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Seventh Circuit Deepens Circuit Split Over FCA Dismissal Authority

The Seventh Circuit has created a third standard for evaluating motions to dismiss pursuant to the government's FCA dismissal authority.

The US Court of Appeals for the Seventh Circuit's August 17, 2020, opinion in *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*[1] (*CIMZNHCA*) outlines a new standard for evaluating government motions to dismiss False Claims Act (FCA) cases over relator objections. This case is one of several in which the US Department of Justice (DOJ) has moved to dismiss *qui tam* actions since the issuance of the so-called Granston Memo in January 2018.

Virtually all of the cases have been evaluated under one of two standards: (1) The D.C. Circuit's deferential *Swift v. United States* standard, which provides the government "an unfettered right" to dismiss a *qui tam* action,[2] or (2) the Ninth Circuit's more stringent *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp*. test, requiring the government to identify a "valid government purpose" that is rationally related to dismissal.[3]

CIMZNHCA provides yet a third test. Fortunately for the government and FCA defendants, the Seventh Circuit's test "lies much nearer to *Swift* than *Sequoia Orange*."[4] In a lengthy opinion, the Seventh Circuit held that Federal Rule of Civil Procedure 41(a)'s standard for voluntary dismissals applies to Section 3730(c)(2)(A) dismissals — a standard that is particularly lenient when the dismissal motion is filed prior to the defendant's filing of an answer or summary judgment motion. Additionally, the government must show "good cause" for intervening in the suit if the motion is filed after the government initially declined to intervene.

The Government's Dismissal Authority Pursuant to the FCA

The vast majority of FCA cases are filed by individuals, or relators on behalf of the US government, and known as *qui tam* actions.[5] The FCA provides the government the right to dismiss a *qui tam* action notwithstanding the objections of the relator provided the relator is given notice and an opportunity to be heard.[6] Before 2018, the government rarely exercised its dismissal authority under the FCA to dismiss *qui tam* actions. This changed in January 2018, when Michael D. Granston, director of the Commercial Litigation Branch of DOJ's Fraud Section, issued an internal memorandum encouraging DOJ attorneys to consider exercising the government's long-underused authority to dismiss FCA *qui tam* cases that "lack substantial merit."[7] (See Latham's *Client Alert* Government Gatekeeper? DOJ Memo Encourages

Dismissal of Meritless False Claims Act Cases.) The memorandum's substance is now incorporated in the DOJ Justice Manual,[8] and DOJ leadership has continued to beat the dismissal drum.[9]

In the two-and-a-half years since the Granston Memo was issued, DOJ has sought dismissal in approximately 50 cases, and has been largely successful in obtaining dismissal.[10] The US District Court for the Southern District of Illinois' decision in *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 17-CV-765-SMY-MAB, 2019 WL 1598109 (S.D. Ill. Apr. 15, 2019) marked one of two times a court has denied DOJ's request for dismissal since the Granston Memo.[11]

The Seventh Circuit Articulates a New Standard

Relator CIMZNHCA, LLC, a litigation funding company,[12] filed a complaint alleging that pharmaceutical companies paid kickbacks to physicians for prescribing and recommending products to patients who were insured under federal healthcare programs. The government declined to intervene and then moved to dismiss pursuant to Section 3730(c)(2)(A). The US District Court for the Southern District of Illinois denied DOJ's motion to dismiss, citing *Sequoia Orange* and finding that DOJ's decision to dismiss was "not rationally related to a valid governmental purpose."[13] DOJ appealed the denial to the Seventh Circuit.

The Seventh Circuit reversed and remanded the lower court's decision and recommended dismissal. In so doing, the court rejected the more stringent *Sequoia Orange* test adopted by the district court, but also refused to adopt the deferential *Swift* test the government has long advocated. The court stated repeatedly that "the choice between the competing standards [i]s a false one."[14]

The Seventh Circuit instead articulated a new test, treating a motion to dismiss as necessarily including a motion to intervene and applying the voluntary dismissal standard set forth in Federal Rule of Civil Procedure 41(a).

