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Recent Supreme Court Case Affirms Government's Power to Dismiss Qui Tam Suits

Health Care Law Brief on **July 19, 2023**

On June 16, 2023, the Supreme Court (the "Court") in *United States ex rel. Polansky v. Executive Health Resources* affirmed the federal government's power to dismiss a False Claims Act ("FCA") action brought under the *qui tam* provisions whenever it chooses to intervene. *Polansky* is the second FCA case this summer in which the Court has ruled in favor of the federal government—i.e., the Department of Justice, acting through the Attorney General ("DOJ"). Writing for an 8-1 majority, Justice Kagan explained that DOJ receives considerable deference, even over the objection of the individual who raised the action (i.e., the relator or whistleblower), to dismiss cases that are inconsistent with DOJ's interests.

By way of background, in an FCA suit filed by a relator, DOJ has the right to intervene in the case, usually while the case remains under seal. If it intervenes, DOJ becomes the primary mover and, thus, may later move to dismiss the case. However, if DOJ declines to intervene, the relator may continue the case, but DOJ remains a party in interest. In *Polansky*, the relator (Dr. Jesse Polansky) filed a *qui tam* action against Executive Health Resources for allegedly submitting fraudulent claims to the Medicare program. While DOJ declined to intervene during the seal period, Dr. Polansky continued the case, which underwent years of discovery, requiring substantial amounts of documents and testimony from the federal government. By 2019, however, DOJ determined that the case's burdens outweighed its potential value and, thus, moved to dismiss the case under 31 U.S.C. § 3730(c)(2)(A) ("Subparagraph (2)(A)"). DOJ's motion was filed over Dr. Polansky's objection that DOJ lacked dismissal authority.

The District Court granted the motion, determining that DOJ had reached a "valid conclusion based on the results of its investigation" to dismiss the case. The Third Circuit Court of Appeals affirmed the granting of the motion, holding that (1) a motion to dismiss implicitly is a motion to intervene, and (2) the standard to rule on a Subparagraph (2)(A) motion to dismiss comes from Federal Rule of Civil Procedure ("FRCP") 41. After the Court granted review, DOJ argued that it possessed "essentially unfettered discretion to dismiss." By contrast, Dr. Polansky advocated for an "arbitrary and capricious" standard of review.

The Court adopted *neither* parties' standard, but rather affirmed the Third Circuit's "Goldilocks position." Justice Kagan explained that no departure from the FRCP was warranted—the standards outlined in FRCP 41 governed a request to dismiss under Subparagraph (2)(A). Justice Kagan further explained that applications of FRCP 41 in the FCA context differ in two respects from non-FCA cases. First, a dismissal under Subparagraph (2)(A) requires advance notice and an opportunity for hearing. District courts are therefore required to use this framework to apply FRCP 41. Furthermore, district courts must consider the interests of both the federal government and the relator as part of its analysis to determine whether a dismissal occurs on "proper terms."

The Court's decision may modestly reduce the number of *qui tam* actions in the future, although it is not expected to stem the growing wave that has emerged over the past decade. Despite such notable volume increase, the rate of intervention by DOJ has only negligibly changed. Recognizing DOJ's right to intervene beyond the initial seal period, potential relators may be less likely to bring forth complaints, knowing that their efforts may result in a dismissal years after the complaint is initiated and after years of discovery and unrecoverable costs to both relators and their counsel.

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Special thanks to summer associate Brandon McCoy for his contribution to this post.

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