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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA, <i>ex rel.</i> LINDA NICHOLSON,	)	
Plaintiff,	)	
-vs-	)	Case No. 10 C 3361
LILIAN SPIGELMAN, M.D.,	)	Chicago, Illinois
HEPHZIBAH CHILDREN'S	)	April 19, 2011
ASSOCIATION, and SEARS	)	9:45 a.m.
PHARMACY,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE GARY FEINERMAN

APPEARANCES:

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1 (Proceedings heard in open court:)

2 THE CLERK: 10 C 3361, United States of America  
3 versus Spigelman.

4 MR. PRUITT: Good morning, your Honor. Eric Pruitt  
5 on behalf of the United States.

6 MR. KRETCHMAR: Good morning, your Honor.  
7 S. Randolph Kretchmar on behalf of the relator.

8 MR. GALLAND: George Galland for Hephzibah Children's  
9 Association.

10 MR. VELTMAN: Good morning, your Honor. Stephen  
11 Veltman on behalf of Dr. Lilian Spigelman.

12 MR. TAKIGUCHI: And Mas Takiguchi on behalf of Sears  
13 pharmacy.

14 THE COURT: Good morning. We're here for a hearing  
15 on the United States's motion to dismiss the relator's  
16 complaint.

17 (Discussion held off the record.)

18 THE COURT: Sorry for the interruption.

19 So, we're here on a hearing for the United States's  
20 motion to dismiss the relator's complaint, and I've read the  
21 briefs. And let's assume we're in *Sequoia* land and not in  
22 *Swift* land. I issued an order asking the government to  
23 address an issue that was raised in the relator's brief and  
24 that I didn't think that the government really addressed  
25 head-on in its reply.

1           You're saying that there was only five prescriptions  
2 at issue here, and the plaintiff -- the relator responds,  
3 "Well, yeah, the complaint only refers to five prescriptions,  
4 but I'm talking about hundreds, if not thousands. And there's  
5 all this money to be gotten for the U.S. Treasury and,  
6 incidentally, for the relator and counsel."

7           So, you didn't really address that issue.

8           MR. PRUITT: That's correct, your Honor. I looked  
9 back at my brief, and I apologize for that. Your Honor, would  
10 you like me to review the other points I wanted to get on the  
11 record and then address that last or address that first?

12          THE COURT: Whatever way you want.

13          MR. PRUITT: I guess a few points quickly that I want  
14 to make sure we've underscored for the record.

15          This case involves an alleged injury to the United  
16 States, and it's the United States' remedy that's at issue  
17 here, whether or not that is pursued or not on behalf of the  
18 United States. We're not preventing the relator from seeking  
19 a remedy for any injury that occurred to her or her daughter.  
20 If she feels her daughter was harmed by what these defendants  
21 did -- she hasn't actually alleged malpractice --

22          THE COURT: So, is it actually the parent of the  
23 child who was prescribed --

24          MR. PRUITT: That is my understanding that's who our  
25 relator is.

1 MR. KRETCHMAR: Yes, your Honor, that's correct.

2 MR. PRUITT: So, we're not precluding them or getting  
3 in the way of them suing for any injury they've had. We're  
4 talking about an alleged injury to the United States, and it's  
5 our claim.

6 And I think what's -- you talk about *Sequoia Orange*.  
7 Under *Sequoia Orange*, it's an issue of prosecutorial --

8 THE COURT: Okay. Mr. Pruitt, you can go on for as  
9 long as you want. I'm telling you right now you're not  
10 telling me anything I don't already know.

11 MR. PRUITT: Then let me get right to your point,  
12 your Honor. I think all we know is there are five claims  
13 alleged. They say that there could be more. That is  
14 speculation. We don't have evidence of that right now. But  
15 even if there was more --

16 THE COURT: What investigation has the government  
17 done to determine how many claims there might be?

18 MR. PRUITT: Well, your Honor, we don't divulge our  
19 deliberative process in declining qui tams. We investigate  
20 the allegations that are made, and the allegations that were  
21 presented to us related to these specific claims related to a  
22 specific drug. We investigated that and came to the  
23 conclusion that it was not a case that the United States  
24 wanted to intervene on based on the allegations presented.

25 THE COURT: Well, let's say there were -- let's say

1 the relator was right and there were a thousand false claims  
2 involving the off-label prescribing of Celexa. Would that be  
3 a case that the government would be interested in continuing  
4 to pursue?

