



DOJ MAY SETTLE QUI TAM CASES OVER RELATORS' OBJECTIONS

by Kristin Graham Koehler, Scott Stein, and Morgan Lindsay

The United States is not required to satisfy the good-cause intervention standard in 31 U.S.C. § 3730(c)(3) when settling a False Claims Act (FCA) *qui tam* action over a relator's objection. The US Court of Appeals for the Eleventh Circuit upheld this principle recently in *United States ex rel. Christiansen v. Everglades College, Inc.*, — F.3d —, 2017 U.S. App. LEXIS 7842 (11th Cir. May 3, 2017). Two relators brought a *qui tam* lawsuit against Everglades College, Inc. (d/b/a Keiser University) under the FCA, alleging that the University, which participated in federal student financial-aid programs, falsely certified its compliance with a federal law banning incentive payments to university admissions employees. The Justice Department initially declined to intervene. The relators prevailed at trial but received no damages and only \$11,000 in penalties.

While the relators' appeal was pending, the government, which feared an affirmance of the district court's narrow interpretation of FCA liability, settled the case with Keiser for \$335,000. The court of appeals remanded the case back to the district court, which allowed the government to intervene and approved the settlement after holding a statutorily-mandated fairness hearing. The relators subsequently appealed from that judgment.

On appeal, the relators argued that the government had failed to satisfy the good-cause intervention requirements under 31 U.S.C. § 3730(c)(3). The Eleventh Circuit rejected this argument, concluding that the government did not need to satisfy the good-cause standard because § 3730(c)(3) does not apply to settlements. Rather, subsection (c)(3) "applies only when the government intervenes for the purpose of *actually proceeding with the litigation*—not when it is stepping in only for the purpose of settling and ending the case."

The court of appeals also articulated the standard for determining when a settlement between the United States and an FCA defendant is "fair, adequate, and reasonable," as required by 31 U.S.C. § 3730(c)(2)(B). The relators argued that the standard used to evaluate proposed class settlements between private parties under Rule 23(e)(2) of the Federal Rules of Civil Procedure should apply. The Eleventh Circuit rejected this position, concluding that the purposes of Rule 23 were inapplicable in the *qui tam* context.

The court held that, in the FCA context, there must be both "considerable deference to the settlement rationale offered by the government" and sufficient judicial review of the settlement's fairness, as required by § 3730(c)(2)(B). As such, when reviewing whether a settlement is "fair, adequate, and reasonable," a court must "ask whether the government has advanced a reasonable basis for concluding the settlement is in the best interests of the [US], and whether the settlement unfairly reduces the relator's potential *qui tam* recovery."

Applying this standard, the court concluded that the proposed settlement was fair, adequate, and reasonable because the government's rationale for settling was reasonable—the government secured a recovery 30 times larger than the relators' award, and the government wanted to prevent the "precedential impact of a potentially adverse appellate decision." The proposed settlement agreement did not unfairly reduce the relators' potential recovery because the relators' theory of the case hinged on a proposition that remained an open question in the circuit, and the settlement agreement actually resulted in a higher recovery for relators than what they received at trial.

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