PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 9 **NUMBER 13** **January 2023**

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: ..... heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call . . . . . (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . . (518) 487-3385
Fax Number . . . . . (800) 828-8341
Customer Service Website . . . . . http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call

Your account manager or . . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . . (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)
ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT'S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).
Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT'S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2023–Pub.4938)

Editor-in-Chief, Editor & Board of Editors

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Polansky and the Future of False Claims Act Qui Tam Prosecution

By Jennifer A. Short, Tjasse L. Fritz and Bridget Mayer Briggs*

The U.S. Supreme Court will be addressing whether the United States can seek to dismiss a whistleblower's False Claims Act lawsuit after it has elected not to participate in the case. The Court also will consider the standard that should apply if the government can seek dismissal. The authors of this article discuss the case.

In its current term, the U.S. Supreme Court is poised to address the issue of whether the United States can seek to dismiss a whistleblower's False Claims Act ("FCA") lawsuit after it has elected not to participate in the case. And, if it can seek dismissal, what standard should apply?

The Court agreed to consider the matter of United States ex rel. Polansky v. Executive Health Resources, Inc.[1] In his cert petition, the whistleblower presses the theory that after the United States declines to intervene in an FCA qui tam case, it lacks any authority to dismiss the action. At a minimum, the petitioner argues that the Court should resolve a long-standing split among the circuit courts regarding the standard that applies to such a motion—a split that has splintered even further in response to an uptick in such motions since 2018.

DISMISSAL UNDER SECTION 3730(c)(2)(A) OF THE FALSE CLAIMS ACT

The FCA does not specifically address the government's authority to dismiss a qui tam after declining to intervene. The FCA provision on government dismissal, 31 U.S.C. § 3730(c)(2)(A), simply provides that the government may dismiss a qui tam action despite the objections of the whistleblower so long as the whistleblower is notified of the filing of a motion to dismiss and provided an opportunity for a hearing.

HISTORY OF POLANSKY

Dr. Polansky filed his case on behalf of the United States in 2012, alleging that Executive Health Resources, a healthcare consulting company, had

---

* Jennifer A. Short (jennifer.short@blankrome.com) is a partner at Blank Rome LLP with broad experience in the public and private sectors with government and internal investigations, particularly related to government contractors and healthcare providers. Tjasse L. Fritz (tjasse.fritz@blankrome.com) is an associate at the firm concentrating her practice on government contracts and related complex litigation. Bridget Mayer Briggs (bridget.briggs@blankrome.com) is a partner at the firm focusing her practice on white collar investigations, regulatory litigation, and class action defense matters.

[1] Case No. 19-3810.

systematically advised its client physicians and hospitals to misclassify patients for inpatient procedures so that they could seek higher reimbursements from Medicare. The government investigated the claims for two years before declining to intervene. Dr. Polansky, however, chose to litigate without the government's assistance.

The litigation continued for the next several years—with Dr. Polansky allegedly accruing approximately $20 million in legal fees—until the government reappeared and sought to dismiss the action.

The U.S. District Court for the Eastern District of Pennsylvania dismissed the case, reasoning that the government could satisfy either of the two standards that had been adopted by the circuit courts in this circumstance. Dr. Polansky appealed, and the U.S. Court of Appeals for the Third Circuit upheld the dismissal.

THE TRADITIONAL, TWO-WAY CIRCUIT "SPLIT"

When confronted with a government motion to dismiss an FCA case after declining intervention, circuit courts generally have taken two approaches.

The first follows the standard set by United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,[2] which adopted a "rational basis" test: the government need only cite a rational basis to dismiss any qui tam FCA case consistent with the Constitution.

The second group has followed the standard set by the U.S. Court of Appeals for the D.C. Circuit in Swift v. United States,[3] which maintains that the government has "unfettered discretion" to dismiss an FCA case because the claims are brought on behalf of, and for the benefit of, the United States, the real party in interest.

Although these standards differ, a different result would be rare, with the government generally obtaining dismissal.

