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Can't Touch This: Relators' Limited Control in Qui Tam Actions

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INTRODUCTION

Between 2015 and 2020, the U.S. Government won or negotiated more than $16.4 billion from litigation arising from the False Claims Act ("FCA").[1] Of this staggering reward, approximately eighty percent

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[1] 31 U.S.C. §§ 3729–3733 (2006); *Justice Department Recovers Over $4.6 Billion From False Claims Act Cases in Fiscal Year 2016* (Dec. 14, 2016), https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016; *Justice Department Recovers Over $3.7 Billion From False Claims Act Cases in Fiscal Year 2017* (Dec. 21, 2017), https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017; *Justice Department Recovers Over $2.8 Billion From False Claims Act Cases in Fiscal Year 2018* (Dec. 21, 2018), https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018; *Justice Department Recovers Over $3 Billion From False Claims Act Cases in Fiscal Year 2019* (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019; *Justice Department Recovers Over $2.2 Billion*

of cases were brought to the attention of the government by whistleblowers[2] (referred to as "relators" in the context of the FCA) who put the government on notice of alleged fraudulent conduct. Relators hold a pivotal role in FCA litigation by providing the government information related to individuals or entities who have defrauded it through filing a *qui tam* action with the court that describes the fraudulent conduct with detail.[3] These complaints are filed under seal for at least sixty days[4] to give the government adequate time to investigate and determine whether it will intervene in the case.[5] If the government declines to intervene, the relator becomes responsible for litigating the case on behalf of the government, and the defendant is notified of the filed suit.[6]

Relators are incentivized to file FCA actions and proceed in litigation because they are entitled to anywhere between 15–25% of the overall reward (as well as reasonable attorneys' fees and court costs) should they be successful.[7] This monetary incentive has proven its efficacy through many successful recoveries for the government. In the year 2020 alone, the DOJ recovered $1.69 billion from *qui tam* lawsuits where it recovered only $545 million in litigation arising without a relator's involvement.[8] While *qui tam* actions are significant to the DOJ's annual FCA recovery, they have led to conflict where the

From False Claims Act Cases in Fiscal Year 2020 (Jan. 14, 2021), https://www.justice.gov/opa/pr/justice-department-recovers-over-22-billion-false-claims-act-cases-fiscal-year-2020 [*hereinafter DOJ Recovery Press Releases*].

[2] *See Fraud Statistics-Overview Oct. 1, 1986 - Sept. 30, 2020* (January 14, 2021), https://www.justice.gov/opa/press-release/file/1354316/download (reporting that from 2016 to 2020, whistleblowers brought 3,347 of 4,168 new FCA matters).

[3] 31 U.S.C. § 3730(b)(2) (requiring "A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government).

[4] *Id.*

[5] *Id.*

[6] 31 U.S.C. § 3730(b)(3).

[7] 31 U.S.C. § 3730(d)

[8] *See Fraud Statistics-Overview Oct. 1, 1986 – Sept. 30, 2020, supra* note 2.

government and relator disagree on whether an ongoing FCA suit led by a relator should be dismissed.[9]

Before this issue reached the Seventh Circuit, the other circuits developed two competing approaches—the *Sequoia* and *Swift* standards.[10] The Ninth Circuit first heard the issue in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, and created a standard requiring the government to have a rationally related reason for dismissing a relator's *qui tam* action.[11] Five years later, the D.C. declined to follow this standard in its ruling of *Swift v. United States*, , adopting a rule that granted the government an "unfettered right" to dismiss *any* FCA action—including when it is against the relator's wishes.[12] As discussed below in Part II, these standards are both erroneous in their reasoning and application. The *Sequoia* standard grants the government too little control where the *Swift* standard grants too much.

In 2020, seventeen years after *Sequoia*, the Seventh Circuit attempted to merge the two standards into one hybrid approach in its ruling of *United States ex rel. Cimznhca v. UCB, Inc.*[13] The Seventh Circuit established a standard that "lies much nearer to *Swift* than *Sequoia*,"[14] in finding that the government has an unfettered right to dismiss an FCA action without cause prior to the defendants filing an answer or motion for summary judgment, and after this point, must have a rationally related reason for doing so.[15]

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[9] *See* 31 U.S.C. § 3730(c)(2)(A) (authorizing the government to dismiss an FCA action when they notify the relator, and the court provides a hearing on the motion).

