BUSINESS TORTS & UNFAIR COMPETITION
AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

Winter 2014, Vol. 21 No. 2

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The False Claims Act: Protecting Your Client When Amending a Sealed Complaint

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During the Civil War, unscrupulous contractors supplied the Union Army with empty boxes filled with sawdust instead of muskets, uniforms that disintegrated in the first heavy rain, and blind and diseased mules. The massive scope of this fraud moved Congress to pass and President Abraham Lincoln to sign what is now the False Claims Act, 31 U.S.C. §§ 3729–3733 (FCA). The FCA has become the United States' primary tool for prosecuting fraud in every part of the government, from Medicare and other federal healthcare programs, to defense contracting, procurement, and grant funding.

The United States does not have the resources to police fraud on its own. The FCA solves this problem by enlisting citizens to serve as *qui tam* relators. The government remains the real party in interest, and the FCA allows the United States to delegate to relators the prosecution of the case in return for a portion of the proceeds—typically between 15 and 30 percent of the recovery. 31 U.S.C. § 3730(c)(3), (d). The FCA provides for treble damages and civil penalties of $5,500 to $11,000 per false claim. § 3729(a)(1). Successful relators also recover attorney fees and costs. § 3729(d)(1), (d)(2). The highest dollar-value citizen-initiated *qui tam* FCA suits have returned hundreds of millions of dollars to the treasury in recent years, leading to impressive relator's share rewards.

Unlike most other federal litigation, the FCA requires the relator to file the complaint under seal and provide a pre-filing disclosure to the United States of all material information within the relator's possession. 31 U.S.C. § 3730(b)(2). FCA cases then remain under seal, often for years, as the United States investigates the complaint and decides whether to elect to intervene, delegate prosecution of the case to the relator, pursue an alternate remedy, settle the case, or move for dismissal. § 3730(c)(2)(A), (c)(2)(B), (c)(5), (d)(1), (d)(2).

But FCA litigation is fraught with great traps. This article examines one of these traps: the strategic and procedural question of whether and how to amend a sealed FCA complaint. This decision is affected by numerous considerations unique to the FCA: (1) the FCA's first-to-file rule; (2) its public disclosure bar; (3) statute of limitations concerns; (4) preserving the right to share in an alternative remedy pursued by the government; (5) the government's interest in the case; (6) and the uncomfortable fit of Federal Rule of Civil Procedure 15 with the FCA's seal provisions.

The First-to-File Rule

One of the most important considerations in deciding when to amend a complaint is the first-to-file rule. Under the FCA, the relator who is first to file particular allegations is the one who will receive an award. 31 U.S.C. § 3730(b)(5). The rush to be first to file is often described as the "race to the courthouse." The logic underlying this rule is that once the government is informed of the fraud, it has no need for a second-filed relator. The rule also encourages relators to come

forward as soon as possible when they learn of fraud. Courts examine who is first to file for each particular allegation, so if a relator has additional factual allegations not set forth in the original complaint, it is important for the relator to file an amended complaint to preserve his or her first to file status for those allegations. It is not unheard of for there to be as many as six relators in a *qui tam* case, so time is particularly of the essence when it comes to amending an FCA complaint.

The prevailing test that courts have used in applying the first-to-file rule is the "same material elements" test. *United States ex rel Carter v. Halliburton Co.*, 716 F.3d 171, 181-82 (4th Cir. 2013). Under this test, as explained in the *Halliburton* case, a later suit is barred if it is based on the "same material elements of fraud" as the earlier suit, even though the later suit may "incorporate somewhat different details." In other words, the second suit may be barred even if it does not plead "identical facts." Although the first-to- file bar seems relatively straightforward, in application it can be difficult to determine whether two suits allege the "same material elements." For this reason, if there is any doubt whether the relator's new additional facts cover the "same material elements of fraud" as the original complaint, it is best to amend the complaint.

