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7th Circ. FCA Dismissal Ruling May Have Unintended Effects

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(August 24, 2020, 3:04 PM EDT)


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Following three decades of atrophy, the U.S. Department of Justice has been flexing its False Claims Act dismissal authority at an increasing pace.[1] Not surprisingly, this welcome uptick of activity in nonintervened FCA cases has created new opportunities for appellate court decisions to weigh in on a long-standing circuit court split regarding the proper standard of review for government dismissal motions.

In early August, the U.S. Court of Appeals for the Ninth Circuit complicated matters by holding in U.S. v. Academy Mortgage Corp. that the Justice Department could not immediately appeal as of right a district court decision denying the government's motion to dismiss, meaning that the qui tam action must proceed even though the government is on record as wanting it dismissed.[2]

And last week, in U.S. v. UCB Inc.,[3] the U.S. Court of Appeals for the Seventh Circuit waded into the quagmire (1) with a new interpretation of the dismissal provision that solves the appeal issue identified by the Ninth Circuit, but through a rationale that could be the subject of scrutiny and may have other, unintended effects, and (2) by declining to follow either of the prevailing standards in the circuit split, creating a third standard.

In the end, given the standard articulated by the Seventh Circuit, the government should have little difficulty achieving dismissal, which is likely what Congress intended. But the court's rationale is questionable, and the consequences of its reasoning could be significant, especially when considering broader statutory interpretation and constitutional implications.

Background of U.S. v. UCB

The UCB action arose when a limited liability company, Venari Partners, formed 11 subsidiaries for the sole purpose of filing 11 separate qui tam actions alleging identical FCA violations against pharmaceutical companies based on supposed kickbacks to physicians for prescribing certain drugs to Medicare and Medicaid patients.[4]

The government declined to intervene in the UCB action in December 2017, and a series of extensions to the defendants' time to answer followed while a motion to transfer venue was pending.

One year later, in December 2018, the government filed a motion to dismiss pursuant to Title 31 of the U.S. Code, Section 3730(c)(2)(A),[5] stating that all of the Venari Partners' qui tam actions "lack sufficient merit to justify the cost of investigation and prosecution and otherwise [are] contrary to the public interest."[6]

The U.S. District Court for the Southern District of Illinois adopted the Ninth Circuit's 1998 Sequoia Orange test for evaluating dismissal under Section 3730(c)(2)(A),[7] but then became only the second district court to deny dismissal under this standard. The district court reasoned that the government's dismissal was "arbitrary and capricious" and not rationally related to a valid government purpose[8] because the government's investigation was not "minimally adequate" and thus could not support a "meaningful cost-benefit" analysis.[9] The government immediately appealed.

Seventh Circuit's Decision

The Seventh Circuit reversed, holding that the district court should have granted the government's motion to dismiss under Section 3730(c)(2)(A). However, the appellate court reached this result in a circuitous fashion, making new jurisdictional, statutory construction, and dismissal standard law along the way.

The first issue tackled by the court was its jurisdiction to hear the appeal as of right. The court noted that, just two weeks earlier, in the U.S. v. Academy Mortgage Corp. case,[10] the Ninth Circuit held that the denial of a dismissal motion under Section 3730(c)(2)(A) is a collateral order that the government could not immediately appeal as of right (as opposed to seeking interlocutory review). The Seventh Circuit determined that it did not need to decide that question in order to determine its jurisdiction. Instead, the appeals court elected to construe the government's motion under Section 3730(c)(2)(A) as both a motion to dismiss and a motion to intervene under Section 3730(c)(3).[11]

As the court noted, "It is well established that denials of motions to intervene are appealable."[12] Thus, even though the government had not, in fact, moved to intervene, the Seventh Circuit deemed it to have done so and then evaluated and decided the merits of the government's (unfiled) motion to intervene along with the actually filed motion to dismiss.

The court reached this result following a novel and lengthy FCA statutory construction analysis that ended with a holding that intervention is required prior to the exercise of any Section 3730(c)(2)(A) authority, even though the provision contains no such language.[13]

Moving to the merits, the Seventh Circuit rejected both the Ninth Circuit Sequoia Orange test, which was applied by the district court, and the other prevailing standard: the U.S. Court of Appeals for the D.C. Circuit's 2003 "unfettered right to dismiss" standard articulated in Swift v. U.S.[14] Instead, based on its determination that the government must first intervene — and deeming it to have done so — the Seventh Circuit looked to the Federal Rules of Civil Procedure.[15]

Because Federal Rule of Civil Procedure 41(a)(1) gives an absolute right of voluntary dismissal before an answer is served,[16] the Seventh Circuit determined that the government had that absolute right in the UCB action.[17] If that Rule 41(a)(1) opportunity passes (i.e., where an answer has been served or a summary judgment motion filed), then a court will have to decide what "terms" of dismissal are proper

under Rule 41(a)(2)[18] — a question the Seventh Circuit left for another day, while noting that "there are always background constraints on executive action" and potential due process concerns in terms of a relator's property interests.[19]

While the Seventh Circuit "agree[d] in principle" with suggestions that government dismissal could not violate the equal protection clause or work a fraud on the court — two considerations relevant to the Sequoia Orange test — it also characterized these issues simply as "grist for the hearing" and not bars to dismissal.[20]

Thus, the Seventh Circuit described its newly announced dismissal standard as "much nearer to Swift [unfettered discretion] than Sequoia Orange [rational relation],"[21] at least with respect to early dismissals such as those under Rule 41(a)(1).

