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U.S. Supreme Court: Dismissal Not Mandatory for False Claims Act Seal Violation

By Alice S. Fisher, Abid R. Qureshi, Melissa Arbus Sherry, Anne W. Robinson, and Dean W. Baxtresser*

A recent unanimous U.S. Supreme Court decision places discretion in the hands of district courts as to whether and how to sanction relators who violate the seal requirement in False Claims Act cases. The authors of this article discuss the decision.

Only a month after oral argument, the U.S. Supreme Court issued a unanimous decision in *State Farm Fire & Casualty Co. v. United States ex rel. Rigsby*.[1] The Court rejected petitioner State Farm's contention that a relator's violation of the seal requirement in federal False Claims Act ("FCA") cases requires a mandatory dismissal of the action. However, the Court held that dismissal may be appropriate in some cases. The Court refused to adopt a specific standard to be applied but tacitly endorsed the U.S. Court of Appeals for the Ninth Circuit's three-factor balancing test to determine the proper sanction to address a seal violation.

STATE FARM FIRE & CASUALTY CO. V. RIGSBY

The relators in *Rigsby* were two former employees of the petitioner insurance company, State Farm Fire & Casualty Co. ("State Farm").[2] Relators prevailed at trial in arguing that State Farm instructed its employees to deliberately misclassify types of damage in the aftermath of Hurricane Katrina in order to decrease State Farm's liability and shift costs to the government.[3] Many years prior to the trial, however, relators' then-attorney, Dickie Scruggs, violated the FCA's mandatory seal requirement by disclosing the allegations and the

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[1] No. 15-513 (Kennedy, J.).

[2] Slip Op. at 3.

[3] *Id.*

litigation to several media sources. He emailed a sealed evidentiary filing to journalists at ABC, the Associated Press, and *The New York Times*—all of whom published stories discussing the allegations.[4] Scruggs also met with a Mississippi congressman who later publicly mentioned State Farm's alleged fraud.[5]

After the case was unsealed, State Farm filed a motion to dismiss the case based on Scruggs' conduct. However, by this time, Scruggs and his associates were no longer representing the relators.[6] Scruggs withdrew his representation after being indicted (and eventually pleading guilty) for bribing a state court judge, and the district court removed Scruggs' associates from the case for making improper payments to the relators.[7]

The district court applied a multi-factor balancing test to guide its ultimate decision not to dismiss. The court reasoned that the government was not likely harmed by the seal violation, that the violation did not constitute a complete failure to file under seal or serve the government and that the attorneys' ostensible bad faith could not be imputed to the relators themselves.[8] The U.S. Court of Appeals for the Fifth Circuit affirmed, noting that even if bad faith were imputed to the relators, the violation still did "not merit dismissal."[9]

Two questions were presented to the Court: (1) whether the seal violation *required* dismissal of the FCA complaint and, if not, (2) whether the district court abused its discretion by declining to dismiss the complaint in this case.

DISMISSAL IS NOT MANDATORY FOR A VIOLATION OF THE FCA'S SEAL REQUIREMENT

In an opinion written by Justice Kennedy, the Court unanimously rejected State Farm's contention that violating the seal requirement results in mandatory dismissal, concluding that "[t]he FCA does not enact so harsh a rule."[10] Rather, "the question whether dismissal is appropriate should be left to the sound discretion of the district court."[11]

Before *Rigsby*, this question had generated a circuit split, with the U.S.

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[4] *Id.* at 4.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *United States ex rel. Rigsby v. State Farm Fire & Casualty Co.*, 794 F.3d 457, 472 (5th Cir. 2015).

[9] *Id.*

[10] Slip Op. at 6.

[11] *Id.* at 10.

Courts of Appeals for the Fourth[12] and Sixth[13] Circuits holding that dismissal is *required* when a relator violates the seal requirement, and the U.S. Courts of Appeals for the Second,[14] Ninth,[15] and (in this case) Fifth[16] Circuits holding that dismissal is subject to a district court's discretion. In siding with the latter circuits, the Court grounded its reasoning in the text of the FCA statute. While acknowledging that the language of the FCA makes the seal *requirement* mandatory, in that a complaint "shall" be kept under seal, the statute notably did not provide a remedy for violating this requirement.[17] In contrast, the Court identified other provisions in the FCA that expressly mandate dismissal, such as the public disclosure bar.[18] Thus, the Court reasoned, if Congress had "intended to require dismissal for a violation of the seal requirement, it would have said so."[19]

The Court also explained that a rigid rule requiring dismissal would run contrary to the government interests the seal provision was intended to protect and advance: namely, that "a relator filing a civil complaint would alert defendants to a pending federal criminal investigation."[20] According to the Court, the seal requirement was enacted alongside a set of reforms meant to "encourage more private enforcement suits" to supplement inadequate federal enforcement resources.[21] Mandating dismissal, the Court reasoned, would deprive the government of that needed assistance.[22]

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[12] *United States ex rel. Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015).

[13] *United States ex rel. Summers v. LHC Group Inc.*, 623 F.3d 287, 296 (6th Cir. 2010).

[14] *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 998 (2d Cir. 1995).

[15] *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995).

[16] *Rigsby*, 794 F.3d 457.

[17] Slip Op. at 6.

[18] *Id.* at 7, 9.

[19] *Id.* at 7.

