

Staying True to the False Claims Act: Why the Government Is an Unexplored Prime Vehicle to Dismiss Cases

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I. INTRODUCTION

To rectify the advent of rampant false claims levied against the government in the wake of the Civil War, Congress borrowed from the English practice of deputizing private attorneys general when it enacted the False Claims Act (“FCA”).¹ Under the FCA, a private individual, known as a relator, assumes the role of prosecuting the presumably under-policed sovereign interest of vindicating fraud on the government.² The relator benefits through compensation from meritorious claims, and the government benefits through compensation for latent, undetected sovereign injuries.³ Everyone wins (except those liable). But what happens when the government, over the opposition of the relator, wishes to discontinue a case? Whose interests matter? And whose interests should control?

Although *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, a case from October Term 2016, circumscribed a defendant’s ability to dismiss an FCA case on the basis of certain statutory violations,⁴ the Court has yet to address *what* level of authority the government has in controlling a lawsuit filed in its stead, and *how* courts should review governmental motions to dismiss. Amid those unresolved questions, advocates seeking to dismiss FCA lawsuits should review not just their clients’ procedural vehicles, but also the government’s statutory grants of authority. Even if a violation of a statutory requirement does not compel dismissal *per se*, *Rigsby* suggests that statutory violations still have valence when persuading the government to move to dismiss cases.⁵ Among the grounds that the government could articulate in seeking to dismiss a case, a statutory violation presents a crisp argument in support of dismissal.

This Article proposes that advocates seeking to dismiss FCA lawsuits should explore all options, including persuading the government to exercise its statutory right to dismiss the case. In three

1. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 553–55, (2000); *see also infra* Part II.

2. *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 440 (2016).

3. *Id.*

4. *See generally id.* at 442–43 (holding that violating the seal requirement does not mandate dismissal).

5. *Id.*; *see also infra* Part III.

parts, the Article introduces the FCA, reviews *Rigsby*, and explains how statutory violations can assist in convincing the government to dismiss these lawsuits. Although a circuit split has formed on the legal standard for determining when a court can enter a judgment dismissing an FCA case on motion by the government, under all standards, advocates should apprise the government with haste of statutory violations and explain how those violations impinge otherwise countervailing interests in seeking sovereign relief.⁶ And in those limited instances when the government moves to dismiss, courts should give special solitude to the government's determination that its interests are best served by dismissing the case.

II. THE FALSE CLAIMS ACT

The Latin phrase *qui tam* is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning a person “who pursues this action on our Lord the King’s behalf as well as his own.”⁷ In a *qui tam* action, a private individual, known as a relator, sues on behalf of the United States as a partial assignee.⁸ Such lawsuits are creatures of statute, lacking a judicially recognized American common-law origin.⁹ Courts have observed that *qui tam* causes of action have been used throughout American and English history for, among other things, discovering and prosecuting fraud against the government.¹⁰ And while the United States has referenced the English system to justify the legality of *qui tam* statutes, as irony would have it, the English system has since abolished all such statutes.¹¹ *Qui tam* statutes also have a

6. See *infra* Part IV.

7. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000) (referencing 3 WILLIAM BLACKSTONE, COMMENTARIES *160).

8. *Vt. Agency*, 529 U.S. at 773 n.4 (emphasis omitted).

9. *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007) (quoting *United Seniors Ass’n, Inc. v. Philip Morris U.S.A.*, 500 F.3d 19, 23 (1st Cir. 2007)); *Patent Compliance Grp., Inc. v. Interdesign, Inc.*, No. 3:10-CV-0404-P, 2010 WL 11537430, at *2 (N.D. Tex. June 28, 2010).

10. *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749, 752 (5th Cir. 2001); *Vt. Agency*, 529 U.S. at 774.

11. See *Common Informers Act*, 1951, 14 & 15 Geo. 6 c. 39, § 1 (Eng.) (abolishing all English *qui tam* statutes); cf. Beck, *supra* note 1, at 565–66 (noting that, as police and public safety enforcement expanded, English *qui tam* statutes declined considerably).

long tradition of withstanding constitutional attacks under a variety of theories.¹²

The FCA, one of the few remaining *qui tam* statutes under federal law,¹³ “imposes significant penalties on those who defraud the Government.”¹⁴ Enacted in 1863,¹⁵ the FCA “was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War.”¹⁶ Specifically, “[a] series of sensational congressional investigations’ prompted hearings where witnesses ‘painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.’¹⁷ Congress responded, imposing liability for ten variants of fraud on the government and subjecting private violators to double damages, forfeiture, and up to five years’ imprisonment.¹⁸

12. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J, dissenting) (observing that in *qui tam* actions, the courts have “repeatedly held that individual litigants, acting as private attorneys-general, may have standing as ‘representatives of the public interest’”) (quoting *Scripps-Howard Radio, Inc. v. Fed. Comm’n Comm’n*, 316 U.S. 4, 14 (1942)); *Associated Indus. of N.Y. State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (“Congress can constitutionally enact a statute conferring on any non-official person . . . authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy . . . even if the sole purpose is to vindicate the public interest.”) (footnote omitted), *vacated as moot*, 320 U.S. 707 (1943); *Pub. Interest Bounty Hunters v. Bd. of Governors of Fed. Reserve Sys.*, 548 F. Supp. 157, 161 (N.D. Ga. 1982) (noting that *qui tam* statutes “provide a private citizen who would otherwise have no judicially cognizable ‘interest’ in rights protected by particular federal substantive provisions with an interest sufficient to give that individual standing to sue to enforce these provisions”); see also *Riley*, 252 F.3d at 752–53 (“[W]e find that history, although not the sole definitive argument supporting the view that the FCA’s *qui tam* provisions do not violate Article II, is certainly a ‘touchstone illuminating’ their constitutionality.”).

