wiley

ALERT

The More Things Change, The More They Stay The Same: Seventh Circuit Takes New Path in Adding to Jurisprudence Supporting DOJ's Right to Affirmatively Dismiss *Qui Tam* Actions

August 20, 2020

In an opinion released early this week, the Seventh Circuit both fortified the U.S. Department of Justice's (DOJ) position that it has broad authority to proactively dismiss actions brought under the False Claims Act's (FCA) *qui tam* provisions and carved a new path for defending such dismissal motions. By reversing a rare district court decision concluding that DOJ failed to provide a sufficient rational basis for dismissal pursuant to 31 U.S.C. section 3730(c)(2)(A), the Seventh Circuit's decision adds to the overwhelming body of cases siding with DOJ on this issue and increases the degree of difficulty for relators challenging an affirmative dismissal. However, the novel approach on which this decision is based creates a three-way circuit split. That split, combined with recent rumblings from Congress, creates a heightened risk that the rules of the road regarding affirmative *qui tam* dismissals may soon be in flux.

DOJ's Power to Dismiss Qui Tam Cases: Trends and Challenges

In January 2018, DOJ released the Granston Memo directing its attorneys to examine certain specified factors and consider the merits of filing a section 3730 (c)(2)(A) motion to dismiss concurrent with its decision to decline a *qui tam action*. Since then, DOJ has increasingly used its (c)(2)(A) authority, similarly increasing relator interest in challenging DOJ's dismissal authority and forcing courts to determine the appropriate standard for reviewing such dismissal motions. To date, courts have generally used one of two standards. On one side of the circuit split, the Ninth Circuit's "rational relation" test requires

Authors

Brandon J. Moss
Partner
202.719.7554
bmoss@wiley.law

Michelle B. Bradshaw
Associate
202.719.7290
mbradshaw@wiley.law

Practice Areas

Civil Fraud, False Claims, *Qui Tam* and Whistleblower Actions

Government Contracts

Internal Investigations and False Claims Act

White Collar Defense & Government Investigations

DOJ to identify a valid government purpose for dismissal and show a rational relationship between the accomplishment of that purpose and dismissal. *See Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998). On the other, the D.C. Circuit has held that DOJ has an "unfettered right to dismiss." *See Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003).

Despite division on the appropriate standard for review, courts have almost uniformly granted (c)(2)(A) motions. For instance, DOJ succeeded with 10 of its 11 attempts to dismiss the FCA cases brought against drug manufacturers by the National Healthcare Analysis Group (NHCA)—a shell company seemingly stood up for the sole purpose of bringing those *qui tam* actions. The district courts granting dismissal either applied the *Sequoia Orange* "rational relation" test or sidestepped the (c)(2)(A) split by noting DOJ met either *Sequoia Orange* or *Swift standard*. The sole denial in the NHCA cases applied the *Sequoia Orange* standard, noting the statute's hearing requirement would be superfluous if judges had no power, and holding DOJ failed to adequately investigate and perform sufficient cost-benefit analysis. *See United States ex rel. CIMZNHCA v. UCB, Inc.*, No. 3:17-cv-00765 (S.D. Ill.). As expected, DOJ appealed.

The Seventh Circuit Carves its Own Path

Surprisingly, instead of choosing the *Sequoia Orange* or *Swift* standard, the Seventh Circuit elected to forge a new path with its reversal. *See United States ex rel. Cimznhca, LLC v. UCB, Inc.*, No. 19-2273, 2020 WL 4743033 (7th Cir. Aug. 17, 2020). Declaring as "false" the "choice presented to us on the merits" as between *Sequoia Orange* or *Swift, the Seventh Circuit looked to the* Federal Rules of Civil Procedure for the correct standard. Specifically, it pointed to Rule 41(a)(1)(A)(i) as providing an "absolute" right for the plaintiff to dismiss an action by serving a notice of dismissal at any time "before the opposing party serves either an answer or a motion for summary judgment." Because a Rule 41(a) "notice is self-executing and case-terminating," a valid notice eliminates any further action "for the district judge to take . . . her further orders are void." Recognizing section 3730(c)(2) requires the Government to give the relator "notice and opportunity to be heard" before it can dismiss without the relator's consent, the Court determined the Government was entitled to dismissal because it filed a "motion to dismiss" before the defendants filed an answer or motion for summary judgment, and relator received notice and had the opportunity to be heard—it was of no consequence that the Government labeled its filing a "motion" not a "notice." The Government's dismissal was also not close to "[w]herever the limits of the government's power lie," and thus still met the *Sequoia Orange* standard, which the Seventh Circuit determined should be limited to prohibiting the Government from violating the substantive component of the Due Process Clause. The lower court erred in faulting the Government for "fail[ing] to make a particularized dollar-figure estimate of the potential costs and benefits of [the] lawsuit" because neither the Constitution nor statute require the Government to justify litigation decisions in such a manner.

The Seventh Circuit agreed with the district court that (c)(2)(A)'s hearing requirement is not "simply to give the relator a formal opportunity to convince the government not to end the case" as *Swift* suggested. But though (c)(2)(A)'s notice and hearing provisions are not "futile as a general matter," they more frequently "serve no great purpose." Such a hearing could be appropriate if the Government moved the Court for an order of dismissal under Rule 41(a)(2) when Rule 41(a)(1) conditions for dismissal without a court order were not

available. The Court also "agree[d] in principle" with a (c)(2)(A) hearing for "review for fraud on the court" as *Swift* entertained, but only "in exceptional cases." But more often than not, the Government's conduct fails to "bump up against the Rules [of Civil Procedure], the statute, or the Constitution." The "danger" of the (c)(2)(A) hearing often "serv[ing] little purpose" does not justify imposing the burdensome *Sequoia Orange* standard on the Government. The Seventh Circuit further noted the *Swift* standard improperly formed a standard based on a Senate report about "an unenacted version of the 1986 amendments" when Congress has not supplied a standard in the enacted statute. Congress must say if it "wishes to require some extra-constitutional minimum of fairness, reasonableness, or adequacy of the government's [(c)(2)(A)] decision."

What's Next?

All in, this decision both adds to the Government's nearly spotless track record on such motions and presents the Government with a new weapon to use against relators challenging its exercise of dismissal authority. However, it also further muddies the jurisprudential waters by inserting a third standard for review—a fact that may attract the Supreme Court's attention. While the Supreme Court denied *cert.* on this issue earlier this year, an appeal in this case could be attractive to the Supreme Court, both because it shows this is an issue that is being more frequently litigated and because the decision creates a three-way circuit split. Indeed, it was a three-way circuit split that led to the Supreme Court's last foray into FCA waters in *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019).

Separately, this most recent affirmation of DOJ's dismissal power is likely to draw the ire of Senator Chuck Grassley. Known as the father of the FCA's whistleblower provisions, Senator Grassley has publicly taken issue with the Granston Memo and related affirmative dismissals as "undermin[ing] the purpose of [the] 1986 amendments to the False Claims Act, which was to empower whistleblowers." Indeed, as recently as July, Senator Grassley committed to proposing legislation that will "clarif[y] ambiguities created by the courts and reins in" DOJ's (c)(2)(A) authority by requiring DOJ "to state its reasons and provide whistleblowers who bring the cases an opportunity to be heard whenever it decides to drop a False Claims Act case." In the meantime, however, it seems likely that the Seventh Circuit's resounding endorsement of DOJ's dismissal authority will encourage DOJ to continue flexing its (c)(2)(A) muscles consistent with the factors identified in the Granston Memo.