LJN LAW JOURNAL NEWSLETTERS

Business Crimes Bulletin ®

An ALM Publication

Volume 25, Number 6 • February 2018

The False Claims Act Seal: Does It Bind and Gag the Defendant?

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A company that finds itself the target of a federal fraud investigation often faces the fraught question of whether it may, or even must, disclose the existence of that investigation to third parties, such as its investors, shareholders, major creditors, or insurers. The question can be even more complicated if that investigation is being pursued under the False Claims Act and arises as the result of a sealed *qui tam* complaint. The Department of Justice (DOJ) takes the position that all parties — itself included — are bound by the seal, and therefore may not disclose the existence or nature of the underlying *qui tam* suit to anyone.

But the DOJ's position, as applied to defendants at least, does not square well with the law. While a whistleblower who brings a False Claims Act suit is both bound and gagged by the seal, the defendant arguably may not be.

Background

Whistleblowers who bring *qui tam* suits on behalf of the United States in False Claims Act cases are required to file their cases *in camera* and under seal. As a result, the complaint does not appear on the public docket, and the investigation proceeds out of the public spotlight. The DOJ likes it that way, because it may pursue its investigation in a manner that does not tip off the target of the investigation. The target also benefits from that secrecy because it avoids the reputational harm that would ensue if the public were to learn that it is the subject of a federal fraud investigation.

But while the DOJ and the target share an interest in maintaining the secrecy of the investigation, the whistleblower may not share those interests. People blow a whistle precisely because they want to draw attention to something; they want to be heard, to sound an alarm. While some whistleblowers want to remain confidential — such as one who is a current employee of the target and fears reprisal — others may think that they can use the publicity of the suit and the related investigation to pressure the defendant into a settlement, often by leveraging the defendant's desire to protect its own reputation.

Nevertheless, False Claims Act whistleblowers rarely publicize their own cases because they are incented not to: A relator who "breaches the seal" by speaking publicly about the case risks being sanctioned by the court. Those sanctions can include the denial of their right to share in the proceeds of any settlement (*See, e.g., U.S. ex rel. Bibby v. Wells Fargo Home Mortg. Inc.*, 76 F. Supp. 3d 1399, 1416 (N.D. Ga. 2015)), and even the outright dismissal of the case with prejudice (*See State Farm Fire and Casualty Co. v. U.S. ex rel. Rigsby, et al.*, 137 S. Ct. 436, 444 (2016)).

Whether the target of the investigation is similarly bound by the seal is far from clear. The statute and the case law say nothing about the obligations of a defendant to maintain the secrecy of the *qui tam* suit. On a surface level, that's not surprising: The very purpose of the seal is to ensure that the defendant isn't tipped off about the case. Congress probably did not give much thought to whether the defendant, which isn't supposed to know about the suit in the first place, is bound by the FCA's sealing provisions.

In practice, however, it is commonplace for defendants to learn about the *qui tam* suit during the course of the government's investigation, while the case is still under seal. While the government typically does not alert the target, at an early stage, that there is a *qui tam* suit pending under seal, the government will often, at a later stage, disclose the existence of the *qui tam*, and even disclose the complaint itself, to the target of its investigation. The government discloses the *qui tam* complaint to solicit the target's response to the complaint's allegations, and sometimes as part of settlement discussions. Before doing so, the government applies to the court for a "partial unsealing" order, which is an order that authorizes the government to share the complaint with the defendant.

When the target receives a copy of the sealed-yet-partially-unsealed complaint, it will likely face the question of whether it may disclose it. The question does not generate any case law because, as observed above, the defendant typically shares the government's interest in secrecy; a target of an investigation is hardly incentivized to blow the whistle on itself and disclose that it is the target of a federal fraud investigation.

