

# SCOTUS' Busy Term in Government Contracts and Its Implications

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*Special to the Legal*

The Supreme Court of the United States' (SCOTUS) June 2023 term was highlighted by a number of important decisions, including precedent changing cases concerning the False Claims Act (FCA). In two important decisions, SCOTUS decided a set of consolidated cases and an appeal from the U.S. Court of Appeals for the Third Circuit regarding the FCA. Justice Clarence Thomas delivered the court's unanimous opinion in the consolidated cases, while Justice Elena Kagan delivered the court's opinion in *Polansky*. Both of the opinions, discussed below, have important implications for any government contractor, construction included.

## 'SCHUTTE' REQUIRES SUBJECTIVE BELIEFS OF DEFENDANTS

The first decision is *United States ex rel. Schutte v. SuperValu*, Case No. 21-1326, and *United States ex rel. Proctor v. Safeway*, Case No. 22-111. Writing for a unanimous court, Thomas emphasized the importance of a defendant's subjective beliefs about committing fraud in applying the FCA's knowledge requirement. In rejecting the government's (and many private relators) argument, the court rejected the claim that a violation of the FCA exists if the defendant's conduct was consistent with an "objectively reasonable" interpretation under the law. Instead, SCOTUS concluded that the violator must be found to have subjective intent, namely it knew that it was committing or intended to commit fraud or submit a false claim.

*Schutte* centered around three individual whistleblower relators (relators are whistleblowers who file a FCA qui tam action as private citizens on behalf of the government) who sued on the government's behalf under the FCA qui tam provisions. The whistleblowers claimed that multiple supermarkets and pharmacies overbilled the government by millions of dollars, relating to price-match programs designed to compete with other pharmacies to drive market prices down. The whistleblowers claimed that the pharmacies' failures to offer the discounts for the usual and customary prices created a higher price than the discounted prices available to the government. As a result, they argued that the submission for payments for higher than usual and customary priced prescriptions to the government created an FCA violation.

SCOTUS' decision considered whether the pharmacies "could have the scienter required by the FCA if they correctly understood that standard and thought that their claims were inaccurate." Scienter, in plain terms, means "an intent to defraud." The court held that "[w]hat



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matters for an FCA case is whether the defendant knew the claim was false. Thus, if respondents correctly interpreted the relevant phrase and believed their claims were false, then they could have known their claims were false." In other words, the defendant pharmacies had to know their claims were false, not the prior objective standard that the government has routinely used, namely whether a reasonable person knew or should have known their actions were fraudulent. This is a critical distinction.

The court concluded that in order to bring and prove an FCA case, the government or relator must prove the defendants knowingly committed (or intended to commit) fraud against the government. This narrowed standard increases the burden on the government and relators to prove their cases in order to find FCA liability.

## GOVERNMENT MAY DISMISS FCA SUIT DURING ENTIRETY OF LITIGATION LIFECYCLE

Later in the June term, SCOTUS upheld decisions by the trial court and Third Circuit in *United States ex rel. Polansky v. Executive Health Resources*, Case No. 21-1052. This case involves the right of the government to unilaterally dismiss a qui tam FCA suit brought by a relator after the government had initially declined to intervene. In rendering its decision, SCOTUS confirmed that the government may intervene at a date later than the initial 60 days the FCA references, and move to dismiss a FCA lawsuit at any time during the life of the case. Moreover, the court confirmed the Third Circuit's application and test for evaluation, holding that trial courts should

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consider motions to dismiss by the government under the standard set out in Federal Rule of Civil Procedure 41(a).

## BEGINNING AND INTERVENING IN A FCA LAWSUIT

In a qui tam action, the relator initiates an FCA case by filing an FCA lawsuit under seal on behalf of the government. Once the suit is filed, the government has 60 days (which period is often extended) to elect to intervene or allow the relator to proceed on its own. If the government elects not to intervene initially, as SCOTUS has now affirmed, the government retains the power to intervene later, provided it shows good cause.

## BACKGROUND OF 'POLANSKY'

In *Polansky*, the relator filed a qui tam lawsuit in 2012, accusing his former employer of overbilling Medicare. At the time the lawsuit began, the government declined to intervene—leaving the plaintiff to litigate on his own. The relator proceeded through five years of litigation, including extensive discovery and motions practice, during which the government was required to participate, even though it was not a party to the litigation and incurring significant costs related to discovery, privilege issues and motions. After five years, the government filed a motion to dismiss the whistleblower's case, arguing that the cost and time investment in the case outweighed the claims made. Though the whistleblower objected to the dismissal, the trial court granted the government's request, and the Third Circuit affirmed.

## 'POLANSKY'S' IMPACT ON FCA LITIGATION LIFECYCLE

In *Polansky*, SCOTUS reasoned that the government retained the power to intervene and move to dismiss a qui tam lawsuit at any time during the lawsuit's pendency. The court held that the government's interest remained the same regardless of the length of time elapsed in a given action (and given that the FCA is intended): "to redress the injuries against the government." The court recognized that the government may move to dismiss a qui tam action even without formal intervention, suggesting that the filing of the motion to dismiss implies government intervention. This suggestion by the court may result in future lower court decisions that address

whether and under what circumstances the government must formally intervene before moving to dismiss.

SCOTUS also provided guidance to lower courts faced with a contested motion by the government to dismiss a qui tam lawsuit. The court confirmed that such motions are governed by Federal Rule of Civil Procedure 41(a). Under that rule, a court can dismiss an action where the court considers the government's motion to be proper under Rule 41(a). Where the government "offers reasonable argument for why the burdens of continued litigation outweigh its benefit," it is appropriate for the district court to order dismissal of a matter.

This decision clarifies Congress intended the government to retain the right to intervene and seek dismissal of a given FCA case at any time. It will undoubtedly impact government contracting—especially in high-value cases moving forward and will likely cause the plaintiff's qui tam bar to spend more time developing their case before filing suit with the hope and expectation that the government will (a) intervene and (b) not seek dismissal later down the line. Moreover, the government's ability to file a motion to dismiss during any stage of the litigation and obtain a dismissal any time it can offer "a reasonable argument of why the burdens of continued litigation outweigh its benefit," will impact defense strategy in FCA litigation. Defendants may appeal to the government and advocate for dismissal for cost and efficiency reasons. Relators, for their part, will likely be required to show why the benefit of their litigation is greater than the cost to the government, regardless of the strength of their case. Government contractors and other FCA defendants should carefully consider whether the circumstances of their specific case provide an opportunity to persuade the government to pursue dismissal for cost and efficiency reasons.

## FEDERAL CONTRACTORS' RESPONSE TO FCA CLAIMS

In light of the court's rulings, contractors should document their good-faith compliance efforts contemporaneously and in a non-privileged manner. This will help defend against certain claims regarding whether the contractor knew or should have known of a potential fraud.

Prior to the court's *Schutte* ruling, for a defendant to be held liable for submitting a false claim to the government for payment under the FCA, the government maintained that the defendant had to act objectively "knowingly." The FCA defines knowingly as an individual or entity having actual knowledge, deliberate ignorance, or reckless disregard—as SCOTUS has now confirmed. Since the FCA's inception, the government and relators have relied on the objective standard to prosecute and hold accountable individuals and entities who submit false requests for payment to the government. That standard is no more. ●