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Washington Legal Foundation
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2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

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End the Endless Extensions of the Seal Period in False Claims Act *Qui Tam* Cases

by Stephen A. Wood

The False Claims Act's *qui tam* provisions permit private persons or entities to bring suit in the name of the government against defendants who are claimed to have violated the law. An action is commenced by filing a complaint under seal and serving upon the government "substantially all material evidence and information the person possesses." 31 U.S.C. § 3730(b)(2). Once filed, the government has 60 days to investigate the case. *Id.* At the end of its investigation, the government must make an election—either take over the case or decline to intervene. 31 U.S.C. § 3730(b)(4). The government may also move to dismiss the action or attempt to settle with the defendant during this time period. *See* 31 U.S.C. § 3730 (c)(2).

Neither the statute itself nor the legislative history of the FCA contemplates that the government should have an indefinite period of time in which to investigate a potential False Claims Act violation. Yet, that has been an unfortunate reality in many *qui tam* cases, where the proceedings have remained under seal at the request of the government for years. This practice is not only contrary to the statutory language and legislative history, it is abusive and potentially threatens a defendant's fundamental right to due process. It is incumbent upon both courts and defendants to put a stop to this abuse and require the government to live within the statutory dictates and Congress' stated intent.

The False Claims Act Sealing Requirement—Statutory Text and Legislative History

As mentioned, the statute allows the government 60 days to investigate a *qui tam* action. "The complaint 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. . . . The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal . . . ." 31 U.S.C. § 3730(b). Courts have held that the sealing serves several purposes: to determine whether the circumstances are already under government investigation, to assess the merits of government intervention, to avoid tipping off the target, and to spare the target's reputation (at least temporarily). *See American Civil Liberties Union v. Holder*, 673 F.3d 245, 249–50 (4th Cir. 2011).

The statute's legislative history sheds further, important light on the intentions of the drafters:

> Keeping the *qui tam* complaint under seal for the initial 60–day time period is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action.

Stephen A. Wood is a Principal with Chuhak & Tecson, P.C. in Chicago, IL and serves as a Featured Guest Commentator on the *WLF Legal Pulse*. Text, with references, available at www.wlflegalpulse.com.

> By providing for sealed complaints, the Committee does not intend to affect defendants' rights in any way. . . .
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> Subsection (b)(3) of section 3730 establishes that the Government may petition the Court for extensions of both the 60–day evaluatory period and the time during which the complaint remains under seal. Extensions will be granted, however, only upon a showing of 'good cause'. *The Committee intends that courts weigh carefully any extensions on the period of time in which the Government has to decide whether to intervene and take over the litigation. The Committee feels that with the vast majority of cases, 60 days is an adequate amount of time to allow Government coordination, review and decision. Consequently, 'good cause' would not be established merely upon a showing that the Government was overburdened and had not had a chance to address the complaint.* While a pending criminal investigation of the allegations contained in the qui tam complaint will often establish 'good cause' for staying the civil action, the Committee does not intend that criminal investigations be considered an automatic bar to proceeding with a civil fraud suit.
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> The Committee believes that if an initial stay is granted based on the existence of a criminal investigation, the court should carefully scrutinize any additional Government requests for extensions by evaluating the Government's progress with its criminal inquiry. *The Government should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the qui tam litigation.*

S. Rep. No. 99-345 (1986) (emphasis added).

So, the seal was not intended to prejudice defendants. Congress intended that 60 days would be adequate in the vast majority of cases. Requests for extension could not be rubber-stamped; they should be carefully scrutinized and granted only upon a showing of good cause. And a lack of resources cannot be used to justify more time. Notably, although the False Claims Act has been amended several times since the watershed legislation of 1986 to which the above-quoted legislative history pertains, in the decades since, Congress has *never* altered the sealing provision or qualified its stated rationale.

