# The Feared Onslaught of Government Initiated Qui Tam Dismissals and That New Silver Bullet for the Defense That Never Materialized Post-Granston Memo or Post-*Polansky*

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In January 2018, Michael Granston, then director of the U.S. Department of Justice (DOJ) Commercial Litigation Branch, Fraud Section, issued a memorandum to DOJ trial attorneys and assistant U.S. attorneys who enforced the False Claims Act (FCA)[1] encouraging greater use of the government's power to dismiss a relator's qui tam complaint under 31 U.S.C. §§ 3730(c)(2)(A) and listing factors for prosecutors to evaluate in making those decisions.[2] It was supposed to be a watershed moment for the qui tam bar on both the relators' and the defense side. Relators' counsel called it a travesty signaling that DOJ was going to take a softer stance on FCA enforcement under the Trump Administration (i.e., that DOJ was possibly "acced[ing] to the dismissal requests of government agency personnel who are unduly friendly with the industries they regulate.").[3] The opposing camp used it as a rallying cry to convince their clients that they had a new (and presumably effective) weapon in their defense arsenal.[4] Fortunately and unfortunately for both sides, the numbers do not meaningfully support either position – a conclusion that we'll discuss after a brief primer on the FCA, the dismissal provision, and the U.S. Supreme Court's recent decision in *United States, ex rel. Polansky v. Exec. Health Res., Inc.*.[5]

The FCA was passed during the Civil War to provide the U.S. government recourse against government contractors selling fraudulent goods to the U.S. Army. Today, the FCA is the U.S. government's primary fraud enforcement statute. The FCA prohibits the submission of false or fraudulent claims to the government or the use of false statements in the submission of those claims. A key aspect of the FCA is its whistleblower or qui tam provisions, which allow whistleblowers who first report suspected violations to the DOJ to obtain a percentage of the government's recovery from a successful resolution of the matter. The FCA requires relators to file complaints under seal in a U.S. District Court and to serve a copy of the complaint and all disclosure materials on the U.S. attorney general and the U.S. Attorney's Office for the district in which the case has been filed. After proper service, the DOJ will investigate the allegations in the complaint and determine whether it will intervene in the matter (in whole or in part) and prosecute those claims, decline to intervene

in the matter (in whole or in part), or move to dismiss the relator's complaint altogether. If the DOJ declines to intervene, the relator has the option to continue prosecuting the claims on his or her own.

But what happens when the relator wants to move forward with the litigation post-declination, but the DOJ does not want the relator to proceed? The FCA dismissal provision, added via the 1986 amendments and found at § 3730(c)(2)(A), provides that "[t]he Government may dismiss the action notwithstanding the objections of the [relator] if the [relator] has been notified by the Government of the filing of the motion and the court has provided the [relator] with an opportunity for a hearing on the motion." Before the 2018 Granston Memo, no guidance existed for when the government would seek dismissal under this provision. The Granston Memo provided factors for DOJ attorneys to consider when moving for a dismissal, which include curbing meritless claims, preventing opportunistic qui tam actions, preventing interference with agency policies and programs, controlling litigation brought on behalf of the United States, safeguarding classified information and national security interests, preserving government resources, and addressing egregious procedural errors. The Granston Memo was an internal DOJ policy memo, not a standard that was intended to apply to or bind the courts. The principles articulated in the memo have, however, directly influenced DOJ briefing and court decisions in FCA actions.

At the time of the Granston Memo, federal courts were already split on the issue of what standards should apply when evaluating DOJ dismissal motions. The U.S. Court of Appeals for the District of Columbia Circuit gave the DOJ "unfettered discretion" to dismiss an action.[6] Other federal courts adopted different standards, such as "a two-step analysis to test the justification for dismissal: (1) identification of a valid governmental purpose; and (2) a rational relation between dismissal and accomplishment of that purpose."[7] The burden would then shift to the relator to demonstrate that dismissal was "fraudulent, arbitrary and capricious, or illegal."[8]

The Supreme Court recently resolved the split in *United States, ex rel. Polansky v. Exec. Health Res., Inc.*.[9] There, relator Jesse Polansky, a former employee of Executive Health Resources, filed an FCA lawsuit alleging that Executive Health was falsely certifying inpatient hospital admissions as medically necessary, causing overbilling of Medicare. DOJ initially chose not to intervene, but then later moved to dismiss Polansky's complaint.