1. Government Intervention Is Required to Exercise Its Dismissal Authority

The Seventh Circuit first tackled whether it had jurisdiction to hear the appeal, as denials of motions to dismiss are not final judgments under 12 U.S.C. § 1292. Indeed, earlier this month the Ninth Circuit denied a similar government appeal on jurisdictional grounds.[15]

Contrary to the weight of authority in other circuits,[16] the Seventh Circuit held that the government must intervene before seeking to dismiss a lawsuit.[17] The Seventh Circuit "treat[ed] the government's motion to dismiss as a motion both to intervene and then to dismiss under § 3730(c)(3) because intervention was in substance what the government sought and in form what the False Claims Act requires."[18] Requiring intervention to dismiss is significant because, if DOJ initially declines to intervene, it can only intervene later for "good cause."[19] The court treated intervention as subsumed in the government's motion to dismiss and held that it therefore had "jurisdiction over the appeal of what amounted to an order denying a motion to intervene."[20]

2. Federal Rule of Civil Procedure 41(a) Voluntary Dismissal Standard Applies

On the merits, the Seventh Circuit held that the appropriate standard for evaluating DOJ's dismissal request is found in Federal Rule of Civil Procedure 41(a) and that the government must demonstrate "good cause" to intervene when it files a dismissal motion after initially declining to intervene.

Rule 41(a) governs plaintiffs' ability to dismiss a civil action. Rule 41(a)(1) "provides that 'the plaintiff may dismiss an action' by serving a notice of dismissal any time 'before the opposing party serves either an answer or a motion for summary judgment.'"[21] The court emphasized Rule 41(a)(1)'s low threshold, noting that a plaintiff does not "need a good reason, or even a sane or any reason" to seek dismissal under Rule

41(a)(1) and that "the notice is self-executing and case-terminating."[22] Thus, when DOJ intervenes and files a motion to dismiss before the defendant has answered or moved for summary judgment, the right to dismiss is "absolute."[23] "In other words, once a valid Rule 41(a)(1) notice has been served, 'the case [is] gone; no action remain[s] for the district judge to take.'"[24] If the litigation has progressed beyond the filing of an answer or summary judgment motion, Rule 42(a)(2) applies, providing slightly greater constraints on the ability to dismiss. Under Rule 42(a)(2), "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper."[25] Finally, the court relegated the need to demonstrate "good cause" to intervene, where applicable, as an afterthought that is easily satisfied in light of Rule 41(a)'s "unrestricted substantive right" to dismiss.[26]

As to the language in Section 3730(c)(2)(A) providing a relator notice and opportunity for a hearing on the motion, the Seventh Circuit agreed with the lower court in rejecting *Swift*'s rationale that "the function of a hearing when the relator requests one is simply to give the relator a formal opportunity to convince the government not to end the case."[27] The court similarly rejected *Sequoia Orange*'s reliance on the hearing guarantee as requiring a two-step rationale test.[28] The court once again took a middle-of-the-road approach, holding that while "the court is not called upon to serve as a mere convening authority," such hearings will be of value only in "exceptional cases."[29] The relator here, according to the court, was afforded the hearing that due process required, but "simply had no substantive case to make at the hearing."[30]

Conclusion

On balance, the Seventh Circuit's opinion reversing the district court's order and applying the Rule 41(a) standard to dismissal requests is favorable for the government and FCA defendants. The court squarely rejected the Ninth Circuit's *Sequoia Orange* two-step test, explaining in detail the lack of statutory support for any reasonableness review of the government's decision.

Until the US Supreme Court weighs in to resolve the now-three-way Circuit split on this issue (which it recently declined to do),[31] the government and FCA defendants must keep in mind the relevant circuit's case law when evaluating the likelihood of dismissal. In the Seventh Circuit, dismissing the case as early as possible has distinct advantages. The *CIMZNHCA* opinion suggests that the government's ability to dismiss a case over the objection of a relator early in the case is largely unfettered, subject only to the "bare rationality" standard of substantive due process. Should the government wait until the defendant has filed an answer or summary judgment motion, it must satisfy a higher standard and put forth "proper" grounds for dismissal under Federal Rule of Civil Procedure 41(a)(2).