The Seal in Practice—The Government Routinely Pushes for Extended Sealed Proceedings

Despite the statutory language and Congress' admonitions, the reality has been quite different. To say that many courts have given the government wide latitude in granting extensions of the seal period is perhaps the understatement of the century. *See, e.g., United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 266 (2d Cir. 2006) (seal extended for eight years); *In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 498 F. Supp. 2d 389, 392 (D. Mass. 2007) (case under seal for nine years); *United States ex rel. Yannacopolous v. General Dynamics*, 457 F. Supp. 2d 854, 857 (N.D. Ill. 2006) (seal extended for seven years); *United States ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 349 F. Supp. 2d 170, 172 (D. Mass. 2004) (eight year seal period); *United States ex rel. Sarmont v. Target Corp.*, No. 02 C 0815, 2003 WL 22389119 at *2 (N.D. Ill. Oct. 20, 2003) (case under seal for seven years while government claimed to be pursuing criminal investigation). In fact, multi-year extensions of the seal period are much closer to the norm.

Why, despite such a short presumptive seal period, is this occurring? Regrettably, the FCA's unique statutory framework fosters an environment that actually promotes abuse of the presumptive 60-day limit on sealed proceedings. First and perhaps most importantly, during the seal period, all proceedings before the court are essentially *ex parte*. That is, the government's and the relator's voices, almost always in unison at this stage, are the only ones the court has the benefit of hearing. No one is

present to speak for the defendant, to even question the government's rationale, let alone object to the requested extension in any respect.

Second, the government typically proffers a virtuous rationale for the extension that, on its face at least, most courts are disinclined to question. For example, despite the legislative history's clear statement that limited resources do not constitute "good cause," this is often raised by the government, at least indirectly, as justification for more time. The government typically represents that the pleadings raise complex issues that it cannot adequately analyze or investigate without extending the time period of the seal. The government often claims that the complex allegations have led to a sweeping, even "nationwide," investigation to include the possibility of criminal proceedings, and that it is essential to extend the seal period to permit the government to fully investigate not only the possibility of civil-fraud liability, but whether crimes have been committed and by whom. *See, e.g., United States ex rel. Martin v. Life Care Centers of America, Inc.*, 912 F. Supp. 2d 618, 620 (E.D. Tenn. 2012) (extension requested because government's resources were insufficient in view of the complexity of the litigation, government conducting a "nationwide" investigation, etc.).

In this same vein, the government argues that discovery under the FCA during the sealed period takes time. In 2009, Congress expanded the use of civil investigative demands, a discovery device available only to the government, to obtain documents, interrogatory answers, and depositions. The government needs time to use these tools, the government argues, and defendants need time to respond. What's more, FCA pleadings must meet the heightened pleading standard under Rule 9(b) of the Federal Rules of Civil Procedure. The government should have sufficient time to marshal facts to support a pleading that will pass muster under this more exacting standard.

Finally, the government argues that it actually serves the interests of the defendant to keep the matter under seal as long as possible, to spare the defendant from the stain and financial harm that follows public disclosure of allegations of fraud. In addition, the government may argue that sealing promotes settlement, that the matter can perhaps be resolved more easily before the defendant gains unwanted attention and censure in the capital markets or the court of public opinion. While this may have some validity, the asserted relief from opprobrium may only be temporary. And as discussed *infra*, countervailing factors may significantly diminish the benefit of confidentiality.

Some Litigants and Courts Push Back

Despite these justifications, a few courts have pushed back in the face of serial requests for extension of time, noting the profound unfairness in these protracted investigations and their complete lack of a statutory basis. *See, e.g., United States ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188 (N.D. Cal. 1997) (Walker, J.). In *Costa* the court rejected the government's request to keep a *qui tam* action sealed that had already been sealed for more than 18 months: "*The sixty-day period during which the complaint would be sealed was intended as a compromise*, allowing the government to complete its investigation and formulate and adopt a litigation strategy without seriously injuring the interests of the defendant." *Id.* at 1189 (emphasis added). Citing the statute's text and history, the court noted "[t]here is nothing in the statute or legislative history to suggest that, in evaluating requests for such extensions, the court should disregard the interests of the defendant and the public. Defendants have a legitimate interest in building their defense while the evidence is still fresh." *Id.*

The *Costa* court noted further that the FCA sealing process placed the defendant at a significant disadvantage: "[T]he government appears to be fully engaged in its discovery . . . each of the defendants has been served with a subpoena, investigative interviews have been conducted with numerous current and former B & T employees and government personnel have been crisscrossing the country to conduct

interviews and audits." In response to the government's argument that this offered an opportunity for confidential settlement talks, the court expressed doubt about the fairness of the process: "The defendants are proceeding in these matters based on plaintiffs' representations. They are apparently discussing the settlement of a case without knowing with certainty the allegations leveled against them. . . ." Continuing, the court noted with skepticism that "[e]ach of the plaintiff parties has suggested that keeping the file under seal serves defendants' interests by avoiding unflattering publicity; the court is not, however, convinced that defendants' current state of ignorance is a blissful one." *Id.* at 1190.

