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Supreme Court to consider whether the government can dismiss a False Claims Act suit if it opted not to intervene at the outset

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The U.S. Supreme Court has agreed to consider whether the Government can dismiss a False Claims Act (FCA) lawsuit pursuant to 31 U.S.C. § 3730(c)(2)(A) over the Relator's objections after initially choosing not to intervene in the case and, if so, what standard applies.

The Supreme Court's decision should resolve a circuit split over whether and under what circumstances the Government can invoke its authority to dismiss *qui tam* cases when it initially declined intervention.

Polansky's claims

Jesse Polansky brought a *qui tam* action under the FCA on behalf of the United States, alleging that Executive Health Resources, Inc. (EHR) caused its client hospitals to fraudulently bill Medicare and Medicaid by falsely designating patient admissions as inpatient when they should have been marked as outpatient.

The Supreme Court's decision should resolve a circuit split over whether and under what circumstances the Government can invoke its authority to dismiss qui tam *cases when it initially declined intervention.*

Polansky filed his Complaint under seal in July 2012, and the Government declined to intervene in the case in June 2014. Thereafter, Polansky served the unsealed Complaint on EHR and litigated the case before the District Court for the Eastern District of Pennsylvania.

In August 2019, five years after choosing not to intervene, the Government filed a Motion to Dismiss Relator's Complaint under 31 U.S.C. § 3730(c)(2)(A), citing the low likelihood of success, the concern that material it deems privileged has been produced and will be used, and the expense of the litigation (including internal staff obligations; anticipated costs related to document production; expected attorney time associated with preparing depositions of government personnel, monitoring the litigation, and filing statements of interest).

Although Section 3730(c)(2)(A) establishes the Government's authority to dismiss a qui tam *action, the FCA does not provide a standard of review for courts to apply to Government dismissal motions.*

The District Court granted dismissal in November 2019.[1] Polansky appealed to the 3rd Circuit, arguing the Government had given up its right to seek dismissal of his suit when it initially declined to intervene.

Circuit split

The FCA allows private whistleblowers (called "relators") to bring claims of fraud on behalf of the Government and receive a share of the proceeds. The Government has the option to intervene in the case. If the Government declines to intervene, the relator may continue to litigate the case on their own.

Polansky considers the scope of the Government's authority when it declines to intervene at the outset and later opposes the relator's suit.

Under 31 U.S.C. § 3730(c)(2)(A), the Government has the right to dismiss a *qui tam* action "notwithstanding the objections of the [relator]" so long as the relator receives notice and an opportunity to be heard on the Government's motion.

Although Section 3730(c)(2)(A) establishes the Government's authority to dismiss a *qui tam* action, the FCA does not provide a standard of review for courts to apply to Government dismissal motions.

This has led to a circuit split, with the 9th and 10th Circuits adopting a "rational relationship" test,[2] the D.C. Circuit adopting an "unfettered discretion" approach, and the 7th Circuit adopting a process-oriented approach based on the Federal Rules of Civil Procedure.

The Eastern District of Pennsylvania avoided this quagmire by concluding that the Government was entitled to dismissal regardless of the applicable standard.

Polansky's appeal

On appeal, the 3rd Circuit held that the Government is required to intervene before moving to dismiss an FCA case.[3] Once it has intervened, the Government becomes a party, and like any party, is subject to the Federal Rules of Civil Procedure, including the rule governing voluntary dismissal.

The Circuit concluded that the District Court acted within its discretion in granting the Government's motion to dismiss Polansky's case.

Therefore, the 3rd Circuit concluded as a matter of first impression, the Government's motion to dismiss must satisfy Federal Rule of Civil Procedure 41(a), which establishes different standards for a motion to dismiss depending on the posture of the case.

This means that, if the defendant has yet to answer or move for summary judgment, the Government is entitled to dismissal, Fed. R. Civ. P. 41(a)(1)(A), albeit with an opportunity for the relator to be heard, subject only to the constitutional bar on arbitrary Government action. However, if the litigation has gone past that point, dismissal must be "only by court order, on terms the court considers proper."[4]

Based on this standard, the Circuit concluded that the District Court acted within its discretion in granting the Government's motion to dismiss Polansky's case.

Supreme Court review

After the 3rd Circuit affirmed the dismissal, Polansky filed a Petition for a Writ of Certiorari, asking the Supreme Court to decide (1) whether the Government has authority to dismiss an FCA suit after initially declining to proceed with the action, and (2) what standard of review applies if the Government does have that authority. Clarity on these issues will be welcome, given the (at least) three-way circuit split.

That said, the Department of Justice has only rarely moved to dismiss *qui tam* cases in the last few years. When it does, the lower courts almost always grant the motion to dismiss regardless of the applicable standard.

Polansky thus is unlikely to approach the far-reaching significance of the Court's ruling in *Escobar* on the FCA's materiality requirement. Nor will it do anything to resolve the looming circuit split over objective falsity and the FCA's scienter standard. That question, the resolution of which could equal or even exceed *Escobar*'s importance, will have to wait for another day.

Notes

[1] *Polansky v. Executive Health Resources, Inc.*, 422 F.Supp.3d 916 (E.D. Pa. 2019).

[2] The rational relationship test requires that the Government identify (1) a valid government purpose supporting dismissal and (2) a rational relation between dismissal and accomplishment of the asserted purposes. If the Government satisfies both elements of the rational relationship test, then the burden shifts to the relator to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.

[3] *Polansky v. Executive Health Resources Inc.*, 17 F.4th 376 (3rd Cir. 2021).

[4] Fed. R. Civ. P. 41(a)(2).

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