No. 15-513

In the Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

UNITED STATES, EX REL. CORI RIGSBY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF COALITION FOR GOVERNMENT PROCUREMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Coalition for Government Procurement (Coalition) is a nonprofit, nonpartisan organization comprising small, medium, and large commercial contractors that sell products and services to the federal government. The Coalition has over 200 member companies covering a wide variety of industries. Its members include the top five federal contractors and collectively account for a significant percentage of the sales generated through General Services Administration (GSA) and Department of Veterans Affairs contracts, including those awarded through the Multiple Award Schedules (MAS) program. According to the GSA website, MAS contracts alone are responsible for $50 billion in annual spending, representing approximately 10 percent of overall federal spending. Coalition members are also responsible for many other commercial items purchased annually by the federal government through other contractual mechanisms. The Coalition has been active for more than 35 years in bringing together public- and private-sector procurement leaders to work toward the mutual goal of common-sense acquisition.[1]

The Coalition's members have been subject to a number of False Claims Act (FCA or Act) actions, brought both by relators and by the government. They also have been subject to FCA investigations.

[1]Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. All parties have consented to the filing of this brief.

The Coalition therefore has a strong interest in the enforcement of the Act's seal requirement in general and the standard for deciding whether to dismiss a relator's claim for violation of that requirement in particular.

INTRODUCTION AND SUMMARY OF ARGUMENT

The FCA provides that complaints filed by relators "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). The effect of this statutory mandate is twofold: it shields the existence and content of the complaint from the public (as is common whenever a protective order is issued); and it withholds the existence and content of the complaint from the defendant. These two requirements work in tandem. One purpose of the latter is to allow the Department of Justice (DOJ) to investigate the allegations without "tipping off" the defendant. One purpose of the former is to protect the reputation of the defendant, which does not yet even know what the exact allegations are and is therefore unable to defend itself.

FCA actions are often kept under seal for three years or even longer. And they expose defendants to the possibility of hundreds of millions of dollars in damages. Failure to enforce the seal leaves FCA defendants defenseless to protect their reputation for an extended period and gives relators a strong incentive to go public with their allegations, in the hope of forcing defendants to settle quickly or convincing DOJ officials to intervene.

Violation of the seal has additional consequences that uniquely affect government contractors. In the first place, public notoriety resulting from the breach undermines the ability of the defendant to win contracts in procurements conducted while the case is under seal. Under public-contracting law, a contracting officer (CO) cannot award a contract unless the CO has made an affirmative finding that the awardee is a "responsible" offeror. Negative publicity due to ongoing litigation casts doubt on the fitness of the defendant to contract with the government. Likewise, in federal procurements competitors of the defendant can cite the existence of pending allegations to call into question the defendant's ability to perform—or, if the defendant is an awardee, to persuade the agency to take corrective action. Beyond this, swirling rumors of an FCA investigation inhibit the defendant from entering into subcontracting or teaming arrangements with other government contractors.

Finally, despite the seal, FCA defendants can usually infer from the subpoenas they receive that some sort of investigation is underway. When the seal is respected, defendants have the opportunity to conduct an internal audit and to promptly disclose noncompliance, if any exists. This proactive approach often allows defendants to avoid protracted litigation. Violation of the seal requirement undermines the ability of contractors to exercise this option. It also exposes them to possible liability under the Mandatory Disclosure Rule and to payment reductions under the Business Systems Rule.

The standard applied by the Fifth Circuit below allows relators to violate the seal with impunity. A *per se* rule of dismissal—or, at a minimum, a rule requiring consideration of the interests of defendants—is necessary to even the playing field. Not coincidentally, such a rule also is more consistent with the text, purpose, and history of the FCA's seal provision than the Fifth Circuit's standard.

ARGUMENT

A. The Seal Requirement Protects The Interests Of Defendants In FCA Actions

The FCA authorizes both the U.S. Attorney General (AG) and private relators to file civil actions against anyone that "knowingly presents, or causes to be presented," a "false or fraudulent claim" to the U.S. government. 31 U.S.C. § 3729(a). In the case of suits by the AG, the FCA provides considerable leeway. The FCA simply directs the AG to investigate "diligently" any suspected FCA violation. 31 U.S.C. § 3730(a). If the investigation shows that a person has violated the Act, the AG is then authorized to "bring a civil action" in federal court. *Id*. No specific time restriction is imposed on DOJ's ability to carry out investigations. As a practical matter, it is free to investigate until the expiration of the FCA's statute of limitations—which, depending on the circumstances, is six to ten years, see 31 U.S.C. § 3731(b).

