Dismissing FCA Cases Over Relators' Objections

Law360, New York (May 07, 2012, 1:36 PM ET) -- The recent decision of the Tenth Circuit Court of Appeals in United States ex rel. Wickliffe v. EMC Corporation (10th Cir. April 4, 2012) highlights a tool rarely used by the government in qui tam actions brought under the federal False Claims Act — the government's dismissal of an action under 31 U.S.C. § 3730(c)(2)(A) over a relator's objection. A review of the government's approach in EMC Corporation indicates that defense counsel should, where possible, demonstrate to the government how allowing a qui tam action to proceed will harm its policy interests or reduce its recoveries in other situations, and argue that dismissal is therefore appropriate.

Background

Generally speaking, the qui tam provisions of the False Claims Act, 31 U.S.C. § 3729 et seq., permit an individual (known as a "relator") to bring a civil action on behalf of the government against a person who knowingly presents a false or fraudulent claim to the government for payment or approval.[1] Section 3730(c)(2)(A) provides that "[t]he Government 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." Because the relator is bringing the claim on behalf of the government (who remains the real party in interest), the government retains the right to seek dismissal of the action even if it chooses not to intervene in the action.

The government rarely invokes § 3730(c)(2)(A) to dismiss an action over the objection of a relator, and there are few circuit court cases that substantively consider the provision. The reason for the government's reluctance is straightforward: The government need only expend relatively minimal resources to monitor a qui tam action, and if the relator is successful then the government will be able to share in the recovery (albeit with a greater share of the recovery going to the relator).[2]

For example, in fiscal year 2011, the government recovered $86,453,147 in settlements and judgments in qui tam actions where it declined to intervene.[3] Given the potential recoveries available, the government has an obvious incentive to either intervene in the action or, alternatively, decline to intervene but allow the relator to proceed with the case.

There are, however, instances in which the government utilizes this mechanism. As discussed below, this generally arises when dismissal achieves other governmental strategic purposes, such as effectuating a settlement with a defendant corporation that has already faced FCA claims (as in EMC Corporation) or when it is in accordance with a larger governmental policy change (as in the Sequoia case discussed below). The government rarely moves to dismiss FCA claims on the merits, even when it indicates in discussions with defense counsel that it does not believe the claims have much merit.

As a practitioner, it is important to be aware of this statutory tool and attempt to convince the government to utilize it. The government will often provide a defendant the opportunity to respond to a relator's allegations in advance of deciding whether to intervene. In the context of such advocacy, EMC Corporation demonstrates that defense counsel should attempt to identify how a dismissal would advance the government's interests, as the standard defense arguments of innocence, burden, defense costs, and costs to affected governmental agency or program generally fall on deaf ears. In such efforts, EMC Corporation and a knowledge of the existing case law regarding § 3730(c)(2)(A) will be instructive.

Standards of Review for § 3730(c)(2)(A) Motions to Dismiss — United States ex rel. Wickliffe v. EMC Corporation

In United States ex rel. Wickliffe v. EMC Corporation, the Tenth Circuit addressed the standard of review to be applied to a government's decision to dismiss a qui tam action over the relator's objection. There, the relator alleged that EMC knowingly sold defective computers to government agencies and fraudulently concealed information regarding the defect.[4]

These same allegations had, however, previously been brought to the government's attention by a different relator, following which the government investigated EMC and entered into a settlement with the company and that relator. As a result — and as acknowledged by relator Wickliffe's counsel — the government would not be able to recover additional damages from EMC through the prosecution of a second FCA action.[6] The government therefore acted both because there was no potential for additional recovery and in order to effectuate the settlement it had negotiated.

The district court dismissed Wickliffe's action — over his objections — on two separate grounds. First, it ruled that Wickliffe was not the "first to file," and that his claim was therefore jurisdictionally barred by § 3730(b)(5) of the FCA. That section — which is also rarely invoked — provides that when "a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action."

On appeal, the parties agreed that the bar should not apply unless the allegations in the previously filed case satisfied the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), but disagreed as to whether the prior relator's complaint did so. Although the Tenth Circuit was dubious that the heightened Rule 9(b) pleading standard should be considered in this analysis, the Tenth Circuit proceeded "without deciding the complicated first-impression issue of the applicability of Rule 9(b) to § 3730(b)(5)"[6] because the district court had also granted dismissal under § 3730(c)(2)(A).

Turning to the district court's allowance of the government's motion to dismiss under § 3730(c)(2)(A), the Tenth Circuit noted that it had not previously determined the level of scrutiny to be applied to such motions brought by the government before the defendant has been served.[7] To evaluate the proper standard, the Tenth Circuit reviewed the standards previously applied by the Ninth and D.C. Circuits.

In United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998), the Ninth Circuit held that the standard for motions to dismiss under § 3730(c)(2)(A) before the defendant was served required that the government demonstrate the "(1) identification of a valid government purpose [for dismissal]; and (2) a rational relation between dismissal and accomplishment of the purpose," which was not "fraudulent, arbitrary and capricious, or illegal."[8] The Ninth Circuit held that the "government's decision to end [a war in the citrus industry arising out of pricing regulations] on all fronts, including dismissal of the qui tam claims, was rationally related to a legitimate governmental purpose."[9]

In Swift v. United States, 318 F.3d 250 (D.C. Cir. 2003), the D.C. Circuit declined to adopt the Ninth Circuit's analysis in Sequoia and instead applied a more deferential standard. There, a relator alleged fraud concerning time sheets and leave slips in the U.S. Department of Justice's Office of Legal Counsel. Inasmuch as the total alleged damages were a mere $6,169.20, the government asserted that "the amount of money involved did not justify the expense of litigation even if the allegations could be proven."[10]

Analogizing the decision to seek dismissal to an exercise of prosecutorial discretion, the D.C. Circuit viewed the government's decision as "nearly unreviewable."[11] The court held that under § 3730(c)(2)(A) the government has a virtually "unfettered right to dismiss [the] action" and 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."[12] The D.C. Circuit recently reaffirmed this standard, while also holding that this deference to the government's decision to dismiss neither extends to nor conflicts with the court's statutory power under § 3730(c)(2)(B) to approve FCA settlements.[13]

The Tenth Circuit had previously applied the 9th Circuit's Sequoia standard where the government moved to dismiss under § 3730(c)(2)(A) after the defendant had been served.[14] In EMC Corporation, the court did not find it necessary to decide the issue of whether the Sequoia standard or the more deferential Swift standard applied where the government moves to dismiss before service. Instead, the court held: "We need not resolve this question because even under the greater judicial scrutiny imposed by the Sequoia standard, the government's motion to dismiss passes muster in this case."[15]

Applying Sequoia's "rational relation" standard, the court noted that the government's rationale for dismissing the case was that it became aware of the claims before Wickliffe filed his complaint, and in fact had resolved the same allegations by entering into a settlement agreement with the previous relator.[16] The court found this rationale sufficient, noting that "[t]he government has a valid interest in ending duplicative litigation involving resolved claims." The government met the burden under even the more stringent Sequoia standard.[17]

The other circuits have not yet ruled what standard applies to § 3730(c)(2)(A), and thus this remains an open question in many circuits. The cases discussed above, however, provide guidance to approaches defense counsel may take with regard to this powerful procedural tool.

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