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Seventh Circuit Sets Low Bar for Government Dismissal of a "Professional Relator's" *Qui Tam* Action

by Stephen A. Wood

Under the False Claims Act, the government retains certain rights in *qui tam* cases in which it declines to intervene. Among these is the right to move to dismiss a *qui tam* action. *See* 31 U.S.C. § 3730 (c)(2)(A). For years, courts have applied one of two competing standards in deciding these motions. The first, decided in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), requires the government to meet a two-part test: (1) identification of a valid government purpose, and (2) a rational relation between dismissal and accomplishment of the purpose. The second standard, announced in *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), rejected the *Sequoia Orange* test, holding that the decision to dismiss is akin to the exercise of prosecutorial discretion, a matter not subject to judicial review for separation-of-powers reasons.

Recently, the U.S. Court of Appeals for the Seventh Circuit offered its own gloss on the standard applicable to the government's request for dismissal pursuant to 3730(c)(2)(A). In *United States v. UCB, Inc.*, 970 F.3d 875 (7th Cir. 2020), the Seventh Circuit held that Rule 41 of the Federal Rules of Civil Procedure provides the government with unfettered discretion to dismiss a complaint before the defendant has answered or moved for summary judgment. Thereafter, any hearing on the propriety of the government's dismissal is exceptionally narrow, limited in essence to consideration of whether the motion involved fraud or the deprivation of the relator's constitutional rights.

The decision in *United States v. UCB* is noteworthy for other reasons. Unlike *Sequoia Orange* and *Swift*, which were both decided after entry of final judgment, *UCB* involved an interlocutory appeal by the government of the district court's denial of its motion to dismiss, and much of the Seventh Circuit's decision was consumed with the issue of appellate jurisdiction. In addition, the case was brought by, in the government's words, a "professional relator," a company formed for the express purpose of bringing this action, one of eleven nearly identical suits filed in various district courts by related companies involving almost identical circumstances, all of which the government was seeking to dismiss. The government's move against these relators has fed an ongoing controversy not only about the standard for dismissal, but about the government's role and need for policing or gatekeeping with respect to *qui tam* cases. As the common law on government dismissals develops, controversy regarding the standard, the government's role, and the statutory incentives that gave rise to the professional relator class will continue.

Background—Government Dismissal of *Qui Tam* Actions

In *Sequoia Orange*, the district court granted the government's motion to dismiss relator's

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qui tam action under 31 U.S.C. § 3730(c)(2)(A), which provides as follows: "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." On appeal, the relator argued that Rule 41(a)(2) governed and dismissal could not be granted because it would prejudice the relator. The Ninth Circuit held that Rule 41 did not apply to the government's dismissal motions under 3730(c)(2)(A) because the government's motion was brought "under a specific statute establishing unique relationships among the parties." *Id.* at 1145. Since the FCA does not expressly provide a standard, the 9th Circuit embraced the standard crafted and applied by the district court, a two-step analysis: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose. *Id.* at 1144. "If the government satisfies the two step test, the burden switches to the relator 'to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.'" *Id.* This is the same analysis, according to the 9th Circuit, applied to determine whether executive action violates substantive due process. *Id.* As for separation of powers, the standard presents no concern because it imposes no more constraint on the government's prosecutorial calculus than the Constitution itself. Because the government was able to meet the 9th Circuit's standard, the dismissal was affirmed.

In *Swift*, the district court also granted the government's motion to dismiss the action under 3730(c)(2)(A) and the relator appealed. The relator objected that the government did not first intervene before moving to dismiss. Rejecting several arguments in support of this position, the D.C. Circuit eventually concluded that the point was largely an academic one, that the court "could construe the government's motion to dismiss as including a motion to intervene, a motion the district court granted by ordering dismissal." *Id.* at 252. In rejecting the relator's merits argument that the government had failed to meet the *Sequoia Orange* standard, the D.C. Circuit rejected the standard altogether: "[W]e cannot see how § 3730(c)(2)(A) gives the judiciary general oversight of the Executive's judgment in this regard . . . . Nothing in § 3730 (c)(2)(A) purports to deprive the Executive Branch of its historical prerogative to decide which cases should go forward in the name of the United States." *Id.*