[10] Compare U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1147 (9th Cir. 1998)) (holding there must be a rational basis for the government's dismissal); *with* Swift v. United States, 318 F.3d 250, 253 (D.C. Cir. 2003) (holding the Government has an "unfettered right" to dismiss any FCA actions filed by relators).

[11] 151 F.3d at 1145.

[12] 318 F.3d at 253.

[13] 970 F.3d 835, 850–51 (7th Cir. 2020)

[14] *Id.* at 840.

[15] *Id.* at 850.

The Seventh Circuit took a creative approach to resolving the issue but erred, like its sister courts, in failing to appropriately weigh the interests of the government against those of the relator when granting dismissal. While the court crafted a solution that conforms to the Federal Rules of Civil Procedure, the result extra-statutory deference to relators—something the Seventh Circuit sought to resolve.

While this topic may seem inconsequential on its face, its implications can easily be hypothesized in times where the government disburses much aid. For example, in the first eighteen months of the COVID-19 pandemic, the government allotted $4.5 trillion in relief to Americans.[16] Further, just over a year into the pandemic, the DOJ had reported 474 criminal indictments for false claims totaling over $569 million.[17] The fraud from these crucial government relief programs had run rampant. These funds were spent on a variety of expenses not related to their purpose, including two new shiny Lamborghinis for two men from Florida[18] and Texas[19] respectively. With such rampant fraud continuing through the early 2020s, and with *qui tam* actions remaining prevalent in the government's recoveries, clear rules must be established that appropriately balance the interests of the government and the relators alike.

This Note argues that all three standards are incorrect in their failure to adequately consider the purpose of the False Claims Act. The

[16] *COVID-19 Spending*, USASpending.gov, (Sep. 30, 2021), https://www.usaspending.gov/disaster/covid-19?publicLaw=all

[17] *Justice Department Takes Action Against COVID-19 Fraud*, (March 26, 2021), https://www.justice.gov/opa/pr/justice-department-takes-action-against-covid-19-fraud.

[18] *See Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Florida Man Who Used COVID-Relief Funds to Purchase Lamborghini Sports Car Charged in Miami Federal Court* (July 27, 2020), https://www.justice.gov/opa/pr/florida-man-who-used-covid-relief-fundspurchase-lamborghini-sports-car-charged-miami-federal

[19] *See Press Release, Off. of Pub. Affs., U.S. Dep't of Just.*, *Texas Entrepreneur Charged with Spending COVID Relief Funds on Improper Expenses Including Lamborghini and Strip Club* (Aug. 4, 2020), https://www.justice.gov/opa/pr/texas-entrepreneur-charged-spendingcovid-relief-funds-improper-expenses-including.

Sequoia standard[20] incentivizes the filing of frivolous litigation through its more demanding standard for the government to explain their reasoning to the relator. Conversely, the *Swift* standard[21] places too little emphasis on the relator's interest, departing from the text of the FCA in giving relators a pointless hearing where their objections do not have to be considered. The Seventh Circuit is likely the closest to adopting an optimal standard,[22] however it similarly failed to appropriately weigh the interests of the government against those of the relator when granting dismissal in its failure to allow for the relator's objection to be considered in early stages of litigation.

This Note includes four parts. Part I provides historical context of the FCA and provides an overview of the Government's right to dismiss FCA *qui tam* lawsuits. Part II provides an analysis of the rules adopted by the circuits that have reached this issue. Part III provides commentary on District Court for the Southern District of Illinois and the Seventh Circuit decisions in *United States v. UCB*. arguing that the Seventh Circuit erred in finding that the government must disclose its reasons to the relator on why it is dismissing the case at any stage of litigation. Finally, Part IV argues for a proposed solution that appropriately weighs the interests of both the relator and the government.

I. BACKGROUND

A. *The Qui Tam Provision of the False Claims Act*

The FCA[23] is a federal statute that forbids an individual or entity from presenting "false or fraudulent claim[s] for payment or approval" to the U.S. Government.[24] This statute grants the government a right to recover the funds disbursed to any individual or entity that submitted

[20] *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998).

[21] Swift v. United States, 318 F.3d 250, 253 (D.C. Cir. 2003).

[22] *See* U.S. ex rel CIMZNHCA, LLC v UCB, Inc., 970 F.3d at 850–51.

