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False Claims Act

Circuit Tension Over FCA Seal Provision May Require Supreme Court Resolution

Two circuit court decisions issued this past summer involving the consequences for relators' violations of the False Claims Act's seal provisions highlight a conflict between circuits that the Supreme Court might need to resolve.

Specifically, the Fourth and Fifth circuits followed precedent from the Second and Ninth circuits, which say that seal violations shouldn't necessarily result in the dismissal of these cases. These holdings conflict with Sixth Circuit precedent, which has a rigid per se dismissal rule for relators' violations.

The statute provides at 31 U.S.C. § 3730(b)(2) that a relator's 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. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.''

Guidance Needed. Aaron P. Silberman of Rogers Joseph O'Donnell told Bloomberg BNA in an e-mail that there is clearly a circuit split, and that while disputes over violations of FCA seal requirements aren't that common, ''the results if a district court gets it wrong, to any party's detriment, may be significant, so Supreme Court guidance would be a welcome development.''

Because the FCA is unclear about the consequences of a relator's failure to comply with the seal provisions, a case-by-case approach is appropriate, Silberman said.

''Guidance would be very helpful regarding how courts should weigh factors such as the kind and amount of information revealed, the relator's culpability, the likely harm to the government's ability to investigate, and the likely harm to the defendant's reputation,'' he said.

He added that he doesn't believe one factor should trump all others. However, ''significant impairment of the government's ability to investigate clearly should be among the most important considerations,'' he said.

Silberman added that ''where the combination of factors justify it, the court should dismiss the relator's complaint even where the government does not request it, though it would certainly be appropriate for the court to take the government's position on dismissal into account.''

Mark Troy of Crowell & Moring told Bloomberg BNA in an e-mail that the Supreme Court has more important FCA issues to confront — such as the viability of implied certification claims and the manner in which damages can be calculated in such cases where the government really has suffered no actual financial loss — but that the circuits are surely divided on seal violations.

He said the circuit conflict stems from a lack of clarity from Congress. Moreover, ''while relators are required to file the complaint in camera and the court is required to maintain the complaint under seal, the FCA does not explicitly prohibit relators from disclosing the existence of the case,'' he said.

Attorney Disclosures. The circuit to most recently weigh in on this matter was the Fourth Circuit in *Smith v. Clark/Smoot/Russell*, 2015 BL 255832, 4th Cir., No. 14-1406, 8/10/15. It ruled that a relator was allowed to pursue his case despite communication between his attorney and defendants that violated the 60-day waiting period (104 FCR 869, 8/18/15).

Relator Brian K. Smith worked on several construction projects in the Washington, D.C., area that were subject to the Davis-Bacon Act, which requires government contractors to pay their workers no less than locally prevailing wages.

Smith's attorney filed his FCA action under seal in camera, alleging that the defendants falsely certified to the government that they had complied with the Davis-Bacon Act.

The next day, the attorney called a defendant's in-house counsel to inform him about the filing. The attorney also told another defendant's human resources representative. The district court dismissed the case with prejudice for this violation of the FCA's seal requirements.

Dismissal was improper, the Fourth Circuit said, because the violating communication didn't result in an ''incurable and egregious frustration'' of the statutory objectives underlying the FCA's filing and service requirements.

Despite the violation, the government could still investigate the alleged fraud and determine if it was already investigating the same issue. In addition, because the communication didn't involve the public, the defendants' reputations suffered no harm, according to the court.

Robert S. Salcido of Akin Gump told Bloomberg BNA in an e-mail Aug. 11 that this interpretation undermines the statutory language which says that the action shall be filed under seal and remain under seal.

He added that the ruling imposes costs on the government with no corresponding benefit. ''The cost of permitting such actions to proceed is that relators are not sufficiently deterred from prematurely publicizing the case when their self-interest so dictates,'' he said.

 ISSN 0014-9063

Incurable Frustration. The Fourth Circuit relied on the reasoning in *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 998 (2d. Cir. 1995), which involved allegations that General Electric Co. submitted false claims related to the production of radar systems.

The relators didn't file a notice of motion or otherwise arrange for the complaint to be filed in camera. In addition, the complaint itself didn't indicate that it should be filed under seal and wasn't submitted in a sealed envelope.

Shortly after the filing, a reporter arranged for an interview with the relators, and a newspaper article published two days later revealed the substance of the complaint.

The defendants moved to dismiss for failing to comply with Section 3730(b)(2), arguing that dismissal was necessary under the statutory scheme. The court agreed, saying these violations ''incurably frustrated'' the interests protected by Section 3730(b)(2), such as:

- allowing the government time to fully evaluate the lawsuit and decide whether to intervene;
- protecting defendants from having to answer complaints without knowing whether the government or relators would pursue the litigation;
- protecting a defendant's reputation from meritless qui tam actions; and
- incentivizing defendants to settle so they can avoid the unsealing of a case.

The relators' counsel said his clients shouldn't be penalized because he did his best to satisfy the seal requirement. However, the court said the attorney only made a ''marginal'' effort to do so and mentioned that the relators' primary objective was to get one relator's job back.

There appears to be a significant difference between an attorney disclosing the existence of a case in two private conversations, and an attorney disclosing the existence of a case to a newspaper reporter to persuade a party to rehire a relator. Nonetheless, the Second and Fourth circuits' incurable frustration test allows courts to assess the egregiousness of a seal violation before grounding FCA litigation.

