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9th Circuit Skeptical of Government Interlocutory Appeal of Unprecedented Denial of Motion to Dismiss Qui Tam Case

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Dinsmore on FCA
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In *United States v. United States ex rel. Thrower*, No. 18-16408, on November 14, a panel of the Ninth Circuit gave a skeptical reception to the Department of Justice (DOJ) argument that the district court's denial of the government's motion to dismiss a False Claims Act (FCA) *qui tam* complaint against Academy Mortgage Corporation (Academy) invaded the government's "prosecutorial discretion." Moreover, the panel seemed doubtful of its jurisdiction over the appeal, with U.S. Circuit Judge William A. Fletcher saying DOJ "probably made a mistake" in seeking reversal by the court of appeals rather than trying to satisfy the district court's concerns regarding dismissal of the action.

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False Claims Act

The government appeals the district court's denial of its motion to dismiss a qui tam enforcement action under the False Claims Act. View the oral argument.

The case raises a question of first impression not only in the circuit, but nationally: never before, it appears, had a district court denied a government motion to dismiss an FCA case.[2] *See United States ex rel. Nicholson v. Spigelman*, No. 10 C 3361, 2011 U.S. Dist. LEXIS 74258, at *9 (N.D. Ill. July 8, 2011).

Relator Gwen Thrower filed her complaint in the Northern District of California in 2016 alleging mortgage fraud by Academy, where she was an underwriter. The complaint alleged the company incentivized practices by its underwriters that violated U.S. Department of Housing and Urban Development regulations, including fraudulently certifying Federal Housing Administration-insured mortgage loans that were in fact likely to default.

Among the complaint's other allegations are that Academy circumvented prohibitions on paying commissions by offering underwriters gift certificates and other rewards, pressured underwriters never to decline a loan, and required loan decisions within 24 hours—too short for underwriters to exercise due diligence.

After DOJ declined to intervene in the action, Thrower amended her complaint. DOJ subsequently moved for dismissal, and U.S. District Judge Edward M. Chen denied the motion, finding the government had failed to conduct a "full investigation" of Thrower's complaint or amended complaint. *See United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998). DOJ then filed the interlocutory appeal with the Ninth Circuit.

Oral argument revolved around whether the district court's denial of the government motion to dismiss violated federal statutory and constitutional law, and whether the appellate court properly had jurisdiction over the appeal.

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Statutory and Constitutional Law

Regarding the first question, Patterson characterized the denial of the motion to dismiss as an unprecedented "infringement on the Executive Branch's authority to enforce federal law," that both raised "constitutional concerns" and flouted the government's statutory dismissal right under the FCA. *See* 28 U.S.C. § 3730(c)(2)(A). The decision, in her words, allowed "relators and district courts [to] hijack the enforcement process."

In support of the "infringement" argument, Patterson emphasized prudential concerns. By denying the motion to dismiss, she contended, the district court was "imposing huge costs on the government"—particularly in responding to discovery—over "a case [it] thinks never should have proceeded this far." However, U.S. Circuit Judge Kim McLane Wardlaw, presiding, questioned how that burden differed from that of any nonparty served with subpoenas to produce documents. Patterson asserted the difference was "because we're being required to do that as the plaintiff."

Judge Wardlaw and U.S. Circuit Judge Richard Linn of the Federal Circuit, sitting by designation, then questioned the "absence of analysis" to support the government's determination the case wasn't "worth it"—an absence suggesting, for Judge Wardlaw, that the government decision was "arbitrary." Patterson took exception to the question's premise, likening it to what she saw as a "key error" of the district court—the idea that "a dollars-and-cents cost-benefit analysis" is required for the determination to be non-arbitrary. The relevant standard, Patterson argued (and Judge Wardlaw agreed), is simply whether the government's decision "had a rational basis."

Judge Fletcher bristled at the prudential argument, though, suggesting "it would have been a better use of government resources to try to satisfy the district court" rather than appeal to the Ninth Circuit. He added pointedly, "I mean, talking about diversion of government resources, I think you probably made a mistake."

Jurisdiction–Finality and the Collateral Order Doctrine

The issue of jurisdiction came from the panel, with Judge Fletcher laying down the gauntlet by asking, "[W]hy in the world can we hear this interlocutory appeal?" Patterson answered, "Because the Supreme Court has said so," and cited *United States v. Eisenstein*, 556 U.S. 928 (2009).

Judge Fletcher, however, questioned whether *Eisenstein* helps the government, noting that the "footnote [Patterson] like[d]" stated that "the United States may appeal, for example, the dismissal of an FCA action over its objections." Distinguishing *Eisenstein* from the case at bar, Judge

Fletcher observed, “That’s a final order!" Patterson later asserted that while the district court had not “barred the doors,” its order “clear[ly] . . . was conclusive.”

Even absent true finality of the district court’s order, though, jurisdiction could potentially be salvaged by the collateral order doctrine, which carves out a “small class of decisions excepted from the final-judgment rule.” *United States ex rel. Sequoia Orange Co. v. Sunkist Growers*, No. 92-16821, 1994 U.S. App. LEXIS 8892, at *4 (9th Cir. 1994); *see also Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (characterizing the doctrine as conferring jurisdiction over “claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated”). The balance of oral argument centered on the applicability of the collateral order doctrine. Patterson contended it applied, again invoking the Executive Branch’s enforcement powers and resources to argue the government’s rights could not be vindicated if appeal had to await final judgment.

Judge Wardlaw disputed that “having to respond to discovery” implicated an interest of what Patterson referred to as “a higher order.” Indeed, she described the discovery burden as being of a distinctly “lower order” than, for instance, a denial of summary judgment based on qualified immunity.

In a similar vein, Nelson Thomas, counsel for the relator, devoted most of his brief argument to enumerating types of district court decisions not appealable under the collateral order doctrine, including disqualification of counsel, motion to dismiss for lack of jurisdiction, attorney-client privilege, and others. The district court’s denial of the government motion to dismiss here, he argued, was on “a level far below” even those situations. Thomas’s argument met with virtually no questioning from the panel.

Finally, on rebuttal, Judge Fletcher asked Patterson why the government appealed under 28 U.S.C. § 1291, governing appeals of final orders, rather than § 1292, which applies to interlocutory appeals. Patterson replied with the conclusory assertion, “[W]e didn’t need to, because we have a 1291 right to a collateral order appeal.” Judge Fletcher responded, “Well, maybe you don’t. . . . I guess you’re about to find out.” Patterson concluded by repeating her earlier contention that the district court was wrongly “forc[ing] the United States . . . to continue as a plaintiff.”

Given the potential impact of this appeal on the FCA litigation landscape, all eyes will be on the Ninth Circuit and its resolution of *Thrower*—as well as on the course *CIMZNHCA* will take in the Seventh Circuit.

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[1] All quotations from oral argument are drawn from the video recording.

[2] Remarkably, a similar case is now before the Seventh Circuit: In *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 19-2273, on appeal from the Southern District of Illinois, the district court also denied the government's motion to dismiss the *qui tam* suit. The parties to the appeal are currently in the midst of briefing in that case.