[23] 31 U.S.C. §§ 3729–3733

[24] 31 U.S.C. § 3729(a)(1)(A)

the false claim and provides grounds for the government to prosecute them criminally.[25]

The FCA originated in the Civil War era as a response to widespread fraud against the Union which harmed its military forces.[26] At the time of the FCA's enactment, the Union Army was suffering incredible losses due to American contractors providing the Federal Government with faulty supplies—including rifles, ammunition, and food.[27] Given the importance of the Government's interest in delivering adequate supplies to its soldiers, Congress enacted the FCA as a means to for the Government to recover damages against those attempting to defraud it.[28] While rooted in historical circumstances, this statute has since developed into the Federal Government's "primary litigation tool for combatting fraud."[29]

The False Claims Act remained untouched until 1943 when Congress amended the Act to cut successful relators' rewards significantly to disincentivize the filing of frivolous FCA claims.[30] In the 1986, Congress amended the Act once again—which formed the basis of the substance in the modern FCA—changing the relators' award, this time entitling a successful relator to 15–30% of the government's recovery and attorneys' fees.[31] This reward was dependent on government intervention.[32] If the government intervened, then the relator could receive between fifteen and twenty-five percent

[25] *Id.*

[26] Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 768 (2000).

[27] *Id.*

[28] *See* 3 GUSTAVUS MYER, HISTORY OF THE GREAT AMERICAN FORTUNES (1910) (quoting Lincoln after the passage of the first FCA in 1863, "[w]orse than traitors in arms are the men, pretending loyalty to the flag, who feast and fatten on the misfortunes of the nation, while patriotic blood is crimsoning the plains of the south, and their countrymen are moldering in the dust.")

[29] U.S. ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 (5th Cir. 2010).

[30] 31 U.S.C. § 232(C) (Supp. III 1943), 57 Stat. 608 (1943).

[31] U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649–51 (D.C. Cir. 1994) (explaining substance of 1986 amendments).

[32] 31 USC § 3730(d)(1)–(2).

of the reward whereas if the government did not intervene, the reward would increase to between twenty-five and thirty percent.[33] After the 1986 amendment, and with an increased portion of the overall reward awaiting relators, there was an influx of *qui tam* suits filed leading to widespread success in recovering fraudulently claimed government funds.[34]

The DOJ reclaims an incredible sum of money from fraudulent disbursements due to relators putting it on notice of fraud, the success rate for relators largely depends on its intervention which only occurs twenty-two percent of the time.[35] Of the cases in the DOJ intervenes, about ninety-five percent result in a recovery for the government.[36] Conversely, only about six percent of the seventy-eight percent of cases the government does not intervene in are successful.[37] These statistics are somewhat problematic, despite the ever-increasing number of filed *qui tam* actions the rate of intervention has remained largely stagnant.[38] With such a great incentive for relators to litigate on the government's behalf (and with its intervention), the DOJ has recognized that it needs to better serve the public by monitoring the cases it does not intervene in to defend against frivolous lawsuits.[39]

The interests of the government and relator are often at odds and the Supreme Court has repeatedly denied granting certiorari to clarify the many differing interpretations of the FCA among the circuits.[40] Without pivotal guidance, the circuit courts are left at odds with one another in their attempts to interpret the Act, including the unresolved

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[33] *Id.*

[34] *See supra* note 2.

[35] Michael Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein in Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. CIN. L. REV. 1233, 1263 (2008).

[36] David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?*, 42 PUB. CONTRACT L. J. 225, 240 (2013).

[37] *See* Rich, *supra* note 26, at 1263-64.

[38] *See* Granton, *supra* note 10.

[39] *Id.*

[40] *Id.*

questions presented in *UCB*.[41] Before reaching the various standards between the circuits, it is first important to understand why the government often seeks dismissal in these cases.

B. The Government's Motivation for Seeking Dismissal

The issue at the heart of this Note revolves around when, how, and for what purpose the government may choose to dismiss a *qui tam* lawsuit arising under the FCA.[42] Section 3730(c)(2)(A) of the FCA explains that the government may seek dismissal—notwithstanding a relator's objections—so long as (1) the relator has been notified of the motion, and (2) the court has provided the relator with a hearing on the motion.[43] The circuits that have reached this issue have all approached this section with contrasting interpretations, and none have fully hit the mark.[44]

This issue was somewhat elusive until the year 2018, when a leaked memorandum from the Director of the Civil Division's Fraud Section, Michael Granston, was formally adopted by the DOJ (the "Granston Memo").[45] The Granston Memo encouraged DOJ attorneys to take an active step in seeking dismissals of frivolous lawsuits and offered several reasons to do so.[46] These motivations include:

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[41] *See, e.g.*, Michael Murray, Note, Seeking More Scienter: The Effect of False Claims Act Interpretations, 117 YALE L.J. 981, 982-84 (2008) (discussing the circuit split regarding implied certification in relation to the FCA); Joel D. Hesch, Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar" in Light of the 2010 Amendments, 51 U. RICH. L. REV. 991, 994 (2017) (discussing the circuit split regarding the original source exception to the public disclosure bar); Brief for Cochise Consultancy as Amicus Curiae, p. 2, Cochise Consultancy, Inc. v. United States, 2019 WL 157807 (U.S.) (discussing the circuit split on applying the FCA's statute of limitations).

