Whistleblower Defense Alert: District Court Imposes $1.6 Million Sanction Against Relators for Violating the FCA Seal

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Jacob D. Mahle

Victor A. Walton, Jr.

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By Victor A. Walton, Jr. and Jacob D. Mahle

Earlier this week, Judge Amy Totenberg of the United States District Court for the Northern District of Georgia imposed significant monetary sanctions against a pair of relators who blatantly and repeatedly violated the seal order in a pending *qui tam* action, *United States ex rel. Bibby v. Wells Fargo Bank, N.A.*, Case No. 1:06-CV-0547-AT.

The *Bibby* relators were two licensed mortgage brokers who claimed that lenders, including Wells Fargo, "engaged in a fraudulent scheme to overcharge veterans on closing costs during the origination of loans" under a VA program. [(Decision, p. 1.)] Relators originally filed their complaint in March 2006, and the government subsequently moved to seal the case. The government repeatedly obtained extensions of the seal order, eventually moving for (and receiving) an eleventh extension in May 2009. Despite that extension, relators began violating the seal order by privately communicating with members of the media. After the improper communications began, the government requested and received seven additional extensions keeping the case under full or partial seal.

After the government declined to intervene in the litigation in October 2011, the relators independently litigated their qui tam action. According to the Court, in that time span, the relators recovered more than $161 million on behalf of the government, of which relators received $43,161,500.00, or approximately 27% of the total, pursuant to the provisions of 31 U.S.C. § 3730(d)(2).

In March of 2014, relators' counsel admitted to the Court that relators had repeatedly violated the seal order by disclosing the existence of the case to third parties, and that those violations had begun in 2009. In light of those violations, Wells Fargo moved to dismiss the relators from the case. Wells Fargo, the relators, and the government all submitted briefs concerning the appropriate sanction for the relators' seal violations. Wells Fargo argued that the severity and bad faith of the seal violations warranted dismissal of the action. The government conceded

that the misconduct was serious, but asserted that dismissal was inappropriate because there was no evidence that the government's investigation was harmed by the disclosures, and a dismissal would only result in a windfall to Wells Fargo. The government suggested that the Court instead impose a sanction of $2.7 million against relators, which would effectively reduce the relators' previous recoveries to the statutory minimum of 25%. Relators argued that no sanction was appropriate, but that if a monetary sanction was warranted, $500,000 would be appropriate.

Judge Totenberg concluded that there was no evidence that the existence or progress of the case was publicized while it was under seal. Although the relators indisputably violated the order, the media members to whom information was disclosed did not publicize any information about the case until after it was unsealed. As such, the Court noted that "Wells Fargo and the Government admit that Relators' seal violations resulted in no actual harm to the Government's investigation of this case while the case was sealed." (Decision, pp. 9-10.)

The Court considered whether dismissal was appropriate under (1) the False Claims Act, (2) Rule 41 of the Federal Rules of Civil Procedure, and (3) the inherent powers of the Court—and rejected dismissal as a sanction under all three grounds. The Court reviewed previous FCA cases dealing with seal violations, noting that the statute itself does not provide an explicit sanction for violating its seal requirements. Recognizing that the Eleventh Circuit "has not addressed when dismissal would be an appropriate sanction for violating the Court's subsequent order extending the seal," (Decision, pp. 13-14), the Court chose to employ a test considering the objectives of the seal requirement—especially the government's interest in investigating the allegations—while assessing whether the particular seal violation hampered those objectives. Here, the Court adopted the approach it characterized as employed by the "vast majority" of courts, particularly the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 247 (9th Cir. 1995). In so doing, it rejected the approach of the Sixth Circuit in *United States ex rel. Summers v. LHC Grp., Inc.*, 623 F.3d 287 (2010), which held that violation of a procedural filing requirement under the FCA mandates dismissal regardless of the facts and circumstances. (Decision, p. 18.) The Court distinguished the *Summers* case by noting that the seal violations in *Summers* occurred at the very outset of the case during the mandatory minimum 60-day seal period, as opposed to after years of the case proceeding under seal as in *Bibby*. The Court concluded that dismissal was not required under the circumstances before it because monetary sanctions would vindicate the authority and integrity of the judicial process. The Court concluded $1.61 million represented the amount relators had been compensated above the statutory minimum on previous awards when taking into account taxes paid on those settlements.

Taken as a whole, the Judge Totenberg's imposition of a $1.6 million sanction demonstrates that courts take seal violations seriously, and should help discourage other relators and their counsel from trying to bias an investigation or prejudice a proceeding by violating the FCA seal in the future. The decision is a welcome development for companies subject to litigation under the False Claims Act.

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