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Tipping the scales: Third Circuit weighs in on circuit split regarding the government's dismissal authority over False Claims Act qui tams

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In its recent decision *Polansky v. Executive Health Resources Inc.*, No. 19-3810 (3d Cir. Oct. 28, 2021),[1] the U.S. Court of Appeals for the Third Circuit became the most recent to weigh in on the circuit split regarding the Government's authority to dismiss False Claims Act ("FCA") qui tam actions pursuant to 31 U.S.C. § 3730(c)(2)(A). Siding with the Seventh Circuit's recently adopted approach,[2] the Third Circuit held that Federal Rule of Civil Procedure 41(a) applies to government dismissals in FCA qui tam actions the same as it would in any other suit.

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In doing so, the Third Circuit cemented what is now a three-way split regarding the standard the Government must meet to exercise its dismissal authority, rejecting both the D.C. Circuit's approach, that the Government's dismissal power is unfettered, and the Ninth Circuit's approach that the motion to dismiss must have a "rational relation" to a valid government purpose.

In the same opinion, the Third Circuit also entered the fray on a second, related split, siding with the Sixth and Seventh Circuits in finding that the Government must intervene in FCA suits before moving to dismiss. In contrast, the D.C., Ninth, and Tenth Circuits do not require the Government to intervene before moving for dismissal of an FCA suit at any point in the litigation.

The qui tam action in *Polansky* accused Executive Health Inc. of systematically enabling its client hospitals to over-admit patients by certifying inpatient services that should have been provided on an outpatient basis and then billing those services to Medicare. The relator filed the complaint in 2012 under seal where it remained for two years until the Government declined to intervene.

After the declination, the relator continued the suit until 2019 when the Government notified the parties that it intended to dismiss the action pursuant to its authority under § 3730(c). The United States District Court for the Eastern District of Pennsylvania granted the Government's motion over the relator's objection, and the relator subsequently appealed to the Third Circuit.

On appeal, the Third Circuit affirmed the dismissal order, holding that the Government must only meet the standard articulated in Federal Rule of Civil Procedure 41(a) to exercise its dismissal power, siding with the Seventh Circuit's ruling in *U.S. ex rel. CIMZNHCA, LLC v. UCB, Inc.*, 970 F.3d 835 (7th Cir. 2020). Rule 41(a) articulates different standards for a dismissal by a plaintiff (here, the Government as the real party in interest) depending on the procedural posture of the case.

For example, if the motion is filed before the defendant files an answer or motion for summary judgment, the plaintiff is entitled to an automatic and immediate dismissal upon filing notice with the court. In contrast, once a defendant has filed a responsive pleading, the case is considered past the "point of no return," and a plaintiff may move to dismiss only with leave of the court "on terms that the court considers proper."

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In these cases, the court has wide discretion, but the Third Circuit suggested that dismissal will generally be granted upon the Government's showing of "good cause." The Third Circuit found these same standards should apply to FCA actions. The addition of a relator, the Court held, requires only that the relator be given notice and an opportunity for a hearing in response to the Government's motion, as provided for under § 3730(c)(2)(A).

In doing so, the Third Circuit rejected the D.C. Circuit's interpretation of § 3730(c)(2)(A) in *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), giving the Government unfettered discretion to

dismiss an action at any point, as well as the Ninth Circuit's "rational relation" test articulated in *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998). Instead, the Third Circuit in *Polansky* found that, because responsive pleadings had been filed, the district court had wide discretion to permit or deny the Government's motion.

Reviewing the district court's granting of dismissal for abuse of discretion, the Third Circuit found that the district court had thoroughly examined the interests of all parties and concluded that it did not abuse its discretion in granting the Government's motion to dismiss. In sum, in the Third Circuit, the Government's dismissal authority is effectively automatic prior to the filing of an answer or motion for summary judgment, after which point it is subject to the court's discretion and a weighing of the interests of the parties.

Based upon the review the Third Circuit conducted here, it appears that the standard the Government will be held to when it seeks to dismiss after a case has passed the initial stages is something at least as, if not more, deferential than the Ninth Circuit's valid purpose / rational relation test.

The Third Circuit also weighed in on a second split regarding whether the Government must intervene before it can exercise its dismissal authority. Citing § 3730(c)(2)(A), the Court held that § 3730(c)(1) requires the Government to intervene in an FCA action before it can move to dismiss under § 3730(c)(2)(A). Here, the Third Circuit considered the Government's motion to dismiss as including a motion to intervene because "intervention was in substance what the Government sought."

Thus, the Third Circuit's decision in this case adds more fuel to the fire for two existing circuit splits: (1) the standard that applies to a Government motion to dismiss a qui tam action; and (2) whether the Government is required to intervene before moving to dismiss an FCA action. *Polansky* is notable in its expansion of DOJ's dismissal authority. While that authority might not always go unchecked, that authority is enforceable well past a declination.

Notes

[1] https://bit.ly/3CMF1XH

[2] https://bit.ly/3cDMtKd

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