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FEATURE COMMENT: When The King No Longer Wants You Suing In His Name: The NHAG Saga And Its Implications For DOJ's Ability To Dismiss Qui Tam Suits

Qui tam is short for the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur, which means "who pursues this action on our Lord the King's behalf as well as his own." See *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 n.1 (2000); 42 GC ¶ 204. Whether and when the Department of Justice may dismiss cases brought by private individuals under the qui tam provisions of the False Claims Act, 31 USCA § 3730, has been raised for many years. See Elmer, Liu and Mason, "The Government's Overlooked Weapon in Protecting the Public Fisc: Dismissals Under 31 U.S.C. § 3730(c)(2)(A)," ABA 7th Annual National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 2008), available at *nicholsliu.com/wp-content/uploads/2018/12/FCA-Govt-Dismissal-Article.pdf*. The debate is now reaching a crescendo.

This is evident from the dueling notices of supplemental authority filed recently by DOJ and the relators in a case in Seattle, Wash., where the Government has sought to dismiss the case over the relators' objection. *U.S. ex rel. SCEF, LLC v. Astra Zeneca PLC, et al.*, No. 17-cv-1328 (W.D. Wash.). On April 15, after the motion to dismiss was otherwise fully briefed, the qui tam relators notified the court of an opinion issued that day from the Southern District of Illinois, in which the judge denied the Government's motion to voluntarily dismiss a qui tam complaint. The very next day, DOJ cited an April 3 opinion from the U.S. District Court for the Eastern District of Pennsylvania, in which the judge *granted* a similar motion to dismiss. It is rare to submit notices of supplemental authority, and even rarer to cite unpublished opinions from district courts in other circuits—so why file these?

The answer is that all three cases are related, part of a nationwide series of cases engineered by the National Healthcare Analysis Group (NHAG). These cases have produced some fireworks of late. One motion to dismiss denied, another granted. Accusations that DOJ is hostile toward "professional relators." Counterclaims by DOJ that this "professional relator" was, in fact, deceiving witnesses and feigning objectivity to seek a windfall. One judge ordering relator's counsel to show cause why he should not be sanctioned "for prosecuting this action without sufficient factual and legal support," and another judge decrying the Government's investigation as not even "minimally adequate."

Overview of the NHAG Cases—The NHAG web comprises 11 FCA cases spanning seven judicial districts and ensnaring 58 defendants. The cases have three unifying traits. First, they all allege the same basic theory of fraud, premised on violations of the Anti-Kickback Statute. 42 USCA § 1320a-7b(b). Second, NHAG (or a member of its corporate family) is a relator in every case (sometimes alongside other relators). Third, DOJ is attempting to dismiss *all* of them.

While most relators are individuals, there is nothing in the statute preventing business entities from serving as qui tam relators. See generally 31 USCA § 3730(b). And to be sure, business entities have previously brought qui tam cases—including successful ones, in which the Government intervened. The 11 NHAG cases were all brought by shell-company subsidiaries or affiliates of Venari Partners LLC, doing business as "National Healthcare Analysis Group," a limited liability company formed by investors and former Wall Street investment bankers. See, e.g., Memorandum of Law in

Support of the United States' Motion to Dismiss at 1-7, ECF No. 18-1, No. 2:16-cv-05203-GJP (E.D. Pa. Dec. 17, 2018).

NHAG operated on an interesting, if not unique, business model. See generally id.; Herz, "Medicare Scammers Steal $60 Billion a Year. This Man is Hunting Them," Wired, March 7, 2016, available at *www.wired.com/2016/03/john-mininno-medicare/* (last visited April 22). John Mininno, one of NHAG's founders, saw a "massive business opportunity" in the publication of data by the Centers for Medicare and Medicaid Services. Id. The company identified "potential informants" by scouring public sources of resumes and then contacted those sources, asking for information. DOJ referred to this as "information obtained under false pretenses," as NHAG held itself out to be conducting a "qualitative research study" when in fact it was building a case as a putative qui tam relator. NHAG responded that "it is standard practice to 'blind' respondents during a fact-finding exercise," which "is done *to avoid bias*." See, e.g., Response to U.S. Motion to Dismiss at 9, ECF No. 34, No. 2:17-cv-01328 (W.D. Wash. Jan. 22, 2019) (emphasis in original).

