



1-1-2007

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Recommended Citation

Fabrikant, Robert and Nwabuzor, Nkechinyem (2007) "In the Shadow of the False Claims Act: "Outsourcing" the Investigation by Government Counsel to Relator Counsel During the Seal Period," *North Dakota Law Review*: Vol. 83 : No. 3 , Article 2.

Available at: <https://commons.und.edu/ndlr/vol83/iss3/2>

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IN THE SHADOW OF THE FALSE CLAIMS ACT: “OUTSOURCING” THE INVESTIGATION BY GOVERNMENT COUNSEL TO RELATOR COUNSEL DURING THE SEAL PERIOD

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I. INTRODUCTION

The civil False Claims Act (FCA)¹ was enacted during the Civil War to combat fraudulent sales and other abusive practices by private suppliers to the Union Army. From the outset, the FCA permitted actions to be brought either by the attorney general, or a private citizen acting on behalf of the United States.² Where a private citizen files a claim under the FCA, it is termed a *qui tam* lawsuit.³

In its current form, the FCA requires a private citizen, also known as the relator, to file an FCA complaint under seal. Most activity in *qui tam* cases takes place while the case is under seal, yet there has been little scholarly review of the practices which predominate while the complaint is under seal. This short comment addresses only several of the important, and troublesome, practices which have taken root since Congress enacted the 1986 amendments to the FCA, which created the seal period mechanism. As demonstrated below, collusive activity by government and *qui tam* counsel have subverted the purposes for which Congress created the seal period. Immediate action by Congress and the courts is necessary to prevent the seal period from continuing to be used as a sword, not a shield, by government and *qui tam* counsel.

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Many of the practices discussed here are not documented in scholarly or other sources, but are based on Mr. Fabrikant’s more than twenty-five years of defending *qui tam* cases.

1. 31 U.S.C. §§ 3729-3733 (2003).

2. *Id.* § 3730 (a) & (b).

3. *Qui tam* is a term of art that originates from the Latin phrase “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*” which means ‘who pursues this action on our Lord the King’s behalf as well as his own.’” *Rockwell Int’l Corp. v. United States*, 127 S. Ct. 1397, 7403 n.2 (2007). *Qui tam* actions are actions brought on behalf of the government by a private party, who receives some part of the recovery awarded as compensation for his efforts. *United States ex rel. Fender v. Tenet Healthcare Corp.*, 105 F. Supp. 2d 1228, 1229 (N.D. Ala. 2000).

II. STATUTORY FRAMEWORK AND LEGISLATIVE HISTORY

Under the FCA, whistleblowers may file a *qui tam* complaint under seal alleging that the government has been defrauded by a government contractor.⁴ The complaint remains under seal for sixty days (“the seal period”), during which the government is to determine whether the suit warrants the government intervening in the action and taking over the suit.⁵ The government may extend the seal period only by obtaining an order from a district court judge upon a showing of “good cause.”⁶

The pertinent legislative history makes crystal clear that the purpose in providing for a seal period was two-fold: first, to maximize the government’s ability to investigate the allegations in the complaint by keeping from public view the allegations in the complaint;⁷ and second, to avoid compromising a pending criminal investigation.⁸ It is common knowledge, however, that government counsel often use the seal period for the purpose of leveraging a settlement, rather than determining whether to intervene in the lawsuit. It is also common knowledge that government counsel routinely permit, indeed invite, whistleblower’s counsel to do much of the government’s investigative work during the seal period.⁹ The latter practice may fairly be described as a form of “outsourcing.”

This article argues that government counsel’s increasing, and misplaced, reliance on relator’s counsel during the seal period has the reprehensible effect of sapping the government’s ability to meet their professional responsibility of evaluating the allegations in the complaint in a “fair and even handed” manner.¹⁰ It also argues that “outsourcing” is exacerbated by attempts by whistleblower’s counsel to be compensated for their work on behalf of government counsel under the attorneys’ fees provision of the FCA. Finally, the cumulative effect of these abusive practices is to unduly prolong the seal period, and to enhance the ability of the government and

4. 31 U.S.C. § 3729(d) (2003).

5. *Id.* § 3730(b)(2).

6. *Id.* § 3730(b)(3) (2003).

7. S. REP. NO. 99-345, at 24 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5289.

8. *Id.* at 16, reprinted in 1986 U.S.C.C.A.N. at 5281.

9. *See, e.g.,* United States *ex rel.* Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323, 1337 (M.D. Fla. 2001).

