No. 122487

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE *EX REL.* SCHAD, DIAMOND & SHEDDEN, P.C.,	)	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-15-2668.
Relator-Appellant,	)	
v.	)	There heard on appeal from the Circuit Court of Cook County, Illinois, County Department,
MY PILLOW, INC.,	)	Law Division, No. 12 L 7874.
Defendant-Appellee.	)	The Honorable THOMAS R. MULROY, Judge Presiding.

BRIEF *AMICUS CURIAE* OF
ILLINOIS ATTORNEY GENERAL LISA MADIGAN
IN SUPPORT OF DEFENDANT-APPELLEE

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POINTS AND AUTHORITIES

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ARGUMENT

I. Interest of the Illinois Attorney General.

The Illinois False Claims Act (Act) provides that the Attorney General shall investigate violations of the Act and permits the Attorney General to bring civil actions against persons presenting false claims to the government. 740 ILCS 175/4(a) (2016). The Act also provides that false claims actions may be initiated on behalf of the government by a private relator plaintiff. 740 ILCS 175/4(b) (2016). When a relator brings an action under the Act, the Attorney General has the right to intervene in the action and conduct the proceedings, dismiss or settle the action, or allow the relator to conduct the action. 740 ILCS 175/4(b)(4), (c)(2) (2016).

The Attorney General declined to intervene in the underlying action and the relator, a law firm, conducted the proceedings. At issue on this appeal is whether a relator law firm is entitled to attorneys' fees for work performed by its attorneys in conducting the litigation, in addition to receiving the relator's share of the award. *See* 740 ILCS 175/4(d)(2) (2016). The appellate court held that "the Act does not permit the award of attorney fees to relator, who served as its own attorney for much of this case" and reversed the circuit court's fee award "[t]o the extent that the trial court awarded relator fees for work performed by relator's own attorneys." *People ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, 2017 IL App (1st) 152668, ¶ 148.

In arguing that a relator law firm is entitled to an attorneys' fees award for work performed by its attorneys, relator relies on this Court's decision in *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484 (2005), and argues that the Attorney General retained "complete control" over the litigation after declining to intervene and therefore acted as "independent counsel" to the relator and could ensure that the relator's attorneys effectively prosecuted the action and did not generate excessive or abusive attorneys' fees. Pl. Br. 18, 23. This is a mischaracterization of the Attorney General's role in cases where the Attorney General declines to intervene under the Act and permits the relator to conduct the proceeding.

The Attorney General has an interest in the correct representation to this Court of the office's role when she declines to intervene in a false claims case that the relator then conducts. Additionally, because the Attorney General has an obligation to consider every action filed by a relator under the Act, *see* 740 ILCS 175/4(b) (2016), a ruling that a successful relator law firm is always entitled to attorneys' fees for its attorneys' work could provide an incentive for law firms to bring low-value or meritless actions in the hopes of obtaining attorneys' fees awards. The resulting potential increase in such litigation would unduly burden the Attorney General's resources and is inconsistent with the Act's purpose of discouraging parasitic or frivolous lawsuits. Therefore, the Attorney General has a strong institutional interest in the issues raised in this appeal.

II. The Act defines a private party's right to conduct a false claims proceeding in Illinois.

The Act permits civil actions by private persons as relators asserting that a party has made or presented a false claim to the State. 740 ILCS 175/4(b) (2016); *see* 740 ILCS 175/2(a) (2016) (defining "State"); 740 ILCS 175/3 (2016) (defining "false claims"). Such a *qui tam* action is brought in the State's name "for the person and for the State." 740 ILCS 175/4(b)(1) (2016). A *qui tam* action under the Act may be dismissed only if the court and the Attorney General give written consent. *Id*.

The relator must serve on the Attorney General the complaint and written disclosure of all material evidence and information in the relator's possession. 740 ILCS 175/4(b)(2) (2016). The complaint is filed with the court *in camera*, and remains under seal for at least 60 days. *Id*. The defendant may not be served with the complaint until the court orders that service may be made. *Id*. The Attorney General may, for good cause, move for an extension of time during which the complaint remains under seal. 740 ILCS 175/4(b)(3) (2016).

Before the expiration of the time the complaint remains under seal, the Attorney General may either intervene in the case and proceed with the action, "in which case the action shall be conducted by the State," or notify the court that she "declines to take over the action, in which case the person bringing the action shall have the right to conduct the action." 740 ILCS 175/4(b)(4)

(2016). The Attorney General may also elect to pursue the State's claim through an alternate remedy. 740 ILCS 175/4(c)(5) (2016).

