THE GOVERNMENT CONTRACTOR®

THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 62, No. 35 **September 23, 2020**

Focus

¶ 260

FEATURE COMMENT: The Evolving Debate Over The Government's Dismissal Authority Under The False Claims Act

Significant attention has been focused in recent years on a provision of the False Claims Act that permits the Government to seek to dismiss a "qui tam" action over the objection of the person, known as a "relator," who initiated the action. The FCA authorizes a relator to sue in the name of the Government to recover money for the Government, but provides that the Government may dismiss the case over the relator's objection, as long as the relator has been provided notice and an opportunity for a hearing.

This spotlight on the Government's dismissal authority followed a 2018 Department of Justice memorandum addressing the use of the authority. The memo acknowledged that the Government had sparingly invoked the provision in the past, but broke new ground by directing Government lawyers to consider whether to seek dismissal of a case when they are recommending that the Government not join a case.

The subsequent uptick in Government dismissal motions generated increased litigation over this provision. In the absence of express statutory language explaining what standard a court should apply when the Government seeks to dismiss a qui tam action, courts have employed different approaches, ranging from near complete deference to the Government to a form of rational basis review, with some courts concluding that either standard produces the same result.

This article reviews the background of the issue, recent appellate court attempts to grapple with it, and possible ways forward. While a legislative fix ultimately may be desirable, the statute already provides adequate tools for courts to evaluate dismissal requests based on the individual circumstances of a case. Courts can exercise that review without impermissibly infringing on the executive branch's prerogatives, while ensuring that use of the dismissal authority does not undermine the FCA's purpose of encouraging private investment in enforcement of the statute.

Background—*The Government's Dismissal Authority Under 31 USCA § 3730(b)(2)*: The FCA, 31 USCA § 3729, et seq., which prohibits the submission of false or fraudulent requests for payment to the U.S., creates a unique public/private partnership in the pursuit of redressing fraud against the Government. The FCA authorizes individuals who know about violations of the statute to file lawsuits on behalf of the U.S. in exchange for a share of the proceeds recovered for the Government. The Government may proceed with the action, 31 USCA § 3730(b)(4)(A), in which case it assumes "primary responsibility" for litigation of the case, 31 USCA § 3730(c)(1), but the relator continues as "a party," subject to the limitations provided in 31 USCA § 3730(c)(2). Those limitations include the right of the Government to "dismiss the action notwithstanding the objections" of the person if they were 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. 31 USCA § 3730(c)(2)(A).

If the Government does not proceed with the action, the relator has the right to conduct the action. 31 USCA § 3730(b)(4)(B). The court may, "without limiting the status and rights of the person initiating the action," permit the Government to intervene later, on a showing of "good cause." 31 USCA § 3730(c)(3).

The FCA partnership between the Government and relators has been enormously successful, resulting in more than $45 billion in recoveries for the U.S. and billions more in related criminal fines

since 1986, when Congress amended the FCA to increase incentives for relators to pursue these cases. *www.justice.gov/opa/press-release/file/1233201/download* (statistics through 2019). The effect of this approach on deterring fraud is likely far greater than the monetary recovery it has produced.

What Did Congress Intend?: The dismissal provision does not provide any further explanation of the purpose of the hearing that 31 USCA § 3730(c)(2)(A) describes or the specific role of the court. The Government has maintained, and some courts have agreed, that the lack of an express standard for courts to apply should be interpreted to mean there is almost no role for the courts, see, e.g., *Swift v. U.S.*, 318 F.3d 250, 253 (D.C. Cir. 2003); 45 GC ¶ 93. Other courts have rejected the conclusion that Congress required a court hearing that has almost no role for the court. See, e.g., *U.S. ex rel. Harris v. EMD Serono, Inc.,* 370 F. Supp. 3d 483, 488 (E.D. Pa. 2019).

The legislative history of the provision does not resolve this question, but it contains clues to what Congress may have contemplated. The Senate report on the 1986 FCA Amendments explained that the amendments were intended to provide a greater role for relators, including the right to object and seek an evidentiary hearing if the Government sought dismissal. The report explained that the hearing should not be granted as a matter of right but only on a showing of a "substantial and particularized need," such as by showing the dismissal was "unreasonable in light of existing evidence, that the Government had not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations." S. Rep. No. 99-345, at 25–26 (noting that section (c)(1) generally provides qui tam relators "with a more direct role," including "acting as a check that the Government does not neglect evidence, cause undue delay, or drop the false claims case without legitimate reason.").