10. Memorandum from Eric H. Holder, Jr., Deputy Attorney General, Dep’t of Justice, to all United States Attorneys et. al, Re: Guidance on the Use of the False Claims Act in Civil Health Matters, June 3, 1998, available at <http://www.usdoj.gov/dag/readingroom/chcm.htm> (setting out the manner in which government attorneys are to enforce the FCA in civil health care matters). This directive was issued in response to concerns that DOJ had acted in an abusive, heavy handed manner in the healthcare area in applying the FCA. This resulted in the GAO report which appears in the following footnote.

relator's counsel, often acting in consort, to extract unreasonable settlements from defendants.¹¹

III. ABUSIVE PRACTICES BY GOVERNMENT AND *QUI TAM* COUNSEL DURING THE SEAL PERIOD

A. EXCESSIVE LENGTH OF THE SEAL PERIOD

The government intervenes in approximately one third of all FCA cases.¹² It is almost always the case that the sixty-day seal period provided in the FCA is extended, usually by an extraordinarily lengthy amount. There are no available statistics which show the average/median length of the seal period. The only systematic review which pertains to the issues at hand was conducted by the Government Accountability Office (GAO) in 2005. The GAO concluded, after reviewing data maintained by the U.S. Department of Justice (DOJ) for the period 1986 to 2005, that “cases in which DOJ intervened took a median of 38 months to conclude and ranged from 4 months to 187 months.”¹³ This figure does not include cases in which the government did *not* intervene. Nevertheless, it provides a reliable indication of the length of the seal period in cases where the underlying allegations (or other matters which were brought to the government's attention during the seal period) are sufficiently meritorious to warrant intervention by the government.¹⁴

If the median seal period is, indeed, thirty-eight months, then the median exceeds the statutorily contemplated period of two months, by a factor of eighteen. This reflects cases in which the government has intervened over a period of nearly twenty years. Given the protracted period during which this extravagant ballooning of the seal period has occurred, it

11. The Government Accounting Office issued a report in 1999 lamenting abusive practices by the United States Department of Justice in using the FCA to coerce settlements. U.S. GENERAL ACCOUNTING OFFICE, GAO/HEHS-99-170, MEDICARE FRAUD AND ABUSE: DOJ'S IMPLEMENTATION OF FALSE CLAIMS ACT GUIDANCE IN NATIONAL INITIATIVES VARIES 4-5 (1999) [hereinafter GAO REPORT].

12. *Id.* at 29.

13. Letter from Laurie E. Elkstrand, Director, Homeland Security and Justice, GAO, to U.S. Rep. F. James Sensenbrenner and Rep. Chris Cannon, and Sen. Charles E. Grassley (Jan. 31, 2006) [hereinafter GAO Letter].

14. *Id.* (emphasis added). The GAO report indicates that cases in which the government intervened, settled for amounts which significantly exceeded those cases in which the government declined to intervene. GAO REPORT, *supra* note 11, at 35. The GAO report indicates that in the 538 cases in which the government intervened from 1987 through 2005 the median settlement recovery was \$1,200,000, whereas the median settlement recovery in non-intervened cases was \$100,000, or less than ten percent of the median settlement in the intervened cases. *Id.* This confirms the obvious point that cases in which the government intervenes are more substantial than the non-intervened cases. *Id.*

is fair, indeed long overdue, to ask why it has occurred, and what actually happens during the seal period?

There is a plethora of data on the amounts of the financial settlements which occur at the termination of the seal period,¹⁵ and somewhat less data on the length of the seal period. Yet, there is surprisingly little or no data on what actually happens during the seal period. In particular, there are very few reported cases describing, or challenging, what transpires during the seal period. Reported decisions which discuss what occurs during the seal period do so usually in the context of deciding whether the relator's assistance to the government, especially in the form of work done by relator's counsel, entitles the relator to a greater share of the amount recovered from the defendant by the government.

Strangely, these court discussions do *not* occur in the context of deciding whether to award attorneys' fees and expenses for relator's counsel's assistance during the seal period. As noted below, relator's counsel seek to use their rendering assistance to the government as a factor which entitles their client to a larger share of the government's recovery, *and* to argue that their clients are entitled to recover attorneys' fees for that very same assistance. We are aware of no case in which this "double-dipping" has been challenged.

B. ABUSIVE PRACTICES

Prior to 1986, the FCA limited relators to receiving not more than the percent of the proceeds recovered in the event the government intervened in the suit.¹⁶ As part of the 1986 amendments to the FCA, however, Congress increased the cap in cases in which the government intervened from ten percent to thirty percent.¹⁷ The statute provides little insight on how the relator's share is to be determined other than to say that it "depend[s] upon the extent to which the person substantially contributed to the prosecution of the action."¹⁸ The DOJ has prepared a Relators Share Guidelines

15. For example, the GAO reported, "[F]rom fiscal years 1987 through 2005, settlement and judgments for the federal government in FCA cases have exceeded \$15 billion, of which \$9.6 billion, or 64 percent, was for cases filed by whistle blowers under [the] FCA's qui tam provisions." GAO Letter, *supra* note 13, at 1.