5 MR. PRUITT: In this instance, with this case here,  
6 based on speculation as to that possibility, the answer is  
7 still no. This was --

8 THE COURT: Why is that?

9 MR. PRUITT: Your Honor, this is our cost-benefit  
10 analysis as to whether or not we want this claim pursued on  
11 behalf of the United States. We believe, based on the case we  
12 have in front of us, and even with that possibility hanging  
13 out there, that this is not a way in which we want to direct  
14 and use our prosecutorial resources.

15 We've already seen in response that just with respect  
16 to this motion alone, the relator wanted the deposition of  
17 four possible high-level CMS witnesses, and that was just for  
18 this motion. And the filings that were made last night showed  
19 that the relator intends to broaden this out not just to one  
20 drug, but to dozens and dozens of drugs. The possible scope  
21 of discovery here is immense.

22 It would go to -- even if there were more claims at  
23 issue, again it would go to the Court or the relator  
24 disagreeing with the analysis that the government has done in  
25 how to exercise its prosecutorial discretion. It doesn't make

1 the decision any less rational as a basis for legitimate  
2 government purpose.

3           What the relator needs to show here is that the  
4 decision is arbitrary, capricious, or fraudulent under *Sequoia*  
5 *Orange*, and I think even the possibility that there are  
6 thousands of claims wouldn't make our decision arbitrary,  
7 capricious, or fraudulent.

8           THE COURT: Okay. Well, I'll give you fraudulent,  
9 and I'll give you illegal. So, we don't have to talk about  
10 fraudulent or illegal. But what about arbitrary and  
11 capricious? If there's this pot of gold at the end of the  
12 rainbow, according to the relator, and I think I've read  
13 somewhere that the government is in need of funds at this  
14 particular point in our history, why wouldn't it be arbitrary  
15 and capricious for the government not to go after all that  
16 money? Because we can talk about, you know, a million  
17 dollars, \$5 million. It's not nothing, but --

18           MR. PRUITT: Yeah. Well, your Honor, every relator  
19 who comes in the door says there's a pot of gold at the end of  
20 the rainbow. I think the -- you know, the public record on  
21 these bears out that that's almost never the case.

22           We make our own assessment. And unfortunately, I  
23 have one hand tied behind my back here because it's the  
24 government's policy that we do not comment on our views as to  
25 the validity of the claims in theses qui tam cases. I can

1 only tell you that, obviously, the potential value of the case  
2 is something that we weigh and consider in making these  
3 decisions and in making this decision here. That possibility  
4 is something obviously we're not ignorant of and considered in  
5 making the decision.

6 I still don't think that makes it arbitrary and  
7 capricious. As you know, I bring it back to we have limited  
8 prosecutorial resources here, and we have to make a decision  
9 as to where to allocate them. The fact that someone says  
10 there's a pot of gold doesn't mean there is.

11 You know, on the criminal side, we've recently had  
12 the government decide not to redo the trial against Robert  
13 Blagojevich. People might question that decision. People  
14 might question the decision to prosecute the governor.

15 The government is making its decision on how to  
16 allocate resources. We don't think it's arbitrary and  
17 capricious.

18 THE COURT: Okay. Let me ask if any of the other --

19 MR. PRUITT: I'm sorry, your Honor. Something that I  
20 don't think was made clear in the brief but is an important  
21 fact to put on the record. If there was a judgment or a  
22 settlement in this case, the United States' share is roughly  
23 70 percent, with 30 percent going to the relator. Of that,  
24 though, because it's a Medicaid case, the United States would  
25 only get 40 percent of that 70 percent because of the rules



1 that apply for how that is split between the state and the  
2 federal government in this context.

3 So, even if there was a larger pool of money, I just  
4 think it's important to note that it's not as if the United  
5 States gets that entire pot of whatever it is at the end. It  
6 just gets a sliver of that pot.

7 THE COURT: Is the Attorney General of the State of  
8 Illinois a stakeholder in this case, given that the State will  
9 be getting -- would be getting 60 percent of the 70 percent?

10 MR. PRUITT: The money goes to us -- because they  
11 didn't bring a claim under the Illinois false claims statute,  
12 which could have happened, although it was not done here.  
13 Pursuant to the federal False Claims Act, if there was a  
14 judgment or a settlement, the money comes to us; and then  
15 under agreement we have with them, we would then disburse, you  
16 know, their share to them.

