Critical Legal Issues: WORKING PAPER SERIES

Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

RES JUDICATA IN *QUI TAM* LITIGATION: WHY GOVERNMENT SHOULD BE BOUND BY JUDGMENTS IN NON-INTERVENED CASES

Stephen A. Wood
Chuhak & Tecson, P.C.

Washington Legal Foundation
Critical Legal Issues WORKING PAPER Series

Number 220
April 2021

TABLE OF CONTENTS

ABOUT OUR LEGAL STUDIES DIVISION

Since 1986, WLF's Legal Studies Division has served as the preeminent publisher of persuasive, expertly researched, and highly respected legal publications that explore cutting-edge and timely legal issues. These articles do more than inform the legal community and the public about issues vital to the fundamental rights of Americans—they are the very substance that tips the scales in favor of those rights. Legal Studies publications are marketed to an expansive audience, which includes judges, policymakers, government officials, the media, and other key legal audiences.

The Legal Studies Division focuses on matters related to the protection and advancement of economic liberty. Our publications tackle legal and policy questions implicating principles of free enterprise, individual and business civil liberties, limited government, and the rule of law.

WLF's publications target a select legal policy-making audience, with thousands of decision makers and top legal minds relying on our publications for analysis of timely issues. Our authors include the nation's most versed legal professionals, such as expert attorneys at major law firms, judges, law professors, business executives, and senior government officials who contribute on a strictly *pro bono* basis.

Our eight publication formats include the concise COUNSEL'S ADVISORY, succinct LEGAL OPINION LETTER, provocative LEGAL BACKGROUNDER, in-depth WORKING PAPER and CONTEMPORARY LEGAL NOTE, topical CIRCULATING OPINION, informal CONVERSATIONS WITH, balanced ON THE MERITS, and comprehensive MONOGRAPH. Each format presents single-issue advocacy on discrete legal topics.

In addition to WLF's own distribution network, full texts of LEGAL OPINION LETTERS and LEGAL BACKGROUNDERS appear on the LEXIS/NEXIS® online information service under the filename "*WLF*," and every WLF publication since 2002 appears on our website at www.wlf.org. You can also subscribe to receive select publications at www.WLF.org.

To receive information about WLF publications, or to obtain permission to republish this publication, please contact Glenn Lammi, Chief Counsel, Legal Studies Division, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, DC 20036, (202) 588-0302, glammi@wlf.org.

ABOUT THE AUTHOR

Stephen A. Wood is a Principal with Chuhak & Tecson, P.C. in its Chicago, IL office. He heads the firm's litigation practice group. While his practice encompasses a broad range of commercial and tort matters, including experience as lead counsel in mass tort multidistrict litigation proceedings, Mr. Wood specializes in internal investigations and government enforcement proceedings including the defense of False Claims Act cases. He regularly writes for Washington Legal Foundation's blog, the *WLF Legal Pulse*, as the Feature Expert Contributor on the False Claims Act.

EXECUTIVE SUMMARY

The U.S. Supreme Court's denial of *certiorari* in *Bristol-Myers Squibb Co. v. State of New Mexico ex rel. Balderas*, leaves unresolved an important question regarding the application of principles of *res judicata* to a False Claims Act *qui tam* suit in which the government has not intervened. In the underlying federal lawsuit, the relator's claims were dismissed for failure to plead materiality, a necessary element of the plaintiff's proof in any FCA case, after several pleading attempts. Although such a disposition is almost universally deemed to be "on the merits" for *res judicata* purposes, the defendants' subsequent motion to dismiss a parallel New Mexico state court suit was denied, though New Mexico was a real party in interest in the dismissed federal case.

Several courts have recognized a *res judicata* exception for the government in *qui tam* cases in which it does not intervene. The reasoning is usually that it is unfair to bind the government in a case it has not actively prosecuted. Furthermore, several courts, following a decision by the U.S. Court of Appeals for the Fifth Circuit in *United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, have reasoned that binding the government to a pleading stage dismissal in a declined *qui tam* case would encourage relators to file deficient pleadings knowing that if the government is to avoid a binding adverse outcome, it will need to intercede, thus shifting the pleading burden, so to speak, to the government. A *res judicata* exception was necessary to avoid what the *Williams* court called "perverse incentives."

