Legal Backgrounder

Vol. 32 No. 10 May 5, 2017

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

A Convincing Case for Judicial Stays of Discovery in False Claims Act *Qui Tam* Litigation

by Stephen A. Wood

Originally adopted during the Civil War, the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, stands today as the federal government's primary anti-fraud weapon. The FCA imposes civil liability on any person who, among other things, "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1)(A). Today, most FCA claims are brought by private actors, known as relators (informally "whistleblowers"), under the law's *qui tam* provisions. In essence, these provisions permit private persons with knowledge of fraud to sue on the government's behalf in exchange for a sizable share in the government's recovery. *See* 31 U.S.C. § 3730(d)(2).

Of the suits brought by *qui tam* relators (702 were filed in 2016),[1] recent data indicate that the government intervenes in just over 1 in 5 of these cases. *See* Michael Lockman, *In Defense of a Strict Pleading Standard for False Claims Act Whistleblowers*, 82 U. Chi. L. Rev. 1563-64 (2015). Of the non-intervened cases, relators are successful in obtaining a settlement or judgment a mere *six percent* of the time.[2] That is, only a small percentage of these non-intervened *qui tam* claims results in a judgment or settlement, suggesting that many of these claims, perhaps 70% or more, lacked merit from the outset. *See, e.g.,* Christina Orsini Broderick, Qui Tam *Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 975 (2007) (reviewing data suggesting more than 70% of *qui tam* cases are "frivolous"). These numbers strongly suggest that the promise of a windfall leads relators to bring many unmeritorious claims.

While accurate data would be nearly impossible to compile, the cost of frivolous *qui tam* cases surely runs into the hundreds of millions of dollars annually, adding significantly to the cost of doing business with the federal government. Congress is unlikely to address this problem. In fact, federal lawmakers have increased incentives and lowered procedural hurdles for *qui tam* plaintiffs in recent years. That does not prevent the courts, however, from policing the law's abuses and trimming baseless FCA claims from their dockets.

---

[1] *See* US Department of Justice, Fraud Statistics Overview, Dec. 13, 2016, *available at* https://www.justice.gov/opa/press-release/file/918361/download.

[2] In a typical year, the recoveries from non-intervened cases represent a single-digit percentage of total recoveries from all FCA cases, including those initiated by the government. For example in 2016, recoveries in non-intervened cases represented about 2% of total recoveries, and in 2014, about 1%. Recoveries in non-intervened cases in 2015 represented about 31% of the total, an anomaly. *See* US Department of Justice, Fraud Statistics Overview, *supra*. *See also* US Chamber Inst. for Legal Reform, *The New Lawsuit Ecosystem*, at 63 (Oct. 2013).

Stephen A. Wood is a Partner with Chuhak & Tecson PC in Chicago, IL. The author would like to thank Jay B. Stephens, former General Counsel of Raytheon Company, for his encouragement and feedback on the thesis of this article. Mr. Stephens, currently Of Counsel at Kirkland & Ellis LLP, is Chairman of Washington Legal Foundation's Legal Policy Advisory Board.

Stay of Discovery—A Commonsense Response

Against the backdrop of so many meritless FCA claims, the burden and expense of civil discovery loom much larger than in a typical civil case. Electronic discovery is one of the most costly phases of litigation. In *qui tam* FCA cases in particular, the burdens of electronic discovery are likely to be borne disproportionately by defendants. *See, e.g., U.S. ex rel. Keeler v. Eisai, Inc.*, No. 09-22302, 2012 WL 12842791 (S.D. Fla. Sept. 27, 2012) (parties required to conduct sweeping discovery including electronic discovery while Rule 9(b) motion to dismiss pending).[3]

One practical and simple cost-control measure would be to stay discovery until pleadings-stage dispositive motions have been decided, especially motions challenging the sufficiency of the complaint under Federal Rule of Civil Procedure 9(b). Notably, federal common law generally provides that Rule 9(b) should be satisfied before discovery commences: "[I]f allowed to go forward, Relators' FCA claim would have to rest primarily on facts learned through the costly process of discovery. This is precisely what Rule 9(b) seeks to prevent."[4] Despite this, many FCA cases launch headlong into discovery in spite of a pending Rule 9(b) motion to dismiss.[5]

In fact, courts from time to time *deny* motions to stay discovery brought by FCA defendants. In *U.S. ex rel. Bingham v. HCA, Inc.*, for instance, the parties moved *jointly* to stay discovery, but only as to the parties, not as to third parties, and only during the pendency of defendant's motion to dismiss. The court denied the motion.[6] While the rationale for the court's decision does not appear in the ECF record, clearly the court refused to deviate, even in the face of a joint request, from the standard civil case management procedure. Later in the case, the relator moved for leave to amend the complaint with facts gleaned from discovery. The court, to its credit, sustained defendant's objection by refusing to consider the new information and dismissed the complaint with prejudice. *Bingham*, 2016 WL 6027115 at *4-5. Staying discovery in the first instance would have been simpler and more cost effective.