As the D.C. Circuit pointed out in *Swift,* supra, the dismissal provision ultimately enacted did not include language permitting a relator to petition for an evidentiary hearing. However, the provision enacted is arguably stronger, as it provides for a mandatory opportunity for a hearing and a generally greater role for relators than the version addressed by the Senate report. See S. 1562, 99th Cong., 2d Sess. (1986) (providing that if the Government intervened, the action is conducted "solely by the government" and only authorizing the person to seek leave of court to conduct the action if the Government failed to proceed with reasonable diligence). Prior to the 1986 Amendments, the FCA provided the Government no rights to intervene in a qui tam action after having first declined to do so. See S. Rep. No. 99-345, at 10–12, 25.

In the absence of express statutory language setting forth a standard and no other direct explanation of the role courts should play in conducting a hearing, courts have developed different approaches. The Ninth Circuit confronted the question of the Government's dismissal authority in *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp*., 151 F.3d 1139 (9th Cir. 1998), a case in which the Government had initially intervened, but then sought to dismiss. The court held that to support a motion to dismiss, the Government must present a valid Government purpose for dismissing the case and a rational relationship between dismissal and the accomplishment of that purpose. Relators can rebut the Government's presentation by showing that the Government's decision is "fraudulent, arbitrary and capricious, or illegal." Id. at 1145. The court held that this limited review of executive branch decisions respected the constitutional separation of powers. In *Sequoia*, the Government had argued, among other things, that the qui tam case against a citrus company would foment unrest in an industry where the Government had only recently attempted to achieve peace though settlement of all cases alleging violations of an agency's marketing orders. The Ninth Circuit concluded that the Government had met its burden.

The D.C. Circuit rejected the Ninth Circuit's approach in a case in which the Government did not intervene and had moved to dismiss at the outset, before the complaint was served on the defendant. *Swift v. U.S.*, 318 F.3d 250 (D.C. Cir. 2003) involved a qui tam action brought by a DOJ employee who alleged that other DOJ attorneys had engaged in time-sheet fraud, amounting to about $6,000. The Government argued that even if the allegations were true, the case did not justify the expense of litigation. The D.C. Circuit held that the Government has unfettered discretion to dismiss a qui tam case and the hearing authorized by the statute is simply to provide the relator "a formal opportunity to convince the Government not to end the case." Id. at 253. The court did not interpret the FCA to require the Government to intervene in a case before moving to dismiss, but considered the issue academic. Even if intervention were required, the court said, it would treat the

Government's motion as a motion to intervene and dismiss. Id. at 252. However, because the Government had not yet declined the case at the time it moved to dismiss, it would not have had to show good cause to intervene.

The Tenth Circuit subsequently sided with the *Sequoia* standard. In *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925 (10th Cir. 2005), the Government initially declined the case, but later moved to dismiss on grounds that classified information was at risk. The appellate court affirmed the grant of the Government's motion. It also held that the FCA did not require the Government to intervene before seeking dismissal and opined that such a requirement would place the FCA on "constitutionally unsteady ground." Id. at 934.

The standards set out in *Sequoia* and *Swift* are where the case law largely remained. Until 2018.

The Granston Memo: In January 2018, the then-head of the Fraud Section of DOJ's Commercial Litigation Branch, Michael Granston, issued a memo directing DOJ lawyers to evaluate whether they should move to dismiss a qui tam case when they are recommending declining the case. Noting that DOJ had invoked the FCA dismissal provision rarely in the prior 30 years, the memo explained that with the growth in the number of qui tam cases, DOJ should use the authority more. The memo grouped the past cases into categories to illustrate possible reasons for seeking dismissal. The categories were described at a high level of generality, including "Meritless Qui Tams," "Preserving Government Resources," and "Addressing Egregious Procedural Errors." The "meritless qui tams" category consisted largely of cases where a fatal defect appeared on the face of the complaint, such as cases where the defendant was a governmental entity and the case would be barred by sovereign immunity, or the case did not involve federal funds and would not implicate the FCA. The "preserving Government resources" category included cases like *Swift*, where the damages were about $6,000. Egregious procedural errors included cases in which the case was not filed under seal, thus interfering with the Government's investigation. Many on all sides of the debate over use of the dismissal authority would find those specific examples appropriate uses. The memo's directive and list of reasons for dismissal, but not the case examples, has been incorporated into the Department of Justice Civil Manual, 4-4.111, *www.justice.gov/jm/jm-4-4000-commerical-litigation#4-4.111*.

