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The Supreme Court Clarifies the Government's FCA Dismissal Power and Invites Constitutional Challenge to the FCA's Qui Tam Provision

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For the second time this month, the United States Supreme Court addressed a circuit split involving the False Claims Act (FCA, 31 U.S.C. §§ 3729 – 3733). Earlier, in the *SuperValu* decision (discussed in a recent Health Law Rx Blog), the Court clarified that subjective intent is relevant in determining whether an objectively reasonable (but incorrect) interpretation of a rule or regulation could negate the FCA's scienter element (*U.S. ex rel. Schutte v. SuperValu Inc.*, 143 S.Ct. 1391, 1401 (U.S. 2023)). Last week, in *U.S. ex rel. Polansky v. Executive Health Resources, Inc.*, the Court held that, despite declining to intervene at the outset of a case, the Government retains the authority to intervene later, including for the purposes of seeking dismissal pursuant to and consistent with Federal Rule 41(a) (*U.S. ex rel. Polansky v. Exec. Health Res., Inc.*, No. 21-1052, 2023 WL 4034314, at *2 (U.S. June 16, 2023)).

Statutory Context and a Split Among the Circuits

The False Claims Act provides that, even in a declined *qui tam* action, the Government remains a "real party in interest," with the statutory right to intervene for good cause shown at any time (31 U.S.C.

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§ 3730(c)(3)). In *Polansky*, the relator argued (with agreement from Justice Thomas) that this language did not grant the Government any intervention rights after the Government's initial decision to decline intervention early in the case (*Polansky*, 2023 WL 4034314, at *3). The majority disagreed.

For more than twenty years, various Courts of Appeals agreed that post-declination intervention was possible under the FCA. But these courts applied different standards when late-case Government intervention preceded its effort to dismiss the matter. The D.C. Circuit found the Government's dismissal authority to be "unfettered" (*Swift v. U.S.*, 318 F. 3d 250, 252 (D.C. Cir. 2003)). The First Circuit placed an onus on the relator to avoid dismissal by showing that the Government's motion was "transgress[ing] constitutional limitations" or "perpetrating a fraud on the court" (*Borzilleri v. Bayer Healthcare Pharms., Inc.*, 24 F.4th 32, 42 (1st Cir. 2022)). Tilting far more towards the relator's rights camp, the Ninth and Tenth Circuits held that the Government could dismiss a whistleblower FCA case only when it identified "a valid government purpose" that had "a rational relation [to] the dismissal" (*U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998); *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir. 2005) (adopting *Sequoia Orange* standard)). In a procedural anomaly, three circuits did not even require the Government to intervene before seeking dismissal. Finally, the Seventh Circuit set a process that allowed the Government to intervene but mandated compliance with Federal Rule of Civil Procedure 41(a), granting dismissal only "on terms that the court considers proper" (*U.S. ex rel. Cimznhca, LLC v. UCB, Inc.*, 970 F.3d 835, 850-51 (7th Cir. 2020)).

Polansky resolved this circuit split.

Seventh Circuit for the Win

Polansky emanated from the United States Court of Appeals for the Third Circuit, which applied the Seventh Circuit's "good cause" test for intervention (31 U.S.C. § 3730(c)(3)) and Federal Rule 41(a)'s "terms the court considers proper" test related to the question of dismissal (*Polansky v. Exec. Health Res., Inc.*, 17 F. 4th 376, 390 (2021)). Ultimately, the Supreme Court affirmed. It held that the Government may dismiss an FCA case over the whistleblower's objection provided that it intervened ***at any point*** in the litigation (*Polansky*, 2023 WL 4034314, at *3). A district court should apply the good cause test stated in 31 U.S.C. § 3730(c)(3) to determine if intervention is proper. Once intervention has occurred, the Government may move under Federal Rule 41(a) to dismiss a *qui tam* case, and a district court may grant a plaintiff's motion to voluntarily dismiss a case "on terms that the court considers proper" (*Id.*at *8). Procedurally, the FCA requires notice to the relator of the Government's motion for dismissal and a hearing during which the court must apply Rule 41's standard to determine whether the Government has provided proper grounds for dismissal (31 U.S.C. § 3730(c)(2)(A)).

Ruling Sets a Low Bar for Government's Dismissal of *Qui Tam* Suits

The Court's majority opinion in *Polansky* acknowledged that although district courts must consider the relator's interests and expenses in the litigation, the Government's motion to dismiss "will satisfy Rule 41 in all but the most exceptional cases"(*Polansky*, 2023 WL 4034314, at *9). The Court explained that FCA suits allege injury solely to the Government (*Id.*at *4). If the Government's dismissal motion offers a reasonable argument that the benefits of continued litigation are outweighed by the burdens, district courts "should think several times over" before denying dismissal, even when the whistleblower provides a credible counterargument (*Id.*at *9). The Court stated that the burdens of continued litigation of non-intervened cases, such as the Government's expenses of

monitoring the case and participating in discovery, and the potential disclosure of privileged information, provide proper grounds for dismissal that district courts should grant "[a]bsent some extraordinary circumstance" (*Id.*)

Why This Split Resolution Matters Now

Ultimately, this decision matters for three reasons:

1. **Validation of the Granston Memo**: On January 10, 2018, Director of the DOJ's Commercial Litigation Branch's Fraud Section Michael D. Granston issued an internal memo (Granston Memo) articulating several factors that the DOJ should consider when evaluating dismissal of FCA cases. The Granston Memo noted that the FCA gives the Government the authority to intervene in a previously declined case for the purposes of dismissing *qui tam* actions. In so doing, the Granston Memo encouraged the DOJ to serve as the gatekeeper for FCA litigation and to advance the Government's interests while avoiding problematic precedent. Acknowledging the circuit split regarding the DOJ's discretion when moving to dismiss, the Granston Memo advised U.S. Attorneys to identify a basis for dismissal that complied with any potential standard.
   The *Polansky* decision validates the DOJ's interpretation of its own authority to intervene in late-stage FCA cases.
2. **Impact on defense strategy**: False Claims Act practitioners are familiar with the impact that the Granston Memo has had on the course of litigating *qui tam* cases. Although late-case government intervention for the purposes of dismissal is a seldomly used DOJ tool, the mere normalization of this discussion since 2018 has impacted many facets of advanced stage False Claims Act cases. In the last five years or so, defense practitioners have been able, at times and when appropriate, to leverage the prospect of government intervention for dismissal to alter the

course of a *qui tam* case. *Polansky* appears to add to that leverage.

3. **Article II versus the *qui tam* provision**: *Polansky* will be forever bookmarked as the first case in which multiple Supreme Court justices winked at the possibility that the *qui tam* provision of the False Claims Act may run afoul of Article II of the Constitution. In his reasoned dissent, Justice Thomas argued that Article II grants executive power entirely to the President and the Executive Branch. In their concurring decisions, Justices Kavanaugh and Barrett agreed with Justice Thomas' view that "[t]here are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation" that the Court should analyze "in an appropriate case" (*Polansky*, 2023 WL 4034314, at *11 (Kavanaugh, J. concurring)). Collectively, these Justices appear to be inviting a test case to challenge whether the FCA's *qui tam* provision, which has yielded billions in recoveries to the federal fisc, is even constitutional at all. Such a ruling by the Court would forever change the landscape of FCA enforcement. The Supreme Court may one day agree with Justice Thomas that because *qui tam* plaintiffs are not Article II officers of the United States, "Congress cannot authorize a private relator to wield executive authority to represent the United States' interests in civil litigation" (*Id.*at *15 (Thomas, J. dissenting)).