17 I don't know if I can answer whether they're a  
18 stakeholder.

19 THE COURT: I guess what I mean is do they have some  
20 sort of standing to come in and say, "No, no, no. We don't  
21 want this case to be dismissed. We want it to go forward  
22 because we're going to get -- we're a real party in interest,  
23 at least one step removed." And they haven't shown up and --

24 MR. PRUITT: They haven't shown up. I don't want to  
25 speak to their decision-making, obviously, but, yeah, I mean

1 obviously, they do have some interest, remote interest in the  
2 resolution of the case because of the money.

3 THE COURT: Let me ask -- before I get to the  
4 relator, let me ask if any of the other defendants want to  
5 chime in on the government's motion to dismiss.

6 MR. GALLAND: Judge, before I decide to chime in, I  
7 just wonder if I can ask you whether you've had a chance to  
8 get to the briefing on the merits motion to dismiss that the  
9 defendants have filed?

10 THE COURT: I've reviewed them very lightly, but I --  
11 any argument on that would -- can probably wait until after  
12 this motion is decided, assuming the motion is denied.

13 MR. GALLAND: Let me just comment on your question  
14 about the Illinois Attorney General. One of the arguments  
15 that the defendants make in moving to dismiss this case on the  
16 merits is that it is uncontested that under Illinois' Medicaid  
17 rules, it is not unlawful to request reimbursement for an  
18 off-label use that's not -- doesn't appear in one of these  
19 compendia. The relator concedes that, and it's in Illinois'  
20 regulations.

21 I would be most surprised to see the Illinois  
22 Attorney General coming in saying, "Even though we allow these  
23 claims, I've got skin in this game, and I want money back." I  
24 don't think that's going to happen.

25 MR. TAKIGUCHI: And to that end, for Sears Pharmacy,

1 we have complied with the regulations and reimbursement  
2 procedures for those small claims. And we -- as you know that  
3 the litigants here involve a shelter, the State of Illinois as  
4 guardian, and a licensed, board-certified psychiatrist who  
5 issued bona fide prescriptions.

6           And under this scenario, I feel that we have a  
7 legitimate issue with CMS, as we relied on their guidelines  
8 and their guidance both on reimbursement and to regulators in  
9 the State of Illinois under the pharmacy regulator division in  
10 submitting these.

11           And these were not done -- clearly, as you indicated,  
12 it's not illegal. It's not fraudulent. There's no scienter  
13 here. The issue really is going to rest on directions and  
14 regulations also that the pharmacy operated under under the  
15 State of Illinois.

16           MR. VELTMAN: Your Honor, Steve Veltman on behalf of  
17 Dr. Spigelman. I'll simply chime in and say that there is no  
18 pot of gold at the end of this hunt. In addition to the  
19 motions that have been briefed, a motion on standing which has  
20 not yet been fully briefed but will be if you need to get  
21 there, and in addition to the complexities of trying to figure  
22 out how many prescriptions of Celexa may have been prescribed  
23 to others that were then filled through this pharmacy, the  
24 insurmountable hurdle of scienter that Dr. Spigelman could  
25 have possibly known and acted in willful ignorance of

1 relator's theory of the case; and at the end of the day, that  
2 the insurance that's defending Dr. Spigelman has a reservation  
3 of rights that insurance does not pay for fraud. Everyone  
4 pretty much knows that. And so you don't -- you don't even  
5 have a policy to go against.

6 So, there is no pot of gold here for a variety of  
7 reasons, and I think the government has correctly understood  
8 that.

9 THE COURT: Okay. Let me turn it over to the relator  
10 and ask if you want to comment on anything pertinent to the  
11 motion, and then I might have some questions for you.

12 MR. KRETCHMAR: Yeah. Your Honor, apparently, the  
13 Justice Department's whole reason for seeking to dismiss this  
14 case was that there's just no money in it. It costs them more  
15 than it's worth to the United States to litigate it.

16 And we think this argument -- this analysis is  
17 unlikely to a point of incredulity. The case entails all  
18 false claims caused and/or presented by defendants within the  
19 six-year statute of limitations for prescriptions of  
20 psychotropic drugs to children not for any medically-accepted  
21 indication.

22 Relator's complaint specifically listed five such  
23 prescriptions and alleged that these five were the tip of a  
24 much, much larger iceberg. The government pretends that it's  
25 reasonable to presume that the relator's particularly pled

1 non-public facts are simply all there is to this action and  
2 they're only there to qualify her as a whistleblower. The  
3 presumption that this is all there is to it simply isn't  
4 reasonable, even vaguely.