Following the 2018 memo, the Government proceeded to move to dismiss cases more frequently, although the number of dismissals remains a small percentage of the hundreds of qui tam cases filed each year. As a result, more courts were asked to weigh in on the dismissal standard. For the most part, courts granted or affirmed the Government's motion to dismiss, often without choosing between the *Swift* and *Sequoia* standards, concluding that the Government met either test. See, e.g., *Chang v. Children's Advocacy Ctr.*, 938 F.3d 384 (3rd Cir. 2019); 61 GC ¶ 282. In at least two cases, however, district courts denied the Government's motion, which led to two recent appellate decisions on the dismissal authority.

Recent Circuit Decisions—*The Ninth Circuit Makes Some Observations*: In *U.S. ex rel. Thrower v. Acad. Mortgage Corp.,* 968 F.3d 996 (9th Cir. 2020), the Ninth Circuit held that it lacked jurisdiction over the Government's appeal of a denial of its motion to dismiss. The Government had appealed under the "collateral order" doctrine, which allows early appeals of certain important issues. The Ninth Circuit held that the Government's appeal did not qualify under that doctrine. Because a key factor in the evaluation of the availability of an appeal under the collateral order doctrine is the significance of the underlying issue, however, the court made some observations about the Government's power to dismiss an FCA qui tam case.

The court observed that the Government's main articulated concern—discovery burdens—did not support an early appeal because the Government could ask a court for relief from an overly burdensome subpoena, just like any other third party. 968 F.3d at 1006. The court also pointed out that the Government's interest in controlling litigation brought in its name was not at its "apex" in qui tam cases that Congress had authorized. Id. at 1007. Denial of a motion to dismiss did not force the Government to pursue a case it did not want to, the court noted, as the Government would be required only to respond to discovery, provide its views if a relator sought to dismiss, and collect most of the recovery in successful cases. Id. at 1008. Finally, the court noted that the Government had other ways to protect its interests, including intervening in the qui tam case or seeking mandamus if truly significant issues, such as protecting classified information, were at stake. Id. at 1009.

The Seventh Circuit Weighs In: The Seventh Circuit recently staked out its own position. *U.S. ex rel. CIMZNHCA v. UCB, Inc.,* 970 F.3d 835 (7th Cir. 2020), involved allegations that a pharmaceutical company violated the FCA by providing free education services to physicians and their patients and free reimbursement support services in violation of the Anti-Kickback Statute. The Government initially declined to intervene and a year later moved to dismiss, maintaining that agencies had consistently held that the conduct complained of was probably lawful and was beneficial to patients and the public. The district court applied the *Sequoia* standard and denied the Government's motion.

The Seventh Circuit reversed. The court first engaged in a detailed statutory analysis of the FCA and concluded that the FCA requires the Government to intervene in a qui tam case it initially declined before it can move to dismiss. The Seventh Circuit reasoned that § 3730(c)(1) speaks of the relator's rights when the Government intervenes in a case, subject to the limitations in (c)(2), and the right of the Government to dismiss the case, also appears in (c)(2). If the Government does not intervene, it is not a party to the case and has no right to file a motion to dismiss. The statute permits the Government to regain party status after having initially declined to intervene, but to do so it must persuade the court that it has "good cause." 31 USCA § 3730(c)(3).

