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FEATURE COMMENT: Sealed To Perfection? Supreme Court Considers What To Do When A Relator Violates The FCA Seal Requirement

For the third term in a row, the U.S. Supreme Court will decide a case brought by a qui tam relator under the federal False Claims Act. On November 1, the Supreme Court heard oral argument in *State Farm & Cas. Co. v. U.S. ex rel. Rigsby*. At issue in *Rigsby* is the FCA's seal requirement. When a relator files a qui tam complaint under the FCA, the complaint must be filed under seal so that the Government can decide whether to intervene before the defendant learns about it. In theory, this preserves the integrity and secrecy of any ongoing investigation until the Government decides how to proceed.

The FCA does not say, however, what should happen if a relator violates the seal requirement by publicly revealing allegations from the complaint while it is under seal and being investigated by the Government. The Court granted review in *Rigsby* to resolve a circuit split about what should happen when the seal requirement is violated.

The regional circuits have developed three tests for dealing with seal violations: (1) a bright-line rule that mandates dismissal, (2) a rule that considers whether the violation frustrates the congressional goals served by the seal requirement, and (3) a balancing test that focuses on whether the violation actually harms the Government. This FEATURE COMMENT summarizes the facts of *Rigsby*; describes the current state of the law, including the three tests adopted by the regional circuits; and concludes with analysis of the arguments made during oral argument.

The Seal Requirement—Under the FCA,

> [a] copy of the relator's complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government … 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.

31 USCA § 3730(b)(2). This requirement provides the Government with time to investigate and determine whether it wants to intervene. The Government regularly seeks numerous extensions while it investigates the conduct alleged in a relator's complaint, and this investigatory period can last for years.

The seal requirement also reduces the risk that the existence of a suit will compromise an ongoing criminal investigation. It has also been argued by the defense bar that the seal requirement protects a defendant's reputation until further investigation is performed. If the Government decides not to pursue the case at that time, the relator may proceed with the action on its own.

Although the importance of the seal is well-established, the case law is unsettled about what should happen if a relator violates the seal requirement. *Rigsby* will likely resolve the tension between the circuits and establish a single test for addressing seal violations.

The *Rigsby* Seal Violation—Although the question before the Court may sound like a dry procedural issue, the *Rigsby* case arises from a colorful set of facts and underscores the potential for relators to violate the seal in bad faith in an effort to leverage the media to extract settlements from FCA defendants. The case was brought by sisters Kerri Rigsby and Cori Rigsby, who worked as claims adjusters at a company which held a contract with insurance company State Farm. Their FCA suit alleged that State Farm committed fraud in the aftermath of Hurricane Katrina by misclassifying wind damage as water damage. According to the relators' theory, State Farm was incentivized to

classify losses as flood damage because these claims would be covered by the Government under the federal flood-insurance program.

The Rigsby sisters were represented by well-known plaintiffs' attorney Richard Scruggs, who earned a reputation as the "King of Torts" because of his successes litigating asbestos and tobacco cases. Scruggs also served six years in federal prison on charges that he bribed a judge in a case unrelated to the *Rigsby* matter. In his class action tort cases, Scruggs is famous for having used the media and public officials to shape public opinion and pressure defendants into large settlements.

Scruggs attempted to use the same tactics in the FCA case against State Farm, and he shared information about the suit with news publications and a member of Congress. While the case was still under seal in the U.S. District Court for the Southern District of Mississippi, the Rigsby sisters discussed their allegations in an interview with ABC's 20/20, although they did not go so far as to say "we filed a lawsuit against State Farm." When the complaint was finally unsealed—a year after the 20/20 interview—State Farm moved to have the case dismissed on the grounds of relators' "repeated intentional violations of the FCA seal requirement."

State Farm argued that the relators leaked confidential documents to "to fuel a media campaign designed to demonize and put pressure on State Farm to settle," and that the relators hired "one of the nation's most prominent public relations firms to assist them with this all-out campaign, which featured the Rigsbys in media interviews, filming, and photo shoots." The district court declined to dismiss the relators' complaint on the basis of the seal violations, and the case proceeded to trial, where the jury found that State Farm had violated the FCA. The U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's decision not to dismiss the complaint because of the violation of the seal requirement, and on May 31, the Supreme Court agreed to review the case.

The Circuit Split—As recognized by the Fifth Circuit in *Rigsby*, there currently is a three-way circuit split on the seal violation issue.