All 11 of the NHAG qui tam cases were filed in 2016 or 2017. Because investigations of qui tam complaints are conducted under seal, any glimpse of those proceedings is rare. But in this case, because NHAG has impugned the conclusion of DOJ's inquiry, both parties have documented publicly the principal events of the investigation. See generally Affidavit in Response to Order to Show Cause, ECF No. 56, No. 1:16-cv-11379-IT (D. Mass. Dec. 26, 2018); Declaration of Colin Huntley, ECF No. 40, No. 2:17-cv-01328 (W.D. Wash. Feb. 22, 2019).

In the summer of 2018, after what it describes as "a thorough investigation of relators' allegations," which found them to "lack sufficient factual and legal support to justify the immense cost of additional investigation and litigation," DOJ began filing notices of intervention. See, e.g., *U.S. ex rel. SAPF, LLC, et al. v. Amgen, Inc., et al.*, No. 16-cv-5203 (E.D. Pa.) (June 13, 2018). DOJ did not cite this lack of factual or legal support in its notice of declination. See generally id.

On Oct. 4, 2018, DOJ gave NHAG 24 hours to dismiss its cases voluntarily or face motions to dismiss by the Government. After relators' counsel in several of the cases asked for time to make their case, the parties spent much of October and November engaged in meetings and teleconferences over the future of the cases. See generally Huntley Declaration, supra. However, relators were ultimately unable to deter DOJ from its intention to dismiss the cases, and on Dec. 17, 2018, in a coordinated effort, DOJ filed motions to dismiss in the 10 remaining cases (one of the cases had already been dismissed voluntarily, see *U.S. ex rel. Health Choice Advocates, LLC v. Gilead, et al.*, No. 5:17-cv-121 (E.D. Tex.)).

To date, the results in those 10 motions have been:

- Three cases voluntarily dismissed. See *U.S. ex rel. SAPF, LLC, et al. v. Amgen, Inc., et al.*, No. 16-cv-5203 (E.D. Pa.); *U.S. ex rel. Miller, et al. v. AbbVie, Inc.*, No. 3:16-cv-2111 (N.D. Tex.); *U.S. ex rel. Carle, et al. v. Otsuka Holdings Co., et al.*, No. 17-cv-966 (N.D. Ill.).
- One motion granted after going unopposed. See *U.S. ex rel. SMSF, LLC v. Biogen, Inc.*, No. 1:16-cv-11379 (D. Mass.). Notably, the fact that the defendants' and Government's motions went unopposed and were subsequently granted prompted the district judge to order relator's counsel to show cause why he should not have his pro-hac-vice status revoked "for prosecuting an action without sufficient factual and legal support, as charged in the [Government's motion to dismiss]." Id. (Dec. 18, 2018). Relator's counsel filed an affidavit in response, apologizing for the oversight and arguing that his client's case has merit. Although the court did not sanction relator's counsel, neither did it revisit its granting (as unopposed) the Government's motion to dismiss. The case was closed shortly thereafter.
- One motion granted over relators' objection. See *U.S. ex rel. Harris v. EMD Serono, Inc.,* No. 16-cv-5594, 2019 WL 1468934 (E.D. Pa. April 3, 2019).
- One motion denied. See *U.S. ex rel. CIMZN-HCA, LLC v. UCB, Inc.*, 17-cv-765-SMY-MAB (S.D. Ill. April 15, 2019).
- DOJ's motion remains pending in four cases. See *U.S. ex rel. NHCA-TEV, LLC v. Teva Pharm., et al.*, No. 17-cv-2040 (E.D. Pa.); *U.S. ex rel. SCEF, LLC v. Astra Zeneca PLC, et al.*, No. 17-cv-1328 (W.D. Wash.); *U.S. ex rel. Health Choice Alliance, LLC v. Eli Lilly & Co., et al.*, No. 5:17-cv-123-RWS-CMC (E.D. Tex.); *U.S. ex rel. Health Choice Group, LLC v. Bayer Corp., et al.*, No. 5:17-cv-126 (E.D. Tex.).