This view is flawed and out of step with the realities of *qui tam* litigation. From the initial filing of the complaint and for as long as it remains under seal, a relator's primary objective is to persuade the government to intervene in the case because the overwhelming majority of *qui tam* cases in which the government intervenes result in settlement or judgment. In addition, upon intervention the government is required by law to take the lead, relieving the relator of the main burdens of litigation. *See* 31 U.S.C. § 3730(c)(1). Thus, relators have a powerful incentive to present the best possible case to prosecutors. Even in a world where *res judicata* bars the government from pursuing its own action post-*qui tam* dismissal, the merit of the case more than anything will drive the government's intervention decisions. Beyond this, the government has a variety of practices and tools at its disposal to ensure that its interests are not prejudiced by a poorly pled or prosecuted *qui tam* case. There is no valid justification for departing from long-standing policies underpinning the doctrine of *res judicata* in False Claims Act litigation. This is an issue that warrants Supreme Court review to restore not only a uniform standard, but a degree of fairness to a statutory scheme that already heavily favors the government and its agents.

RES JUDICATA IN *QUI TAM* LITIGATION: WHY GOVERNMENT SHOULD BE BOUND BY JUDGMENTS IN NON-INTERVENED CASES

INTRODUCTION

Recently, the U.S. Supreme Court denied certiorari in *Bristol-Myers Squibb Co. v. State of New Mexico ex rel. Balderas*,[1] an important case that concerned the application of *res judicata* principles to a False Claims Act *qui tam* suit. The *qui tam* relator alleged that a pharmaceutical company violated the False Claims Act by making misleading statements in the marketing of an FDA-approved drug. The complaint in the underlying action, *United States ex rel. Dickson v. Bristol-Myers Squibb Co.*—after four amendments—was dismissed for failure to plead facts establishing that any alleged violation was material. Although both state and federal law establish that such a disposition is "on the merits" for *res judicata* purposes, a similar action involving the same parties is nonetheless proceeding in state court at the time of this writing.

The cert denial is regrettable for a several reasons. It leaves in place a split of authority among the federal circuits (and now some states) on the *res judicata* effect of a pleading-stage disposition against the relator in a *qui tam* case in which the government has declined to intervene. The decision not to hear the appeal also

[1] 436 P.3d 724 ((N.M. Ct. App. 2019), *cert denied*, 141 S. Ct. 1052 (2021).

leaves unsettled questions regarding the resolution of an issue that arises all too frequently considering the number of *qui tam* lawsuits that relators file each year, the great majority of which the government declined intervention.

The courts that have refused to bind the government to a pleading-stage *qui tam* dismissal reason that fairness and avoidance of undesirable incentives justify giving the government a do-over. These concerns are unfounded and ignore the realities of *qui tam* litigation. As discussed below, the government has a range of statutory, common law, and other tools to protect its interests against the possibility of a binding adverse judgment in a case in which it has not formally intervened. As in other areas of civil litigation, the policies that underlie the doctrine of claim preclusion—fairness, conservation of resources, avoidance of inconsistent outcomes—are best served by holding the government to the final results of *qui tam* cases in which it does not intervene, including those cases that are disposed of on the merits at the pleading stage.

I. BACKGROUND

A. The *Dickson* Litigation

In 2011, a False Claims Act *qui tam* action was filed in the Southern District of Illinois against various defendants. The relator alleged that the defendants violated the False Claims Act by making false representations in the marketing of prescription blood-thinner Plavix®. The defendants allegedly directed false marketing at physicians

and state formulary committees to induce them to prescribe the drug and include it on the state-approved drug formularies. *See United States ex rel. Dickson v. Bristol-Myers Squibb Co.,* 332 F. Supp. 3d 927, 933 (D. N.J. 2017).[2]

The relator originally filed suit on behalf of the United States and more than twenty states and municipalities. Eighteen months after relator's sealed filing, the government declined to intervene in the case. Prior to the government's decision, the relator filed a first amended complaint, the first of what would be four amendments (five complaints in total). After unsealing, the relator filed a second amended complaint and defendants moved to dismiss that pleading, which was granted in part and denied in part. On February 12, 2013, the Judicial Panel on Multidistrict Litigation ordered the case transferred from the Southern District of Illinois to the District of New Jersey after the defendants moved to consolidate all then-pending actions pertaining to the marketing or use of Plavix. *See In re Plavix Marketing, Sales Practices and Products Liability Litigation*, 923 F. Supp. 2d 1376, 1380 (J.P.M.L. 2013). In the MDL, there was yet another round of amendment and pleadings-related motion practice which resulted in dismissal of some, but not all, claims.

