Reject The Mistaken Qui Tam FCA Resealing Doctrine

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In recent years, a number of courts, with the approval of the U.S. Department of Justice, have embraced the view that, when a relator files an amended complaint in a qui tam False Claims Act case after the government has declined to intervene and the case has been unsealed, the amended complaint should nonetheless be filed under seal, at least if it contains substantial amendments. This interpretation of the FCA is contrary to the statute's plain terms and purposes and should be rejected.

For more than its first century, the FCA did not include a sealing requirement at all. It was only in the major revision of the statute in 1986 that Congress added one. At that time, the Senate committee gave several reasons to justify the rule that a relator's initial complaint be filed under seal, including that the government would be able to determine privately whether it was already investigating the allegations made by the relator.[1] In addition, the Senate committee asserted that the seal requirement would prevent a company under criminal investigation from being "tipped off" by the public filing of a civil false claims suit with overlapping allegations.[2]

Since 1986, the FCA has provided that when a "private person" brings an FCA action:

> A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. 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 elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

31 U.S.C. § 3730(b)(2).

In the first decade or so after establishment of the sealing requirement, a number of courts grappled with how to apply the new requirement. Many of these decisions concerned the appropriate sanction for a relator's failure to comply, in whole or in in part, with the requirement when filing an initial complaint.[3] But a handful addressed the argument, typically made by defendants, that a relator's failure to file an amended complaint under seal, even after the government had declined to intervene and the case had been brought into open court, should be grounds for dismissal.

The first three district judges to address this argument in published opinions correctly rejected it. In United States ex rel. Walle v. Martin Marietta Corp., 1994 WL 518307 (E.D. La. 1994), the relator added an additional claim by amendment after the case had been unsealed following the government's declining to intervene. The defendant argued that at least the new claim should be dismissed because it had not been filed under seal and thus had not been "scrutinized by the

Government."[4] The court rejected the argument as "specious."[5] It noted that "to allow for the instance where additional claims surface through discovery or otherwise, the Government has the statutory authority to intervene at a later date."[6]

Similarly, in United States ex rel. Milam v. Regents of University of California, 912 F. Supp. 868 (D. Md. 1995), two of the defendants sought dismissal (at summary judgment) of an amended complaint that added them as defendants because it had not been filed under seal. The court denied the motion. After reviewing the sealing provision's purposes, the court explained that "[n]either the statute nor any relevant caselaw imposed upon [the relator] the duty to file any amendments to [the initial] complaint in camera and under seal. Likewise there is no suggestion in the legislative history that the provision was intended to benefit the defendant ... except to inform the defendant whether its opponent is the relator or the federal government."[7]

Three years later, in Wisz ex rel. United States v. C/HCA Development Inc., 31 F. Supp. 2d 1068 (N.D. Ill. 1998), the court also refused to dismiss based on a relator's failure to file an amended complaint under seal, noting that "[b]y its terms, the statute applies only to 'the complaint' and not to any amended complaint."[8]

Although these early decisions refused to apply the sealing requirement to amended complaints filed after a case had been unsealed, many courts have subsequently accepted the contrary view. In United States ex rel. Bain v. Georgia Gulf Corp., 386 F.3d 648, 658 n.10 (5th Cir. 2004), the Fifth Circuit suggested in brief dictum in a footnote that that the (b)(2) sealing requirement might apply to an amended complaint filed after the government had declined to intervene.[9] A few years later, in United States ex rel. Ubl v. IIF Data Solutions, No. 1:06-cv-641, 2009 WL 1254704 (E.D. Va. May 5, 2009), the court denied a motion to dismiss in part on the ground that "[i]n general, where the court already has unsealed the case and granted the relator leave to amend the complaint, the policy arguments supporting dismissal for failure to comply with the [(b)(2)] filing and service requirements no longer hold."[10] But the court suggested that "under different circumstances an amended complaint might add new substantive claims for relief, or new and substantially different (as opposed to merely more detailed) allegations of fraud from those in the original complaint."[11] "In such a case," the court stated, "the policy considerations behind Section 3730(b)(2) might warrant ordering the qui tam relator to file the amended complaint under seal and serve it on the government."[12]

In the years since the Ubl decision in 2009, many courts have turned that suggestion into a principle.[13] Indeed, in 2016, one district judge observed that "[i]n recent years, district courts have generally agreed [with the re-sealing doctrine], finding that when an amended complaint makes similar allegations of fraud, resealing is not required," implying that the growing agreement among lower courts includes the view that amended complaints that do raise new allegations of fraud should be sealed.[14] The government has also taken the position that an amended complaint is subject to the sealing requirement, even after the government has elected not to intervene.[15]

The increasingly common view that a relator's amended complaint, at least one that includes substantial additions, should be filed under seal, even though the case has previously been unsealed, runs contrary to the FCA's language, legislative history, and purposes.

