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High Court Inaction Paves Way For Increasing FCA Dismissals

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On Monday, the U.S. Supreme Court denied certiorari in U.S. v. JPMorgan Chase Bank NA, declining to resolve the circuit split on the U.S. Department of Justice's authority to dismiss qui tams — False Claims Act cases filed by whistleblowers. By doing so, the Supreme Court has allowed important precedent regarding the scope of judicial review over DOJ affirmative motions to dismiss to stand, which should pave the way for the DOJ to continue securing qui tam dismissals without having to withstand probing judicial review in most circuits.

The False Claims Act and the DOJ's Dismissal Authority

Over the last decade, the FCA has shone as the federal government's primary civil litigation tool against fraud, yielding $38 billion in total government recoveries. Relators have been leading the charge during that period, filing more than 7,000 actions under the FCA compared to just under 1,500 suits brought by the federal government.

While the majority of funds the DOJ recovers come from cases in which they intervene, the government also recovers when relators succeed with a declined case. On the other side of the coin, the DOJ bears certain burdens related to FCA suits — regardless of its intervention decision.

Even if the DOJ declines a case, the federal government remains the real party in interest. As such, it must monitor the case and, when necessary, file statements of interest or defend certain positions, for fear that a relator-led case could create precedent undermining the

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DOJ-supported cases down the road.

The DOJ may also have a role in coordinating discovery from relevant federal agencies. The government could also be on the hook for certain defense costs — in particular, government contractors who successfully fight off a relator's meritless case may seek 80% of litigation costs depending on the type of contract under which the action arose.

Potentially recognizing the risks and burdens inherent in allowing an individual to step into the shoes of the federal government, the FCA contains a provision allowing the DOJ to reconsider its intervention decision, settle the case or even affirmatively terminate a relator's case.

In relevant part, Title 31, Section 3730(c)(2)(A) of the U.S. Code provides:

The [g]overnment 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.

The DOJ has historically used its (c)(2)(A) dismissal authority in only the most rare of occasions. As such, there was very little opportunity for litigation that could flesh out the contours and boundaries of the authority.

For example, what, if anything, does the DOJ have to show for a court to grant its dismissal motion? Is there a scenario in which a relator could successfully defeat a DOJ (c)(2)(A) motion?

Indeed, while circuit courts had looked at these issues, the fact that they came to very different conclusions was rarely if ever discussed because the situation presented itself so infrequently.

The January 2018 release of the Granston memo not only brought subsection (c)(2)(A) to the forefront of FCA practitioners' brains, it also opened the door for additional litigation regarding the appropriate amount of deference courts should give the DOJ over qui tam actions.

The Granston Memo

The 2018 Granston memo generated significant interest in the DOJ's dismissal authority under 31 U.S.C. Section 3730(c)(2)(A). Initially an internal memo leaked after the DOJ affirmatively denied rumors of a policy change, it was ultimately incorporated into the Justice Manual.[1]

The memo directs that, "[w]hen evaluating a recommendation to decline intervention in a qui tam action, attorneys should also consider whether the government's interests are served, in addition, by seeking dismissal pursuant to 31 U.S.C. Section 3730(c)(2)(A)," calling the dismissal authority "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent."

To aid in that process, the memo includes a general framework for evaluating the propriety of such an affirmative dismissal, focusing on seven key but nonexhaustive issues. In doing so, the memo gifted defendants a road map to try to persuade the DOJ to seek dismissals.

FCA practitioners on both sides of the "v" generally agree that meritless qui tam actions should not be allowed to consume precious resources. Relators counsel in particular have applauded the theoretical possibility that subsection (c)(2)(A) could be used to dismiss meritless actions that could have become vehicles for harmful precedent or otherwise detract government attention from their own cases.

However, when the rubber hit the road and the DOJ began exercising its (c)(2)(A) powers, there was great debate as to whether it was using that power appropriately, and the level of deference a DOJ dismissal decision deserved.

The DOJ's new emphasis on its (c)(2)(A) authority also piqued the interest of staunch FCA champion Sen. Chuck Grassley, R-Iowa. He wrote U.S. Attorney General William Barr in September 2019 expressing concern that the Granston memo was undermining the FCA's purpose and questioning whether some of the government's motions to dismiss were inappropriately based on wasting government resources (not merits).

Barr responded on Dec. 19, 2019 with a comprehensive summary of the DOJ's use of its (c)(2)(A) authority: Since essentially issuing the Granston memo, the DOJ had filed 45 motions to dismiss, 26 of which had been ruled on with all but one resulting in dismissal.

Notably, the response neglected to mention how many relators voluntarily dropped their qui tams in response to a threatened (c)(2)(A) motion in the Granston memo era.

Scope of Judicial Review and Schneider

The uptick in motions to dismiss under Section 3730(c)(2)(A) has yielded a similar increase in relators interested in challenging the DOJ's dismissal authority and thrust into the limelight a long-overlooked circuit split.

On one side of the split, in Sequoia Orange Co. v. Baird-Neece Packing Corp., the U.S. Court of Appeals for the Ninth Circuit has used a "rational relation" test, requiring the DOJ to identify a valid government purpose for dismissal and show a rational relationship between the accomplishment of that purpose and dismissal.[2]

Alternatively, the DOJ has discretion under the U.S. Court of Appeals for the D.C. Circuit's "unfettered right to dismiss" standard, articulated in Swift v. United States.[3] Of course, it is the DOJ's position that the unfettered discretion standard is the appropriate standard, whereas relators are most frequently inclined to support the more searching rational relation test.