Judges have broad discretion over discovery, so they often view requests for discovery stays with skepticism. Absent unusual circumstances, *e.g.*, a threshold jurisdictional issue, most courts do not see the filing of a motion to dismiss as justification for a stay of civil discovery. *See, e.g., DSM Desotech, Inc. v. 3D Systems Corp.*, 08-cv-1531, 2008 WL 4812440, *2 (N.D. Ill. Oct. 28, 2008) (stay requires showing of good cause; pending dispositive motion in itself not good cause). Courts are often reluctant to delay the progress of the litigation to any degree. And the decision on such motions may easily take several months. Further, most motions to dismiss are denied ultimately, at least in part, resulting in what many courts would see as

[3] In *Keeler*, the parties were required to conduct discovery that included broad electronic discovery for nearly two years before the court ultimately dismissed the action with prejudice for failure to plead fraud with particularity under Rule 9(b). *U.S. ex rel. Keeler v. Eisai, Inc.*, No. 09-cv-22302-KMW, 2013 WL 12049080 (S.D. Fla. Feb. 1, 2013). After the dismissal was affirmed on appeal, the defendant moved in the district court to recover costs in defending the action. See *U.S. ex rel. Keeler v. Eisai, Inc.*, No. 09-cv-22302-KWM/WCT, 2015 WL 11181727, *3 (S.D. Fla. Mar. 30, 2015). The court awarded costs in the amount of $31,365. This, however, was a fraction of the total costs sought by the defendant, which included $576,391.89 in electronic discovery-related costs. *Id.* at *3, *14.

[4] *U.S. ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 380 (4th Cir. 2008); *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1359-60 (11th Cir. 2006) ("The particularity requirement of Rule 9 is a nullity if Plaintiff gets a ticket to the discovery process without identifying a single claim."); *U.S. ex rel. Riley v. Alpha Therapeutic Corp.*, No. C-96-0704 DLJ, 1997 WL 818593, *4, n.1 (N.D. Cal. Nov. 10, 1997) (same).

[5] *See, e.g., U.S. ex rel. Doe v. Health First, Inc.*, No. 14-cv-501-Orl-37DAB, 2016 WL 3959343, *2 (M.D. Fla. July 27, 2016); *U.S. ex rel. Brooks v. Trillium Community Health Plan, Inc.*, 14-cv-01424-AA, 2016 WL 1725300, *3 (D. Ore. Apr. 29, 2016) (plaintiff used billing data produced in discovery to amend complaint).

[6] *See U.S. ex rel. Bingham v. HCA, Inc.*, No. 13-cv-23671-MGC, Joint Mot. Part. Stay Disc., ECF Nos. 32, 34, and 35.

a pointless delay. Some courts have gone so far as to adopt local rules or practice guidelines codifying their disapproval of discovery stays.[7]

Whether or not judicial resistance to discovery stays is appropriate in civil cases generally, courts should treat *qui tam* litigation as an exception. Historical data demonstrates that most *qui tam* cases will be dismissed prior to trial. This fact alone distinguishes these cases from other civil litigation in the federal courts. Requiring the parties to undertake expensive discovery in litigation given this trend is hard to justify. Beyond this, the peculiarities of the FCA statutory scheme present other compelling justifications for a stay.

Stay of Discovery Serves the FCA's Objectives

Congress' intent in passing the FCA was to enlist the assistance of *insiders* with knowledge of fraud to catch those making false claims to the government. *See, e.g., Campbell v. Redding Medical Center*, 421 F.3d 817, 824 (9th Cir. 2005) (noting that "insiders" who come forward voluntarily were meant to be rewarded for taking significant personal risks to bring fraud to light). At the same time, the *qui tam* provisions were intended to discourage "opportunistic plaintiffs who have no significant information to contribute of their own." *Id.* at 823. These twin objectives are undermined when courts permit *qui tam* plaintiffs access to discovery in the early stages of litigation while the complaint's legal sufficiency is being questioned.

And by permitting post-discovery amendment of FCA pleadings, a court can actually undermine the interests of the government. Under the law, *qui tam* relators must provide the government with a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses" at the outset of a suit. *See* 31 U.S.C. § 3730(b)(2). This requirement serves to facilitate the investigation and inform the government's intervention decision. If the government declines to intervene at the conclusion of its investigation, it can only do so later with leave of court upon a showing of good cause. 31 U.S.C. § 3730(c)(3). Thus, permitting relators to rely on discovery to supplement their pleadings arguably relieves them, to a degree, of their obligation at the commencement of suit to fully inform the government's investigation and intervention calculus.