[2] Relator alleged that defendants falsely promoted the drug's efficacy over less expensive, non-prescription alternatives. The drug was thus allegedly not "cost-effective" and would not have been included on state formularies or prescribed by doctors absent defendants' false marketing efforts. This was not, in other words, an "off label" marketing case whereby plaintiffs allege that defendants urged doctors to prescribe drugs and seek reimbursement for non-FDA-approved indications.

Pursuant to the request of the parties, and because relator's claims rested on a theory of liability for implied certification of compliance with federal requirements, the MDL court stayed the case pending a decision in *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). While a detailed analysis of *Escobar* is beyond the scope of this discussion, it should be noted that the Supreme Court approved the implied certification theory while also imposing limits on that theory and on FCA claims in general, including a requirement that FCA violations be alleged and proved to be material.[3]

Two months later, relator filed her 175-page fourth amended complaint. Defendants moved thereafter to dismiss that complaint in its entirety. After disposing of defense arguments that the fourth amended complaint violated the law-of-the-case doctrine and the FRCP 9(b) requirement for pleading fraud with particularity, the district court considered defendants' materiality argument. The court concluded that the relator's allegations were not material because even if the certification of compliance was false, it had no bearing on the state's action in reimbursing these payments. The relator declined to appeal the decision.

[3] The False Claims Act defines materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). *Escobar* held that the materiality requirement was "rigorous" and "demanding." *Escobar*, 136 S. Ct. at 2003. Furthermore, materiality is shown by "the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Id.* at 2002.

B. New Mexico Proceeds with a Similar Action in State Court

One of the states participating in the *Dickson* action was New Mexico. Although New Mexico, like the federal government and other states, declined to intervene, it nevertheless remained a real party in interest by permitting the relator to represent its interests in the federal litigation. The relator in *Dickson* asserted a single claim for New Mexico, arising under its version of the False Claims Act, the Medicaid False Claims Act, NMSA 1978, §§ 27-14-1 to 15 (2004).

In September of 2016, despite its participation in *Dickson*, the State of New Mexico filed another action in state court in which it was represented by private plaintiffs' attorneys. Notably, New Mexico did not bring this action under the Medicaid False Claims Act, but rather asserted claims against the same defendants arising under the state Unfair Practices Act, the Medicaid Fraud Act (a different statute from the Medicaid False Claims Act), the Fraud Against Taxpayers Act, as well as common-law theories of fraud, negligence, and unjust enrichment. The State was seeking to recover under these various theories for "Defendants' false, deceptive, and unfair labeling and promotion of their prescription antiplatelet drug Plavix." *Balderas*, 436 P.3d at 727.

The defendants moved to dismiss or in the alternative to stay the New Mexico state court litigation on the grounds that there was a *qui tam* action pending in the MDL in which New Mexico was a real party in interest which arose out of the same

nucleus of operative fact. This motion led to the stay of the state court proceedings. Although New Mexico could have withdrawn from the *Dickson* case to pursue its own action, it chose not to do so.

Once the dismissal of the fourth amended complaint in *Dickson* was final and the time for appeal had passed, the defendants moved to dismiss the New Mexico litigation on, among other grounds, *res judicata*. Although the claims in the New Mexico action were nominally different, defendants rightly argued that New Mexico was engaged in improper claim splitting and New Mexico's claims were barred because they could have been brought in the *Dickson* case. The New Mexico trial court rejected defendants' *res judicata* defense, holding that the claims in the two actions were not the same:

> [W]hile [R]elator ... stood in the shoes of the State of New Mexico for purposes of the New Mexico [Medicaid False Claims Act] claim, [R]elator did not stand in the State's shoes for purposes of the claims asserted by the State here ... [I]n a case such as this, where [R]elator's claims were dismissed based on a failure to comply with the heightened pleading requirements of [Federal Rule of Civil Procedure] 9(b), and not based on the merits of the claim, it would be inappropriate to bar the State's claims.

