RES JUDICATA IN *QUI TAM* LITIGATION: WHY GOVERNMENT SHOULD BE BOUND BY JUDGMENTS IN NON-INTERVENED CASES

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Executive Summary

The U.S. Supreme Court's denial of *certiorari* in *Bristol-Myers Squibb Co. v. State of New Mexico ex rel. Balderas*, leaves unresolved an important question regarding the application of principles of *res judicata* to a False Claims Act *qui tam* suit in which the government has not intervened. In the underlying federal lawsuit, the relator's claims were dismissed for failure to plead materiality, a necessary element of the plaintiff's proof in any FCA case, after several pleading attempts. Although such a disposition is almost universally deemed to be "on the merits" for *res judicata* purposes, the defendants' subsequent motion to dismiss a parallel New Mexico state court suit was denied, though New Mexico was a real party in interest in the dismissed federal case.

Several courts have recognized a *res judicata* exception for the government in *qui tam* cases in which it does not intervene. The reasoning is usually that it is unfair to bind the government in a case it has not actively prosecuted. Furthermore, several courts, following a decision by the U.S. Court of Appeals for the Fifth Circuit in *United States ex rel. Williams v. Bell Helicopter Textron, Inc.*, have reasoned that binding the government to a pleading stage dismissal in a declined *qui tam* case would encourage relators to file deficient pleadings knowing that if the government is to avoid a binding adverse outcome, it will need to intercede, thus shifting the pleading burden, so to speak, to the government. A *res judicata* exception was necessary to avoid what the *Williams* court called "perverse incentives."

This view is flawed and out of step with the realities of *qui tam* litigation. From the initial filing of the complaint and for as long as it remains under seal, a relator's primary objective is to persuade the government to intervene in the case because the overwhelming majority of *qui tam* cases in which the government intervenes result in settlement or judgment. In addition, upon intervention the government is required by law to take the lead, relieving the relator of the main burdens of litigation. *See* 31 U.S.C. § 3730(c)(1). Thus, relators have a powerful incentive to present the best possible case to prosecutors. Even in a world where *res judicata* bars the government from pursuing its own action post-*qui tam* dismissal, the merit of the case more than anything will drive the government's intervention decisions. Beyond this, the government has a variety of practices and tools at its disposal to ensure that its interests are not prejudiced by a poorly pled or prosecuted *qui tam* case. There is no valid justification for departing from long-standing policies underpinning the doctrine of *res judicata* in False Claims Act litigation.

This is an issue that warrants Supreme Court review to restore not only a uniform standard, but a degree of fairness to a statutory scheme that already heavily favors the government and its agents.