SUPREME COURT AFFIRMS GOVERNMENT'S BROAD DISMISSAL AUTHORITY IN FALSE CLAIMS ACT SUITS

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US Health Care and FDA Alert

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On 16 June 2023, the United States Supreme Court issued a decision in the case of *United States ex rel. Polansky v. Executive Health Resources*[1], holding that the federal government (Government) maintains the authority to dismiss a federal False Claims Act (FCA) action over a relator's objection so long as the Government first intervenes in the action. The court also held that in assessing the Government's motion to dismiss a relator's FCA action, district courts should apply the rule governing voluntary dismissal of suits in ordinary civil litigation. This decision, in giving the Government broad discretion to dismiss a *qui tam* action, may affect the Government's decision on when to intervene in an action. Additionally, the decision reinforces FCA defendants' ability to urge the Government for dismissal throughout the lifecycle of the *qui tam* action, rather than solely at the pre-intervention phase.

BACKGROUND

The FCA allows private citizens—relators—to file FCA suits on behalf of the Government, which are known as *qui tam* suits. In a *qui tam* suit, the FCA allows the Government a 60-day period (subject to extensions) to investigate and evaluate the action, during which the relator's complaint remains under seal.[2] The Government then has the choice to intervene and effectively take over the action or to decline to intervene and allow the relator to continue conducting the action on the Government's behalf.[3] Even where the Government declines to intervene, the FCA makes clear that the Government has certain continuing rights in the action. For example, if the Government declines to intervene, the Government can later seek leave from the court to intervene "upon a showing of good cause."[4] The FCA also allows the Government to "dismiss the action notwithstanding the objections of the [relator]" so long as the relator has received notice of the motion to dismiss and an opportunity for a hearing.[5] But, the FCA is silent on whether the Government's dismissal authority survives where the Government has allowed the seal period to lapse without intervening. This silence led to a circuit split on the issue.[6]

In *Polansky*, the relator filed a *qui tam* action in 2012 alleging that the defendant had aided hospitals in a scheme to overbill the Medicare program.[7] After reviewing the evidence, the Government declined to intervene within the seal period.[8] Thereafter, the case spent a number of years in discovery before the Government finally decided, in 2019, that the "varied burdens of the suit outweighed its potential value."[9] The District Court for the Eastern District of Pennsylvania granted the Government's motion to dismiss and the Third Circuit affirmed, holding that the Government retains the authority to dismiss an FCA action where the government declined to intervene during the seal period so long as the Government intervenes sometime later; and, the standard a district court should

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use in ruling on such a motion to dismiss comes from Federal Rule of Civil Procedure (FRCP or Federal Rule(s)) 41(a).[10]

Given the existing circuit split, the Supreme Court granted *certiorari* in *Polansky* to settle (i) whether the Government has authority to dismiss a *qui tam* action if the Government declined to intervene during the seal period, and (ii) if so, what standard a district court should use in ruling on such a motion to dismiss a qui tam action.[11]

THE OPINION

In an 8-1 opinion, the Supreme Court affirmed the Third Circuit's holding on each of those questions. As to the question of the Government's ongoing dismissal authority, the court held that the Government may move to dismiss a *qui tam* FCA action "so long as it intervened sometime in the litigation, whether at the outset or afterward."[12] In so holding, the Supreme Court rejected the Government's contention that the Government may move to dismiss a *qui tam* action even if it has never intervened and likewise rejected the relator's position that the Government's dismissal authority only exists where the Government has intervened within the seal period.[13] The court based its holding on an interpretation of the statute and a reasoning that the purpose of a qui tam action is "to vindicate the Government's interests."[14] The court found that though the Government's interest "is typically to redress injuries against the Government," the interest may instead be "to obtain dismissal of the suit because it will likely cost the Government more than it is worth."[15] Regardless, "that interest does not diminish in importance because the Government waited to intervene."[16]

As to question of the appropriate standard to apply in assessing the Government's motion to dismiss a *qui tam* action, the Supreme Court held that FRCP 41(a) should apply.[17] FRCP 41(a) governs voluntary dismissals in ordinary civil litigation and the standard under FRCP 41(a) varies with a case's procedural posture. Where a defendant has not yet served an answer or motion for summary judgment, the plaintiff need only file a notice of dismissal. But, otherwise dismissal requires a "court order, on terms that the court considers proper."[18]

The court rejected the Government's position of "essentially unfettered discretion to dismiss" and the relator's proposal of "a complicated form of arbitrary-and-capricious review, with a burden shifting component."[19] Instead, the Supreme Court again sided with the Third Circuit and its "Goldilocks" position somewhere in between the two parties' positions.[20] The court reasoned that the Federal Rules "are the default rules in civil litigation, and nothing warrants a departure from them" in the FCA context.[21] The decision did note, however, that the application of FRCP 41(a) here will differ in two ways from the typical civil case. First, because the FCA requires notice and an opportunity for hearing before a *qui tam* dismissal, the district court "must use that procedural framework to apply [Federal] Rule 41's standards."[22] Second, in the FCA context, the set of interests the court should consider in ruling on a post-answer motion is more likely to include the relator's interests given that the relator may have committed substantial resources to the action.[23] Despite these nuances, the court noted that the Government's motions to dismiss qui tam FCA actions "will satisfy [Federal] Rule 41 in all but the most exceptional cases" and that the Government's "views are entitled to substantial deference."[24] As the Supreme Court stated "[i]f the Government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant the motion. And that is so even if the relator presents a credible assessment to the contrary."[25]