The FCA is far more prescriptive in the case of suits brought by qui tam relators "in the name of the Government." 31 U.S.C. § 3730(b)(1). As relevant here, the Act contains three mandates for *qui tam* actions. First, the complaint "shall be filed in camera." § 3730(b)(2). Second, it "shall remain under seal for at least 60 days," although the government can move for extensions of time for "good cause." § 3730(b)(2), (3). Third, the complaint "shall not be served on defendant until the court so orders." § 3730(b)(2).

These requirements complement one another. On the one hand, the delay in service of the complaint—

and the specific allegations therein—affords DOJ an opportunity to investigate the allegations and to decide whether to intervene in the case. In carrying out its investigation, the government has a number of options. It can cause the issuance of subpoenas through the Office of the Inspector General (OIG) of the agency allegedly harmed by the defendant. 5 U.S.C. App. 3 § 6. Alternatively, the AG can issue civil investigative demands (CIDs) to the subject of the investigation, requiring it to produce documents, answer written interrogatories, or provide oral testimony. 31 U.S.C. § 3733. Once the government elects to intervene in the pending action, however, DOJ loses the ability to use this powerful tool. See 31 U.S.C. § 3733(a)(1) (AG may issue CIDs only "before commencing a civil proceeding * * * or making an election" to intervene in a pending *qui tam* action).[2] On the other hand, the requirement that the complaint be filed in camera serves to allow DOJ to retain control over the investigation by withholding information from the defendant and to keep the complaint out of the public eye.

This view of the statute is confirmed by the legislative history. The Senate Report, in particular, makes clear that the seal requirement was added for four reasons: (1) in response to the concern, expressed by DOJ, that a public filing could potentially "tip off investigation targets" in parallel criminal proceedings; (2) "to allow the Government an ade-

[2] In this regard, the involvement of a relator places DOJ at a disadvantage, because it requires DOJ to seek extensions of time in order to pursue its investigation once the 60 days have elapsed. See Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for Qui Tam Complaints Filed Under the False Claims Ac*t, 38 SEATTLE U. L. REV. 901, 914-919 (2015).

quate opportunity to fully evaluate the private enforcement suit and determine * * * if that suit involves matters the Government is already investigating"; (3) to determine "whether it is in the Government's interest to intervene and take over the civil action"; and (4) to "protect[] * * * the defendant's interests." S. Rep. No. 99–345, at 24 (1986).

B. Failure To Enforce The Seal Requirement Exposes FCA Defendants to Reputational Harm And Pressure To Settle

Although the legislative history does not specify which interests of the defendant are at stake, the courts have explained that one purpose of the seal requirement is "*to protect the reputation of a defendant* in that the defendant is named in a fraud action brought in the name of the United States, but the United States has not yet decided whether to intervene." *ACLU* v. *Holder*, 673 F.3d 245, 250 (4th Cir. 2011) (emphasis added); see also *U.S. ex rel. Pilon* v. *Martin Marietta Corp.*, 60 F.3d 995, 999 (2d Cir. 1995) ("[A] defendant's reputation is protected * * * when a meritless *qui tam* action is filed, because the public will know that the government had an opportunity to review the claims but elected not to pursue them"). Violation of the seal is especially prejudicial to defendants because it exposes them to hostile news coverage while leaving them powerless to make an effective response—given that their access to the complaint is barred by the seal. The magnitude of FCA judgments, the high cost of defending against FCA suits, and the length of time in which most cases are kept under seal all create a strong incentive to settle, which can be exploited by unscrupulous relators.

Contrary to the history and purpose of the seal provision discussed above, the balancing test applied by the Fifth Circuit does not give any consideration at all to the interests of the defendant, and it allows relators to violate the seal without incurring any consequences. This result is especially troubling for two reasons.

First, FCA litigation has skyrocketed since the 1986 amendments to the law—from 30 *qui tam* suits filed in 1987, to 269 in 1995, to 406 in 2005, to 632 in 2015. Total *qui tam* settlements and judgments have likewise soared—from $0 in 1987, to $2.3 million in 1988, to $240.6 million in 1995, to $1.16 billion in 2005, to $2.91 billion in 2015. All told, the United States has collected $33.23 billion in *qui tam* settlements and judgments since 1987. See US Department of Justice, Civil Division, Fraud Statistics—Overview, at *1-2 (Nov. 23, 2015), available at https://www.justice.gov/opa/file/796866/download.

FCA awards are set to increase dramatically this year, as federal agencies raise FCA civil penalties in response to the Civil Penalties Inflation Improvement Act, codified as Section 701 of the Bipartisan Budget Act of 2015, 28 U.S.C. § 2461. DOJ recently issued an interim final rule that raises the minimum per-claim penalty under the FCA from $5,500 to $10,781, and the maximum per-claim penalty from $11,000 to $21,563. These changes became effective on August 1, 2016, and apply to violations occurring after November 2, 2015. See Civil Monetary Penalties Inflation Adjustment, 81 Fed. Reg. 42,491, 42,498 (June 30, 2016) (interim final rule). This increase is particularly significant because, quite often, actual damage to the government is non-existent or difficult to prove.[3]

Given the size of FCA awards, rumors of a pending lawsuit or ongoing investigation not only raise questions about the integrity of the defendant's business practices, but can cast doubt on its future solvency.

