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'Mixed Messages': DOJ Efforts to Dismiss Qui Tam Actions

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The False Claims Act (FCA), 31 U.S.C. §3729 *et seq*., was enacted in 1863 to punish fraud perpetrated against the government by Civil War profiteers. Since its enactment, Congress has amended the FCA to strike a balance between the FCA's dual purposes of rooting out fraud against the government and encouraging private individuals aware of such fraud to bring it to the government's attention. From 1986, the government has recovered over $59 billion in FCA settlements and judgments. *See,* U.S. Department of Justice, Fraud Statistics Overview (Dec. 21, 2018), (hereinafter DOJ Fraud Statistics 2018).

Background of *Qui Tam* Actions

The FCA provides for commencement of an action in either of two ways. First, the DOJ may bring a civil action for violation of the FCA. 31 USCS §3730(a). Second, a private person may bring a civil action on behalf of the United States for violation of the FCA. 31 USCS §3730(b). The second type of civil action, brought by the relator, is known as a *qui tam* action.

Qui tam actions brought by relators account for the vast majority of FCA actions. Of the $59 billion recovered by the government since 1986, $42.5 billion of that was recovered in *qui tam* actions. *See,* DOJ Fraud Statistics 2018. The number of *qui tam* actions filed annually has increased 20 fold since the 1986 amendment that increased awards to relators. *See,* DOJ Fraud Statistics 2018.

Guidance from the Granston Memo

Despite the historical trend of reduced government involvement in *qui tam* actions, the government is sending "mixed messages" regarding its view of FCA relators. On Jan. 10, 2018, the DOJ issued a memo "intended to provide a general framework for evaluating when to seek dismissal under section 3730(c)(2)(A) and to ensure a consistent approach to this issue across the Department." Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, to Attorneys, Commercial Litigation Branch, Fraud Section and Assistant U.S. Attorneys Handling False Claims Act Cases (Jan. 10, 2018) (hereinafter Granston Memo).

The Granston Memo lists seven non-exhaustive factors that the DOJ can rely on for dismissal. According to the Granston Memo, the DOJ may seek to dismiss: 1) a *qui tam* complaint that is facially

lacking in merit; 2) a *qui tam* action that duplicates a pre-existing government investigation; 3) a *qui tam* action that threatens to interfere with an agency's policies or administration of its programs; 4) when necessary to protect the DOJ's "litigation prerogatives"; 5) when necessary to safeguard classified information such as an action involving an intelligence agency or military procurement contract; 6) when the government's expected costs are likely to exceed any expected gains; and 7) when problems with the relator's action frustrate the government efforts to conduct a proper investigation. *See,* Granston Memo. Following the incorporation of the Granston Memo in the DOJ Justice Manual at Section 4-4.111, the DOJ pushed to increase dismissals pursuant to section 3730(c)(2)(A). While these factors are not surprising, the Granston Memo formally announced the start of a more restrictive approach to *qui tam* actions.

Dispute over the Statute of Limitations

Although signs point toward increased efforts to restrict *qui tam* actions, the United States supported an expansive view of the statute of limitations for relators in *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019). *Cochise Consultancy* addressed the limitations period in *qui tam* actions in which the government declined to intervene. One issue was whether the relator constituted "the official of the United States" whose knowledge triggers the Section 3731(b)(2) three year limitations period. The three year limitations period begins to run after "the date when facts material to the right of action are known or reasonably should have been known by the official of the United States." 31 USCS §3730(b)(2).

The relator argued that the three year limitations period applied in non-intervened *qui tam* actions and that the "official of the United States" in such cases was not the relator. Cochise Consultancy argued that Section 3731(b)(2) only applied in *qui tam* actions where the government intervened and, thus, the relator did not benefit from the extended limitations period. The government supported the relator's position citing the appellate opinion in the matter. "[B]oth paragraphs (1) and (2) in 3731(b) apply to a civil action under section 3730 … the plain meaning of that phrase encompasses an FCA suit like this one because a non-intervened case is a type of civil action under section 3730." Brief for the United States as Amicus Curiae Supporting Respondent at 6-7, *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1509 (2019) (internal citations and quotations omitted).

Justice Thomas, writing for a unanimous Court in *Cochise Consultancy*, adopted the position taken by the government. He cited the plain language of the statute observing that "[h]ere, either a relator-initiated, non-intervened suit is a 'civil action under section 3730' — and thus subject to the limitations periods in subsections (b)(1) and (b)(2) — or it is not. It is such an action. Whatever the default tolling rule might be, the clear text of the statute controls this case." *Cochise Consultancy, Inc.*, 139 S. Ct. at 1512. Thus, the interpretation adopted by the Supreme Court, and urged for by the DOJ, increases the time in which relators can file *qui tam* actions.

DOJ's Authority for Unilateral Dismissal of *Qui Tam* Actions

Although the DOJ supported the relator's expansive statute of limitations arguments in *Cochise Consultancy*, that trend is not continuing. The FCA provides that "[t]he Government may dismiss the [*qui tam* 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." 31 USCS §3730. Recently, the DOJ argued, and lost in the Federal District Court, that its authority to dismiss qui tam actions in which it has not intervened is beyond judicial scrutiny. *See, United States v. UCB, Inc.*, 2019 U.S. Dist. LEXIS 64267, at 6 (S.D. Ill. Apr. 15, 2019). Currently, the DOJ's power to unilaterally dismiss *qui tam* actions is the subject of a significant Circuit split with several Courts of Appeals interpreting the "hearing" requirement quite differently.