Balderas v. Bristol-Myers Squibb Co., 436 P.3d at 728. The trial court was wrong about the basis for the federal court's dismissal. It was based on lack of materiality, not Rule 9(b). Nonetheless, recognizing the importance of the claim-preclusion issue to the ultimate outcome of the litigation, the trial court certified its ruling for interlocutory review which was granted by the New Mexico Court of Appeals.

Unfortunately, the defendants fared no better on appeal. Relying principally on two cases, *United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, 417 F.3d 450, 455-56 (5th Cir. 2005) and *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1057 (11th Cir. 2015), the Court of Appeals rejected the defendants' *res judicata* arguments. The rationale offered in *Williams* and embraced by the *Balderas* court was based in part on the notion that to bind the government by a pleadings-stage dismissal in a non-intervened case would create "perverse incentives." Quoting from *Williams*, the Court of Appeals noted the following:

> By essentially requiring the government to intervene in order to avoid forfeiting any future claims against the defendant, private parties would have the added incentive to file FCA suits lacking in the required particularity, knowing full well that the government would be obligated to intervene and ultimately 'fill in the blanks' of the deficient complaint. . . . [This allows a] relator, in the most egregious of circumstances, to make sweeping allegations that, while true, he is unable to effectively litigate, but which nonetheless bind the government, via [claim preclusion], and prevent it from suing over those concerns at a later date when more information is available.

Balderas, 436 P.3d at 731.

The New Mexico Court of Appeals also cited various district court opinions rejecting claim preclusion in *qui tam* pleading-stage dismissals because "the government had no involvement in preparing the complaint" and "[t]he government's decision not to intervene ... does not suggest that the government necessarily believed that no FCA case was viable ... [and thus] it would be inappropriate to dismiss with prejudice as to the [government] . . ." *Balderas*, 436 P.3d at 731. In addition,

"the government should not be bound by the relator's failure to plead what might otherwise be a valid claim. In other words, '[w]hy would Congress want [a poorly plead but meritorious] earlier suit to bar a later potentially successful suit that might result in a large recovery for the [g]overnment?'" *Balderas*, 436 P.3d at 733, *citing Kellogg Brown & Root Svcs., Inc. v. United States ex rel. Carter*, 575 U.S. 650 (2015) (holding that first to file bar should not bar a suit that followed one dismissed for failure to prosecute). For these reasons, the Court of Appeals held that the *Dickson* dismissal was without prejudice to the government, which did not bar the action pending in New Mexico state court.

Defendants sought an opportunity for review before the New Mexico Supreme Court and on March 11, 2019, that court granted *certiorari*. After oral argument, however, the court quashed the writ as improvidently granted without explanation. That led to the defendants' ill-fated petition before the U.S. Supreme Court.

II. ANALYSIS

A. The Elements of *Res Judicata* Are Clearly Met Here

The *Balderas* court's analysis started, as it should, with the elements. The doctrine of *res judicata* applies where "three elements are met: (1) a final judgment on the merits in an earlier action, (2) identity of parties or privies in the two suits, and (3) identity of the cause of action in both suits." *Balderas*, 436 P.3d at 729. When these elements are satisfied, the defense of claim preclusion bars relitigation not only

of claims actually brought by the plaintiff and its privies, but also claims that could have been brought in the first action. *Id.*; *see also Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1239, 1245 (10th Cir. 2017).

A dismissal at the pleading stage that stands as a final judgment is an adjudication on the merits for purposes of *res judicata*. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399, n.3 (1981). Thus, the dismissal in *Dickson* of the fourth amended complaint with no subsequent appeal was a final adjudication on the merits. Indeed, the *Balderas* court agreed that the dismissal of the fourth amended complaint in *Dickson* was an adjudication on the merits at least as to the relator. *Balderas*, 436 P.3d at 734. There is also no real dispute that the relator and the governmental entities on whose behalf the *Dickson* action was brought were in privity. *Qui tam* relators are in privity with the government since the government, even though it has not intervened, remains the real party in interest. *See United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009). Nor should there have been any dispute about whether the claims in the second suit arose out of the same nucleus of operative fact as *Dickson*—the defendants' marketing practices for Plavix. *See Balderas*, 436 P.3d at 729-30.[4]

[4] In its Brief in Opposition to defendants' Petition for Writ of Certiorari to the U.S. Supreme Court, the State took the position that it was contesting all elements of *res judicata*, including whether the claims arose out of the same set of operative facts. Interestingly, it conceded that its state court claims arose out of the marketing and sales practices for Plavix, although it characterized its lawsuit as "a consumer protection action." This was not, however, a class action on behalf of New Mexico residents who had taken Plavix, but a series of claims by the State of New Mexico intended to

In any other civil litigation, dismissal would have very likely followed. Here, though, the New Mexico Court of Appeals allowed the State's action to proceed largely in reliance upon several authorities that were themselves the product of a misguided and erroneous understanding of the realities and true incentives in *qui tam* litigation, discussed *infra*.