13. See *Vt. Agency*, 529 U.S. at 768 n.1.

14. *Universal Health Servs. Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1995 (2016).

15. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

16. *United States v. Bornstein*, 423 U.S. 303, 309 (1976).

17. *Universal Health Servs.*, 136 S. Ct. at 1996 (quoting *United States v. McNinch*, 356 U.S. 595, 599 (1958)).

18. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696.

While Congress has repeatedly amended the FCA, “its focus remains on those who present or directly induce the submission of false or fraudulent claims. A ‘claim’ . . . includes direct requests to the Government for payment as well as reimbursement requests made to the recipients of federal funds under federal benefits programs.”¹⁹ The scienter requirement defines “knowing” and “knowingly” as “actual knowledge of the information,” “deliberate ignorance of the truth or falsity of the information,” or “reckless disregard of the truth or falsity of the information.”²⁰ The FCA defines “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”²¹ Congress also has increased the civil penalties so that liability is “essentially punitive in nature,”²² providing for treble damages plus civil penalties of up to \$10,000 per false claim.²³ The exposure from these lawsuits is daunting and can prove ruinous, fulfilling the purposes of the FCA to deter those from committing fraud against the government and to reward those relators who assist.²⁴

The government retains the authority to intervene in a relator’s lawsuit or to bring an FCA lawsuit in the first place.²⁵ In a system designed to benefit both the relator and the government, “[a] relator who initiates a meritorious *qui tam* suit receives a percentage of the

19. *Universal Health Servs.*, 136 S. Ct. at 1996 (citing 31 U.S.C. §§ 3729(a)-(b)(2)(A) (2012)).

20. 31 U.S.C. § 3729(b)(1)(A) (2012).

21. 31 U.S.C. § 3729(b)(4) (2012).

22. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000).

23. 31 § 3729(a)(1)(G) (2012); 28 C.F.R. § 85.3(a)(9) (2015) (adjusting penalties for inflation).

24. *See, e.g., United States ex rel. Harman v. Trinity Indus., Inc.*, 166 F. Supp. 3d 737 (E.D. Tex. 2015) (Final J. at 2–3, ECF No. 713) (“Consistent with the Orders stated above, pursuant to Rule 58 of the Federal Rules of Civil Procedure, and in accordance with the jury’s verdict, the COURT FURTHER ORDERS AND HEREBY ENTERS FINAL JUDGMENT that the United States Government have and recover the sum of \$464,352,525.00 from Defendants Trinity Industries, Inc. and Trinity Highway Products, LLC, jointly and severally; and, that the Relator, Joshua Harman, have and recover the sum of \$218,021,090.75 from Defendants Trinity Industries, Inc. and Trinity Highway Products, LLC, jointly and severally.”).

25. *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 440 (2016) (citing 31 U.S.C. §§ 3730(a)–(b)).

ultimate damages award, plus attorney's fees and costs."²⁶ In the Supreme Court's estimate, "encourag[ing] more private enforcement suits" helps "strengthen the Government's hand in fighting false claims."²⁷ The government may dismiss a *qui tam* 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 a hearing on the motion."²⁸ The government also can take control of the litigation.²⁹ "If the government takes control of the litigation, the relator receives 15–25% of any award; if the government declines to take control, the relator receives 25–30% of any award."³⁰

The FCA constrains how relators can prosecute their case. Under the "first-to-file bar," a relator may not "bring a related action based on the facts underlying [a] pending action."³¹ The paragraph known as the "public disclosure bar" provides that at the time the lawsuit is filed, "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions . . . unless the action is brought by the Attorney General or . . . an original source of the information."³² The relator must also serve on the government "[a] copy of the complaint and written disclosure of substantially all material evidence and information the [relator] possesses."³³ In addition, "[t]he complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders."³⁴ These procedural

26. *Id.* (citation omitted).

27. *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U. S. 280, 298 (2010) (citations omitted); *id.* at 298 (quoting *Cook Cty. v. United States ex rel. Chandler*, 538 U.S. 119, 133–34).

28. 31 U.S.C. § 3730(c)(2)(A) (2012).

29. Ronald Mann, *Argument Preview: Justices to Consider "Seal" Requirement in False Claims Act Cases*, SCOTUSBLOG (Oct. 25, 2016, 10:18 AM), <http://www.scotusblog.com/2016/10/argument-preview-justices-to-consider-seal-requirement-in-false-claims-act-cases/>.

30. *Id.*

31. *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015) (citation omitted).

32. 31 U.S.C. § 3730(e)(4)(A) (2006 & Supp. 2010); *Graham Cty.*, 559 U.S. at 286 (citations omitted).

33. 31 U.S.C. § 3730(b)(2) (2012).

34. *Id.*

measures increase the government's authority to control the lawsuit filed in its stead.

