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US Supreme Court to Review Department of Justice Dismissal Authority

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On June 21, 2022, the Supreme Court agreed to review a US Court of Appeals for the Third Circuit decision holding that the federal government's ability to dismiss False Claims Act (FCA) lawsuits is controlled by Federal Rule of Civil Procedure 41, rather than being foreclosed by the government's decision not to intervene. Rule 41 provides that a court may grant a plaintiff's request to dismiss a case "on terms that the court considers proper."[1] The Supreme Court's decision to review this case signals an interest in potentially resolving a decades-long split over the scope of the government's authority to dismiss FCA cases, and the applicable legal standard.

The FCA allows private actors to sue individuals or entities for submitting false or fraudulent claims to the government. A plaintiff – known as a relator – must file suit under seal and provide notice to the Department of Justice (DOJ), which can investigate and determine whether to intervene and pursue the litigation itself. If the government decides to pursue the litigation, the relator still retains some rights to continue as a party to the action, but cannot prevent the government from later dismissing the action, as long as the relator receives notice and the opportunity for a hearing.[2] If the government declines to intervene, the relator can still pursue a civil suit against the defendant and share any recovery with the United States.

The key issue in the Third Circuit was whether the government has any authority to dismiss an FCA suit after initially declining to intervene. *Polansky v. Exec. Health Res.*, 17 F.4th 376, 393 (3d Cir. 2021), involved a *qui tam* suit filed in 2012 by a former employee of Executive Health Resources, alleging the company was falsely certifying that inpatient hospital admissions were medically necessary in order to obtain higher reimbursement rates. The DOJ investigated and declined to intervene. Seven years after the suit was filed, as the parties were preparing for summary judgment, the government moved to dismiss the case in district court. The dismissal was granted and later affirmed by the Third Circuit, which ruled that although the government must intervene before seeking to dismiss, its motion to dismiss was effectively a combined motion to intervene and dismiss. The court rejected Polansky's argument that the government lost its right to seek dismissal because it declined to intervene. Following the reasoning of the Seventh Circuit, the Third Circuit held that the government's request for dismissal was governed by Federal Rule 41(a). That is, when the litigation has progressed beyond the filing of an answer, the action "may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper."[3] In practice, that is a relatively low threshold to dismissal.

The Supreme Court's review of this case should provide needed clarity as the government continues to take a closer look at *qui tam* suits and seeks to weed out frivolous cases or those that conflict with government priorities. This initiative stems from the 2018 DOJ memorandum, known as the Granston memo, which advised DOJ attorneys to consider seeking dismissal to achieve seven goals including to "prevent parasitic or opportunistic *qui tam* actions." The resulting increase in dismissal motions exacerbated a circuit split on when dismissal is appropriate. The standard adopted by the District of Columbia Circuit provides that the government has an "unfettered right" to dismiss an FCA case.[4] The Ninth and Tenth Circuits, however, curbed the government's ability somewhat by requiring the government to identify a valid governmental purpose and show the relationship between the purpose and dismissal.[5] Relators also can defeat dismissal by showing that it would be arbitrary and capricious.[6] In 2020, the Seventh Circuit declined to adopt either rule and instead applied the standard set forth in Rule 41(a), a move endorsed by the Third Circuit in *Polansky*.

What does this mean for the future of *qui tam* litigation?

The Supreme Court's decision in this case hopefully will provide needed clarity about the government's role and appropriate procedures for FCA cases. The government opposed Polansky's petition on grounds that the FCA is

"best read to preserve the Executive Branch's virtually unfettered discretion to dismiss an action brought in the name of the United States to remedy a wrong done to the United States." If the Supreme Court rejects that interpretation and agrees with Polansky – that the government loses its authority to dismiss if it declines to intervene – it would vastly undercut the government's authority over and ability to manage FCA litigation, and could raise constitutional concerns about the FCA's whistleblower provisions. On the other hand, a decision that Rule 41 applies or that the government must simply provide a rational basis for dismissal would help to cement the government's dismissal authority, but likely result in little noticeable change to the state of FCA litigation.

Notes

1. Fed. R. Civ. P. 41(a)(2).
2. See 31 USC § 3730(c)(2)(A).
3. Fed. R. Civ. P. 41(a)(2).
4. See *Swift v. United States,* 318 F.3d 250, 253 (D.C. Cir. 2003).
5. See *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139, 1145 (9th Cir. 1998); *Ridenour v. Kaiser-Hill Co., Ltd. Liab. Co.,* 397 F.3d 925 (10th Cir. 2005); see also *United States v. Gilead Sciences, Inc.,* 2019 WL 5722618, at *8 (N.D. Cal. Nov. 5, 2019), which granted the government's motion to dismiss under Sequoia Orange based on the government's demonstrated factual basis supporting the government's purposes, and a rational relationship between dismissal and accomplishing those purposes; the relators also failed to show that dismissal was fraudulent, arbitrary, capricious or illegal.
6. See *U.S. ex rel. Sequoia Orange Co. v. Sunland Packing House Co.,* 912 F. Supp. 1325, 1340 (E.D. Cal. 1995), *aff'd sub nom. U.S. ex rel., Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139 (9th Cir. 1998), which explained that a court's review of a decision to dismiss considers whether the dismissal is arbitrary or otherwise illegal.

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