Takeaways

Going forward in the Seventh Circuit, it appears that any government motion to dismiss a qui tam case under Section 3730(c)(2)(A) will now have to be preceded by or accompanied by a motion to intervene under Section 3730(c)(3): "[I]t ought to have been filed that way to begin with. ... We read the False Claims Act as requiring the government to intervene before exercising any right under § 3730(c)(2)."[22]

The Seventh Circuit did not cite to any other court decision that conditioned the government's exercise of dismissal authority on intervention in the qui tam case, and we are not aware of any such decisions construing Section 3730(c)(2)(A) to require it.

Indeed, the Seventh Circuit recognized that several appellate courts "have expressly or tacitly endorsed [the government's] prerogative" not to intervene in order to exercise its dismissal authority.

For example, in Ridenour v. Kaiser Hill Co., Inc., the U.S. Court of Appeals for the Tenth Circuit in 2005 expressly "decline[d] to construe the FCA as requiring intervention for cause before dismissal because a plain reading of the statute does not require it, canons of statutory construction do not support such a result, and in our view, such a reading would render the FCA constitutionally infirm."[23]

The Seventh Circuit's novel statutory construction thus raises a host of issues.

For example, the Seventh Circuit's assessment that "[t]he power to terminate the action is simply part of the power 'to conduct the action'"[24] is troublesome in that it seems to ignore the bargain that Congress designed, and that the U.S. Supreme Court recognized, in making a relator only "a partial assignee" of the government, which always remains the real party in interest.[25]

Indeed, if nothing else, the Seventh Circuit's intervention requirement would seem to give the relator two separate opportunities to challenge the government's decision: first on the motion to intervene and again on the motion to dismiss.

And there could be additional tangential effects. For instance, once the government has intervened — even for purposes of dismissal — that would appear to open the door to potential fee recovery opportunities for defendants under Title 31 of the U.S. Code, Section 3730(g). And in the unlikely event that a court grants intervention but denies dismissal, the government would then be a party to the case for discovery purposes.

In the even more unlikely scenario in which the government intervenes, the case proceeds, and the government obtains a recovery, the government's intervention likely would result in the relator being eligible for a lesser "relator's share" under Title 31 of the U.S. Code, Section 3730(d)(1).

There also are constitutional ramifications to the Seventh Circuit's decision. Because dismissal under Section 3730(c)(2)(A) does not contain a "good cause" requirement, unlike late intervention under Section 3730(c)(3), the Seventh Circuit's holding is novel and extra-statutory in effectively requiring good cause for dismissal.

As other circuits have recognized, a court's refusal to allow the government to dismiss a civil action brought in its name and to which the relator is only a partial assignee raises serious separation-of-powers concerns.[26] The Seventh Circuit glossed over these constitutional concerns by finding good cause to be a "uniquely flexible and capacious concept."[27]

But other issues remain. If intervention is allowed under this capacious concept but then — in a post-answer situation[28] — dismissal is denied, would the government be forced to continue to conduct the action? The statute does not provide for a second nonintervention decision.

While these scenarios may seem unrealistic, the same could have been said with respect to what now has become reality: a district court rejecting the government's rationale for dismissing a case, and an appellate court finding that the government may not immediately appeal a denial of its motion to dismiss an action brought in its name.

The Seventh Circuit did not consider these outstanding questions or offer any answers, and instead provided only a warning: "The government cannot eat its cake and have it too. If the government wishes to control the action as a party, it must intervene as a party, as provided for by Congress."[29]

With all of these unanswered questions, FCA practitioners will simply have to watch what happens next. Even if another dismissal denial is not likely in the Seventh Circuit, these varying circuit court standards and rulings on Section 3730(c)(2)(A), along with the escalating usage of dismissal authority, increase the prospect that these issues will land in the Supreme Court sooner rather than later.

