

Court Examines Standard for Approval of Settlement of Qui Tam Over a Relator's Objection

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by Betsy Sellers

The False Claims Act (FCA) allows plaintiffs/relators to bring *qui tam* actions, in which the government may then elect to intervene. The FCA also provides that “[t]he Government may settle a [*qui tam*] action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.” 31 U.S.C. § 3730(c)(2)(B). In *United States ex rel. Shepard v. Tippet*, a federal court in Colorado recently examined the standard for deciding whether a settlement was “fair, adequate, and reasonable” such that it should be approved over the relators’ objections. 2017 U.S. Dist. LEXIS 27083 (D. Colo. Feb. 27, 2017). The Tenth Circuit had not decided the question, and the *Shepard* court noted a split among other courts of appeal that had considered the issue.

In *Shepard*, the relators argued that the standards for approving class action settlements were appropriate in the FCA *qui tam* context. The inquiry, the relators argued, should involve a review of four factors:

(1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable.

Id. at *4 (quoting *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1188 (10th Cir. 2002)).

Citing a Ninth Circuit case addressing dismissal of an FCA case, the Government argued for a much more deferential standard. That standard includes a two-part test: “(1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose.” *Id.* at *3 (quoting *United States ex rel. Sequoia*

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Orange Co. v. Baird-Neece Packing Com., 151 F.3d 1139, 1145 (9th Cir. 1998)).

In reaching its conclusion that the deferential *Sequoia Orange* standard is appropriate, the *Shepard* court considered legislative intent behind 1986 amendments to the FCA that created the current framework for government intervention in *qui tam* actions. Those amendments allowed a relator to remain involved even after government intervention, thus increasing the relator's role. At the same time, though, the amendments gave the government greater control over *qui tam* actions. *Id.* at *4 (collecting cases).

Noting that the government is the real party in interest, the *Shepard* court concluded that the government should have at least as much authority to settle a *qui tam* action as to dismiss it. Moreover, "hamper[ing] the government's ability to settle may run afoul of the separation of powers doctrine." *Id.* Requiring only a rational relation to a valid governmental interest, then, is the proper standard. Finding the government had met that standard in this case, the *Shepard* court approved the settlement notwithstanding the relators' objections.