Is Unsealing False Claims Act Complaints the Right Answer?

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Companies should make vigorous efforts to unseal civil False Claims Act complaints against them earlier in the process in an effort to achieve better results, argues Michael K. Loucks, a former acting U.S. attorney for the District of Massachusetts who is currently a Boston-based partner in a major law firm. Loucks also co-authored a post on his firm's website, further explaining why companies should take on an aggressive strategy to unseal complaints.

The False Claims Act permits individual whistleblowers to file cases on behalf of the United States government against those who have allegedly defrauded the government. All complaints under the act must be filed under seal for 60 days and must be served on the government rather than on the defendant. The Department of Justice has the option of intervening in the suit or declining to do so. If it formally makes either a "yes" or a "no" decision, the case is unsealed. However, the government can extend the 60-day seal for "good cause" while it is making its decision. A whistleblower can recover a substantial portion of a settlement or verdict under the FCA – up to 30 percent of the final value.

DOJ recently reported to Congress that there are 885 pending False Claims Act cases involving health care fraud alone, with about 200 prosecutors to handle all health care fraud cases. On average, a case is sealed for more than a year, and at times, much longer.

Loucks contends that unsealing complaints earlier in the process would be advantageous to the companies. The extra time would allow the companies to learn the scope of the complaints earlier, allowing time to identify potential witnesses, develop a more comprehensive defense strategy, and engage in all the discovery that civil litigants are entitled to. Increased openness would also permit companies to correct any problems that the complaint may have highlighted.

There is nothing of course objectionable about Loucks' suggestions. But someone as experienced as him also knows how difficult it is for a company to learn of the existence of a sealed complaint filed against it in the first place, and then to successfully unseal the complaint. Not surprisingly, the New York Times suggested that Loucks was able to be so successful as a prosecutor because he was able to operate in secret through the prolonged use of sealed complaints. (The case that the New York Times called his "crowning achievement" was a $2.3 billion settlement with Pfizer that was the result of a four-year secret investigation.)

Defendants have no tried and true solution of determining whether a sealed complaint has been filed against them. Indeed, many whistleblowers often continue to work for their employers long after they have filed a sealed complaint against that employer. Often there is nothing to suggest to a company that it is a target of an investigation. Accordingly, defendants will not know to ask the court to unseal a complaint that they do not know exists.

Even if a company were to learn of the existence of a sealed complaint, dozens of published cases – some of which Loucks himself participated in – confirm that when confronted with the objections of the government, courts rarely, if ever, unseal FCA complaints. (The *National Law Journal* is now reporting on a novel development: Some judges, notably including some in the U.S. District Court for Massachusetts, are now unsealing many FCA cases. It appears that the judges are doing this because they want to increase the visibility of the judicial system to the public.) In general, however, the "good cause" language in the FCA is often an easy standard for prosecutors to meet and allows them to keep cases under seal – even over defendant's objections – for extended periods of time.

We are surprised by the lack of attention on Loucks' part to the question of whether a defendant necessarily wants a complaint to be unsealed. Loucks built his reputation on obtaining huge settlements from publicly traded health care companies. Traditionally, those entities announce the existence of a complaint on the same day that the complaint is unsealed and the matter is settled. It is not surprising that organizations would seek to keep the complaint sealed from the public eye and only unseal the complaint when the announcement of a settlement is believed to mitigate the impact of that case on that company's share value. (For more on the role of company disclosure, see our Web site here.)

While we certainly agree that companies confronted with complaints under the False Claims Act complaints may want to consider asking courts to unseal complaints against them, there are a host of issues that must be analyzed and considered, including the effect of disclosure on the market and the practical ability to successfully argue for disclosure under the FCA and existing case law interpreting that statute.

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The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. These posts are edited by Jeff Ifrah and Jonathan Groner, the former managing editor of the Legal Times. We look forward to hearing your thoughts and comments!