *Id.*

[20] *Borzilleri v. Bayer Healthcare Pharms., Inc.*, No. 20-1066 (1st Cir. Jan. 21, 2022).

fulfill this purpose, the government always must articulate its reasons for dismissal.[21]

Second, the hearing allows the court to assess any claim by the relator "that, in seeking dismissal, the government is *transgressing constitutional limitations or perpetrating a fraud on the court*."[22] If the relator cannot establish a transgression of constitutional limitations or that the government is perpetrating a fraud on the court, the court must grant the dismissal.[23]

In so holding, the court emphasized that the government merely must articulate its reasons for dismissal, and that the burden is always on the relator to establish that the government has transgressed constitutional limitations or perpetrated a fraud on the court. Moreover, the relator is not entitled to discovery or an evidentiary hearing on these questions. If the relator seeks such discovery, it must first make a "substantial threshold" showing to support its claims.[24]

The court also elaborated on instances where a request for dismissal could "transgress[]constitutional limitations." For example, if the dismissal was "based on an unjustifiable standard such as race, religion, or other arbitrary classification in violation of equal protection principles" or "violate[s] a right otherwise protected by the substantive Due Process Clause and shock[s] the conscience."[25]

Finally, the court addressed the relator's assertion that the court must assess the diligence of the government's investigation prior to granting the government's motion to dismiss.[26] The court found this assertion "problematic" and rejected it for several reasons:

(1) A "diligence" inquiry is not hinted at in the text of the FCA;

(2) A searching "diligence" inquiry would require the court to review the government's investigatory decisions, over which the Department of Justice ("DOJ") has wide discretion; and

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[21] *Id.* at 7.

[22] *Id.* at 9.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 7. Similarly, the Eleventh Circuit, in recently affirming dismissal of a qui tam action likewise noted that the Government's authority is not "boundless." *United States v. Republic of Honduras*, 21 F.4th 1353, 1357 (11th Cir. 2021). There the circuit noted "the decision to dismiss must not be based on a constitutionally impermissible standard such as race, religion, other arbitrary classification, or vindictiveness." *Id.*

[26] *Borzilleri v. Bayer Healthcare Pharms., Inc.*, No. 20-1066 (1st Cir. Jan. 21, 2022).

(3) Such an inquiry, particularly in complex FCA suits, would require the court to conduct a "mini-trial."[27]

CONGRESS ENTERTAINS REVISION TO FCA THAT WOULD ESTABLISH A DISMISSAL STANDARD

As the circuit courts remain divided on the appropriate standard to evaluate government motions to dismiss qui tam actions, it is worth noting that Congress is currently considering amendments to the FCA, including a provision that would adopt "the valid government purpose standard." Specifically, S.2428 would amend Section 3730(c)(2)(A) to require the government to "identify a valid government purpose and a rational relation between dismissal and accomplishment of the purpose." The relator would then "have the burden of demonstrating that the dismissal is fraudulent, arbitrary and capricious or illegal." In other words, S.2428 seeks to codify the *Sequoia Orange* standard.

Senator Grassley, the bill's sponsor and longtime advocate for the relator's bar, has described DOJ's practice of dismissing charges in many of the FCA cases brought by whistleblowers as "especially ironic," given the "massive increase" in government funding related to the COVID-19 response that has "created new opportunities for fraudsters trying to cheat the government." According to Senator Grassley, "[if] there are serious allegations of fraud against the government, the Attorney General should have to state the legitimate reasons for deciding not to pursue them in court."

The proposed legislation does not elaborate on what constitutes a "valid government purpose," but Senator Grassley's criticism of DOJ's practice of moving to dismiss FCA actions, could suggest that Congress intends to severely curb DOJ's dismissal authority. Such an effort, however, would seem to be inconsistent with the well-established principle that agency decisions not to institute enforcement actions are essentially unreviewable absent a violation of constitutional rights.[28] The proposed legislation stands in sharp contrast to the position articulated in the so-called Granston Memo, which was issued in 2018 under the prior administration's DOJ and remains codified in the Department of Justice Manual today.

The Granston Memo broke from the historical practice of largely allowing relators to proceed on their own, and instead encouraged prosecutors to seek dismissals under Section 3730(c)(2)(A) more liberally in order to "advance the Government's interest, preserve limited resources, and avoid adverse precedent."

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[27] *Id.* at 8.

[28] *See Heckler v. Chaney*, 470 U.S. 821, 838 (1985).

How the current DOJ will view S.2428 should it become law is unclear, as it has not yet taken any action to withdraw or alter the policy pronounced in the Granston Memo.

CONCLUSION

The First Circuit's decision further solidifies that the government has broad discretion in seeking dismissal of qui tam FCA actions. While the government's continued exercise of its dismissal authority is a welcome trend for private entities doing business with the federal government, the government continues to aggressively use the FCA to root out perceived fraud.

Moreover, government decisions to seek dismissal of qui tam actions are typically made after lengthy investigations where defendants have already been subjected to burdensome Civil Investigative Demands and discovery requests. As a result, companies must remain vigilant in ensuring compliance. Moreover, where companies face relator-only litigation, it would behoove them to consult with DOJ regarding the possibility of their seeking dismissal under Section 3730(c)(2)(A), particularly where there is evidence of bad faith on the part of the relator, or the prospect of parties seeking overly burdensome discovery from a federal agency (a prospect even more likely after the Supreme Court's ruling on ways to prove/disprove materiality in *Escobar*).