Contrary to the intent of Congress, the existing statutory structure is inherently unfair as the *Costa* court recognized: "The court notes with regret that when the earlier extensions were granted in this case, the effects of inertia and the lack of an opposing party may have resulted in a less searching inquiry regarding good cause than is appropriate. Unfortunately, the relative ease of granting, rather than denying, these extensions may too often lead courts to prolong unnecessarily the period of the seal." *Id.* at 1191-92.

And so, in *Costa*, the court identified many of the serious problems posed by the government's efforts to stretch the seal period for years beyond that contemplated by the drafters. That period was a compromise by Congress. In the main, the government should be able to determine whether intervention is necessary within 60 days. Extensions beyond that should be relatively brief and exceptional.

Many of the same concerns raised by the *Costa* court were voiced by the court in *United States ex rel. Martin v. Life Care Centers of America, Inc.*, 912 F. Supp. 2d 618 (E.D. Tenn. 2012). In *Martin*, the complaint remained under seal for more than four years, the court having granted several extension requests, even administratively closing the case *indefinitely* at the government's request for more time to make its intervention decision. Finally, at a status hearing, a non-lawyer member of the news media objected to the government's request that the proceeding be closed to the public. Upon consideration of the media's motion to intervene, the court examined the history of the government's extension requests and concluded that they were abusive. Notably, since the government had approached the defendant regarding settlement two and one-half years prior to the status hearing, the court concluded that the government had decided at least by that time that it planned to intervene. *Id.* at 624. Any sealing beyond that point could not be justified and likely served only to strengthen the government's litigation position at defendant's expense.

A Multi-Year Extension of the Seal Not Only Contravenes the Statute, it Undermines the Rights of Defendants

The seal period was never intended to provide the government with an opportunity to conduct one-sided discovery aimed at improving its litigation position while the defendant remained largely if not completely in the dark. Yet, that is precisely the concern with the government's repeated requests for extension of the seal in many of these cases. Too, the potential for evidentiary prejudice is obvious. Over a period of years, evidence can be lost—documents are destroyed or misplaced, memories fade, people die. A years-long seal period can put a defendant in an evidentiary hole too deep to climb out of.

Certainly, confidentiality during the investigation and settlement discussions is beneficial, but only to a point. As the government pursues discovery of the defendant, through subpoena or civil investigative demand, the investigation's existence becomes known outside the government/relator team. This has a couple of consequences. First, any benefit from avoiding "tipping off" the defendant ceases at that point. Second, most defendants likely initiate internal investigations immediately upon receipt of discovery. Word of the investigation spreads internally within the target organization or externally if the

investigation extends to former employees or subcontractors. The more people outside of government who know about the investigation, the harder it is to maintain confidentiality, and the more likely the investigation will become public. *See, e.g., Martin*, 912 F. Supp. 2d at 621-22 (complaint unsealed after local news media moved to intervene in the case). Very likely, once a seal has been extended multiple times to accommodate anything beyond nominal government discovery, the benefits of confidentiality for the defendant are substantially diminished.

While the government likes to tout the benefits of settlement prior to unsealing, there are disadvantages. To begin with, defendant has no ability to conduct the formal discovery that would be available to a litigant in any other civil-litigation context. That means no depositions or written discovery of the relator, his supporting witnesses, his sources, or others outside the company who might contradict the relator's claims. Any information in the possession of the target organization will come from its own internal investigation or from the government. These limits can put the defendant in the position of having to defend with one arm tied behinds its back. Thus, settlement discussions during the seal period might be more likened to a shakedown than a negotiation. As the *Costa* court noted, a defendant's ignorance during sealed proceedings may not be entirely "blissful."

