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U.S. SUPREME COURT DECLINES TO SETTLE CIRCUIT SPLIT ON IMPACT OF FAILURE TO FOLLOW FCA'S FILING-UNDER-SEAL PROCEDURES

The Supreme Court of the United States on June 27, 2011, denied certiorari in *U.S. ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287 (6th Cir. 2010), leaving unsettled a split within the circuits over the impact of a relator's failure to comply with the filing-under-seal provisions of the federal False Claims Act ("FCA").

The relator in *Summers* filed suit under the FCA's *qui tam* provisions but did so on the public docket rather than under seal, as required by § 3730 of the statute. Her later efforts to have the complaint sealed were unsuccessful, and the district court ultimately dismissed her complaint on grounds that the failure to comply with the seal procedures was "a fatal deficiency" depriving her of the right to pursue her FCA claim and frustrating the procedure's underlying purposes. The relator appealed to the U.S. Court of Appeals for the Sixth Circuit, arguing that the district court should have applied a balancing test where the nature and circumstances of her procedural violation would be taken into account in considering dismissal.

Specifically, the relator urged the Sixth Circuit to adopt the balancing approach articulated by the U.S. Court of Appeals for the Ninth Circuit in *U.S. ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995). In *Lujan,* the relator had filed her formal FCA complaint under seal but had previously made similar allegations publicly in wrongful termination and worker's compensation proceedings. Additionally, it appeared that after filing her *qui tam* complaint, she had provided information on her case to at least one newspaper, which ran a story discussing her claims. Based upon these violations of the filing-under-seal provisions, the defendant had obtained a dismissal of the complaint by the district court. The Ninth Circuit reversed, rejecting a *per se* rule and instead holding that the court must consider (i) whether and to what extent the government was harmed by the relator's failure to comply with the seal requirements, (ii) the nature and relative severity of the particular violation, and (iii) whether the relator had acted in bad faith.

In *Summers*, the Sixth Circuit rejected any "*Lujan*-style balancing test" as "a form of judicial overreach." The Sixth Circuit explained, "Congress has created the *qui tam* cause of action in False Claims Act cases, and has imposed procedural conditions on that cause of action as it sees fit to balance competing policy goals. We will not second-guess its calculus; without meeting those conditions, a False Claims Act plaintiff has no more right to bring suit in the Government's name than any other private person."

The relator in *Summers* petitioned the Supreme Court for certiorari. In an *amicus* brief filed at the Court's invitation, the federal government expressed its disagreement with the Sixth Circuit's decision. The Sixth Circuit's "inflexible approach," the government argued, found no support in either the FCA's text or purpose, and was at odds with *Lujan*. While agreeing that the question presented warranted resolution by the Court, the government argued, however, that "[t]he present case does not provide a suitable vehicle" because it appeared that the relator's claims were alternately subject to dismissal under the FCA's first-to-file bar. Perhaps for this reason, the Court denied the petition for certiorari.

The circuit split thus remains unsettled, and resolution will have to await another day. In the meantime, FCA defendants are well advised to confirm that a relator has complied with the statute's filing-under-seal requirements. While the *per se* rule of *Summers* and the balancing approach of *Lujan* might, for the time being, result in different conclusions based upon the particular circumstances presented, it is at least clear that failure to follow the FCA's filing-under-seal provisions may subject a relator's complaint to dismissal.

DOJ AND HHS WITHDRAW APPROVAL OF 14 STATE FALSE CLAIM ACTS, DENY APPROVAL OF 10 MORE

Section 1909 of the Social Security Act provides a financial incentive for states to enact their own false claims acts. Those states with qualifying acts, as determined by the Department of Justice ("DOJ") in consultation with the Department of Health and Human Services ("HHS"), will receive a 10-percentage-point increase in their share of any amounts recovered under their statute. To qualify, a state statute must meet four requirements, among them that it establish liability of a similar breadth as the federal FCA and that the state statute contain provisions at least as effective as its federal counterpart's for rewarding and facilitating *qui tam* actions. During the past several years, the DOJ and HHS had approved the respective false claims acts of 14 states – California, Georgia, Hawaii, Illinois, Indiana, Massachusetts, Michigan, Nevada, New York, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin.

Earlier this year, however, the DOJ and HHS issued letters to those 14 states, advising that in light of recent amendments to the FCA, their statutes no longer qualified for the Section 1909 incentive and that approval of their statutes would be withdrawn. Ten other states – Colorado, Connecticut, Delaware, Florida, Iowa, Louisiana, Montana, New Jersey, North Carolina, and Oklahoma – were informed that their statutes failed to meet the requirements of Section 1909 and would not be approved.

The DOJ and HHS pointed out that the FCA had been amended on three separate occasions in the last two years – by the Fraud Enforcement and Recovery Act in 2009, and by both the Patient Protection and Affordable Care Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. These amendments, among other things, expanded the scope of liability imposed for falsely avoiding or decreasing an obligation to pay money to the federal government, and provided additional protections to employees, contractors, and agents who suffer retaliation for steps taken in furtherance of an action under the FCA. The DOJ and HHS determined that the statutes of all 24 states mentioned above failed to meet the expanded requirements of the FCA and, thus, did not qualify for the Section 1909 incentives.

The DOJ and HHS granted the 14 states whose false claims acts previously qualified for the Section 1909 incentive a "grace period" until March 31, 2013, to amend their statutes and resubmit them for approval. Until the end of that grace period, those 14 states will continue to receive the Section 1909 incentive – but failing amendment and approval, as of April 1, 2013, the incentive will be lost. It is anticipated that the next 18 months will see many of these states amend their false claims acts in order to re-qualify.
