



## Government Contracts Advisory

MARCH 9, 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 Seeks United States' View on Appeal Involving Requirements for Filing False Claims Act *Qui Tam* Cases Under Seal

As further evidence of its continuing interest in civil False Claims Act ("FCA") matters, (see **MLA's client alert on *United States v. Science Applications Int'l Corp***"), No. 09-5385. (Slip Op.) on February 28, 2011, the Supreme Court requested that the Acting Solicitor General express the views of the United States on the pending petition for certiorari in *United States ex rel. Summers v. LHC Group, Inc.*, No. 10-827, a case that presents a circuit split involving the statutory requirements for filing FCA *qui tam* complaints under seal.

The FCA requires that a private plaintiff, known as a "*qui tam* relator," who seeks to bring an FCA action on behalf of the United States, must file the 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 so 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.* Thus, the "primary purpose of the under seal requirement is to permit the Government sufficient time in which it may ascertain the status quo and come to a decision as to whether it will intervene ...." *United States ex rel. Summers v. LHC Group, Inc.*, 623 F.3d 287, 292 (6th Cir. 2010).

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 joined the Second Circuit and 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 affirmed the dismissal with prejudice of a complaint that was publicly-filed in violation of the FCA. *Summers*, 623 F.3d at 296. See also *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 999-1000 (2d Cir. 1995) (failure to comply with the FCA's requirements for filing under seal required dismissal with prejudice of relators' claims). The Sixth Circuit reasoned that because "the very existence of the *qui tam* right to bring suit in the name of the Government is created by statute, it is particularly appropriate to have the right exist only with the preconditions that Congress deemed necessary for the purpose of safeguarding the Government's interests." *Summers*, 623 F.3d at 298.

The Sixth Circuit in *Summers* rejected the contrary view of the Ninth Circuit, which holds 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. In *Summers*, the Sixth Circuit declined to adopt the Ninth Circuit's balancing test, finding that it represented a "judicial overreach" that was inconsistent with the FCA's text and purpose. See 623 F.3d at 296.

In responding to the Court's request, it is expected the government will reiterate the position it took in the Sixth Circuit. There, the government filed a brief asserting that the Ninth Circuit's balancing test "properly captured how these violations [of the FCA's filing requirements] should be handled." *Summers*, 623 F.3d at 295 n.6.

In any event, the *Summers* appeal highlights an important issue for defendants in FCA cases. Pending any further word from the Supreme Court on this subject, defendants in FCA cases should ascertain at the beginning of any action: (1) whether the relator complied with the FCA's requirements for filing and serving the complaint; and (2) whether any non-compliance provides a basis for dismissal under the relevant circuit's precedent.

ALBANY | ATLANTA | BRUSSELS | DENVER | LOS ANGELES | NEW YORK | PHILADELPHIA | SAN DIEGO | SAN FRANCISCO | WASHINGTON, DC

**About McKenna Long & Aldridge LLP** | McKenna Long & Aldridge LLP is an international law firm with 475 attorneys and public policy advisors. The firm provides business solutions in the area of complex litigation, corporate, environmental, energy and climate change, finance, government contracts, health care, intellectual property and technology, international law, public policy and regulatory affairs, and real estate. To learn more about the firm and its services, log on to [www.mckennalong.com](http://www.mckennalong.com).

If you would like to be added to, or removed from this mailing list, please email [information@mckennalong.com](mailto:information@mckennalong.com). Requests to unsubscribe from a list are honored within 10 business days.

© 2010 MCKENNA LONG & ALDRIDGE LLP, 1900 K STREET, NW, WASHINGTON DC, 20006. All Rights Reserved.

---

\*This Advisory is for informational purposes only and does not constitute specific legal advice or opinions. Such advice and opinions are provided by the firm only upon engagement with respect to specific factual situations. This communication is considered Attorney Advertising.