Simpson Thacher

# Memorandum

## Power Play: The Supreme Court Affirms the Federal Government's Broad Authority to Dismiss False Claims Act Suits

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On June 16, 2023, the Supreme Court confirmed that the federal government has broad authority to seek dismissal of whistleblower False Claims Act (FCA) cases at any time, including well after the initial intervention period has passed. The 8-1 decision in *United States ex. rel. Polansky* affirmed the decision of the United States Court of Appeals for the Third Circuit. Under the new ruling, the federal government need only intervene at some point in the proceeding and provide a reasonable explanation for its dismissal request in order to obtain dismissal of an FCA action.

### The FCA

The FCA is a unique statute in that it empowers private individuals, known as *qui tam* relators, to file an action on behalf of the United States government. *Qui tam* relators must allege that they have evidence of false or fraudulent claims being submitted to the government for payment. In return, *qui tam* relators receive a portion of the recovery as an incentive for uncovering situations where the government has been defrauded.

In all FCA cases, the government is entitled to review the complaint and has 60 days—known as the "seal period"—to determine whether they want to take over the Relator's case and proceed as the Plaintiff. If, after the seal period, the government decides not to intervene, the Relator can pursue this action individually on behalf of the government. The government can intervene and dismiss a case that it believes is meritless, but until now, the question of when the government could intervene and obtain a dismissal was unclear.

### Background and Procedural History

Relator Dr. Jesse Polansky brought a *qui tam* action against Executive Health Resources (EHR), a company for which he'd done consulting, alleging that EHR was systematically enabling healthcare providers to over-bill Medicare. Polansky alleged EHR falsely certified certain inpatient services for which the patients did not qualify.

The government declined to intervene during the "seal period" and, despite continuing to investigate Polansky's claims, initially declined to pursue the action citing the "weighty privilege issues." Polansky then moved forward independently with his claim. For seven years, Polansky litigated this action in the United States District Court for the Eastern District of Pennsylvania.

After years of litigation, the government notified all parties that it intended to file a motion to dismiss the action. The court granted the motion to dismiss over Polansky's objection, and the United States Court of Appeals for the Third Circuit affirmed.

The Third Circuit held that the language of the FCA allowed the government to intervene but wrote that the standard to obtain a dismissal must meet the standard outlined in Federal Rule of Civil Procedure Rule 41. The Supreme Court granted certiorari to resolve a circuit split on the questions of when the government can intervene and what the standard is for dismissal.

## Supreme Court Rules That Federal Government Can Dismiss FCA Claims at Any Point Under the "Goldilocks" Position

Justice Kagan, writing for the Court, concluded that the federal government has the authority to dismiss whistleblower FCA cases that it initially declines to intervene in over a relator's objection, as long as it intervenes at some point and provides a reasonable explanation.

Referring to it as a straightforward reading of the FCA, Kagan explained that the statute allows the government to take responsibility for the case and dismiss it "at a later date upon a showing of good cause." The Court rejected Polansky's interpretation of the FCA, which would have only granted the government "primary control of the action if it intervenes in the seal period." Instead, Kagan wrote that in a case's seal and post-seal periods, "the government's interest in the suit is the same—and is the predominant one."

The Court also determined the appropriate standard that should be applied when the government seeks to dismiss an FCA case. While the government wanted unfettered discretion to dismiss claims and Polanksy wanted a form of an "arbitrary-and-capricious" standard to be applied, the Court adopted the Third Circuit's "Goldilocks position" and ruled that the district court can dismiss a motion under the typical requirements of Federal Rule of Civil Procedure 41(a). According to the Court, motions to dismiss a claim should be granted if the government provides a reasonable explanation.

Justice Clarence Thomas, the sole dissenting Justice, disagreed with the majority's reading of the FCA. Instead, Justice Thomas reasoned that the FCA does not enable the government to "unilaterally dismiss a pending *qui tam* action after it has 'decline[d] to take over the action' from the relator at its outset."

## Implications

The *Polansky* decision grants defendants an extra layer of protection against FCA claims. Rather than having to defend lawsuits against an aggressive relator, defendants may obtain dismissal if the government can be persuaded—at any time—that the suit is not in the government's best interests. The government's decision to dismiss an action could save defendants a substantial amount of time and resources. Defendants now have a substantial incentive to seek to maintain or establish an open line of communication with the government about the potential risks and benefits of a given *qui tam* action proceeding.

Defendants may also benefit if whistleblowers feel added pressure following *Polansky* to pursue only meritorious suits. The *Polansky* decision makes clear that a relator is not assured of a substantial payout merely by dragging out a litigation or insisting upon a high-dollar settlement. A relator must keep an eye firmly on his or her obligation to act in the government's interests at all times—at risk of the government intervening to terminate the suit. The possibility of dismissal at any point in time now hangs over the heads of future whistleblowers.

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