Even if the first-to-file issue is never litigated, it can be a concern when negotiating a share agreement between multiple relators. When there are multiple relators the government will frequently seek permission from the court to partially unseal the cases to disclose to the relators that there are multiple cases based on similar allegations. Sometimes relators will agree to file a joint amended complaint and share in the recovery. Whether a first-filed relator should enter into a relator's share agreement is a complicated question that depends on many factors, such as whether the second-filed relator can contribute evidence that will substantially increase the odds of reaching a successful result. When there are distinct factual allegations, relators may agree to a different percentage of the recovery for each particular allegation. Given the law on the first-to-file rule, the relator who is first to file on a particular allegation has the best bargaining position and will typically receive the largest percentage of the recovery.

The Public Disclosure Bar

FCA suits have a unique filing requirement—for a court to have authority to preside over an FCA claim, the facts supporting the relator's allegations cannot be based on public information. *SeeUnited States v. Kiewit Pac. Co.*, 2013 U.S. Dist. LEXIS 153135 (N.D. Cal. Oct. 24, 2013). Commonly referred to as the "public disclosure bar," the FCA orders courts to dismiss any FCA action in which the allegations are based on information that is substantially the same as information that was publicly disclosed during government hearings, audits or investigations, or through the news media. 31 U.S.C. §3730(e)(4)(A)(i)–(iii) (2010).

The public disclosure bar has an exception for relators who are the "original source" of the information alleged, even when the same information has been publicly disclosed. The FCA defines an original source as someone "who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which

allegations or transactions in a claim are based, or (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government *before filing* an action under this section." 31 U.S.C. §3730(e)(4)(B) (2010) (emphasis added). The original source exception grants jurisdiction when the relator's knowledge of the information is independent of the publicly disclosed information, supports the allegations, and was disclosed to the government prior to filing the complaint.

To ensure compliance with the "original source" provision, practitioners should take special note of the prefiling requirement and be sure to disclose all information underlying the claims to the government. The prefiling disclosure should set forth not only the allegations but also the facts, documents, and witness testimony on which the allegations are based. Failure to make the required prefiling disclosure could undermine the relator's "original source" status.

New facts often arise or become known after the initial FCA filing and disclosure to the government that make it necessary to file an amended complaint while the case is still pending under seal. Assuming a relator is the original source for the initial allegations, a question arises as to whether a relator retains original source status when submitting supplemental information to the government.

There is some debate about whether the language of the FCA requiring disclosure prior to the filing of an "action" refers only to the original complaint, or to subsequent complaints. If "action" is meant to refer only to the initial complaint, a relator could not be the original source of any information disclosed after filing the initial complaint. Courts have held, however, that a relator can be the "original source" of new allegations by disclosing supplemental information to the government prior to filing an amended complaint. Federal district courts in Ohio and Pennsylvania both recently held that relators can be an original source of information added to an amended complaint. *See United States ex rel. Antoon v. Cleveland Clinic Found.*, 2013 U.S. Dist. LEXIS 148888, *51 (S.D. Ohio 2013); *United States ex rel. Spay v. CVS Caremark Corp.*, 913 F. Supp. 2d 125, 166, n.45 (E.D. Pa. 2012).

Regardless, a relator *cannot* be considered an original source without disclosing the information to the government prior to filing the complaint or any amended complaints. To ensure that your whistleblower client does not waive his or her status as an original source, it is critical to disclose all new information to the government prior to filing an amended complaint under seal.

Preserving the Statute of Limitations

Another important reason to amend a sealed complaint is to preserve the statute of limitations. The FCA has a six-year limitations period. 31 U.S.C. § 3731(b). If the government intervenes, its complaint generally relates back to the relator's complaint for statute of limitations purposes. § 3731(c). Often the defendant's scheme has been ongoing for years, well before the statute of limitations period. Getting new claims filed quickly is important to maximizing the recovery.

