

SCOTUS Denies Review of Dismissal at DOJ's Request; Circuit Split Remains

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by Chris DeLong

On June 28, 2021, the United States Supreme Court denied review of a Seventh Circuit decision affirming the Department of Justice ("DOJ")-requested dismissal of a False Claims Act ("FCA") suit alleging a drug kickback scheme. *Cimznhca LLC v. United States*, No. 20-1138, 2021 U.S. LEXIS 3404 (June 28, 2021). As a result, the circuit split regarding the standard that applies to a Government's motion to dismiss an FCA action remains unresolved.

In the underlying case, relator Cimznhca, LLC filed an action against four defendants, UCB, Inc. RXC Acquisition Company, Omnicare Inc., and CVS Health Corporation, in July 2017. *United States ex rel. Cimznhca, LLC v. UCB, Inc.*, 970 F.3d 835, 839-40 (7th Cir. 2020). Relator alleged that the defendants were engaged in a kickback scheme by providing physicians with incentives for prescribing a brand-name drug over other competitors. *Id.* The Government declined to intervene in December 2017, and Relator continued to prosecute the case. *Id.* However, the Government moved to dismiss under 31 U.S.C. § 3730(c)(2)(A) in December 2018. *Id.* at 840; see also Granston Memo (Jan. 10, 2018) (encouraging the DOJ to use its power to dismiss relators' claims more often). Relator objected to the dismissal.

The district court held a hearing on the petition and applied the *Sequoia Orange* rational-basis test from the Ninth Circuit. *Id.* Under *Sequoia Orange*, when the government identifies a valid governmental purpose and a relationship between the purpose and dismissal, the court will dismiss unless the Relator can demonstrate that the dismissal is arbitrary and capricious. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998). The district court determined the Government's motion was arbitrary and capricious and denied it. *Cimznhca*, 970 F.3d at 840. The Government appealed the order. *Id.*

The competing dismissal standard is the unfettered-right standard from *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003). Under the *Swift* standard, the Government may dismiss an action without judicial review in virtually all cases. *Id.* at 253. The Tenth

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Circuit has followed the Ninth, adopting the *Sequoia Orange* standard. See, e.g., *Ridenour v. Kaiser-Hill Co., Ltd. Liab. Co.*, 397 F.3d 925 (10th Cir. 2005). The Second and Third Circuits have noted the split but declined to adopt either standard. See, e.g., *Chang v. Children's Advocacy Ctr.*, 938 F.3d 384 (3d Cir. 2019); *United States ex rel. Borzilleri v. Abbvie, Inc.*, 837 F. App'x 813, 816 (2d. Cir. 2020).

In this case, the Seventh Circuit reversed and directed the district court to dismiss. 970 F.3d at 854. The Seventh Circuit declined to decide whether *Sequoia Orange* or *Swift* was the proper standard, but suggested that something closer to *Swift* would apply in almost all cases, excepting, for example, a fraud on the court. *Id.* at 851-52. Relator petitioned for a writ of certiorari, noting the circuit split on the dismissal standard.

With the Supreme Court's denial of Relator's petition for a writ of certiorari, the circuit split remains. Defendants embroiled in FCA cases should thus remain cognizant of the opportunity, under the right circumstances, for an early exit with the support of the DOJ, but note that the applicable standard will vary depending upon the circuit in which the case is filed.