As an idiosyncratic statute with enigmatic accompaniments, litigation over the breadth and mechanics of the FCA surface with frequency at the Supreme Court.³⁵ The October Term 2016 brought *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, a case involving a district court's discretion in dismissing a case for violation of the seal requirement.³⁶

III. *RIGSBY* AND ITS EFFECTS ON DISMISSING A CASE FOR VIOLATION OF THE SEAL REQUIREMENT

Rigsby arose from the devastation that followed Hurricane Katrina.³⁷ Cori and Kerri Rigsby worked as claims adjusters for a company that provided services to State Farm Fire & Casualty Company ("State Farm").³⁸ Under the insurance plan between the government and State Farm, State Farm insured damages caused by high winds while the government insured flood-related damages.³⁹

35. See, e.g., *Kellogg Brown & Root Servs.*, 135 S. Ct. at 1973 ("In this case, we must decide . . . whether the False Claims Act's first-to-file bar keeps new claims out of court only while related claims are still alive or whether it may bar those claims in perpetuity."); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 404 (2011) ("We must decide whether a federal agency's written response to a request for records under the Freedom of Information Act . . . constitutes a 'report' within the meaning of the [FCA's] public disclosure bar."); *Graham Cty.*, 559 U.S. at 283 ("The question before us is whether the reference to 'administrative' reports, audits, and investigations in that provision encompasses disclosures made in state and local sources as well as federal sources."); see also *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 929 (2009) ("The question presented is whether the 30-day time limit to file a notice of appeal . . . or the 60-day time limit in [the Federal Rules of Appellate Procedure] applies when the United States declines to formally intervene in a *qui tam* action brought under the [FCA].").

36. *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016) ("In general, the question whether dismissal is appropriate should be left to the sound discretion of the district court.").

37. Amy Howe, *Today's Orders: One New Grant, One CVSG, Two Summary Reversals*, SCOTUSBLOG (May 31, 2016, 5:34 PM), <http://www.scotusblog.com/2016/05/todays-orders-one-new-grant-one-cvsg-two-summary-reversals/>.

38. *Id.*

39. *Id.*

The Rigsbys contended that, for some homes damaged by high winds, “State Farm fraudulently attributed damage . . . to flooding,” thereby requiring the government to cover the damages under its National Flood Insurance Program.⁴⁰

The Rigsbys sued State Farm in the United States District Court for the Southern District of Mississippi.⁴¹ Although they filed the case under seal in accordance with the FCA, the Rigsbys and their attorney Dickie Scruggs, “a prominent Mississippi trial lawyer who would go on to serve six years in federal prison on bribery charges,” and who now uses that experience to help high-school dropouts earn a GED,⁴² told the press and a member of Congress about the lawsuit before the court lifted the seal.⁴³ State Farm moved to dismiss, “citing the sisters’ ‘repeated intentional violations of the FCA seal requirement.’”⁴⁴ The district court denied the motion, and the United States Court of Appeals for the Fifth Circuit affirmed.⁴⁵

State Farm filed a petition for writ of certiorari, asking the Supreme Court to decide, among other things, “what standard should apply to determine whether to dismiss an FCA complaint after a violation of the seal requirement”:⁴⁶

It contended that the lower courts are divided on what standard should be used: . . . a bright-line rule that mandates dismissal; . . . whether “the violation incurably frustrates the congressional goals served by

40. *Id.*

41. *See generally* United States *ex rel.* Rigsby v. State Farm Fire & Cas. Co., No. 1:06CV433-HSO-RHW, 2014 WL 691500, at *1 (S.D. Miss. Feb. 21, 2014).

42. *Teaching in Prison Prompts Former Attorney Dickie Scruggs to Escalate Second Chance MS: Helping Mississippians Earn a GED and Skills Training*, BUSINESS WIRE (Sep. 2, 2015, 8:00 AM), <http://www.businesswire.com/news/home/20150902005229/en/Teaching-Prison-Prompts-Attorney-Dickie-Scruggs-Escalate>.

43. Howe, *supra* note 37.

44. *Id.*

45. United States *ex rel.* Rigsby v. State Farm Fire & Cas. Co., 794 F.3d 457, 480-81 (5th Cir. 2015) (“We therefore REVERSE the district court’s decision to deny the Rigsbys additional discovery, but AFFIRM that court’s decisions with respect to the seal violations, subject matter jurisdiction, and State Farm’s motion for judgment as a matter of law.”).

46. Howe, *supra* note 37.

the seal requirement”; or, as the Fifth Circuit held, a balancing test that focuses on whether the violation actually harms the government.⁴⁷

In January 2016, the Court issued a Call for the Views of the Solicitor General.⁴⁸ In a brief filed in April 2016, the government recommended denying review because the mandatory-dismissal rule was an “outlier” among other holdings that endorsed a more discretionary standard for dismissal.⁴⁹

In May 2016, the Court granted certiorari to the Fifth Circuit, limited to what standard governs the decision on whether to dismiss a relator’s claim for violation of the FCA’s seal requirement.⁵⁰ The Chamber of Commerce and Financial Services Roundtable filed an amicus brief supporting State Farm’s position and chronicling the recent increase in FCA litigation.⁵¹ The Solicitor General, supporting the relators, argued that “Congress’ failure to specify a particular remedy for violations of the seal requirement suggest[ed] an expectation” that courts should exercise discretion before dismissing a case upon a finding of a seal violation.⁵² In his preview of the case before oral argument, Professor Ronald Mann suggested that “[t]he key question in the oral argument will be whether State Farm can

47. *Id.* (quoting Petition for a Writ of Certiorari at 2, *Rigsby*, 137 S. Ct. 436 (No. 15-513), http://www.scotusblog.com/wp-content/uploads/2015/10/15-__PetitionForWritOfCertiorari.pdf).

48. *Id.*; *State Farm Fire and Casualty Co. v. United States ex rel. Rigsby*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/state-farm-fire-and-casualty-co-v-united-states/>. See generally Adam Feldman, *Lessons in Not Throwing Caution to the Wind*, EMPIRICALSCOTUS (June 2, 2016), <https://empiricalscotus.com/2016/06/02/caution-to-the-wind/>.

49. Howe, *supra* note 37; see also Brief for the United States as Amicus Curiae at 7–16, *Rigsby*, 137 S. Ct. 436 (No. 15-513), <http://www.scotusblog.com/wp-content/uploads/2016/04/15-513-State-Farm-4.14.16.pdf>.

