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CIVIL FALSE CLAIMS ACT: Relators Escape Severe Sanctions and are Permitted to Continue Representing the United States Notwithstanding Their "Blatant Disregard" of the FCA's Statutory Seal

For most litigants, getting hit with a $1.6 million court-ordered sanction would be considered a bad day. But we suspect that was not the reaction of the relators in *United States ex rel. Bibby v. Wells Fargo Bank, N.A.,* No. 1:06-CV-0547-AT, 2015 U.S. Dist. LEXIS 636 (N.D. Ga. Jan. 5, 2015), who recently were on the receiving end of that sanction for having deliberately violated the False Claims Act's ("FCA") seal requirements. To the contrary, given the alternatives before the court—whether the dismissal advocated by Wells Fargo or the $2.7 million forfeiture proposed by the Justice Department—these relators likely are breathing sighs of relief.[1] In fact, the sanction amounts to a mere wrist slap since it requires the relators to forfeit only a small fraction of their $43 million "relators' share" award to date *and* it allows relators to remain in the case and attempt to collect even more. The sanction is even more remarkable considering the district court's specific findings that relators had exhibited "a considerable lack of good faith" and acted in "blatant disregard" of the FCA's seal by repeatedly "engaging in inappropriate communications with the media" while their *qui tam* case was under seal. *Bibby,* 2015 U.S. Dist. LEXIS 636, at *39. This outcome is at odds with the way some courts have dealt with far less egregious seal violations and, in any event, does little to deter future relator misconduct.

Background of the *Bibby* Case

In March 2006, the two relators filed a *qui tam* suit alleging that a number of lending institutions defrauded veterans by inflating closing costs under a Veterans Affairs loan refinancing program. Under the FCA,

> [t]he complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.

31 U.S.C. §3730(b)(2). As is the norm in *qui tam* cases, the Justice Department obtained several extensions of the 60-day statutory seal in order to investigate the relators' allegations. While the case

[1] Readers should note that the authors' firm represents Wells Fargo in other matters, but does not represent Wells Fargo in the *Bibby* case.

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remained under seal, the Justice Department conducted an investigation before notifying the court that it was declining to intervene in the case.

But, according to the district court's findings, during the same period while their complaint remained under seal, the relators apparently were not happy with the pace of the Justice Department's investigation and took matters into their own hands. In particular, relators engaged in regular communications with both a television reporter and a television producer, generating some 175 pages of emails and attachments that included detailed discussions about the lawsuit and the status of the government's investigation. *Bibby,* 2015 U.S. Dist. LEXIS 636, at *8. The court found that relators also attempted to provide information about the case to other media outlets through an anonymous email account that they had created. *Id.* at *10.

All of this media activity was unbeknownst to the defendants and the Justice Department, and, after the complaint was unsealed, relators settled with six of the defendants, providing the government with a $161 million recovery. Still clueless about the seal violations, the Justice Department agreed to an approximate 27% (or $43 million) relators' share award.

Much later, during discovery in the lawsuit against the remaining defendant (Wells Fargo), relators' misconduct was uncovered, and Wells Fargo moved to dismiss the case—as to the relators—due to the intentional seal violations. For its part, the Justice Department supported the imposition of sanctions, but proposed a monetary forfeiture of $2.7 million (to reduce relators' share to the FCA statutory minimum of 25%), which would have reverted to the U.S. Treasury. Remarkably, the Justice Department did not seem alarmed by the prospect of allowing these relators—who admitted intentionally violating the seal, *Bibby,* 2015 U.S. Dist. LEXIS 636, at *11—to continue prosecuting this lawsuit in the name of the United States. Rejecting both dismissal and the full $2.7 million forfeiture proposed by the Justice Department, the district court determined that a $1.6 million sanction was appropriate and let relators continue to act for the government in the ongoing litigation.

Seal Violation Analysis

Courts have developed two different approaches to the question of whether seal violations require dismissal of a *qui tam* relator from the litigation. In the absence of Eleventh Circuit precedent, the court in *Bibby* adopted the balancing approach used by the Ninth and Second Circuits, which considers the facts and circumstances of the violation—the extent of harm to the objectives of the seal provision (including harm to the government's investigation), the severity of the violation, and the relator's bad faith—to determine whether dismissal is warranted. *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995) (requiring the district court to consider on remand whether the government was actually harmed by the disclosure, the relative severity of the seal violation, and the bad faith or willfulness of the relator); *United States ex rel. Pilon v. Martin Marietta Corp.,* 60 F.3d 995, 998 (2d Cir. 1995) (dismissing *qui tam* complaint with prejudice for seal violations that were "particularly egregious and incurably frustrated the statutory objectives underlying the filing and service requirements"). As the *Bibby* court acknowledged, the Sixth Circuit has rejected that balancing approach as a form of judicial overreaching, holding that dismissal is the appropriate sanction because exceptions to the seal requirement contradict the overall balance struck by Congress in adopting the requirement in the first place. *See United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 3057 (2011).

The Sixth Circuit's strict enforcement approach best serves the purpose of the seal requirement—which is to prevent potential harm to government investigations of *qui tam* allegations—and most effectively deters intentional relator abuses of the seal. As the Sixth Circuit held:

> We…find unpersuasive the argument that the mere possibility that the Government *might* have been harmed by disclosure is not alone enough reason to justify dismissal of the entire action…. The mere possibility that the Government *might* be harmed by disclosure is, in fact, the point of the *in camera* requirement.

Summers, 623 F.3d at 297 (internal quotations and citations omitted). But under either of the above-described appellate standards, given the record before the *Bibby* court, the *Bibby* relators should have been dismissed from the case.

Moreover, the relatively minor sanction imposed on the *Bibby* relators is unlikely to deter future relator abuses and does not effectively serve the purpose of the provision. Individuals should not be entitled to the benefits afforded *qui tam* relators if they fail to comply with the *qui tam* provisions of the FCA, including the seal requirement: "[a]n FCA plaintiff who cannot satisfy those conditions…cannot bring suit in the name of the Government and has no basis for recovery." *Summers*, 623 F.3d at 298. Relators can and should be dismissed from FCA actions where they flagrantly and deliberately violate the seal provisions, leaving prosecution of the case to the Justice Department if it believes the allegations are worthy of pursuit.

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