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Justices Could Tip Power Balance In FCA Seal Dispute

By **Daniel Wilson**

Law360, Nashville (October 31, 2016, 3:37 PM EDT) -- The U.S. Supreme Court is set to hear arguments Tuesday over when violations of the False Claims Act's automatic seal require dismissal of a case, with a permissive standard potentially offering relators significant leverage in FCA disputes, attorneys said.

The case, State Farm Fire and Casualty Co. v. U.S. ex rel. Rigsby et al., pits sisters and former insurance adjusters Cori and Kerri Rigsby, who have argued for a lenient seal violation standard, against State Farm, who has argued for a rigid standard requiring automatic dismissal for any violation.

The Rigsbys have accused the insurer of bilking the National Flood Insurance Program, taking what should have been wind damage claims stemming from Hurricane Katrina and misclassifying them as flood damage claims so the government would be on the hook for claims instead of the insurer, and a jury sided with the sisters after trial on a bellwether claim.

But State Farm argues that because former counsel for the Rigsbys intentionally leaked information to the press while the case was still under seal, **allegedly trying** to generate hostile media coverage of the company and put pressure on it to settle, the case should have automatically been dismissed.

Although on its surface a narrower and perhaps less consequential issue than those addressed in other **recent Supreme Court FCA cases**, as the high court takes **an increasing interest** in the anti-fraud statute, the potential for clarification of the requirements around seal violations has been welcomed by attorneys in both the relators and defendants bars, given both the significant monetary and reputational stakes typically involved in FCA suits.

The standard each side would like to see adopted by the justices varies, however, with relators attorneys telling Law360 that a standard that takes into account the circumstances of the case, such as the effect of any seal violation, as well as its intent, would be most appropriate.

Under the FCA, qui tam relators are required to file their case under seal and maintain that seal for at least 60 days — to be lifted when the court allows — in order to give the government a chance to quietly investigate claims out of the public eye and decide whether to intervene in a case.

"The lower courts refused to [dismiss the case] even though the text of the FCA is mandatory ... and even though the structure and history of the seal provision make clear that compliance with it is a mandatory precondition to serving as a private relator," State Farm said in its July opening brief.

The sisters, however, argue that the FCA does not specify any particular consequence for breaking the seal, asking for a more lenient standard.

"Dismissal ... ought to be a last resort because it necessarily impairs the government's interest in recovering damages for fraud, thus harming the principal beneficiary of both the FCA in general and the seal requirement in particular," they said in a September brief. "Other sanctions can

punish and deter seal violations without imposing costs on the government."

Both sides have won amicus support, with the federal government for instance weighing in on the side of the Rigsbys, **arguing that** although deterrence of seal violations is important to protect government interests and discourage "extreme bad-faith tactics," the FCA is not prescriptive on the issue and does not require the "draconian" sanction of dismissal for all seal violations.

A broad swath of industry has backed State Farm, including the National Association of Mutual Insurance Cos., which — in a joint brief with the American Tort Reform Association — argued seal violations should be considered to revoke relators' standing to bring suits on behalf of the government, and the U.S. Chamber of Commerce, which has argued that a case-by-case "balancing test" approach invites flouting of the seal requirement.

In addition to those briefs, the high court will have a range of circuit court decisions to dig through, with the five circuit courts that have tackled the issue having taken effectively three different stances, ranging from the permissive to the rigid.

The Fifth Circuit ruled in the Rigsbys' case that the government's interest wasn't harmed, so dismissal wasn't required, similar to the Ninth Circuit's stance, while the Sixth Circuit has ruled that any seal violation is a "per se" violation that requires automatic dismissal.

The Second and Fourth circuits have taken an in-between approach that a seal violation must lead to dismissal when the congressional purpose of the FCA has been frustrated, based on factors such as potential harm to the government's interest or potential reputational harm to the defendant.

Going straight to a "red card" send-off instead of a "yellow card" warning for all seal breaches would go against the overarching purpose of the FCA of protecting the government against fraud and would ultimately cause harm to taxpayers, R. Scott Oswald, managing principal of The Employment Law Group PC, **told Law360** in May after the Supreme Court **agreed to take** the case.

Defendants attorneys, however, have largely argued that automatic dismissal for seal violations — with perhaps a limited exception for truly inadvertent violations that don't cause harm — would be the most appropriate and fairest result.

Although FCA seal violations are currently rare, nearly all of them are intentional and backing a standard based around factors such as the harm to the government from the leak — a murky issue that is difficult to prove — will essentially encourage strategic seal violations to gain leverage in litigation, Mintz Levin Cohn Ferris Glovsky & Popeo PC member Laurence Freedman said.

"These cases can cause enormous reputational harm to people named, they often are without merit, and can often [result in] incredible financial consequences just to defend," he said. "Given all of that, it's not what the statute envisions, nor is it in any way fair, to be permissive about breaches."

Relators, tapped to act on behalf of the federal government, should be be held to a strict standard, Freedman argued, pushing back against claims that a strict standard would hurt efforts to fight fraud. Dismissing relators from a case for breaking the seal does not stop the government from picking up those allegations and running with them, he said.

Whichever way the high court comes out could offer a potentially significant shift in the way each side approaches FCA suits, potentially giving relators more leverage to extract settlements, or prompting defendants to aggressively look for potential seal violations, no matter how minor, several attorneys noted.

"If the court holds that violation of that rule is ultimately no big deal, then that could have the effect of encouraging plaintiffs to leak information to the press and use the press to extract settlements," Bradley Arant Boult Cummings LLP associate Aron Beezley **told Law360** in July.

"If, on the other hand, the Supreme Court holds that violation of the 60-day rule should result in

dismissal of the suit, for instance, then the plaintiffs bar would probably view that as being a pretty draconian result," Beezley added.

The Rigsbys are represented by William E. Copley, August J. Matteis Jr., Derek Y. Sugimura, Pamira S. Matteis, Matthew S. Krauss and Timothy M. Belknap of Weisbrod Matteis & Copley PLLC, Tejinder Singh of Goldstein & Russell PC, and C. Maison Heidelberg of Watson Heidelberg Jones PLLC. The government is represented by Ian H. Gershengorn, Benjamin C. Mizer, Malcolm L. Stewart, John F. Bash, Douglas N. Letter, Michael S. Raab, Thomas G. Pulham and Sarah W. Carroll of the U.S. Department of Justice.

State Farm is represented by Sheila L. Birnbaum, Kathleen M. Sullivan, Douglas W. Dunham, Ellen P. Quackenbos and Bert L. Wolff of Quinn Emanuel Urquhart & Sullivan LLP, and Jeffrey B. Wall of Sullivan & Cromwell LLP.

The case is State Farm Fire and Casualty Co. v. U.S. ex rel. Rigsby et al., case number 15-513, in the U.S. Supreme Court.

--Editing by Katherine Rautenberg and Aaron Pelc.