The Sixth Circuit has concluded that a violation of the FCA's seal requirement mandates an automatic dismissal of the case. See *U.S. ex rel. Summers v. LHC Grp., Inc.*, 623 F.3d 287 (6th Cir. 2010). In *Summers*, the court reasoned that since

> the very existence of the *qui tam* right to bring suit in the name of the Government is created by statute, it is particularly appropriate to have the right exist in a given case only with the preconditions that Congress deemed necessary for the purpose of safeguarding the Government's interests.

Id. Moreover, the Sixth Circuit recognized that a relator might file a complaint under seal and then expose the "defendant to immediate and hostile media coverage" in an effort to obtain "leverage to demand that a defendant come to terms quickly." Id.

Under the approach of the Second and Fourth circuits, dismissal is proper if a seal violation "incurably frustrate[s]" the interests served by the seal rule, which include shielding the defendant from meritless lawsuits and providing the Government with the ability to evaluate a suit fully and determine if it relates to matters being criminally investigated. See, e.g., *U.S. ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995), 38 GC ¶ 31; *Smith v. Clark/Smoot/Russell*, 796 F.3d 424 (4th Cir. 2015).

In *Pilon*, relator's counsel failed to file the FCA complaint under seal and serve the Government. Counsel also allowed the relator to discuss the complaint in an interview a few hours after the case was filed on an open docket. Id. at 997. The Second Circuit affirmed the trial court's dismissal of the complaint and reasoned that the relator's failure to comply with the procedural requirements "incurably frustrated" the statutory purpose underlying those requirements. As the Second Circuit noted, there is a risk that such a blatant violation will tip off the defendant before the Government has a chance to review, but there is also an increased risk that a premature unsealing of a meritless case will harm a defendant's reputation.

> [A] defendant's reputation is protected to some degree when a meritless *qui tam* action is filed, because the public will know that the government had an opportunity to review the claims but elected not to pursue them. In addition, when a potentially meritorious complaint is filed, a defendant may be willing to reach a speedy and valuable settlement with the government in order to avoid the unsealing.

Id. at 999.

The Ninth Circuit takes a slightly different approach, holding that dismissal is appropriate only if the relator's seal violation caused actual harm to the Government. In *U.S. ex rel. Lujan v. Hughes*

Aircraft Co., 67 F.3d 242 (9th Cir. 1995), a relator made statements to the press about the existence and nature of a complaint while it was still under seal. The Ninth Circuit developed a three-factor balancing test to evaluate whether dismissal was proper:

1. Whether the disclosure actually harmed the Government.
2. The nature and severity of the violation (for example, disclosing underlying facts in general terms in a newspaper, a minor violation, versus completely failing to file the complaint under seal, a major violation).
3. The presence or absence of bad faith or willfulness.

Applying these factors, the Ninth Circuit held that the Government did not suffer harm because the defendant was already aware of the prospective qui tam allegations, and the news article did not provide defendant with any additional information about the case while the Government was investigating the matter. Id. The court also reasoned that the relator's violation was less severe than a failure to file under seal and serve the Government. Id.

In *Rigsby*, the Fifth Circuit acknowledged the divergent opinions of the Second, Sixth and Ninth circuits, and opted to apply the Ninth Circuit's three-factor balancing test. Rejecting the Sixth Circuit's per se standard, the Fifth Circuit held that "a seal violation does not automatically mandate dismissal." *U.S. ex rel. Rigsby v. State Farm & Cas. Co.*, 794 F.3d 457, 471 (5th Cir. 2015), cert. granted, 136 S. Ct. 2386 (2015) (No. 15-513).

Argument before the Supreme Court—State Farm argued for a per se rule under which courts must dismiss an FCA qui tam complaint if a relator violates the seal requirement, except for certain de minimis violations. Although such a rule would be easy to apply, the justices seemed skeptical that such a rule would be appropriate. Justice Alito, for example, saw problems with applying such a rule, noting that a rule with de minimis exceptions is not a per se rule, and he also found problems with cases in which a disclosure "was inadvertent, it was not done in bad faith, and it cause[d] no harm."

In the alternative, State Farm argued that there should "be a discretionary standard akin to equitable discretion." Under such a standard, "bad faith should be the primary factor," and "the severity of the violation should be measured by what the relator did or the relator's counsel did at the time of the disclosure, not the consequences; its character, not its consequences; ex-ante, not ex-post." State Farm went on to argue that "actual harm to the government should not be a requirement."

Justice Kagan asked what it would mean to "make bad faith primary." She cited one example "where there was bad faith, but in fact there was also 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." Justice Kagan questioned why such a case should be dismissed.