Second, FCA complaints are often kept under seal for several years. Although 31 U.S.C. § 3730(b)(2) requires the government to show "good cause" to obtain an extension of the seal beyond the 60-day minimum, such extensions are routinely granted. Indeed, according to a recent study, FCA cases are held under seal for a mean of nearly 600 days and a median of 437 days after initial filing. See David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?*, 42 PUB. CONT. L. J. 225, 246 (2013). In cases in which the government eventually elects to intervene, the typical time under seal is even longer: three years for "standard" cases and six years for "large and complex" ones. Hesch, *supra* note 2, at 917. In more extreme situations, the seal has lasted as long as 8 years.[4]

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[3] In one notable case, the relator chose to forego proof of actual damages and sued for penalties alone. The relator won a judgment of $54 million but accepted a remittitur of $24 million. Although the district court ruled that the penalty violated the Eighth Amendment, the Fourth Circuit reversed and reinstated the award. *U.S. ex rel. Bunk* v. *Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 395 (4th Cir. 2013).

[4] For instance, in 2012 a company agreed to settle allegations that it had unlawfully promoted certain prescription drugs and engaged in false price-reporting practices. The settlement resolved four consolidated FCA suits, the first of which had been

In combination with the magnitude of potential damages and the cost of defending an FCA suit, the extended duration of the seal gives relators an incentive to violate the seal and go public with their allegations, with the goal of forcing a settlement or pressuring DOJ to intervene in the case. A failure to consistently enforce the seal requirement creates an uneven playing field, one in which relators can violate the seal with impunity—even willfully, as in this case—secure in the knowledge that the breach will likely go unpunished.

C. Negative Publicity From Violation Of The Seal Requirement Places Government Contractors At A Competitive Disadvantage

Although violation of the FCA's seal requirement is harmful to all defendants, it is uniquely detrimental to government contractors, because it places them at a competitive disadvantage in a number of different ways.

1. As an initial matter, the negative publicity caused by rumors of an FCA investigation can jeopardize a government contractor's ability to qualify as a "responsible" contractor, which is a prerequisite to doing business with the government.

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filed in 2003. The government did not intervene until 2011. See US Department of Justice, *Press Release: GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data* (July 2, 2012), available at https://www.justice.gov/opa/pr/glaxosmithkline-plead-guilty-and-pay-3-billion-resolve-fraud-allegations-and-failure-report; see also Consolidated Settlement Agreement in *U.S. ex rel. Thorpe* v. *GlaxoSmithKline LLC,* No. 11-cv-10398 (D. Mass. July 2, 2012), at 1-2, available at https://www.justice.gov/sites/default/files/opa/legacy/2012/07/02/plea-ex-b.pdf.

It is a general principle of government contracting that the federal government may conduct business only with "responsible" contractors. FAR 9.103(a), 48 C.F.R. § 9.103(a). In fact, before awarding a contract the CO must "make an affirmative determination of responsibility." FAR 9.103(b), 48 C.F.R. § 9.103(b). Because responsibility determinations are largely a matter of judgment, COs generally have broad discretion in making them. See, *e.g., John C. Grimberg Co.* v. *United States*, 185 F.3d 1297, 1303 (Fed. Cir. 1999); *Trilon Educ. Corp.* v. *United States*, 578 F.2d 1356, 1358 (Ct. Cl. 1978).

"To be determined responsible," a contractor must, among other things, "[h]ave adequate financial resources to perform the contract, or the ability to obtain them"; "[h]ave a satisfactory record of integrity and business ethics"; and "[h]ave the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them." FAR 9.104–1, 48 C.F.R. § 9.104-1. Pending FCA allegations cast doubt on a contractor's ability to satisfy each of these basic prerequisites. For instance, a large settlement or judgment could deprive a contractor of the financial resources required to carry out a contract. Similarly, a pending FCA suit calls into question the contractor's integrity and business ethics, as well as its accounting and operational controls.

Knowledge of a pending FCA action could influence the CO's judgment about the fitness of a contractor that is a small or medium-sized business with only a short history of contracting with the government. Since COs have wide discretion in making responsibility findings, a finding of non-responsibility would be very difficult to challenge. Likewise, if the award decision is a "close call" between two or more contractors, knowledge that one of the offerors is facing a potentially catastrophic judgment or settlement could tip the scale in favor of another offeror. In such circumstances, a contractor's ability to defend itself is severely limited, as its knowledge of the specific allegations is necessarily partial or speculative.

2. There are two other ways in which violation of the FCA's seal requirement places government contractors at a competitive disadvantage.

