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Third Time's the Charm: U.S. Supreme Court Grants Certiorari to Examine the Government's Ability to Dismiss FCA *Qui Tam* Actions

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Last week, the U.S. Supreme Court unexpectedly granted certiorari in a False Claims Act ("FCA")[1] case that asks the Court to determine whether the government may dismiss a *qui tam* action if the government initially declines to intervene in the case and, if so, what standard of review a court should apply to the government's dismissal request. The grant was unexpected because the Court very recently turned down two similar requests.[2] Even more surprising is that the Court will take up the question whether the government has any authority at all to dismiss a case after it has first declined to intervene. While there is a clear circuit split as to the applicable standard the government must meet to dismiss a case over a relator's objection, no circuit has ever questioned the government's authority to seek dismissal after initially declining to intervene in a case. A holding to that effect, although unlikely, would have profound impacts on *qui tam* litigation for the government, relators, and defendants alike.

United States, ex rel. Polansky v. Executive Health Resources, Inc., the case in which the Court granted certiorari, arises out of a *qui tam* action filed in 2012 by Jesse Polansky, a medical professional and former consultant for the Respondent, Executive Health Resources Inc. Polansky accused his then-employer of violating the FCA by misclassifying patients and treatments in billing records in order to receive greater reimbursements. After conducting a two-year investigation, the government initially declined to intervene in the case. Then, in November 2019, after years of litigation, the government, citing the burden of litigation on the United States and a low likelihood of success on the merits, invoked its statutory authority under 31 U.S.C. § 3730(c)(2)(A) to dismiss the case. Relator objected. The Eastern District of Pennsylvania allowed the dismissal and, in October 2021, the Third Circuit affirmed.

There is at least a four-way circuit split regarding the standard that applies when considering a request by the government to dismiss a *qui tam* case. The Court's grant of certiorari in this case, however, sets up a larger battle over not just which of these standards should apply, but also whether the government may ever dismiss a *qui tam* action after it initially declined to intervene in the matter. The two specific questions the Court has said it will consider are (i) whether 31 U.S.C. § 3730(c)(2)(A) allows the Government to dismiss a *qui tam* action even if it initially declined to intervene and (ii) what standard courts should apply when considering whether the Government can dismiss a *qui tam* action.

Below, we provide a brief background on the FCA, an overview of the circuit split, and a discussion of the potential implications of the Court's decision.

False Claims Act Overview

The False Claims Act is the government's primary tool for addressing fraud against the government. In general terms, the FCA prohibits knowingly submitting or causing to be submitted false claims to the federal government.[3] Violators may face treble damages plus an additional penalty of $5,500 to $10,000 (as adjusted by inflation, with current maximum penalties of more than $25,000) for each violation.[4] In the 2021 fiscal year, the U.S. Department of Justice obtained more than $5.6 billion in FCA settlements and judgments.[5]

Private plaintiffs called "relators" may bring FCA claims in the name of the United States by filing a sealed complaint in a federal district court under the statute's *qui tam* provisions.[6] The *qui tam* provisions, in effect, deputize "private attorneys general" to report and prosecute potential fraud against the Government, and incentivize whistleblowing by promising the relator a portion of the government's recovery. The *qui tam* provisions are thus an attractive tool for the private plaintiffs' bar, and, for better or worse, relator-driven cases have skyrocketed over the past few decades.[7]

In order to safeguard against unmeritorious *qui tam* actions and to give the United States the opportunity to take the lead in litigating promising cases, the FCA requires relators to serve the complaint on the U.S. Attorney General as well as the U.S.

Attorney for the judicial district where the *qui tam* action is filed. Upon being served with the complaint, the government has 60 days to investigate the claim and decide whether to intervene and take primary responsibility for prosecuting the action.[8] If the government declines to intervene, the relator may proceed with the action,[9] though the court may permit the government to intervene at a later date if there is a showing of good cause.[10]

The Circuit Split

The FCA provision at issue in *Polansky*, 31 U.S.C. § 3730(c)(2)(A), gives the government the authority to dismiss a *qui tam* action, provided that a relator has notice and an opportunity for a hearing on the United States' dismissal request. The requirements of this provision have been interpreted by Courts of Appeals in at least four different ways.

- D.C. Circuit: The D.C. Circuit applies the most liberal dismissal standard, reading § 3730(c)(2)(A) as granting the government an "unfettered right" to dismiss a *qui tam* action. In the D.C. Circuit's view, the provision vests the executive branch with sole dismissal authority, consistent with the executive branch's prerogative to exercise prosecutorial discretion.[11]

- Ninth and Tenth Circuits: The Ninth Circuit's standard, which is widely understood to be the strictest for the government, involves a "two-step" burden-shifting analysis. The analysis requires that the government first identify a "valid government purpose" and "rational relation between dismissal and accomplishment of that purpose." If the Government satisfies its burden, then the onus shifts to the relator to show that the dismissal would be "fraudulent, arbitrary, and capricious."[12] The Tenth Circuit has adopted the same standard.[13]

- First Circuit: The First Circuit recently announced yet another standard, which allows the government to dismiss a *qui tam* action without needing to intervene. The First Circuit's standard requires the government to provide a statement of its reasons for seeking dismissal to allow the relator a formal opportunity at a hearing to convince the government to withdraw its dismissal. If the government declines and decides to move forward with dismissal, the relator can prevent dismissal only by showing that the government is transgressing constitutional limitations or engaging in fraud on the court.[14]

- Seventh and Third Circuits: Under the Seventh Circuit's standard, a court may allow the government to invoke its dismissal authority under § 3730(c)(2)(A) only after electing to intervene (even if it declined to intervene at an earlier point) and if it satisfies Federal Rule of Civil Procedure 41's general standards for dismissal, which provides for dismissal "only by court order, on terms that the court considers proper."[15] The Third Circuit, which heard *Polansky*, adopted the Seventh Circuit's approach.

