

## CLIENT ALERT

### U.S. Supreme Court Poised to Resolve Two FCA Circuit Splits

June 22, 2022

Yesterday, the U.S. Supreme Court granted certiorari in *Polansky v. Executive Health Resources Inc.*, No. 19-3810 (3d Cir. Oct. 28, 2021), which involves the Government's authority to dismiss a relator's qui tam action pursuant to 31 U.S.C. § 3730(c)(2)(A) of the False Claims Act. In *Polansky*, the U.S. Court of Appeals for the Third Circuit held the Government must intervene in FCA suits before moving to dismiss and that, where responsive pleadings have been filed, a court has wide discretion to permit or deny the Government's exercise of dismissal authority. This cemented two circuit splits. The first split is between the Third, Sixth, and Seventh Circuits, which require the Government to intervene before moving for dismissal of an FCA suit, and the D.C., Ninth, and Tenth Circuits, which do not require the Government to intervene before moving for dismissal of an FCA suit at any point in the litigation. The second is a three-way split among the Circuits regarding the standard of review a court must apply when determining whether the Government can dismiss a qui tam action over a relator's objection: the Third and Seventh Circuits apply the Rule 41(b) standard, the D.C. Circuit considers the Government's dismissal authority unfettered, and the Ninth Circuit applies a "rational relation" test requiring the Government to demonstrate a valid government purpose and a "rational relation" between the dismissal and that government purpose. The Supreme Court is now poised to resolve both of these splits.

Of note, the Solicitor General for the U.S. Department of Justice, Elizabeth Prelogar, filed a response in the matter, urging the Supreme Court to decline the relator's petition for certiorari and arguing 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." In addition, the Solicitor General wrote that, "while the court below erred in holding that the government must intervene in an FCA action in order to seek dismissal under § 3730(c)(2)(A), that holding had no practical impact on the disposition of this suit." Accordingly, because the § 3730(c)(2)(A) dismissal standard is not "outcome-determinative," she argued that the Supreme Court should deny the petition for a writ of certiorari.

Despite the Solicitor General's views, the Supreme Court has apparently decided it is time to resolve the split of authority on the standards and procedural hoops associated with a Government motion to dismiss a relator's qui tam action.

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