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DOJ must intervene to dismiss FCA qui tam suits, Supreme Court says

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The U.S. Supreme Court has ruled that the False Claims Act does not allow the U.S. Justice Department to dismiss a qui tam lawsuit over a whistleblower's objections unless the government intervenes, which it may do at any time.

United States ex rel. Polansky v. Executive Health Resources Inc. et al., No. 21-1052, 2023 WL 4034314 (U.S. June 16, 2023).

The high court's 8-1 decision, which Justice Elena Kagan authored June 16, says the FCA, 31 U.S.C.A. § 3729, limits the government's dismissal authority in whistleblower suits if it declines to intervene.

The majority affirmed the 3rd U.S. Circuit Court of Appeals' decision that the government could move to dismiss whistleblower Dr. Jesse Polansky's FCA suit against medical billing company Executive Health Resources Inc. over his objection if it intervened at some point during the litigation.

Polansky had petitioned the Supreme Court to reverse the 3rd Circuit's ruling that the government could dismiss his case in which it initially chose not to intervene, but was deemed to have sought intervention when it filed a dismissal motion under 31 U.S.C.A. § 3730(c)(2)(A).

Section 3730(c)(2)(A) says the government can dismiss the action notwithstanding the relator's objections if the government notifies the relator that it has filed a dismissal motion and the court has given the relator an opportunity to be heard.

Majority affirms intervention a prerequisite

The majority said that while the government cannot move to dismiss a qui tam action unless it has become a party by intervening, that intervention is not limited to the 60-day "seal period" when the government can investigate the relator's complaint and evidence and decide whether to take over the case.

"The government may seek dismissal of an FCA action over a relator's objection so long as it intervened sometime in the litigation, whether at the outset or afterward," Justice Kagan said.

The FCA still protects the relator by ensuring that the court cannot impose additional limits on the whistleblower when granting the government's post-seal period motion to intervene, she said.

The majority said district courts should apply Federal Rule of Civil Procedure 41(a), which governs voluntary dismissals in civil litigation, when determining if the government can dismiss a qui tam suit over a relator's objection.

"If the government offers a reasonable argument for why the burdens of continued litigation outweigh its benefits, the court should grant the motion ... even if the relator presents a credible assessment to the contrary," Justice Kagan said.

"The government gave good grounds for thinking that this suit would not do what all qui tam actions are supposed to do: vindicate the government's interests," she added.

Dissent disputes dismissal power

In a dissenting opinion, Justice Clarence Thomas wrote that the FCA does not allow the government to "seize the reins from the relator to unilaterally dismiss the suit after declining to proceed with an action during the seal period."

EXPERT REACTION

The following attorney was not involved in *Polansky*.

"A substantial minority of the justices suggested that [qui tam] actions are not constitutionally permissible on separation of powers grounds and that this issue should be explored in future cases. This only adds to the risk of bringing these actions, if they may be scrutinized by courts on constitutional grounds and may eventually be held to be unconstitutional. Although the rewards for bringing a qui tam action are substantial, *Polansky* makes clear that the risks are substantial as well."

– Eric Chaffee, Peter M. Gerhart distinguished research scholar and associate director, Case Western Reserve University, Center for Business Law

The FCA cautions the government that if it intervenes after the seal period, the relator will retain the right to conduct the suit without restrictions, Justice Thomas said.

He also questioned Congress' authority to allow private whistleblowers to represent the government in civil litigation.

"There is good reason to suspect that Article II [of the U.S. Constitution] does not permit private relators to represent the United States' interests in FCA suits," Justice Thomas said.

Justice Brett Kavanaugh, joined by Justice Amy Coney Barrett, wrote a concurring opinion in which he joined the majority opinion "in full," but he agreed with Justice Thomas that qui tam suits may run afoul of Article II. He encouraged the high court to consider the issue "in an appropriate case."

Daniel L. Geyser of Haynes & Boone LLP represented the petitioner. Solicitor General Elizabeth B. Prelogar represented the government. Mark W. Mosier of Covington & Burling LLP represented Executive.

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Related Filings:
Supreme Court opinion: 2023 WL 4034314
Petitioner's brief: 2022 WL 3924956
3rd Circuit opinion: 17 F.4th 376
District Court order: 422 F. Supp. 3d 916

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