16. This cap was inserted in the 1943 amendments to the FCA. 31 U.S.C. § 3730 (1982). Under the 1943 amendments the relator could recover up to twenty-five percent if the government failed to intervene.

17. 31 U.S.C. § 3730(d).

18. The legislative history of the Senate bill identifies three factors that ought to bear on the percentage awarded to the relator: first, the significance of the information provided by the relator to the government; second, the relator's contribution to the result; and third, whether the government was previously aware of the information initially provided by the relator to the government. S. REP. NO. 99-345, at 28 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5293.

(Guidelines), which sets forth a number of factors which it takes into account in deciding how large the relator's share of the proceeds should be.¹⁹

These Guidelines have several provisions which bear on the issues at hand. First, the Guidelines mention "[t]he relator provided substantial assistance during the investigation and pre-trial phase of the case;"²⁰ second, the "relator's counsel provided substantial assistance to the government";²¹ and third, the "relator and his counsel supported and cooperated with the government during the entire proceeding."²²

A case in point is *United States ex rel. Alderson v. Quorum Health Group, Inc.*,²³ where the court awarded the relator twenty-four percent of the government's recovery.²⁴ In *Alderson*, the court noted that during the seal period relator's counsel

predicted [to relator] that DOJ would demand that [relator's counsel], on behalf of [the relator] assume primary responsibility for prosecution of the litigation. . . . [and] further predicted that, absent [relator's counsel] assuming the burden of lead plaintiff's counsel, the United States would decline to intervene.²⁵

The court further noted that at a pre-intervention meeting, at which the government lawyers

reiterated their skeptical view of [relator's case] . . . as anticipated by [relator's] counsel, DOJ claimed a scarcity of resources to undertake protracted litigation against [the defendant]. DOJ sought and received assurance from [relator's] counsel of their ability and willingness to commit the necessary resources to the case and to undertake the principal role in prosecuting the litigation . . . [subsequently] pursuant to . . . and in reliance on the commitment from [relator's counsel] the United States intervened.²⁶

19. These Guidelines became available through a Freedom of Information Act request, and have now become public. See generally 11 FALSE CLAIMS ACT & QUI TAM Q. REV. 17-19 (1997).

20. Dep't of Justice, Relator's Share Guidelines 2 (Dec. 1996) (internal memorandum), available at http://www.usdoj.gov/civil/frauds/fcrs/fraudnet/topics/relator's_share__intervened.htm (follow Relator's Share Guidelines hyperlink under DOJ Memoranda).

21. *Id.*

22. *Id.*

23. 171 F. Supp. 2d 1323 (M.D. Fla. 2001).

24. *Alderson*, 171 F. Supp. 2d at 1338.

25. *Id.* at 1328.

26. *Id.* at 1329.

The court further commented that “much of the work surrounding the preparation of the United States’ [superseding complaint by way of intervention] reveals significant cooperation between the parties. For example, auditors’ reports were appended as exhibits to the United States’ complaints . . . [during this process,] the parties undertook the arduous task of identifying and highlighting, page by page, individual categories of information contained in the [cost reports which relator contended contained false statements], individual categories of information contained in the reports. This task was managed principally by [one of relator’s counsel] who directed a team of DOJ paralegals.”²⁷

The extraordinary assistance to the government provided by relator’s counsel during the seal period was a significant factor in awarding relator a share of the proceeds at the upper range of the statutorily permissible amount. *Alderson* did not, however, address the extent to which, if at all, that very same assistance by relator’s counsel, which counted toward an upward share for the relator, could also be recovered under the attorneys’ fees provision of the statute. Thus, the court had no occasion to determine whether it would be a prohibited form of “double dipping” to permit counsel’s conduct to count both in calculating the relator’s percentage share and also in setting the proper amount for the recovery of attorneys’ fees.

The case of *United States ex rel. John Doe I v. Pennsylvania Blue Shield, Xact Medicare Services, Inc.*²⁸ is the only reported case which remotely comes close to addressing “outsourcing.” In that case, defendants sought to reduce relator’s attorneys’ fee award on the ground that a portion of counsel’s hours were redundant, and therefore unnecessary, because they duplicated time spent by government counsel and their investigators.²⁹ The court held that it could not reduce the award unless the defendant could, with specificity, identify the hours which duplicated the government’s investigatory efforts.³⁰ The court did not address the situation where the government lays back during the seal period and allows the relator (and relator’s counsel) to do the government’s investigative work.³¹

27. *Id.* at 1330.

28. 54 F. Supp. 2d 410 (M.D. Pa. 1999).

29. *Pa. Blue Shield*, 54 F. Supp. 2d. at 414-15.