'Fundamental Purpose' Not Imperiled. The other circuit to weigh in on this issue recently was the Fifth Circuit in *United States ex rel. Rigsby v. State Farm Fire and Cas. Co.*, 2015 BL 223044, 5th Cir., No. 14-60160, 7/13/15, (104 FCR 773, 7/21/15), which, like the Fourth Circuit in *Clark/Smoot/Russell* excused a seal violation.

In *Rigsby*, relators accused an insurance company of submitting false claims to the government for payment on flood policies arising out of damage caused by Hurricane Katrina.

The insurance company said dismissal was necessary because the relators' counsel violated the seal provision by revealing the existence of the lawsuit to several news outlets by e-mailing evidence, some of which included the case caption. The relators also participated in interviews that led to the publication of news stories about the case and told a congressman about the litigation.

Most of these events, the court said, occurred before the partial lifting of the seal to allow the relators to address related litigation in Alabama.

But the court ruled that these transgressions didn't merit dismissal because the disclosures didn't result in publication of the lawsuit before the seal was partially lifted. Because the disclosures themselves didn't notify the insurer of the lawsuit, the court said ''a fundamental purpose of the seal requirement — allowing the government to determine whether to join the suit without tipping off a defendant — was not imperiled.''

The court also held that the seal violations weren't severe because there wasn't a complete failure to file under seal or serve the government.

Finally, the court said the attorney's conduct didn't attach bad faith to the relators, as there was no indication they the authorized the disclosures.

Three-Part Test. Because this was a matter of first impression, the Fifth Circuit relied on the standard used in *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 243–44 (9th Cir. 1995), which involved the disclosure of a qui tam action to a major newspaper.

The Ninth Circuit acknowledged the violation but said requirements of Section 3730(b)(2) aren't jurisdictional, and violation of those requirements doesn't per se require dismissal.

Courts should ensure a balance between encouraging private FCA actions and allowing the government an adequate opportunity to evaluate whether to join the lawsuit, the Ninth Circuit said.

When considering whether to sanction a relator with dismissal, the Ninth Circuit said courts must determine (1) whether and to what extent the seal violation caused harm to the government; (2) the relative severity or nature of the disclosure; and (3) whether the disclosure occurred in bad faith.

Troy said this case ''rejected the per se test, requiring that defendants show actual harm to the government.''

''The Ninth Circuit failed to recognize, as the Second Circuit did, that the seal also protects defendants from the public disclosure of harmful yet meritless allegations that the government could dismiss prior to any public disclosure,'' he said. ''*Lujan* effectively reduces a defendant to having to argue that the breach of the seal harmed the government's investigation; that is, that having learned of the allegations, the defendant must have altered or destroyed evidence or taken some other action to hamper the government's investigation. Certainly no defendant wants to put forth that argument.''

The three-part test for the Fifth and Ninth circuits, and the incurable frustration analysis used by the Second and Fourth circuits, starkly differ from the simple standard used by the Sixth Circuit.

Per Se Dismissal. According to an unsuccessful filing by the insurer in *Rigsby*, (104 FCR 896, 8/25/15), the Supreme Court should resolve the substantial conflict between the Ninth Circuit's test and the per se dismissal rule in *United States ex rel. Summers v. LHC Group Inc.*, 6th Cir., No. 09-5883, 10/4/10, (94 FCR 363, 10/12/10).

The Sixth Circuit case involved accusations that an in-home health care firm billed Medicare for services after they were no longer needed. The complaint was posted on a public online portal and was available to anyone with an account.

Days later, the relator's counsel filed a motion to seal the case, but the district court said he failed to set forth a basis on which it should be granted.

The defendant said the failure to file under seal required dismissal, but before the district court could rule on this motion, the relator again publicly filed a motion

   ISSN 0014-9063

to amend the complaint. The court then dismissed the case.

On appeal, the relator urged adoption of the *Lujan* test, but the court said its balancing test constituted judicial overreach and a dismissal with prejudice was required.

No Exception. The court said Congress established the 60-day in-camera period as the proper amount of time to allow the government to investigate the allegations while protecting a relator's rights in the litigation.

By allowing the government to intervene before the 60-day period expired, Congress knew there were circumstances that would remove the need for the full 60-day period and knew how to provide for them, the court said.

''No such exception is found in the statute or in its legislative history for situations in which a relator simply fails to abide by the under-seal requirement,'' the court said.

Congress also injected a seal provision exception by allowing the government to extend the 60-day period upon a showing of good cause. If Congress could include an extension exception, the court said, it could have included an exception allowing for the shortening of the 60-day period, but didn't do so.

The court also rejected the argument that the mere possibility that the government might be harmed by disclosure isn't enough reason to justify dismissing the entire action. The possibility of harm from a disclosure is the reason the in-camera requirement exists, the court stated.

Troy added that the FCA's ''legislative history indicates that the purpose of the seal requirement is to prevent the defendant from learning about the case while the government conducts its investigation. The Sixth Circuit has held that this purpose is frustrated if the relator discloses the case, and therefore, the failure to file in camera is a per se violation that merits dismissal.''

Ultimately, the court concluded that based on how Congress structured the seal provisions, it would have included exceptions for relators' violations if it so desired. Without a specified exception for relator disclosures to rely upon, a dismissal was required under the Sixth Circuit's rationale.

Conclusion. Troy said most FCA practitioners are careful to avoid seal violations, and therefore this issue doesn't arise often.

''When it does occur, the directive from most circuit courts is for the district court to consider an appropriate sanction on a case-by-case basis as they do for a wide array of offenses arising in litigation,'' he said.

Nonetheless, the stark difference in the Sixth Circuit's approach to seal violations compared to those of the other four circuits might be an issue the Supreme Court chooses to resolve.

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