FCA defendants should monitor developments in this area closely, as at least one additional appeal of a Section 3730(c)(2)(A) dismissal order remains pending,[32] and Senator Grassley continues to advocate legislative changes to curb DOJ's dismissal authority.[33]

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Endnotes

[1] No. 19-2273, 2020 WL 4743033 (7th Cir. Aug. 17, 2020).

[2] *See* 318 F.3d 250, 252 (D.C. Cir. 2003). The D.C. Circuit later clarified that the only exception to that rule is where there is "'fraud on the court.'" *United States ex rel. Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008). The Eighth Circuit has joined the D.C. Circuit and applied the *Swift* standard. *United States ex rel. Davis v. Hennepin Cty.*, No. 18-CV-01551 (ECT/HB),

2019 WL 608848, at *5 (D. Minn. Feb. 13, 2019) (summarily affirmed in *United States ex rel. Davis v. Hennepin Cty.*, No: 19-2298 (8th Cir. Aug. 14, 2019)). The Third Circuit, in *United States ex rel. Chang v. Children's Advocacy Ctr.*, 938 F.3d 384, 388 (3d Cir. 2019), declined to weigh in on whether the *Swift* or *Sequoia Orange* standard applied, finding both satisfied in any event. *Id.* (further finding that Section 3720(c)(2)(A) does not afford the right to a hearing unless specifically requested or a challenge demonstrates that the government's motion to dismiss is arbitrary and capricious).

[3] 151 F.3d 1139, 1145 (9th Cir. 1998); *see also United States ex rel. Thrower v. Acad. Mortg. Corp.,* No. 18-16408, 2020 WL 4462130, at *10 (9th Cir. Aug. 4, 2020) (reaffirming *Sequoia Orange* standard and dismissing for lack of jurisdiction government's appeal of district court's denial of motion to dismiss). The Tenth Circuit has also adopted the *Sequoia Orange* standard. *See United States ex rel. Ridenour v. KaiserHill Co.*, 397 F.3d 925, 936 (10th Cir. 2005); *but see United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App'x 849, 853 (10th Cir. 2012) (declining to endorse either the *Sequoia Orange* or *Swift* standards where defendant had not been served with *qui tam* complaint and finding that both standards were met under the facts of that case).

[4] *See CIMZNHCA*, 2020 WL 4743033, at *2.

[5] 31 U.S.C. § 3730(b)(1).

[6] 31 U.S.C. § 3730(c)(2)(A).

[7] Mem. from Michael D. Granston, Dir., US Dep't of Just. Com. Litig. Branch, Fraud Section to Att'ys. of the US Dep't of Just. Com. Litig. Branch, Fraud Section & Ass't US. Att'ys. Handling False Claims Act Cases (Jan. 10, 2018) ("Granston Memo"), https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.

[8] US Dep't of Just., Just. Manual § 4-4.111 (Sept. 2018) ("Justice Manual"). The Justice Manual states that Section 3730(c)(2)(A) is an "important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent."

[9] For example, in 2019 Deputy Associate Attorney General Stephen Cox remarked: "Bad cases that result in bad case law inhibit [the government's] ability to enforce the False Claims Act in good and meritorious cases." DOJ has "instructed [its] lawyers to consider dismissing qui tam cases when they are not in [its] best interests," and that "[t]his authority is an important tool to protect the integrity of the False Claims Act and the interests of the United States." Deputy Associate Att'y Gen. Stephen Cox, Remarks at the 2019 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 28, 2019), https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-2019-advanced-forum-false.

[10] *See* Principal Deputy Assistant Att'y Gen. Ethan P. Davis, Remarks on the False Claims Act at the US Chamber of Commerce's Institute for Legal Reform (June 26, 2020), https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims ("[I]n the two years following the memo, the Department has moved to dismiss around 50 qui tams.").

[11] *See* Deputy Associate Att'y Gen. Stephen Cox, Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 27,2020), https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced (remarking that "[c]ourts have granted [the government's] motions in all but one of the roughly thirty decisions that have been rendered during that [the] two-year period" since issuance of the Granston Memo). There are in fact two, taking into account *United States v. Academy Mortgage Corp.,* No. 3:16-cv-02120-EMC, 2018 WL 3208157, at *2–*3 (N.D. Cal. June 29, 2018).