The first two courts to rule on these motions came to opposite conclusions, which makes predicting the remaining four especially difficult. The ultimate resolution of this group of cases has broader implications for the Government's ability to dismiss qui tam complaints in which it has declined to intervene. That, in turn, has ramifications both existential (e.g., the constitutionality of the qui tam regime) and practical (e.g., the ability of DOJ to enter the fray and to move to dismiss meritless qui tam suits, which it has been historically reluctant to do).

The FCA Framework—DOJ has always had the authority to dismiss certain qui tam suits. See 31 USCA § 3730(c)(2)(A) ("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.").

The Government's willingness to seek dismissal, and the grounds therefor, were recently published as DOJ guidance in what is commonly referred to as the Granston memorandum. The memo's policies are now codified in the Justice Manual § 4-4.111, DOJ Dismissal of a Civil *Qui Tam* Action, available at *www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.111* (last visited April 22). The memo provides a non-exclusive list of grounds for seeking dismissal of part or all of a relator's case, including "Curbing meritless *qui tams* that facially lack merit (either because the relator's legal theory is inherently defective, or the relator's factual allegations are frivolous)"; "Preventing parasitic or opportunistic qui tam actions that duplicate a pre-existing government investigation and add no useful information to the investigation"; and "Preventing interference with an agency's policies or the administration of its programs." Id.

Regardless of the reason *why* DOJ moves to dismiss, there is a revitalizing split among circuit courts over the deference given to the Government when it files a motion under § (c)(2)(A). The Ninth and Tenth Circuits require the Government to justify its decision by showing that dismissal is related to a valid governmental purpose, whereas the D.C. Circuit gives the Government an "unfettered right" to dismiss. Compare *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F. 3d 1139, 1145 (9th Cir. 1998) with *Swift v. U.S.*, 318 F. 3d 250, 252 (D.C. Cir. 2003); 45 GC ¶ 93. This split is often referred to by the cases that have arisen from the Ninth (*Sequoia Orange*) and D.C. (*Swift*) Circuits, respectively.

An interesting question, not explored by the courts in the NHAG cases, is whether DOJ has *any* authority to dismiss a qui tam lawsuit after declining to intervene. Consider how the statute is structured, with attention to the headers:

> (c) Rights of the Parties to Qui Tam Actions—
>
> **(1) If the Government proceeds with the action**, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).
>
> **(2) (A)** ***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.
>
> **(B)** The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.
>
> **(C)** Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation … .
>
> **(D)** Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.
>
> **(3) If the Government elects not to proceed with the action**, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposi-

> tion transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.
>
> **(4) Whether or not the Government proceeds with the action**, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days.

31 USCA § 3730(c) (emphasis added).

The statute clearly divides the parties' rights into three categories: (1) "if the Government proceeds with the action"; (2) "if the Government elects not to proceed with the action"; and (3) "whether or not the Government proceeds with the action." The Government's ability to dismiss a qui tam suit, found in § (c)(2)(A), clearly falls under the first category. There is no analogous dismissal authority in the second or third categories.

Note also that one of the succeeding rights, to limit participation by the relator (§ (c)(2)(B)), clearly applies to intervened cases only. Indeed, § (c)(2) itself is set forth as merely a limitation on the rights of a qui tam relator in an *intervened* case. See id. § (c)(1) ("Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2)."). And if Congress intended for the dismissal right to apply regardless of intervention, it could have put the right under "whether or not the Government proceeds with the action." Id. But it did not, which raises the question whether the dismissal right in § (c)(2)(A) even applies in declined cases.