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But while a target may not want the world to know about the *qui tam*, it may well want some people to know about it. For example, a company that has insurance coverage may want or even need to disclose the *qui tam* complaint to its carriers, and to do so promptly, to avoid the carriers raising defenses to coverage based on lack of prompt notice of the suit. *See, e.g., AmerisourceBergen v. Ace American Ins. Co.*, 100 A.3d 283 (Pa. Super. 2014) (holding that claim was deemed to have been made when the *qui tam* complaint was filed, even though the policyholder was unaware of the *qui tam* until years later).

Also, public companies may have obligations to disclose *qui tam* suits in their securities filings, depending upon their assessment of the materiality of the complaint. *See* John T. Boese, American Bar Association, Securities Disclosure in *Qui Tam* Cases; *see also* Michael G. Scheininger and Daniel L. Russell Jr., SEC Rules and the "Partially Unsealed" *Qui Tam* Complaint: Conflicting Obligations of Confidentiality and Disclosure?, American Bar Association's Civil False Claims Act and *Qui Tam* Enforcement 2008 CLE. And even privately held companies may have a need to disclose the complaint to their lenders or major investors, either to alert them to the significance of the matter or, conversely, to assure them that the case does not pose a significant risk.

What may the FCA defendant do? On the one hand, even after it is disclosed privately to the defendant, the complaint is said to remain "under seal," a status that at least implies that the complaint is not meant to be made public. On the other hand, there is obviously a big difference between a defendant selectively alerting a single large investor and a plaintiff disclosing the case to the news media. Also, since one of the main purposes of the seal is to protect the government by not tipping off the target of the investigation, that purpose arguably has become moot by the government's decision to disclose the complaint to the target. *U.S. ex rel. Rigsby v. State Farm Fire and Cas. Co.*, No. 06-433, 2011 WL 8107251, at *8 (S. D. Miss. Jan. 24, 2011) (finding that partial lifting of the seal, which authorized relators to make disclosures concerning the *qui tam* action in pleadings and other documents distributed to litigants and their attorneys in another litigation, rendered the seal "moot.").

For the reasons explained below, a defendant that learns about the *qui tam* as a result of a disclosure by the government has a strong argument that it is not bound by the seal at all. And even if bound, it's probably not gagged from speaking about it.

The Sealing Provisions of The False Claims Act

The False Claims Act authorizes private parties to bring an action in federal court "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). When a private person brings such a suit, the Act requires that the complaint be filed *in camera*, and provides that it "shall remain under seal for at least 60 days." 31 U.S.C. 3730(b)(2). The statute directs the relator to serve the government with the complaint and a "written disclosure" of its "material evidence," but provides that the complaint "shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2).

The statute contemplates that the government will use the 60-day period during which the case remains sealed to investigate the allegations and to decide whether it will: 1) "proceed with the action, in which case the action shall be conducted by the Government"; or 2) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action. 31 U.S.C. § 3730(b)(4)(A) & (B). Recognizing that the government may need more than a mere two months to investigate the allegations, the statute grants the government the right to apply to the court "for extensions of the time during which the complaint remains under seal." 31 U.S.C. § 3730(b)(3). Such a motion may be supported by affidavits or other submissions which, like the complaint itself, must be filed *in camera*. The court may grant an extension of the seal period "for good cause shown." *Id.*

While the seal provisions of the False Claims Act impose several mandatory obligations on relators, they do not, on their face, purport to bind anyone else. Relators are told that they "shall" file the complaint "in camera;" they "shall" serve the Government with the complaint and a written disclosure of their material evidence; and they "shall not" serve the defendant. But, these provisions impose no duties or responsibilities on the defendant. In fact, the only procedural provision that references the defendant operates to relieve the defendant of any obligation to respond to the complaint, explaining that the defendant "shall not" be required to respond to the complaint until after the complaint is unsealed and served in accordance with Rule 4 of the Federal Rules. So while the seal provisions of the FCA explicitly bind the relator, they impose no explicit obligation on the defendant.

The Nature of the Seal: A Procedural Filing Requirement or an Enforceable Gag Order?