And although concluding a settlement while the complaint is under seal may benefit the defendant to a degree, this should not be overstated. Importantly, the government, unlike private parties, will not enter into confidential settlements. Thus, when the settlement is executed, the matter will become public at that time. The markets may respond less harshly knowing that the defendant company has put the matter behind it, that at least the uncertainty of the outcome has been removed. But, in the current climate, the settlement of civil litigation with the government in no way represents the end of a company's troubles arising out of a particular course of conduct. Apart from other non-DOJ regulatory enforcement (which may not be part of the settlement), parallel civil proceedings will likely follow the announced settlement. Thus, concluding a settlement during the sealing period while at an informational disadvantage may be of limited benefit.

Finally, the government's insistence on extended seal periods raises genuine due-process concerns that courts should take into account. The *ex parte* nature of the proceedings is cause for concern in itself. *See Alderman v. United States*, 394 U.S. 165, 183-84 (1969) (adversary proceedings essential for achieving justice in a given case). To the extent proceedings are conducted on an *ex parte* basis, the court must take steps to protect the interests of the non-represented defendant.

More fundamentally, the essence of due process is notice and a meaningful opportunity to be heard. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Can anyone doubt that due-process concerns grow and intensify the longer a complaint remains sealed? One court has rejected this argument, though, by analogizing to sealed indictments which have been found to be constitutional. If sealed indictments are permitted, sealing a civil complaint for an extended period of time is no less constitutionally sound. *See United States ex rel. Downy v. Corning, Inc.*, 118 F. Supp. 2d 1160, 1171 (D. N.M. 2000). Yet, *Downy* failed to acknowledge that sealed indictments can also run afoul of due process (as well as the Sixth Amendment right to a speedy trial), particularly where the government is in a position to conduct an arrest, yet fails to do so, and the delay results in material prejudice to the criminal defendant. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 795 (1977) (delay in prosecution solely to obtain tactical advantage over the accused likely violates due process).

Conclusion

It is true that the government faces no similar time constraint in a fraud investigation precipitated by a whistleblower tip or that the government itself initiates. In such a circumstance, the only time limit

the government faces in bringing suit is the statute of limitations. The scenarios are not comparable, though, because a party who invokes the *qui tam* provisions has elected to initiate a lawsuit against the defendant, usually to reap the financial reward the statute offers relators. Sealing of such a suit, depriving the defendant of knowledge of its very existence, is an extraordinary measure, departing from the usual course of civil litigation. Given that False Claims Act violations sound in fraud, and the primary beneficiary is the federal fisc, a limited period of sealing to permit the government some time to determine whether to intervene in the case may be justifiable. But this can easily be abused by *ex parte* requests to extend the seal period that serve mainly to strengthen the government's litigation hand or extract onerous settlement terms from a defendant who has had no opportunity for formal discovery.

Courts must put an end to this practice, and strictly scrutinize any requested extension that continues the seal period more than one year beyond filing of the *qui tam* complaint. That should be more than enough time for the government to pursue limited discovery and consider the merits of intervention. Any request to continue the seal period beyond one year should be rejected, unless the government makes a compelling and detailed showing that additional fact gathering is necessary to inform the intervention decision, and even then, no more than six additional months should be permitted. If at that point further discovery is necessary to build a case against a defendant, it must take place pursuant to the Federal Rules of Civil Procedure where the defendant is on an equal footing.

Of course, affirmative action by a defendant to unseal a complaint, forcing the government's hand, may carry reporting consequences for public-company defendants. In addition, it turns a more or less accommodative process into an openly adversarial one, a sobering reality given that the primary objective of any investigative target should be to discourage government intervention in a *qui tam* suit. But after a second or third (or fourth) civil investigative demand and the lapse of a year or more, intervention may be a foregone conclusion, especially once the government has broached the subject of settlement with the defendant, as noted by the court in *Martin*. *See Martin*, 912 F. Supp. 2d at 624 ("It defies logic to suggest that the Government would give Defendant a 'lengthy and detailed' report of an investigation and attempt to obtain a settlement based on claims that it did not intend to pursue."). At that point, a further extension of the seal period may only put the defendant at a greater disadvantage with no material added benefit.