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SCOTUS maintains the government may intervene in previously declined FCA matters to seek dismissal

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On Friday, June 16, 2023, the U.S. Supreme Court ("SCOTUS") ruled that the federal government may seek to dismiss a *qui tam* False Claims Act ("FCA") suit over the relator's objection, even where it previously declined to intervene in the case and the relator invested in moving the case forward.

The 8-1 decision by the high Court firmly established the broad authority for the government to intervene in such circumstances under a Rule 41(a) "reasonableness" standard, explaining that the key reason for this is that "the government's interest in [an FCA] suit ... is the predominant one" based on the "FCA's government-centered purposes."[1]

When an FCA suit is filed, the government has 60 days (which is typically extended) under the FCA statute to decide whether to decline or intervene in the case.[2] If declined, the relator may proceed with the litigation without the government's support.

The high Court firmly established the broad authority for the government to intervene in such circumstances under a Rule 41(a) "reasonableness" standard.

The statute also allows the government to intervene "at a later date upon a showing of good cause."[3] As of 2022, publicly available statistics show that the government has elected to intervene only in about 40 percent of all *qui tam* FCA matters subject to judgment or settlement.[4]

In recent years, the government has increasingly sought to use its authority under § 3730(c)(2)(A) to dismiss unfavorable *qui tam* cases over relators' objection. As we previously discussed,[5] there has been disagreement among lower federal courts about what standard to apply when the government returns to a case it previously declined and seeks to dismiss the relator's ongoing efforts.

In this case, the government argued § 3730(c)(2)(A) lacked any standard of review and gave it an unbound ability to intervene ("The Government thinks it has essentially unfettered discretion to dismiss."),[6] whereas the relator requested "a complicated form of arbitrary-and-capricious review, with a burden-shifting component."[7] The Supreme Court rejected both of these arguments.

Writing for the majority, Justice Kagan explained that district courts should look to the voluntary dismissal standard articulated under Federal Rule of Civil Procedure 41(a), and that the only condition placed on the government's right to obtain dismissal is its presentation of a "reasonable argument for why the burdens of continued litigation outweigh its benefits," and if this presentation is made "the court should grant the motion .... even if the relator presents a credible assessment to the contrary."[8]

The Polansky *decision should embolden the government to seek post-declination dismissals where appropriate, even if the case has been ongoing for several years at the relator's expense.*

This standard applies even if years have passed since the initial declination. In *Polansky*, the relator, a medical doctor, filed a *qui tam* suit in 2012 related to allegations that his employer overbilled Medicare. After the government declined to intervene, Dr. Polansky elected to continue the case on his own.

But after five years that were subject to extensive discovery — in which the government necessarily had to take part — the government sought to dismiss the case in 2019 based on the burden of discovery and the low likelihood of the suit's success.

The *Polansky* decision should embolden the government to seek post-declination dismissals where appropriate, even if the case has been ongoing for several years at the relator's expense. Doing so will require only a rational explanation about why doing so benefits the government.

For some relators, the knowledge that the government may return to claim its "throne" in an FCA case and seek dismissal with little obstacle will underscore increased risk in continuing FCA cases after a government declination. This is especially true if the discovery process will impose substantial costs on the government, as in *Polansky*.

With the right to later intervention and dismissal over the relator's objection clearly established, FCA defendants will push the government for dismissal throughout a non-intervened case, highlighting the many instances where an unmeritorious case is wasting the resources of both the government and defendant.

Notes

[1] *United States Ex Rel. Polansky v. Executive Health Resources, Inc.*, Slip. Op. No. 21–1052, at 12, 599 U.S. ___ (2023). https://bit.ly/3CJRRZl

[2] *See* 31 U.S.C. § 3730.

[3] § 3730(c)(3).

[4] https://bit.ly/3NJSnwC

[5] https://bit.ly/3r0ec2g

[6] *Polansky, supra*, at 13.

[7] *Id.*

[8] *Polansky*, *supra* at 16.

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