Supreme Court Finds Broad Government Authority to Dismiss FCA Cases

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The Supreme Court recently resolved long-outstanding questions about the timing and scope of the government's authority to dismiss False Claims Act (FCA) cases brought by private individuals. In *United States ex rel. Polansky v. Executive Health Resources, Inc.*, No. 21-1052 (June 16, 2023), the Supreme Court rejected arguments from both the government and the relator to instead approve a lower court holding giving the government substantial—but not unfettered—discretion to dismiss FCA cases the government deems too burdensome or lacking merit.

The relator in *Polansky* filed suit against his employer, a medical billing company, alleging that it facilitated healthcare fraud. The government reviewed the case while it was under seal and declined to intervene, so the relator proceeded. Years of discovery ensued that imposed burdens not only on the defendant but on the government as well, and that also revealed privilege issues for the government. Reviewing the case, the government decided the burdens of the case outweighed its potential recovery. The government thus filed a motion to dismiss the case pursuant to 31 U.S.C. § 3730(c)(2)(A), which states that "[t]he Government may dismiss the action notwithstanding the objections of the" relator.

But because that subparagraph (unlike other parts of Section 3730([c]) does not say ***when*** this authority applies, the relator argued the government lacked authority to dismiss the case because it had not intervened in the case from the beginning. The district court and Third Circuit disagreed, finding that so long as the government intervened at ***some*** point it retained the power to dismiss the case. The lower courts also found that the government had articulated a reasonable basis to dismiss the case based on the government's "thorough examination" of the cost and potential benefits of the case. Because other courts had come to different conclusions, the Supreme Court accepted the relator's petition.

In an 8-1 decision the Supreme Court affirmed the lower courts' decisions. Although the government argued that it had unlimited authority to dismiss FCA cases regardless of whether it had intervened

in the case or not, the Supreme Court found that the dismissal authority only applied when the government had in fact intervened in the case (regardless of when the government intervened). This requirement, however, is not a burdensome one, as the lower courts found (and the Supreme Court agreed) that the government's motion to dismiss was an implied motion to intervene, and established good cause to intervene in the case. The Supreme Court found no textual support at all for the relator's position that the government could only dismiss a case in which it had intervened from the outset.

Finally the Supreme Court found that the government's motion to dismiss should be reviewed under the default standard for voluntary dismissals in Federal Rule of Civil Procedure 41(a) (as opposed to the Government's request for unlimited discretion and the relator's request for a complicated burden-shifting approach). "[T]he Federal Rules apply in FCA litigation in courts across the country every day[,]" and the Supreme Court found no reason to depart from that situation. Rule 41(a) permits a voluntary dismissal "on terms that the court considers proper." So long as the government can give a reasonable argument for why the burden of a case outweighs its benefits, a court should generally grant a motion to dismiss even over a relator's credible argument otherwise.

FCA defendants will rightly see this case as a positive development in FCA law. However, it remains to be seen how impactful it will be. In the past, the government has infrequently used its power to dismiss FCA cases. Now that the standards for doing so are clearer, perhaps the government will exercise it more often. But it's important to remember that the relevant consideration is whether a case's drawbacks outweigh its potential benefit *to the government*. If discovery in an FCA case is not burdening the government or impairing the government's interests, a defendant's pleas to have it dismissed may fall on deaf ears. More impactful changes may be on the horizon—Justice Thomas, the lone dissenter, would have remanded to the Third Circuit to "consider the serious constitutional questions" raised, in his view, by permitting a private individual to represent the government at all. Justices Kavanaugh and Barrett, while agreeing with the disposition of the case, filed a concurrence agreeing with Justice Thomas that constitutional issues exist which the Supreme Court should examine "in an appropriate case."

Vorys has deep experience, across multiple different industries, with the FCA. We will continue to monitor this and other FCA developments. Please do not hesitate to contact your Vorys attorney with issues that you may have.