50. *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 136 S. Ct. 2386 (2016) (“Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to Question 1 presented by the petition.”).

51. Mann, *supra* note 29 (citing Brief for the Chamber of Commerce of the United States of America and the Financial Services Roundtable as Amicus Curiae Supporting Petitioner, *Rigsby*, 137 S. Ct. 436 (No. 15-513), <http://www.scotusblog.com/wp-content/uploads/2015/11/U.S.-Chamber-Amicus-Brief-State-Farm-v.-Rigsby-SCOTUS.pdf>).

52. *Id.*

persuade the justices who have been protective of defendants in class actions that the circumstances of False Claims Act litigation justify a similarly protective intervention.”⁵³

The Court heard the case on November 1, 2016.⁵⁴ Following oral argument, Professor Mann predicted that “[a]lthough the argument left much unclear, the justices appeared skeptical of the mandatory rule” compelling dismissal for violations of the seal requirement.⁵⁵ Justice Samuel Alito, Professor Mann reflected, pressed how State Farm could justify automatic dismissal in a “case where the disclosure is very limited, seen by only one person, let’s say; it was inadvertent, it was not done in bad faith, and it causes no harm.”⁵⁶ Professor Mann also highlighted observations from Justice Stephen G. Breyer, which explored the various reasons for concluding that the question is well suited for the district judge’s discretion:

Life is complicated. There are all kinds of factors, and these factors affect the basic fairness of the situation, which is something that judges should look to as well. Like many, many, many decisions, this is conferred upon the district court to make a fair decision in light of the circumstances, to be reviewed by abuse of discretion.⁵⁷

Justice Elena Kagan added that special solicitude should be given to the government in these matters: “[W]hy shouldn’t the primary factor [in deciding whether dismissal is appropriate] just be what the government wants? In other words, given that the government is the beneficiary of this provision, why shouldn’t we give very significant

53. *Id.*

54. *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436 (2016).

55. Ronald Mann, *Argument Analysis: Justices Dubious About Mandating Dismissal for “Seal” Violations in False Claims Act Cases*, SCOTUSBLOG (Nov. 2, 2016, 6:49 AM), <http://www.scotusblog.com/2016/11/argument-analysis-state-farm-v-rigsby/>.

56. *Id.* (quoting Oral Argument at 10:36–10:48, *Rigsby*, 137 S. Ct. 436 (No. 15-513), <https://www.oyez.org/cases/2016/15-513>).

57. *Id.* (quoting Oral Argument at 14:08–14:35, *Rigsby*, 137 S. Ct. 436 (No. 15-513), <https://www.oyez.org/cases/2016/15-513>).

discretion to the government?”⁵⁸ Professor Mann’s prediction proved correct.

On December 6, 2015, in a unanimous opinion authored by Justice Anthony M. Kennedy, the Court affirmed the judgment, concluding that a violation of the seal requirement does not mandate dismissing a lawsuit brought under the FCA.⁵⁹ Observing that the text of the FCA provides that “a complaint ‘shall’ be kept under seal,” the Court explained that the absence of an explicit remedy suggests that the breach of a mandatory obligation should not compel a loss of rights.⁶⁰ Justice Kennedy noted that “the FCA has a number of provisions that do require, in express terms, the dismissal of a relator’s action”—but none of those terms are housed in the seal-requirement provision.⁶¹ The government’s interest in maintaining the seal, the Court recognized, is to preclude alerting defendants of pending criminal investigations.⁶² In Justice Kennedy’s view, “it would make little sense to adopt a rigid interpretation of the seal provision that prejudices the Government by depriving it of needed assistance from private parties.”⁶³ Instead of mandatory dismissal, and in lieu of articulating a legal standard, the Court kept the coda simple: “In general, the question whether dismissal is appropriate should be left to the sound discretion of the district court.”⁶⁴ The Court took pains to note that seal-requirement violations could still result in discretionary dismissal (reading in that an affirmance may have resulted under the opposite outcome), the imposition of sanctions for violations of court orders, and disciplinary actions “to punish and deter seal violations even when dismissal is not appropriate.”⁶⁵

According to Professor Mann, “the opinion in this case is short and sweet, abjuring any extended discussion of the statute’s goals or purposes and treating the result as flowing directly from the statutory

58. *Id.* (quoting Oral Argument at 25:06–25:19, *Rigsby*, 137 S. Ct. 436 (No.15-513), <https://www.oyez.org/cases/2016/15-513>).

59. *Rigsby*, 137 S. Ct. 436, 444–45 (2016).

60. *Id.* at 442.

61. *Id.* at 442–43.

62. *Id.* at 443.

63. *Id.*

64. *Id.* at 444.

65. *Id.*

language.”⁶⁶ Compared to other opinions released around that time, Professor Mann suggested that the Court appeared “content to sit back and intervene as incrementally as possible, leaving the ongoing development of the law as much as possible to the lower courts.”⁶⁷

Although *Rigsby* rejected the argument that failure to file a complaint under seal compels dismissal of an FCA lawsuit, the case provides grist for savvy litigators to dismiss these cases on other grounds. The FCA affords the government the ability to move to dismiss these cases,⁶⁸ enabling litigators with an opportunity to persuade the government that dismissal is appropriate in view of superseding governmental interests. The ability of advocates to identify procedural shortcomings undermines the relator’s lawsuit. Juxtaposing those shortcomings as aligned with the government’s prevailing interests makes the case easier for the government to justify moving to dismiss.