The procedural posture of *Polanksy* required the Supreme Court to balance the practical realities of litigating FCA claims against the policy considerations that inspired the statute. Because the FCA is an anti-fraud statute that imposes civil liability on any person or entity that deceptively secures payments from the government, the purported injury and the right to bring a claim belongs exclusively to the United States.[10] And while the FCA allows a private individual to bring a claim on behalf of the government, the claim ultimately belongs to the United States as the real party in interest.[11] Given that the government always has a vested interest in the outcome of FCA claims, what role does the United States play when it declines to intervene in an FCA action?

*Polansky* gave the Supreme Court an opportunity to answer that question and address the scope of DOJ's dismissal authority in non-intervened whistleblower cases. On one hand, limiting the government's ability to dismiss an FCA lawsuit would run contrary to the longstanding principle that an FCA claim always belongs to the United States. On the other hand, allowing the government to dismiss non-intervened FCA cases might encourage lobbying and strategic litigation gamesmanship.

In weighing these competing considerations, the Supreme Court reasoned that the underlying purpose of the FCA lawsuit is "to vindicate the Government's interests," and the statute itself provides the government broad latitude to reassess FCA actions as circumstances change and evidence develops.[12] Therefore, the FCA never requires the United States to "take a back seat to its co-party relator" at any point during an FCA action.[13] The Supreme Court decided that the United States can move to dismiss an FCA complaint even if DOJ initially declined to intervene so long as the court gives the relator notice and an opportunity for a hearing and considers the interests of the relator.[14] The Court also noted that because "the Government's views are entitled to substantial deference," district courts "should think several times over before denying a motion to dismiss."[15] So long as "the Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant the motion" even if the relator presents a "credible assessment to the contrary."[16]

*Polansky* was not a unanimous decision, meaning that not all the Supreme Court Justices agreed upon the level of deference and discretion that should be given to DOJ in dismissing FCA claims. Justice Kagan delivered the majority opinion with Justices Roberts, Alito, Sotomayor, Gorsuch, Kavanaugh, Barrett, and Jackson joining. Justice Kavanaugh filed a concurring opinion in which Justice Barrett joined. Justice Thomas filed a dissenting opinion in which he noted that he believes the FCA gives the United States no power to unilaterally dismiss a pending qui tam action after it has declined to take over the action from the relator at the outset.

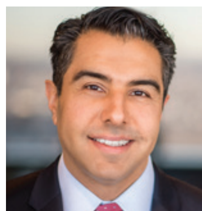
In the wake of *Polansky*, district courts have applied the Supreme Court's guidance to give substantial deference to the government when DOJ moves to dismiss an FCA complaint. For example, in October 2015, relator Dr. W. Blake Vanderlan filed an FCA lawsuit in federal court in Mississippi alleging that his former employer, Jackson MHA, violated the Emergency Medical Treatment and Labor Act (EMTALA)[17] by transferring uninsured African American trauma patients to another hospital while certifying on Medicare claims forms that it complied with all laws.[18] The government initially declined to intervene, but years later, in November 2018, moved to dismiss, arguing that the claims lacked merit and would consume excessive government resources.[19]

In *Vanderlan*, the district court gave DOJ substantial deference and dismissed the complaint because the government met its minimal showing of articulating a reasonable argument for dismissal.[20] DOJ met this burden by articulating the risk of creating bad law and explaining that the cost of the litigation would outweigh the potential benefit. The court noted that it could dismiss the FCA claim without discovery or an evidentiary hearing because the government was merely required to make a reasonable "argument" in favor of dismissal. Although Vanderlan "vigorously and passionately pursued the FCA claims, the claims were never his, and the Government ha[d] substantial discretion to seek dismissal."[21]

Despite the deference afforded to the United States in the post-*Polansky* world, and even post-Granston Memo, Section 3730(c)(2)(A) dismissals are still rare. How rare? Prior to the Granston Memo, the DOJ had moved to dismiss 32 qui tam complaints since the 1986 amendments that added the dismissal provision. In the immediate aftermath of the Granston Memo, the DOJ moved

to dismiss 45 cases between January 2018 and December 2019. This may seem like a large number, but in that same period of time, relators filed over 1,170 qui tam actions. By December 2020, the DOJ had only moved to dismiss five additional times.[22] Since the Granston Memo, relators have been filing an average of 655 qui tam cases a year, with the highest number being 712 in fiscal year 2023.[23] The Supreme Court issued the *Polansky* ruling on June 16, 2023, and by March 19, 2024, it had been estimated that the DOJ filed at least eight Section 3730(c)(2)(A) dismissal motions.[24] If we extrapolate that rate to a full year, it amounts to 12 Section 3730(c)(2)(A) motions per year. When comparing that number to the number of qui tam actions filed per year, the (c)(2)(A) dismissal rate can be calculated at approximately 1.8 percent, which is quite rare.