State Farm responded that dismissal might not be warranted in Justice Kagan's hypothetical, but the facts in *Rigsby*, State Farm maintained, are different:

> Here, the courts, by looking to the consequences, failed to describe as severe—and the Government actually calls this a minor violation—to leak the contents of the complaint to national news media. If you affirm, you are sending a message to every relator in the country in *qui tam* suits, and their counsel, leak away with no consequence.

The relators, who argued for only a few minutes, sought to reframe the issue as

> not really whether the courts will punish and deter violations of the False Claims Act seal requirement, but whether they will do so in a way that is counterproductive to the Government's interest, or whether they will instead impose other sanctions that would benefit the Government, allow cases to go forward, and simultaneously create an effective deterrent.

The Government's attorney then argued for several minutes, pressing the point that the purpose of the seal requirement "is to protect the Government by making sure that potential targets of criminal and civil investigations are not tipped off." In response, Justice Sotomayor asked how the Court should "measure the appropriate sanction," and "based on what evaluation?" She was particularly interested in whether a sanction should be based on the harm caused after the fact or on the severity of the violation when it occurred. The Government argued that the Court should look to both.

Justice Kennedy then asked how the Court could go about writing the "ideal platonic opinion." The Government argued that the Court should treat violations of the seal requirement like courts have

treated violations of protective orders, "with a healthy dose of discretion, but, in light of the purpose of this provision, to protect the Government." The Government cited the three-factor test adopted by the Ninth Circuit as "the three key factors in a mine run case." The Government noted that other factors, such as a defendant's reputation, "could be relevant."

The argument then closed with a brief rebuttal from State Farm. State Farm reminded the court that "if you're concerned nonetheless about any windfall to the defendants, it won't happen, because the Government can come in and pick this case and relate the complaint back to the time of the relator's filing." State Farm closed by seeking "a proper balancing test that doesn't give carte blanche to these kinds of bad faith violations, which harm not just the Government in the long run, but our system of justice."

Analysis—Nearly lost in the oral arguments in this case is the fact that a per se dismissal rule would not harm the Government's interest; it would affect only the relator. As State Farm's attorney stated at oral argument, "if I make no point clearer today, let me make this point clear: The suit does not go away on our rule; the relators go away on our rule." Time and time again, relators argue that adopting limiting interpretations of the FCA's qui tam provisions will negatively affect Government recoveries. Indeed, counsel for the *Rigsby* relators complained that

> every time the Government has to take over for a relator, those resources come from somewhere. Even if the Government gets a bigger recovery on the back end, those resources come from somewhere. And they take attention away from other frauds that the Government could be pursuing, and they undermine Congress's objectives.

We believe that the thousands of attorneys in corporate legal departments who have, at some point in their careers, been on the receiving end of a Government subpoena or civil investigative demand might be surprised by the notion that the U.S. lacks the resources necessary to investigate and prosecute allegations of fraud.

It will be interesting to see how, if at all, the Court describes whose interest the seal requirement protects. The transcript suggests it is the Government's interest that is to be protected by the seal requirement. If this is true, then can seal violations be waived? Justice Ginsburg suggested they can. Allowing seal violations to be waived would add a new layer of complexity to an already complex issue.

Lastly, this case will hopefully resolve the complicated question of what is protected by the seal requirement. As was recognized at oral argument during an exchange between State Farm's attorney and Chief Justice Roberts, there is a tension between a person's First Amendment right to communicate allegations and the FCA's requirement that the complaint containing those allegations remain under seal. As Chief Justice Roberts said, "if Mr. Scruggs stands on the courthouse steps and discloses the underlying facts, I think people can put two and two together and realize that he just might be filing a lawsuit."

Conclusion—Last term, the Court addressed the implied certification doctrine of liability in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016), a case that will affect a broad swath of FCA cases. See Rhoad, McLaughlin, Crawford and Hill, Feature Comment, "Frankenstein's Monster Is (Still) Alive: Supreme Court Recognizes Validity Of Implied Certification Theory," 58 GC ¶ 219. In contrast, the *Rigsby* decision will have a more limited effect—impacting only qui tam cases in which the relator publicizes his or her allegations while the complaint is under seal. Nonetheless, the ruling is needed to address the current circuit split, and to resolve the question of whether seal violations require dismissal no matter what, or if a more permissive standard will apply. Either way, the decision will offer needed clarity to both the relators and defense bar.

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