

**ALERT**

# Supreme Court to Determine Standard for Reviewing Relator's Violation of FCA Seal Requirement

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June 2, 2016

On May 31, 2016, the Supreme Court of the United States announced that it will review an issue at the center of a significant circuit split over *qui tam* actions brought under the False Claims Act (FCA): what standard governs the decision whether to dismiss a whistleblower's claim for violation of the FCA's seal requirement.

The FCA requires that *qui tam* complaints be served on the government, "filed in camera" and "remain under seal for at least 60 days." 31 U.S.C. § 3730(b). These requirements appear in the same section of the FCA that creates the *qui tam* right of action, signifying that they are a necessary precursor to maintaining such an action. Despite this clear statutory mandate, the circuit courts are split over whether dismissal, or any other sanction, is appropriate where a relator violates the seal requirement by disclosing the existence of a *qui tam* action before the seal is lifted. The Ninth Circuit uses a three-factor test, set out in *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245-46 (9th Cir.1995), that weighs (1) the harm to the government caused by the relator's disclosures; (2) the relative severity of the relator's violation; and (3) any evidence of bad faith or willfulness. The Second and Fourth Circuits apply a different test. Those courts will dismiss an action if the seal violation "results in an incurable and egregious frustration of the 'statutory objectives underlying the filing and service requirements.'" *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015) (quoting *U.S. ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 998 (2d Cir. 1995)). In contrast, the Sixth Circuit applies a bright-line rule and dismisses a *qui tam* action if the relator violates the seal requirement. *U.S. ex rel. Summers v. LHC Grp., Inc.*,

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623 F.3d 287, 298 (6th Cir. 2010).

Next term, the Court will review the Fifth Circuit's decision in *State Farm Fire and Casualty Co. v. United States ex rel. Rigsby*, 794 F.3d 457 (5th Cir. 2015). The relators in *State Farm* properly served their complaint on the government and filed it under seal. Before the seal was lifted, however, attorneys for the relators disclosed the existence of the *qui tam* action to several individuals. In addition, the relators publicly disclosed the facts underlying the action, even providing interviews for ABC's "20/20" news program. State Farm moved to dismiss the case based on these disclosures. The district court applied the three-factor test set out in *Lujan* and denied State Farm's motion to dismiss. On appeal, the Fifth Circuit affirmed, endorsing the *Lujan* test and refusing to dismiss the relators' FCA claim, despite the blatant violation of the seal requirement.

As State Farm argued in its petition for *certiorari*, the *Lujan* test violates Supreme Court precedent requiring dismissal where a plaintiff fails to satisfy statutory preconditions to filing suit. Moreover, the test emphasizes hardship to the government, disregarding that this is often exceedingly difficult for a defendant to demonstrate and thus unfairly favoring relators. The *Lujan* test also ignores an important policy underlying the seal requirement: to protect the reputation of a defendant named in a *qui tam* action before the government has had the opportunity to evaluate the merits of the claim. See *Smith*, 796 F.3d at 430; *Pilon*, 60 F.3d at 999. By diluting the sanctions for violating the seal requirement, the *Lujan* approach potentially encourages relators to disclose the existence of an action in order to pressure defendants to settle rather than face reputational harm and negative press, which can prove fruitful for relators regardless of the merits of their claims. Accordingly, the *Lujan* test ignores the plain language of the FCA and incentivizes the violation of FCA procedures. Conversely, a straightforward rule like that applied by the Sixth Circuit discourages willful violations of the seal requirement and helps prevent whistleblowers from forcing defendants to quickly settle meritless claims to avoid reputational damage.

Given the flood of *qui tam* actions in the past several years, the Supreme Court's decision will have a substantial impact on FCA litigation and hopefully will eliminate the amorphous tests applied by several of the circuits in favor of a bright-line rule. The Court has the opportunity to prevent abuse of the *qui tam* right of action and ensure that the FCA's procedural requirements are enforced.

No matter which approach the Court adopts, a company served with a *qui tam* complaint should promptly determine whether the relator violated the seal requirement. This may involve, as appropriate given the facts, searching for public statements about the case or underlying allegations in the press or court filings, and potentially interviewing employees about discussions with the whistleblower. If a violation is discovered, the defendant should prepare to argue that the relator's actions warrant dismissal.