If the Attorney General proceeds with the action, she "shall have primary responsibility for prosecuting the action," and is not bound by any act of the relator. 740 ILCS 175/4(c)(1) (2016). The relator has the right to continue as a party to the action, except that the Attorney General has the right to dismiss or settle the action notwithstanding the relator's objection, and the Attorney General may move the court to impose limitations on the relator's participation in the action. 740 ILCS 175/4(c)(2) (2016). The Attorney General may file her own complaint or amend the relator's complaint. 740 ILCS 175/5(c) (2016).

If the Attorney General declines to intervene in the action, the relator "shall have the right to conduct the action." 740 ILCS 175/4(c)(3) (2016). In that case, "[i]f the State so requests," it shall be served with copies of all pleadings and supplied with all deposition transcripts at its expense. *Id*. The Attorney General retains the right to intervene in the action at a later point, upon a showing of good cause. *Id*.

Regardless of whether the Attorney General elects to intervene, the court may stay discovery by the relator upon a showing by the Attorney General that the discovery would interfere with the State's investigation or prosecution of a matter arising out of the same facts. 740 ILCS 175/4(c)(4) (2016).

The Act also provides that, when the Attorney General proceeds with an action brought by a relator, the relator shall receive an amount payable from the proceeds or settlement of the claim, typically between 15% and 25% of the proceeds or settlement. 740 ILCS 175/4(d)(1) (2016). If the Attorney General does not conduct the proceeding, the relator bringing the claim shall receive between 25% and 30% of the proceeds or settlement. 740 ILCS 175/4(d)(2) (2016). In both cases, the relator "shall also receive an amount for reasonable expenses, which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs," payable by the defendant. 740 ILCS 175/4(d)(1), (2) (2016).

III. When the Attorney General declines to intervene in a false claims lawsuit, the relator conducts the litigation without the Attorney General's oversight of filings and discovery.

In arguing that the Attorney General acts as "independent counsel" to the relator, the relator overstates the extent to which the Attorney General controls the litigation when the Attorney General declines to intervene. In *Scachitti*, this Court addressed whether the Act "usurp[s] the constitutional powers of the Attorney General to represent the State" by permitting actions by private *qui tam* relators. 215 Ill. 2d at 509. The precise issue before the Court was whether the Act "places sufficient control in the hands of the Attorney General" over *qui tam* actions. *Id*.

In holding that the Act "does not usurp the Attorney General's constitutional power to conduct the legal affairs of the state when the state is

the real party in interest," *id*. at 515, this Court found that "the Attorney General in all circumstances effectively maintains control over the litigation," *id*. at 513. This Court focused on three statutory features to reach this conclusion: first, the Attorney General has the authority to intervene in any action at any time and assume primary responsibility for prosecution of the case, *id*. at 511 (citing 740 ILCS 175/4(b), (c) (2002)); second, even if the Attorney General declines to intervene, she "retains control over the litigation by monitoring the proceedings through receiving copies of all pleadings and deposition transcripts," *id*. (citing 740 ILCS 175/4(c)(3) (2002)); and third, the Attorney General retains the authority to dismiss or settle the action at any time, *id*. at 511-12 (citing 740 ILCS 175/4(b), (c) (2002)).

Here, the Attorney General declined to intervene but on appeal relator claims that the Attorney General "authorized and oversaw" the action. Pl. Br. 18. Relator asserts that the Attorney General had "complete control" over the litigation and therefore provided "an objective[,] detached review of independent counsel." *Id*. at 21 (internal quotation marks omitted). While relator is correct that it is in a "subordinate position" to the Attorney General, *id*., it misrepresents the nature of the Attorney General's involvement when she has declined to intervene in or dismiss or settle an action under the Act.

As the Act makes clear, when the Attorney General declines to intervene, the relator "shall have the right to conduct the action." 740 ILCS 175/4(b)(4)(B) (2016); *see also* 740 ILCS 175/4(c)(3) (2016) ("If the State elects

not to proceed with the action, the person who initiated the action shall have the right to conduct the action."). To be sure, the Attorney General effectively maintains control over the litigation in the sense that she may intervene at any time, upon a showing of good cause, 740 ILCS 175/4(c)(3) (2016), may request a stay of discovery pending a state investigation or prosecution of an action arising out of the same facts, 740 ILCS 175/4(c)(4) (2016), or may dismiss or settle the action, 740 ILCS 175/4(c)(2) (2016); *see Scachitti*, 215 Ill. 2d at 511-13.

