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Explainer

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**DOJ in 'Driver's Seat': Supreme Court's FCA Ruling Explained**

By Daniel Seiden 2023-07-10T04:45:40000-04:00

1. High court clarified DOJ ability to end whistleblower suits
2. A DOJ-sought dismissal has never been overruled on appeal

The US Supreme Court resolved a 20-year circuit split near the end of its term, when it backed the Justice Department's authority to end a whistleblower's False Claims Act suit that prosecutors viewed as too costly in government resources to continue.

The split grew in recent years from two standards to three, then to four. Petitions seeking resolution were denied by the court in 2020 and 2021. Meanwhile, a DOJ official issued guidelines on when to increase dismissal motions, prompting Sen. Chuck Grassley (R-Iowa) to introduce legislation to make it more difficult for the DOJ to stop whistleblower suits.

But all the wrangling and arguing didn't make much of a difference to FCA litigation in the end.

Only twice have whistleblower suits survived a DOJ motion to dismiss at the trial court level regardless of the various standards. And no appeals court ever held that any whistleblower suit should proceed over the government's motion to dismiss, a DOJ brief said.

"Obviously, there was a circuit split," said Bob Rhoad, who represents FCA defendants with Nichols Liu LLP. But "that issue was mostly academic and of little practical consequence. The DOJ almost invariably succeeded in its efforts to dismiss."

The bigger question was why a whistleblower "would want to proceed in a case over the objection of the real party in interest," he said. "In other words, it was always much ado about nothing."

## 1. Why stop cases that help the government?

The statute allows the DOJ to move to end FCA whistleblower suits—which allege fraud by government contractors and health-care providers—by giving notice of a motion to dismiss with opportunity for a hearing on the motion.

The Justice Department has repeatedly argued in such motions that the government views a case as meritless or that the burden on government resources doesn't support the litigation.

In January 2018, DOJ official Michael Granston issued a memorandum describing situations where the department should use its power to end whistleblower suits. In addition to merit and litigation costs, the memo said DOJ should use dismissal motions to avoid duplicating government investigations, to prevent interference with government programs, and to protect classified information and national security.

In one case, now before the Eleventh Circuit, the DOJ sought dismissal of a suit against Honduras—alleging fraud under a hurricane relief program—in part to preserve diplomatic relations.

## 2. What does DOJ have to do?

Appeals courts disagreed over how easy it should be for DOJ to win dismissal, with the Ninth Circuit saying in 1998 that the government needed to show that dismissal served a valid purpose, and the D.C. Circuit in 2003 ruling that the government has unfettered discretion to end a suit. The First Circuit said in 2022 that dismissal is proper if the government explains its reason, provided it doesn't transgress constitutional limits or perpetrate a fraud on the court.

But it was the Third Circuit's standard, from a 2021 decision, that the Supreme Court adopted on June 16 in *United States ex rel. Polansky v. Exec. Health Resources Inc.*

For the government to win dismissal, it must intervene in the whistleblower's suit, and then show that the motion satisfies the voluntary dismissal rule in Federal Rule of Civil Procedure 41, Justice Elena Kagan wrote in the 8-1 opinion. Dismissal should be granted if the government offers a reasonable argument for why the burdens of continued litigation outweigh the benefits, the opinion said.

A district court "should think several times over before denying a motion to dismiss," Kagan said.

## 3. How big is this DOJ win?

The Supreme Court's ruling "keeps a large thumb on the scale for the government," but it also gives whistleblowers procedural rights that will increase scrutiny on the government, said Chris McLamb, who represents whistleblowers with Constantine Cannon LLP.

It gives them "a chance to fight off the most unjust dismissals—where the government has let the relator litigate a case for years through motions and discovery, only to swoop in late and shut the whole thing down," he said.

"While the Court characterized the Third Circuit's position as the 'Goldilocks position,' it's closer to 'unfettered discretion' than the standard proposed by the relator," said Tirzah Lollar, who represents FCA defendants with Arnold & Porter Kaye Scholer LLP. "The Supreme Court made clear that DOJ is in the driver's seat."

It is hard to imagine "a situation in which the government has considered the underlying facts of a case, determined it ripe for intervention and dismissal, and a court disagrees with that reasoning," said Jacquelyn Papish, an FCA defense lawyer with Barnes & Thornburg LLP.

The government "almost certainly will be able to come forward with better-reasoned arguments in almost every case," said Jaime L.M. Jones, who represents false claims defendants with Sidley Austin LLP.

#### 4. What about Congress?

The small percentage of whistleblower cases the government targets limits the impact of the high court's ruling.

In December 2020, Granston said in a speech to an American Bar Association gathering of qui tam lawyers that DOJ sought dismissal in about 50 actions since his memo. "While that is more than had been dismissed prior to the guidance, it is a very small fraction of the more than 2,000 qui tam actions that have been filed over that same period of time," he said.

The Granston memo caught Grassley's attention. He wrote to then-Attorney General William P. Barr in September 2019 to inquire about dismissal motions that cite litigation costs even though their "arguments were vague, pretextual and could not demonstrate cost was prohibitive."

The DOJ responded with a rundown of its dismissal efforts, stating that the "fact that we have sought to dismiss fewer than 4% of cases reflects our serious commitment to allow appropriate qui tam matters to proceed."

Grassley's concerns remained, and he introduced legislation in July 2021 to limit DOJ dismissal power. But the bill died at the end of the 117th Congress.

"The False Claims Act has recovered billions of dollars in taxpayer money that would otherwise be lost to fraud," Grassley told Bloomberg Law. "I've fought to strengthen and uphold the False Claims Act for decades and certainly don't intend to stop now."

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 [US Supreme Court opinion](#)

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