Discovery Is Not Necessary to Protect the Government's Interests

As noted above, judges are naturally disinclined to dismiss private disputes at the pleading stage. Consider, however, the perceived gravity of a *qui tam* case alleging fraud against the government. Further, consider that the government is absent from the proceedings. Asked to adjudicate the rights of an absent party, some judges may understandably welcome discovery to reassure themselves that no fraud was committed, that the motion to dismiss is truly meritorious. For instance, in *U.S. ex rel. Jallali v. Sun Healthcare Group*, the defendant moved to dismiss the *qui tam* complaint for failure to comply with Rule 9(b).[8] The parties proceeded with extensive discovery. After hearing evidence on the defendant's motion and scouring the discovery record, the court dismissed the complaint with prejudice for failure to allege fraud with particularity. While the *Jallali* court did not indicate that the purpose of discovery was to protect an absent party—the federal government—the decision may well reflect a desire for certitude in light of the unique features of a non-intervened *qui tam* case.

To the extent that a court were to require discovery to protect the government, it is unnecessary and misguided. First, the FCA imposes on the government a duty to investigate "diligently" any claimed violation

[7] The Southern District of Florida Discovery Practices Handbook provides that "[n]ormally, the pendency of a motion to dismiss or motion for summary judgment will not justify a unilateral motion to stay discovery pending a ruling on the dispositive motion." S.D. Fla. L.R., App. A. (Discovery Practices Handbook), I(D)(5) (2014).

[8] *See Jallali*, No. 12-cv-61011-KMW, 2015 WL 10687577 at *1 (S.D. Fla. Sept. 17, 2015).

ISBN 1056 3059

of the FCA while a suit remains under seal. 31 U.S.C. § 3730(a). The FCA gives the government 60 days to conduct its investigation and the right to seek multiple extensions of time as needed. 31 U.S.C. § 3730(b)(3). In furtherance of that investigation, the government has the right to obtain information via Civil Investigative Demand (CID). 31 U.S.C. § 3733. This includes the right to request documents, serve interrogatories, and take testimony.[9] Whether the government elects to avail itself of the CID tool to augment its investigation, it typically possesses substantial information regarding the claims or transactions at issue since the government is usually a party to those transactions. *See, e.g., U.S. ex rel. Atkins v. McInteer,* 470 F.3d, at 1360 n.17 (11th Cir. 2006) ("[T]he government already possesses the claims—false or otherwise—a potential defendant has submitted for payment. The government can, therefore, access those claims on its own and evaluate any FCA liability ... *before* determining whether to bring suit or intervene.")

Finally, any dismissal order entered in cases in which the government has not intervened routinely provides that the dismissal is without prejudice as to the United States. That is, the government's rights are normally not finally adjudicated in a case that it neither prosecuted nor controlled.[10]

Conclusion

While good reasons exist for staying discovery in the event of a motion to dismiss in other contexts too, the rationale for such a stay is especially compelling in FCA *qui tam* suits. Indeed, such a stay pending the outcome of a Rule 9(b) motion should be mandatory. A mandatory stay not only has the potential to reduce expenditures in many cases that evidence reveals are unlikely to survive the pleadings stage, it also promotes the FCA's objective of encouraging insiders to come forward with proof of fraud that can inform the government's intervention decision. Further, discovery is not necessary to safeguard the government's interests in non-intervened cases. Existing law provides the government with ample tools to protect its own interests without the need for assistance from the court.

[9] The defendant has no reciprocal right to discovery during the investigation phase of the case. Once the government makes its election, or files its own complaint, the Federal Rules of Civil Procedure control the conduct of discovery. 31 U.S.C. § 3733(a)(1). Note also that while there is clearly an argument to be made for staying discovery pending decision on a motion to dismiss in cases in which the United States government has intervened, the arguments are more compelling in non-intervened *qui tam* cases.

[10] *See, e.g., Urquilla-Diaz v. Kaplan Univ*. 780 F.3d 1039, 1057 (11th Cir. 2015) (judgment dismissing *qui tam* action with prejudice modified to indicate that order was without prejudice as to the United States); *See also U.S. ex rel. Williams v. Bell Helicopter Textron Inc.*, 417 F.3d 450, 456 (5th Cir. 2005) (dismissal with prejudice as to relator, but without prejudice as to United States which had not intervened in case). Often the government will file a "Statement of Interest" in cases in which it has not intervened setting forth its position that any dismissal should be without prejudice as to the United States. *See, e.g., U.S. ex rel. Olsen v. Lockheed Martin Corp.*, No. 1:09-cv-03083-JEC, 2010 WL 1786606 at *2 (N.D. Ga. Feb. 1, 2010).

  ISBN 1056 3059