United States ex rel. Polansky v. Executive Health Resources, Inc, et al.: Supreme Court Clarifies Standard Under Which Government Can Intervene and Dismiss FCA Actions

June 16, 2023

Today, the Supreme Court issued a decision in *United States el rel. Polansky v. Executive Health Resources, Inc., et al*,[1] clarifying that the government maintains authority to dismiss a *qui tam* False Claims Act (FCA) action after initially declining to intervene so long as the government intervenes before moving to dismiss. Writing for an eight to one majority, Justice Elena Kagan's opinion resolves a circuit split as to the standard the government must satisfy in moving to dismiss an FCA case.

The Court held that the government maintains authority, with good cause shown, to intervene and move to dismiss an FCA suit even when it initially declined to intervene. The Court further reasoned that a district court facing a government's motion to dismiss should apply Federal Rule of Civil Procedure 41(a), which governs voluntary dismissals in civil litigation.

Background

Enacted during the Civil War, the FCA empowers private citizens to file suit on behalf of the government against those alleged to have defrauded the government. If successful, these actions, known as *qui tam* suits, entitle private citizens (known as "relators") up to 30 percent of the recovery.

When a relator files a *qui tam* complaint, the statute provides the government 60 days — which, in practice, is often further extended — to investigate the allegations while the complaint is under seal. After this period, the government may either take over the action or allow the relator to conduct the action on its behalf.[2] If the government declines to intervene, the "person who initiated the action shall have the right to conduct the action" and the government can later seek leave from the court to intervene "upon a showing of good cause."[3] "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."[4]

The statute's silence as to a description of the hearing on the motion or any standard the government must meet for dismissal resulted in a circuit split. For instance, the DC Circuit has held that the government has an "unfettered right to dismiss [a *qui tam*] action," while, at the other extreme, the Ninth Circuit has applied a

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1 599 U.S. ___ (2023).

2 31 U.S.C. § 3730(b)(4)(A)–(B).

3 *Id.* at § 3730(c)(3).

4 *Id.* at § 3730(c)(2)(A).

comparatively more demanding two-step burden-shifting analysis.[5] Under the test adopted in the Ninth Circuit, the government must identify a valid governmental purpose and a rational relationship between dismissal and accomplishment of the purpose before the burden shifts to relator to show that the dismissal is fraudulent, arbitrary and capricious, or illegal.[6]

In *Polansky*, Relator-Petitioner Dr. Jesse Polansky filed a *qui tam* action in 2012 alleging that Defendant Executive Health Resources provided false Medicare billing certifications that resulted in the submission of false claims to the government. After spending two years investigating the allegations while the complaint remained under seal, in June 2014, the government declined to intervene, and thereafter Polansky continued with the case. In February 2019, the government notified the court and parties of its intention to dismiss the action pursuant to 31 U.S.C. § 3730(c)(2)(A). The government and Polansky initially agreed that, rather than dismiss the action, Polansky would file an amended, narrower complaint. The government thus informed the district court in June 2019 that it decided not to move to dismiss but "reserve[d] the right to evaluate whether dismissal is warranted in the future based on further developments."[7] In August 2019, the government filed a motion to dismiss, which the court granted over Polansky's objection that the government lacked such authority and that counsel had already incurred an estimated $20 million in attorneys' fees.

The Third Circuit upheld the dismissal over arguments from Polansky that the government lacked authority to dismiss a *qui tam* action after initially declining to intervene and that the government, as the Ninth Circuit has held, was required to show a rational basis for dismissal.[8] The Third Circuit instead followed the Seventh Circuit and reasoned that the government could dismiss an action after moving to intervene later in the case and that a motion for dismissal was required to satisfy only the less demanding requirements of Federal Rule of Civil Procedure 41(a).[9] Rule 41(a)'s standards vary based on the procedural posture. Before a defendant files an answer or motion for summary judgment, the plaintiff can automatically dismiss an action without court approval by filing a notice of dismissal.[10] After the defendant files a responsive pleading, the rule provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper."[11] Polansky filed a petition for a writ of certiorari, pointing to the circuit split and conflicting approaches to *qui tam* actions filed across the country. The Supreme Court granted certiorari and heard oral argument on December 6, 2022.

The government maintains the power to intervene and move to dismiss a *qui tam* suit regardless of whether it initially declines to pursue the action.

The Supreme Court affirmed the Third Circuit's decision in its entirety. No circuit had taken the extreme position Polansky put forward that the government must intervene at the outset of a case or lose its right to dismiss a *qui tam* action. Noting that the government's interest in a *qui tam* action is "the predominant one," the Supreme Court similarly held that the FCA at no point removes the government's authority to dismiss an action brought on its behalf "so long as it intervened sometime in the litigation, whether at the outset or afterward."[12] In cases where the government initially declines to pursue the action, it may intervene at any point in the case "upon a showing of good cause."[13] As both the Third and Seventh Circuits have held, "showing 'good cause' is neither a burdensome nor unfamiliar obligation."[14]

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5 Compare *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), with *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998).

6 *Sequoia Orange Co.*, 151 F.3d.

7 *Jesse Polansky, M.D., M.P.H., et al. v. Executive Health Resources, Inc., et al.*, No. 12-CV-4239, ECF No. 454, at 4 (E.D. Pa. June 21, 2019).

