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ALERT

Supreme Court Clarifies DOJ's FCA Dismissal Authority

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WHAT: On June 16, 2023, the U.S. Supreme Court ruled 8–1 that the Government has broad authority to intervene and dismiss False Claims Act (FCA) suits litigated by relators. *U.S. ex rel. Polansky v. Executive Health Resources Inc.* asked the Court to consider (1) the scope of the Government's authority to seek dismissal of a *qui tam* over a relator's objection and (2) the standard district courts must apply when ruling on such a motion. While Friday's decision largely confirmed the Government's broad authority to seek dismissal of a *qui tam* case, it was not a total win for the Department of Justice (DOJ).

BACKGROUND: Polansky worked for Executive Health Resources which assists hospitals in submitting bills for Medicare-covered services. He filed a *qui tam* action alleging the company caused its hospital clients to falsely label services as "inpatient" rather than "outpatient" to bill Medicare for those services at the higher inpatient rates. DOJ declined to intervene, and Polansky began litigating the matter. After five years of litigation, DOJ moved to dismiss the *qui tam* on the grounds that the "burdens of the suit," including "weighty privilege issues," "outweighed its potential value," especially because it doubted Polansky's ability to prevail. The district court granted DOJ's motion to dismiss over Polansky's objections and the Third Circuit later affirmed.

In briefing, the Government argued for "unfettered" dismissal authority. DOJ said it should not be required to intervene before seeking dismissal and that dismissal should only be rejected if a relator shows a constitutional violation occurred (e.g., dismissal based on the relator's sex or race). Polansky, on the other hand, argued DOJ waived its dismissal authority when it originally declined

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to intervene. And if the Government has the authority to later seek dismissal, the court must review that decision under an arbitrary and capricious standard with a burden-shifting component.

The Supreme Court ultimately carved a middle ground. First, it held DOJ must intervene before seeking a 31 U.S.C. § 3730(c)(2)(A) dismissal. Thus, if the Government originally declined to intervene, it must satisfy § 3730 (c)(3)'s "good cause" standard and ask the court to allow it to intervene at a later point. Second, the Supreme Court agreed with the Third Circuit that once the Government properly intervenes, a court must evaluate any dismissal over the relator's objection using Federal Rule of Civil Procedure 41(a). Under Rule 41(a), if the defendant has not served its answer or moved for summary judgment, the plaintiff (or the Government here) only needs to file a notice of dismissal. Otherwise, the court may dismiss the action "only by court order, on terms that the court considers proper." In the FCA context, that requires the court to weigh the relator's interests against the "Government's views" in seeking dismissal. However, the Court added that the Government's dismissal request should be honored "in all but the most exceptional cases," and that "a district court should think several times over before denying a motion to dismiss." In sum, if the "Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant" its dismissal motion — "even if the relator presents a credible assessment to the contrary."

Justice Thomas authored the sole dissent. He argued that the text, structure, and history of the FCA did not allow the Government to seek dismissal of a pending *qui tam* once "it has declined to take over the action from the relator at the outset." A concurrence from Justice Kavanaugh, joined by Justice Barrett, agreed with the majority but noted they were willing to consider the constitutionality of the FCA's *qui tam* provisions in another case.

TAKEAWAYS: Friday's decision reaffirms that the Government is "entitled to substantial deference" when seeking dismissal of *qui tam* suits. Still, it is unlikely the Government will increase the frequency with which it uses its (c)(2)(A) dismissal authority. Deputy Assistant Attorney General Michael Granston earlier this year noted that DOJ has only moved to dismiss 58 *qui tam* actions in the last five years, despite more than 3,000 being filed. Absent from these statistics, however, are situations where DOJ engages in a dialogue with relators such that cases are voluntarily dismissed, something encouraged by DOJ's Dismissal Factors. That said, more dismissals may occur in the short term if DOJ paused or decreased dismissals pending the *Polansky* ruling. Interestingly, Justice Thomas's dissent and Justice Kavanaugh and Barrett's concurrence also seemed to breathe new life into an old argument: a direct challenge to the constitutionality of the FCA's *qui tam* provisions. For his part, Justice Thomas seems to believe that the ability of a private party to litigate on the Government's behalf runs contrary to Article II. While the lower courts that have addressed these constitutional challenges almost unanimously upheld the *qui tam* provisions, it remains to be seen whether defendants will renew these arguments and whether courts will ultimately overturn existing precedents.