[42] *See generally* UCB, 970 F.3d 835.

[43] 28 U.S.C. § 3730(c)(2)(A).

[44] *See* discussion *infra* Part II.

[45] MICHAEL D. GRANSTON, U.S. DEP'T. OF JUST., FACTORS FOR EVALUATING DISMISSAL PURSUANT TO 31 U.S.C. 3730(C)(2)(A) (2018) (*hereinafter Granston Memo*).

[46] *See generally id.*

1. *"Curbing Meritless Qui Tams;"*[47]
2. "*Preventing Parasitic or Opportunistic Qui Tam Actions;*"[48]
3. "*Preventing Interference with Agency Policies and Programs;*"[49]
4. "*Controlling Litigation Brought on Behalf of the United States;*"[50]
5. "*Safeguarding Classified Information and National Security Interests;*"[51]
6. "*Preserving Government Resources;*"[52] and
7. "*Addressing Egregious Procedural Efforts.*"[53]

Granston articulated the policy threading these reasons as "[dismissal authority] remains an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent."[54] This non-exhaustive list highlights the government's interests in preventing some *qui tam* lawsuits, and gives explicit information on why the government should be making these decisions.[55] The government in these instances would have a reasonable articulable understanding of why they are moving for a suit to be dismissed, and because the government is the true injured party in these actions, should be able to make dismissals at their discretion.

The Granston memo proved to be effective. Since the passing of the modern FCA and prior to the Granston memo, the government had moved to dismiss only forty-five of over 12,500 filed *qui tam* actions.[56]

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[47] *Id.* at p.3.

[48] *Id.* at p.4.

[49] *Id.*

[50] *Id.* at p.5.

[51] *Id.* at p.6.

[52] *Id.*

[53] *Id.* at p.7.

[54] *Id.* at p.2.

[55] *Id.* at pp.2-7

[56] *See Principal Deputy Assistant Attorney General Ethan P. Davis delivers remarks on the False Claims Act at the U.S. Chamber of Commerce's Institute for Legal Reform* (June 26, 2020), https://www.justice.gov/civil/speech/principal-

In the two years following the Granston Memo, the government made about fifty motions to dismiss.[57] With the dramatic spike in government dismissals, the issue surrounding § 3730(c)(2)(A) has started to make *prima facie* appearances in the circuit courts as recently as October 2021,[58] and at least three cases remain pending appeal from district courts in the First, Second, and Fifth Circuits.[59]

II. THE *SEQUOIA* AND *SWIFT* STANDARDS

As discussed above, the Seventh Circuit's decision in *UCB* was issued amidst a preexisting circuit split.[60] This Part will analyze the holdings of each respective case and offer commentary on issues arising under each standard.

A. Sequoia Orange Co. v. Sunland Packing House

The Ninth Circuit was the first circuit court to rule on the issue of governmental dismissal of FCA actions in 1998.[61] The Sequoia Orange Company filed thirty-four *qui tam* actions against many of its

deputy-assistant-attorney-general-ethan-p-davis-delivers-remarks-false-claims; *see also Fraud Statistics-Overview Oct. 1, 1986 - Sept. 30, 2020*, supra note 3.

[57] *Id.*

[58] *See* U.S. ex rel CIMZNHCA, LLC v UCB, Inc., 970 F.3d at 850–51.; *see also* Polansky v. Exec. Health Res., Inc., 422 F.Supp.3d 916 (3d Cir. Oct. 28, 2021) (holding that the standard adopted by the Seventh Circuit in *UCB* was the appropriate standard in interpreting government dismissals under § 3730(c)(2)(A)).

