No. 08-660

In the

Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
IRWIN EISENSTEIN,
Petitioner,

v.

CITY OF NEW YORK, MICHAEL BLOOMBERG,
JOHN DOE, JAND DOE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES *Page*

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

STATEMENT OF THE CASE

The United States District Court for the Southern District of New York dismissed petitioner's complaint for failure to state a claim upon which relief can be granted. The complaint purported to allege four claims, only one of which was made under the False Claims Act, 31 U.S.C. §§ 3729 *et seq*. (the "FCA"). Petitioner filed his notice of appeal fifty-four days after entry of the District Court's judgment.

The Second Circuit dismissed petitioner's appeal for lack of jurisdiction. The Court held that in an FCA action in which the government has declined to intervene, the government is not a party for purposes of Fed. R. App. P. 4(a)(1). Therefore, the Court held, petitioner had thirty days to file his notice of appeal. Because he filed his notice of appeal more than thirty days after entry of judgment, the appellate court held that it lacked jurisdiction to hear the appeal.

BACKGROUND

Petitioner Irwin Eisenstein commenced this action *pro se*, alleging four separate claims, including a single claim under the FCA. As required by 31 U.S.C. § 3730(b)(2), petitioner filed his complaint with the United States District Court for the Southern District of New York *in camera* and served it upon the United States Government.

31 U.S.C. § 3730(b)(2) allows the Government sixty days to elect to intervene in the action. The Government, pursuant to 31 U.S.C. § 3730(b)(4)(B), timely notified the District Court that it declined to intervene in the action. The Government's notice indicates that copies were sent to each of the plaintiffs named in the complaint. Thereafter, petitioner exercised his right to conduct the action pursuant to 31 U.S.C. § 3730(c)(3).

The District Court entered an Order unsealing the complaint and authorizing its service upon Respondents. The District Court also directed the plaintiffs to serve a copy of the United States' Notice of Election to Decline Intervention upon Respondents. Thereafter, petitioner served a copy of the complaint upon Respondents.

The District Court dismissed the complaint for failure to state any claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). Fifty-four days after entry of judgment, petitioner filed a notice of appeal.

The United States Court of Appeals for the Second Circuit, in a *sua sponte* Order dated December 26, 2006, directed the parties and the United States to brief the question whether petitioner timely filed his notice of appeal. (Appendix 4a-5a)[1] Specifically, the Circuit Court

[1] References to "Appendix" followed by a page number refer to Petitioner's Appendix annexed to his petition.

requested briefing on whether the thirty day time limit in Fed. R. App. P. 4(a)(1)(A) (28 U.S.C. § 2107(a)) for filing a notice of appeal, or the sixty day time limit in Rule 4(a)(1)(B) (28 U.S.C. § 2107(b)), applicable where the United States Government is a party, applies in an action under the FCA where the United States has declined to intervene.

The Court noted that the Circuits were split on the question whether the thirty day or the sixty day limit applied in an FCA action where the United States declines to intervene in the proceedings: the Fifth, Seventh and Ninth Circuits had held that the sixty day limit applies, while the Tenth Circuit had applied the thirty day time limit. *See United States ex rel. Lu v. Ou*, 368 F.3d 773 (7th Cir. 2004) (applying the sixty day limit); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304 (5th Cir. 1999)(same); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100 (9th Cir. 1996), *cert. denied,* 520 U.S. 1211 (1997)(same); *compare United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327 (10th Cir. 1978), *cert. denied*, 444 U.S. 839 (1979)(applying the thirty day limit).

Respondents submitted their Brief advocating the thirty day limit. Respondents based their motion on the additional ground that a non-attorney litigant may not prosecute an FCA action

pro se.[2] The United States submitted a Brief as *amicus curiae* which also advocated the 30-day time limit. The Circuit Court appointed *pro bono* counsel to represent petitioner solely for the purpose of briefing the two issues raised by the motion.