Alternate Remedies under the False Claims Act

The FCA expressly contemplates the possibility that the Government may use a relator's information to seek a remedy for fraud under other statutes. 31 U.S.C. § 3730(c)(5). Under some circumstances, the FCA permits relators to share in a recovery under other statutes as if the Government had recovered the money under the FCA. For example, in *United States v. Bisig*, 2005 U.S. Dist. LEXIS 38316, 2005 WL 3532554 (S.D. Ind. 2005) the relators filed their FCA complaint, but the United States chose instead to pursue a criminal action against the defendant and recovered under a criminal forfeiture statute. Ultimately, the court found relators were entitled to share in the government's recovery.

Although the government tends to oppose awards under 3730(c)(5)'s "alternate remedies" provision, relators can create or enhance their rights to alternate remedies by amending the complaint and disclosure statement to be as specific as possible about all the fraudulent schemes that the relator knows about. That way, it will be clear that the relator was the source of the government's information if it seeks an alternate remedy. The government may oppose an award of an alternate remedy when the complaint does not identify the defendant who paid the United States. *Bisig*, 2005 U.S. Dist. LEXIS 38316, at *11–12. The United States has also opposed an alternate remedy when the complaint did not comply with Rule 9(b)'s requirement that fraud be pled with particularity. *United States ex rel. Bledsoe v. County Health Sys.*, 342 F.3d 634, 704 (6th Cir. 2003). Courts have also denied relators an alternate remedy when the complaint and disclosure did not include facts sufficient to support a claim under the FCA.*United States ex rel. Hefner v. Hackensack Univ. Med. Ctr.*, 495 F.3d 103, 111–12 (3d Cir. 2007).

The Government's Interest

When amending a *qui tam* complaint, the government's interests should also be considered because a government decision to intervene significantly affects the success of FCA cases. Government attorneys can grow irritated with multiple amendments and with the addition of weak and unsupported claims. To alleviate these issues, it may be helpful to give the government a summary of what has been changed in the amended complaint or provide a redlined version showing the changes. Counsel should consider omitting weaker allegations if they might be distracting to the government or hurt the relator's credibility. Relator's counsel can also discuss prioritization of the claims with government attorneys.

How to Amend a Sealed Complaint

Given the many reasons to amend, FCA relators often amend their complaints while the case remains under seal. Rule 15(a), which governs amendments to pleadings, does not expressly permit a party to amend sealed FCA complaints absent leave of court because a sealed FCA complaint has yet to be served. Rather, Rule 15(a)(1) permits a party to "amend its pleading once as a matter of course" either within 21 days of service of the pleading, 21 days after service of a responsive pleading, or 21 days after service of a Rule 12(b), 12(e), or 12(f) motion, whichever is first. In all other cases, Rule 15(a)(2) specifies that pleadings may only be amended with the opposing party's consent or leave of court, which shall be freely given.

In most cases, leave of court should be sought to amend sealed FCA complaints. Given that defendants experience no prejudice from amendments to sealed complaints since they have yet to be served and discovery has not begun, such motions should be granted. Moving for leave to amend while the complaint is under seal has the additional benefit of preserving the relator's single Rule 15(a)(1) opportunity to amend without leave of court until after the defendant moves to dismiss. This allows relators to correct deficiencies identified in motions to dismiss without obtaining leave of court.

Some have interpreted the history of Rule 15 and the advisory committee notes to permit complaints to be filed under seal *before* service without leave of court. Such practice can prove problematic. Rule 4(m) gives the relator 120 days to serve the complaint after unsealing. If a relator serves an amended complaint filed while the case was under seal without leave of court, the defendant may move to dismiss on grounds that it was not served with the operative complaint after the 120 days had run. To avoid this scenario, a relator could move to amend the complaint after unsealing and then serve the newly amended complaint.

Conclusion

Amending sealed False Claims Act complaints is just one of the steps in successfully navigating the traps of complex FCA litigation. Because of these traps and the large scope of most cases, attorneys who are inexperienced in FCA litigation should seek co-counsel. But the sometimes long and complicated path to resolution of FCA cases is worth the voyage to correct what are often unconscionable wrongs against the American public.

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