ALERTS

SCOTUS Cert Recap: How To Evaluate Federal Government Motions To Dismiss False Claims Act Suits And How To Count Violations Of Foreign Financial Account Reporting Requirements

June 22, 2022

Highlights

On June 21, the Supreme Court agreed to consider the following two questions:

To what degree does the federal government have authority to dismiss a private party's False Claims Act suit after the government initially declines to proceed with the suit?

When a taxpayer with multiple foreign financial accounts fails to file the form federal law requires, has the taxpayer committed a single violation of federal law or multiple violations for each unreported account?

The U.S. Supreme Court granted two cert. petitions on June 21 – one involving the extent of the federal government's authority to dismiss private parties' claims under the False Claims Act (FCA) and another involving how courts should count violations of the Bank Secrecy Act's requirement to report foreign financial accounts.

Both petitions raise questions that split the lower federal courts of

RELATED PEOPLE

Kian Hudson
Partner
Indianapolis

P 317-229-3111
F 317-231-7433
kian.hudson@btlaw.com

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Appeals and Critical Motions

appeals, and the Supreme Court's answers is likely to have widespread significance, for hundreds of FCA suits are filed each year and millions of foreign financial accounts are subject to the reporting requirement. FCA litigators, as well as lawyers assisting American expatriates and others with foreign financial accounts, are likely watching these cases closely.

Federal Government's Authority to Dismiss Relators' FCA Suits

In *United States ex rel. Polansky v. Executive Health Resources, Inc.*, the Court will address a longstanding circuit conflict regarding the federal government's authority to dismiss FCA suits brought by private parties.

The FCA imposes civil liability on anyone who knowingly presents a "false or fraudulent claim for payment" to the federal government, and it provides that such civil liability can be recovered by an action brought either by the government or by a private party (called a "relator"). When a relator initiates such a suit, the FCA provides that the federal government has 60 days to decide whether to intervene and "proceed with the action" itself or to decline to intervene, "in which case the person bringing the action shall have the right to conduct the action." If the government "elects not to proceed with the action," the FCA further allows that "the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause." Finally, the FCA expressly provides that "[i]f the Government proceeds with the action," it "may dismiss the action notwithstanding the objections of the [relator]" so long as the relator has been notified and provided with an opportunity for a hearing on the government's motion to dismiss.

The FCA does not expressly address, however, the question presented in *Polansky*: When, if ever, may the government dismiss a relator's action if it initially chooses *not* to intervene? The lower federal courts of appeals have provided a variety of answers to this question. Some courts have given the government largely unlimited discretion to dismiss FCA actions, others have required a rational relation between dismissal and a valid governmental purpose, and still others have held that the government must meet the statutory good cause standard for intervention and then satisfy the ordinary requirements for voluntary dismissal under Federal Rule of Civil Procedure 41. And to this array of options, the petitioner in *Polansky* adds yet another possible rule: After declining to intervene, the government lacks *any* authority to dismiss.

The Supreme Court is now set to resolve this dispute, and its decision could have considerable consequences. Hundreds of FCA cases are filed each year, and the government declines to intervene in the vast majority of those cases. And because even a single FCA case can involve millions or billions of dollars of claims, the financial stakes of this case will be significant.

Violations of the Bank Secrecy Act's Foreign Account Reporting Requirement

In *Bittner v. United States*, the Court will consider another question with potentially far-reaching financial consequences: When a taxpayer with multiple foreign financial accounts fails to file the form federal law requires, has the taxpayer committed a single violation of federal law or multiple violations for each unreported account?

Section 5314 of the Bank Secrecy Act directs the Treasury Secretary to issue regulations requiring U.S. persons to report information about financial accounts they maintain outside the country. The regulations carrying out this mandate require any U.S. person with a financial interest in one or more foreign financial accounts with an aggregate balance of more than $10,000 to disclose those accounts using a single annual form – a Report of Foreign Bank and Financial Accounts (FBAR). And for "any person who violates, or causes any violation of any provision of Section 5314," the Act authorizes the Secretary to impose a civil penalty of up to $10,000, and for willful violations, the greater of $100,000 or 50 percent of the accounts' aggregate balance.

In Bittner the Court will decide whether this language makes a failure to file an annual FBAR a single violation subject to a single $10,000 maximum penalty or whether there are separate violations, each subject to a $10,000 maximum penalty, for each foreign account that should have been reported. Bittner aptly illustrates the significance of this question. From 2007 to 2011, the defendant – a U.S. citizen living in Romania – maintained dozens of foreign accounts and failed to file the required annual FBAR each of these five years. The defendant argues that these failures constituted five violations that – because the government concedes the violations were non-willful – subject him to a maximum $50,000 fine. The government, meanwhile, contends that each account the defendant failed to report qualifies as a separate violation, producing a total of 272 violations and subjecting the defendant to a maximum $2.72 million penalty.

The U.S. Court of Appeals for the Ninth Circuit has adopted the defendant's view, while in this case the U.S. Court of Appeals for the Fifth Circuit sided with the government. And as the cert. petition observes, the resolution of this dispute could affect millions of people. Only 1.3 million FBARs were filed in 2019, yet several million U.S. citizens live abroad each year and tens of millions of current U.S. residents are foreign-born or have other strong ties overseas; it is likely that many of these people have a foreign account, perhaps multiple foreign accounts, triggering a reporting requirement with which they have not complied. For each of these individuals, the Court's answer could mean a difference of hundreds of thousands of dollars in potential penalties. The case is thus certain to garner considerable interest from practitioners and advocacy groups.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work or Kian Hudson at 317-229-3111 or kian.hudson@btlaw.com.