8 *Polansky v. Exec. Health Res.*, 17 F.4th 376 (3d Cir. 2021).

9 *Id.* at 380.

10 Fed. R. Civ. P. 41(a)(1)(A).

11 *Id.* at 41(a)(2).

12 *Polansky*, 599 U.S. ___ (2023).

13 31 U.S.C. § 3730(c)(3).

14 *Polansky v. Exec. Health Res.*, 17 F.4th 376, 387 (3d Cir. 2021); *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835, 848–9 (7th Cir. 2020).

Once it intervenes, the government has the right to move to dismiss the suit, as would any plaintiff. As the Court noted, the suit remains "one to vindicate the Government's interests."[15] And while the government's interest "is typically to redress injuries against the Government," in some cases, the "interest is to obtain dismissal of the suit because it will likely cost the Government more than it is worth. Either way, that interest does not diminish in importance because the Government waited to intervene."[16]

Once the government intervenes, Federal Rule 41(a) provides the standard of review for a motion to dismiss.

The Court agreed with the Third Circuit that the appropriate standard comes from Federal Rule 41(a) and declined to accept either the government's position that it had "essentially unfettered discretion to dismiss" or impose a more demanding standard in cases where the government initially declined to intervene.[17] Instead, the Court reasoned that nothing in the FCA "suggests that Congress meant to except *qui tam* actions from the usual voluntary dismissal rule."[18] Once a defendant has served an answer or motion for summary judgment, "dismissal requires a 'court order, on terms that the court considers proper.'"[19]

As the Court noted, the application of the "default" rule in FCA cases will vary from a typical civil case in two ways. First, Section (c)(2)(A) of the FCA requires that the relator be given notice and an opportunity to be heard on the government's motion to dismiss. During the hearing, the district court will apply the standards of Rule 41. Second, the Court held that the Rule's "proper terms" analysis must consider the relator's interest. That said, the Court agreed with the Third Circuit that the government's motion to dismiss "will satisfy Rule 41 in all but the most exceptional cases" and that the government's position is "entitled to substantial deference."[20] "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."[21]

Impact

Polansky is the second of two FCA decisions the Supreme Court issued this term. Earlier this month, the Court issued a unanimous decision in United States ex rel. Schutte v. SuperValu Inc., finding that the FCA's scienter element — the defendant's knowledge of the claim's falsity — is subjective, referencing the defendant's knowledge and beliefs and not what an objectively reasonable person might have known or believed.[22] Along with that decision, the Court's decision today impacts FCA actions in several ways.

First, we expect continued significant activity by *qui tam* relators despite this decision, though there is the potential for some limited chastening of the plaintiffs' bar at least in some regions. *Qui tam* actions make up a significant portion of FCA cases filed and litigated each year. In fiscal year 2021, relators filed 598 *qui tam* suits, and in 2022, that number increased to 652. As no circuit had previously held that the government is divested of authority to dismiss an action after initially declining to intervene — and because the standard to intervene does not impose a heavy burden — it is unlikely that this decision will stall the trending increase in FCA *qui tam* litigation. That said, the Supreme Court has now clarified the very low burden on the government to dismiss *qui tam* actions. As before, relators are always taking on some risk that they will expend millions of dollars on litigation costs, only to have their case dismissed over their objections. Particularly in areas such as the Ninth Circuit where the standard was previously more relator-friendly, this could cause modest hesitation on the part

[15] *Polanksy*, 599 U.S. ___ (2023).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *United States ex rel. Schutte v. SuperValu Inc.*, 589 U.S. ___ (2023).

of some relators, though these late-stage dismissals have traditionally been rare. As many state false claims act statutes track the federal statute and apply its precedent, state actions could be similarly affected.

Second, this decision could impact the government's decision whether to intervene at the start of *qui tam* cases. In recent years, the government has intervened in only approximately 20 percent of FCA *qui tam* actions.[23] In rejecting Polansky's positions, the Court clarified that the government maintains its right to intervene and move to dismiss *qui tam* actions throughout the litigation. Cementing the government's ability to change its position on dismissal as cases progress may reduce the pressure on the government to intervene at the outset to either dismiss or pursue the action, since it has even clearer authority to see how the case proceeds and make a decision at a later date. The decision also may further encourage relators to remain in close communication with the government throughout the action, as relators ultimately bear the risk of a late dismissal.

Finally, Justice Clarence Thomas dissented, opining that the FCA does not provide the government with the right to unilaterally dismiss a *qui tam* action after initially declining to intervene, and pointing to potential inconsistencies between Article II and *qui tam* suits generally.[24] A short concurrence by Justice Brett Kavanaugh and joined by Justice Amy Coney Barrett noted its agreement with the dissent's concerns 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," suggesting that the Court should consider those concerns in an appropriate case.[25]

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[23] Press Release, U.S. Dep't of Justice, Deputy Associate Attorney General Stephen Cox Provides Keynote Remarks at the 2020 Advanced Forum on False Claims and Qui Tam Enforcement (Jan. 27, 2020), available at https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-provides-keynote-remarks-2020-advanced.

[24] *Polansky*, 599 U.S. ___ (2023) (Thomas, J. dissenting).

[25] *Polansky*, 599 U.S. ___ (2023) (Kavanaugh, J. concurring).

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6/16/23