The court next treated the Government's motion to dismiss as a motion to intervene, which enabled the court to avoid the procedural issue confronted in *Thrower*, supra, as denial of a motion to intervene, unlike denial of a motion to dismiss, is immediately appealable. The court explained that this approach also pointed the way to the appropriate standard to apply in considering the Government's motion to dismiss. The court observed that Fed. R. Civ. P. 41(a)(1)(A)(i) permits a plaintiff to voluntarily dismiss their case at any time prior to the opposing party serving an answer or a motion for summary judgment, simply by filing a notice and without supplying any reason, subject to any applicable federal statute providing otherwise. The applicable statute—the FCA—provides that the relator is entitled to notice and an opportunity for a hearing under § 3730(c)(2). The court then summarily concluded that those requirements had been met and that ended the case. CIMZNHCA, 970 F.3d at 850. Adding the Rule 41 step thus did not add much clarity to the standard under § 3730(c)(2).

The court stressed that its decision did not mean a substantive hearing is never appropriate. For example, the court stated, when a motion to dismiss is filed after the defendant has answered a complaint, then dismissal is permitted only on such terms as the court considers proper. See Fed. R. Civ. P. 41(a)(2). The court suggested that such a hearing could explore the terms on which the requested dismissal would be proper. 970 F.3d at 850–851. (The *Sequoia* case had rejected the Rule 41(a)(2) approach, characterizing that rule as intended to protect defendants from vexatious litigants. 151 F.3d at 1145). The court stated that in extreme cases, allegations of violations of due process or equal protection, or fraud, could supply "grist for a hearing." But absent those circumstances, the court concluded, the Government was not required to justify its litigation decisions by demonstrating that it had performed a cost-benefit analysis. The court rejected the two-step *Sequoia* test, observing that "if 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." The concurring opinion would have declined to choose which standard to apply because in its view, the Government's reason was adequate under either standard. 970 F.3d at 855–856.

Although the *CIMZNHCA* decision is notable for holding that the Government must intervene to dismiss, that requirement—at least as the Seventh Circuit employed it—adds little. The court did not expressly address the meaning of "good cause" to intervene, but rather backed into the conclusion that the requirement had been met based on the near unfettered right to dismiss that the court had established existed under Fed. R. Civ. P. 41. The court concluded that in the absence of countervailing facts that would make a hearing necessary, it would have been an abuse of discretion for the district court to deny intervention. 970 F.3d at 853.

What Is Really at Stake—Although much of the debate over the dismissal provision is couched in concern for the constitutional prerogatives of the executive branch, the issue has received outsized attention for other reasons. Because the Government's dismissal of a qui tam action ends the ability of a relator to pursue a case and the potential for dismissal significantly discourages private investment in such cases, it is another tool for defending against qui tam actions. See, e.g., *www.foley.com/en/insights/*

publications/2018/01/leaked-doj-memo-indicates-new-Government-focus-on (observing that this is "an important development to employ in defense of FCA qui tam suits" and "it is worthwhile for defense counsel to help DOJ with its evaluation").

The defense bar has long urged DOJ to seek to dismiss "non-meritorious" qui tam cases. But as blog posts attest, the defense bar's view of meritless qui tam cases is somewhat broad. Indeed, the Chamber of Commerce has argued that most non-intervened qui tam actions are meritless. See, e.g., Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Appellant, *U.S. ex rel. Thrower v. Acad. Mortgage Corp.*, 2019 WL 1580722, at 28 (filed March 22, 2019). And the defense bar has not been shy about its intentions to use broad discovery of Government agencies to spark DOJ's interest in getting rid of cases to avoid discovery burdens. Although DOJ warned that such tactics were unlikely to convince DOJ to dismiss declined cases, see, e.g., Law 360, "Top DOJ Atty Spotlights Main FCA Target Areas for 2020" (Feb. 27, 2020), the tactics appear to have worked as discovery burdens on agencies have been one of the primary reasons provided by the Government in seeking to dismiss cases since the Granston memo was issued.

With hundreds of qui tam cases filed each year, the Government must be selective, so many cases proceed without the Government. Statistically, declined cases are far less likely to succeed. But the failure of a non-intervened case does not mean the case was "meritless" in the sense that it never should have been allowed to proceed. Many such cases fail for lack of the ability to establish sufficient facts that are not easily accessible by the relator (which does not mean they do not exist), or failure to overcome the statute's many procedural hurdles (which also does not mean the allegations are without merit). Proceeding without the Government is undoubtedly riskier; in recognition of that, the FCA provides a larger reward for successful non-intervened cases. 31 USCA §3730(d)(2). Some non-intervened cases have in fact achieved very large recoveries for the Government.