And the Seventh Circuit's statutory construction may influence new legislative proposals on the issue, which Sen. Chuck Grassley, R-Iowa, the primary author of the 1986 FCA amendments, recently announced were forthcoming. In particular, Grassley promised legislation that "clarifies ambiguities created by the courts and reigns in" the Justice Department's recent dismissal practice.[30]

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[1] See Meredith S. Auten et al., Senator Grassley Drafting Legislation to Potentially Limit DOJ Dismissal Power in FCA Cases, Morgan Lewis LawFlash (Aug. 5, 2020), www.morganlewis.com/pubs/senator-grassley-drafting-legislation-to-potentially-limit-doj-dismissal-power-in-fca-cases.

[2] See Douglas W. Baruch et al., Ninth Circuit's Refusal to Consider Government Appeal of FCA Dismissal Authority Portends Trouble, Morgan Lewis LawFlash (Aug. 7, 2020), www.morganlewis.com/pubs/ninth-circuits-refusal-to-consider-government-appeal-of-fca-dismissal-authority-portends-trouble.

[3] United States ex rel. CIMZNHCA, LLC v. UCB, Inc., No. 19-2273, 2020 WL 4743033 (7th Cir. Aug. 17, 2020).

[4] Id. at *1-2.

[5] 31 USC § 3730(c)(2)(A) ("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.").

[6] UCB, Inc., 2020 WL 4743033, at *2.

[7] See United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1146 (9th Cir. 1998). Under this standard, the government first must identify a valid governmental purpose and demonstrate a rational relationship between dismissal and accomplishment of that purpose. If satisfied, the burden shifts to the relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." Id.

[8] UCB, Inc., 2020 WL 4743033, at *2. The first district court was that in United States v. Academy Mortgage Corp., No. 18-16408, 2020 WL 4462130 (9th Cir. Aug. 4, 2020).

[9] United States ex rel. CIMZNHCA, LLC v. UCB, Inc., No. 17-CV-765-SMY-MAB, 2019 WL 1598109 (S.D. Ill. Apr. 15, 2019). While the Seventh Circuit did not apply this same test, it nevertheless was particularly critical of the district court's rationality analysis:

> The government proposed to terminate this suit in part because, across nine cited agency guidances, advisory opinions, and final rulemakings, it has consistently held that the conduct complained of is probably lawful. Not only lawful, but beneficial to patients and the public. As the government argued in the district court, "These relators"—created as investment vehicles for financial speculators—"should not be permitted to indiscriminately advance claims on behalf of the government against an entire industry that would undermine . . . practices the federal government has determined are . . . appropriate and beneficial to federal healthcare programs and their beneficiaries." This is not government irrationality. It oppresses no one and shocks no one's conscience.

2020 WL 4743033, at *12.

[10] 2020 WL 4462130.

[11] 31 USC § 3730(c)(3) ("When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.").

[12] UCB, Inc., 2020 WL 4743033, at *4.

[13] Id. at *6.

[14] Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003).

[15] UCB, Inc., 2020 WL 4743033, at *10.

[16] Fed. R. Civ. P. 41(a)(1)(A)(i) ("Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment[.]").

[17] UCB, Inc., 2020 WL 4743033, at *10.

[18] Fed. R. Civ. P. 41(a)(2) ("Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.").

[19] UCB, Inc., 2020 WL 4743033, at *11.

[20] Id. at *12.

[21] Id. at *2.

[22] Id. at *5.

[23] Ridenour v. Kaiser Hill Co., Inc., 397 F.3d 925, 932 (10th Cir. 2005). In Swift v. United States, the DC Circuit rejected as "unwarranted" the relator's argument that the government may not move to dismiss under Section 3730(c)(2) unless it has intervened pursuant to Sections 3730(b) and 3730(c)(1). 318 F.3d at 251-52. Although the Swift court found the argument "largely academic" because of the relator's concession that the court could simply construe the government's motion to dismiss as including a motion to intervene, this concession has become a centerpiece of the Seventh Circuit's statutory construction in the UCB case.

[24] UCB, Inc., 2020 WL 4743033, at *9.

[25] Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 773 n.4 (2000) (emphasis in original).

[26] See, e.g., Ridenour, 397 F.3d at 934 ("[T]o condition the Government's right to move to dismiss an action in which it did not initially intervene upon a requirement of late intervention tied to a showing of good cause would place the FCA on constitutionally unsteady ground."); Swift, 318 F.3d at 253 (explaining that "the decision whether to bring an action on behalf of the United States is . . . a decision generally committed to [the government's] absolute discretion" (internal quotation marks omitted)).

[27] UCB, Inc., 2020 WL 4743033, at *8.

[28] The Seventh Circuit suggested that there always will be good cause to intervene at the pre-answer stage, when voluntary dismissal also is unfettered, but it did not provide answers for other situations. Id. at *13.

[29] Id. at *9.

[30] Senator Chuck Grassley, Grassley Celebrating Whistleblower Appreciation Day (July 30, 2020),

(transcript available at www.grassley.senate.gov/news/news-releases/grassley-celebrating-whistleblower-appreciation-day). See also Auten, supra note 1.