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Client Alert Commentary

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US Supreme Court Upholds Broad, but Not Unfettered, Government Authority to Dismiss FCA Cases

DOJ may dismiss* qui tam *False Claims Act cases at any point, as long as it intervenes in the case and satisfies the deferential Federal Rule of Civil Procedure 41(a) standard.

The US Supreme Court, in its 8-1 June 16, 2023, opinion in *U.S. ex rel. Polansky v. Executive Health Resources, Inc.*,[1] clarified the government's ability to dismiss False Claims Act (FCA) cases over a relator's objection. Adopting the framework outlined by the US Court of Appeals for the Third Circuit, the Court upheld the broad discretion afforded to the US Department of Justice (DOJ) to dismiss *qui tam* actions, so long as DOJ intervenes and meets the standard for voluntary dismissal under Federal Rule of Civil Procedure 41(a).

In his dissent, Justice Clarence Thomas resurrected the debate about whether the FCA's *qui tam* provisions, which permit private whistleblowers to represent the interests of the United States in litigation, violate Article II of the Constitution. Joined in concurrence by Justices Brett Kavanaugh and Amy Coney Barrett with respect to the constitutionality issue, Justice Thomas's dissent may open the door to future constitutional challenges to the *qui tam* provisions of the FCA.

Circuit Splits: How We Got Here

The Court's decision resolves a split among the US Courts of Appeals regarding the government's authority to dismiss an FCA case and the standard that lower courts should use to rule on a motion to dismiss from the government.

Historically, the D.C. and Ninth Circuits dictated the range of interpretations regarding the standard required for the government to dismiss a *qui tam* action over a relator's objection. The D.C. Circuit provided the government an "unfettered right" to dismiss a *qui tam* suit,[2] whereas the Ninth Circuit required the government to identify a "valid government purpose" rationally related to the case's dismissal.[3] The First and Eighth Circuits largely followed the D.C. Circuit's interpretation, while the Tenth Circuit joined the Ninth Circuit in applying restraint to the government's dismissal authority.[4]

The Seventh Circuit in *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*[5] and the Third Circuit in *Polansky* adopted a third approach. The circuits focused their analysis on two central questions: (1) whether the government has the authority to dismiss an FCA action if it originally declined to intervene; and (2) what standard applies to the government's motion to dismiss. On the first issue,

both circuits agreed that intervention was required, and that the government must show "good cause" to intervene after initially declining. With respect to the second question, the circuits held that the appropriate standard for evaluating the government's motion to dismiss an FCA action is found in Federal Rule of Civil Procedure 41(a).

Supreme Court Adopts Third Circuit's Approach

Relator Jesse Polansky filed a *qui tam* action[6] against Executive Health Resources (EHR), alleging that the company enabled its clients to defraud the government by billing Medicare for outpatient services at higher inpatient rates. DOJ initially declined to intervene,[7] but five years into the litigation DOJ filed a motion to dismiss the suit over Polansky's objection due to the "tremendous, ongoing burden on the government," privilege concerns, and doubts about Polansky's credibility and ability to prove an FCA violation.[8] The district court sided with DOJ and dismissed the suit. The Third Circuit affirmed, and Polansky appealed.

The Court, rejecting the positions of both the relator and the government,[9] adopted the Third Circuit's middle-of-the-road approach, ruling that:

1. the government must intervene before moving to dismiss a *qui tam* action pursuant to Section 3730(c)(2)(A), though it must demonstrate "good cause" to do so if it initially declined; and

2. courts should review the government's motion to dismiss under the Federal Rule of Civil Procedure 41(a) standard, which gives "substantial deference" to the government.

1. DOJ May Exercise Its Dismissal Authority at Any Point So Long as It First Intervenes

The Court held that "the Government may seek dismissal of an FCA action over a relator's objection so long as it intervened sometime in the litigation, whether at the outset or afterward."[10] As required by the FCA, the government must show "good cause" to intervene after expiration of the seal period.[11] The Court did not address what is required to demonstrate "good cause," but noted that the Third Circuit held that it was "neither a burdensome nor unfamiliar obligation."[12]