IV. HOW ADVOCATES CAN USE STATUTORY VIOLATIONS TO SUPPORT DISMISSING FCA LAWSUITS THROUGH THE GOVERNMENT’S PREROGATIVE

A. *Emerging Split Among the Ninth, Tenth, and D.C. Circuits*

The FCA provides the government with the ability to dismiss a lawsuit brought under the statute: “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 a hearing on the motion.”⁶⁹ The Ninth, Tenth, and D.C. Circuits have diverged on the standard for adjudicating a governmental motion to dismiss.⁷⁰

66. Ronald Mann, *Opinion Analysis: Justices Reject Automatic Dismissal for Seal Violations in False Claims Act Cases*, SCOTUSBLOG (Dec. 6, 2016, 5:43 PM), <http://www.scotusblog.com/2016/12/opinion-analysis-justices-reject-automatic-dismissal-for-seal-violations-in-false-claims-act-cases/>.

67. *Id.*

68. See 31 U.S.C. § 3730(c)(2)(A) (2006 & Supp. 2010).

69. *Id.*

70. The Fifth Circuit has also noted, in passing, that the Government “retains the power . . . of unilaterally dismissing the defendant.” *Searcy v. Philips Elecs. N.*

In *Sequoia Orange Co. v. Baird-Neece Packing Corp.*, a citrus company brought a *qui tam* action under the FCA against other citrus companies for allegedly making false statements to the government about a citrus marketing program.⁷¹ Several years after the litigation began, the government intervened and moved to dismiss pursuant to 31 U.S.C. § 3730(c)(2)(A).⁷² The government sought dismissal because it had abandoned that marketing program amid “the background of a war in the citrus industry related to the administration of that program.”⁷³ The district court granted the government’s motion to dismiss.⁷⁴ On appeal, after reflecting that “[t]he *qui tam* statute itself does not create a particular standard for dismissal,”⁷⁵ the Ninth Circuit defaulted to the standard espoused by the district court.⁷⁶ Accordingly, the government has the burden of first identifying a valid purpose for dismissal and then articulating a rational relationship between that purpose and effectuating dismissal.⁷⁷ Upon a sufficient showing by the government, the burden switches to the relator “to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal.”⁷⁸ The Ninth Circuit reasoned that “[t]he same analysis is applied to determine whether executive action violates substantive due process,”⁷⁹ citing the Senate Report to the False Claims Amendment Act of 1986 and constitutional rulings on prosecutorial authority.⁸⁰ After determining

Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997). While this language resembles the D.C. Circuit’s “unfettered discretion” test, the Fifth Circuit has not articulated a test meriting discussion.

71. *Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1141 (9th Cir. 1998).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1145.

76. *Id.* at 1145–46.

77. *Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1341 (E.D. Cal. 1995).

78. *Id.* at 1347.

79. *Sequoia Orange*, 151 F.3d at 1145 (citing *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990)).

80. *Id.* at 1145–46 (citation omitted); *see also* *United States v. Redondo-Lemos*, 955 F.2d 1296, 1298–99 (9th Cir. 1992) (holding that the due process clause prohibits arbitrary or irrational prosecutorial decisions); S. REP. NO. 99-345, at 26 (1986) (finding that a hearing is appropriate “if the relator presents a colorable claim

the proper standard, the court applied the standard and affirmed the grant of the government's motion to dismiss.⁸¹ As part of its reasoning, the court recognized as legitimate the government's interest in eliminating legal battles among industry participants and avoiding litigation costs that could be passed onto taxpayers.⁸²

Five years later, in *Swift v. United States*, the D.C. Circuit declined to follow *Sequoia Orange*, crafting a standard more deferential to the government.⁸³ Susan Swift, an attorney with the Department of Justice, brought a *qui tam* action against some employees at the Justice Department.⁸⁴ Swift alleged that the employees had "present[ed] a false claim to the government" through "time sheets and leave slips."⁸⁵ The total amount of the alleged fraud was \$6,169.20.⁸⁶ Without intervening and before the defendants were served, the government moved to dismiss the complaint, "arguing that the amount of money involved did not justify the expense of litigation even if the allegations could be proven."⁸⁷ After a hearing, the district court granted the government's motion because "the government had demonstrated that dismissal was rationally related to a valid governmental purpose."⁸⁸

While the D.C. Circuit rejected the district court's application of *Sequoia Orange*, the appellate court affirmed the judgment as consistent with its interpretation of the statute.⁸⁹ Instead of a burden-shifting framework, the court adopted a more deferential approach to the government's position: the government has "an unfettered right to dismiss an action."⁹⁰ The court reasoned "that decisions not to prosecute . . . are unreviewable," and that the statute does not "give[]

that the settlement or dismissal is unreasonable in light of existing evidence, that the Government has not fully investigated the allegations, or that the Government's decision was based on arbitrary and improper considerations").

81. *Sequoia Orange*, 151 F.3d at 1146–47.

82. *Id.* at 1146.

83. *Swift v. United States*, 318 F.3d 250, 252–53 (D.C. Cir. 2003).

84. *Id.* at 250.

85. *Id.*

86. *Id.*

87. *Id.* at 251.

88. *Id.*

89. *See id.* at 252–54.

