RIPPING THE VEIL OFF THE GOVERNMENT'S QUI TAM INVESTIGATIONS

On May 10, 2018, United States Senior District Judge for the Central District of Illinois, Joe Billy McDade, issued an order that should form the template for all courts asked to keep the government's False Claims Act ("FCA") extension motions under seal.[1] Far too often, courts simply grant the government's *ex parte* motions without considering the matters to be sealed, the public's interest in transparency or the defendants' interest in rebutting the government's or a *qui tam* relator's accusations.

The FCA[2] calls for the government to decide whether it will intervene in a *qui tam* lawsuit within 60 days[3] but allows the government extensions with a showing of good cause.[4] In most cases, the government files its intervention decision and includes a motion to unseal the complaint but keep the remainder of its filing under seal. See, for example, Order Regarding the United States' Notice of Election to Decline Intervention:[5]

> ORDERED that all other contents of the Court's docket in this action remain under seal and not be made public or served upon the defendant, except for this Order and The United States' Notice of Election to Decline Intervention, which the relator will serve upon the defendant with the complaint.
>
> ORDERED that the seal in this case is lifted as to all other matters occurring in this action after the date of this Order.[6]

Judge McDade was asked to issue a similar order. He refused to do so. Instead, the court reviewed the law and the government's filings. After doing so, he unsealed the entire docket.

First, the court ordered the government to show good cause to keep its filings under seal. This is consistent with the statute, which states, "(t)he Government may, *for good case shown*, move the court for extensions of time during which the complaint remains under seal under paragraph (2)."[7] The government responded that the motions and supporting documents should remain under seal "because in discussing the content and extent of the United States' investigation, such papers [were] [] provided by law to the Court alone for the sole purpose of evaluating whether the seal and time for making an election to intervene should be extended."[8]

The court found that the government's position was not supported by the statute. While the FCA clearly requires that *qui tam* cases be filed under seal, it does not state that extensions are to remain under seal.[9] Further, even upon a showing of good cause, the court must balance the government's interest in keeping the information under seal against the public's interest in access to the record and the defendant's interest in the information the government hopes to conceal.[10] The information should remain under seal "if unsealing would disclose confidential investigative techniques, reveal information that would jeopardize an ongoing investigation, or injure non-parties."[11]

The court conducted a review of the governments' filings and found "(n)one of the Government's motions provided specific or identifying information about its ongoing investigation into Defendants' activities."[12] The government's motions and reports, since unsealed, show utterly mundane information and activities. These include:

> "(t)he government's ongoing investigation is necessary for the United States to decide whether to formally intervene in this *qui tam* case;"[13] "(t)he Government intends to use this extension to continue to interview potential witnesses and review Medicare records and compare those records to other records received in the case;"[14] "(t)he Government intends to use this extension to continue to investigate the Medicare claims submitted to the government against records concerning the whereabouts of the therapist allegedly performing the physical therapy services;"[15] "(t)he government intends to use this extension to conduct interviews in response to new information revealed through investigation;"[16] "(t)he government intends to use this extension to send and receive responses to subpoena requests in response to new information through investigation;"[17] and "to investigate responses to subpoena requests that

> authorized access to new information."[18]

The government's last motion stated the AUSA previously assigned to the matter left the US Attorney's Office and the new AUSA knew nothing about the case.[19] It also stated the claims, which had been under investigation for five years at that point, "could possibly be legitimate claims."[20]

The tale told by the government's extension motions is one of a very typical investigation, including subpoenas, witness interviews and record reviews, without revealing any confidential government investigative tools or techniques.

What the government knew about a *qui tam* relator's FCA allegations, and when the government knew it, is crucial to an essential element of the FCA—materiality. The Supreme Court made clear that the materiality element of the statute went to whether it would pay a claim if it knew of the alleged fraud, and from the time a *qui tam* complaint is filed under seal, the government is on notice of that alleged fraud. The extent of its knowledge, and its continuing payments while the matter is under investigation, are crucial to the question of materiality. As the Supreme Court stated in 2016:

> "If the government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material."[21]

Once the government receives a *qui tam* complaint, it is on notice of the relator's allegations. Depending upon the details of the allegations, and upon what the government learns in its investigations, its continued payment of the claims goes directly to the question of whether the alleged falsity is material to the government's payment decisions. The government should not be permitted to conceal facts directly relevant to this essential element of an alleged FCA violation behind motions to seal its motions and other evidence of its knowledge.

Judge McDade's ruling in *Morgan*, particularly in light of the Supreme Court's decision in *Escobar*, should be a template for all courts considering the government's motions to unseal only a *qui tam* complaint and to keep all of its other pleadings under seal.

If you have any questions, please contact David Honig at (317) 977-1447 or dhonig@hallrender.com or your regular Hall Render attorney.

[1] Order, *United States ex rel. Morgan v. Champion Fitness*, Doc. #27, Case No. 1:13-CV-1593, C.D. Ill., May 10, 2018.

[2] 31 U.S.C. § 3729 et seq.

[3] 31 U.S.C. § 3730(b)(2).

[4] 31 U.S.C. § 3730(b)(3).

[5] Doc. #7, *United States ex rel. McClary v. Powers, et al.*, Case No. 1:17-cv-00441-CWD, D. Idaho, May 11, 2018).

[6] Id.

[7] 31 U.S.C. § 3730(b)(3), emphasis added.

[8] Order, Doc. #27, p. 2.

[9] Id., citing *Yannacopolous v. Gen. Dynamics*, 457 F.Supp.2d 854, 858 (N.D. Ill. 2006).

[10] Id., citing *In re Bank One Sec. Litig.*, 222 F.R.D. 582, 586 (N.D. Ill. 2004).

[11] Id., quoting *Yannacopolous*, 457 F.Supp.2d at 858.

[12] Id., p. 5.

[13] Status Report, *Morgan*, Doc. #3.

[14] Memorandum in Support of the *Ex Parte* Motion for Extension of Time to Consider Whether to Intervene, *Morgan*, Doc. #6-1.

[15] Memorandum in Support of the *Ex Parte* Motion for Extension of Time to Consider Whether to Intervene, *Morgan*, Doc. #7-1.

[16] Memorandum in Support of the *Ex Parte* Motion for Extension of Time to Consider Whether to Intervene, *Morgan*, Doc. #10-1.

[17] Memorandum in Support of the *Ex Parte* Motion for Extension of Time to Consider Whether to Intervene, *Morgan*, Doc. #12-1.

[18] Memorandum in Support of the *Ex Parte* Motion for Extension of Time to Consider Whether to Intervene, *Morgan*, Doc. #14-1.

[19] Memorandum in Support of the *Ex Parte* Motion for Extension of Time for Intervention Determination, *Morgan*, Doc. #24.

[20] Id.

[21] *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989, 1995 (2016).