2. Federal Rule of Civil Procedure 41(a) Applies to Dismissals

The Court agreed with the Third Circuit that the appropriate standard for evaluating DOJ's motions to dismiss a *qui tam* action is found in Federal Rule of Civil Procedure 41(a), which governs plaintiffs' ability to voluntarily dismiss a civil action. (See Latham's Client Alert Seventh Circuit Deepens Circuit Split Over FCA Dismissal Authority.) The Court reasoned that the Federal Rules are the "default rules in civil litigation" and that nothing in the FCA suggests a departure "from the usual voluntary dismissal rule."[13]

The Court gave little weight to the FCA's requirement that the relator be afforded a hearing prior to dismissal.[14] Regarding the purpose of the hearing, the Court noted that the Third Circuit posited that a hearing "might inquire into allegations that a dismissal" violates the relator's constitutional rights.[15]

The Court stated that in considering a post-answer dismissal motion, courts should consider the interests of whistleblowers — many of whom "have by then committed substantial resources" — in conducting the "proper terms" assessment required by Rule 41(a)(2).[16] Nonetheless, the Court noted that dismissal motions will meet Rule 41's requirements "in all but the most exceptional cases."[17] Recognizing the government's entitlement to substantial deference in this context, the Court explained that courts should grant dismissal "if the Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits."[18]

Dissent Questions Constitutionality of *Qui Tam* Provisions

In Part I of his dissent, Justice Thomas argued that the relevant statutory provisions in 31 U.S.C. § 3730(b) and (c) "do not permit the Government to seize the reins from the relator to unilaterally dismiss the suit" after the government previously declined to intervene during the seal period.[19] In Part II, joined by Justices Kavanaugh and Barrett, Justice Thomas questioned the constitutionality of the FCA's *qui tam* provisions under Article II. Noting that the President alone holds "executive Power," he queried whether Congress can permit a private whistleblower to "wield executive authority to represent the United States' interests in civil litigation."[20] Justice Thomas did not offer an answer to this question. He instead stated that the case should be vacated and remanded "for the Third Circuit to consider the correct disposition of that motion in light of any applicable constitutional requirements."[21]

5 Key Takeaways for FCA Defendants

1. **The government is "entitled to substantial deference" in dismissing *qui tam* claims.** *Polansky* makes clear that the government's interest in *qui tam* actions is the "predominant one" and reinforces its wide latitude to dismiss cases at any juncture.

2. **The Court's opinion is consistent with the factors set forth in the 2018 Granston Memo.** The Court found that the government's bases for dismissing the suit — discovery costs, possible disclosure of privileged documents, and the merits of the suit itself — were "all that is needed for the Government to prevail on a 2(A) motion to dismiss."[22] Accordingly, FCA defendants should look for opportunities to request dismissal and frame requests pursuant to both the bases articulated by the government in *Polansky* and the other factors outlined in the 2018 memo. (See Latham's Client Alert Government Gatekeeper? DOJ Memo Encourages Dismissal of Meritless False Claims Act Cases.) A review of § 3730(c)(2) motions to dismiss shows that merit and burden upon the government are the factors most frequently cited in support of dismissal.

3. **FCA defendants should consider strategic discovery.** Based on the government's reasoning for moving to dismiss in *Polansky*, burdensome discovery can be a key factor in prompting DOJ's dismissal request.[23] Sequencing government-related discovery early in the discovery process may allow DOJ to understand, at the earliest possible point, the costs of allowing the litigation to proceed.

4. **FCA defendants should consider arguing the constitutionality of the FCA's *qui tam* provisions.** Justices Thomas, Kavanaugh, and Barrett suggested that the FCA's *qui tam* provisions may be inconsistent with Article II of the Constitution because "private relators may not represent the interests of the United States in litigation."[24] If whistleblowers proceed in an FCA suit on their own, FCA defendants should be especially mindful to raise these constitutionality arguments, even in circuits that have previously ruled on the issue in order to create the potential for *en banc* review and to preserve the ability for Supreme Court review.

5. **The Court's decision may deter relators' counsel from proceeding in declined cases.** Polansky incurred more than $20 million in attorney fees before DOJ moved to dismiss his claim. Since DOJ can intervene and dismiss *qui tam* claims upon a showing of "good cause" after the seal period, relators' counsel may now hesitate to pursue cases, particularly those requiring substantial litigation costs, where the risk of later dismissal is higher.

If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Anne W. Robinson
anne.robinson@lw.com
+1.202.637.2161
Washington, D.C.

Morgan L. Maddoux
morgan.maddoux@lw.com
+1.202.637.3318
Washington, D.C.