[59] *See generally* United States v. Bayer HealthCare Pharms., Inc., No. 1:14-cv-31 (D.R.I. Oct. 21, 2019), *appeal filed*, No. 20-1066 (1st Cir. Jan. 16, 2020); *see also* U.S. ex rel. Borzilleri v. AbbVie, Inc., No. 1:15-cv-7881, 2019 WL 3203000 (S.D.N.Y. July 16, 2019), *appeal filed*, No. 19-2947 (2d Cir. Sept. 13, 2019); U.S. ex rel. Health Choice Alliance, LLC v. Eli Lilly and Co., Inc., No. 5:17-cv-123, 2019 WL 4727422 (E.D. Tex. Sept. 27, 2019), *appeal filed*, No. 19-40906 (5th Cir. Oct. 29, 2019).

[60] *See supra* note 10.

[61] U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1141 (9th Cir. 1998)).

competitors (the government only intervened in ten).[62] These actions all alleged violations of the Secretary of Agriculture's orders limiting the quantity of oranges and lemons that could be shipped into various markets identified by the Secretary.[63] These allegations claimed that the defendants had been over-shipping citrus into the regulated markets, and failed to "report, account and pay assessments for those overshipments."[64]

After Sequoia's filings, turmoil over these orders continued to grow.[65] The Secretary learned of widespread fraud in relation to these orders, and in June 1993, formally suspended them temporarily to gather proposed amendments from citrus industry growers and packinghouses.[66] In tandem with the suspension, the government sought to intervene in Sequoia's twenty-four actions it had previously declined to intervene in, in an effort to settle all FCA cases tied to the citrus marketing orders.[67] The District Court below granted the dismissals, adopting a two-step analysis: first requiring the identification of a "valid governmental purpose,"[68] and next explaining a rational relation between the dismissal and effectuating the purpose.[69] The District Court ultimately found the governments reasons compelling for dismissal, finding that the government had a rational reason for the motion in furtherance of its legitimate interest to ending all controversy over their citrus marketing program.[70]

On appeal, the Ninth Circuit heard the relator's arguments alleging that the district court erred in applying the rational relation standard.[71] Further alleging that the government had not proven that its

[62] *Id.*
[63] *Id.* at 1141–42.
[64] *Id.* at 1142.
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 1145.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 1146

dismissal was rationally related to a legitimate interest.[72] The Ninth Circuit affirmed the lower court in finding the government had met its burden.[73]

The Ninth Circuit explained that the government had a legitimate interest in dismissing the litigation because it "deemed further FCA litigation over FCA litigation over prorate violations harmful to the industry as a whole."[74] Further, that dismissal was appropriate by allowing the government to treat all prorate violations equally through their dismissal.[75] In its holding, the Ninth Circuit concluded that the rational relation test was appropriate in § 3730(c)(2)(A) litigation (albeit without explaining why this standard was appropriate).[76]

In *Sequoia*, the Ninth Circuit became the first federal court of appeals to interpret this dismissal standard, and did so in a strikingly brief, conclusory opinion. The rationally related standard for government dismissals is problematic for a few reasons. First, there is nothing in the text of the FCA that would lead to such a conclusion.[77] By adopting this standard, the court is overstepping the plain text of the statute by imposing an additional burden on the government to articulate their decision-making process—opposed to the discretion of Congress in granting the government prosecutorial discretion over FCA cases.[78]

B. SWIFT V. UNITED STATES

Five years after *Sequoia*, the issue of § 3730(c)(2)(A) dismissals once again reached the federal appellate courts, this time in the D.C.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 1147.

[77] *See generally* 31 U.S.C. § 3730

[78] *See* U.S. ex rel. Kelly v. Boeing Co., 9 F.3d 743, 756 (9th Cir.1993) (holding that the FCA grants the judiciary approval authority over government dismissals under § 3730I(2)(A).

Circuit.[79] This case arose from a DOJ employee attorney filing a *qui tam* action alleging that a different employee and two former DOJ employees conspired to present false time sheets and leave slips to the government, totaling $6169.20.[80] About three months later, the government moved to dismiss the action, claiming that the amount of money involved did not justify the expense of litigation—even if the allegations could be proven.[81] The relator opposed the motion and sought a rehearing as well as leave to engage in discovery in relation to government policies on *qui tam* dismissals.[82] Additionally, the relator moved for the court to unseal the record to help in gathering information.[83] The district court offered a hearing for the relator, but denied all of her motions.[84] Soon after, the court dismissed the complaint on the basis that the government had demonstrated that the dismissal was rationally related to a valid government purpose.[85]

The relator raised a few issues on appeal including: (1) the government must move to intervene prior to dismissal; and (2) the court erred in dismissing the suit because the government did not investigate her claims.[86]

