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White Collar Defense and Investigations Alert
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The Supreme Court Confirms The Government's Significant Discretion To Dismiss False Claims Act Cases

On June 16, 2023, the Supreme Court ruled in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, that (i) under the False Claims Act, the government may move to dismiss a False Claims Act ("FCA") action pursuant to 31 U.S.C. § 3730(c)(2)(A) and (ii) in assessing the government's motion to dismiss an FCA action over a relator's objection under Federal Rule of Civil Procedure 41, the government should be afforded substantial deference. This decision is a strong endorsement of the government's right to dismiss cases brought by relators under the FCA that are frivolous, inconsistent with government policy, or wasteful of the time of government employees, even when the relator objects. As discussed below, defendants should leverage *Polansky* to press the government to seek the dismissal of FCA cases that fall into these categories.

The Role of the Government In False Claims Act Litigation

Under the False Claims Act, any person who presents false or fraudulent claims for payment to the federal government is subject to civil liability. *See* 31 U. S. C. §§3729–3733. The statute further authorizes private parties, known as relators, to sue on the government's behalf in *qui tam* actions. §3730(b)(1).

Pursuant to this statute, relators must file their complaint under seal and serve a copy and supporting evidence on the government. *See* §3730(b)(2). The government then has 60 days (often extended for "good cause") to decide whether to "intervene and proceed with the action." §§3730(b)(2)–(3). If the government elects to intervene during that seal period, the government may take control of the case. §§3730(b)(4)(A)–(B). If, however, the government passes on intervention, it remains a real party in interest, and may still intervene after the seal period ends, as long as it shows good cause. *See* §3730(c)(3).

Once the government intervenes, it has the power to move to dismiss the case pursuant to Section 3730(c)(2)(A) when, for example, it believes a case is meritless, wasteful, or otherwise inconsistent with government policy. In practice, however, even when the government does not think that the lawsuit is worth investing its own resources, it more often simply declines to intervene in a case, rather than move for dismissal.

Even if the government does not intervene, if the relator succeeds in the lawsuit, the government is still entitled to the lion's share of any recovery from the defendant. Under the FCA, the government has recovered more than $70 billion since 1986[1], much of it driven by whistleblower lawsuits and largely focused on health care and defense contracting.

[1] https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year

The Supreme Court's Decision In *Polansky*

In *United States ex rel. Polansky v. Executive Health Resources, Inc.*, a *qui tam* action, relator Jesse Polansky alleged that respondent Executive Health Resources helped hospitals overbill Medicare. The government declined to intervene during the seal period, and the case spent years in discovery until the government decided that the burdens of the suit outweighed its value. The government then filed a motion under Section 3730(c)(2)(A), which provides that "[t]he government may dismiss the action notwithstanding the objections of the [relator]," so long as the relator receives notice and an opportunity for a hearing prior to dismissal. The district court granted the motion for voluntary dismissal, and the Third Circuit affirmed. The panel concluded that the government was permitted to dismiss pursuant to Section 3730(c)(2)(A) even though it did not intervene during the seal period, and that the district court did not abuse its broad discretion to dismiss under Federal Rule of Civil Procedure 41(a).

The Supreme Court granted certiorari to resolve a circuit split on two questions: (i) whether the government has the authority to dismiss an action under Section 3730(c)(2)(A) if it declined to intervene during the seal period; and (ii) what standard the district court should use in ruling on a Section 3730(c)(2)(A) dismissal motion.

As to the first question, the Supreme Court interpreted Section 3720(c)(2) to mean that the government may move to dismiss once it has intervened, whether during the seal period or after. In other words, moving to intervene during the seal period is not necessary as long as the government intervenes at some point before it seeks to dismiss the FCA action. The Court reached this conclusion as a matter of statutory interpretation. As the Court explained, "Congress decided not to make seal-period intervention an on-off switch." (Slip Op. at 13). The Court explained that "nothing about the statute's objectives suggests that the Government should have to take a back seat to its co-party relator," as the purpose of the lawsuit "remains, as it was in the seal period, one to vindicate the Government's interests." (*Id.*).

As to the second question, the Supreme Court held that dismissal is governed by a low standard — Federal Rule of Civil Procedure 41 ("Rule 41"), which governs voluntary dismissals in civil litigation. The Court found that under Rule 41, although the interests of the whistleblower must be considered, including the substantial resources he may have expended on the action, the government's views are entitled to substantial deference. Because *qui tam* suits allege injury to the government alone, the Court held that "a district court should think several times over before denying a motion to dismiss. If the government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant the motion. And that is so even if the relator presents a credible assessment to the contrary." (Slip Op. at 16).

As an additional note, Justice Thomas, in his dissent, proposed the possibility that the FCA's statutory structure renders *qui tam* actions unconstitutional under Article II's separation of powers clause. According to the dissent, only the executive and not private citizens should be permitted to bring suits to vindicate the government's interests. Justices Kavanaugh and Barrett concurred with the majority opinion but agreed with Justice Thomas's opinion regarding the potential unconstitutionality of *qui tam* actions. In other words, three justices have concluded that there is a colorable argument that the FCA is unconstitutional. It is worth seeing if litigants in other FCA cases press this argument in future cert petitions.

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Final Thoughts

Too often a defendant in a pending FCA action has already demonstrated to the demanding standards of the Department of Justice that an action is meritless, as the government routinely conducts extensive investigations during the seal period in order to determine whether or not to intervene. Then, having convinced the government not to intervene, the defendant faces an unsealed FCA civil complaint and must litigate the same issues again. Defendants do not need to be burdened in this way, and where the government has determined that a lawsuit brought under the FCA lacks merit, why shouldn't the government give serious consideration to seeking voluntary dismissal?

In the past, the government might have hesitated lest it get bogged down in a legal quagmire about the extent of its authority. No more: the Supreme Court's decision in *Polansky* is a welcome clarification of the law that should embolden defendants to ask for voluntary dismissal and the government to agree to this relief. It is now clear beyond peradventure that the government may move to dismiss an FCA action even if it did not intervene during the seal period, and that the government is afforded deference when it seeks to dismiss whistleblower lawsuits filed under the FCA's *qui tam* provisions.

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