B. The Notion that Binding the Government Creates "Perverse Incentives" Is Contrary to Law and *Qui Tam* Practice

The Fifth Circuit's concern in *Williams* that allowing a pleading-stage dismissal of a *qui tam* action to bar an action by the government would create "perverse incentives" is unfounded, mainly because it reflects a lack of understanding of the real incentives at work in *qui tam* litigation as well as the interactions between the relator and the government both before and after a case is unsealed. At initial filing of the complaint under seal, a relator's chief, if not sole, objective is to persuade the government to intervene in the case, to convince prosecutors that the case has real merit. This is so for the principal reason that the vast majority of all *qui tam* cases in which the government intervenes result in settlement or judgment. *See infra*, n. 4. In addition, although a relator remains a party and has the right to participate when the government intervenes, the government nonetheless is required by law to take the

---

benefit State coffers (as well as the private plaintiff's attorneys who were prosecuting the action). And, as noted *supra*, while the State brought several fraud-related claims, it expressly avoided asserting the one claim the *Dickson* relator asserted on New Mexico's behalf. It would appear that the State was engaged in an obvious form of artful pleading intended to forestall a potential *res judicata* argument should its effort in the *Dickson* litigation fail.

lead, relieving the relator of the main burdens of litigation. *See* 31 U.S.C. § 3730(c)(1) (upon intervention, government has primary responsibility for prosecuting the action).

Poorly drafted, vague, or general pleadings are, as a matter of common sense, less likely to convince the government to take responsibility for the case by intervening. In light of this simple reality, the government's leverage over the *qui tam* relator's sealed complaint is significant. The *Williams* court's notion of "perverse incentives" misapprehends the government-relator dynamic. Irrespective of the application of *res judicata* (no doubt a distant prospect while the case is under seal), the relator has every incentive to craft a pleading that identifies the causes of action as particularly as possible. Thus, the concern expressed in *Williams* that binding the government to the results of judgments in declined cases leaves it at the mercy of sloppy relators is consistent with neither reality nor logic.

Beyond this, the government routinely seeks and obtains multiple extensions of the 60-day seal period during which it "diligently" carries out an investigation mandated by statute. *See* 31 U.S.C. § 3730 (a). These investigations often drag on for years. *See, e.g., United States ex rel. Yannacopolos v. General Dynamics*, 457 F. Supp. 2d 854, 857 (N. D. Ill. 2006) (*qui tam* complaint remained under seal for 7 years). In fact, in *Dickson*, the government took eighteen months to investigate the relator's claims before notifying the court of its decision not to intervene. Significant also, during that time the relator filed an amended complaint under seal, very likely as a

result of feedback from the government regarding the factual and legal sufficiency of the original complaint.

The government also can and often does conduct discovery of the defendant through the use of a civil investigative demand (CID) while the matter remains sealed. *See* 31 U.S.C. § 3733. And the government has the discretion to share information obtained through CIDs with relators and their counsel. 31 U.S.C. § 3733 (a)(1)(D). If the government ultimately decides not to intervene, it is usually because the case is determined to be lacking in merit, although other secondary factors may come into play. *See* David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of* Qui Tam *Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689 (2013) (using regression analysis to identify the factors that influence intervention decisions).[5] Too, the government remains informed regarding the progress of a case post-declination and by statute it is entitled to receive copies of all pleadings and discovery. *See* 31 U.S.C. § 3730(c)(3). If developments warrant, it can reverse course and seek leave to intervene later. *Id.*