Looking to the first issue, the D.C. Circuit Court of Appeals found that a motion to intervene need not precede a motion to dismiss.[87] The court looks to § 3730(b)(2) for its analysis, which requires the government to (after the statutory sixty-day period) "proceed with the action ... or notify the court that it declines to take over the action."[88]

[79] *See generally* Swift v. United States, 318 F.3d 250, 253 (D.C. Cir. 2003).
[80] *Id.*
[81] *Id.*
[82] *Id.* at 251.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*

The court interpreted this provision to say that intervention is only necessary where the government wishes to proceed in the action.[89]

Looking to the second issue, the court disagreed with the *Sequoia* standard and instead adopts the standard that the government has an "unfettered right" to dismissing FCA claims.[90] The court reached this holding upon analyzing the text of § 3730(c)(2)(A) and finding that it does not give the judiciary any oversight over the judgment of the Executive.[91] The court reads the text very literally, finding that the text reading "[t]he Government may dismiss the action" explicitly omits the judiciary from any sort of weight in the analysis.[92] The court bolstered this claim by looking to the Federal Rules of Civil Procedure Rule 41(a)(1)(i).[93] This rule allows for any plaintiff to dismiss a civil action without leave of court prior to the adverse parties' filing an answer or motion for summary judgment.[94]

Additionally, the court read the hearing requirement of § 3730(c)(2)(A) simply is utilized as a means for the relator to convince the government not to dismiss the case.[95] The court distinguished its reasoning from *Sequoia* in explaining that the Senate Report relied upon by the Ninth Circuit was in relation to an unenacted version of the FCA, and as such should not be considered in this analysis.[96]

Because the court found that the government has an unfettered right to dismiss an FCA claim (and because it was raised prior to the defendant's answer), the court affirmed the lower decision.[97]

C. Key Differences between Sequoia and Swift

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[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 253.
[96] *Id.*
[97] *Id.* at 254.

As discussed above, courts following the *Sequoia*[98] standard analyze whether the government had a rational reason for dismissing the actions, whereas in *Swift*, the court found that the government has an unfettered right to dismiss an FCA claim.[99] These two standards differ in how much deference they give each party. Under the *Sequoia* standard, the court is placing a burden on the government through mandating it to provide a rational reason for the dismissal.[100] This may not seem like a great burden, but there are many reasons that the government would want to keep their decisions held closely and not disclosed for the public.[101]

Specifically, the third rationale proposed in the Granston memo involves the "preventing [of] interference with agency policies and programs."[102] Situations may be hypothesized where the government wouldn't want a *qui tam* action to interfere with its operations.

For example, imagine that the government is conducting a multi-year investigation on a suspect in State A, building its case as it collects enough evidence to indict her. Should a relator in State B file a *qui tam* action against the same suspect alleging the same fraud the government has spent years investigating? The government would surely move to dismiss the action so that is would not ruin their investigation (that would likely recover more falsely claimed money than the relator). If a court were to employ the *Sequoia* standard, the government will likely have to share with the court their intentions to litigate against the suspect. This sort of action risks putting the suspect on notice of the investigation, cutting against the FCA's purpose in potentially shielding a fraudster.

Additionally, the *Sequoia* standard is flawed in requiring the government to have a rational basis for dismissing a *qui tam* action that the Federal Rules of Civil Procedure would not require from any other

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[98] U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1141 (9th Cir. 1998)).

[99] Swift v. United States, 318 F.3d 250, 253 (D.C. Cir. 2003).

[100] Sequoia, 151 F.3d at 1141.

[101] *See generally* GRANSTON MEMO

[102] *Id.*

plaintiff.[103] At early stages in trial, a plaintiff is able to dismiss their filed action without leave, and by requiring the government to prove a rational basis for dismissal, the courts would be applying a burden on the government that does not exist in the FCA or FRCP.

While less problematic than the *Sequoia* Standard, the *Swift* Standard also does not align closely with the text and purpose of the FCA. This standard recognizes that the government is the true injured party, and as such, grants them more deference than the relators. While *Swift* comments that it may not extend past the answer/summary judgment stage of litigation, it does not offer a suggestion of how to handle any disputes that arise over a dismissal in that context.

