GIBSON DUNN

Supreme Court Upholds The Federal Government's Broad Authority To Dismiss False Claims Act Lawsuits After It Has Intervened

***United States, ex rel. Polansky v. Executive Health Resources, Inc.*, No. 21-1052**

Decided June 16, 2023

Today, the Supreme Court held 8-1 that the federal government may move at any time to dismiss a False Claims Act lawsuit over the objection of a relator, so long as it first intervenes in the action.

Background:

The False Claims Act (FCA) allows private individuals, known as relators, to bring claims on behalf of the government against parties who have allegedly defrauded the federal government. When a relator files a complaint based on an alleged violation of the FCA, the government has the opportunity to intervene and litigate the action itself, or it can decline to intervene and allow the relator to litigate the action on its behalf. The statute provides that the Government "may dismiss the action"—notwithstanding the objections of the relator—if "the court has provided the [relator] with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A).

Jesse Polansky brought an FCA claim against Executive Health Resources. The government initially declined to intervene. After Polansky spent five years litigating the case, the government moved to dismiss the case, citing discovery costs, the low likelihood that the lawsuit would succeed, and concerns about Polansky's credibility. The district court granted the government's motion and the Third Circuit affirmed, rejecting Polansky's argument that the government lacks authority to seek dismissal under § 3730(c)(2)(A) after declining to intervene at the outset of the case.

"[W]e hold that the Government may seek dismissal of an FCA action over a relator's objection so long as it intervened sometime in the litigation, whether at the outset or afterward."

Justice Kagan,
writing for the Court

Gibson Dunn submitted an *amicus* brief on behalf of Pharmaceutical Research and Manufacturers of America in support of the winning respondent:

Executive Health Resources, Inc.

Issue:
Whether the government can seek dismissal of an FCA suit despite initially declining to intervene and, if so, what standard applies.

Court's Holding:
The government may seek to dismiss an FCA lawsuit even after initially declining to intervene, as long as it intervenes before moving to dismiss. Federal Rule of Civil Procedure 41(a)'s generally applicable standards—which permit voluntary dismissals "on terms that the court considers proper"—govern the government's dismissal motion, but courts applying those standards should grant the government's views substantial deference.

What It Means:

- Today's decision confirms what lower courts have widely held for years: the government should be given wide latitude to dismiss an FCA suit when litigation of the suit is not in the government's interest, including because it imposes discovery costs on federal employees and agencies that exceed any potential benefits or because it interferes with federal policy priorities. The decision also could present additional opportunities for defendants facing abusive FCA litigation to enlist support from the government even at advanced stages of the litigation.

- The Court's decision is consistent with the Department of Justice's 2018 "Granston" memo, which required department lawyers to consider pursuing dismissal of cases brought by relators that are shown to be frivolous, parasitic or opportunistic, or otherwise contrary to the government's policies and programs. Michael D. Granston, U.S. Dep't of Justice, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)* (Jan. 10, 2018). The Department has, even after the Granston memo, exercised its authority to dismiss FCA lawsuits very sparingly, but may have more confidence to seek dismissal of FCA lawsuits now that the Court has confirmed its authority to do so at any stage.

- Justice Thomas questioned the constitutionality of the FCA's provisions allowing private relators to bring False Claims Act actions on behalf of the federal government. Justices Kavanaugh and Barrett, concurring in the Court's decision, agreed with Justice Thomas's view that there are "substantial arguments" that permitting private relators to represent the government is "inconsistent" with Article II and stated that the Court should address this "Article II issue" in a future case. These arguments have previously failed in lower courts, but these separate opinions will draw new attention to the issue, which is of significant importance given the enormous growth of *qui tam* FCA litigation in recent decades.

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

Appellate and Constitutional Law Practice

Thomas H. Dupree Jr.
+1 202.955.8547
tdupree@gibsondunn.com

Allyson N. Ho
+1 214.698.3233
aho@gibsondunn.com

Julian W. Poon
+1 213.229.7758
jpoon@gibsondunn.com

Lucas C. Townsend
+1 202.887.3731
ltownsend@gibsondunn.com

Bradley J. Hamburger
+1 213.229.7658
bhamburger@gibsondunn.com

Brad G. Hubbard
+1 214.698.3326
bhubbard@gibsondunn.com

False Claims Act / Qui Tam Defense & FDA and Health Care Practices

John D.W. Partridge
+1 303.298.5931
jpartridge@gibsondunn.com

Jonathan M. Phillips
+1 202.887.3546
jphillips@gibsondunn.com

Winston Y. Chan
+1 415.393.8362
wchan@gibsondunn.com

Gustav W. Eyler
+1 202.955.8610
geyler@gibsondunn.com