30. *Id.*

31. The case has been criticized on the ground that “it is clearly improper, and it could require significant, intrusive discovery into the government investigation.” JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 4-244 (3d ed. 2006). This may be so, but it does not address the more important question whether non-redundant work should be recompensed if it was work that the legislative history would suggest should be performed by the government, not the relator, during the seal period.

The *Alderson* court's discussion of the character and quantity of the assistance rendered to the government during the seal period by relator's counsel mirrors our own experience in this area. This assistance consists broadly of the following:

First, during the seal period, relator's counsel, at the request of the government, conducts factual and legal research, drafts and reviews government letters to defense counsel, drafts and reviews internal government position papers, drafts and reviews government mediation briefs and presentations, participates in interviewing fact witnesses, and, unbeknownst to the defense, takes over responsibility for paying and preparing the government's expert witnesses, supplying paralegals and other clerical help to the government, and reviewing documents produced by defendants (including documents produced under compulsion). It is sometimes the case that when the relator takes over contractual responsibility for the expert witness, the relator enters into a new contract with the expert which calls for the expert to be reimbursed at a significantly higher amount than called for under the government's contract, and the new contract often contains a contingency feature which did not appear in the government's contract, and which gives the expert an impermissible stake in the outcome of the case.

Second, during the seal period, at the request of government counsel, relator's counsel conducts settlement negotiations with defense counsel. These negotiations involve relator's counsel proposing a settlement dollar amount to defendants, and the government not only participating with relator's counsel in developing what is ostensibly the relator's settlement position, but government counsel explicitly endorsing the settlement offer(s) made by relator's counsel.

Third, during the seal period, government counsel either makes substantial settlement offers to the defense and/or "recommends" to the defendant that it accept a settlement offer from the relator which calls for a substantial payment by the defendant. The government prolongs the seal period, and may conduct additional factual and/or legal research while settlement negotiations are being conducted with the defendant.

As all of the above unfolds, relator's counsel often acts, and sees themselves as acting, as "general counsel" to the government. In fact, a highly regarded relator's counsel has publicly stated that relator's counsel should seek to assume the position of "general counsel" to the government in *qui tam* cases.³²

32. Mark Raspanti, *Current Practices*, 71 *TEMPLE L. REV.* 36, 41 (1998).

IV. THE ABUSIVE PRACTICES, AKA “OUTSOURCING,” ARE CONTRARY TO THE FCA

All, or virtually all, of the practices set out above contravene Congress’s two purposes in creating the seal period mechanism: first, to enable the government to investigate the allegations in the relator’s complaint in order to determine whether the case warrants government intervention; and second, to avoid compromising an ongoing criminal investigation (should one, in fact, exist). While the foregoing, abusive, practices may constitute “substantial assistance” to the government, and therefore may enable the relator to obtain an increased share of the proceeds from the suit, the relator should *not* be recompensed separately for these practices during the seal period.

A relator’s recompense for assistance provided by its counsel to the government is to obtain *from the government* (and the court) an increase in its fractional share of the ultimate settlement proceeds. If relators were able to recover *both* a higher percentage of the settlement proceeds for assisting the government *and* the costs incurred in performing legal and investigative work on behalf of the government, relators effectively would be awarded a double recovery. The FCA does not countenance such a windfall for relators for work done by relator’s counsel during the seal period.

It is arguable that the FCA *does* contemplate a double recovery for work done by relator’s counsel before and after, but not during, the seal period. Prior to the seal period, relator’s counsel has no choice but to expend energy preparing and filing the complaint. *After* the seal period, if the government declines to intervene or intervenes *sans* settlement, relator’s counsel may have to undertake substantial litigation activities. Such work by relator’s counsel is entirely conventional, and wholly within the ambit of the FCA. This cannot be said, however, about work by relator’s counsel *during* the seal period.

The legislative history makes clear that the seal period was created for the benefit of the *government*, not relators.³³ Specifically, the seal period was created “in response to Justice Department concerns that *qui tam* complaints filed in open court [as was the case prior to the 1986 amendments] might tip off targets of ongoing criminal investigations.”³⁴ “Under this provision, the purposes of *qui tam* actions are balanced with law enforcement needs. . . .”³⁵

33. S. REP. NO. 99-345, at 16 (1986), as reprinted in U.S.C.C.A.N. 5266, 9263.

34. *Id.*

35. *Id.*

The legislative history also makes clear that the onus is on the government, not the relator, during the seal period. Thus, the Senate Report states:

Keeping the qui tam complaint under seal for the initial 60-day 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.*³⁶

The Report later mentions that creating the sixty-day seal period furnishes the “*Government an opportunity to study and evaluate the information*” provided by the relator.³⁷ As a prominent relator lawyer correctly put it: “During the period while the complaint remains under seal, the government is obligated to investigate the allegations and determine whether to intervene in the action.”³⁸

“Outsourcing” of the type outlined above, does not simply restore the *status quo* as it existed before Congress imposed the mechanism of the “seal period.” Rather, “outsourcing” actually puts the relator in a better position than before the 1986 Amendments. Prior to the 1986 Amendments, a relator filed a complaint and the lawsuit proceeded like any other suit. By virtue of “outsourcing” a relator can now hide behind the “seal” and conduct one-sided discovery against defendants. Thus, through this improper collaboration, the government and the relator have converted the seal period primarily for the benefit of relator, and, in so doing, have subverted the purposes for which Congress created the seal period. “Outsourcing” enables the relator to use the seal period as a sword rather than a shield.

