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CLIENT ALERT

Fifth Circuit Declines to Take a Side in the FCA Circuit Split on DOJ's Dismissal Authority Pursuant to 31 U.S.C. § 3730(c)(2)(A)

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A panel of the U.S. Court of Appeals for the Fifth Circuit recently rejected an argument advanced by two subsidiaries of a nationwide health care "watchdog" that the government improperly moved to dismiss two False Claims Act (FCA) lawsuits in *U.S. ex rel. Health Choice Alliance LLC et al. v. Eli Lilly & Co. Inc. et al.*, No. 19-40906 (5th Cir. Jul. 7, 2021). The relators accused Bayer Corp. and Eli Lilly & Co. Inc. of participating in a kickback scheme by offering free patient-education services to providers in exchange for providers prescribing their products in violation of the Anti-Kickback Act and the FCA. The government initially declined to intervene in the cases, then a year later, notified the relators that it intended to move to dismiss and detailed its concerns about the viability of the cases. After two-and-a-half months of negotiations with the relators, the government moved to dismiss the cases pursuant to its authority under 31 U.S.C. § 3730(c)(2)(A), citing, among other things, its two-year investigation into the relators' cases. The District Court granted the motions and the relators appealed.

Before undertaking its substantive analysis under the FCA, the Fifth Circuit analyzed whether it had jurisdiction to hear the relators' appeal. Though the relators and government agreed that there was appellate jurisdiction, the Fifth Circuit identified a potential issue based on the timeline of two events: (1) relators' voluntary dismissal without prejudice; and (2) the District Court's order granting the government's motion to dismiss. Specifically, the Fifth Circuit analyzed whether the relators' voluntary dismissal eight months prior to the government's motion to dismiss deprived the District Court of the ability to issue a final appealable order. The Fifth Circuit declined to create a Circuit split on the question, and concluded "that the prior without-prejudice dismissals did not deprive the district court's subsequent decision of finality."

With the jurisdictional question resolved, the Fifth Circuit next turned to the question of the government's § 3730(c)(2)(A) authority to dismiss FCA lawsuits; but ultimately declined the opportunity to take a side on the standard for dismissal of a *qui tam* lawsuit under the FCA. As it typically does, the government advocated for the "unfettered discretion" standard from *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), while the relators unsurprisingly argued for the rational-relation test from *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir.1998). Without deciding which standard should apply, the panel instead determined that: (1) the government had satisfied the higher *Sequoia Orange* standard by establishing a rational relationship between dismissal and accomplishment of a valid government purpose—the patient education programs in question were lawful, and the case lacked sufficient merit to justify the cost of its investigation and prosecution; and (2) relator could not "demonstrate that dismissal [wa]s fraudulent, arbitrary and capricious, or illegal." The Fifth Circuit ultimately determined, however, that the relators had an opportunity to present their evidence and arguments against dismissal in a hearing and failed to persuade the district court judge, so dismissal was appropriate.

While the Fifth Circuit has declined several times to formally weigh in on the standard that applies to DOJ's authority to move to dismiss a *qui tam* case, this decision reaffirms that even the *Sequoia* rational relation test is highly deferential. This case also serves as a reminder that the government's decision not to intervene in a *qui tam* suit does not rule out the possibility of DOJ later moving to dismiss the suit altogether if the circumstances warrant it.

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