First, § 3730(b)(2)'s terms make clear that it applies only to the initial complaint, not amendments. It refers only (and three times) to the "the complaint," not "complaints" in the plural or "amended complaints." It (twice) links together the requirement to file the complaint under seal with the requirement to file the written disclosure of "all material evidence and information" supporting the relator's allegations under seal, a step which takes place only at the time an initial complaint is filed.

Second, the legislative history is consistent with that reading. In describing the sealing requirements added in 1986, the Senate Judiciary Committee report states that "sealing the initial private civil false claims complaint protects both the Government and the defendant's interests without harming those of the private relator."[16]

Third, resealing does not serve the purposes § 3730(b)(2). As the legislative history reflects, two of those principal purposes are ensuring the government has sufficient time to decide whether to intervene and avoiding "tipping off" defendants while the government determines whether a qui tam complaint overlaps with an ongoing government investigation, particularly a criminal one.[17] As to the first of these, once the government makes an intervention decision, however, it has presumably fully investigated any allegations made by the relator. And, in any event, the government's decision not to intervene does not mean that it waives its right to change its mind, as the FCA expressly permits the government both to receive copies of all filed pleadings and to intervene "at a later date upon a showing of good cause." § 3730(c)(3). As to the second, once the defendant has been served with the original complaint, it is not going to be "tipped off" as to any undercover government investigation. It knows both that the government has had an opportunity to investigate its activities and whether the government has decided to join the litigation against it.

In sum, the sealing requirement in § 3730(b)(2) applies only before the government decides on intervention and the case is unsealed, not after. Both courts and the government should recognize as much.

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[1] See, e.g., Erickson ex rel. United States v. American Institute of Biological Sciences, 716 F.Supp. 908, 912 (E.D. Va. 1989) (citing S. Rep. No. 99-345, at 24); United States ex rel. Summers v. LHC Group, Inc., 623 F.3d 287, 292 (6th Cir. 2010).

[2] Erickson, 716 F.Supp at 912 (citing S. Rep. No. 99-345, at 24-25).

[3] See, e.g., United States ex rel. Pilon v. Martin Marietta Corp., 60 F.2d 995, 998-99 (2d Cir. 1994); United States ex rel. Lujan v. Hughes Aircraft Co., 67 F.3d 242, 245 (9th Cir. 1995); Erickson, 716 F. Supp. at 911. Much more recently, the Supreme Court addressed the proper remedy for a violation of the seal requirement, though not in the context of failure to file the initial complaint itself under seal. See State Farm Fire and Cas. Co. v. U.S ex rel. Rigsby, 137 S.Ct. 436 (2016).

[4] Id. at *1.

[5] Id. at *2.

[6] Id. (citing 31 U.S.C. § 3730(c)(3)).

[7] Id. at 890.

[8] Id. at 1069; see United States ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co., 668 F. Supp. 2d 780, 803 (E.D. La. 2009) (reviewing decisions to that point and finding "meritless" the argument for applying the (b)(2) requirements to amended complaints); United States ex rel. Stewart v. Altech Services, Inc., No. 07-213, 2010 WL 4806829, at *1 (E.D. Wash. Nov. 18, 2010); United States ex rel. Woodard v. DaVita, Inc., No. 1:05-cv-227, 2010 WL 11531271, at *13 (E.D. Tex. Dec. 21, 2010); United States ex rel. Griffith v. Conn, No. 11-157, 2013 WL 3935074, at *2 (E.D. Ky. July 30, 2013); United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc., 972 F.Supp.2d 1317, 1324-25 (N.D. Ga. 2013); United States ex rel. Phalp v. Lincare Holdings, Inc., No. 10-21094, 2014 WL 11860706, at *3 (S.D. Fla. Mar. 26, 2014).