- Eleventh Circuit: Although the Eleventh Circuit previously adopted a standard similar to the Seventh and Third Circuit's standard—under which the government need not intervene but must satisfy Rule 41's general standard before the court can grant dismissal—the court recently ordered that the issue be reheard en banc.[16]

Potential Implications for the Court's Decision

Although the government has not historically exercised its authority to intervene and dismiss *qui tam* cases under § 3730(c)(2)(A) with great regularity, the January 2018 publication of a DOJ memorandum, commonly referred to as the "Granston memo" laying out factors that DOJ considers in deciding whether to dismiss meritless *qui tam* cases, sparked hopes in the defense bar that dismissals would become more common. Whether or not that has happened in practice, the spate of dismissals that followed the Granston memo appears to have led to this week's grant of certiorari. And the stakes are high for all involved.

While it seems unlikely that the Court will agree with Petitioner that the government may never dismiss a *qui tam* action after it initially declined to intervene—given the statute's plain language,[17] the lack of any circuit court holding to that effect, and the implications of such a ruling for the constitutionality of the *qui tam* provisions of the statute themselves[18] —such a decision would have major consequences for the government. The government would undoubtedly need to spend more time

and resources investigating relators' claims at the outset of a case before deciding whether to intervene and, almost inevitably, would seek more extensions on their 60-day statutory period to investigate. Whether or not such a development would result in the government dismissing more, or even significantly more, cases at the outset is difficult to predict. But one thing is certain: relators in declined cases would have nearly free rein as the primary prosecutors of their claims, without apprehension that the government might step back in to dismiss their claims. Over time, this loss of control over the prosecution of FCA actions could lead to unfavorable (for the government) precedents, and undermine its enforcement efforts using its primary anti-fraud tool. And, of course, unmeritorious claims might survive longer than they would today, to the detriment of putative defendants and the courts.

As for the battle over the applicable dismissal standard, the implications are obvious. Unsurprisingly, if the Court is going to permit the government to dismiss after not initially intervening, Petitioner urges the Court to adopt the Ninth Circuit's more stringent standard. Relators, of course, favor greater limitations on the government's authority to dismiss the cases they are prosecuting. On the other side, defendants and the government itself would prefer to see the government have an "unfettered right" to dismiss *qui tam* actions at any time. It is now up to the Court to decide.

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In its inaugural False Claims Act ranking, Chambers & Partners ranked Ropes & Gray in band 1, noting the firm's team is known for its "nationally acclaimed practice with significant pedigree in the healthcare, pharmaceutical and life sciences fields, where it represents a number of highly significant players in extremely contentious FCA matters. The practice also demonstrates considerable skill in handling FCA matters in the cybersecurity and financial services spaces."

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This Alert ran in today's issue of Law360.

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1. 31 U.S.C. §§ 3729-3733.
2. *United States ex rel. Schneider v. JPMorgan Chase Bank*, 140 S. Ct. 2660 (2020); *Cimznhca, LLC v. UCB, Inc*., 141 S. Ct. 2878 (2021).
3. https://www.justice.gov/civil/false-claims-act.
4. 31 U.S.C. § 3729(a)(1)(G).
5. https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.
6. 31 U.S.C. § 3730(b).
7. https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020#:~:text=The%20number%20of%20lawsuits%20filed,13%20new%20cases%20every%20week.
8. 31 U.S.C. § 3730(b)-(c)(1).
9. 31 U.S.C. § 3730(b).
10. 31 U.S.C. § 3730(D)(3).
11. *See Swift v. United States*, 318 F.3d 250, 252-53 (D.C. Cir. 2003).
12. *See United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp*., 151 F.3d 1139, 1145 (9th Cir. 1998).
13. *See Ridenour v. Kaiser-Hill Co*., 397 F.3d 925, 936 (10th Cir. 2005).
14. *See United States ex rel. Borzilleri v. Bayer Healthcare Pharm., Inc*., 24 F.4th 32, 44-45 (1st Cir. 2022).
15. *See United States ex rel. CIMZNHCA, LLC v. UCB, Inc*., 970 F.3d 835 (7th Cir. 2020); Fed. R. Civ. P. 41(a)(2).
16. *See United States v. Republic of Honduras*, 21 F.4th 1353, 1357, 1361-1362 (11th Cir. 2021), reh'g en banc ordered *United States v. Republic of Honduras*, 26 F.4th 1252 (11th Cir. 2022).
17. 31 U.S.C. § 3730(c)(2)(A).
18. *See, e.g., United States ex rel. Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 934 (10th Cir. 2005) (discussing the implications for the Take Care Clause).