Petitioner *pro se* and Respondent also submitted briefs on the merits of the appeal. At no time did the United States move to intervene, nor did the United States submit any papers other than the Brief requested by the Circuit Court and the Government's Notice of Election to Decline Intervention. (Appendix 5a)

The Order of the Circuit Court of Appeals

In a unanimous opinion issued on August 19, 2008 (Appendix 1a), the Second Circuit dismissed the appeal as untimely. *United States ex rel. Irwin Eisenstein v. City of New York*, 540 F.3d 94 (2nd Cir. 2008). The Court held that, in an action under the FCA in which the United States has declined to intervene, the United States is not a party for purposes of Fed. R. App. P. 4(a)(1), and therefore

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[2] The Court did not reach this issue. In the event that this Court were to reverse the Second Circuit on the issue raised here by petitioner, the Second Circuit would likely affirm the District Court's dismissal on the separate ground that a non-attorney litigant may not prosecute an FCA action *pro se*. (Appendix 3a n.1) *See United States ex rel. Mergent Services v. Flaherty*, 540 F.3d 89 (2d Cir. 2008).

the thirty day time limit for filing a notice of appeal applies.

The Court held that "[a]s used in Rule 4(a)(1), the word 'party' refers to the person participating in the proceedings with control over litigation." (Appendix 8a) Therefore, the Court concluded, the government's status as the real party in interest in an FCA suit did not make the government a "party" where the government has declined to intervene and played no role in the court proceedings.

The Court wrote that the term "real party in interest" "is a term of art used in the rules of procedure," referring to Fed. R. Civ. P. 17(a)(1), which requires that actions be brought in the name of the "real party in interest". (Appendix 10a) The Court concluded that "[w]e therefore regard the omission of 'real party in interest' from [Federal Rule of Appellate Procedure] Rule [4](a)(1)(B) as meaningful." *Id.*

Indeed, where the government has not intervened in an FCA suit, the relator has the exclusive right to conduct the action. 31 U.S.C. §§ 3730(b)(4)(B), (b)(5) and (c)(3). The government may subsequently intervene only upon a showing of good cause. 31 U.S.C. § 3730(c)(3). As the Second Circuit wrote, "The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (Appendix 8a)

The Court also noted that the intent underlying Rule 4(a)(1)(B) is to account for the "slow machinery of government." (Appendix 10a) The Court held that "this rationale is obviously inapplicable to the present case, where the government has played no part in the underlying litigation other than to decline to participate in it." (Appendix 11a)

The Court agreed with the Tenth Circuit that the naming of the government as a plaintiff "was merely a statutory formality," citing *Van Cott*, 588 F.2d at 1329. (Appendix 15a). The Court held that where, as here, all active parties are aware that the government had declined to intervene, there is no need to allow more than the standard thirty days to make an appeal. (*Id.*)

The Second Circuit declined to follow the analysis employed by the Fifth, Seventh and Ninth Circuits, which hold that a "literal" interpretation of Rule 4(a) compels the conclusion that the government is a party, and that such an interpretation is required because it provides litigants with the ability "to figure out which time period applies, easily, without extensive research, and without uncertainty." *Hughes Aircraft Co., supra,* 98 F.3d at 1102. (Appendix 13a) As set forth above, the Court held that the use of the term "real party in interest" in Fed. R. Civ. P. 17 is

intended to be distinct from the word "party" in Rule 4(a)(1).

Finally, the Court noted that "counsel of minimal competence will take pause upon reading Rule 4(a) to consider whether the United States was actually a 'party' to the action" and that, if there were any doubt, "any reasonable counsel would allay these concerns by sensibly filing a notice of appeal within 30 days."[3] (Appendix 14a) Significantly, the Court observed that "there is little history of confusion, and, even with this decision, the issue has not arisen in the majority of circuits despite the many decades in which the provisions of Rule 4(a)(1)(B) and False Claims Act *qui tam* actions have coexisted." (*Id.*)

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[3] Every Circuit Court which has considered the issue has held that a non-attorney litigant may not bring an action under the False Claims Act without appearing by a duly admitted attorney. *See, e.g., United States ex rel. Mergent Services v. Flaherty, supra*, 540 F.3d 89 (2d Cir. 2008); *Timson v. Sampson*, 518 F.3d 870 (11th Cir.), *cert. denied*, 129 S. Ct. 74 (2008); *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 1728 (2008); *United States ex rel. Lu v. Ou, supra*, 368 F.3d 773 (7th Cir. 2004); *United States v. Onan*, 190 F.2d 1 (8th Cir.), *cert. denied*, 342 U.S. 869 (1951).