The court noted that granting the government's dismissal motion in this instance was also consistent with Rule 41(a) insofar as the plaintiff has an unreviewable right to dismissal before the defendant has answered or moved for summary judgment. Nonetheless, the D.C. Circuit concluded that the government would have easily satisfied the *Sequoia Orange* standard: "The asserted governmental interests were that the dollar recovery was not large enough to warrant expending resources monitoring the case, complying with discovery requests, and so forth, and that spending time and effort on this case would divert scarce resources from more significant cases." *Id.* at 254. The D.C. Circuit rejected the 9th Circuit's standard, not only because it imposed judicial constraints on the exclusive province of the executive, but for its flawed reliance upon a draft version of the statute that suggested a relator should be allowed to file objections and request an evidentiary hearing in the event the government should decide to dismiss the action. As for the function of the hearing afforded the relator under 3730(c)(2)(A), the *Swift* court concluded that it served only to permit the relator an opportunity to convince the government not to dismiss the action.

United States of America v. UCB, Inc.

Facts

The relator in this case was a limited liability company formed expressly for the purpose of bringing this action against the defendant, UCB, Inc., a biopharmaceutical company that manufactures and sells, among other things, Cimzia, a drug used to treat Crohn's disease. Relator alleged that the defendant violated the False Claims Act by engaging nurse educators to provide free instruction to physicians and assistance with insurance paperwork. This, it was claimed, violated the Anti-Kickback Statute, a law that prohibits providing anything of value in exchange for patient referrals.

Notably, the relator was one of 11 similar entities created for the sole purpose of bringing a False Claims Act lawsuit against drug or biopharmaceutical companies. The remaining ten entities filed their actions in various district courts around the country against various healthcare defendants alleging violations of the False Claims Act. The 11 LLCs were created by certain investors with backgrounds in private equity, venture capital, or other financial services. The relator in the case against UCB was represented by a law firm specializing in representing plaintiffs in mass tort and "whistleblower" litigation. So, in this action, a "professional relator was represented by a member of the professional *qui tam* bar.

Less than five months after the filing of the complaint, the government filed its standard Notice of Election to Decline Intervention. As always, the government provided no explanation for its decision not to intervene and take the case over. The defendants subsequently moved to transfer venue to New Jersey, which the district court eventually denied. Three days after the one-year anniversary of its announced decision not to intervene, the government moved to dismiss the action under 31 U.S.C. § 3730(c)(2)(A). The district court denied this motion as well, finding that the government's actions were arbitrary and capricious, and its stated reasons for seeking dismissal were in fact "pretextual," and were just as likely predicated on "animus towards the relator." *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 17-CV-765-SMY-MAB, 2019 WL 1598109 at *4, (S. D. Ill. Apr. 19, 2019). This conclusion seems to have been based on the court's perceived criticism of the relator's business model by the government and the assertion that a relator's status as a "professional relator" is a valid reason for dismissal. A motion to reconsider was also denied.

Analysis

The government sought interlocutory review of this ruling. The notice of appeal filed in the district court was silent on the basis for appellate jurisdiction. On appeal, the relator argued that appellate jurisdiction was lacking, mandating dismissal of the government's appeal. In the Seventh Circuit, the government argued that the collateral-order doctrine supplied the necessary jurisdictional predicate. This doctrine provides for appellate jurisdiction over orders which, although not final judgments, nonetheless "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

The Seventh Circuit wasn't buying either argument, finding jurisdiction albeit under a different, non-collateral basis. While appeals from denial of motions to dismiss are typically not allowed, appeals from denial of motions to intervene are another matter. The Court of Appeals thus construed the government's motion as something more than what the government intended—as a motion to *intervene and* dismiss. The route to this conclusion took the Court on a rather lengthy journey through the jurisprudence on collateral order appeals and the False Claims Act's convoluted structure. Because collateral-order appeals stand as an exception to the requirement for final judgment, the Supreme Court has decreed that the exception must remain narrow. *See Mohawk Ind. v. Carpenter*, 558 U.S. 100, 106 (2009). And because denial of the government's motion to dismiss a *qui tam* case was so rare, the Court of Appeals was loathe to establish it as a new category for collateral-order review.[1]

The solution was to construe the government's motion as a motion to intervene and dismiss. The court noted that denial of motions to intervene have long been immediately reviewable. The government in fact was intervening substantively in a matter involving two other parties. The False Claims Act, as a procedural matter also, requires intervention before seeking dismissal. Or, at least, intervention is implied based on the structure of 3730(c): "We conclude that paragraph (2) fits in best right where paragraph (1) puts it: as a limit on the right of the relator to continue as a party after the government has intervened. It can have no other independent operation without disrupting the structure of the statute as a whole."