THE SPLIT SPLINTERS

While most circuits have chosen to adopt either the Sequoia Orange or Swift approach, a handful of decisions in the last few years have wrestled with the FCA's (c)(2)(A) procedural intricacies.

For instance, in United States ex rel. CIMZNHCA, LLC v. UCB, Inc.,[4] the U.S. Court of Appeals for the Seventh Circuit essentially decided that, despite previously declining intervention, the government had intended to file a motion to intervene.

---

[2] 151 F.3d 1139 (9th Cir. 1998).

[3] 318 F.3d 250 (D.C. Cir. 2003).

[4] 970 F.3d 835 (7th Cir. 2020).

Once the government had joined the lawsuit, it could have sought a voluntary dismissal pursuant to Federal Rule of Civil Procedure 41. Accordingly, the CIMZNHCA court held that the Rule 41 standards for voluntary dismissals applied.

POLANSKY'S POSITION

The Relator in Polansky argues that "the government lacks *any* FCA dismissal authority after initially declining to intervene and instead vested the relator with '*the* right to conduct the action'—a statutory right framed in unitary terms that this Court has recognized as 'exclusive.' "[5]

In other words, Polansky contends that once the government declines intervention, it has no dismissal authority at all. Although the Supreme Court has declined in the past to examine the circuit split, the novelty of Polansky's theory seems to have caught the Justices' attention.

WHAT COULD HAPPEN?

This case will have one of four outcomes with potentially significant implications for how FCA dismissals are handled in the future:

1. *SCOTUS Selects Either the* Swift *or* Sequoia *Standard*

   What happens if this is the basis of the ruling? Not much. Current Department of Justice ("DOJ") guidance is to meet either standard. A ruling will simply clarify the standard and provide more consistency among the circuits.

2. *Adoption of a Rule 41 Inquiry*

   A Supreme Court decision to adopt a Rule 41 approach would add another procedural step to a DOJ dismissal, at additional cost to all parties. This result would have few practical implications, with government-sought dismissals generally approved. It is somewhat unlikely that the Court will latch on to the Rule 41 approach, as it denied certiorari in *CIMZNHCA.*

3. *Adoption of a New Standard*

   The Court could, of course, adopt an entirely new standard couched in constitutional norms or the language of the FCA. For example, the Court could hold that the government should proceed pursuant to 31 U.S.C. § 3730(c)(3) by filing a post-declination

[5] Petition for Writ of Certiorari at 4 (citing Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 769 (2000)) (emphasis in original).

motion to intervene for "good cause" and later dismiss under § 3730(c)(2)(A). Such a result would likely mean that the government will continue to have fairly broad authority to dismiss cases over a relator's objection.

4. *Adoption of Polansky's Theory*

Complete rejection of the government's authority to dismiss a qui tam FCA case would mark a shift in reasoning behind qui tam litigation in general. In such a case, the Relator would no longer stand in the place of the government but would act on their own behalf with what amounts to a stipulated 2/3 tax on any potential award.

This outcome would force a major shift in DOJ strategy. Specifically, if declination automatically ties its hands, DOJ may decide to be more proactive with its dismissal authority, rather than allowing the relator to proceed. Alternatively, a court-imposed restriction on the government's rights in any qui tam action may lead agencies to protract pre-claim investigations even further. Either option would have a significant impact on the defendant's costs—either a reprieve with a quicker dismissal or a heavy burden with continual commercial restrictions and negotiation.

CONCLUSION

While there are clear policy reasons for permitting the government to dismiss cases brought on its behalf, it seems unfair to a relator who has spent time, money, and effort if the government's ability to dismiss is absolute. Such a regime might discourage whistleblowers to file suit in the first place. These are interests the Supreme Court is likely to try to balance in addressing this issue.

Regardless of the outcome of Polansky, the morass involved in post-declination dismissals demonstrates that defendants should aim to convince the government to dismiss a case that lacks merit before making an intervention decision. However, should the government decline to intervene and a relator pursues a case, a qui tam defendant should continue efforts to demonstrate a lack of merit to the government.