REASONS FOR DENYING THE PETITION

THE SECOND CIRCUIT CORRECTLY HELD THAT, WHERE THE GOVERNMENT HAS NOT INTERVENED IN AN ACTION UNDER THE FALSE CLAIMS ACT, THE GOVERNMENT IS NOT A PARTY FOR PURPOSES OF FED. R. APP. P. 4(a)(1) BECAUSE THE UNITED STATES MAY NEITHER PARTICIPATE IN THE PROCEEDINGS NOR CONTROL THE LITIGATION AND BECAUSE INTERVENTION WOULD NOT BE NECESSARY IF THE UNITED STATES WERE A PARTY.

All of the Courts which have addressed the issue have recognized that the sixty day rule applies where the government is a "party." Furthermore, it is undisputed here that the government is the real party in interest in an FCA suit. Where the parties and the Courts differ is whether a "real party in interest" is the same as a "party" for purposes of Fed. R. App. P. 4(a)(1). A proper interpretation of the rule compels the conclusion reached here by the Second Circuit: the government is not a party for purposes of the time limit within which an appeal must be filed.

This Court has not specifically addressed whether the United States is a party to an action under the False Claims Act for purposes of

determining whether the thirty day or the sixty day rule of Fed. R. App. P. 4(a)(1) applies. However, this Court's holding in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), addresses a related question, albeit in a different context. There is no need to revisit the issue here.

In *Stevens,* this Court was presented with the question "whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the False Claims Act, 31 U.S.C. §§ 3729-3733." 529 U.S. at 768. But, before the Court could reach the main question, it first addressed whether the private individual had standing under U.S. Const. Article III to maintain the action at all where the government had declined to intervene. The Court answered this threshold question in the affirmative, finding that the private individual was a partial assignee of the government's claim.

The Court held:

> We believe, however, that adequate basis for the relator's suit for his bounty is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor. The FCA can reasonably be regarded as effecting a partial assignment of the Government's

> damages claim. [footnote omitted] Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits . . . – and also suits by subrogees, who have been described as "equitable assignees." . . . We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

529 U.S. at 773-774 (citations omitted)

The decision in *Stevens* distinguishes between a "party" (who must have Art. III standing to maintain a suit) and a "real party in interest," such as the government, who may not even have appeared in the action. Had the government been a party plaintiff to the litigation in *Stevens*, then there would clearly have been standing because the alleged injury in fact was indisputably sustained by the government. 529 U.S. at 774 ("We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.").

Indeed, in *Stevens*, this Court noted that "'the Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*.'" 529 U.S. at 771-772 (citations omitted) (emphasis in original). Where, as here, the government has not intervened and taken

control of the suit, the only "party" in the action must be the relator. Because the government is not a party, then a litigant has thirty, not sixty, days to file a notice of appeal.

This Court's holding in *Stevens* undermines one of the rationales of the Seventh Circuit's holding in *Ou*. In *Ou*, as the Second Circuit noted, "the Seventh Circuit appears to have concluded that the United States must be a party to FCA actions because relators by themselves lack standing to sue. *Ou*, 368 F.3d at 775." (Appendix 14a) *Stevens* holds that relators do have standing to sue.

The Ninth Circuit's reliance on cases brought under the Miller Act is misplaced. The government is a real party, not just a party in interest, under the Miller Act. *United States Fidelity and* Guaranty *Co. v. United States for the Benefit of Kenyon*, 204 U.S. 349, 359 (1907)(United States is real litigant, not a mere nominal party, in cases under the statutory predecessor to the Miller Act).

Furthermore, the Fifth, Seventh and Ninth Circuits incorrectly equated the government's status as the real party in interest in a False Claims Act action to status as a party for purposes of the Federal Rules of Appellate Procedure — even where the government has not intervened. However, those Courts did not have the benefit of this Court's holding in *Stevens*. The standing analysis employed by this Court and the conclusion

reached in *Stevens* answer the question presented by petitioner here, and there is no need for the Court to revisit the issue.