5           Defendant Hephzibah houses 10 children at any given  
6 time, according to their web site. As many as 80 percent are  
7 probably prescribed one or more psychotropic medications  
8 monthly, and up to three-quarters of those prescriptions are  
9 not for any medically-accepted indication. This comes out to  
10 more than 400 false claims for which Hephzibah may be liable,  
11 well over \$200,000 in statutory penalties.

12           Defendants Spigelman and Sears are each probably in  
13 to the scheme for similar numbers, depending on what portion  
14 of Hephzibah's business they have and how many additional  
15 prescriptions they write or fill for non-Hephzibah Medicaid  
16 customers in a six-year period.

17           Bottom line is, this case could easily be worth  
18 \$5 million to the United States government. It's a reasonable  
19 estimate.

20           Above and beyond this immediate level of penalty,  
21 there's probably a deterrence benefit that's several orders of  
22 magnitude higher than that. If prescribers and pharmacists  
23 are put on notice that they can be held liable for false  
24 claims such as the ones in this case, then they're much less  
25 likely to try and charge Medicaid in the future for so many

1 prescriptions that are not for any medically-accepted  
2 indication.

3           Obviously, we're not at the point of proving these  
4 numbers today, but we can, and we have adequately alleged a  
5 scenario which would reasonably predict this kind of value to  
6 the United States.

7           The Justice Department effectively asked the Court to  
8 ignore the whole essence of our complaint by pretending that  
9 the case is only worth a few hundred, or perhaps with  
10 penalties, a bit more. We think, in the language of *Sequoia*  
11 *Orange*, that the government's decision was based on arbitrary  
12 and improper considerations.

13           If this case could conceivably recover millions to  
14 the public fisc, why does the Justice Department attempt to  
15 insist that it just wouldn't be worth it? Do they actually  
16 expect to spend millions in answering discovery requests from  
17 the defendants? It seems extremely unlikely, extremely  
18 doubtful.

19           And I might add that our discovery request to depose  
20 four government officials for this motion is something that  
21 never would have come up. We would not be needing to run that  
22 discovery on the government except for this motion. If this  
23 motion is denied --

24           THE COURT: Let me ask you, were those letters --  
25 exchanging letters with the Utah Attorney General's Office --

1 MR. KRETCHMAR: Exactly.

2 THE COURT: Were those letters dealing with Celexa,  
3 or was it just off-label prescribed generally?

4 MR. KRETCHMAR: It was off-label, non-compendium  
5 prescriptions, but it's not Celexa specifically.

6 THE COURT: And you read the government's letters as  
7 saying, "We don't care about off-label. We'll let everybody  
8 do what they want to do"?

9 MR. KRETCHMAR: Well, the argument from the  
10 defendants is that the United States has an official policy  
11 that enables -- that qualifies these prescriptions for  
12 Medicaid. And the only evidence that is really cited is these  
13 letters.

14 We think -- we wonder. Perhaps the government  
15 believes pharmaceutical companies should be prosecuted for  
16 defrauding Medicaid, but psychiatrists and foster homes and  
17 pharmacies should be allowed to defraud Medicaid.

18 I saw a quote from New York University law professor  
19 Richard Epstein recently in *National Affairs*. He said, "It's  
20 become quite difficult to limit the discretion of government  
21 officials, who have lately acquired unprecedented ability to  
22 make the rules up as they go along. Yet limiting such  
23 discretion is ultimately vital to the rule of law itself."

24 Prosecuting pharmaceutical companies for defrauding  
25 Medicaid while simultaneously protecting psychiatrists and so

1 on --

2 THE COURT: Is this Professor Epstein, or is this now  
3 you?

4 MR. KRETCHMAR: No, this is now me. Sorry, your  
5 Honor.

6 You can't go after one part of the scheme and not the  
7 other actors without thwarting Congress's restriction of  
8 Medicaid coverage for outpatient prescriptions to  
9 medically-accepted indications. And to the immediate point,  
10 it would constitute an arbitrary and improper consideration  
11 upon which to base a motion to dismiss this case.

12 In their reply, the government does not argue against  
13 the application of *Sequoia Orange*. We want to point out,  
14 however, that *Sequoia Orange* actually only addresses one out  
15 of three grounds for denying a motion to dismiss by the  
16 government as intended by Congress, according to the Senate  
17 report on the False Claims Amendment Act of 1986. We noted  
18 this in our opposition.

