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Whistleblower Defense Alert: The Supreme Court Rejects Mandatory Dismissal of Relator Claims For Seal Violations

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By: Jacob Mahle

On December 6, 2016, the Supreme Court of the United States handed down their second unanimous interpretation of the contours of the False Claims Act (FCA) in the last six months. Although it will not have the same impact as the *Escobar* decision, the Court's ruling in *State Farm Fire & Casualty Co. v. United States ex rel. Rigsby*, 580 U.S. ____, No. 15-513 (2016) clarifies the consequences for violation of the FCA's seal requirement, and continues the Court's trend of leaving the nuts and bolts of the statute's interpretation to the discretion of the lower courts.

Rigsby centered on State Farm's insurance policies and claims made under them in the wake of Hurricane Katrina. State Farm issued both flood insurance policies (which were backed by the federal government) and general homeowner's insurance policies (backed solely by State Farm). As a result of this distinction, the government would pay claims for hurricane damage caused by flooding, while State Farm was responsible for claims caused by wind damage. The relators were claims adjusters for a State Farm contractor, and were tasked with visiting homes affected by Hurricane Katrina and determining the extent to which homeowners were entitled to insurance payouts. The relators claimed that State Farm instructed them to misclassify wind damage as flood damage to shift financial responsibility for the claims to the federal government.

Filing under seal, the relators brought suit based on these allegations in April 2006. The seal was extended a number of times before it was partially lifted in January 2007 to allow disclosure of the action to another district court hearing a suit against the relators pertaining to State Farm's alleged fraud. The suit was fully unsealed in August 2007, and the government declined intervention in January 2008.

While the case was still fully sealed, however, the relators' then-attorney "emailed a sealed evidentiary filing that disclosed the complaint's existence to journalists at ABC, the Associated Press, and the *New York Times*." *Id.* at 4. Each news outlet ran a story based on the allegations,

but none revealed the existence of a *qui tam* complaint. The relators then met with a Mississippi Congressman who later spoke out publicly against the purported fraud (again without mentioning the existence of the suit). After the partial lifting of the seal, the relators' then-attorney disclosed the existence of the suit to various others. The disclosing attorney withdrew from representing the relators in March 2008 after he was indicted for attempting to bribe a state-court judge.

In January 2011, State Farm moved to dismiss the suit on the grounds that they had violated the FCA's seal requirement. The district court considered only seal violations prior to the partial lifting of the seal, "reasoning the partial lifting in effect had mooted the seal." *Id.* at 5. The District Court applied the test for dismissal set forth in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245-247 (9th Cir. 1995), and balanced three factors: (1) actual harm to the government, (2) the severity of the violations, and (3) the evidence of bad faith. The district court decided against dismissal, and the relators ultimately prevailed at trial on a "bellwether" claim involving a single damaged home. On appeal, the Fifth Circuit affirmed, deciding that the FCA did not require automatic dismissal of a claim for a violation of the FCA's seal requirement, and (utilizing the same factors as the district court) concluding that dismissal was not warranted based on the facts before it.

On appeal, the Supreme Court construed 31 U.S.C. § 3730(b)(2)'s seal requirement. That provision of the FCA provides that, when a relator files a *qui tam* complaint, "[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." The Court affirmed the Fifth Circuit, finding that the text of the seal requirement of the FCA "does not enact so harsh a rule" as to require dismissal for a seal violation. *Id.* at 6. Instead, the Court concluded that the structure of the FCA militated in the other direction, as other provisions of the Act required the dismissal of relators' actions in various circumstances. In the Court's view, it was "proper to infer that, had Congress intended to require dismissal for a violation of the seal requirement, it would have said so." *Id.* at 7. The Court also noted that its conclusion was consistent with the general purpose of the seal requirement, which was enacted in the 1980's to "allay the government's concern that a relator filing a civil complaint would alert defendants to a pending federal criminal investigation." *Id.* In that context, the Court concluded that it made "little sense to adopt a rigid interpretation of the seal provision that prejudices the government by depriving it of needed assistance from private parties." *Id.* After rejecting various arguments offered by the petitioner, the Court then concluded the district court did not abuse its discretion by denying the motion to dismiss, and held that generally, "the question whether dismissal is appropriate should be left to the sound discretion of the district court. While the factors articulated in *United States ex rel. Lujan v. Hughes Aircraft Co.* appear to be appropriate, it is unnecessary to explore these and other relevant considerations. These standards can be discussed in the course of later cases."

On the most basic level, the *Rigsby* decision resolved a circuit split regarding the effect of a seal violation. In so doing, it sided with decisions in the Second and Ninth Circuits and overturned the Sixth Circuit's view that a seal violation required mandatory dismissal of relator claims (see *United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287, 296 (6th Cir. 2010)). More broadly, *Rigsby* is in many respects a natural follow-up to the Court's *Escobar* decision. As in *Escobar*, a unanimous Supreme Court resolved the fundamental question before it, but left it up to the lower courts to define the contours of when (if ever) a seal violation can support dismissal of the relator's action. In short, as evidenced by the spate of post-*Escobar* decisions that have helped define the law of materiality under the FCA, the Supreme Court remains willing to provide broad strokes while allowing the federal circuits to fill in the details that practitioners and litigants

must deal with in navigating a *qui tam* suit.