The U.S. Court of Appeals for the District of Columbia views section 3730(c)(2)(A) as "giv[ing] the government an unfettered right to dismiss an action" and rendering the government's decision to dismiss "unreviewable." *Swift v. United States*, 355 U.S. App. D.C. 59, 318 F.3d 250, 252 (2003). The court concluded 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." *Id*. at 253. The Fifth Circuit Court of Appeals and the Eighth Circuit Court of Appeals have made similar holdings regarding the government's expansive discretion to dismiss *qui tam* actions. *See, Riley v. St. Luke's Episcopal Hospital*, 252 F.3d 749, 753 (5th Cir. 2001) (the government retains the unilateral power to dismiss an action notwithstanding the objections of the person initiating the action); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998) (the real party in interest in a *qui tam* action is always the United States and the United States had absolute power to proceed with, settle, or dismiss the action).

The Ninth Circuit Court of Appeals in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139 (9th Cir. 1998) concluded differently. In *Sequoia Orange Co.*, the Ninth Circuit adopted the following two-step analysis for dismissal: "(1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose." *Id*. at 1141. The Tenth Circuit Court of Appeals applied the same two-step analysis as explained in *Ridenour v. Kaiser-Hill Co., Ltd. Liability Co*., 397 F.3d 925, 936 (10th Cir. 2005).

Questioning the Scope of the DOJ's Authority to Dismiss

As noted above, a recent case questioning the government's authority to dismiss comes from the U.S. District Court for the Southern District of Illinois. In *United States of America ex rel. Cimznhca, LLC v. UCB, Inc., et al*, the government sought dismissal of a *qui tam* action citing the first and sixth factors from the Granston Memo. *United States v. UCB, Inc.*, 2019 U.S. Dist. LEXIS 64267, at 6 (S.D. Ill. Apr. 15, 2019). Applying the standard set forth in *United States ex rel. Sequoia Orange Co.*, Judge Yandle denied the government's motion citing the government's failure to "review any additional materials from the relator relevant to this case" outside of the Complaint and disclosure materials attached to the complaint. *Id*. at 10. Despite citing the sixth factor in the Granston Memo — that the government's expected costs are likely to exceed any recovery — it "did not assess or analyze the costs it would likely incur versus the potential recovery that would flow to the Government if this case were to proceed." *Id*. The court determined that this "falls short of a minimally adequate investigation to support the claimed governmental purpose." *Id*.

The court explicitly rejected the standard set forth by the D.C. Circuit Court of Appeals in *Swift* reasoning that the *Swift* standard "renders the hearing specifically provided for in the statute superfluous and belies the role of the judiciary in ensuring constitutional checks and balances." *Id.* at 7. The court reasoned that Congress did not intend for courts to simply provide a venue while the relator pleads its case to the government. *Id*. at 7-8.

The court's order in *UCB* denying the government's motion to dismiss was entered on April 15, 2019, and, on June 7, 2019, the court denied the government's subsequent "motion to alter judgment." On July 5, 2019, the government filed an appeal to the Seventh Circuit Court of Appeals. Amended Notice of Appeal, *United States v. UCB, Inc.*, No. 17-CV-765-SMY-MAB, 2019 U.S. Dist. LEXIS 64267 (S.D. Ill. Apr. 15, 2019).

Analysis

The *UCB* decision will be watched for two key reasons. First, if the Seventh Circuit upholds the decision in *UCB,* that decision will deepen the existing circuit split on the standard of review court's apply when evaluating a motion to dismiss a *qui tam* action pursuant to section 3730(c)(2)(A). Second, it reflects that the courts will continue looking to the plain language of the statute when interpreting the

FCA. Judge Yandle's analysis in *UCB* closely tracks Justice Thomas' analysis in *Cochise Consulting*. Both judges rely on the "plain language" of the statute to avoid results that would render provisions of the FCA superfluous.

The government is proceeding forward with its efforts to dismiss *qui tam* actions in which it has not intervened. The courts, at least in some circuits, have found that naming a Granston Memo factor as a justification of dismissal, without a fact-based inquiry and report, is not enough. Recently, a California federal court requested additional briefing from the DOJ on the cost-benefit analysis it performed in deciding to seek dismissal of a *qui tam* action. *See, United States of America et al v. Gilead Science, Inc. et al*, No. C-11-00941 (N.D. Cal. Aug. 1, 2019). Judge Chen questioned whether the DOJ's cost-benefit analysis was sufficient so as not to be arbitrary. In other words, there are no "automatic dismissals" and the government must pursue an adequate investigation of the *qui tam* action that explains the valid government purpose for dismissal. While the Granston Memo suggests that the peak of intervention in *qui tam* actions has passed, the focus is now on how sweeping the DOJ's authority to dismiss will be.

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