

It's (Not) About Time - Government May Move to Dismiss FCA Suit at Any Point During its Pendency

On Friday, June 16, 2023, the United States Supreme Court (SCOTUS or the Court) upheld prior decisions by the trial court and Third Circuit in *U.S. ex rel. Polansky v. Executive Health Resources, Inc.* *Polansky* involves the right of the U.S. Government to dismiss a *qui tam* False Claims Act (FCA) suit brought by a relator/private citizen after initially declining to intervene. The Court confirmed that the Government may intervene and move to dismiss a FCA lawsuit at any time during the life of the case. Moreover, the Court confirmed the Third Circuit's application and test for evaluation, holding that trial courts should consider motions to dismiss by the Government under the standard set out in Federal Rule of Civil Procedure 41(a). Justice Elena Kagan delivered the opinion of the Court, and Justice Thomas – who has previously authored important FCA-related opinions in *Escobar* and *Schutte* – filed a lone dissent.

As previously discussed in our June 5, 2023 alert, under the False Claims Act, for a defendant to be held liable for submitting a false claim to the Government for payment, the Government is required to show that the defendant acted objectively “knowingly.” The FCA defines “knowingly” to include actual knowledge, deliberate ignorance, or reckless disregard for the truth. Since the FCA's inception, the Government (and relators) has relied on the legislation to prosecute and hold accountable individuals and entities who submit false requests for payment to the Government. The FCA's enforcement mechanism usually occurs through a *qui tam* lawsuit, where a private individual or set of individuals act as whistleblowers, referred to as relators in FCA parlance. The relator initiates an FCA case by filing an FCA lawsuit under seal on behalf of the Government. Once the FCA lawsuit is filed, the Government has the option to intervene in the case or allow the relator to proceed on their own. If the Government elects not to intervene initially, as the SCOTUS has now affirmed, the Government retains the power to intervene at a later date, provided it can show good cause.

In the Supreme Court's June 16th decision in *Polansky*, the individual relator filed a *qui tam* lawsuit in 2012, accusing his former employer of overbilling Medicare for medical services. At the time the lawsuit began, the Government declined to intervene on the relator's behalf – leaving him to litigate the case on his own. The relator proceeded through five years of litigation, including extensive discovery and motion practice. The Government was required to participate in the discovery, even though it was not a party to the litigation, incurring significant costs related to discovery, privilege issues, and motion practice. After five years, the Government moved to intervene in the case and dismiss the whistleblower's case. Though the whistleblower objected to the dismissal, the trial court granted the Government's request, and the Third Circuit subsequently affirmed the dismissal.

Last week, the Supreme Court affirmed the Third Circuit's decision dismissing the whistleblower's action in an 8-1 decision. In affirming the decision below, the Court reasoned that the Government retained the power to intervene and move to dismiss a *qui tam* lawsuit at any time during the lawsuit's pendency. The Court found that the Government's interest remained the same regardless of the length of time elapsed in a given action: “to redress the injuries against the Government.” Interestingly, the Court implied that the Government may move to dismiss a *qui tam* action even without filing a formal intervention by the Government, suggesting that the filing of the motion implies Government intervention. This suggestion by the Court may result in future lower court decisions that address whether and under what circumstances the Government must file a formal intervention before moving to dismiss.

Additionally, the Supreme Court provided guidance to lower courts faced with a contested motion by the Government to dismiss a *qui tam* lawsuit. The Court explained that such motions are governed by the standards outlined in Federal Rule of Civil Procedure 41(a). Under this test, a court



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can dismiss a given action where the court considers the Government's motion to be proper under Rule 41(a). The Supreme Court held that where the Government "offers reasonable argument for why the burdens of continued litigation outweigh its benefit," it is appropriate for the district court to order dismissal of a matter.

This decision clarifies that Congress intended the Government to retain the right to intervene and seek dismissal of a given case at any time. It will undoubtedly impact government contracting – especially in high-value cases moving forward. Moreover, the Government's ability to file a motion to dismiss during any stage of the litigation (subject to a showing of good cause for intervening and explaining why it seeks intervention later in time during the case) and obtain a dismissal any time it can "offer[] a reasonable argument of why the burdens of continued litigation outweigh its benefit," will undoubtedly impact defense strategy in FCA litigation. Defendants may appeal to the Government and advocate for dismissal for cost and efficiency reasons. Relators, for their part, will likely be required to show why the benefit of their litigation is greater than the cost to the Government, regardless of the strength of their case. Government contractors and other FCA defendants should carefully consider whether the circumstances of their specific case provide an opportunity to persuade the Government to pursue dismissal for cost and efficiency reasons.
