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Legal Sidebar

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

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The False Claims Act (FCA) subjects a person to civil penalties and triple damages if he or she submits "a false or fraudulent claim" seeking payment from the federal government. The Attorney General may pursue these remedies by bringing a civil action in federal court against the person alleged to have violated the act (the defendant). To encourage whistleblowers to report fraud on the government, the act also authorizes *qui tam* actions, in which private individuals called relators sue FCA defendants on behalf of themselves and the government.

While the government and the relator are nominally on the same side of a *qui tam* case (as plaintiffs), they are not always aligned on litigation strategy, including whether to voluntarily dismiss or settle a particular action. As explained in a previous Legal Sidebar, lower courts had reached different conclusions about when and under what circumstances the government could dismiss a *qui tam* action over the relator's objection, prompting the Supreme Court to take up the issue. On June 16, 2023, the Supreme Court decided *United States ex rel. Polansky v. Executive Health Resources, Inc.*, holding that (1) the government must intervene in an FCA *qui tam* action before moving to dismiss that action; and (2) the government's motion to dismiss is subject to Federal Rule of Civil Procedure 41(a), which governs voluntary dismissal of civil actions. Although *Polansky* places some limits on the government's ability to dismiss FCA *qui tam* actions, the Court also affirmed the government's broad discretion to seek dismissal and instructed courts to largely defer to the government's dismissal decisions. Thus, going forward, it will likely be difficult for relators to overcome a government motion to dismiss. This Legal Sidebar discusses the *Polansky* decision and some of the legal options for Congress in light of the Court's ruling.

Background on Dismissal of FCA *Qui Tam* Actions

While private relators may file *qui tam* actions under the FCA, they act only as "assignees" of part of the government's damages claim. In a successful action or settlement, the relator is awarded a portion of the government's proceeds and can recover his or her reasonable expenses, attorneys' fees, and costs from the defendant. If, however, the case is dismissed or the defendant prevails at summary judgment or trial, the relator bears, at a minimum, his or her own litigation expenses, attorneys' fees, and costs.

That the government is a "real party in interest" in an FCA *qui tam* action is reflected in various provisions of the statute. For instance, the complaint in an FCA action remains under seal (i.e., not

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publicly available) for a period of at least 60 days to give the government time to investigate the allegations and decide whether to intervene in the case. If the government chooses to intervene, it bears "primary responsibility for prosecuting the action," though the relator may "continue as a party to the action" subject to certain limitations. Even if the government does not intervene during the seal period, it may still intervene "at a later date upon a showing of good cause."

Section 3730(c)(2) of the FCA also authorizes the government to settle or dismiss an FCA *qui tam* action over the relator's objection if certain conditions are met. Specifically, Subparagraph (2)(A)—the dismissal provision at issue in *Polansky*—authorizes dismissal if the government notifies the relator that it has filed a motion to dismiss and the court provides the relator "with an opportunity for a hearing on the motion." According to the Department of Justice (DOJ), the dismissal provision provides "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent." DOJ has identified a "non-exhaustive list" of seven factors that can serve as grounds for seeking dismissal:

> 1. Curbing meritless qui tams that facially lack merit (either because the relator's legal theory is inherently defective, or the relator's factual allegations are frivolous)
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> 2. Preventing parasitic or opportunistic qui tam actions that duplicate a pre-existing government investigation and add no useful information to the investigation
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> 3. Preventing interference with an agency's policies or the administration of its programs
>
> 4. Controlling litigation brought on behalf of the United States, in order to protect the Department's litigation prerogatives
>
> 5. Safeguarding classified information and national security interests
>
> 6. Preserving government resources, particularly where the government's costs (including the opportunity costs of expending resources on other matters) are likely to exceed any expected gain
>
> 7. Addressing egregious procedural errors that could frustrate the government's efforts to conduct a proper investigation

In *Polansky*, the Supreme Court confronted two questions related to the dismissal provision that had divided the lower courts. First, if the government initially declines to intervene in a *qui tam* action, must it later intervene before seeking to dismiss that action under Section 3730(c)(2)(A)? Second, what legal standards, if any, must a court apply in deciding the government's motion to dismiss?

Summary of the *Polansky* Decision

The Supreme Court's decision in *Polansky* was nearly unanimous, with eight Members of the Court signing on to the majority opinion written by Justice Kagan. The Court affirmed the Third Circuit's decision on both of the issues under consideration.

On the question of intervention, the Supreme Court held that the government must intervene before seeking to dismiss a *qui tam* action over the relator's objection but is not limited to intervening during the seal period. In other words, the government may seek to intervene at a later time upon a showing of good cause—a statutory requirement for interventions after the seal period—and then move to dismiss the action. Accordingly, the Court declined to adopt the relator's argument that the government has no authority to dismiss a *qui tam* action after initially declining to intervene in the case. In the Court's words, "Congress decided not to make seal-period intervention an on-off switch," allowing the government to seek dismissal at a later time if its interests in the lawsuit change. At the same time, the Court rejected the government's and the defendant's position that no intervention is required so long as the relator receives notice of the government's motion to dismiss and an opportunity for a hearing. The dismissal provision, the Court reasoned, is "explicitly hooked" as a textual matter to the preceding paragraph, "which applies only when 'the Government proceeds'" with the *qui tam* action by becoming a party to that action.

