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The False Claims Act Seal: The DOJ's Position

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Editor's Note: As discussed in Part One of this article, investigations of False Claim Act violations that are initiated as a result of a sealed qui tam *complaint raise the question: While the relator and the government are bound by the seal and so cannot reveal the existence of the case or its particulars, does the same apply to the target of the claim? The authors continue their analysis here.*

The DOJ

Notwithstanding the absence of an explicit gag order in the statute, the Department of Justice (DOJ) takes the position that, even if the relator properly files the case under seal at the outset, that relator can later "breach the seal," and be subject to judicial sanction, if he or she discloses the existence of the *qui tam* to others. Brief for United States as Defendants-Appellants, *American Civil Liberties Union et al. v. Holder, et al.*, No. 09-2086 (4th Cir. Filed Jan. 17, 2010), at pp. 15-16. In other words, while the statute itself does not silence the relator (or anyone else), the DOJ treats the relator as both bound and gagged.

Perhaps sensitive to the First Amendment implications of its position, the DOJ has been careful not to take the position that the sealing provisions broadly gag the relator from speaking. In *ACLU v. Holder*, 673 F.3d 245 (4th Cir. 2011), the ACLU and other public interest organizations sued the DOJ to challenge the sealing provisions of the FCA on First Amendment grounds. They argued not only that the sealing provisions violated the public's right of access to judicial proceedings, but also that the seal provisions "gag" relators from speaking about their *qui tam* complaints.

In its defense, the DOJ interpreted the sealing provisions narrowly, stressing that the relator was barred from speaking only about the *qui tam* filing and the government's investigation; even while under seal, the government explained, "a relator is free to speak about the facts underlying his allegations of fraud to anyone he wishes, including the press, the public or even the defendant."

Id. While the Justice Department acknowledged that the sealing provisions operate, in practice, to bar the relator from disclosing the existence of the *qui tam* suit, it characterized that restriction not as a "gag order" imposed by the FCA, but rather as a voluntary choice by the relator: In exchange for the right to bring suit in the name of the United States (and to potentially receive a share of the proceeds), the relator chooses to give up the right to speak publicly about the suit until the matter is unsealed.

Conditions Regarding Relators

Relators are permitted to bring suit on behalf of the United States, and to share in the government's recovery, subject to particular conditions necessary to allow the United States to adequately protect its interests by evaluating *qui tam* suits before they go public. One of those conditions is that a relator must refrain from speaking about his lawsuit until the matter is unsealed and served on the defendant. Allowing a private citizen to litigate for the United States contingent on such a limitation does not implicate the First Amendment. Brief for United States as Defendants-Appellants, *American Civil Liberties Union et al. v. Holder, et al.*, No. 09-2086 (4th Cir. Filed Jan. 17, 2010), at 30.

The U.S. Court of Appeals for the Fourth Circuit agreed with that argument when it held that the ACLU lacked standing to assert that the seal provisions violated the First Amendment by "gagging" relators from speaking about the *qui tam* complaint, and therefore did not address this issue on the merits; the court adopted the DOJ's reasoning, however, in its response to the dissenting opinion. *ACLU*, 673 F.3d at 256. The court there observed that the FCA's sealing provisions do not bar the relator from discussing the underlying fraud, and that they "only preclude the relator who wants to use the FCA to recover money from discussing the FCA complaint for a brief period of time." *ACLU*, 673 F.3d at 256.

Of course, the DOJ's rationale, with which the Fourth Circuit seemed to agree, does not apply equally — or at all — to the defendant. Unlike relators, defendants obviously do not choose to become parties to *qui tam* suits, and at no time do they agree to sacrifice their First Amendment rights in exchange for anything. Accordingly, even to the extent the FCA operates in practice as a "gag order" on relators — in the sense that relators voluntary choose not to speak in exchange for the potential to recover money — it does not operate the same way on defendants.

The Risk of Contempt

So if the FCA's sealing provisions do not themselves operate to bind a defendant, may a defendant freely disclose the existence of the qui tam suit once it learns about it? According to the DOJ, the answer is still "no."

When the government wants to disclose the *qui tam* complaint to the defendant, it does so only after requesting permission from the court and obtaining a court order "partially" unsealing the *qui tam* complaint. While the FCA's sealing provisions are ministerial in nature and bind only the relator, the DOJ treats the FCA seal as imposing a gag order that applies to all parties, including itself.

That position, it seems, stems not from the statute, but from the court's sealing order itself. Although a court order is not strictly required for the clerk's office to maintain the complaint under seal for the initial 60-day period (the statute itself authorizes that much), the FCA contemplates that the case will remain under seal thereafter only if the court enters an order extending the seal. Accordingly, when (as in most cases) the DOJ has not completed its investigation within the 60-day window, it applies for a court order extending the seal.

The DOJ has taken the position that "[a]ny violation of the seal requirement that occurs after the initial 60 day period necessarily violates the court's order as well." Brief for the United States as Amicus Curiae Supporting Respondents, in *State Farm Fire & Cas. Co. v. U.S.*, No. 15-513 (Sup. Ct. Sept. 2016) at 14. Again, the Supreme Court seems to agree with the government. When the Court held last year that district courts enjoy discretion to impose a remedy for violating the FCA seal, it observed that district courts have "inherent power" to impose sanctions "for violations of court orders." *State Farm*, 137 S. Ct. at 444. Perhaps for this reason, when the Justice Department discloses a "partially unsealed" *qui tam* complaint to a defendant, it typically alerts the defendant that the matter remains "under seal," and admonishes the defendant, in words or substance, to "proceed accordingly."

But what does that mean? If the issue boils down to a potential violation of a court order, it depends on what the court order says. And because the government typically does not disclose the partial unsealing order to the defendant, the defendant does not know what it says. In all likelihood, however, the court's sealing order does not gag the defendant.

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