19 The government's motion to dismiss should be denied  
20 if: One, dismissal is unreasonable in light of existing  
21 evidence; two, the government has not fully investigated the  
22 allegations; or three, the government's decision was based on  
23 arbitrary and improper considerations. Here, we would argue  
24 that all three of these reasons apply.

25 The *Swift* interpretation, just one comment. Even in



1 *Swift*, the dismissal is still conditioned -- or the discretion  
2 to dismiss is still conditioned on good faith and absence of  
3 fraud on the court. Our argument originally against *Swift* was  
4 with the characterization that the only right relator has  
5 under FCA is to try and talk the government into changing its  
6 mind.

7           Our due process argument, by the way, is not, as the  
8 government asserts it, the relator's rights under the case are  
9 fundamental, but rather, that relator can't be deprived of her  
10 statutory rights under the FCA without reasonable notice and  
11 opportunity to respond before an impartial decision-maker.

12           And the request to depose the government employees,  
13 again, is based on this motion only. If this motion is  
14 denied, we don't need to depose those employees. This is not  
15 an indication that we will need to seek some unlimited amount  
16 of discovery against the United States.

17           So, we ask that the Court deny the motion, or that if  
18 we haven't made enough of a showing at this point, in the  
19 Court's opinion, that we be enabled to -- allowed to depose  
20 the four employees that we have named and also to discover --  
21 conduct discovery on the number of prescriptions of Medicaid  
22 recipients under 18 that were not for a medically-accepted  
23 indication that were presented or caused to be presented by  
24 the defendants.

25           THE COURT: All right. Thank you.

1           Mr. Pruitt, I know that -- or I understand from your  
2 papers that there was a \$300 million recovery against Forest  
3 Labs, is that correct?

4           MR. PRUITT: There was, your Honor.

5           THE COURT: Is it your suggestion that the  
6 \$300 million recovered from Forest Labs reimbursed the  
7 government for the money that it had expended for paying for  
8 the pharmaceuticals that were prescribed by doctors down the  
9 chain and sold by the pharmacies?

10          MR. PRUITT: I don't know if I can go so far as to  
11 make that representation on behalf of the government, your  
12 Honor. I can say that it is evidence that we are not ignorant  
13 of the -- you know, we are not ignoring what we believe to be  
14 the presentation of false claims to the United States in  
15 relation to the off-label marketing of the drug, that we're  
16 not -- it's not some sort of fraudulent conspiracy where the  
17 government, for whatever reason, is turning a blind eye to  
18 issues related to this. We have pursued it in the past in  
19 other contexts. But I can't go so far as to make the  
20 representation that you're --

21          THE COURT: Are you saying that for purposes of  
22 Celexa, the government's resources are better spent going  
23 after one entity at the top of the pyramid, as opposed to  
24 hundreds, if not thousands, of doctors and pharmacies and  
25 hospitals at the bottom of the pyramid?

1 MR. PRUITT: I can say that that is the sort of  
2 decision-making process that the Department of Justice goes  
3 through in allocating its prosecutorial resources. I don't  
4 think I'm authorized to make a representation as to what the  
5 DOJ's decision is specifically here, but that is the sort of  
6 analysis that one engages in.

7 There are all sorts of allegations made, all sorts of  
8 possible defendants that can be pursued in relation to all  
9 manner of things, and they have different issues with respect  
10 to their scienter, with their intent. There are all sorts of  
11 factors that go into that analysis. So, in a sense, it's one  
12 of the factors in that analysis.

13 THE COURT: Then why is it that you say that you're  
14 going to be subject -- that the government's going to be  
15 subject to discovery? Let's assume that we take the relator  
16 at her word or counsel at his word, and the relator isn't  
17 going to go -- isn't going to try to seek discovery from the  
18 government. What kind of discovery might the defendants seek  
19 from the government?

20 MR. PRUITT: Well, the defendants obviously can speak  
21 to that. I think -- and I will tell you, your Honor,  
22 obviously, what triggered this process with the Department of  
23 Justice was seeing the 12(b)(1), 12(b)(6) motions were filed  
24 and seeing, you know, rather heated discussions back and forth  
25 about the government's policies, about representations made by

1 CMS officials, DOJ's failure to take a position.

2 It became apparent to us, and I think probably more  
3 particularly, as framed by the defendants, that these issues  
4 as to the government's position on these policies,  
5 regulations, et cetera, would go to the issues of scienter,  
6 materiality from the defendants' perspective particularly.  
7 Obviously, they can speak to that. I can't speak for them.  
8 But that was obviously a concern.

