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ALERT

Supreme Court to Consider DOJ's Dismissal Authority in False Claims Act *Qui Tam* Cases

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What: The U.S. Supreme Court recently granted *certiorari* on a petition seeking to curtail the U.S. Department of Justice's (DOJ) ability to dismiss False Claims Act (FCA) *qui tam* cases, even if DOJ has determined that the case is likely meritless or will be costly for the Government to pursue.

Takeaways and Industry Impacts:

On June 21, 2022, the Supreme Court announced its decision to hear *United States ex rel. Polansky v. Executive Health Resources Inc.* in which the Relator-Petitioner raises two issues critical to DOJ's ability to move for and secure dismissals of FCA *qui tam* cases under 31 U.S.C. § 3730(c)(2)(A). The first is whether DOJ forfeits its right to move to dismiss a case if it initially declined to intervene. The second is, if DOJ retains its dismissal authority post-declination, what standard of review should courts apply to such motions to dismiss. In other words, is the Section 3730(c)(2)(A) hearing "merely a forum for the relator" to try to persuade DOJ not to dismiss, "or is it an adversarial hearing to inform the District Court's ruling"? The Supreme Court's upcoming ruling could provide more clarity and more incentive for DOJ to dismiss meritless or wasteful *qui tam* actions earlier in the litigation—possibly as early as its decision not to intervene.

The second issue—the dismissal standard—essentially boils down to how deferential courts should be to DOJ motions to dismiss *qui tam* actions. Although the circuit courts have promulgated numerous standards to address this issue—discussed in detail below—all of the pending standards are deferential to the U.S., the real party in interest in a *qui tam* action. If the Supreme Court decides that DOJ has an "unfettered right" to secure dismissals, as one circuit has

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ruled, DOJ may be emboldened to dismiss more *qui tam* actions. Alternatively, if the Supreme Court affirms the approach of other circuits that a later-filed motion for dismissal is subject to more stringent judicial scrutiny, then DOJ may be incentivized to seek dismissal of weaker cases earlier in the proceedings, even before defendants have engaged in the costly exercises of briefing their own motions to dismiss and engaging in discovery. Regardless of the exact standard the Supreme Court adopts, it is likely to maintain the deference currently afforded to DOJ. Indeed, as DOJ noted in its opposition to the petition for *certiorari*, "no court of appeals has ever held that any particular *qui tam* action should go forward over" a DOJ motion to dismiss.

As for the intervention issue, the Relator is asking the Supreme Court to find that DOJ forfeits its ability to later move for dismissal if it initially declines to intervene in the case. No appellate court has ever accepted that argument, and it is unlikely the Supreme Court will do so, as the U.S. remains the real party in interest in an FCA case. If the Court does somehow restrict DOJ's dismissal authority, however, it could motivate DOJ to accelerate its decision-making and move to intervene for the purpose of dismissal as soon as it finishes its investigation—rather than risk the prospect of losing control of a problematic *qui tam* action.

***Background on Qui Tam Actions*:** Under the FCA, Congress has provided an opportunity for private citizens, known as "relators," to stand in the shoes of the U.S. and bring suits—referred to as "*qui tam* actions"—on its behalf. A relator may allege that a defendant made a false claim for payment to the Government in violation of Section 3729(a)(1). After a relator files such a complaint, Section 3730(b)(2) allows DOJ the opportunity to investigate and decide whether "to intervene and proceed with the action." Even if DOJ declines to intervene, Section 3730(c)(3) allows it to later intervene "upon a showing of good cause."

Most notably, DOJ may move—even over a relator's objection—to dismiss the *qui tam* action under Section 3730(c)(2)(A), which states that "[t]he 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." The FCA does not, however, provide the standard for evaluating such motions. Since the 2018 Granston Memo, which has been incorporated into guidance in the Justice Manual, there has been a modest increase in motions to dismiss under Section 3730(c)(2)(A) and a corresponding rise in relator interest in challenging DOJ's dismissal authority.

Four-Way Circuit Split: Traditionally, courts have been split two ways on DOJ's dismissal authority under Section 3730(c)(2)(A) but have agreed that intervention is not required for such dismissal. On one side of the split, the Ninth Circuit in 1998 first used a "rational relation" test in *Sequoia Orange Co. v. Baird-Neece Packing Corp.*, which required DOJ to identify a valid government purpose for dismissal and show a rational relationship between the accomplishment of that purpose and dismissal. It also noted that Section 3730(c)(2)(A) allows dismissal without intervention and does not "limit the government's dismissal authority based upon the manner of intervention." The Tenth Circuit has similarly followed the "rational relation" standard. On the other side of the historic split, the D.C. Circuit in 2003 articulated DOJ's "unfettered right to dismiss" in *Swift v. United States*. That opinion also noted intervention is not required for dismissal, but if it were, the motion to dismiss could be interpreted to include a motion to intervene.