First, ill-gotten knowledge of FCA suits provides competitors with a basis for filing bid protests against the defendant-awardee. In a number of cases, disappointed offerors have filed bid protests before the Government Accountability Office (GAO) alleging, among other things, that the agency failed to give due consideration to pending FCA litigation in evaluating an offeror's past performance and responsibility. In one case, for example, the GAO sustained a protest challenging the CO's affirmative determination of the awardee's responsibility on the ground that the CO had ignored information about a pending FCA suit against the awardee. *FCi Fed., Inc.*, B-408558.4-6 (Oct. 20, 2014), 2014 CPD P 308, at 5-8; see also *Dyncorp Int'l LLC*, B-411465 (Aug. 4, 2015), 2015 CPD P 228, at 14 (denying a protest on the ground that the agency had complied with the evaluation criteria for past performance); *Glob. Integrated Sec. (USA) Inc.*, B-408916.6 (Sept. 30, 2015), 2015 CPD P 305, at 2 (denying reconsideration on the ground that the protester failed to raise new facts or legal arguments).

Second, knowledge of FCA litigation hinders contractors from entering into teaming or subcontracting agreements. In order to enter into such an agreement, contractors are typically required to disclose the existence of any ongoing litigation. If the relator violates the seal and announces a case before the defendant is even aware of an ongoing investigation, the defendant is caught flat-footed and risks providing either erroneous or unhelpful information in response to inquiries about the litigation. If it becomes known within the contracting community that a business is facing an FCA lawsuit, other contractors may be reluctant to enter into a teaming or subcontracting agreement, especially if the defendant in question is unaware of the nature of the allegations or the magnitude of possible damages.

D. Violation Of The Seal Requirement Inhibits The Ability Of Government Contractors To Obtain An Equitable Settlement And Exposes Them To Liability For Failure To Disclose

Typically, when a government contractor receives a subpoena from OIG or a CID from DOJ, the contractor can infer that something is afoot and begin an internal investigation, even if it has no knowledge that an FCA suit has been filed. If the internal investigation reveals potential FCA violations, the contractor must, under the Mandatory Disclosure Rule discussed below, immediately disclose any issues to the CO and agency OIG. The internal investigation also enables a contractor to have a better command of the facts and, if necessary, negotiate a settlement. In 2011, for example, a company successfully negotiated a settlement that released it from *all* the allegations the relator had made in its complaint—before the government had even decided whether to intervene. See Settlement Agreement in *U.S. ex rel. Garofolo* v. *FedEx Corp.,* No. 06-0815 (D.D.C. Apr. 29, 2011), available at http://legaltimes.

typepad.com/files/fedex-civil-settlement.pdf; see also 31 U.S.C. § 3739(c)(2) (authorizing government to settle or dismiss any *qui tam* complaint notwithstanding any objection by relator). When a pending FCA lawsuit becomes public due to the breach of the seal, the contactor loses the ability to take steps to manage its own issues and make necessary discoveries.

Breach of the seal not only short-circuits the settlement process, but can also expose the contractor to liability under the Mandatory Disclosure Rule. This rule requires contractors to make timely disclosure to the agency OIG of "credible evidence" of any violation of "Federal criminal law involving fraud, conflict of interest, bribery, or gratuity," or "a violation of the civil False Claims Act." FAR 52.203-13, 48 C.F.R. § 52.203-13; see Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064 (Nov. 12, 2008) (final rule). The consequences of violating the Mandatory Disclosure Rule can be severe—the failure to make a required disclosure of a criminal or FCA violation is cause for suspension or debarment, which means that the contractor is ineligible to participate in federal procurements for one to three years. *See* FAR 9.407-2(a)(8), 48 C.F.R. § 9.407-2(a)(8) (suspension); FAR 9.406-2(b)(vi), 48 C.F.R. § 9.406-2(b)(vi) (debarment). The list of businesses suspended and debarred by the federal government is public. Contractors on that list are likely to face similar actions by state and local governments.

While it may be impossible for large businesses to be immediately aware of all the misdeeds of their employees, early revelation of an FCA investigation can be damaging. If the agency debarment official learns of potential FCA violations following a seal violation rather than through proactive disclosure by the contractor, the official may infer that the company has failed to comply with the Mandatory Disclosure Rule.

At the very least, this will call into question the effectiveness of the contractor's compliance regime, a result that can have serious financial implications. Under the Business Systems Rule, for example, contractors subject to cost accounting are required to have "acceptable business systems." If the CO finds that the contractor has failed to satisfy this requirement, the CO is authorized to withhold payments. See DFARS 252.242-7005, 48 C.F.R. § 252.242-7005.

CONCLUSION

The judgment of the court of appeals should be reversed or, in the alternative, vacated.

Respectfully submitted.

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