The FCA does not contemplate that the relator and the government may maintain the seal for an indefinite period while one or both of them investigate and the government makes its intervention decision. Rather, the

36. *Id.* at 5289 (emphasis added). According to the leading treatise in the field, the “primary purpose [for mandating that the complaint be filed initially under seal when it passed the 1986 Amendments] was to allow the government to ascertain privately ‘whether it was already investigating the claims stated in the suit and then to consider whether it wished to intervene.’” BOESE, *supra* note 31, at 4-159 (quoting from Erickson *ex rel.* United States v. Am. Inst. of Biological Sciences, 716 F. Supp. 908, 912 (E.D. Va. 1989) (citing S. REP. NO. 99-345 (1986)); United States *ex rel.* Piiolon v. Martin Marietta Corp., 60 F.3d 995, 998 (2d Cir. 1995)). *See, e.g.*, United States *ex rel.* Made in the U.S.A Found v. Billington, 985 F. Supp. 604, 608 (D. Md. 1997) (finding the purpose of requiring a relator to file a written disclosure statement along with sealed complaint is to enable government to properly investigate claims prior to deciding whether to intervene).

37. S. REP. NO. 99-345, at 5289 (emphasis added).

38. Raspanti, *supra* note 32, at 38.

statute provides that the sixty-day seal period may be extended, but only for “good cause.”³⁹ Congress believed that “with the vast majority of cases, 60 days, is an adequate amount of time to permit Government coordination, review and decision.”⁴⁰ “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.”⁴¹ The committee’s strong desire that the government toe the line during the seal period was dramatically underscored by their statement that it “does not intend that criminal investigations be considered an automatic bar to proceeding with a civil fraud suit.”⁴²

When the 1986 Amendments were enacted, the DOJ attorneys in civil FCA cases “rel[ie]d] in large part on FBI reports and information gathered by the various Inspectors General.”⁴³ The government identified two flaws in the then existing investigatory scheme: first, that the DOJ attorneys did not have compulsory process available to them after a relator filed a suit (at that time *not* under seal) to determine whether to intervene in the relator’s suit. The second defect related to the civil DOJ attorneys being unable to obtain information which had been obtained through the grand jury process.⁴⁴ Congress rectified these inadequacies by granting CID authority to DOJ during the newly created seal period. If Congress had intended to allow, or encourage, relators to participate in the government’s seal period investigation (and supplement the work done by the FBI and the Inspectors General, through “outsourcing” or otherwise), surely it would have been explicit, as it was explicit in sweetening the incentives for relators to file suits under seal. Instead, Congress expressly limited the use of the expanded investigatory tools *to the government*.

Congress’s failure to invite or endorse an “outsourcing” approach to supplement the government’s seal period investigation is significant for the further reason that Congress was then aware that “perhaps the most serious problem plaguing effective [FCA] enforcement is a lack of resources on the part of Federal enforcement agencies.”⁴⁵ “Outsourcing,” especially of the

39. 31 U.S.C. § 3730(b)(3) (2003).

40. Act of October 6, 1986, Pub. L. No. 99-562, § 2, 1986 U.S.C.C.A.N. (99 Stat.) 5289-90 (codified at 31 U.S.C. § 3729(e)).

41. *Id.* (emphasis added).

42. *Id.* at 5290.

43. *Id.* at 5271 (omitting footnote reference to testimony of Associate Deputy Attorney General Jay Stephens).

44. This reflected the holding in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), limiting the access of civil government lawyers to information obtained through the grand jury process.

45. S. REP. NO. 99-345, at 5272 (1986).

type that occurred here, is, presumably, a response to a lack of government resources, yet Congress, being then painfully aware of the government's reportedly inadequate resources did not invite or endorse "outsourcing." It is certainly the case that "outsourcing" would have been a quick fix to the government's reported lack of resources, yet Congress moved in a different direction. It provided the government with additional investigatory tools which were emphatically not made available to relators. Congress's failure to enshrine "outsourcing" is noteworthy in view of the fact that it was aware that the government's FCA adversaries were large companies, and that "too often" the "government's enforcement team is overmatched by the legal teams major contractors retain."⁴⁶

All of the above makes clear that, during the seal period, it is incumbent upon the *government* to make an intervention decision and for the *government* to conduct the investigation necessary to make that decision.⁴⁷ If the government is "overburdened" during the seal period, it is precluded from seeking to extend the seal period for that reason. *A fortiori*, being "overburdened" does not provide the government with a legally sufficient justification for "outsourcing" the investigation during the seal period.

