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FEATURE COMMENT: You Win Some, You Lose Some: In Wake Of Ninth Circuit Defeat, The Government Gets A Big Win From Seventh Circuit Ruling Expanding Its Dismissal Authority Over FCA Qui Tam Actions

Over the course of a mere two-week span last month, the U.S. Court of Appeals for the Seventh Circuit and the Court of Appeals for the Ninth Circuit became the first two circuit courts to issue decisions on lower court denials of a motion to dismiss by the Department of Justice pursuant to its authority under the False Claims Act, 31 USCA § 3730(c)(2)(A). Those decisions follow the only two instances of a federal district court denying the Government's motion to dismiss under the FCA. On Aug. 4, 2020, the Ninth Circuit, declining to reach the merits, dismissed the Government's appeal of one of those denials, but provided a roadmap for the Government to secure appellate review in the future. Just two weeks later, on Aug. 17, 2020, the Seventh Circuit reversed a district court's order denying the Government's motion to dismiss and remanded with instructions to dismiss the relator's qui tam suit with prejudice. The Seventh Circuit's decision is particularly notable not only because it overturns one of only two instances where a court has denied the Government's motion to dismiss under § 3730(c)(2)(A), but also because it reinforces the Government's significant discretion to dismiss qui tam suits, albeit by a novel path that adds a new standard to the existing circuit split as to what the Government must demonstrate to justify dismissal

and which, in so doing, leaves some questions for future actions.

This article discusses these decisions and provides the following takeaways in the evolving landscape of the Government's dismissal authority:

- The Seventh Circuit's *UCB* decision adds a third approach to the existing circuit split headlined by the D.C. Circuit and Ninth Circuit on how courts should assess DOJ's statutory right to dismiss qui tam cases.
- *UCB* is favorable for defendants in that the Seventh Circuit agreed with the D.C. Circuit that the Government should have a nearly unassailable right to dismiss qui tam cases brought in the Government's name by relators.
- The Seventh Circuit complicated the Government's path to seek dismissal by requiring it to first intervene in the case, adding an administrative burden and requiring good cause for intervention when the Government seeks to dismiss after initially declining to intervene.
- Sen. Chuck Grassley (R-Iowa), a vocal opponent of the view that the Government has unfettered dismissal authority, is said to be working on legislation to restrict the Government's right to dismiss qui tam actions, an action that could resolve the growing circuit split without intervention by the Supreme Court.

The Seventh Circuit's Decision in *UCB*—

In *U.S. ex rel. CIMZNHCA, LLC v. UCB, Inc.*, — F.3d —, 2020 WL 4743033 (7th Cir. Aug. 17, 2020), the relator's complaint alleged that several pharmaceutical companies paid physicians illegal kickbacks for prescribing or recommending Cimzia, a drug intended to treat Crohn's disease, to patients who received benefits under federal healthcare programs. The Government, exercising its authority under § 3730(c)(2)(A), moved to dismiss the suit. The Government asserted that the relator's claims were insufficient to justify the

cost of investigation and prosecution, and that the case ran contrary to the public interest in that pharmaceutical companies' provision of educational and administrative support services to providers served a public interest.

The U.S. District Court for the Northern District of Illinois, however, denied the Government's motion to dismiss, purportedly by adopting parts of the Ninth Circuit's "rational relationship" test for dismissal under the FCA, requiring the Government to show (1) a valid governmental purpose and (2) a rational relationship between the Government's dismissal and that purpose. Applying the "rational relationship" test, the district court deemed the Government's evaluation of the claims to have been insufficient and its public interest arguments hollow, and concluded that the Government's dismissal decisions were "arbitrary and capricious" and "not rationally related to a valid governmental purpose." The Government promptly appealed the court's order.

On appeal, the Seventh Circuit addressed two central questions: first, whether it had jurisdiction to consider the district court's denial of the Government's motion to dismiss the *qui tam* suit under § 3730(c)(2)(A), and second, on the merits, what standard of review applies to such a motion. On the jurisdictional question, the Seventh Circuit held that it had jurisdiction, albeit based on an argument not briefed by the parties. The Court treated the Government's motion to dismiss as *a motion to intervene* under § 3730(c)(3) and then to dismiss under § 3730(c)(2)(A) "because intervention was in substance what the government sought and in form what the False Claims Act requires." Accordingly, the district court's denial of "what amounted to" a motion to intervene was appealable.

With respect to the merits, the parties' arguments concentrated on the application of two distinct standards: The D.C. Circuit's standard under *Swift v. U.S.*, 318 F.3d 250 (D.C. Cir. 2003); 45 GC ¶ 93, which recognizes the Government as possessing "unfettered" discretion to dismiss; and the Ninth Circuit's standard under *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), which requires that the Government identify a "valid government purpose" and show "a rational relation between dismissal and accomplishment of the purpose." The Seventh Circuit declined to apply either standard, eschewing the parties' framing of the issue—"We view the choice between the compet-

ing standards as a false one, based on a misunderstanding of the government's rights and obligations under the False Claims Act"—and articulated a new approach.