[5] Between 1986 and the end of 2007, more than 97% of all FCA recoveries came from either the *qui tam* cases in which the government intervened or those FCA claims the government initiated. Statement of Michael F. Hertz, Deputy Assistant Attorney General, Civil Division, United States Department of Justice, Before the United States Senate Committee on the Judiciary, Feb. 27, 2008 at 8, http://www.friedfrank.com/files/QTam/testimony_hertz.pdf; s*ee also* Engstrom, 107 NW. U. L. REV. at 1722 (90% rate of recovery in intervened cases, 10% rate in non-intervened cases; cases prosecuted by government generated 94% of all monies recovered under FCA between 1989 and 2011). The lopsided ratio of recoveries in government-initiated or intervened versus non-intervened *qui tam* cases has not changed materially in recent years, supporting the conclusion that the government's intervention decision is heavily influenced by the merits of the claims.

The point of all this is that the government has a range of tools and practices to protect itself against the prospect of binding judgment in a case in which the government declined intervention. The concerns expressed by the court in *Williams*, echoed in *Balderas*, regarding incentives and fairness are completely unjustified.

C. Supreme Court Precedent Supports the Application of *Res Judicata* to Bar Follow-On Government Litigation

In truth, the U.S. Supreme Court has already decided that the government is bound when a *qui tam* case has been dismissed at the pleading stage. In *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009), the district court dismissed a *qui tam* action at the pleading stage. The claimants waited 54 days after judgment was entered to file a notice of appeal. While the deadline in most appeals is 30 days from entry of judgment, in cases where "the United States or an officer or agency thereof is a party" to the action, that time limit is 60 days. *See* Fed. R. App. P. 4(a)(1)(B)(i). Holding that the United States was not a party absent intervention, the Court of Appeals dismissed the appeal as untimely.

The Supreme Court granted review to resolve a circuit split on the question of whether the United States was a party to *qui tam* litigation in which it had not intervened. While noting that the government remains the real party in interest, the Supreme Court held that it was not a party unless it formally intervenes in the case. The petitioner argued that the United States was bound by the judgment even in the

absence of formal intervention, which the Supreme Court seemed to concede if it rejected the assertion that necessarily meant that the United States was a party:

> [P]etitioner relies on the fact that the United States is bound by the judgment in all FCA actions regardless of its participation in the case. But this fact is not determinative; nonparties may be bound by a judgment for a host of different reasons. . . . If the United States believes that its rights are jeopardized by an ongoing *qui tam* action, the FCA provides for intervention—including 'for good cause shown' after the expiration of the 60–day review period. The fact that the Government is bound by the judgment is not a legitimate basis for disregarding this statutory scheme.

Eisenstein, 556 U.S. at 936, citing *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (setting forth six exceptions to the rule that nonparties are not bound by a judgment). *Balderas* rejected the argument that *Eisenstein* had settled the matter: "[I]n light of *Eisenstein*'s narrow holding—that the [g]overnment was not a 'party' for the purposes of [Rule] 4(a)(1)(B)—it would be inappropriate to interpret this passing observation so broadly." *Balderas*, 436 P.3d at 732. The Supreme Court's statement, however, was more than a "passing observation." Notably, it is not qualified in any way, *e.g.*, by prefacing the response to the petitioner with "even if true" or "that the Government *may be* bound" or words to that effect. And at least one federal appellate court has held that *Eisenstein* has settled the matter. *See Lusby*, 570 F.3d at 853 (*Eisenstein* precludes dismissal without prejudice as to the government).

Apart from its dismissive treatment of *Eisenstein*, the *Balderas* court also misrepresented the holding and effect of *Kellogg Brown & Root Svcs, Inc. v. United*

States ex rel. Carter, 575 U.S. 650 (2015), suggesting that case supported the *Balderas* holding when in fact the opposite is much closer to the truth. In *Carter,* the Supreme Court took up the issue of the first-to-file bar in a *qui tam* case where the earlier action was dismissed for want of prosecution. The Supreme Court rejected the defendants' argument that the second relator's complaint should be dismissed under these circumstances:

> Not only does petitioners' argument push the term 'pending' far beyond the breaking point, but it would lead to strange results that Congress is unlikely to have wanted. Under petitioners' interpretation, a first-filed suit would bar all subsequent related suits even if that earlier suit was dismissed for a reason having nothing to do with the merits. Here, for example, the *Thorpe* suit, which provided the ground for the initial invocation of the first-to-file rule, was dismissed for failure to prosecute. Why would Congress want the abandonment of an earlier suit to bar a later potentially successful suit that might result in a large recovery for the Government?