9 MR. GALLAND: If I may make a suggestion. It's just  
10 a suggestion.

11 It seems to me as the Court deals with this motion of  
12 the government, the defendants, of course, we just want to  
13 win. We don't care whether we win because you grant this  
14 motion or because you find our motion to dismiss meritorious.

15 We're a small charity in Oak Park, we're a  
16 mom-and-pop pharmacy in Oak Park, and we're a psychiatrist  
17 who's now retired and is uninsured for any judgment in this  
18 case, as are, in all likelihood, all the defendants.

19 This is one of the more mythical pots of gold. Even  
20 if the relator had the law on her side, she would succeed  
21 exactly in putting us out of business, all three, or in the  
22 poor house with respect to Dr. Spigelman.

23 My suggestion is that the Court really can't --  
24 really needs to see and see in detail, in order to decide the  
25 government's motion, the merits issue which is lurking

1 underneath this. And that is the fact that as we have argued  
2 in our motion -- and I'm not going to argue it, but I'm just  
3 going to tell you what the argument is again. The defendants  
4 are -- the claim of falsity, of a false claim in this case is  
5 predicated on a legal interpretation of the Medicaid statute.  
6 It's the relator's position that the Medicaid statute -- which  
7 is 42 USC 1396r-8. These citations with the statute are as  
8 complicated as the statute itself.

9           The relator's position is that that statute is an  
10 absolute ban on Medicaid -- federal Medicaid funds being used  
11 to reimburse prescriptions that are for off-label uses that  
12 are not supported by one of these three huge compendia that  
13 are cited in the statute.

14           That's a legal position. If that legal position is  
15 correct, then the relator's position is that we have committed  
16 something called legal falsity, in that we have caused the  
17 government to reimburse claims that were legally ineligible  
18 under the statute. That's their position.

19           The defendants' position in response on the 12(b)(6)  
20 motion to dismiss is the -- that's an arguable interpretation  
21 of the Medicaid statute, but there is another competing  
22 interpretation of the Medicaid statute in which that statute  
23 does not forbid off-label, non-compendium uses, but, in fact,  
24 only requires that in return for giving rebates to the states,  
25 that states do reimburse every use which is -- which is

1 supported by the compendia and is an on-label use.

2 That is to say, in the competing interpretation, the  
3 Medicaid statute is a floor on reimbursement, and in the  
4 relator's view, it is a ceiling on reimbursement. And there's  
5 a fight over that.

6 And as we've shown you in our brief, that issue as to  
7 whether it is a floor or a ceiling has been examined by a  
8 court in only one case, one case. It was in 2003, and it  
9 was -- the judge in that case was the most experienced judge  
10 in the country in Medicaid matters, Patti Saris in  
11 Massachusetts. She looked at these competing interpretations,  
12 and she said, "Boy, this is a tough one. I'm not sure who's  
13 right. I'm not sure. I don't have to decide who's right for  
14 the purpose of this motion."

15 That is the one case in which these two competing  
16 interpretations have been commented on by any federal judge.  
17 And our position, position number one, is if the issue is that  
18 complex, if the issue is that unsettled that a judge as  
19 wonderful as Judge Saris can't figure out which position is  
20 right, as a matter of law, the defendants can't be liable for  
21 making a false statement. And that's supported by an absolute  
22 avalanche of case law under the False Claims Act that says  
23 that when your claim of false statement is predicated, as this  
24 one is, on a legal statement of position and that legal  
25 statement of position is unsettled, as a matter of law, that's

1 not a false statement; or in some circuits, whether it's a  
2 false statement or not, as a matter of law, you haven't made a  
3 knowing false statement.

4 That's our first position. And our second position,  
5 which is related to that, is that it is undisputed in this  
6 case that Illinois Medicaid pays for these things, knowingly  
7 pays for these things. Its regulations pay for them. Its  
8 regulations have all been approved by the federal Medicaid  
9 agency, the Center for Medicaid and Medicaid Services, CMS.

10 So, our position is when we're providers and we have  
11 to submit our claims to Illinois, not to the federal  
12 government, if the regs say that we can submit them, if the  
13 federal government disagrees with those, let them disapprove  
14 Illinois' plan. That's their fight, not ours.