[9] Earlier, in Friedman v. FDIC, No. 93-277, 1995 WL 608462 (E.D. La. Oct. 16, 1995), a district court, accepting the government's position, dismissed an FCA claim added in an amended complaint for failure to comply with the (b)(2) requirements where the initial complaint had contained no FCA claims.

[10] Id. at *4.

[11] Id. at *4 n.4.

[12] Id.

[13] See United States ex rel. McCurdy v. General Dynamics National Steel & Shipbuilding, No. 07CV982, 2010 WL 1608411, at *1 (S.D. Cal. Apr. 20, 2010) (refusing to dismiss because amended complaint merely stated same claims with more detail and government had not requested re-sealing); United States ex rel. Davis v. Prince, 766 F. Supp. 2d 679, 684-85 (E.D. Va. 2011) (holding that amended complaint should be filed under seal if it is "substantially different" than complaint considered by the government under seal and denying motion to dismiss because amended complaint did not meet that test); United States ex rel. Wilson v. Bristol-Myers Squibb, Inc., No. 06CV12195, 2011 WL 2462469, at *6-7 (D. Mass. June 16, 2011) (refusing to permit filing of third amended complaint because "inclusion of a new relator, as well

as the new allegations, violates the FAC's filing and sealing provision"), aff'd, 750 F.3d 111, 120 (1st Cir. 2014); Sears v. Livingston Mgmt., No. 09-45, 2013 WL 3730094, at *6-7 (M.D. La. July 11, 2013); Virginia ex rel. Hunter Labs., LLC v. Quest Diagnostics, Inc., No. 1:13-CV-1129, 2014 U.S. Dist. LEXIS 69023, at *13-14 (E.D. Va. May 13, 2014) (refusing to dismiss amended complaint because it "does not depart so profoundly from the original Complaint as to contain new and substantially different allegations of fraud"); United States ex rel. Brooks v. Stevens-Henager College, Inc., No. 1:13-cv-009, 2014 WL 3101817, at *2-3 (D. Idaho July 7, 2014) (permitting sealing of portion of amended complaint because it contains "substantial and different allegations of fraud"); United States ex rel. Reeves v. Bechtel Nat. Co., No. 1:13-cv-213, 2014 WL 4962006, at *1-2 (S.D. Miss. Oct. 3, 2014) (denying motion to seal because amended complaint failed test set out in Ubl and Prince); United States ex rel. Hagerty v. Cyberonics, Inc., 95 F.Supp.3d 240, 262-63 (D. Mass. 2015) (applying "substantially similar" test in denying motion to dismiss amended complaint); United States ex rel. Halegoua v. Kleinberg, No. 14-cv-3943, 2016 WL 4179944, at *2-3 (E.D.N.Y. Aug. 5, 2016) (permitting sealing of amended complaint where it "alleges substantially new allegations which the Government has not had the opportunity to review," government's notice prior to unsealing stated that it "'has not yet made an intervention decision' but nonetheless consented to" unsealing, and government consented to relator's request to re-seal).

[14] United States ex rel. Kolchinsky v. Moody's Corp., 162 F.Supp.3d 186, 198 (S.D.N.Y. 2016).

[15] See United States ex rel. Griffith v. Conn, No. 11-157, 2013 WL 3935074, at *3 (E.D. Ky. July 30, 2013); United States' Mem. in Supp. of Its Mot. that Relators' Am. Compl. Be Filed Under Seal at 1-3, Griffith, No. 7:11-157 (E.D. Ky. July 2, 2013), ECF No. 3-1. The government also apparently supported re-sealing in United States ex rel. Halegoua v. Kleinberg, No. 14-cv-3943, 2016 WL 4179944 (E.D.N.Y. Aug. 5, 2016). See id. at *2-3.

[16] S. Rep. No. 99-345 (July 28, 1986), at 24 (emphasis added).

[17] S. Rep. No. 99-345 (July 28, 1986), at 24-25; see State Farm, 137 S.Ct. at 443 ("The Senate Committee Report indicates that the seal provision was meant to allay the Government's concern that a relator filing a civil complaint would alert defendants to a pending federal criminal investigation.")