This does not mean that the DOJ never dismisses cases. The reality is that frivolous qui tams do get filed, and it is critical that the DOJ uses its investigative resources appropriately and for cases that advance the public interest and should proceed, which is more than 650 per year. The relators' bar can remain confident that the DOJ is doing its duty and is fully engaged and enforcing the FCA—to the tune of $2.68 billion in fiscal year 2023 with the highest number of settlements and judgments in history. The defense bar can also continue to pitch those Section 3730(c)(2)(A) dismissal requests to the DOJ because they do work every now and then. Just don't refer to them as a "Hail Mary"—because those passes get caught 9.7 percent of the time and are clearly more successful.[25] ⦿



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## Endnotes

[1]31 U.S.C. §§ 3729-3733 (2024).

[2]Memorandum from Michael D. Granston, Dir., Dep't of Justice Commercial Litig. Branch, Fraud Section to Attorneys, Commercial Litig. Branch, Fraud Section (Jan. 10, 2018) (the "Granston Memo"). The Granston Memo was incorporated into the DOJ Justice Manual at Section 4-4.111 in September 2018.

[3]Shelly R. Slade, *Separating the Wheat from the Chaff or Undermining Congressional Intent? The U.S.'s Proactive Dismissals of Qui tam Actions*, 55 Procurement Law. no. 3, (Summer 2020), *available at* https://www.americanbar.org/content/dam/aba/publications/procurement_lawyer/pl-55-3-summer-20-complete.pdf.

[4]*FCA Memo No Proof Of New DOJ Direction On Dismissals*, Law360, Jan. 25, 2018, *available at* https://www.kmllp.com/siteFiles/News/news.1422.pdf).

[5]599 U.S. 419 (2023).

[6]*Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003), cert. den., 539 U.S. 944 (2003).

[7]*United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1341–42 (E.D. Cal. 1995), *aff'd sub nom. United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), cert den., 525 U.S. 1067 (1999).

[8]*Id.*

[9]599 U.S. 419 (2023).

[10]*Vermont Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774–75 (2000).

[11]*United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 435 (2023); *Walker v. Nationstar Mortg. LLC*, 142 F. Supp. 3d 63, 65 (D.D.C. 2015) (citing *Rockefeller v. Westinghouse Elec. Co.*, 274 F.Supp.2d 10, 16 (D.D.C. 2003)).

[12]*Polansky*, 599 U.S. at 434-35.

[13]*Id.* at 435.

[14]*Id.* at 426-37.

[15]*Id.* at 437-38.

[16]*Id.* at 438.

[17]42 U.S.C. §1395dd (2024).

[18]*See* Relator's First Amended Complaint for Damages Under the False Claims Act – 31 U.S.C. §§ 3729, *et. seq.*, *United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15-cv-00767 (S.D. Miss. Oct. 26, 2017); Order, *United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15-cv-00767 (S.D. Miss. May 11, 2020); Order, *United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15-cv-00767 (S.D. Miss. Apr. 12, 2024).

[19]Memorandum of Points and Authorities Supporting the United States' Motion to Dismiss Counts I-III, V, & VI of Relator's First Amended Complaint Pursuant to 31 U.S.C. § 3730(c)(2)(A), *United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15-cv-00767 (S.D. Miss. Nov. 5, 2018).

[20]Order, Order, *United States ex rel. Vanderlan v. Jackson HMA, LLC*, No. 3:15-cv-00767 (S.D. Miss. Apr. 12, 2024).

[21]*Id.*

[22]Remarks of Assistant Attorney General Granston, *available at* https://www.justice.gov/opa/speech/remarks-deputy-assistant-attorney-general-michael-d-granston-aba-civil-false-claims-act.

[23]U.S. DOJ Civil Division Fraud Section Statistics Overview , *available at* https://www.justice.gov/opa/media/1339306/dl?inline.

[24]Tirzah S. Lollar and Megan Pieper, *DOJ Flexes Its Post-Polansky (c)(2)(A) Muscles and Moves To Dismiss Qui tam Midway Through Discovery,* Arnold and Porter (Mar. 19, 2024), *available at* https://www.arnoldporter.com/en/perspectives/blogs/fca-qui-notes/posts/2024/03/doj-flexes-post-polansky-muscles.

[25]Kevin Seifert, *The evolution of the Hail Mary: The perfect throw -- and how to defend it*, ESPN Oct. 30, 2019, *available at* https://www.espn.com/nfl/story/_/id/27951311/the-evolution-hail-mary-perfect-throw-how-defend-it.