Although the Attorney General retains this ultimate control, the relator retains the right to conduct the litigation. 740 ILCS 175/4(b) (2016); 740 ILCS 175/4(c)(3) (2016). While the Attorney General may request copies of pleadings that are filed in the action and copies of deposition transcripts, at the State's expense, 740 ILCS 175/4(c)(3) (2016), no statutory provision requires the Attorney General to review or approve any pleadings. As this Court explained in *Scachitti*, where the Attorney General declines to intervene in an action, she "retains control over the litigation *by monitoring proceedings through receiving copies of all pleadings and deposition transcripts*." 215 Ill. 2d at 511 (emphasis added). The Attorney General's control does not entail approving or authorizing every filing made by the relator or otherwise acting as independent counsel to the relator.

For that reason, relator's claim that the Attorney General's "complete control" over the litigation eliminates the potential for abusive fee generation

must fail. *See* Pl. Br. 32. As explained, the Attorney General does not exercise the type of control over the litigation that relator asserts. The Act does not require that the Attorney General review pleadings or discovery requests, and certainly not to determine if they are in good faith or an exercise in excessive fee generation. That would entail a level of micromanagement of the litigation process that the Act reserves to the relator when the Attorney General declines to intervene, 740 ILCS 175/4(b)(4)(B) (2016); 740 ILCS 175/4(c)(3) (2016), and is inconsistent with the actual practice of the parties in *qui tam* cases under the Act. Indeed, relator's view is backward. When the Attorney General declines to intervene, the government has ceded to the private party the day-to-day right to *conduct* the litigation, subject to the Attorney General's right to the ultimate *control* of the litigation. In that scenario, the Attorney General does not play a role in analyzing whether the relator's expenses are justified or reasonable, and therefore does not guarantee against excessive or frivolous fee generation.

Relator's position is also inconsistent with other authority discussing the government's role when it declines to intervene in an action under the substantively similar federal false claims statute. In *U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 935-36 (2009), the Supreme Court explained that the government's role was limited when it declines to intervene in a federal false claims action, even though the government has the "right to receive pleadings and deposition transcripts in cases where it declines to

intervene." And a federal district court has explained that "if the government elects not to intervene, it retains no right to control the litigation in any meaningful way. It may not issue subpoenas, conduct depositions, propound discovery, call witnesses, or cross-examine the defendant's witnesses. It is entitled to receive pleadings and deposition transcripts, but no more." *U.S. v. Whyte*, 229 F. Supp. 3d 484, 490 (W.D. Va. 2017). These cases confirm the Attorney General's understanding that, when she declines to intervene in a *qui tam* action under the Act, she retains the ultimate control of the litigation in that she can later intervene, dismiss, or settle the case, but she does not conduct the proceedings, as that right is granted to the relator.

In sum, relator's arguments that the Attorney General acts as relator's independent counsel and that the Attorney General's "complete control" of its case serves as a check against abusive fee generation should be rejected. As *Scachitti* made clear, the Attorney General must retain ultimate control of the litigation because the State is a real party in interest in *qui tam* actions under the Act. But that control does not include approving or authorizing specific filings, conducting discovery, taking depositions, questioning witnesses, or any of the other day-to-day aspects of conducting litigation.

IV. Providing an attorneys' fee award to a relator law firm for work performed by that firm's attorneys may distort the Act's balance between encouraging disclosure of fraud and discouraging parasitic lawsuits.

The award of attorneys' fees to a law firm that is also the relator for work performed by the firm's attorneys is a problem unique to false claims cases because of the prospect of receiving both a relator's reward and an attorneys' fee award. Recovery of attorneys' fees in such a case may distort the Act's unique balance between encouraging meritorious false claims actions and discouraging parasitic lawsuits. This balance between encouraging false claims actions but also discouraging opportunistic relators is part of the federal False Claims Act, upon which the Illinois statute is modeled. *See State ex rel. Schad v. Nat'l Bus. Furniture, LLC*, 2016 IL App (1st) 150526, ¶ 28. In the federal statute, Congress sought to achieve the "golden mean" between providing adequate incentives for whistleblowers and discouraging parasitic lawsuits. *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 294 (2010); *Cause of Action v. Chi. Transit Auth.*, 815 F.3d 267, 273 (7th Cir. 2016).

