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False Claims Act

State Farm Can't Dodge Katrina Lawsuit Based on Seal Violation

BY DANIEL SEIDEN

Violating the False Claims Act's seal provision — in this case, by leaking information to the press — doesn't require automatic dismissal of a fraud case, the U.S. Supreme Court unanimously held (*State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, U.S., No. 15-513, 12/6/16).

The statute's structure doesn't support such a "harsh" rule, which, if adopted, would harm the government's ability to fight fraud, Justice Anthony Kennedy said.

Therefore, district courts will have discretion over proper violation sanctions, and media disclosures in this case won't keep the plaintiffs from receiving their fair share of a recovery for State Farm's submission of false claims after Hurricane Katrina.

Court Didn't Legislate From Bench. Seal violations — that is, releasing information about a case in violation of a court's order — can greatly harm a defendant's reputation, but the court "correctly observed that Congress expressed no concern for the potential harm to a defendant's reputation when a relator violates the seal provision," Mark Troy, a Los Angeles-based partner in Crowell & Moring's government contracts group, told Bloomberg BNA. "In that regard, the court declined to legislate from the bench," he said.

Robert S. Salcido, a partner at Akin Gump Strauss Hauer & Feld LLP in Washington, said the court's policy concern about dismissals harming the government "appears mistaken" because the government can always intervene and proceed with an action regardless of the whistle-blower's dismissal.

"However, overall, to the extent the court expressly stated that a district court may order dismissal in appropriate cases, the FCA's seal provision will still have sufficient teeth to ensure that relators do not recklessly abuse the FCA's seal provision to the government's and defendant's detriment," he said.

Hurricane Katrina Claims. A jury agreed with FCA plaintiffs Cori and Kerri Rigsby that State Farm submitted false claims to the government for payment on flood policies arising out of damage caused by Hurricane Katrina.

The plaintiffs' media disclosures weren't severe enough to harm the government, and dismissal for the

seal violation wasn't necessary, the U.S. Court of Appeals for the Fifth Circuit ruled.

State Farm petitioned the Supreme Court to resolve a circuit split on this issue.

'Harsh' Rule Not Supported. The court affirmed, stating that the FCA "does not enact so harsh a rule" calling for automatic dismissal for seal violations.

The FCA has several provisions expressly requiring dismissal of an action, and Congress would have provided such language for a seal violation if it wanted to, the court said.

An automatic dismissal rule wouldn't serve the purpose of protecting the government's interests as Congress intended, the court added.

"Because the seal requirement was intended in main to protect the Government's interests," the court said, "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."

This aspect of the decision may have put "the nail in the coffin" for State Farm, said Brad Fagg, a partner with Morgan, Lewis & Bockius LLP in Washington.

The case may not have a great practical effect, he said, "both because prejudicial violations of the sealing requirement are not ubiquitous, and because the Supreme Court was careful to preserve a trial court's discretion to impose both dismissal and lesser sanctions in appropriate cases."

Specific Sanctions Not Endorsed. District courts should have discretion over whether dismissal is a proper sanction for a seal violation, the Supreme Court said.

Balancing factors articulated in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 243-44 (9th Cir. 1995) "appear to be appropriate," the court said while declining to decide what factors district courts should consider.

The factors in the Ninth Circuit test include whether and to what extent a violation harmed the government; the severity or nature of a disclosure; and whether the disclosure occurred in bad faith.

State Farm could have asked for a lesser sanction for the violation, but failed to do so, the court said.

Troy said it's unfortunate that the court didn't endorse specific sanctions short of dismissal that it would have found acceptable.

"A significant reduction in the relator's bounty would deter relators from breaching the seal. And disqualifying relators' counsel from receiving statutory attorneys' fees would almost certainly have prevented the disclosure that occurred in this case," he said. "The Supreme

Court has given free [rein] to district courts to fashion these kinds of remedies.”

Reputational Harm. One potentially useful portion of the opinion for defendants is its response to arguments that dismissals are necessary when seal violations damage reputations, said Aaron P. Silberman, a shareholder at Rogers Joseph O’Donnell in San Francisco and a member of the firm’s government contracts practice group.

“The court stated that dismissal remains a possible remedy, within the trial court’s discretion, as do lesser sanctions,” he said. “Implicit in this response is that district courts may consider potential reputational harm

to defendants in deciding how to sanction relators who violate the seal, up to and including dismissal. This was not always clear under prior lower court decisions regarding seal violations.”

Kathleen M. Sullivan of Quinn Emanuel Urquhart & Sullivan LLP represented petitioner State Farm. Tejinder Singh of Goldstein & Russell P.C. represented the respondents. John F. Bash, assistant to the U.S. Solicitor General, represented the government.

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