Significantly, the Fifth Circuit has also held that the government has no right to appeal where it had not intervened in an FCA action. *Searcy v. Phillips Electronics North America Corp.*, 117 F.3d 154 (5th Cir. 1997). In *Searcy*, the Court wrote:

> In short, the [FCA's] structure distinguishes between cases in which the United States is an active participant and cases in which the United States is a passive beneficiary of the relator's efforts. When the government chooses to remain passive, as it has here, we see no reason to treat it as a party with standing to challenge the district court's action as of right.

117 F.3d at 156.

The Fifth Circuit sought to distinguish its holding in *Searcy* from the Ninth Circuit's decision in *Hughes Aircraft* (holding that the government is a party for purposes of Fed. R. App. P. 4(a)(1)) by writing that "viewing the government as a party for the purposes of Rule 4(a)(1) does not compel us to treat it as a party for all appellate purposes." 117 F.3d at 156. *Searcy* cannot reasonably be

reconciled with the Fifth Circuit's later decision in *Epic Healthcare, supra,* 193 F.3d 304.

In *Epic Healthcare,* the Court held that the government *is* a party for purposes of Fed. R. App. P. 4(a)(1), even though, according to *Searcy*, the government has no right to appeal from a judgment in an FCA action in which it has not intervened. The Fifth Circuit did not disavow its prior holding in *Searcy*; instead, the Court merely repeated its language from *Searcy* that it was not required to treat the government as a party for all appellate purposes. 193 F.3d at 307 n.1. The Court did not explain why the government might need sixty days to decide whether to appeal where, according to the Fifth Circuit, the government had no right to appeal in the first instance.[4]

Furthermore, the rationale of the Fifth Circuit's holding in *Epic Healthcare* and the Ninth Circuit's holding in *Hughes Aircraft* is suspect. Under the guise of a "literal" interpretation, both of those Courts held that the sixty day rule of Fed. R. App. P. 4(a)(1)(B) applies in FCA cases where the government has declined to intervene in order to avoid misleading an unwitting litigant. While the intent of those Courts is admirable, it is not a sound basis upon which to interpret a rule.

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[4] The *Epic Healthcare* Court expressly declined to "join the debate over a relator's standing under Article III," 193 F.3d at 307, a debate which this Court resolved in *Stevens*.

The Second Circuit held that the inclusion of the term of art "real party in interest" in Fed. R. Civ. P. 17(a)(1) and its omission from Fed. R. App. P. 4(a)(1)(B) was deliberate and "meaningful." (Appendix 10a) Thus, a proper interpretation of the Rules, which construes the Rules of Civil Procedure and the Rules of Appellate Procedure *in pari materia*, compels the conclusion that the government, although a real party in interest in a False Claims Act action, is not a "party" for purposes of the deadline for filing a notice of appeal.

Petitioner argues that the Second Circuit's analysis fails to address situations where the government had once been a party to an action, but was subsequently removed, and one of the remaining parties appeals. In fact, the Second Circuit did address that very situation. Referring to its decision in *United States v. American Society of Composers, Authors & Publishers*, 331 F.2d 117 (2d Cir. 1964) the Second Circuit wrote,

> what is of import is neither that Eisenstein brought a False Claims Act claim in the name of the United States, nor that the United States may be entitled to a portion of the recovery if Eisenstein prevails; what is of import is that the United States

> played no role in this matter before the district court.

(Appendix 13a) In *American Society of Composers*, the Court noted here, the sixty day limit was applied because the United States actively participated in the litigation. Appendix 11a. In this case, where the government has declined to intervene, the plain language of the FCA excludes the government from an active role in the proceedings unless the government later moves to intervene "upon a showing of good cause." 31 U.S.C. § 3730(c)(3). As the Second Circuit noted, "The inability to participate without moving to intervene is simply not consistent with the principal characteristics of being a party to litigation." (Appendix 8a)

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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