On the question of the appropriate dismissal standard, the Court agreed with the Third Circuit that Federal Rule of Civil Procedure 41(a) governs FCA motions to dismiss, by default, as it does in other civil cases. Rule 41, the Court explained, allows a plaintiff to file a notice of voluntary dismissal (which does not require court approval) before the defendant serves an answer or summary judgment motion. Once the defendant has served one of those filings, the plaintiff may seek a court order dismissing the action "on terms that the court considers proper." Because the parties in *Polansky* had reached the latter stage in the litigation, Rule 41 required the government to file a motion to dismiss the case and obtain the court's approval.

Application of Rule 41, the Court held, is modified in two respects in FCA *qui tam* cases. First, because the FCA requires "notice and an opportunity for a hearing" to invoke the dismissal provision, the government and the court must adhere to those procedural requirements. Second, in considering what "terms" are "proper" for entry of an order of dismissal under Rule 41, a court must consider the interests of both the government and the relator, who might have "by then committed substantial resources" to the litigation. While instructing lower courts to consider the relator's interests, the Court also advised that "the Government's views are entitled to substantial deference," observing that a government dismissal motion "will satisfy Rule 41 in all but the most exceptional cases." In the Court's estimation, if the government "offers a reasonable argument for why the burdens of continuing litigation outweigh its benefits, the court should grant the motion" to dismiss, "even if the relator presents a credible assessment to the contrary." The Court acknowledged that in *Polansky*, the government had "enumerated the significant costs of future discovery in the suit, including the possible disclosure of privileged documents," and "explained in detail why it had come to believe that the suit had little chance of success on the merits"—all of which, in the Court's view, constituted "good grounds" for seeking dismissal.

In affirming the applicability of Rule 41, the Court declined to adopt the standard employed by the Ninth and Tenth Circuits, which asked whether dismissal bore a "rational relation" to a "valid government purpose" and allowed the relator to rebut the government's evidence of rationality by showing that dismissal would be "fraudulent, arbitrary and capricious, or illegal." The Court also implicitly rejected the D.C. Circuit's position that the government has "an unfettered right to dismiss" an FCA *qui tam* action. The Rule 41 standard previously adopted by the Third and Seventh Circuits constituted a middle ground that, in the Court's view, was the "legally right" approach.

Two Justices wrote separately—Justice Thomas in dissent and Justice Kavanaugh, joined by Justice Barrett, concurring—to express broader concerns that FCA *qui tam* actions may violate constitutional separation-of-powers principles by authorizing unappointed private relators to represent the interests of the federal government in litigation.

Considerations for Congress

The *Polansky* opinion will likely give the government greater flexibility to seek dismissal of FCA *qui tam* actions in some circuits, such as the Ninth and Tenth Circuits, that had adopted a "rational relation" standard of review, while placing modest limits on dismissal authority in jurisdictions such as the D.C. Circuit that had previously taken an "unfettered discretion" approach. The opinion suggests that the government's choice to dismiss the case following intervention is subject to minimal judicial oversight and that the government may seek dismissal due to its assessment of the merits of the allegations or other factors such as resource constraints. In July 2023, an appellate court applying *Polansky* granted a government motion to dismiss based on evidence that the relator "failed to meaningfully prosecute the *qui tam* action and obtain a judgment in favor of the government" despite "controlling the civil litigation" for six years.

Congress has the option to amend the FCA if it would like to "override" the presumption that Rule 41 applies to voluntary dismissal by the government in FCA *qui tam* actions. Congress could also prescribe,

through statutory amendments, more or fewer constraints on the government's dismissal authority. Constitutional separation-of-powers and due process principles could, however, place external limits on Congress's options for limiting or expanding the government's dismissal authority. On the one hand, further limiting the government's dismissal authority could implicate the executive branch's Article II enforcement power. The Supreme Court has stated in another context that "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)." On the other hand, curtailing the relator's rights could trigger other constitutional protections. The *Polansky* Court did not establish parameters for the pre-dismissal "hearing" that a court must offer to an objecting relator. The Court suggested that the hearing "might inquire into allegations that a dismissal 'violate[s] the relator's rights to due process or equal protection'" but declined to decide when and under what circumstances such constitutional constraints might prevent dismissal because the relator had not raised such objections in *Polansky*. One appellate court applying *Polansky* considered and rejected a relator's due process argument in a nonprecedential order, finding the hearing requirement satisfied where the district court considered the parties' arguments in their written submissions.

In addition to its consequences for dismissals under Section 3730(c)(2)(A), the *Polansky* opinion could provide guidance to lower courts interpreting other provisions of the FCA, such as the settlement provision in Section 3730(c)(2)(B). The settlement provision, which has a "similar" structure to the dismissal provision and immediately follows it, allows the government to settle a *qui tam* action with the defendant over the relator's objection "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." In discussing the relationship among the paragraphs in subsection (c), the *Polanksy* Court stated that "[o]nly when Paragraphs 3 and 4 are reached does the necessity of intervention drop away." Thus, although the Court's holding was limited to the dismissal provision, its textual reading of the neighboring paragraphs could suggest that the government must intervene in an FCA *qui tam* action in order to settle the case over the relator's objection. At least one U.S. Court of Appeals has interpreted *Polansky* this way, ruling that the decision abrogated circuit precedent previously holding that the government could settle an action under § 3730(c)(2) without first intervening.

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