Apart from the structure of the statute, the Seventh Circuit also took pains to distinguish two other cases, *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925 (10th Cir. 2005) and *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), that questioned reading an intervention requirement into 3730(c)(2)(A) on constitutional grounds. *See, e.g., Ridenour*, 397 F.3d at 934 ("to condition the Government's right . . . to dismiss an action in which it did not initially intervene upon a requirement of . . . good cause . . . would place the FCA on constitutionally unsteady ground" by "unnecessarily bind[ing] the Government.")

Having concluded that jurisdiction existed, the court turned to the merits of the district court's denial of the government's motion to dismiss, setting the stage by laying out the applicable standard: "The standard is that provided by the Federal Rules of Civil Procedure, as limited by any more specific provision of the False Claims Act and any applicable background constraints on executive conduct in general. In this case, no such substantive limits apply, so the Rules are the beginning and the end of our analysis." Rule 41 of the Federal Rules of Civil Procedure governs dismissal of actions. Subpart (a)(1)(A) provides that a plaintiff may dismiss an action upon notice if before a defendant has served an answer or motion for summary judgment. This right is absolute. Here, the defendants had neither answered nor moved for summary judgment.

That, however, did not entirely answer the question whether the government's motion for dismissal should have been granted since the plaintiff seeking dismissal was not the original plaintiff and the original plaintiff objected to dismissal. By its terms, Rule 41 is subject to any applicable federal statute. *See* Fed. R. Civ. P. 41(a)(1)(A) ("Subject to . . . any applicable federal statute . . . ."). In this instance, the appellate court turned to the FCA for further guidance. Here, the FCA requires only that the relator receive notice and an opportunity to be heard. Once those conditions were met, the case should have been over.

What then is the point of the hearing required under 3730(c)(2)(A)? In this case, considering that the government's motion under Rule 41 was brought before the defendant filed an answer

[1] The government noted that a motion to dismiss under 3730(c)(2)(A) had been denied only once before, in *United States v. Academy Mortgage Corp.*, 968 F.3d 996 (9th Cir. 2020). In that case, the Ninth Circuit declined to recognize the denial order as collateral for purposes of immediate appeal and dismissed the government's appeal for lack of jurisdiction, stating that "the interests implicated by an erroneous denial of a Government motion to dismiss a False Claims Act case in which it has not intervened are insufficiently important to justify an immediate appeal . . . ." *Id.* at 1010. Perhaps the court expected the government to move to intervene upon remand, the likely next step for the government in this case. If brought solely for the purpose of moving to dismiss, however, given that the district court denied the motion to dismiss previously, it may also deny leave to intervene, unless the government offers additional justification for its decision to dismiss the action. This all seems an unnecessary and unreasonable burden on the government's authority to control actions brought in its name, particularly where the government offered essentially the same rationale for dismissal offered in *United States v. UCB*. While the Seventh Circuit's jurisdictional accommodation may seem convenient, if nothing else it was practical and efficient in this instance.

or motion for summary judgment, there was no point. But, as the Seventh Circuit noted, not all cases will be like this one. If the government fails to avail itself of the opportunity to timely dismiss under Rule 41(a)(1)(A), a hearing to determine the conditions for dismissal may be had. And in that circumstance, the government's decision to dismiss should be honored as long as it does not violate substantive due process. Quoting from Supreme Court cases discussing the limits of due process, the court noted that, "'[T]he Due Process Clause was intended to prevent government officials from abusing their power, or employing it as an instrument of oppression,' and 'only the most egregious official conduct can be said to be arbitrary in the constitutional sense. . . . Executive action is not due process of law when it 'shocks the conscience;' when it 'offend[s] even hardened sensibilities;' or when it is 'too close to the rack and the screw to permit of constitutional differentiation.'" *Id.* at 852. In this case, the government introduced evidence that multiple agency rulemakings or other guidance established that the defendant's conduct was not unlawful and in fact benefitted participants in federal healthcare programs. The Seventh Circuit noted: "This is not government irrationality. It oppresses no one and shocks no one's conscience." *Id.* Indeed.

Conclusions

The Seventh Circuit's jurisdictional maneuvering, in particular its argument that intervention was a necessary precursor to dismissal in light of the statutory structure, is the weakest part of the opinion. It seems just as reasonable that the statute does not require the government to intervene before moving to dismiss an action over the relator's objection. In the future, unless and until the statute is amended to give the government a right of immediate appeal of an order denying dismissal, the government will likely style its motions as motions to intervene and dismiss. It is worth noting that the Seventh Circuit's jurisdictional accommodation would not avail the government should the government intervene, initially or after declination with leave of court, with the intention of prosecuting the case only to change its mind later. In that circumstance a motion to dismiss could not be construed as a motion to intervene and dismiss. However unlikely, this scenario is not outside the realm of possibility.