90. *Id.* at 252.

the judiciary general oversight of the Executive's judgment."⁹¹ The court criticized the Ninth Circuit's reliance on legislative history⁹² and refused to read in judicial review through the hearing requirement found in § 3730(c)(2)(A).⁹³ Under the Constitution, as the court explained, the Executive has the duty to "take Care that the Laws be faithfully executed."⁹⁴ The hearing, the court explained, "is simply to give the relator a formal opportunity to convince the government not to end the case."⁹⁵ Although an exception may exist for "fraud on the court," the court did not reach such a conclusion.⁹⁶ The D.C. Circuit did, however, subsequently make clear that broadening the exception should only occur in "exceptional" circumstances.⁹⁷

In 2005, the Tenth Circuit considered *Ridenour v. Kaiser-Hill Co.*, a case involving the Rocky Flats nuclear weapons manufacturing facility near Golden, Colorado.⁹⁸ Rocky Flats was in operation from 1953 through 1992.⁹⁹ In 1989, the Environmental Protection Agency designated Rocky Flats a "Superfund site" under the Comprehensive Environmental Response, Compensation, and Liability Act.¹⁰⁰ During the decontamination efforts, a few of Rocky Flat's security workers began to voice concerns about allegedly weak security.¹⁰¹ Those workers eventually filed a *qui tam* suit under the FCA, alleging that the contractors cleaning up the site "were paid for security measures they either did not provide or provided below acceptable levels."¹⁰²

After years of investigating the claim, the government decided not to intervene.¹⁰³ Four months after unsealing the case, the government requested the Department of Energy "be added to the

91. *Id.*

92. *Id.* at 253.

93. *Id.*

94. *Id.* (quoting U.S. CONST. art. II, § 3).

95. *Id.*

96. *Id.* (internal quotation marks omitted).

97. *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008).

98. *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 929 (10th Cir. 2005).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 929–30.

103. *Id.* at 930.

certificate of service to be kept aware of the progress of suit.”¹⁰⁴ The government eventually filed a motion to dismiss after becoming “concerned about the handling of classified information.”¹⁰⁵ The government argued “the lawsuit would delay the cleanup and closure of Rocky Flats, as well as compromise national security interests by risking inadvertent disclosure of classified information.”¹⁰⁶ After a five-day evidentiary hearing in which the government stipulated that the security workers’ claims were meritorious, the federal magistrate judge recommended granting the government’s motion to dismiss.¹⁰⁷ The district court adopted the recommendation, prompting the security guards to appeal.¹⁰⁸

After reviewing *Sequoia Orange* and *Swift*, the Tenth Circuit acceded to the Ninth Circuit’s approach in *Sequoia Orange* because “it recognizes the constitutional prerogative of the Government under the Take Care Clause, comports with legislative history, and protects the rights of relators to judicial review of a government motion to dismiss.”¹⁰⁹ Applying *Sequoia Orange*, the court affirmed the judgment because “protecting classified information from disclosure and the timely closing of the contaminated Rocky Flats facility are valid governmental purposes.”¹¹⁰ The court emphasized that the risk of inadvertent disclosure of classified material during litigation, even theoretically minimal, was enough to satisfy the government’s burden.¹¹¹ The government satisfied its burden, according to the court, because “there need not be a tight fitting relationship between [the decision to dismiss and the purpose for dismissing]; it is enough that there are plausible, or arguable, reasons supporting the agency

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 935–36. The Tenth Circuit left open the possibility that the *Swift* test may apply if the defendant has not been served. *See Wickliffe v. EMC Corp.*, 473 F. App’x 849, 853 (10th Cir. 2012) (“We need not resolve this question because even under the greater judicial scrutiny imposed by the *Sequoia* standard, the government’s motion to dismiss passes muster in this case.”).

110. *Ridenour*, 397 F.3d at 936.

111. *Id.* at 937.

decision.”¹¹² By the court’s estimate, the government proffered a “plausible, or arguable” reason for dismissal:

[L]itigation would delay the clean-up and closure of Rocky Flats by diverting the focus of security planners and management from the clean-up effort, by requiring the reassignment of personnel from the project to a review of classified documents for declassification or redaction in aid of litigation, and by placing an added financial burden on the project through a requirement to shift funds from clean-up litigation.¹¹³

When the burden shifted to the security guards, they argued that “the Government’s motion dismiss was fraudulent because it was motivated by a desire to spare DOE embarrassment over security lapses at Rocky Flats.”¹¹⁴ The security guards even intimated a massive cover-up conspiracy between the government and the contractors:

[A] revolving door of employment between the DOE and its contractors at Rocky Flats fostered a climate of cover-up of security violations at the facility, including misuse of classification of documents in aid of the cover-up, and inspired both the DOE and its contractors to prevail upon the Department of Justice to dismiss the *qui tam* action.¹¹⁵

In the face of extraordinary allegations of governmental collusion, the court disagreed with the security guards, concluding that no evidence existed that “the Department of Justice exercised anything other than its independent judgment in deciding to dismiss the case” even though “there was evidence of innocent cross-employment between the DOE and its contractors.”¹¹⁶

112. *Id.* (quoting *Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1341 (E.D. Cal. 1995)) (internal quotation marks omitted).

113. *Ridenour*, 397 F.3d at 937.

114. *Id.*

115. *Id.* at 937–38.

116. *Id.* at 938.