The *Swift* standard also presents an issue in relation to the hearing requirement set forth in the FCA. With the unfettered tight to dismiss any FCA claim, a relator objecting to a motion to dismiss would have an inconsequential hearing to plead their case. While *Swift* argues that the hearing is "just a formal opportunity to convince the government not to end the case,"[104] this likely cuts against Congress' intent in including a hearing provision for the motion.[105]

Understanding that neither standard is proper under the FCA's text and history, the Seventh Circuit created a hybrid of the two tests in its holding of *UCB*.[106]

THE SEVENTH CIRCUIT APPROACH

A. United States v. UCB

The Seventh Circuit was the next circuit to reach the issue of government dismissal.[107] In this case, a relator initiated an FCA *qui tam*

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[103] FRCP Rule 41(a)(1)(i) (permitting a plaintiff to dismiss a complaint without court approval if the other party has not filed an answer or motion for summary judgment).

[104] Swift, 318 F.3d at 252.

[105] *See* 31 U.S.C. § 3730(c)(2)(A).

[106] *See generally* U.S. ex rel CIMZNHCA, LLC v UCB, Inc., 970 F.3d.

[107] *Id.*

action alleging that a pharmaceutical company, UCB, illegally paid physicians across the nation with free education services and free assistance with insurance paperwork in return for prescribing its drug, Cimzia.[108] The relator alleged that the scheme on its face would violate the federal Anti-Kickback Statute,[109] and further, when a patient is part of a federal healthcare program,[110] the FCA would also be violated because the government would have paid fraudulent reimbursements.[111]

Over a year after the *qui tam* suit was filed, the government moved to dismiss the case against the defendant without any previous intervention.[112] The government expressed that they found the relator's claims to "lack sufficient merit" and should not proceed.[113] On hearing the motion, the district court applied the *Sequoia* standard and found that the dismissal was not rationally related to the government's purported purpose, and therefore the action should proceed.[114] The government appealed this decision.[115]

In choosing to apply *Sequoia* instead of *Swift*, the district court looked to the plain text of the FCA. § 3730(c)(2)(A) of the Act provides that once a *qui tam* suit is filed, the government has the right to "intervene and proceed" as the plaintiff in place of the relator that filed the action.[116] The court determined that an intervention requiring a hearing would be "[a] hollow ritual" if the court applied *Swift*, granting the government an unfettered right to dismiss the case over the relator's

[108] *Id.* at 839.

[109] 42 U.S.C. § 1320a–7b(g) (prohibiting giving or receiving items or services in return for referring an individual's medicine or treatment).

[110] 42 C.F.R. § 1000.10 (defining federal healthcare programs as "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government").

[111] *UCB*, 970 F.3d at 839.

[112] *Id.* at 840.

[113] *Id.*

[114] *Id.* at 853.

[115] *Id.*

[116] *See* 31 U.S.C. § 3730(c)(2)(A).

objections.[117] The court reasoned that because the relator must have some grounds to defend the objection in a hearing, it chose to apply the *Sequoia* standard, and again, found that the government did not meet its burden in proving that it had a rational basis for dismissing the action.[118]

On appeal, the Seventh Circuit panel began its § 3730(c)(2)(A) analysis by looking to the Federal Rules of Civil Procedure. Under FRCP Rule 41(a)(1)(B), a plaintiff may dismiss an action by filing a notice of dismissal at any time before the defendant files an answer or motion for summary judgment.[119] The court quoted one of its former opinions in commenting that "one doesn't need a good reason, or even a sane or any reason" to dismiss a case under this rule.[120] However, the court continued to hold that where the defendant has already filed an answer or motion for summary judgment, Rule 41(a)(2) would instead apply, allowing "an action [to] be dismissed at the plaintiff's request only by court order."[121]

In applying these rules to the FCA, the court found that in situations where Rule 41(a)(1)(B) applies, the government has an unfettered right to dismiss the lawsuit.[122] Further, the court found that in situations where Rule 41(a)(2) applies, the court has the discretion to determine whether the government has a rational reason for dismissing the action.[123]

The court went on to comment that when viewing these rules considering the *Sequoia* standard, the two cannot coexist.[124] With *Sequoia*, applying the rational relation test before an answer or motion for summary judgment has been imposed therefore raises the bar for the government above what a standard plaintiff may have to experience.

[117] *Id.*
[118] *Id.*
[119] Fed. R. Civ. P. 41(a)(1)(B).
[120] *UCB*, 970 F.3d. at 851.
[121] Fed. R. Civ. P. 41(a)(2).
[122] *UCB*, 970 F.3d. at 851.
[123] *Id.*
[124] *Id.* at 852.

