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Three Considerations for FCA Defendants in Light of Supreme Court's Rejection of Dismissal as Mandatory Remedy for FCA Seal Violations

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On December 6, 2016, the ***Supreme Court*** of the United States issued its decision in ***State Farm Fire & Cas. Co. v. United States ex rel. Rigsby***, 2016 U.S. LEXIS 7420 (U.S. Dec. 6, 2016), holding that a violation of the ***False Claims Act (FCA)*** seal requirement does not mandate dismissal of a relator's complaint. While the Supreme Court held that dismissal was not mandatory, it offered little guidance to lower courts on how to fashion appropriate remedies for future seal violations. To help fill this void, we offer three suggestions for FCA defendants facing a case involving a seal violation.

I. The Rigsby Decision

In *Rigsby*, relators (former claims adjusters) filed a qui tam complaint under seal against State Farm alleging that State Farm instructed them to misclassify certain claims after Hurricane Katrina. State Farm moved to dismiss the complaint, because the relators' former attorney had violated the FCA seal requirement, 31 U.S.C. §3730(b)(2), by disclosing the complaint to several news outlets. The District Court applied a multifactor balancing test (citing a test created by the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.,* 67 F.3d 242 (9th Cir. 1995)) and determined that the factors weighed against dismissal. After the relators prevailed at trial, State Farm appealed. The Court of Appeals for the Fifth Circuit affirmed, holding that the FCA does not mandate dismissal whenever its sealing requirements are violated.

After granting *certiorari* to resolve a circuit split—the Sixth Circuit applied a mandatory dismissal rule, and the Second and Fourth Circuits applied a slightly different balancing test—the Supreme Court held that nothing in the FCA's text or legislative history requires dismissal be the only remedy for a seal violation. The Supreme Court noted that the FCA does not specify a remedy for a seal violation, and the legislative history explains that the seal requirement was intended to protect the government's interest. Consequently, the Supreme Court concluded that "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."

Although it told lower courts what not to do in the event of a seal violation, the Supreme Court offered

little guidance for future cases beyond its observation that "the question whether dismissal is appropriate should be left to the sound discretion of the district court." The Supreme Court failed to address which balancing test lower courts should apply, saying only that the *Lujan* factors "appear to be appropriate." Writing for the Court, Justice Kennedy explained that "it is unnecessary to explore these and other relevant considerations," because "[t]hese standards can be discussed in the course of later cases." As a result, district courts have significant discretion to impose a wide variety of remedies for violations of the FCA's seal (ranging from no penalty to dismissal).

II. The Aftermath: Appropriate Remedies for Future Seal Violations

While the Supreme Court's decision in *Rigsby* offers little guidance for addressing FCA seal violations, there are three significant steps FCA defendants can take to increase the odds of securing a meaningful remedy for a seal violation.

1. Advocate for alternative remedies.

First, the practical consequence of *Rigsby* is that it will be difficult to obtain dismissal of a *qui tam* action based on a seal violation. However, the Supreme Court was sensitive to the argument that the absence of any consequences for a seal violation would encourage strategic violations of the FCA's seal. It balanced that concern with its desire to effectuate the purpose of the FCA's seal, which the Court explained was intended to protect the government. It also expressed concern that, under the facts in Rigsby, the relators would be harmed by the actions of their rogue counsel, who was later disbarred and incarcerated for an unrelated judicial bribery scheme.

When seeking a remedy for a seal violation, FCA defendants should propose sanctions that target the responsible party. Where, as in *Rigsby*, it appears the relator's counsel acted alone, defendants should seek sanctions directed specifically to relator's counsel, such as disqualification and/or forfeiture of the right to recover attorneys' fees if the relator prevails in the litigation. Where the relator knew of or participated in the seal violation, defendants can seek forfeiture of the relator's share of any recovery. Defendants should also request that the court order the seal violator(s) to reimburse the defendant for the attorney's fees and costs incurred to investigate the seal violation and to bring the motion for sanctions.

Finally, defendants should not shy away from seeking dismissal as one of several alternative remedies. Particularly in cases where the relator and his/her counsel acted knowingly to violate the seal, dismissal can be an appropriate remedy. Defendants should make clear that any dismissal would be "without prejudice" to the government—a remedy courts frequently impose when a relator fails to comply with a multitude of other statutory requirements, such as stating a claim for relief or complying with the first-to-file or public disclosure bars.

2. Collect evidence to show the scope of the seal violation and the harm it caused.

Second, the availability of a remedy for the seal violation will depend, in part, on demonstrating that the seal violation caused harm. The lower courts have adopted different approaches about what type of harm warrants a sanction. Most circuits require a showing of actual harm to the government. Others (including the Second and Fourth Circuits) require only a showing that the violation "incurably frustrated" the purpose of the FCA seal requirement. The Supreme Court expressed tacit approval of the actual harm to the government approach but did not mandate the use of a particular balancing test. In addition, there is some disagreement among the lower courts about whether harm to a defendant's reputation is a relevant factor for imposing sanctions for seal violations. Although the

Court's opinion was silent on this issue, at oral argument both the justices and counsel for the United States agreed that harm to the defendant is a relevant factor in appropriate cases. Therefore, defense counsel should gather evidence of harm to both the government and the defendant connected to a violation of the FCA's seal.

The first step is to gather and preserve all evidence of the seal violation. Newspaper and television stories discussing the *qui tam* action, particularly those that espouse a position on the merits of the claims or DOJ's intervention decision, provide valuable evidence of harm to both the defendant and the government. One purpose of the seal is to allow the government to investigate the allegations privately and to decide whether the claims merit the additional resources and attention of the Department of Justice without external public or political pressure. Thus, any public scrutiny of a case before DOJ has completed its investigation is inconsistent with the purpose of the FCA's seal, and harms the integrity of the investigation process Congress specified, which warrants some sanction.

The next step is to dig deeper in an attempt to show that the seal violation caused actual harm to the government or the defendant. As a practical matter, actual harm to the government is incredibly difficult to establish, and the government is unlikely to concede that the violation caused harm, particularly where doing so might result in dismissal of the action. However, defendants and their counsel should not simply accept the government's assertion that it was not harmed by the violation. In cases where the government either has intervened in the litigation or has filed a statement of interest asserting that the seal violation caused no harm, defendants can and should serve discovery on DOJ to test the basis for (and veracity of) these assertions. Where DOJ has not intervened or has not taken a position on the seal violation, defendants should consider a more circumspect approach to discovery to avoid drawing DOJ opposition to the motion for sanctions.

3. Aggressively seek discovery regarding the motivation for the seal violation.

While some seal violations are inadvertent, in many cases (like *Rigsby*), relators and/or their counsel violate the seal intentionally for strategic purposes. While some sanction may be appropriate, even in cases where the violation was unintentional, courts are likely to reserve the harshest penalties for those instances where the violation was intentional or malicious. Accordingly, defendants should not take at face value assertions of good faith by relators and their counsel. Instead, defendants should request discovery regarding the circumstances surrounding the seal violation, including the personal notes and records of relator and relator's counsel, as well as evidence of correspondence with members of the media. The prospect of such discovery—combined with the potential for some sanction against the relator or relator's counsel—could create additional leverage for a favorable settlement.

III. Conclusion

Even without a requirement for mandatory dismissal, violations of the FCA's seal remain a serious issue that merits a forceful response by defendants. By thoughtfully framing discovery and requests for sanctions, defendants can favorably influence the discussion of the considerations relevant to seal violations that the Supreme Court left to future cases.

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