Certainly, there are legitimate Government concerns that warrant dismissing individual cases. Some of these were fleshed out in the pre-2018 use of the authority and identified in the Granston memo. See supra. As that memo points out, relators often voluntarily dismiss cases after discussions with the Government. But by identifying reasons for dismissal at a high level of generality, such as "lacking in merit" or "resource intensive," DOJ invited arguments and tactics for pushing the use of the dismissal authority in almost any case. Attention to this issue, ironically, has produced resource drains of its own.

Congress Could Clarify, But the Existing Statutory Framework Provides Adequate Tools—Given the lack of consensus among courts about Congress's intent in requiring a hearing when the Government moves to dismiss a qui tam action, Congress could address this question. Sen. Charles Grassley, one of the architects of the 1986 Amendments to the FCA, has made clear that he does not believe the executive branch has, or requires, complete discretion to dismiss. See Prepared Remarks of Sen. Grassley on National Whistleblower Day (July 30, 2020), *www.grassley.senate.gov*. He has stated that the Government should explain to a court and the public its reasons for declining to proceed with a case. Id.

Amending the provision to expressly state the role of courts in evaluating a Government motion to dismiss could help provide guidance to courts and eliminate some disputes. But would a standard that contemplated judicial review of executive branch motions to dismiss raise constitutional concerns? As several courts have noted, courts have a role in reviewing executive branch decisions in a number of contexts, including the dismissal of criminal matters. Fed. R. Crim. Pro. 48(a) (Government must have "leave of court" to dismiss the prosecution). Even *Swift*, which held that the Government has unfettered discretion to dismiss, reached that conclusion based on its interpretation of the statutory language. *Swift*, 318 F.3d at 252 ("It may be that despite separation of powers, there could be judicial review of the government's decision that an action brought in its name should be dismissed.").

While individual cases could present circumstances that would implicate constitutional concerns, it is doubtful that the mere potential for that to occur does so. Historically, the Government could not intervene in or control qui tam actions at all. While the Supreme Court did not resolve Article II challenges to the FCA when it held in *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000); 42 GC ¶ 204, that FCA relators have standing to pursue cases in the name of the Government, it would be hard to conclude that the current statute unconstitutionally interferes with the executive branch's prerogatives,

given the historic pedigree of the law and the greater role for the executive branch provided in the 1986 Amendments.

Although Congress could clarify the issues, the existing provision can be interpreted to permit limited judicial review, as courts following the *Sequoia* approach have concluded. A requirement for an explanation has its own rewards, including incentivizing careful decision-making and transparency. Courts are not likely to ignore important Government reasons for dismissal, and historically they have not. But being required to explain reasons is an important check to ensure cases are not dropped for no reason, or for not very good reasons that can be addressed in other ways, such as discovery burdens. Courts are also capable of distinguishing between what the Government might be required to show to support a request to dismiss a case early on, before tremendous resources are invested, and what might be required if dismissal of the case is sought later in the process, particularly if the Government has initially declined the case. Requiring the Government to show good cause to intervene after having initially declined provides one way to evaluate the circumstances surrounding late dismissals that can discourage the very investment the FCA was intended to encourage. S. Rep. 99-345, at 24 ("The Committee's overall intent in amending the qui tam section of the False Claim Act is to encourage more private enforcement suits."). Allowing district courts, which are most familiar with the cases before them, to evaluate motions to dismiss—taking into account the unique circumstances of each case—is also likely to result in a sustainable equilibrium that discourages overzealous use of the dismissal authority in ways that undermine the FCA and does not intrude impermissibly on the executive branch's powers.

✦

This Feature Comment was written for THE GOVERNMENT CONTRACTOR by* Claire M. Sylvia, *a partner in the law firm of Phillips & Cohen LLP, which represents whistleblowers in False Claims Act cases.* www.phillipsandcohen.com. *Ms. Sylvia is the author of THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT, published by Thomson Reuters.