However, if applying *Swift* after an answer or motion for summary judgment has been filed, the rules would also be violated.[125]

Seeing this oversight, the Seventh Circuit dismissed the lower court's issue with the hearing requirement, and instead crafted a rule in stating that during the initial stages of litigation grant the government an unfettered right to dismiss like *Swift*, and after an answer or motion for summary judgment is filed, the standard flips to the rational relation test, like *Sequoia*.[126]

B. Issues with the UCB Holding

With *UCB*, the Seventh Circuit has created the dismissal rule closest to the text and purpose of the False Claims Act. By changing the standard depending on the stage of litigation, this approach provides for the most equitable division of control of the three different dismissal standards. This rule makes a lot of logical sense, the government retains full control to dismiss the action up until the moment a defendant files an answer or motion for summary judgment. The early-stage dismissal causes little to no harm to the parties, where a later stage dismissal has the potential to and therefore should have a rational reason for it.

While this standard is logical, it still fails to meet the full purpose of the FCA. Under the UCB approach, the government's burden to prove that the requested dismissal is rationally related to a legitimate interest can lead to problematic results. The government is often in a position of having more information than a relator,[127] and in scenarios where they have been investigating an individual that was sued by a relator, the government must have the express authority to dismiss the case to protect the public. By being compelled to share its motives to the court, a relator could ruin years of investigatory efforts because they believe that they deserve a share of the reward.

[125] *Id.*

[126] *Id.* at 853.

[127] *See generally* GRANSTON MEMO

Relator's are intended to provide helpful information to the government and lend support where the government is unable.[128] When a relator disagrees with a government dismissal of their *qui tam* action, they are fighting to protect their interest in litigation that they both inserted themselves into and were not harmed.

When the government seeks dismissal of a case, it should be presumed to have effectuated the due diligence needed from a rational relation standard. The government has a privacy interest in many of its dealings, and if a relator comes to stand between it and its litigation, the relator should not be the party that prevails. The government, as the true injured party, should be afforded significant deference in these cases. However, because the need for beneficial *qui tam* relators is so great, a balance needs to be struck that allows for protection of relators while valuing the governments interests appropriately.

POTENTIAL SOLUTIONS

In looking forward, it would be helpful for Congress to propose an amendment in relation to this provision that would clear up their intent for the dismissal standards. The Supreme Court has repeatedly denied hearing this issue, and Congress is in the best position to make a clarification due to its extensive history with the Act. Without Congress and the Supreme Court, the lower courts are left at odds with one another, causing significant problems to the government in its pursuit of justice.

A potential solution has been offered by a scholar at the University of Chicago Law School.[129] This note suggests that the best solution to this issue involves treating the government-relator relationship similar to the board-shareholder relationships in Corporate Law.[130] Under this

[128] *See* Rich, *supra* note 26, at 1266 ("[T]he relator recovery structure of the FCA is intended to encourage whistleblowers to come forward with helpful information.").

[129] THE EXECUTIVE JUDGMENT RULE: A NEW STANDARD OF DISMISSAL FOR QUI TAM SUITS UNDER THE FALSE CLAIMS ACT, 87 U. CHI. L. REV. 1051 (2020)

[130] *Id.* at 1088.

approach, a modified rule close to the Seventh Circuit's is offered. However, it is distinguishable in shifting the burden of proof to the relator to show that the government performed some misstep in their investigative process rather than making the government prove its motives.[131] The offered rule would act similarly to the Business Judgment Rule, protecting board members from liability from substantive decisions absent conduct that is arbitrary and capricious.[132] Under this approach, the government retains its control over the case absent a lack of due diligence, protecting the relator's interest against an unwarranted dismissal.

This proposed rule balances the interests of the relators and the government alike. The government will remain to have its substantive decisions protected, protecting the privacy it needs to operate efficiently. Similarly, relators would be satisfied because there would be recourse for them should the government conduct themselves inappropriately and provides a proper issue for a § 3730(c)(2)(A) hearing: whether the government conducted its investigation with due diligence.

CONCLUSION

With fraudulent activity on the rise,[133] it is now more important than ever to ensure that whistleblowers remain incentivized to turn over valuable information to the government. While the relator's role is important in *qui tam* actions, it is more important that the government retains its privacy that may be extinguished due to a relator's FCA action. Congress could solve this dismissal issue by amending § 3730(c)(2)(B) to include language allowing for government dismissal after the answer/summary judgment stage so long as they conducted their investigations thoroughly. While relators have an important role to play in FCA litigation, their interest in the litigation cannot supersede that of the true injured party.

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[131] *Id.*

[132] *Id.*at 1078.

[133] *See supra* note 17.