An exceedingly lengthy delay in unsealing the complaint is itself strong evidence that the government and the relator abused the seal period. This is especially so if the *qui tam* complaint did not contain allegations which touched on a pending criminal investigation.

By prolonging the seal period for the purpose of conducting settlement-related, one-sided discovery, the government and the relator deliberately, and wrongly, preclude defendants from exercising their rights as litigants under the Federal Rules of Civil Procedure. This violates the spirit of the FCA because, as made plain by the legislative history, "by providing for sealed complaints, [Congress] did not intend to affect defendants' rights in anyway."⁴⁸ Indeed, "the committee feels that sealing the initial private civil false claims complaint protects both the Government and the defendant's interests without harming those of the relator."⁴⁹

Courts have made clear that negotiating settlements does not constitute "good cause" warranting an extension of the seal period.⁵⁰ Moreover,

46. *Id.* at 5273.

47. Elsewhere the committee referred to the seal period as the "the 60-day evaluatory period." *Id.* at 5289.

48. *Id.*

49. *Id.*

50. United States *ex rel.* Costa v. Baker & Taylor, Inc., 955 F. Supp. 1188, 1191 (N.D. Cal. 1997) ("[T]he government argues that lifting the seal would interfere with settlement negotiations. . . . Congress enacted the seal provision to facilitate law enforcement, not to provide

whenever the government makes a settlement demand, or advises defendants that it has quantified the defendant's liability to be a six or more figure number, this can only mean that the government has, at least informally, determined, that the case warrants intervention, or at least had obtained the information they believed they needed to evaluate the matter and to make a formal intervention decision. The government's failure to formalize that decision thereafter is inexplicable and not consistent with the FCA. The government may not keep a complaint under seal after its decision to intervene.⁵¹ The government may not "outsource" an investigation instead of formalizing an intervention decision after it is in a position to know whether the matter warrants intervention.

Unnecessary and prolonged delays in lifting the seal also impinge upon the "public's interest in monitoring" government activity,⁵² and deprive a defendant of the right to clear her good name as promptly as possible. It is for that reason that the legislative history emphatically states: "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."⁵³

If the government is unable or unwilling to conduct its investigation expeditiously, the proper course for relators is to move the court to unseal the complaint, not to do the government's investigative work for it. That was precisely the situation in *United States ex rel. Costa v. Baker & Taylor*,⁵⁴ where a relator prevailed on a motion, over the government's opposition, to unseal the complaint.⁵⁵

Even assuming the government may "outsource" a portion of its investigation, the government remains financially responsible for the entirety of the investigation. A contrary rule would allow the government to shift the costs of its investigation to the defendant. This is contrary to the FCA

an extra bargaining chip in settlement negotiations."); *United States ex rel. Fender v. Tenet Healthcare Corp.*, 105 F. Supp. 2d 1228, 1230 (N.D. Ala. 2000).

The legislative history of section (b)(3) also indicates that "once the Government has elected whether to intervene under paragraph (2), unsealing of the complaint is virtually automatic. Indeed, if the United States does intervene in a civil FCA case it may no longer petition the court for an extension of time to hold the case under seal." *Id.* (citing *United States ex rel. McCoy v. California Med. Review, Inc.*, 715 F. Supp. 967, 969, n.1 (N.D. Cal. 1989)) (internal citations omitted); see also *United States ex rel. Lacorte v. Smithkline Beecham Clinical Lab., Inc.*, No. 97-0942, 1998 U.S. Dist. LEXIS 19224, at *1-5 (E.D. La. Nov. 12, 1998) ("[T]his court is reluctant to grant repeated extensions of time in *qui tam* actions. . . [T]he statute itself and the Congressional Record direct this court to unseal the case once the United States has been given an opportunity to consider intervening. . .").

51. *McCoy*, 715 F. Supp. at 969.

52. *Baker & Taylor*, 955 F. Supp. at 1191.

53. S. REP. NO. 99-345 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5290.

54. 955 F. Supp. 1188 (N.D. Cal. 1997).

55. *Baker & Taylor*, 955 F. Supp. at 1192.

itself, which allows only for certain of relator's fees, costs and expenses to be borne by the defendant. In these circumstances, the American Rule regarding attorneys' fees should govern, and the attorneys' fees should not be shifted to the defendant.

