Government Contracts Advisory

JULY 7, 2011

CONTACTS

For further information regarding the topic discussed in this update, please contact one of the professionals below, or the attorney or public policy advisor with whom you regularly work.

Jason N. Workmaster
202.496.7422

Timothy K. Halloran
202.496.7352

Supreme Court Denies Petition for Certiorari in False Claims Act Case Addressing Requirements for Filing *Qui Tam* Complaints Under Seal

Last week, the United States Supreme Court denied the pending petition for certiorari in *United States ex rel. Summers v. LHC Group, Inc.*, a False Claims Act ("FCA") case involving the statutory requirements for filing *qui tam* complaints under seal. *See United States ex rel. Summers v. LHC Group, Inc.*, No. 10-827, --- S. Ct. ---, 2011 WL 2518841, at *1 (U.S. June 27, 2011). The Court's decision leaves intact a circuit split regarding what happens when a *qui tam* plaintiff, called a "relator," fails to follow the FCA's filing requirements. In some jurisdictions, a relator's failure to follow the FCA's filing requirements will result in dismissal of the complaint, while the consequences of such failure in other jurisdictions remains unclear.

The FCA requires that a relator file his or her complaint under seal and serve a copy of the complaint and a written disclosure of supporting information on the government. *See* 31 U.S.C. § 3730(b)(2). The complaint must remain under seal for at least 60 days and may not be served on the defendant until the court orders. *Id.* While the complaint is under seal, the government investigates the relator's allegations and decides whether to intervene in the case or allow the relator to prosecute the case alone. *Id.*

Periodically, relators file FCA complaints without adhering to the statutory requirements for filing under seal. Over time, a split has arisen among the appellate courts regarding whether such failure to follow the FCA's filing requirements mandates dismissal of the complaint.

In *Summers*, the Sixth Circuit held that "violations of the procedural requirements imposed on *qui tam* plaintiffs under the False Claims Act preclude such plaintiffs from asserting *qui tam* status," and thus affirmed the dismissal with prejudice of a complaint that was publicly-filed in violation of the FCA. *United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287, 296 (6th Cir. 2010); *see also United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 999-1000 (2d Cir. 1995) (holding that failure to comply with FCA's requirements for filing complaint under seal required dismissal with prejudice of relators' claims). The Sixth Circuit rejected the contrary view of the Ninth Circuit, which held that a relator's failure to follow the FCA's filing requirements does not necessarily require dismissal. *See*

United States ex rel. Lujan v. Hughes Aircraft Co., 67 F.3d 242 (9th Cir. 1995). In the Ninth Circuit, when determining whether a relator's violation of the FCA's filing requirements warrants dismissal, a district court must consider: (1) the extent to which the government was harmed; (2) the nature of the violation; and (3) whether the relator acted in bad faith. *See id*. at 245-46.

After the *Summers* appeal reached the Supreme Court, the Court invited the Solicitor General to file an *amicus curiae* brief expressing the government's view on the consequences of a relator's failure to follow the FCA's filing under seal requirements. In its *amicus* brief, the government opined that the Sixth Circuit erred in creating a per se rule mandating dismissal where a relator fails to comply with the FCA's filing requirements and acknowledged that the circuit split on the issue warrants resolution by the Court. However, the government also asserted that the *Summers* case did not provide a suitable vehicle for such resolution because the relator's suit was subject to dismissal for lack of jurisdiction under another provision of the FCA – the "first-to-file bar" of 31 U.S.C. 3730(b)(5). *See* Brief for the United States as Amicus Curiae, *United States ex rel. Summers v. LHC Group, Inc.*, No. 10-827, at 6-7 (U.S. May 26, 2011). The government therefore urged the Court to deny the petition for certiorari, which the Court did on June 27.

In light of the Court's denial of certiorari in the *Summers* case, defendants in FCA actions must remain mindful of the FCA's filing under seal requirements and the fact that a relator's failure to follow those requirements may have different consequences in different jurisdictions. Accordingly, defendants in FCA cases should: (1) ascertain whether the relator complied with the FCA's requirements for filing and serving the complaint; (2) determine whether any non-compliance provides a basis for dismissal under relevant precedent; and (3) continue to monitor developments in this evolving area of law, as it remains unclear how the *Summers* appeal (including the government's *amicus* brief in that appeal) may affect courts that address similar issues in the future.