As under the federal statute, the Act encourages relators to bring a false claims case by the provisions entitling a relator to a share of any award. 740 ILCS 175/4(d)(1), (2) (2016). Additionally, the relator is entitled to "reasonable attorneys' fees and costs." *Id*. But the relator-award provisions could lead to opportunistic relators who seek a reward "even though [they

have] contributed nothing significant to the exposure of the fraud." *U.S. ex rel. Devlin v. State of California*, 84 F.3d 358, 362 (9th Cir. 1996). To avoid such parasitic lawsuits, for instance, the General Assembly enacted the original-source requirement, which permits dismissal of a false claims action, unless such dismissal is opposed by the Attorney General, if the allegations or transactions that form the basis for the suit were publicly disclosed by another source prior to suit. 740 ILCS 175/4(e)(4)(A) (2016). But the balance can be thrown off in other ways as well.

Permitting a relator law firm to recover the relator's reward as well as attorneys' fees for its own legal work on the case risks distorting the golden mean because it encourages parasitic or non-meritorious lawsuits. That is because attorneys' fees may be many times greater than a relator's portion of a recovery, so the case may be far more attractive to the law firm relator than to a different relator. A law firm relator may have an incentive to bring a low-value lawsuit and engage in abusive discovery practices in hopes of obtaining a nuisance-value settlement that provides the relator with both a portion of the settlement and inflated attorneys' fees. The result is that the prospect of an attorneys' fee award may provide incentive for a relator law firm to bring a case regardless of the relative worth of the underlying false claim. That, however, is not the purpose of the Act's fee-shifting provision. *See Hamer v. Lentz*, 132 Ill. 2d 49, 61-62 (1989) (explaining FOIA fee-shifting provision was not intended to be "a reward for successful plaintiffs").

This is not to say that no relator law firm should ever receive an award of attorneys' fees for work performed by its attorneys representing the relator. Instead, when the relator law firm has a true attorney-client relationship with its counsel in the case, the relator's incentives are not distorted and the golden mean is preserved. *See U.S. ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 577 (9th Cir. 1996) (citing *Kay v. Ehrler*, 499 U.S. 432, 435-37 (1991)), *abrogated on other grounds*, *see U.S. v. Kim*, 806 F.3d 1161, 1174 (9th Cir. 2015). In *Kay*, the Supreme Court explained that "an award of fees to only those litigants who have retained independent counsel ensures the effective prosecution of meritorious claims." 499 U.S. at 347. In that way, the purpose of the fee-shifting statute is accomplished.

In rare circumstances, attorneys working at a relator law firm may be sufficiently independent from the relator to be entitled to attorneys' fees, but in each case the court should scrutinize the relationship of the firm's attorneys to the relator to determine whether sufficient independence exists. For instance, where the individual lawyers who conducted the investigation that led to the filing of the case had no role in the subsequent litigation of the case and were not part of the leadership of the firm, sufficient independence may be established.

The appellate court noted that the relator law firm in this case is "a professional relator, a characterization relator does not dispute (and which the record amply supports)." *My Pillow*, 2017 IL App (1st) 152668, ¶ 123.

Furthermore, the court noted that the argument that relator law firm's attorneys were adequately independent of the relator were unconvincing because Stephen Diamond was the president of the law firm, made at least one of the purchases at issue in the action using his personal credit card, and conducted the direct examination of relator's principal witness at trial. *Id*. at ¶ 139. As the court found, "Diamond was the lead counsel at the rather brief trial—as well as a witness called in My Pillow's case-in-chief." *Id*. Thus, "the same person is both the final decision-maker at the client-corporation—its president—and the lead attorney giving advice to the decision-maker." *Id*. at ¶ 140. That is not sufficient independence to justify an award of attorneys' fees for work performed by the relator law firm's own attorneys.

This Court should hold that awarding attorneys' fees to a law firm relator for work performed by the firm's attorneys representing the relator should be limited to those rare circumstances where the attorneys were adequately independent of the relator. The Attorney General's authority to control *qui tam* suits under the Act does not provide the type of independent counsel oversight that would justify an award to a law firm relator for the work its attorneys performed representing it.

CONCLUSION

For these reasons, the Illinois Attorney General respectfully requests that this Court affirm the judgment of the appellate court.

Dated: March 21, 2018

Respectfully submitted,

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SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14 pages.

/s/ *Brett E. Legner*
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