A relator may carry on such investigations of a FCA defendant as the relator may think appropriate, but not all of the fees, costs and expenses of such investigations are recoverable. The legislative history makes clear that prior to the time that the complaint is unsealed, the relator "knowing of government fraud [should] bring that information forward."⁵⁶ The relator is certainly entitled to fees, costs and expenses incurred in "bring[ing] that information forward."⁵⁷ But, after the relator has brought the "information forward," the FCA clearly imposes the duty to investigate FCA violations on the Attorney General.⁵⁸ The mechanism of the seal period was created in the 1986 Amendments to enable the government, not the relator, to conduct that investigation. Though the relator may provide further assistance to the government during the seal period, it is difficult to see how the fees, costs and expenses of that gratuitous assistance could qualify as having been "necessarily incurred."⁵⁹ This is also consistent with the principle that "relators are under a duty to minimize their expenses."⁶⁰

As one court recently declared:

[A] relator files a complaint under seal and serves that complaint and a disclosure statement on the DOJ. The Relator is then obligated to remain idle pending resolution of the Government's investigation and decision whether to intervene.⁶¹ The relator takes over only upon the government's decision not to intervene and the court's lifting of the seal.⁶²

Congress made clear that an important purpose of the 1986 Amendments was "to provide the Government's law enforcers with more effective tools."⁶³ No similar statement of attempting to provide relators "with more effective tools" is contained in the legislative history. Indeed, Congress in the 1986 Amendments lived up to its promise—it furnished the government

56. S. REP. NO. 99-345 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5266.

57. *Id.* at 5267.

58. 31 U.S.C. § 3730(a) (2003).

59. *Id.* § 3730(d)(1).

60. United States *ex rel.* Abbot-Burdick v. Univ. Med. Assoc., No. 2:96-1676-12, 2002 WL 34236885, at *23 (S.C. Dist. Ct. May 23, 2002) (citation omitted).

61. United States *ex rel.* Sarmont v. Target Corp., No. 02 C 0815, 2003 WL 22389119 at *3 (N.D. Ill., Oct. 20, 2003) (citing United States *ex rel.* Khan v. Chicago Housing Authority, No. 01C976, 2002 WL 849801, at *2 (N.D. Ill. 2002)) (emphasis added).

62. *Id.* at *4.

63. S. REP. NO. 99-345, at 2 (1986), as reprinted in 1986 U.S.C.C.A.N. 5161, 5266.

with new investigatory tools, which, importantly, were denied to relators. Congress understood that the government and relators do not stand in the same shoes with respect to FCA proceedings, a distinction the Supreme Court memorialized several years later.⁶⁴

The two key investigatory tools which Congress granted to the *government* were creating the sixty-day seal period (with the option of seeking extensions of time upon a showing of “good cause”), and authorizing the government to use compulsory process during the seal period through the issuance of compulsory investigative demands (CIDs). Significantly, the CID provisions enacted by Congress precluded the government from sharing information obtained through the use of CIDs with third parties. The only limited exception was that the Justice Department could share CID information with other government agencies but only after a court order was obtained.⁶⁵ Instead of allowing relators to share in the government’s new investigatory tools, Congress increased the incentives for relators “knowing of Government fraud” to bring forward information in the form of complaint filed under seal. After the relator brings that information forward by filing a complaint under seal, the burden is on the government to investigate in order to determine whether to intervene.

If a relator chooses “to take a more active role in the litigation,” the 1986 Amendments grant a relator certain rights previously not available to the relator if the government takes over the litigation.⁶⁶ In particular, subsection C(1) provides *qui tam* plaintiffs “with a more direct role not only in keeping abreast of the government’s efforts and protecting his financial stake, but also in acting as a check that the government does not neglect evidence, cause undue (*sic*) delay or drop the false claims case without legitimate reason.”⁶⁷ Thus the relator has the right to “be served, upon request,” with copies of all pleadings filed as well as deposition transcripts, additionally, the person who brought the action may formally object to any motions to dismiss or proposed settlements between the government and the defendant.⁶⁸

64. See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997) (“As a class of plaintiff, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good.”).

65. 31 U.S.C. § 3733(a) (2003) (providing that CID materials may not be shared even with another government agency unless that agency goes through DOJ and obtains a court order). The committee described this as the “single noteworthy difference from the Hart-Scott-Rodino Act [of 1976, 15 U.S.C. Section 1311-1314, the federal statute providing for CID authority to the government in the antitrust area].” S. REP. NO. 99-345, at 5299.

66. S. REP. NO. 99-345, at 5290.

67. *Id.* at 5291.