Despite this clear statutory delineation of rights according to whether the Government intervenes, many courts have read § (c)(2)(A) to apply even if the Government declines to intervene. See, e.g., *Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter*, 135 S. Ct. 1970, 1973–74 (2015) ("Regardless of the option that the United States selects, it retains the right at any time to dismiss the action entirely, § 3730(c)(2)(A)."); 57 GC ¶ 169. But most of those opinions, including the only one from the U.S. Supreme Court, merely assume as much, without analysis. See id. at 1973–74.

In a previous opinion, the Supreme Court laid out the relative rights of the parties in qui tam actions and did *not* list the dismissal right among those that the Government retains after declination:

> If a relator initiates the FCA action, he must deliver a copy of the complaint, and any supporting evidence, to the Government, § 3730(b)(2), which then has 60 days to intervene in the action, §§ 3730(b)(2), (4). If it does so, it assumes primary responsibility for prosecuting the action, § 3730(c)(1), though the relator may continue to participate in the litigation and is entitled to a hearing before voluntary dismissal and to a court determination of reasonableness before settlement, § 3730(c)(2). If the Government declines to intervene within the 60-day period, the relator has the exclusive right to conduct the action, § 3730(b)(4), and the Government may subsequently intervene only on a showing of "good cause," § 3730(c)(3). The relator receives a share of any proceeds from the action—generally ranging from 15 to 25 percent if the Government intervenes (depending upon the relator's contribution to the prosecution), and from 25 to 30 percent if it does not (depending upon the court's assessment of what is reasonable)—plus attorney's fees and costs. §§ 3730(d)(1)–(2).

See *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 769–70 (2000). Indeed, the Court jumped straight from "if the government declines" to § (c)(3), which makes sense given the statutory scheme.

Of the lower courts to have addressed the question head on, most reason that DOJ's ability to dismiss declined qui tam suits helps preserve the constitutionality of the FCA's qui tam provisions. For example, the Ninth Circuit agreed in dicta with the district court in D.C. that "in order to avoid serious constitutional questions which unduly curtailing the Attorney General's prosecutorial discretion would raise," the court "would interpret the Act's provision that the 'Government may dismiss the action notwithstanding the objections' of the relator to apply to actions in which the government has not already intervened." *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 753 n.10 (9th Cir. 1993) (citing *Juliano v. Fed. Asset Disposition Ass'n*, 736 F. Supp. 348, 351 (D.D.C. 1990)); 35 GC ¶ 575. The *Kelly* court made clear that "the specific question addressed in *Juliano* is not directly before us." Id.; see also *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 932 (10th Cir. 2005) (declining to construe the FCA as requiring intervention before moving to dismiss "because a plain reading of the

statute does not require it, canons of statutory construction do not support such a result, and . . . *such a reading would render the FCA constitutionally infirm*") (emphasis added).

This may explain why the NHAG relators apparently never raised this argument; if they did, it might call into question the constitutionality of the qui tam provisions to begin with. That said, one counterargument is that the Government can always intervene—upon showing good cause—and *then* exercise its § (c)(2)(A) authority. This would essentially blend the competing *Sequoia Orange* and *Swift* standards: the Government's discretion would be unfettered before the intervention deadline, but more onerous thereafter.

One thing is clear. The growing disagreements among courts over the Government's § (c)(2)(A) authority make it increasingly likely that the dispute will rise up the federal judicial ladder, perhaps finding its way to the Supreme Court in the coming term. If so, the threshold question of whether § (c)(2)(A) applies in declined cases may resurface.

Conflicting Decisions in the NHAG Cases—Only two of the six opposed motions have been decided, and the decisions reached contrary results.

In *U.S. ex rel. Harris v. EMD Serono, Inc.*, the Eastern District of Pennsylvania granted the Government's motion to dismiss. No. 16-cv-5594, 2019 WL 1468934, at *5 (E.D. Pa. April 3, 2019). The Government had argued, as it has elsewhere, that "continuing to monitor, investigate, and prosecute the case will be too costly and contrary to the public interest." Id. at *2. The court first observed the split in authority, explained above, over the Government's prerogative to dismiss qui tam complaints under 31 USCA § 3730(c)(2)(A). The Third Circuit, which includes the Eastern District of Pennsylvania, has not weighed in. The district court in *Harris* adopted the "rational relationship" test from the Ninth and Tenth Circuits. The statutory requirement for a hearing would be meaningless, the court reasoned, if the Government had unfettered discretion. And in *Harris*, the court found that DOJ had articulated legitimate Government interests: "litigation costs" and "conflict with important policy and enforcement prerogatives of the federal government's healthcare programs." Id. at *4. The court rejected the relators' argument that DOJ was merely hostile to the corporate relator as a "professional relator." Id. at *6.

