DC Circuit Requires Fairness Hearing Where Relator Objects to False Claims Act Settlement

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On April 20, 2012, the US Court of Appeals for the DC Circuit held that the United States cannot settle a *qui tam* action over a relator's objection without a judicial finding that the proposed settlement is fair, adequate, and reasonable under the circumstances, *United States ex rel. Schweizer v. Océ N.V.*, --- F.3d ---, 2012 WL 1372219, potentially complicating efforts by the government and defendants to resolve cases under the False Claims Act (FCA), 31 U.S.C. § 3729 *et seq.*, especially those with little merit or damage to the government.

Summary of the Decision

In April 2006, Stephanie Schweizer sued her employer, Océ North America, Inc., relying in part on the FCA's *qui tam* provisions. The government declined to intervene but later reached a settlement agreement with Océ and then moved to dismiss the *qui tam* claims. The district court granted the motion over Schweizer's objection after holding a hearing but without making a finding that the settlement agreement was fair, adequate, and reasonable.

The DC Circuit reversed and remanded, holding that the district court erred in not making a fairness determination. As an initial matter, the court rejected Schweizer's contention that the government could move to dismiss only if it had previously intervened in the case. Instead, the court held that intervention is necessary only if the government wishes to "proceed with the action." *Schweizer*, 2012 WL 1372219, at *4-*5. In so holding, the DC Circuit joined several other courts, including two other courts of appeals. *See, e.g., Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 932-35 (10th Cir. 2005); *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 753 n.10 (9th Cir. 1993) (dicta); *U.S. v. Shasta Services, Inc.*, 440 F. Supp. 2d 1108, 1112-13 (E.D. Cal. 2006); *Friedman v. Rite Aid Corp.*, 152 F. Supp. 2d 766, 772 (E.D. Pa. 2001) (dicta).

The crux of the opinion focused on the interplay between two provisions of the FCA. Schweizer argued for the applicability of 31 U.S.C. § 3730(c)(2)(B), which provides that the "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." (emphasis added). The government and the defendant, by contrast, pointed to 31 U.S.C. § 3730(c)(2)(A), which states that the "Government may *dismiss* [a *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." (emphasis added). The DC Circuit had previously held that § 3730(c)(2)(A) gives the government an "unfettered" right to dismiss *qui tam* claims, *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), and that the only function of a hearing under that provision is to give the relator a formal opportunity to convince the government not to end the case.

The *Schweizer* court's reasoning focused on the text of § 3730(c)(2)(B). The court held that the text establishes just two conditions to trigger the requirement of a fairness determination following a hearing: (1) the government and the defendant agree to settle the case; and (2) the relator objects. If both conditions exist, as in the *Schweizer* case, a fairness determination following a hearing is required. The court recognized that under this interpretation, judicial approval is required when the government tries to settle a case over a relator's objection but is not required when the government tries to dismiss a case outright. In the latter situation, when the relator will not receive any compensation, he is nevertheless entitled to *less* protection than when some compensation to the relator may be at issue. But the court concluded that the text of § 3730(c)(2) dictated this reading.

Finally, the court rejected the argument that under its reading of § 3730(c)(2)(B) the FCA would unconstitutionally infringe on the President's obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The court pointed to Federal Rule of Criminal Procedure 48(a), which permits the government to dismiss an indictment, information, or complaint only with leave of the court, and noted that the Rule has been upheld even though it vests some discretion in the court as to whether the government may terminate an action brought in its name. As other examples of judicial scrutiny of settlements, the court referred to oversight of plea agreements, antitrust consent decrees, and class action settlements.

Implications

1. The *Schweizer* decision may complicate efforts by FCA defendants to settle *qui tam* actions over the objections of relators. Rather than facing the essentially *pro forma* hearing mandated by § 3730(c)(2)(A), settling defendants (and the government) must now be prepared for a hearing at which they must defend the fairness of the settlement.
2. The decision may lead the government and FCA defendants to avoid having courts approve the terms of, and thus retain jurisdiction over, settlement agreements. The government argued that a fairness determination under § 3730(c)(2)(B) is required only when a settlement is made a part of the judgment in the case. The *Schweizer* court considered it unnecessary to rule on this argument because the settlement agreement before it was incorporated into a judgment in this way. But the court thus left open the possibility that the government and FCA defendants could perhaps escape the fairness determination requirement of § 3730(c)(2)(B) by settling out of court and seeking straight-out dismissal.
3. Finally, FCA defendants in other circuits may still press the Take Care Clause argument

advanced by Océ but rejected by the DC Circuit. The current Administration was unwilling to join that argument, and the government normally defends the constitutionality of federal statutes, but it is conceivable that a different administration would choose to support that constitutional objection to § 3730(c)(2)(B).

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