[12] DOJ has recently been focused on the role that third party litigation funding plays in FCA cases and has suggested some skepticism in the role that third party litigation funding should play in cases brought in the name of the United States. Principal Deputy Assistant Att'y Gen. Ethan P. Davis, Remarks on the False Claims Act at the US Chamber of Commerce's Institute for Legal Reform (June 26, 2020), https://www.justice.gov/civil/speech/principal-deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims (noting that DOJ "ha[s] been actively evaluating the role that litigation funding plays in qui tam litigation"). The Seventh Circuit's decision in *CIMZNHCA* seems to support the government's move to dismiss meritless *qui tam* actions backed by third party funds, especially where such actions threaten to undermine practices the government itself has allowed.

[13] *See* 2019 WL 1598109, at *4.

[14] *See CIMZNHCA*, at *1.

[15] *United States ex rel. Thrower v. Academy Mortg. Corp.,* No. 3:16-cv-02120-EMC, 2018 WL 3208157, at *2–*3 (N.D. Cal. June 29, 2018), *appeal dismissed*, No. 18-16408, 2020 WL 4462130 (9th Cir. Aug. 4, 2020).

[16] *See Chang* , 938 F.3d at 386; *Ridenour*, 397 F.3d at 933–34; *Swift*, 318 F.3d at 251–52; *United States ex rel. Kelly v. Boeing Co*., 9 F.3d 743, 753 n.10 (9th Cir. 1993); *see also United States v. Everglades Coll., Inc*., 855 F.3d 1279, 1285–86 (11th Cir. 2017). Though the *Swift* Court found that the intervention was not required before the government moved to dismiss, the *Swift* Court did allude to the approach the Seventh Circuit took in *CIMZNHCA*, stating "we could construe the government's motion to dismiss as including a motion to intervene." *Swift*, 318 F.3d at 252.

[17] *See CIMZNHCA*, at *9.

[18] *See id.*

[19] 31 U.S.C. § 3730(c)(3).

[20] *See CIMZNHCA*, at *10.

[21] *See id.* (quoting Fed. R. Civ. P. 41(a)(1)(A)(i)).

[22] *See id.* at *10 (quoting *Marques v. Federal Reserve Bank of Chi.*, 286 F.3d 1014, 1018 (7th Cir. 2002)).

[23] *Id.* (citation omitted).

[24] *Id.* at 24 (quoting *Smith v. Potter*, 513 F.3d 781, 782–83 (7th Cir. 2008)).

[25] *See* Fed. R. Civ. P. 41(a)(2).

[26] *CIMZNHCA*, 2020 WL 4743033, at *13.

[27] *Swift*, 318 F.3d at 253.

[28] *CIMZNHCA*, 2020 WL 4743033, at *13.

[29] *See id.* at *12.

[30] *Id.* at *13.

[31] *See United States ex rel. Schneider v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 19-678, 2020 WL 1668623 (Apr. 6, 2020).

[32] *See, e.g., United States ex rel. Borzilleri v. Abbvie, Inc.,* No. 15-CV-7881 (JMF), 2019 WL 3203000 (S.D.N.Y. July 16, 2019), *appeal filed*, No. 19-2947 (2d Cir. Sept. 13, 2019).

[33] On July 30, 2020 Senator Charles Grassley announced plans to propose legislation that will potentially limit DOJ's dismissal power under Section 3730(c)(2)(A) of the FCA. *See* Prepared Floor Remarks by US. Senator Chuck Grassley of Iowa Celebrating Whistleblower Appreciation Day, July 30, 2020. Since the Granston Memo was issued, Senator Grassley has voiced his disagreement with DOJ's increased exercise of its dismissal authority and has sent two letters to Attorney General William Barr objecting to the deference afforded the government in dismissing actions. *See* Letter from Sen. Chuck Grassley to Att'y Gen. William P. Barr, Sept. 4, 2019; Letter from Sen. Chuck Grassley to Att'y Gen. William P. Barr, May 4, 2020.