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Does the Government Retain Control of False Claims Act Cases?

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United States ex rel. Polansky v. Executive Health Resources, Inc. **(S. Ct. June 16, 2023)**

The vast majority of False Claims Act cases are initiated by private parties, known as relators, not the government. In fact, according to the U.S. Department of Justice's most recent fraud statistics, the number of False Claims Act cases initiated by relators has outnumbered those initiated by the government every year since 1995. And, because the government declines to intervene in most *qui tam* cases, relators may end up spending substantial time, money, and energy in the pursuit of their claims on behalf of the government. In these situations, does the government still retain the right to intervene and move to dismiss a case that a relator may have spent years litigating on its own? And, if the government does move to dismiss, is that motion decided based on the usual standards applied to any federal civil case?

On June 16, in an 8-1 decision, the U.S. Supreme Court answered yes to both questions in *United States ex rel. Polansky v. Executive Health Resources, Inc.*, No. 21-1052. Specifically, the Court held that first, the government can move to dismiss a case "whenever (whether during the seal period or later) it has intervened," and second, when it does, district courts must assess the motion using the standards of Federal Rule of Civil Procedure 41, while also acknowledging that "the Government's views are entitled to substantial deference" because a *qui tam* suit "is on behalf of and in the name of the Government" and "alleges injury to the Government alone."

The Court's decision reiterates that False Claims Act defendants should, at all stages throughout the litigation, continually look for opportunities to advocate that the government reevaluate the merits of the case and weigh the burdens of continued litigation against the potential benefits of any recovery from the relators' claims in considering whether dismissal is warranted.

Additionally, in the lone dissenting opinion, Justice Thomas provided an open invitation for False Claims Act defendants to challenge whether the *qui tam* provisions of the False Claims Act are inconsistent with Article II of the U.S. Constitution, which only allows a person who is "appointed as an officer of the United States," not private parties, to conduct litigation that seeks to vindicate the government's rights. In their concurring opinion, Justices Kavanaugh and Barrett agreed that such a challenge may be considered by the Supreme Court in an appropriate case.

The government successfully moved to dismiss the relator's complaint five years after initially declining to participate in the case.

Executive Health Resources (EHR) provides review and certification services for health care providers that bill Medicare.[1] Relator Dr. Jesse Polansky was a consultant for EHR after working for the government agency that runs the Medicare program. While working with EHR, Dr. Polansky came to believe that the company was helping its hospital clients increase patient admissions by allegedly falsely certifying services as inpatient that should have been provided on an outpatient basis.

In 2012, Dr. Polansky filed under seal a *qui tam* lawsuit against EHR for allegedly overbilling Medicare for inpatient stays in violation of the False Claims Act, 31 U.S.C. § 3729 *et seq.* The case remained under seal for the next two years until, following its own investigation of the allegations, the government declined to intervene in the case. Under Section 3730(c)(3) of the False Claims Act, "[i]f the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action." Dr. Polansky exercised this right, and for the next five years, Dr. Polansky and EHR engaged in extensive litigation that included multiple discovery disputes, an amendment of the complaint, and motions for summary judgment.

In 2019, despite initially declining to participate and with summary judgment motions pending, the government moved to dismiss the case based on Section 3730(c)(2)(A), which permits the government to "dismiss [an] action notwithstanding the objections of the person initiating the action" so long as the "person has been notified by the Government," and the "court has provided the person with an opportunity for a hearing on the motion." In support of its motion, the government explained that the anticipated burdens of continued litigation, such as additional document productions, attorney time needed to prepare government officials for depositions, and its concern that privileged material had been produced and would be used, outweighed the potential benefits of any recovery, especially given the government's doubts that Dr. Polansky could prove liability under the False Claims Act with the available evidence. Dr. Polansky vigorously opposed the motion.

The district court subsequently granted the government's motion to dismiss, and the Third Circuit affirmed the dismissal. In affirming the dismissal, the Third Circuit addressed "two key questions" on Section 3730(c)(2)(A) "that have divided our sister circuits," specifically, "whether, and in what circumstances, the Government retains statutory authority to move to dismiss an FCA action … if it opted not to proceed at the outset," and if the government intervenes, is it "automatically entitled to dismissal, or does that decision lie in the District Court's discretion?" In response to these questions, the Third Circuit held that "the Government is required to intervene before moving to dismiss," and after intervening, its "motion must meet the standard of Federal Rule of Civil Procedure 41(a)."[2]

The Supreme Court confirmed the government's continual right to intervene and seek to dismiss a qui tam action.

The Supreme Court affirmed "the Third Circuit across the board."

The Court first addressed the question: "[D]oes the Government have authority to dismiss an action under Subparagraph (2)(A) if it declined to intervene during the seal period?" In answering yes, the Court began by noting the False Claims Act was enacted during the Civil War to combat government fraud, and it has always "been enforced through a unique public-private scheme" that allows private parties (relators) to bring suit "in the name of the Government" for injuries "exclusively to the Government." The Court explained that while a relator does have an interest in the action, given that the relator may receive up to 30% of any recovery, "the relator is no

ordinary civil plaintiff, he is immediately subject to special restrictions." Those restrictions are set forth in Section 3730(c) (Rights of the parties to *qui tam* actions). The Court noted that several of the paragraphs in Section 3730(c) make clear when they apply — when the government elects to proceed with the action (Paragraph 1), when it elects not to proceed (Paragraph 3), and regardless of its election decision (Paragraph 4) — but Paragraph 2, which gives the government the power to dismiss an action, is silent, and "that is the mystery at this case's heart."

