Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

SCOTUS Considers Standards for Government Dismissal of *Qui Tam* Cases Under the False Claims Act

December 2, 2022

On December 6, 2022, the Supreme Court is scheduled to hear oral arguments in a case concerning whether, and under what legal standard, the United States can dismiss a *qui tam* action brought in its name under the False Claims Act (FCA) after initially declining to take over that action. *United States ex rel. Polansky v. Executive Health Resources, Inc.* presents an issue that has divided the circuit courts for almost 20 years and that Congress potentially could clarify through amendments to the FCA.

Background on FCA Litigation and the Circuit Split

The FCA prohibits any person from defrauding the United States by knowingly presenting "a false or fraudulent claim for payment or approval." Violators face up to "treble damages and a civil penalty of up to $10,000 per claim," as adjusted for inflation. In addition to authorizing enforcement by the Attorney General, the FCA authorizes a private individual, called a *relator*, to bring a civil action against a person or entity that has allegedly violated the statute. Referred to as a *qui tam* action, the lawsuit is brought in the government's name, on behalf of the relator and the government. When a *qui tam* action is initiated, the FCA gives the government 60 days, plus any judicial extensions, to investigate the allegations while the complaint remains under seal—that is, unavailable to the defendant or to the public. By the end of the seal period, the government must elect to either: (1) "proceed with the action," in which case the government "conduct[s]" the action; or (2) "decline[] to take over the action," in which case the relator has "the right to conduct the action." The relator's share of the proceeds in a successful *qui tam* action increases if the government declines to intervene.

Central to the *Polansky* case, the FCA also provides that the government "may dismiss the action notwithstanding the [relator's] objections" if the government notifies the relator of its motion to dismiss and the court has provided the relator with "an opportunity for a hearing on the motion." Circuit courts are divided over the application of this provision in circumstances where the government initially declined to take over the action.

Congressional Research Service
https://crsreports.congress.gov
LSB10868

As a threshold matter, the federal appellate courts disagree over whether the government must first intervene in the action in order to seek dismissal. In general, if the government declines to proceed with a *qui tam* action, the FCA allows the government to "intervene at a later date upon a showing of good cause." The Seventh Circuit has held that good-cause intervention is required before the government may seek to dismiss an FCA action that it had initially declined to litigate. However, in that case the court construed the government's motion to dismiss as including a motion to intervene. The Third Circuit took the same approach in *Polansky*, as discussed below. In contrast, the D.C. Circuit has suggested, and the Tenth Circuit has held, that the FCA does not require the government to intervene for good cause before moving to dismiss a *qui tam* action.

The appellate courts are also divided over the proper legal standard for evaluating the government's post-declination motion to dismiss, with lower courts currently following at least three different approaches. The Ninth and Tenth Circuits have applied the "rational relation" test announced in the Ninth Circuit's 1998 decision in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.* In *Sequoia Orange*, the Ninth Circuit held that although the FCA "does not create a particular standard for dismissal," constitutional due process principles and legislative history suggest that the government must show that dismissal bears a "rational relation" to a "valid government purpose." The relator can rebut this showing by demonstrating that dismissal is "fraudulent, arbitrary and capricious, or illegal."

In contrast, the D.C. Circuit has held that the government possesses "an unfettered right to dismiss" a *qui tam* action, regardless of whether it initially declined to take over the action. Analogizing government dismissal to prosecutorial discretion, the court reasoned that a court has no role in balancing the parties' interests in a *qui tam* case. According to the D.C. Circuit, the relator's statutory right to notice and a hearing functions "simply to give the relator a formal opportunity to convince the government not to end the case." While agreeing that this is "one purpose of the hearing," the First Circuit has concluded that "the government must always provide its reasons for seeking dismissal when it so moves," and that the court should grant dismissal unless the relator proves a constitutional violation or "fraud on the court."

By comparison, the Seventh Circuit has ruled that dismissal of an FCA *qui tam* action is governed by Federal Rule of Civil Procedure 41(a), which provides the default rules for a plaintiff's "voluntary dismissal" of a civil action. Specifically, Rule 41(a)(1) allows a plaintiff to dismiss an action without a court order before the defendant files an answer to the complaint or a motion for summary judgment. Rule 41(a)(2) provides that after that time, the plaintiff may move to dismiss the action, and the court may do so "on terms that the court considers proper." Because the Seventh Circuit treated the government as an intervenor-plaintiff for purposes of dismissal, and because the defendant had not yet filed an answer or summary judgment motion, the Seventh Circuit held that Rule 41(a)(1) applies "as limited by any more specific provision" of the FCA and "any applicable background constraints on executive conduct." The court found no limit within the FCA's text apart from the "procedural" requirement to provide the relator with notice and a hearing. As far as constraints on executive conduct, the court found no evidence of a constitutional violation or fraud on the court that might otherwise call into question the government's dismissal authority. This Rule 41(a) approach was later adopted by the Third Circuit (in *Polansky*, as discussed below) and a panel of the Eleventh Circuit—though the panel decision was vacated when the full Eleventh Circuit agreed to rehear that case.

Summary of the *Polansky* Case and Arguments

The *Polansky* case began in 2012 as a *qui tam* action against the relator's former employer, a company that provides billing services to hospitals participating in the federal Medicare program. The relator alleged that the defendant was causing hospitals to seek reimbursement from the federal government for inpatient services that should have been billed as outpatient services, thereby submitting false certifications and claims in violation of the FCA. After two years, the government elected not to proceed with the action, and the court unsealed the complaint. By 2019, the case had proceeded past the motion-

to-dismiss stage and the parties were conducting discovery in preparation for the first phase of trial. In August 2019, the government, which had not intervened, moved to dismiss the case after signaling its intent to do so earlier in the year. The district court granted the government's motion, reasoning that dismissal was appropriate under either the Ninth's Circuit's rational relation test or the D.C. Circuit's unfettered discretion standard.