In ruling on the recent wave of Section 3730(c)(2)(A) motions, courts have largely applied the "unfettered right" to dismiss standard or side-stepped the issue by finding DOJ met either standard. But some courts have forged new paths. In 2020, the Seventh Circuit applied a new standard in *United States ex rel. Cimznhca, LLC v. UCB, Inc.* that continued to fortify DOJ's position of broad authority to dismiss *qui tams*. It sidestepped both *Sequoia Orange* and *Swift* standards, holding that Federal Rule of Civil Procedure 41(a)(1)(A)(i) provided an "absolute" right for DOJ to dismiss an action by serving a notice of dismissal at any time "before the opposing party serves either an answer or a motion for summary judgment." In rejecting unfettered discretion, the Seventh Circuit explained that standard "renders the hearing specifically provided for in the statute superfluous and belies the role of the judiciary in ensuring constitutional checks and balances." While acknowledging that such hearing frequently "serve[s] no great purpose," the Seventh Circuit noted that its approach at least provides a meaningful opportunity for one. If the time for Rule 41(a)(1) notice and corresponding "absolute" right for dismissal has passed, then DOJ would move to dismiss under Rule 41(a)(2) and the hearing "could serve to air what terms of dismissal are 'proper.'" This "proper terms" standard, however, is subject to judicial discretion and not well defined in the FCA context.

Then in 2021, the Fifth Circuit carved a fourth path in *United States ex rel. Health Choice Alliance, LLC v. Eli Lilly and Company Inc*, identifying two conditions for DOJ to be allowed to move for dismissal under Section 3730(c)(2)(A): (1) DOJ must give notice to the relator of its motion to dismiss and (2) the court must provide the relator with "an opportunity for a [meaningful] hearing on the motion" as set forth in Section 3730(c)(2)(A). Shortly after, the Third Circuit in the instant litigation adopted the Seventh Circuit's dismissal standard. Later, the First Circuit in *United States ex rel. Borzilleri v. Bayer Healthcare Pharmaceuticals, Inc.* largely adopted the "unfettered right" standard of the D.C. Circuit, explaining that courts should deny motions to dismiss only if the Government "transgresses constitutional limits" or "attempts to perpetrate a fraud on the court."

The Case: The Supreme Court has granted *certiorari* to hear the case of *United States ex rel. Polansky v. Executive Health Resources Inc.* (21-1052), which involves allegations that the Defendant (EHR), a healthcare billing certification company, caused hospitals and physicians to fraudulently bill Medicare. The Relator filed his initial complaint under seal in 2012 and, after a two-year investigation, DOJ declined to intervene. In August 2019, DOJ moved to dismiss the action under Section 3730(c)(2)(A). In its motion, DOJ argued that dismissal was appropriate "based on its overall evaluation of the matter and in light of recent discovery orders that impose[d] an additional burden on the U.S. requiring the production of sensitive and privileged government material, as well as relator's actions (including those for which the Court imposed sanctions) that may curtail his ability to prove certain aspects of the case and that could require the commitment of additional government resources."

In ruling on DOJ's motion to dismiss in 2019, the U.S. District Court for the Eastern District of Pennsylvania declined to apply either then-existing Section 3730(c)(2)(A) dismissal standard (*Sequoia Orange* or *Swift),* concluding instead that DOJ succeeded under either. The court dismissed the case with prejudice.

On appeal, and notably after further developments in the Section 3730(c)(2)(A) circuit split, the Third Circuit affirmed dismissal, but took a different approach. First, it held that DOJ could not move to dismiss a *qui tam* action if it was not a party to the case. Because DOJ had initially declined to intervene in the matter, the court

held that DOJ must move to intervene before moving to dismiss the action.

Second, the Third Circuit opted for the Seventh Circuit's dismissal standard. Consistent with the Seventh Circuit's approach, the Third Circuit construed DOJ's "motion to dismiss as including a motion to intervene." It also concluded that under Rule 41, the district court had not abused its discretion in dismissing the case.

In January 2022, the Relator filed a petition for a writ of *certiorari*, asking the Supreme Court to address "[w]hether the government has authority to dismiss an FCA suit after initially declining to proceed with the action, and what standard applies if the government has that authority." Over the opposition of both the Defendant-Respondent and DOJ, the Supreme Court announced on June 21, 2022 that it would hear the case.

The Supreme Court likely will resolve the circuit split by deciding which standard courts should apply in evaluating Section 3730(c)(2)(A) motions. Counsel and potential parties on both sides of the issue should stay tuned for the upcoming Supreme Court ruling, which would be expected during the Court's next term.