B. *The D.C. Circuit's Swift Test Holds to Fealty to the Constitution and Statute*

Distilling what should be the standard for the government to dismiss FCA lawsuits, the D.C. Circuit in *Swift* offers a solution moored in the Constitution and the text of the statute.¹¹⁷ Article II, Section 3 makes clear that the Executive Branch “shall take Care that the Laws be faithfully executed.”¹¹⁸ Prosecutorial discretion—determining whether to dismiss a case—exists “at the very core of th[is] executive function.”¹¹⁹ Allowing the judiciary to review these decisions and provide meaningful oversight hobbles this core function and undermines the government’s prerogative when normal acts of “prosecutorial discretion . . . ha[ve] long been held presumptively unreviewable.”¹²⁰ The Take Care Clause, put simply, supports the government’s “unfettered discretion” to dismiss *qui tam* actions.¹²¹ *Swift* does not insulate from review the government’s motion to dismiss, however, because the government’s request still can be

117. We decline to discuss the implications of whether the Government has intervened and whether the defendant has been served. *See, e.g.,* United States *ex rel.* Wickliffe v. EMC Corp., 473 F. App’x 849, 853 (10th Cir. 2012) (discussing that a different standard might exist if the defendant has not been served); Nasuti *ex rel.* United States v. Savage Farms, Inc., No. 12-30121-GAO, 2014 WL 1327015, at *9 (D. Mass. Mar. 27, 2014) (“[T]he court agrees with every circuit that has addressed this issue that intervention is not necessary before the Government may seek dismissal . . .”). Also, we note that the space is slight between *Swift* and *Sequoia Orange*. In practice, the government will always have a legitimate reason to dismiss the action; otherwise it would be undermining a lawsuit that could result in a beneficial judgment without using public resources for litigation expenses. *See, e.g.,* State Farm Fire & Cas. Co. v. United States *ex rel.* Rigsby, 137 S. Ct. 436, 443 (2016) (“Because the seal requirement was intended in main to protect the Government’s interests, it would make little sense to adopt a rigid interpretation of the seal provision that prejudices the Government by depriving it of needed assistance from private parties.”).

118. U.S. CONST. art. II, § 3.

119. *In re Sealed Case*, 131 F.3d 208, 214 (D.C. Cir. 1997).

120. *Id.*

121. *Cf. Myers v. United States*, 272 U.S. 52, 124–25 (1926) (“It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government.”).

reviewed for fraud, arbitrary and capriciousness, and illegality.¹²² But *Swift* does not impose a burden on the government in the first instance to identify “a valid government purpose” and “a rational relation between dismissal and accomplishment of the purpose.”¹²³ Rather, the burden rests with the relator to demonstrate to the government why a lawsuit should endure.

Apart from the constitutional implications, *Swift* has a foothold in the text of the statute. Section 3730(c)(2)(A) gives the government the option of dismissing a case upon a hearing on the motion: “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 a hearing on the motion.”¹²⁴ At the outset, the statutory text uses the term “government,” meaning “[e]xecutive”—not “[j]udicial.”¹²⁵ By using this term, Congress intimated judicial restraint. The statute places only two obligations on the government: (1) provide notice to the relator, and (2) consent to the relator having an opportunity to be heard before dismissing the case.¹²⁶ The statute neither requires the government to have support before seeking dismissal,¹²⁷ nor does it require a legal conclusion that the lawsuit is not meritorious.¹²⁸

Swift recognizes the propriety and salience of a hearing.¹²⁹ The hearing provides the relator with “a formal opportunity to convince the government not to end the case.”¹³⁰ *Swift* affords an opportunity to present evidence of fraud, arbitrary and capriciousness, or illegality.¹³¹ If the relator provides sufficient evidence that the government is dismissing the action because of fraudulent, arbitrary, or illicit reasons,

122. See *Swift v. United States*, 318 F.3d 250, 252–53 (D.C. Cir. 2003).

123. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998).

124. 31 U.S.C. § 3730(c)(2)(A) (2006 & Supp. 2010).

125. *Swift*, 318 F.3d at 252.

126. See 31 U.S.C. § 3730(c)(2)(A) (2006 & Supp. 2010).

127. See *id.*

128. See *id.*

129. See *Swift*, 318 F.3d at 253 (citations omitted).

130. *Id.*

131. See *id.* (leaving open the possibilities for exceptions such as “fraud on the court”).

the court retains authority to deny the government's motion.¹³² But the advent of the government's filing of a motion in itself should give courts pause before retaining the case.

*C. Call to Advocates: Statutory Violations May Encourage
Government Dismissal*

Upon notice of an FCA lawsuit, advocates of those accused of fraud should survey the case for potential grounds for dismissal at the outset of litigation. While defendants have statutory tools at their disposal, advocates should engage the government as well to understand how the lawsuit implicates sovereign concerns. If the government is swayed by the defendant's position, the case for dismissal becomes easier no matter the standard of review adopted by the court.

To mark the inflection point at which the government would forgo a passive avenue to collect penalties from the outsourced work of the relator, advocates must explain why the government stands to lose more in its intangible sovereign interests than it could recover from a successful prosecution. Put differently, advocates need to show that by winning, the government really loses in the end. Superseding costs include disclosing classified information,¹³³ compromising national security,¹³⁴ excessive demands on the government's time,¹³⁵ overwhelming discovery,¹³⁶ damaging foreign relations,¹³⁷ as well as any valid injury that dismissal can prevent or deter.¹³⁸ In Judge Learned Hand-style analysis, if the risk of governmental degradation multiplied by the magnitude of degradation exceeds the prospective recovery, the government should move to dismiss.¹³⁹

132. See, e.g., *United States v. Redondo-Lemos*, 955 F.2d 1296, 1298–99 (9th Cir. 1992) (holding that due process prohibits arbitrary or irrational prosecutorial decisions).

133. *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 936–37 (10th Cir. 2005).

134. *Id.*

135. *Swift v. United States*, 318 F.3d 250, 254 (D.C. Cir. 2003).

136. *Id.*

137. *Cf. Ridenour*, 397 F.3d at 937.