Carter, 575 U.S. at 655. The last sentence in this passage was modified in *Balderas* as follows: "[w]hy would Congress want [a poorly plead but meritorious] earlier suit to bar a later potentially successful suit that might result in a large recovery for the [g]overnment?" *Balderas*, 436 P.3d at 733. The New Mexico Court of Appeals' revision of the Supreme Court's opinion is misleading and disingenuous considering that the Supreme Court was specifically addressing the disposition of an earlier case that was expressly *not* decided on the merits, unlike *Dickson*, and the Supreme Court drew a contrast between such a disposition and one that *was* decided on the merits.

Carter, therefore, hardly supports a decision allowing the government to avoid *res judicata* in *qui tam* cases.

Finally, in *Taylor v. Sturgell*, the Supreme Court analyzed in some detail the exceptions to the rule that nonparties are not bound by a judgment. More than one of the exceptions discussed in *Taylor v. Sturgell* would likely apply to pleadings-stage dismissals of *qui tam* actions. Perhaps most significantly, the Supreme Court recognized that where the nonparty is in a pre-existing substantive legal relationship with the party, such as assignee-assignor, a nonparty may be bound. *Taylor,* 553 U.S. at 894. The Supreme Court has previously held that *qui tam* relators have standing to pursue claims on behalf of the government because they are assignees (at least partially) of the government's interest. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2001).[6] This ground may thus provide a legal basis for binding the government even though it is technically a nonparty in cases in which it has not intervened.

Still, a second exception discussed in *Taylor* may also apply, where a nonparty was "'adequately represented by someone with the same interests who was a party' to the suit." *Taylor,* 553 U.S. at 894. While the interests of the relator and the government may not be identical (*e.g.*, the government may have a deterrent interest

[6] Addressing this issue in its Brief in Opposition to the Petition for Writ of Certiorari, the State of New Mexico argued in a conclusory fashion (citing the Restatement (Second) of Judgments and a civil procedure text, not case law) that as assignor the government was not bound. In fact, it argued that none of the exceptions discussed in *Taylor* applied to bind the State to the *Dickson* judgment.

the relator does not share), their interests should be sufficiently aligned to qualify under this exception. Note too that this exception calls for "adequate" representation, not exemplary or even above-average representation. In any instance where the representation involves a reasonable effort by the relator to prosecute the *qui tam* allegations, the representation should be deemed "adequate." This would exempt from *res judicata* a result like that in *Carter*, where a complaint was dismissed for want of prosecution.

CONCLUSION

One can only speculate as to the Supreme Court's reasons for denying *certiorari* in the *Balderas* case. It is possible that not enough justices saw this case as a suitable vehicle for deciding the issue. It is also possible that an insufficient number of justices perceived the *res judicata* issue as important enough to merit the Court's review. Whatever the reason, it is likely that the issue will reappear on the Court's doorstep at another point in the not-too-distant future.

Oddly, most courts opposing the application of *res judicata* to bar government action in pleading-stage dismissals of *qui tam* actions would agree that *res judicata* should apply in the event of a disposition at summary judgment. But if the government has not intervened and taken an active role in the case, has not controlled the prosecution of the action, in other words, it is unclear why it makes more sense to bind the government by way of a summary judgment than a final

judgment based on a dismissal, as in *Dickson*, after the relator has made repeated attempts to state a claim.

As noted *supra*, the government has ample opportunity to protect its interests even in cases in which it does not intervene. The notion that binding the government to a pleading-stage dismissal would create perverse incentives is simply wrong and out of step with the realities of *qui tam* practice. Far from being unfair as some courts have concluded, the application of *res judicata* to bind the government in declined cases is a just, reasonable, and efficient result.

What's more, fairness should not be viewed as a consideration that applies only to the government. Is it fair to permit the government to sit on the sidelines, studying a defendant's litigation strategies and the relator's missteps, multiplying the advantages the government already possesses through an often years-long sealed investigation, only to bring its own case after the relator has come up short? Due regard for a defendant's interests, the expenditure of significant resources, inconvenience, risk to reputation, etc., should lead courts to reject a special *res judicata* exception for the government in *qui tam* cases.