68. *Id.*

The 1986 Amendments also permit the relator to take over the suit if the government has not proceeded with “reasonable diligence” within six months of intervening in the action.⁶⁹ The committee stated its belief that,

reasonable diligence should be evaluated in light of the amount of government investigative and prosecutive activity in relation to the length of time the government has been aware of the allegations as well as the magnitude of the alleged fraud. Additionally, courts should weigh the resources willing to be devoted by both the government and the individual who brought the action as well as the relative experience and expertise possessed by each party. While in most cases the government’s resources will likely appear to exceed the *qui tam* plaintiffs resources, the committee recognizes that the often heavy, sporadic workload of government attorneys may create a situation where a *qui tam* plaintiff is better able to conduct the litigation in a timely manner.⁷⁰

The upshot is that relator is permitted to stand in the government’s shoes at some point *after*, not before, the seal is lifted, and only after obtaining court approval. The necessary inference is that Congress did not envision “outsourcing” prior to the lifting of the seal.

A likely counterargument is that the “outsourcing” does not result in higher fees, costs and expenses than would have resulted if there had been no “outsourcing.” But, even if this were true, it is wrong to focus on whether the improper conduct of the government and the relator resulted in higher fees, costs and expenses. The key point is that the collusive conduct was violative of the FCA, and the associated fees, costs and expenses are simply not recoverable. A party should not be rewarded for their improper conduct. In any event, under relator’s anticipated theory, an FCA defendant would pay more fees, costs and expenses than if the government had not “outsourced” because the government and the relator are attempting to shift the cost of those items to the defendant, when they should have been borne by the government. Neither the government nor the relator has a blank check against an FCA defendant.

V. WHY ABUSIVE PRACTICES OCCUR

All that transpires during the seal period occurs under the judicial radar screen because extensions of the seal period are procured by *ex parte* requests, and the sad history in this area leaves no doubt but that the courts

69. *Id.*

70. *Id.*

perfunctorily grant government requests. The government is generally unable to move quickly during the seal period because it is unable or unwilling to allocate the necessary resources to do so. This resource deficit manifests itself quantitatively and qualitatively.

Government lawyers are paid considerably less and are less willing to put in the time necessary to lawyer a case than the lawyers representing large corporate defendants. Moreover, particularly after 9/11, government budgetary priorities have taken money away from FCA enforcement and steered it to counter-terrorism areas. For a combination of these reasons, government lawyers have increasingly looked to relator's counsel to assist them in conducting investigations during the seal period. It is against this backdrop that "outsourcing" emerged.

An important reason that "outsourcing" has not been the subject of a judicial challenge is that none of the parties to a *qui tam* case have a strong interest in having the abusive practices brought to a court's attention. First, as noted above, government counsel welcome assistance from relators and their counsel, and have no interest in exposing to judicial review the propriety of such assistance. Moreover, though the government has an institutional interest in expediting recoveries in *qui tam* cases, budgetary and other practical constraints tend to cancel out the government's theoretical desire to expedite settlements and recover money.

Second, relator's have a strong interest in providing virtually unlimited assistance to the government during the seal period. The data conclusively demonstrates that the relator is much better off if the government intervenes. As noted above, where the government does not intervene, and the relator has to go it alone, the median of settlements in non-intervened cases is less than ten percent than in intervened cases. Thus, the relator's strategy is to provide the government with the maximum amount of assistance as possible during the seal period in the hope of convincing the government to intervene. In all but two reported cases, the relator has been willing to allow the government to take whatever time it desired in order to conduct its seal period investigation.⁷¹ From the relator's standpoint, the key is *whether* the government intervenes, not *when* the government intervenes during the seal period.

Third, there are several reasons why *qui tam* defendants are disinclined to challenge "outsourcing" or to seek to terminate the seal period. Defendants are deliberately kept in the dark by government and relator counsel regarding the extent to which the government has solicited and is receiving

71. See text accompanying *supra* note 49.

assistance from relator and his counsel. Thus, *qui tam* defendants do not have sufficient information with which to challenge “outsourcing.”

Even assuming a *qui tam* defendant wished to invoke judicial assistance, defendants are often kept in the dark by the government as to where a case is pending, and as to the identity of the presiding judge. Such conduct occurs by government counsel in direct contravention of orders issued by the presiding judge in granting the government permission to make a defendant aware of the case during the seal period in order to conduct discovery and settlement negotiations. Perhaps most importantly, *qui tam* defendants, as a general rule, perceive that it is not in their interest to expedite closure of the seal period. Closure would likely have the effect of accelerating an announcement by the government that it is intervening in the case. Such an announcement, unless coupled with a settlement, would put downward pressure on the defendant’s share price, and contribute to an unfavorable picture of the defendant in commercial and capital markets.

VI. CONCLUSION

The federal government has reaped substantial benefits from the significant assistance it has received from relator counsel during the seal period, but it does not necessarily follow that such assistance is harmonious with the FCA and its legislative history. Moreover, there is much reason for thinking that this assistance has had the effect of enabling relator counsel to exert excessive influence on their government counterparts. If “outsourcing” is here to stay, it should be because Congress and the courts have placed their imprimatur on it, not because it represents a money-making enterprise for relators, their lawyers, and DOJ.