On appeal, the Third Circuit first considered whether, as the relator argued, the FCA barred the government from seeking dismissal after initially declining to proceed with the action. The court rejected that argument, holding that the government may move to dismiss at any time as long as it first intervenes in the action "upon a showing of good cause." As for the legal standard governing dismissal, the Third Circuit adopted the Seventh's Circuit's Rule 41(a) approach. The court added the "important caveat" that a court should grant dismissal absent "extraordinary prejudice" to one of the parties because the government is "seeking to dismiss a matter brought in its name." On the facts of the case, the court construed the government's motion to dismiss as including a motion to intervene and held that, by examining the government's basis for dismissal, the district court "necessarily" found good cause for intervention. The court then upheld the district court's decision to dismiss based on Rule 41(a)(2)'s "broad grant of discretion" for courts to define the "proper" terms of dismissal and the district court's "thorough examination and weighing of the interests of all the parties."

Before the Supreme Court, the relator maintains that the FCA bars the government from seeking dismissal once the government has declined to conduct the action. In the alternative, the relator urges the Court to adopt the Ninth Circuit's rational relation test for evaluating the government's motion to dismiss. Accordingly, the relator asks the Court to "outright reverse" the Third Circuit's decision or remand the case for consideration under the appropriate dismissal standard. In contrast, the federal government essentially advocates for the D.C. Circuit's unfettered discretion standard. The government argues that nothing in the FCA requires the government to intervene before dismissing a *qui tam* action. It also contends that a court has "no substantive basis" to reject the government's decision to dismiss unless the relator proves a constitutional violation, such as executive action "so egregious" that it "shocks the conscience" (a higher bar than the Ninth Circuit's rational relation test). In the government's view, the Court could affirm the Third Circuit's judgment even if it determines that intervention is required or adopts the rational relation test, because the lower courts made the requisite findings under those standards. Executive Health Resources (the respondent and the defendant below) also asks the Court to affirm the Third Circuit's judgment, arguing that barring the executive branch from making the "policy judgment[]" to dismiss a *qui tam* action would violate the constitutional separation of powers. Like the government, the respondent argues that the "FCA is best read to permit the Government to dismiss at any time, whether or not it has intervened," and without judicial review.

Considerations for Congress

FCA *qui tam* actions have a long history and are a prevalent form of litigation today. Congress enacted the FCA in 1863 "to combat rampant fraud in Civil War defense contracts." Earlier versions of the statute did not permit the government to intervene in an FCA action after an initial 60-day period. If, however, the government chose to proceed with the action, the action was "conducted only by the Government." Congress amended the FCA in 1986 to allow the government to intervene after the seal period upon a showing of good cause and to allow the relator to remain a party after the government's intervention, subject to certain limits on the relator's participation. According to a May 2020 letter to the Department of Justice (DOJ) from Senator Charles E. Grassley, the sponsor of the 1986 amendments, the FCA is "the government's most powerful tool in deterring fraud" and has helped the government to "reclaim more than $60 billion." More than 3,000 new *qui tam* matters were referred to DOJ, investigated, or filed over the five-year period from 2017 through 2021.

In 2018, DOJ identified seven factors that may warrant dismissal of *qui tam* actions that the government initially declined to litigate. The guidance instructs government attorneys to be "judicious" in pursuing dismissals in declined cases, but posits that "such dismissals also provide an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent." This enforcement guidance reportedly resulted in a "significant spike" in motions to dismiss.

The pending Supreme Court decision in *Polansky* has the potential to transform the relationship between the government and relators in FCA cases. Although the United States is the "real party in interest" in an FCA *qui tam* action, the Supreme Court has held that it is a "party," for litigation purposes, "only if it intervenes in accordance with the procedures established by federal law." If the Court were to conclude that the government need not intervene in an FCA case before dismissing the action over the relator's objection, that decision would recognize a power of a non-party that, according to the Seventh Circuit, is "otherwise unheard of in our law." On the other hand, an amicus brief filed by the Chamber of Commerce, the American Health Care Association, and the American Hospital Association asserts that a decision precluding or limiting the government's ability to dismiss declined actions could allow "meritless *qui tam* actions" to proceed, imposing "enormous costs on courts, entities that do business with the government, and the government itself."

According to the *Polansky* parties, a decision in the case could also change the incentives for the government and relators to participate in FCA cases. The relator argues that if the government could dismiss a *qui tam* action conducted by a relator at any time, "few [people] will devote the time and effort necessary to prosecute actions essential to redressing fraud and protecting the federal fisc." The government contends that limiting its dismissal authority would make it more difficult for the government "to respond to changed circumstances as *qui tam* litigation unfolds" and consequently increase its "incentives to dismiss *qui tam* suits during the seal period."

If the Supreme Court were to rest its decision on statutory interpretation grounds, then Congress could amend the FCA if it disagreed with the Court's interpretation—for instance, clarifying whether intervention is a prerequisite to seeking dismissal and what standard, if any, a court should use to evaluate the government's motion to dismiss. If, however, the Court were to adopt the rational relation or "shocks-the-conscience" test as a constitutional floor, or reason, as the respondent argues, that limits on the government's dismissal authority would violate the constitutional separation of powers, then any legislative response from Congress would need to conform to those constitutional constraints.

Author Information

Victoria L. Killion
Legislative Attorney

Disclaimer