The Seventh Circuit's novel course was based on its treatment of the Government's motion as one to intervene. It held that, for the Government, as a party to the suit, Fed. R. Civ. P. 41(a)(1)(A)(i) supplied the appropriate standard for such a motion, namely that a "plaintiff may dismiss an action" by serving notice before a defendant files an answer or a motion for summary judgment. The court noted that the right to dismiss is generally "absolute," "subject to any applicable ... federal statute." The applicable statute, the FCA, provides that the Government may dismiss the action without the relator's consent if the relator receives notice and opportunity to be heard. § 3730(c)(2)(A). Therefore, the relator in *UCB*, having received notice and taken its opportunity to be heard, had been afforded the procedural protections to which it was entitled. The Seventh Circuit explained that while certain circumstances—when executive actions "shock the conscience," or "offend ... hardened sensibilities" and thereby violate a party's constitutional rights—would preclude the Government's non-enforcement decision, those concerns were not at issue and opined that the district court should not otherwise second guess the Government's facially valid reasoning:

Wherever the limits of the government's power lie, this case is not close to them. At bottom the district court faulted the government for having failed to make a particularized dollar-figure estimate of the potential costs and benefits of CIMZNHCA's lawsuit, as opposed to the more general review of the Venari companies' activities undertaken and described by the government. No constitutional or statutory directive imposes such a requirement. None is found in the False Claims Act. The government is not required to justify its litigation decisions in this way, as though it had to show "reasoned decisionmaking" as a matter of administrative law.

In a concurrence, Judge Scudder agreed with the majority's analysis and conclusion, but stressed the court should have resolved the case without deciding whether § 3730(c)(2)(A) conferred upon the Government the unfettered discretion to dismiss a *qui tam* action or if the Government's dismissal decision is subject to rational basis review. Because the Govern-

ment's dismissal request in *UCB* "easily satisfied rational basis review," the district court erred in holding otherwise, and the circumstances did not necessitate the majority's "sophisticated discussion of whether principles of constitutional avoidance should play any role in a question of statutory interpretation under the False Claims Act."

In sum, while rejecting the existing tests, the Seventh Circuit espoused a standard that is "much nearer to *Swift* than to *Sequoia*" on the merits.

The Ninth Circuit's Decision in *Academy Mortgage*—Only two weeks before, the Ninth Circuit reviewed the only other lower court denial of a Government motion to dismiss brought pursuant to its § 3730(c)(2)(A) authority. In *U.S. v. Academy Mort. Corp.*, 968 F.3d 996 (9th Cir. 2020), the Government appealed the U.S. District Court for the District of Northern California's denial of its motion to dismiss, arguing that a denial of a motion to dismiss brought pursuant to the Government's powers to dismiss under the FCA was appealable under the collateral estoppel doctrine. The collateral estoppel doctrine permits appeals of prejudgment decisions when they are "collateral" to the merits of the action and "too important" to be denied immediate appellate review. The Ninth Circuit, however, disagreed, rejecting the Government's arguments as not properly subject to the collateral estoppel doctrine, and dismissing the appeal for lack of jurisdiction. In so doing, the Ninth Circuit was reticent to treat § 3730(c)(2)(A) "as tantamount to a grant of immunity" for the Government to dismiss non-intervened qui tam suits brought by relators, and noted that the Government's concerns should be "substantially diminished by the extraordinarily low likelihood of an erroneous denial" under § 3730(c)(2)(A).

However, the Ninth Circuit did leave the Government with options in the event of a future denial of a § 3730(c)(2)(A) motion. The Ninth Circuit suggested that (1) the Government could ask the district court to certify an interlocutory appeal under 28 USCA § 1292(b), which "allows for appeals of orders that involve a controlling question of law as to which there is substantial ground for difference of opinion, when an immediate appeal may materially advance the ultimate termination of the litigation[,] or (2) in "extreme" cases, such as where classified information may be disclosed, the Government could seek a writ of mandamus. Ultimately, while the Ninth Circuit determined that it did not have jurisdiction to hear

this specific appeal, it did not foreclose the opportunity for the Government to file appeals of denials of motions to dismiss under 31 USCA § 3730(c)(2)(A) in the future.