[20] *Id.* at 7 (citing S. Rep. No. 99-345, pp. 23–24 (1986)). The Court's reliance on legislative history here to support its conclusion is in some tension with other portions of the same legislative history that suggest Congress considered dismissal to be required for a violation of the seal requirement. *See, e.g.*, Petitioner's Br. at 33 (asserting that "both the Senate and House understood the requirement to be a 'condition[] under which [qui tam suits] could be maintained.' " (quoting H.R. Rep. No. 78-833, at 4 (1943) (alterations in brief))). However, stating that the FCA's text and structure is "plain and unambiguous," the Court noted it need not consider legislative history at all. *See* Slip Op. at 9.

[21] Slip Op. at 8.

[22] *Id.*

DISMISSAL REMAINS A POSSIBLE SANCTION FOR SEAL VIOLATIONS

Importantly for FCA defendants, the Court's opinion does not take dismissal off the table. Rather, the decision specifically states that the sanction of dismissal "remains a possible form of relief" for FCA seal violations.[23] The Court also noted that lesser sanctions are available for violation of the FCA seal requirement, stating that "[r]emedial tools like monetary penalties or attorney discipline remain available to punish and deter seal violations even when dismissal is not appropriate."[24]

Although the Court declined to set forth specific factors that district courts should consider when making a sanctions determination, it noted that the Ninth Circuit's analysis in *United States ex rel. Lujan v. Hughes Aircraft Co.*, which the Fifth Circuit applied here, "appear[s] to be appropriate."[25] This test weighs three factors: (1) whether the government was harmed by the disclosures; (2) the severity of the seal violation; and (3) whether there is evidence of bad faith or willfulness in making the disclosures.[26] These factors will be the de facto test for district courts addressing these issues after *Rigsby*.[27]

TAKEAWAYS FOR FCA DEFENDANTS

In light of *Rigsby* and its emphasis on district court discretion, district courts will effectively have the final say on sanctions for seal violations. FCA defendants should take note of the following strategies when approaching a potential seal violation:

- *Distinguish Rigsby*: FCA defendants should continue to request dismissal where appropriate, taking care to distinguish *Rigsby*'s unique facts when doing so. For example, the government's interest in criminal investigation secrecy was not implicated in *Rigsby*. Any evidence that a breach of the FCA seal prejudiced the government's investigative efforts should carry significant weight in obtaining a dismissal. Moreover, the relators in *Rigsby* did not personally violate the seal requirement and, as the district court noted, they were not "aware of the ethical implica-

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[23] *Id.* at 10.

[24] *Id.*

[25] *Id.* The Court found it "unnecessary" to explore what factors might be appropriate in this case and that, instead, "[t]hese standards can be discussed in the course of later cases." *Id.*

[26] *See United States ex rel. Rigsby v. State Farm Fire & Casualty Co.*, (S.D. Miss Jan. 24, 2011) (citing *Hughes Aircraft*, 67 F.3d at 242).

[27] Slip Op. at 10.

tions" of some of their attorneys' conduct.[28] Finally, the attorneys who committed the seal violation were no longer involved in the case when State Farm filed its motion to dismiss. Scruggs had been indicted for bribery and the others had likewise already been disciplined for unethical conduct. Future cases involving conduct actually committed by relators (as opposed to their counsel) could be viewed by courts as requiring a substantially different calculus.

- *Emphasize Reputational Harm*: Petitioner and its amici made much of the reputational harm caused by relators' breach of the seal. The Court referenced this harm when it held that the sanction of dismissal "remains a possible form of relief."[29]
- *Request Dismissal for Failure to File Under Seal*: The Court opened its opinion asking whether "*any* and all violations of the seal requirement mandate dismissal of a private party's complaint with prejudice" but never answered that question in its entirety.[30] The Court said nothing about the situation where a plaintiff fails to *file* under seal. Other courts—including those that recognized district court discretion about whether to dismiss for breaking the seal requirement—have found this type of violation to require dismissal with prejudice.[31] Even though those cases are likely no longer good law after *Rigsby*, FCA defendants should nonetheless press for dismissal when a case is not *filed* under seal.
- *Include Other Sanctions*: The Court specifically highlighted the fact that State Farm "did not request some lesser sanction" for the seal violation.[32] Defendants should press for other remedies such as "monetary penalties or attorney discipline" in addition to dismissal.[33]

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[28] *Id.* at 4.

[29] *Id.* at 10.

[30] *Id.* at 1 (emphasis added).

[31] *See, e.g.*, *Tyson v. Wells Fargo Bank & Co.*, 78 F. Supp. 3d 360, 363 (D.D.C. 2015) ("Because [relator] has failed to follow the proper procedure for service and filing of an FCA case, this case *must be* dismissed." (emphasis added)); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 1000 (2d Cir. 1995) (finding district court abused discretion to decline dismissal with prejudice for failure to comply with filing requirement); *United States ex rel. Le Blanc v. ITT Industries, Inc.*, 492 F. Supp. 2d 303, 305 (S.D.N.Y. 2007) ("[T]he Second Circuit determined in [Pilon] that the complaint *must be* dismissed with prejudice." (emphasis added)).

[32] Slip Op. at 5; *see also id.* at 10 (emphasizing again that "petitioner did not request any sanction other than dismissal").

[33] *Id.* at 10.