In deciding the recent wave of (c)(2)(A) motions, courts have either applied the unfettered right to dismiss standard or side-stepped the issue by noting the DOJ met either standard.

For example, the DOJ succeeded with 10 of its 11 attempts to dismiss the FCA cases that shell company whistleblowers brought against drug manufacturers with backing from the National Healthcare Analysis Group. In all cases, the DOJ argued the allegations of substantially similar conduct were meritless, burdensome and contradicted U.S. Health and Human Services Office of Inspector General guidance. Nine courts found the DOJ's argument sufficient.

However, in U.S. v. UCB Inc., a court in the Southern District of Illinois rejected the government's motion, finding that the DOJ failed to show that it adequately investigated and performed a sufficient cost-benefit analysis.[4] Rejecting the deferential standard articulated by the D.C. Circuit in Swift v. U.S., the court noted unfettered discretion "renders the hearing specifically provided for in the statute superfluous and belies the role of the judiciary in ensuring constitutional checks and balances."

Unsurprisingly, the DOJ appealed to the U.S. Court of Appeals for the Seventh Circuit, and arguments were heard on Jan. 23.

In the interim, the DOJ remained largely successful seeking (c)(2)(A) dismissals. All in, almost 30 courts have ruled on DOJ dismissal petitions since the Granston memo became public, many of which have been forced to confront conflicting positions on the appropriate level of deference to the DOJ's dismissal authority.

Indeed, by most accounts, the increased attention to this issue and the divergent positions seemed to many an appropriate backdrop for Supreme Court review.

On Nov. 20, 2019, petitioner Laurence Schneider presented such an opportunity by filing a petition for certiorari review of the D.C. Circuit's affirmation of the DOJ's power to dismiss his qui tam action against several banks.[5]

The underlying qui tam alleged the banks submitted false certifications of compliance with the 2012 national mortgage settlement. The district court had granted the government's motion to dismiss under Section 3730(c)(2)(A), finding the government has unfettered discretion consistent with Swift, and it "ha[d] heard from Relator on the issue."[6] The D.C. Circuit then affirmed, holding "[t]he merits of the parties' positions are so clear as to warrant summary action."[7]

In his petition for certiorari, Schneider urged the Supreme Court to adopt the stricter standard, arguing the unfettered right to dismiss standard reduces Section 3730(c)(2)(A)'s hearing requirement to a mere formality whereas the rational relation test embodies relators' significant enforcement role. Meanwhile, the DOJ argued "the slight differences between the standards applied by various courts of appeals should very rarely if ever be outcome-determinative."

Yet when given the opportunity to confirm or reject the D.C. Circuit's adoption of the Swift standard, the Supreme Court declined. On April 6, the Supreme Court elected to deny certiorari, thus leaving the D.C. Circuit's decision confirming Swift as controlling circuit precedent.

Where Are We After Schneider?

Because there are so many potentially relevant factors, it is often hard to take firm lessons from cert. denials. For example, while it is possible that the court rejected Schneider because there was a sense that the DOJ's decision would have withstood scrutiny under either standard, it is also possible that there were other flaws with the case, or a sense that there just was not room for it in an already packed docket.

Here, however, the decision to deny cert. does have implications for FCA litigants because it leaves in place a key reaffirmation supporting the DOJ's almost absolute discretion to dismiss qui tams.

Decisions like Schneider further clear the path for (c)(2)(A) dismissals by both adding to the bulk of precedent the DOJ can cite when defending against relator challenges and serving as a deterrent for such challenges.

On the latter point, because the FCA requires a defendant to pay a successful relator's reasonable legal fees, many relators are represented by counsel working on contingency. The clearer it becomes that a DOJ dismissal is a fait accompli, the less likely it is that relator's counsel will want to burn resources challenging it — they would rather move on to the next matter.

In turn, the less likely it is that the DOJ will have to ward off relator challenges to its dismissal authority, the less laborious the process appears, and the more likely it may be for the DOJ to pull the (c)(2)(A) trigger.

So, where does this leave FCA defendants? Regardless of the standard used, the DOJ's success rate on dismissal motions has been phenomenal. As such, it has become increasingly clear that there is much to be gained with expanding the traditional declination presentation to the DOJ to dismissal arguments tailored to the Granston factors. After all, convincing DOJ to seek dismissal largely equates actual dismissal.

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[1] See Justice Manual § 4-4.111.

[2] See Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998), cert. denied, 525 U.S. 1067 (1999).

[3] See Swift v. United States, 318 F.3d 250 (D.C. Cir. 2003), cert. denied, 539 U.S. 944 (2003).

[4] See United States ex rel. CIMZNHCA v. UCB Inc., No. 3:17-cv-00765 (S.D. Ill.).

[5] See United States, ex rel. Laurence Schneider, v. JPMorgan Chase Bank N.A., No. CV 14-1047 (RMC), 2019 WL 1060876 (D.D.C. Mar. 6, 2019).

[6] United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A., No. CV 14-1047 (RMC), 2019 WL 1060876, at *3 (D.D.C. Mar. 6, 2019).

[7] United States ex rel. Schneider, No. 19-7025, 2019 WL 4566462, at *1 (D.C. Cir. Aug. 22, 2019).