# Supreme Court to rule on False Claims Act whistleblowers' right to sue

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## False Claims Act — an overview

The False Claims Act ("FCA") imposes criminal and civil penalties for falsely billing the government, over-representing the amount of a delivered product, or understating an obligation to the government. 31 U.S.C. § 3729(a)(1)(A) (2022). Specifically, the FCA imposes liability on any person or entity who knowingly presents a false or fraudulent claim for payment to the federal government.

Simply put, an FCA defendant is liable for submitting a false claim to the government for payment if it acts "knowingly," defined as acting with actual knowledge, deliberate ignorance, or reckless disregard. For liability to "attach," the false claim must be material to the government's decisions to pay. In other words, if the government would not have likely paid the claim had it known of the fraudulent conduct.

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Under the FCA, a private individual, known as a "whistleblower," may bring a *qui tam* lawsuit against alleged fraudsters on behalf of the government. In a *qui tam* action, the private party who initiates the suit is called a "relator" and the government is considered the "plaintiff" because the government is the party in interest. A *qui tam* lawsuit is filed under seal, so that only the relator and the plaintiff-government know about it.

Once the suit is filed, the Department of Justice has 60 days to investigate and decide whether to intervene to take over the proceeding. If the DOJ does intervene, it has the authority to dismiss the lawsuit by giving the relator notice of a motion to dismiss and the opportunity for a hearing on the motion. However, if the DOJ declines to intervene and litigate the case, the statute permits the relator to pursue the case in federal court against the defendant in the name of the United States. If the DOJ takes over the case and wins/settles, the relator receives between 15% and 25% of the government's award. If the relator pursues the case on the relator's own and wins, the relator may recover up to 30% of the government's award.

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FCA whistleblowers have been invaluable assets in the combat against government fraud. FCA litigation is of great interest to the health care industry. In 2022, the DOJ reported that nearly 90% of all FCA settlements and judgments involved the health care industry, including drug and medical device manufacturers, managed care providers, hospitals, hospice organizations and physicians.

## The DOJ dismissal debate

In recent decades, the DOJ has declined to join roughly 75% of all cases, and has taken the additional step of unilaterally dismissing dozens of non-intervened cases, often because of disagreement with fraud theories. Recently, the Supreme Court of the United States ("SCOTUS") heard arguments in *United States ex. rel. Polansky v. Executive Health Resources, Inc.* ("*Polansky*"), contemplating the DOJ's power to torpedo whistleblower-led lawsuits. SCOTUS' forthcoming opinion is expected to answer whether the federal government can discard whistleblower cases after initially declining to intervene in them.

### *United States ex. rel. Polansky v. Executive Health Resources, Inc.*

In *Polansky*, the relator is a doctor and former consultant for Executive Health Resources ("EHR"), a company that submits claims to Medicare on behalf of health care providers. In 2012, the relator filed an FCA case alleging that EHR was falsely certifying inpatient hospital admissions as medically necessary, leading to the overbilling of millions of dollars of false bills to be submitted to Medicare.

The DOJ investigated the relator's claims for two years before declining to intervene, and the relator proceeded with the lawsuit. However, after more than five years of litigation, the DOJ sought to dismiss the case. Specifically, the DOJ reasoned that dismissal was proper because of a "tremendous, ongoing burden on the government" if the litigation were to continue — including the hiring of government attorneys and other professionals to produce documents sought in discovery, the need to safeguard privileged information and concerns about the relator's credibility.

The district court granted the DOJ's motion to dismiss, and the 3rd U.S. Circuit Court of Appeals affirmed, ruling that the district court acted within its discretion in dismissing the action.

The relator sought Supreme Court review, which was subsequently granted. Upon appeal, the relator argued that because the DOJ initially declined to intervene, then chose to intervene at a later date, the DOJ must show good cause in order to limit "the status and rights of the person initiating the action," including the relator's right to conduct the action.

In contrast, the DOJ argued that the statute does not constrain dismissals. Specifically, the DOJ argued that the "government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the government of the filing of the motion and the court has provided the person with an opportunity for hearing on the motion." 31 U.S.C. § 3730(c)(2)(A). The DOJ took the position that so long as the relator is notified of the motion to dismiss and is provided an opportunity for a hearing, the motion to dismiss is proper.

SCOTUS also considered arguments addressing what standard a court must use to evaluate a DOJ dismissal. The relator argued that a dismissal must satisfy a rational basis review standard because the relator possesses "a property interest in the action and the government cannot deprive a relator of that right without scrutiny." In contrast, the DOJ reasoned that dismissal is not subject to any standard of judicial review other than meeting a constitutional baseline. The DOJ even went as far as to agree that a relator has a property interest in the claim, as assigned by the FCA, which is why compliance with the constitutional baseline is necessary, but no other standard of review applies.

## The potential impact of *Polansky*

Considering the foregoing, if SCOTUS agrees that the DOJ retains the right to dismiss after initially declining to do so, and the standard for dismissal is not rigorous, the DOJ will be rightfully empowered to dismiss cases brought on its behalf. Such an outcome would help protect health care defendants who should not be forced to defend actions — at great financial and reputational cost — brought on behalf of the government that the DOJ does not think should proceed.

Further, in recognizing the tremendous resource drain of defending an FCA suit, the DOJ previously issued the Granston Memo in 2018 outlining factors the DOJ must consider in moving to dismiss FCA cases.

The Granston Memo articulates seven factors for Assistant United States Attorneys to consider when deciding whether to completely dismiss a relator-led FCA action, including: (1) curbing meritless *qui tam* suits; (2) preventing parasitic *qui tam* actions that are duplicative of pre-existing government investigations; (3) preventing interference with agency policies; (4) controlling litigation brought on behalf of the government; (5) safeguarding national security interests; (6) preserving government resources; and (7) addressing egregious procedural errors.

Given the unclear and different interpretations of the dismissal standard employed by trial courts, SCOTUS' decision in *Polansky*, taken in conjunction with the Granston Memo, should provide a uniform standard and consistency across the circuits. In turn, this decision may bring more predictable outcomes to those within the health care industry faced with unwarranted *qui tam* litigation.

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