Ryan J. Malo
ryan.malo@lw.com
+1.202.637.2133
Washington, D.C.

Christopher R. Caulder
chris.caulder@lw.com
+1.202.637.2297
Washington, D.C.

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Endnotes

[1] No. 21-1052, 2023 WL 4034314, 599 U.S. __ (June 16, 2023).

[2] *See Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). The Eighth Circuit has joined the D.C. Circuit and applied the *Swift* standard. *United States ex rel. Davis v. Hennepin Cty.*, No. 18-CV-01551 (ECT/HB), 2019 WL 608848, at *5 (D. Minn. Feb. 13, 2019) (summarily affirmed in *United States ex rel. Davis v. Hennepin Cty.*, No: 19-2298 (8th Cir. Aug. 14, 2019)). The Third Circuit, in *United States ex rel. Chang v. Children's Advocacy Ctr.*, 938 F.3d 384, 388 (3d Cir. 2019), declined to weigh in on whether the *Swift* or *Sequoia Orange* standard applied, finding both satisfied in any event. *Id.* (further finding that Section 3720(c)(2)(A) does not afford the right to a hearing unless specifically requested or a challenge demonstrates that the government's motion to dismiss is arbitrary and capricious).

[3] 151 F.3d 1139, 1145 (9th Cir. 1998); *see also United States ex rel. Thrower v. Acad. Mortg. Corp.*, No. 18-16408, 2020 WL 4462130, at *10 (9th Cir. Aug. 4, 2020) (reaffirming *Sequoia Orange* standard and dismissing for lack of jurisdiction government's appeal of district court's denial of motion to dismiss). The Tenth Circuit has also adopted the *Sequoia Orange* standard. *See United States ex rel. Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 936 (10th Cir. 2005); *but see United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App'x 849, 853 (10th Cir. 2012) (declining to endorse either the *Sequoia Orange* or *Swift*

standards where the defendant had not been served with *qui tam* complaint and finding that both standards were met under the facts of that case).

[4] The Fifth Circuit refused to outline a standard for dismissal, but has confirmed the government's broad FCA dismissal authority. *See United States v. Eli Lilly & Co., Inc.*, 4 F.4th 255, 259 (5th Cir. 2021).

[5] No. 19-2273, 2020 WL 4743033 (7th Cir. Aug. 17, 2020).

[6] 31 U.S.C. § 3730(b)(1).

[7] *Polansky*, No. 21-1052, 2023 WL 4034314, at *5 (U.S. June 16, 2023).

[8] Memorandum of Law in Support of the United States' Motion to Dismiss Relator's Third Amended Complaint at 18, *United States, ex rel. Polansky v. Exec. Health Res. Inc.*, 422 F. Supp. 3d 916, 2019 WL 8750322 (E.D. Pa. Aug. 20, 2019).

[9] Before the Court, none of the parties agreed with the Third Circuit. The government argued that it had "unfettered discretion" to dismiss a *qui tam* action, regardless of whether it had first intervened. Conversely, Polansky contended that he had "exclusive" control over the suit because DOJ had waived its ability to dismiss the suit when it declined to intervene during the seal period. Even if the government had the ability to dismiss the suit after the seal period, Polansky argued, the government must satisfy an arbitrary and capricious review standard with a burden-shifting component.

[10] *Id.* at *2.

[11] 31 U.S.C. § 3730(c)(3).

[12] *Polansky*, 2023 WL 4034314, at *6 n.2.

[13] *Polansky*, 2023 WL 4034314, at *8.

[14] 31 U.S.C. § 3730(c)(2)(A).

[15] *Polansky*, 2023 WL 4034314, at *9 n.4.

[16] Federal Rule of Civil Procedure 41(a)(2) states that an action may be dismissed at the plaintiff's request "on terms that the court considers proper." The Court explained that this assessment "is more likely to involve the relator" because "all relators faced with a [dismissal] motion want their actions to go forward, and many have by then committed substantial resources."

[17] *Polansky*, 2023 WL 4034314, at *9.

[18] *Id.* at *9.

[19] *Id.* at *12.

[20] *Id.* at *15.

[21] *Id.* at *16.

[22] *Id.* at *9.

[23] *See Polansky*, 2023 WL 4034314, at *5 (DOJ moved to dismiss Polansky's *qui tam* suit after "its discovery obligations mounted and weighty privilege issues emerged.").

[24] *Id.* at *11 (Kavanaugh, J. concurring).