



## ALERTS

### A Skeptical Bench Hears Arguments On The Government's Right To Dismiss Qui Tam Claims Under The False Claims Act

December 9, 2022

#### Highlights

The U.S. Supreme Court heard arguments on whether the government can dismiss a *qui tam* action after declining to intervene under the False Claims Act

The Court expressed reluctance to adopt the extreme positions advocated by both Relator and the government, which would result in a finding that the government has either (1) no right or (2) an unfettered right to dismiss post-declaration

It appears likely the Court will adopt a rational basis or an arbitrary and capricious standard to evaluate late dismissal motions by the government

On December 6, 2022, the U.S. Supreme Court heard oral arguments in the case of *United States ex rel. Polansky v. Executive Health Resources, Inc.* The dispute, previously covered [here](#), centers on whether the government retains the right to dismiss a relator's *qui tam* action under the False Claims Act (FCA) after initially declining to intervene. The petitioner, a whistleblower (also known as a relator) alleged in the district

## RELATED PEOPLE



### Jacquelyn Papish

Partner  
Washington, D.C.

P 202-831-6732  
F 202-289-1330  
[Jackie.Papish@btlaw.com](mailto:Jackie.Papish@btlaw.com)



### John E. Kelly

Partner, Healthcare Department  
and Healthcare Industry  
Practice Chair  
Washington, D.C., New York

P 202-831-6731  
F 202-289-1330  
[JKelly@btlaw.com](mailto:JKelly@btlaw.com)



### Thomas K. Petersen

Associate  
Washington, D.C.

P 202-831-6739  
F 202-289-1330  
[Tom.Petersen@btlaw.com](mailto:Tom.Petersen@btlaw.com)

## RELATED INDUSTRIES

Healthcare

court that the defendant, Executive Health Resources, submitted billions of dollars in false claims. The government initially declined to intervene in the case, and the Relator spent years and millions of dollars litigating the case.

Shortly before summary judgment, the government successfully moved to dismiss the case over Relator's objections. Relator, after a subsequent defeat at the Third Circuit Court of Appeals, successfully petitioned the U.S. Supreme Court to hear the case. Relator argues that the government has no right to dismiss a *qui tam* action if it declines to intervene during the initial 60-day "seal period." The government, in turn, counters that the Court cannot limit the executive's power to direct its own lawsuits and thus, the D.C. Circuit's standard – permitting an "unfettered right" to dismiss at any time – applies.

In his briefing, Relator claims that despite the False Claims Act's legislative history, its current text and structure specifically prohibit courts from limiting the "status and rights" of a relator once the government declines to intervene, which *de facto* prohibits the government from unilaterally dismissing a case after the seal period. Relator anchors his argument in the text of the statute, noting that subsection (c)(4) of the act applies "whether or not" the government intervenes in the action, while subsection (c)(2), which conveys the government's dismissal authority lacks such a designation. Relator argues that, because of this distinction, the dismissal authority does not apply "whether or not" the government intervenes but instead, *only* if the government intervenes during the seal period, at which point the government may "proceed with the case."

As anticipated, Relator faced a skeptical bench, with each justice expressing reluctance to outright deny the government a right to dismiss a case after the seal period. Justice Thomas opened questioning by asking Relator to address the constitutional problems implicated by allowing a relator to dictate executive action. Justice Jackson highlighted the False Claims Act's legislative history and the amendments made to the statute over time, which have generally expanded the government's authority to intervene outside the seal period. Justice Kavanaugh noted that the text of the statute does not qualify the dismissal authority in any way beyond requiring courts to provide relators with notice and a hearing. Justices Kagan, Barrett and Jackson all queried why the government would be given the right to intervene if it is – as Relator contends – nonetheless able to exercise the rights of a "full litigant." In response, Relator conceded that, if the Court did not agree that the False Claims Act limits the government's dismissal authority to cases where it intervenes during the seal period, "the government at least has to intervene first and satisfy that good cause showing" before it may dismiss the claim after the seal period has lapsed.

The justices were similarly skeptical of the government's position that it has an "unfettered right" to dismiss *qui tam* matters, which seemed to fare no better than Relator's opposing position. In fact, multiple justices questioned the government's ability to unilaterally dismiss a claim in which the relator holds an assigned property interest. Justice Jackson specifically pressed the government on why the statute would provide a good cause standard for intervention if it had an unfettered right to dismiss at any point during a litigation. Justice Gorsuch likewise acknowledged that *qui tam* actions create a property interest, and thus, "you might think that before you extinguish [that interest], you might have

to come in and be a party to the case.”

At the conclusion of oral argument, the Court did not appear inclined to accept either the Relator’s or the government’s proposed extreme standards. Instead, it seems more likely the Court will take a middle-of-the-road approach and adopt either a rational basis or an arbitrary and capricious standard to evaluate a government’s motion to dismiss following an initial decision declining to intervene. Either standard would allow the government to dismiss a *qui tam* action with relative ease, despite the Court’s likely rejection of government’s proposed “unfettered right” standard.

For more information, please contact John Kelly at 202-831-6731 or [jkelly@btlaw.com](mailto:jkelly@btlaw.com), Jacquelyn Papish at 202-831-6732 or [jpapish@btlaw.com](mailto:jpapish@btlaw.com), A.J. Bolan at 202-831-6734 or [aj.bolan@btlaw.com](mailto:aj.bolan@btlaw.com) or Tom Petersen at 202-831-6739 or [tpetersen@btlaw.com](mailto:tpetersen@btlaw.com).

© 2022 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Barnes & Thornburg LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg LLP.

This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.