15 And so, as a matter of law, our position is, in our  
16 motion to dismiss, if Illinois won't tell us that these are  
17 forbidden prescriptions, we have the right to submit them  
18 without getting clobbered with treble damages and penalties  
19 under the False Claims Act. This is a very strong position in  
20 support of a motion to dismiss, if we do say so ourselves.

21 And it seems to me that if the government, looking at  
22 this situation, makes a decision in its prosecutorial  
23 discretion that this is not the place for that kind of issue  
24 to be thrashed out and if it has other fish to fry in bigger  
25 cases and it wants this case dismissed, I can't think of a

1 good reason in the world why the Court wouldn't respect a  
2 judgment like that, whatever the government's process is.

3 There is an underlying issue here which if I were the  
4 government I would not want decided in this case. It's got  
5 bigger cases to decide.

6 THE COURT: Why not? Why is this case not a good  
7 vehicle, from the government's perspective, to decide that  
8 issue?

9 MR. GALLAND: Because it doesn't need to be decided.  
10 Our position, as you'll see when you have a chance to examine  
11 our briefs in more detail, is that not only does this issue of  
12 what the Medicaid statute means not need to be decided, but it  
13 shouldn't be decided. As long as it is unclear, we win. In  
14 fact, the Court should go no further than that minimum ruling  
15 to dispose of this case. That's our position.

16 Now, the government may take a look at that and say,  
17 "Look, why not dismiss this case altogether, given all the  
18 arguments here?" I don't know what their process is, but  
19 they're entitled to take that position. And it's beyond me  
20 why a case where the government thinks it's not in the  
21 interests of the United States to proceed should proceed.

22 THE COURT: Okay. Thank you. Any response from  
23 Mr. Kretchmar?

24 MR. KRETCHMAR: Yes, your Honor. I'm not prepared to  
25 argue --



1 THE COURT: And you don't have to.

2 MR. KRETCHMAR: -- off the top of my head the way --  
3 Mr. Galland is amazing with this law. I can't even come  
4 close. I would say --

5 THE COURT: Well, Mr. Galland's usually on the other  
6 side of these cases.

7 MR. KRETCHMAR: I would say -- by the way, I know  
8 that. I would say that this issue of floor or ceiling  
9 interpretation is -- I've looked into it with as much  
10 attention as I can muster on a number of occasions; and  
11 although I can't reel it off right now, I do not believe it's  
12 as simple as he's presenting it.

13 This is a situation where, as -- as Richard Epstein  
14 has phrased it, you've got a huge bureaucracy that's making up  
15 the rules as they go along. And the result has been millions  
16 or tens or hundreds of millions of dollars in what, according  
17 to the plain language of the statute, is Medicaid fraud that  
18 nobody's interested in going after.

19 It's one thing if the government doesn't want to  
20 actually prosecute this case themselves and they have better  
21 fish to fry. It's another thing for them to say, "No, we  
22 don't want the relator to do it, either."

23 I go back to the point that I believe they're -- and  
24 actually, with all of the interpretation and the information  
25 that Mr. Galland has just presented, if you look at it in

1 terms of -- there are a lot of people that don't want to have  
2 to decide this. Well, it needs to be decided. That's what  
3 our case is about. And it will be worth it.

4 And I don't believe this is a proper dismissal --  
5 proper motivation, you know, for the Justice Department to  
6 say, "Well, we don't want to have to think about it."

7 THE COURT: All right. Thank you, everybody, for  
8 your briefs. Thank you for your arguments. I'll rule on the  
9 government's motion by mail; and if the case is dismissed,  
10 then I'll close the case. If -- I'm sorry. If the motion --  
11 yeah, if the case is dismissed, I'll close it. If the motion  
12 to dismiss is denied, I'll set a new status, and then we'll go  
13 forward on the various motions and whatever else needs to be  
14 done.

15 MR. GALLAND: Thank you, Judge.

16 MR. VELTMAN: Thank you, your Honor.

17 MR. KRETCHMAR: Thank you, Judge.

18 (Which were all the proceedings heard.)

19 CERTIFICATE

20 I certify that the foregoing is a correct transcript from  
21 the record of proceedings in the above-entitled matter.

22

23 */s/Charles R. Zandi*

*May 11, 2011*

24 Charles R. Zandi  
25 Official Court Reporter

Date