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THE IMPACT

The Supreme Court's decision in *Polansky* confirms that the Government is to be given broad discretion to dismiss a *qui tam* FCA suit, even where the Government has initially declined to intervene and allowed the seal period to lapse. The decision appears to be in-line with the "Granston" Memo issued by the Department of Justice (DOJ) in 2018.[26] The Granston Memo encouraged DOJ lawyers to curb "meritless *qui tams*" and prevent "parasitic or opportunistic qui tams" by utilizing the Government's dismissal authority under the FCA.[27] The Granston Memo likewise emphasized the need for the Government to consider dismissal where the Government's "expected costs are likely to exceed any expected gain," thereby preserving the Government's "limited resources."[28] The court's decision in *Polansky* will enhance and clarify the Government's ability to perform its "gatekeeper role" and should allow the Government to "preserve limited resources" and potentially "avoid adverse precedent."[29]

In practice, *Polansky* could affect the Government's calculus in determining whether to intervene at the beginning of a qui tam action. Given that *Polansky* clarified that the Government's dismissal authority exists throughout the litigation, the Government may feel a less-pressing need to intervene at the outset of an action. For FCA defendants, this could create some uncertainty as to whether the Government might unexpectedly intervene much later in a case where the Government's calculus changes. But, *Polansky* also presents a potentially powerful tool for FCA defendants—the Government's ability to dismiss a qui tam action effectively at any point in the litigation should allow defense counsel to urge the Government to dismiss at multiple points in the lifecycle of the action.

Of note, in his dissent, Justice Clarence Thomas questioned the constitutionality of the FCA's *qui tam* provisions as potentially "inconsistent with Article II" of the Constitution and that private relators "may not represent the interests of the United States in litigation."[30] In a concurrence, Justices Brett Kavanaugh and Amy Coney Barrett agreed with the majority's holding but also noted their agreement with Justice Thomas' view that there are "substantial arguments" as to the constitutionality of "the *qui tam* device."[31] The concurrence argued that the Supreme Court should consider taking up these issues "in an appropriate case" in the future. These constitutionality questions should be closely monitored, particularly given the recent and explosive growth of *qui tam* FCA cases. In the meantime, FCA defendants should be prepared for the Government's late intervention in a *qui tam* action. Additionally, FCA defendants should also note that the decision reinforces their ability to urge the Government for dismissal at all phases of the *qui tam* action, rather than only at the pre-intervention phase. Our Health Care and FDA lawyers will continue to monitor the constitutionality argument and the Government's use of this confirmed discretion.

FOOTNOTES

[1] *United States ex rel. Polansky v. Exec. Health Res.*, 599 U.S. __ (June 16, 2023).

[2] 31 U.S.C. § 3730(b)(2).

[3] Id. § 3730(b)(4).

[4] Id. § 3730(c)(3).

[5] Id. § 3730(c)(2)(A).

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[6] *See Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003) (holding that the Government has an "unfettered right to dismiss [a qui tam] action"). *But see United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp*., 151 F.3d 1139, 1145 (9th Cir. 1998) (requiring that the Government (i) identify a valid governmental purpose, and (ii) a rational relationship between dismissal of a *qui tam* action and accomplishment of the valid governmental purpose before the burden flips to the relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal") (internal citations omitted)).

[7] *Polansky*, supra note 1, at 6.

[8] *Id*.

[9] *Id*.

[10] *Id*. at 6–7 (citing 422 F. Supp. 3d 916, 927 (E.D. Pa. 2019) and 17 F. 4th 376, 383–88 (3d Cir. 2021)).

[11] *Polansky*, supra note 1, at 7.

[12] *Id*. at 2.

[13] *Id*. at 7–8.

[14] *Id*. at 8–13.

[15] *Id*. at 12–13.

[16] *Id*. at 13.

[17] *Id*. at 2.

[18] *Id*. at 13 (citing Fed. R. Civ. P. 41(a)).

[19] *Id*. at 13–14.

[20] *Id*. at 14.

[21] *Id*.

[22] *Id*. at 14–15.

[23] *Id*. at 15.

[24] *Id*.

[25] *Id*. at 16.

[26] DOJ, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)* (Jan. 10, 2018).

[27] *Id* at 3–4.

[28] *Id.* at 1, 6–7.

[29] *See id*. at 2.

[30] *United States ex rel. Polansky v. Exec. Health Res*., 599 U.S. __ (June 16, 2023) (Thomas, J. dissenting).

[31] *United States ex rel. Polansky v. Exec. Health Res*., 599 U.S. __ (June 16, 2023) (Kavanaugh, J. concurring). The fact that 3 justices questioned the constitutionality of a relator continuing a qui tam lawsuit after the

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government declines to intervene could potentially set the stage for this issue to be considered in a future case.

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