While the government and EHR argued that the government can always move to dismiss even if it has not intervened, and Dr. Polansky contended that the government could only move to dismiss if it intervened during the seal period, the Court took the same middle road as the Third Circuit, holding that "Paragraph 2 (like Paragraph 1) applies only if the government has intervened, but the timing of the intervention makes no difference," and therefore, "the Government can file a (2)(A) motion to dismiss whenever (whether during the seal period or later) it has intervened."

The Court then addressed the question: "[W]hat standard should a district court use in ruling on a Subparagraph (2)(A) motion to dismiss?" In holding that a "district court should assess a (2)(A) motion to dismiss using Rule 41's standards," the Court again agreed that the "Third Circuit's Goldilocks position is the legally right one." That is, the "Federal Rules are the default rules in civil litigation, and nothing warrants a departure from them here." The Court emphasized that "the Federal Rules apply in FCA litigation in courts across the country every day," and "[t]here is no reason to make an exception for the one about voluntary dismissals."

The Court did highlight that the application of Rule 41 will differ slightly in False Claims Act cases because the statute requires relators to receive notice and an opportunity to be heard before a case may be dismissed, and it also demands that district courts consider the interests of the relator when determining whether dismissal is appropriate given the "substantial resources" they may have committed in litigating in the case. However, the Court explained that "the Government's views are entitled to substantial deference" because a *qui tam* suit "is on behalf of and in the name of the Government" and "alleges injury to the Government alone." Put simply, the Court stressed that "a district court should think several times over before denying a motion to dismiss."

Key Takeaway: False Claims Act defendants should continually look for opportunities to ask the government to reassess whether the burdens outweigh the benefits of a declined case.

The Supreme Court's reasoning and holdings reaffirm a central tenet of False Claims Act litigation: The government is, and always remains, the real party in interest in the case. And so, as the Court made clear, "[i]f the Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant the motion."

This means that, as we have previously written, even if the government has declined to intervene in a *qui tam* case, defendants should remain engaged with the government and affirmatively bring its attention to the likelihood of investigative and litigation burdens that may impact not only DOJ, but also the FDA, CMS, or other relevant federal agencies. These burdens may include, among others, the government's need to respond to written discovery requests, prepare for employee depositions or trial testimony, and the continual need to monitor the parties' filings throughout the litigation. Defendants also should consider bringing to the government's attention problems with a relator's case, such as a lack of evidence or misinterpretation of the relevant law, that undermine

the possibility of the government benefiting from the case. In sum, at all stages of litigation, defendants should advocate that the government reevaluate the merits of the case and weigh the burden imposed on its agencies against the likelihood of any recovery based on a relator's claims in considering whether dismissal is warranted.

Key Takeaway: There is now an open invitation for defendants to challenge the constitutionality of qui tam actions.

Justice Thomas filed a dissenting opinion. And, in that opinion, he provided an open invitation for False Claims Act defendants to challenge the constitutionality of the *qui tam* provisions: "There are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation." In short, Justice Thomas explained that because a "private relator under the FCA … is not 'appointed as an officer of the United States' under Article II" of the U.S. Constitution, "[i]t thus appears to follow that Congress cannot authorize a private relator to wield executive authority to represent the United States' interest in civil litigation." And, in their concurring opinion, Justices Kavanaugh and Barrett agreed: "[T]he Court should consider the competing arguments on the Article II issue in an appropriate case."

Given the Court's receptivity to recent constitutional challenges of relatively well-established statutory structures — such as *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020) (finding the then-structure of the CFPB violated the constitution); *Axon Enterprise v. FTC*, 143 S. Ct. 890 (2023) (allowing constitutional challenges to the SEC's and FTC's administrative enforcement process to proceed) — a False Claims Act defendant should carefully consider whether, and when, to raise such a challenge.

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[1] More detailed versions of the factual and procedural history of the case are in the opinions of the district and appellate courts at 422 F. Supp. 3d 916 (E.D. Pa. 2019) and 17 F.4th 376 (3d Cir. 2021), respectively.

[2] *Polansky*, 17 F.4th at 380, 383, 388. On the government's dismissal authority, the Third Circuit noted a split between the D.C., Ninth, and Tenth circuits, which permitted "the Government to move for dismissal of the relator's action at any point in the litigation and regardless of whether it has intervened," and the Sixth and Seventh circuits, which allowed the "Government to move for dismissal … only when it 'proceeds with the action.'" *Id.* at 384 (citation omitted). On the motion to dismiss standard, the Third Circuit noted a three-way split: The D.C. Circuit gave the government an "unfettered right" to dismiss; the Ninth and Tenth circuits held the government to a "rational relation" standard; and the Seventh Circuit applied the Federal Rules of Civil Procedure. *Id.* at 388.

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