138. *See id.*

139. *Cf. In re Aramark Sports & Entm't Servs., LLC*, 831 F.3d 1264, 1280 (10th Cir. 2016) (quoting *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d

As discussed above, while the Constitution and statutory text support *Swift*—irrespective of whether a court applies *Swift* or *Sequoia Orange*—advocates should use statutory violations as low-hanging fruit to encourage the government to file motions to dismiss. That an accurate accounting of costs and benefits of litigation might not be apparent from the onset of litigation elevates statutory violations as clean, unobjectionable reasons to begin discussions toward moving to dismiss the case. To support this premise, we use *Sequoia Orange*, the standard least deferential to the government, to show how this would work under the facts in *Rigsby*.

The government’s predisposition in *Rigsby* was to oppose dismissing the lawsuit.¹⁴⁰ Instead of the government seeking dismissal, State Farm moved to dismiss the relators’ case “on the grounds that they had violated the seal requirement.”¹⁴¹ What would have happened if State Farm had advocated for the government to dismiss the case because the Rigsbys violated the seal, which could have impeded ongoing criminal or civil investigations?

Applying *Sequoia Orange*, advocates should assist the government in identifying a valid governmental purpose for dismissal. *Rigsby* made clear that “the seal requirement was intended in main to protect the Government’s interests.”¹⁴² If the government agrees that violating the seal provision—a statutory mechanism intended to protect its interest against disclosure—should result in dismissal of the lawsuit, then the government will have identified a valid governmental purpose (i.e., enforcement of the statutory requirement to file the case under seal).¹⁴³

After identifying a valid governmental interest, advocates should apprise the government of “a rational relation between

Cir. 1947)) (“In his classic formulation Judge Learned Hand wrote that whether a person is negligent ‘is a function of three variables: (1) The probability [of injury]; (2) the gravity of the resulting injury, if [it occurs]; (3) the burden of adequate precautions.’”).

140. See *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 443 (2016).

141. *Id.* at 441.

142. *Id.* at 443.

143. *Cf. United States ex rel. Wickliffe v. EMC Corp.*, 473 F. App’x 849, 853–54 (10th Cir. 2012) (finding that the government had a valid interest in enforcement of the first-to-file bar).

dismissal and accomplishment of the purpose.”¹⁴⁴ The Tenth Circuit has explained that, “to establish a rational relation to a valid governmental purpose, ‘there need not be a tight fitting relationship between the two; it is enough that there are plausible, or arguable, reasons supporting the agency decision.’”¹⁴⁵ The Ninth Circuit similarly explained that this requirement should not “pose significant barriers to the Executive Branch’s exercise of its prosecutorial authority.”¹⁴⁶ Here, a violation of the seal requirement would accomplish the purpose of protecting the sovereign interest of deterring relators from violating the seal requirement in future cases. Additional grounds include cases in which seal-requirement violations threaten other important governmental interests, such as national security.¹⁴⁷ Once the standard is met, faithful application of *Sequoia Orange* should compel dismissal because the government is in the best position to determine whether the violation of the seal requirement harmed its rights.¹⁴⁸ The only way that the relator could overcome this showing is through evidence of fraud or illegality¹⁴⁹—no small feat in the least.

144. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1988).

145. *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 937 (10th Cir. 2005) (quoting *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1341 (E.D. Cal. 1995)).

146. *Sequoia Orange*, 151 F.3d at 1145–46 (quoting *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 756 (9th Cir. 1993)).

147. *See, e.g., Ridenour*, 397 F.3d at 937 (finding that the possibility of inadvertent disclosure of classified documents was sufficient to warrant dismissal).

148. *See Mann, supra* note 29 (“Justice Elena Kagan pressed a similar perspective late in Sullivan’s argument, positing a case with ‘a pretty minor breach that was not likely to cause any harm, and in fact did not cause any harm, and the government comes in to the district court and says “it’s not in our interests for this case to be dismissed.” Why should the court nonetheless dismiss the case?’”).

149. *See, e.g., Ridenour*, 397 F.3d at 938 (finding evidence of “cross-employment between” the government and the defendant did not rise to a level of a climate to cover-up the false claims).

V. CONCLUSION

As Justice Louis Brandeis reminded, sunlight is “the best disinfectant” of public ill.¹⁵⁰ Although spotlighting fraud on the government is beneficent, the government is in the best position to determine whether something needs disinfecting. When confronted with a relator brandishing a lawsuit alleging violations under the FCA, the scope of liability can be ruinous.¹⁵¹ Accused violators of the FCA need not lie down and surrender in view of dire circumstances because Congress has provided several safety valves to challenge the veracity and propriety of these lawsuits. Among those is the ability to seek dismissal of the lawsuit in tandem with the government. A litigation tactic involving the government is Solomonic in all instances because defendants can gauge the government’s interest in the lawsuit as well as understand how sovereign concerns are implicated. If the government is swayed by the defendant’s position, the case for dismissal becomes easier no matter standard of review adopted by the court. A low-value case or one that cuts against superseding interests is ripe for discussion with the government. In the litigation dance among three actors, when the government takes the lead, the favored party is not left behind. The challenge becomes making sure you are the favored partner.

150. JUSTICE LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

151. *See, e.g.,* United States *ex rel.* Harman v. Trinity Indus., 166 F. Supp. 3d 737, 764 (E.D. Tex. 2015) (“Consistent with the Orders stated above, pursuant to Rule 58 of the Federal Rules of Civil Procedure, and in accordance with the jury’s verdict, the COURT FURTHER ORDERS AND HEREBY ENTERS FINAL JUDGMENT that the United States Government have and recover the sum of \$464,352,525.00 from Defendants Trinity Industries, Inc. and Trinity Highway Products, LLC, jointly and severally; and, that the Relator, Joshua Harman, have and recover the sum of \$218,021,090.75 from Defendants Trinity Industries, Inc. and Trinity Highway Products, LLC, jointly and severally.”).