Congressional Interest in the Government's Dismissal Authority—In addition to the now growing circuit split, the Government's § 3730(c)(2)(A) dismissal authority has also garnered congressional interest in recent months—reigniting an inquiry from September 2019 as to DOJ's implementation of the January 2018 "Granston" memo pertaining to the Government's evaluation for recommendations of dismissal. In a letter dated May 4, 2020, Sen. Chuck Grassley wrote to Attorney General William Barr that he "vehemently disagreed" with the DOJ's "reading of the law" of the FCA to the extent that the Government argues that its dismissal authority under the statute is an "unreviewable exercise of prosecutorial authority." Instead, Grassley argued that the Government's position would have a "chilling effect" on whistleblowers "that will ultimately end up costing the taxpayers a lot more."

Following his letter, during a speech from the Senate floor on July 30, 2020, Grassley confirmed his belief that whistleblowers and the FCA are more important than ever during the COVID-19 pandemic. Grassley also confirmed that he is preparing draft legislation to strengthen protections for whistleblowers and noted that it is "especially ironic" that the Government has sought dismissal of qui tam lawsuits "without stating its reasons." According to Grassley, the proposed legislation will require the Government to explain its reasons for seeking a dismissal under the FCA and will resolve confusion created by the courts.

How Will the Government Move Forward from Here?—While both *UCB* and *Academy Mortgage* are significant decisions, that the Seventh Circuit reached the merits in *UCB* concerning the Government's dismissal authority under § 3730(c)(2)(A) will likely make it the more impactful. As only the third circuit to formally resolve such a case, the Seventh Circuit's conclusion that the Government's discretion to dismiss a qui tam is nearly absolute closely aligns with the D.C. Circuit's "unfettered discretion" holding in *Swift*. With the exception of those within the Ninth Circuit, district courts across the country will now have this added precedent to help them determine how much deference to afford the Government's stated reasons for dismissal. *UCB*'s

recognition that it is the Government who is the real party in interest in an FCA suit should weigh heavily in considering the objections of a relator, who is alleging fraud on behalf of the Government that has now formally declared it does not wish for those allegations to be pursued further.

The Seventh Circuit’s direction that the Government’s motion to dismiss be prefaced by a motion to intervene, however, leaves open some potential headaches, not the least of which is that an intervention after an initial declination requires the Government to show “good cause.” 31 USCA § 3730(c)(3). In *UCB*, the Government had not yet made its required intervention decision and thus could intervene as a matter of right. But in other cases, the Government may have already elected to decline to intervene before coming to a determination as to whether it would move for dismissal. Indeed, the Government declines to intervene in the majority of qui tam actions. Presumably, the same reasons that would support the Government’s motion to dismiss would be sufficient “good cause” for a post-declination intervention. The Ninth Circuit suggested as much in *Academy Mortgage*, noting that the Government could likely show good cause for intervening under § 3730(c)(3) post-declination if it was concerned that the continuation of the case would lead to bad precedent, one of the factors that the Government sometimes relies on in § 3730(c)(2)(A) dismissal motions. That said, a relator would have more of a leg to stand on in seeking closer examination of a motion to dismiss filed by the Government, say, on the eve of trial. But that issue is left for another case on another day.

For its part, the Ninth Circuit’s ruling in *Academy Mortgage* will certainly be pointed to by relators facing § 3730(c)(2)(A) dismissals to undercut the Government’s bases for dismissal absent a clear showing that it had conducted a “full investigation” as contemplated, though not articulated, by the district court. Though it declined to reach the merits, the Ninth Circuit’s opinion viewed the Government as more of a non-party than the real party in interest, a stark contrast to the view espoused by the Seventh

Circuit in *UCB*. And while the Court suggested that it might have entertained the Government’s appeal had it proceeded differently, its refusal to do so in this instance leaves the Government to determine its next move in a live case that it does not want to proceed.

As is clear from the recent decisions of the Seventh and Ninth Circuits, as well as Grassley’s statements, the reach and limitations of the Government’s § 3730(c)(2)(A) dismissal authority are currently a source of potential disagreement not only among the courts, but within the Government itself. The Seventh Circuit’s observation that “[i]f Congress wishes to require some extra-constitutional minimum of fairness, reasonableness, or adequacy of the Government’s decision under § 3730(c)(2)(A), it will need to say so,” invites such congressional action. While the Seventh Circuit’s decision bolsters the Government’s discretion to dismiss qui tam suits, the Government must nevertheless proceed with consideration as to how it supports its dismissal decisions. Ultimately, *UCB* and *Academy Mortgage* confirm that the circuit split as to what the Government must show to warrant dismissal under § 3730(c)(2)(a) remains an important aspect of FCA precedent. Whether those decisions may deter or embolden the Government in its exercise of its dismissal authority seems unlikely given the low number of cases that the Government has sought to dismiss even since the release of the January 2018 Granston memo describing the factors that the Government typically considers in making this determination. Congressional action as suggested by Grassley’s letter, however, would be much more likely to have such an impact.



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