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Thomas Dissent Could Signal 'Twilight' for False Claims Act

By Daniel Seiden

- Opinion in *Polansky* highlights Article II concerns
- Look for dissent argument in motions, attorney says

One-third of the US Supreme Court is open to the view that whistleblower provisions in the False Claims Act—which help the US government recover billions of dollars each year—are unconstitutional.

The 8-1 ruling in *United States ex rel. Polansky v. Executive. Health Resources Inc.* held that it was proper for the Justice Department to dismiss a whistleblower's FCA suit that it viewed as too costly.

Although it was unfavorable for whistleblowers, the dissent by Justice Clarence Thomas could be even worse news in the long run.

In the second half of his dissenting opinion, Justice Thomas said the whistleblower provisions in the FCA have a separation-of-powers problem, inhabiting "something of a constitutional twilight zone."

Defendants may now start raising Thomas' views at the district court level, said Bob Rhoad, who represents FCA defendants with Nichols Liu LLP.

It would "seem prudent for any defendant to an FCA qui tam action to raise it in connection with a motion to dismiss or motion for summary judgment," and to do so as soon at the outset, he said.

Thomas said "there is good reason to suspect" that Article II doesn't allow whistleblowers to represent the US government in FCA suits. An FCA whistleblower isn't an appointed officer of the US under Article II, he said.

"It thus appears to follow that Congress cannot authorize a private relator to wield executive authority to represent the United States' interests in civil litigation," he also said.

Justice Brett M. Kavanaugh, in a concurrence joined by Justice Amy Coney Barrett, said he agreed with Thomas' Article II concerns. The court should consider those issues "in an appropriate case," he said.

Three Votes

"That's three votes for certiorari in a case that challenges relators' ability to bring these suits in the first place. We may see more direct challenges from defendants along those lines," said Andrew O'Connor, who represents FCA defendants with Ropes & Gray LLP.

"And if those three Justices find a fourth vote, we could see another blockbuster FCA case before the Court," he said.

Defendants "will surely piggyback on Justice Thomas' dissent in hopes of reopening the debate, but the weight of precedent and history is manifestly against them," said Chris McLamb, who represents whistleblowers with Constantine Cannon LLP.

McLamb said the six other justices "were offered a giftwrapped opportunity to invite a constitutional challenge to the qui tam provisions. They declined." That's no surprise, given that the court has already rejected certiorari on the Article II question since Chief Justice G. Roberts Jr. took the bench, he said.

Arguments about the FCA's constitutionality "are unlikely to prevail," said Colette Matzzie who represents whistleblowers with Phillips & Cohen LLP.

"Qui tam cases are the Executive Branch's most effective tool for ensuring recovery of federal program funds. Courts have been nearly unanimous in concluding that they do not unduly interfere with the Executive Branch's power to execute the law, and the Executive Branch has agreed," she said.

Barr and Grassley

"The justices' questioning of the constitutionality of the FCA's qui tam provisions is surprising but certainly not new," said Jacquelyn Papish, who represents FCA defendants with Barnes & Thornburg LLP.

The issue arose in scholarly articles and litigation shortly after 1986 amendments to the FCA, and was formally raised by then-Assistant Attorney General William P. Barr in 1989 when he wrote a memorandum arguing that the provisions violate the separation-of-powers doctrine, she said.

"Just as Congress cannot vest litigation authority in commission members who have not been duly appointed, it cannot vest such litigation authority in self-selected private bounty hunters who operate without accountability and without commitment to the United States' interests," the memorandum said.

The DOJ's Office of Legal Counsel nevertheless backed the provisions in 1996 with a superseding memorandum, and the government supported them in a 2019 brief filed with the Supreme Court.

The three justices' positions' seem "odd" given the lack of traction on the issue over the last three decades, Papish said.

But the dissent and concurrence may act as a sign to defendants to continue to raise it, she said.

Sen. Chuck Grassley (R-Iowa), who helped expand the whistleblower provisions in the 1986 amendments, asked Barr about his views on the FCA during a 2019 hearing following his nomination to be US Attorney General.

Barr said he would "enforce the law in good faith," and agreed with Grassley that the law empowers whistleblowers.

In response to *Polansky*, Grassley told Bloomberg Law that the "False Claims Act has recovered billions of dollars in taxpayer money that would otherwise be lost to fraud. I've fought to strengthen and uphold the False Claims Act for decades and certainly don't intend to stop now."

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