FCA Seal Opinion Lacks Needed Guidance

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Law360, New York (December 8, 2016, 2:26 PM EST) -- The U.S. Supreme Court's unanimous opinion in State Farm Fire & Casualty Co. v. United States ex rel. Rigsby, No. 15-513 (Dec. 6, 2016), is a disappointingly narrow decision. It merely holds that dismissal of a False Claims Act qui tam suit for violation of the "seal" provision, 31 U.S.C. § 3730(b)(2), is not mandatory. The decision leaves intact a circuit split regarding how a district court should decide whether to dismiss a qui tam suit for a seal violation, and short of dismissal, how to decide what remedies and/or sanctions to impose on the violators.

Under the seal provision, a qui tam relator (i.e., plaintiff) must file his complaint in camera and serve it on the government. The complaint must remain under seal until the government, through the U.S. Department of Justice, investigates the relator's fraud-on-the-government allegations and decides whether to intervene and take over prosecution of the suit. In the State Farm case, the relators alleged a fraudulent scheme to misclassify Hurricane Katrina-related wind damage claims covered by private homeowners' insurance as flood damage claims covered by government-backed flood insurance. While the relators' qui tam complaint was still under seal, their then-attorney knowingly violated the seal by providing journalists documents that disclosed the existence of the qui tam suit and the nature of the relators' allegations.

Holding that the FCA "does not enact so harsh a rule," Justice Kennedy's opinion finds that "[t]he FCA's structure is itself and indication that violating the seal requirement does not mandate dismissal." Slip op. at 6. Although the court expressly declined State Farm's invitation to consider the relevant Senate committee report to support a mandatory dismissal rule, see id. at 9, the court cites the same legislative history as "indicat[ing] that the seal provision was meant to allay the Government's concern that a relator filing a civil suit would alert defendants to a pending federal criminal investigation." Id. at 7. According to the court, "[b]ecause the seal requirement was intended to in main to protect the Government's interests, 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." Ibid. That view is consistent with the position advocated by the United States as amicus curiae. See ibid.

Rather than imposing an automatic-dismissal rule, the opinion holds that "the question of whether dismissal is appropriate should be left to the sound discretion of the district court." Slip op. at 10. While the court held that the district neither committed plain error nor abused its discretion in denying State Farm's motion to dismiss the suit on the ground of the seal violation, it declined to render a conclusion as to what factors a district court should consider when imposing a remedy and/or sanction for a qui tam seal violation. More specifically, while the court stated that "the factors articulated in United States ex rel. Lujan v. Hughes Aircraft Co. [67 F.3d 242 (9th Cir. 1995] appear to be appropriate," the court found it "unnecessary to explore these and other relevant considerations." Slip op at 10. The Lujan factors are actual harm to the government, the severity of the seal violations and the evidence of bad faith. See 67 F.3d at 245, 247.

Consistent with certain questions asked at its November 1 hearing, the court acknowledged the concern expressed by State Farm and amici regarding "the reputational harm FCA defendants may suffer when the seal requirement is violated." Slip op. at 10. But the court indicated that "even if every seal violation does not mandate dismissal, that sanction remains a possible form of relief." Ibid.

The State Farm opinion probably is most notable for what it does not do: As a matter of jurisprudence, the court's narrow opinion fails to squarely endorse the Lujan factors or otherwise resolve the circuit split regarding what factors district courts should consider when imposing remedies and sanctions for qui tam seal violations. More fundamentally, although deliberate qui tam seal violations are relatively rare, the court's rejection of an automatic-dismissal rule—even in egregious cases such as State Farm—coupled with the lack of guidance to district courts, misses an important opportunity to reinforce the integrity of the qui tam scheme. Instead, the opinion sends a message to qui tam relators and their counsel that they may be able to avoid dismissal even after attempting to use premature public disclosure as a pressure tactic to force a settlement (and thereby allow a defendant to mitigate reputational harm and risks of going to trial) before the Justice Department decides whether the relators' allegations have merit. This is quite troubling, especially in view of the increasingly aggressive nature of the "qui tam bar" both in searching for potential whistleblowers and stretching the grounds for False Claims Act liability.

The current eight-member Supreme Court indicated in its State Farm opinion that the standards for dismissal or other sanctions in the event of qui tam seal violations "can be discussed in the course of later cases." Slip op. at 10. The court's decision to punting on that question threatens to undermine the seal requirement, and in turn, the operation of the entire qui tam scheme. As amicus curiae DRI - The Voice of the Defense Bar argued in its merit-stage amicus brief, the seal requirement enables the Justice Department to fulfill an important case-screening function. Let's hope that despite the State Farm decision, future intentional seal violations continue to be rare.

Lawrence S. Ebner is the founder of Capital Appellate Advocacy PLLC, a Washington, D.C.-based appellate litigation boutique that focuses on federal issues.

DISCLOSURE: Ebner filed a Supreme Court merits-stage amicus brief on behalf of DRI-The Voice of the Defense Bar in support of State Farm.