Less than two weeks later, in *U.S. ex rel. CIMZN-HCA, LLC v. UCB, Inc.*, the Southern District of Illinois *denied* the Government's motion to dismiss. No. 17-cv-765-SMY-MAB, 2019 WL 1598109 (S.D. Ill. April 15, 2019). Although the Seventh Circuit has been silent on the proper standard for a § (c)(2)(A) motion, the district court adopted the *Sequoia Orange* standard. Even under that deferential standard, however, the court found "a minimally adequate investigation, including a meaningful cost-benefit analysis," to be missing. Id. at *3.

Specifically, the court seemed unimpressed that the Government "collectively investigated the eleven qui tam cases filed by the relator" and "did not review any additional materials from the relator relevant to this case." Id. The Government also conceded at oral argument that "it did not assess or analyze the costs it would likely incur versus the potential recovery that would flow to the Government if this case were to proceed." Id. This was not even "minimally adequate," in the court's view. The court also found "curious at best" DOJ's argument that relators' theory posed a threat to the Government's enforcement prerogatives in the area of healthcare kickbacks. Finally, the court was receptive to relators' complaint that they were simply disfavored by the Government. At oral argument, the court elicited from DOJ counsel that disapproval of the relator alone could be a "valid purpose" under the *Sequoia Orange* standard. Id. at *4. Clearly disturbed by this contention, the court feared "that the proffered reasons for the decision to dismiss are pretextual and the Government's true motivation is animus towards the relator." Id.

These are the only two opposed motions to be decided; the other four remain pending.

The Path Forward—Which brings us back to Seattle, Wash., where one of those motions remains to be decided. Those four courts now have two contrary templates that they can follow. But regardless of how those courts decide the matter, the die has been cast: there are serious differences among the lower courts over the deference due a DOJ motion to dismiss. Because the Supreme Court has not addressed this question—or even whether DOJ can bring these motions in declined cases—the potential for ultimate resolution at the Supreme Court is high. In the meantime, we may expect parties to continue pressing their arguments in circuits that have not weighed in. The split will deepen, and pressure will build for Supreme Court review.

In our view, DOJ cannot have limitless authority to dismiss qui tam actions—otherwise, the requirement to provide the relator an opportunity for a hearing would be meaningless. Nor should DOJ be able to exercise its discretion in legally suspect ways, for example, by dismissing only cases brought by female relators. Courts should, however, otherwise give DOJ deference to its exercise of prosecutorial discretion, especially when DOJ has determined that a case is meritless.

Indeed, given that protecting the public fisc is the purpose behind the FCA, dismissal of meritless cases furthers the goals of the FCA. It is too often overlooked that the costs of many meritless cases is borne by the public, because (1) if the defendant prevails in an FCA suit, most or all of the costs of litigating the suit are likely to be considered allowable costs under the Federal Acquisition Regulation's cost allowability provisions, and passed onto taxpayers through indirect cost rates, see FAR §§ 31.205-33 ("Professional and consultant service costs"), 31.205-47 ("Costs related to legal and other proceedings"); (2) the costs to courts overseeing the cases are ultimately borne by taxpayers; and (3) the costs to DOJ and agencies in monitoring the litigation and responding to discovery demands are ultimately borne by taxpayers.

The Government is not only in the best position to identify meritless cases early on, it has the responsibility to stop them. After all, the Government is the real party in interest, not the relator. The Government's decision to exercise its prosecutorial discretion to dismiss a qui tam case—brought in the Government's name and on its behalf—should not be second guessed except in rare circumstances.

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