The FCA's requirement for notice and hearing before dismissal has caused much of the mischief surrounding government requests for dismissal, as was the case here. In light of the statutory requirement, the district court refused to accept that the court's sole statutory responsibility was to host the parties while they conferred amongst themselves regarding the government's interest in dismissing the action. *Swift* held that is precisely what the statute required, that the purpose was merely to allow the relator an opportunity to persuade the government not to dismiss. *UCB* suggests that a hearing could entail more, but only in the exceptional circumstance where the relator's rights have been violated.

That the hearing may be a perfunctory matter in virtually all cases does not justify imposing a *Sequoia Orange* rational relationship test upon the government, particularly where the statute does not expressly require it. The Seventh Circuit noted that "[i]f Congress wishes to require some extra-constitutional minimum of fairness, reasonableness, or adequacy of the government's decision under §3730(c)(2)(A), it will need to say so." *Id.* at 853. The statement foreshadows possible congressional activity. Senator Charles Grassley (R-Iowa) spoke to this issue on the floor of the Senate on July 30, 2020 in celebration of National Whistleblower Day, decrying the holding that government dismissals are essentially unreviewable: "[i]f 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." As it stands, the DOJ has always offered its rationale for seeking dismissal in a given case. Senator Grassley may be alluding to a statutory standard for dismissal, a la *Sequoia Orange*, or perhaps some sort of evidentiary requirement.

Such developments would be unfortunate and would further tilt the playing field in favor of *qui tam* plaintiffs. From the sweeping 1986 amendments to the FCA to the Affordable Care Act, Congress has diluted claim requirements, narrowed defenses, and increased financial incentives to make it easier and more lucrative for relators to bring these cases. It is left then to the courts to sort the junk claims from the meritorious. And there is a lot of junk out there. Overwhelmingly, *qui tam* cases in which the government does not intervene are either dismissed at the pleading stage or fail to survive summary judgment. *See, e.g.*, Christina Orsini Broderick, Note, Qui Tam *Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 975 tbl.2 (2007) (reporting data that 92% of *qui tam* cases where the U.S. declined to intervene were dismissed or failed to progress past summary judgment, noting that such a high rate of pre-trial disposition suggests a large number of *qui tam* actions are meritless); Sean Elameto, *Guarding the Guardians: Accountability in* Qui Tam *Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 826 (2012) ("The immense disparity between recoveries in *qui tam* actions in which the Government intervened and those in which it did not suggests that most *qui tam* actions brought without government intervention assert meritless or frivolous claims.").[2]

The original concept behind the *qui tam* provisions was to enlist the assistance of insiders who had personal knowledge of fraud, giving them a share of the recovery as an incentive for sharing their inside information with the government. *See, e.g., Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992) ("The paradigm *qui tam* plaintiff is the 'whistleblowing insider.' *Qui tam* suits are meant to encourage insiders privy to fraud on the government to blow the whistle on crime."), *overruled on other grounds*, 792 F.3d 1121 (9th Cir. 2015). Contrast that with the relator in the *UCB* case, an LLC created by private equity and venture capital investors for the sole purpose of bringing a *qui tam* suit against the defendant. Congress' liberalization of the *qui tam* provisions between 1986 and 2009 has spawned a new class of entrepreneurial litigation.

The final lesson of *United States v. UCB, Inc.* is that the False Claims Act is now being invoked not merely by insiders, but by "professional relators" for the purpose of enriching Wall Street speculators. Far from limiting or qualifying the DOJ's control over *qui tam* cases, including their dismissal, these developments indicate that Congress should be empowering the Justice Department with tools and direction to actively police these *qui tam* cases, the majority of which are meritless. This would be a more productive, efficient, and cost-effective undertaking for Senator Grassley and his Congressional colleagues than pursuing measures that would likely only contribute to the number of tenuous *qui tam* claims that needlessly add to the burden not only on private companies, but on the government as well.

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[2] *See also* David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?* 42 Pub. Cont. L.J. 225, 226 (2013). The author notes that between 1986 and 2009, based on DOJ data, the government obtained a recovery in only 6% of non-intervened cases, compared with 95% of intervened cases. Intervention serves, therefore, as a proxy for merit. *Id.* at 227.