To address whether the defendant is bound by the seal in a False Claims Act case — and if so what it means to be "bound" — it is necessary to consider the nature of the seal itself: What does it mean to say that the case is "under seal"? Further, what does it mean to say that the "sealed" complaint has been "partially" unsealed?

To begin with, the law recognizes a distinction between sealing provisions and non-disclosure provisions. When a court seals a court record, it denies the public access to a document that otherwise would be part of the public file in a judicial proceeding. The court accomplishes this by issuing a "ministerial" directive to the clerk of court to limit public access to the document, such as by manually filing the document in a sealed envelope. *ACLU v. Holder,* 652 F. Supp. 2d 654, 671 (E.D. Va. 2009) (characterizing the clerk's function of placing the *qui tam* complaint and docket under seal as a "ministerial" act).

Although standards vary, some courts will authorize the sealing of an otherwise public document upon a showing of mere "good cause." In contrast, a non-disclosure order or provision imposes a duty directly on a party to remain silent.

While both seal provisions and "gag"

provisions operate to conceal information from the public, they are evaluated under different legal standards because they address different interests. As one court explained: "Judicial gag orders impinge upon freedom of speech and the press under the First Amendment, and must pass muster under well-established constitutional case law. On the other hand, sealed judicial orders conflict with the common law tradition of public access to judicial proceedings, and are typically evaluated under more flexible common law rules." *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 880 (S.D. Tex. 2008).

This distinction between a sealing provision and a non-disclosure provision is perhaps best illustrated by Rule 6(e) of the Federal Rules of Criminal Procedure, which governs the secrecy of federal grand jury proceedings. By its plain terms, Rule 6(e) includes both sealing provisions and non-disclosure provisions. But these provisions are not co-extensive. While Rule 6(e)'s sealing provisions require that records relating to grand jury proceedings "must be kept under seal," its non-disclosure provisions prohibit "disclosure" of matters "occurring before the grand jury" only by certain categories of people, including grand jurors, prosecutors, and court reporters. *See* Rule 6(e)(2)(B).

Categories of persons who are not specifically enumerated in the non-disclosure provisions — such as witnesses — are not precluded from discussing the grand jury proceedings, even though those proceedings take place under seal. *See also U.S. v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983) ("Witnesses are not under the [6(e)(2)(B)] prohibition unless they also happen to fit into one of the enumerated classes."). Finally, Rule 6 also addresses remedy, explicitly providing that knowing violations "may be punished as a contempt of court."

In contrast to Rule 6(e), the False Claims Act addresses sealing, but says nothing at all about non-disclosure; it does not itself purport to "gag" any party. The Act requires the relator to file the action "under seal," but does not, by its terms, otherwise limit what the relator — or anyone else — may say. Nor, as the Supreme Court recently observed, does the FCA provide a remedy for violating the sealing requirement, leaving it to the discretion of the district judge. *State Farm Fire & Casualty Co. v. United States*, 137 S. Ct. 436, 442 (2016) ("The statute says nothing, however, about the remedy for a violation of that rule.").

The DOJ's Position

Notwithstanding the absence of an explicit gag order in the statute, the Department of Justice (DOJ) takes the position that, even if the relator properly files the case under seal at the outset, that relator can later "breach the seal," and be subject to judicial sanction, if he or she discloses the existence of the *qui tam* to others.

When the government wants to disclose the qui tam complaint to the defendant, it does so only after requesting permission from the court and obtaining a court order "partially" unsealing the qui tam complaint.

Brief for United States as Defendants-Appellants, *American Civil Liberties Union et al. v. Holder, et al.*, No. 09-2086 (4th Cir. Filed Jan. 17, 2010), at pp. 15-16. In other words, while the statute itself does not silence the relator (or anyone else), the DOJ treats the relator as both bound and gagged.

Perhaps sensitive to the First Amendment implications of its position, the DOJ has been careful not to take the position that the sealing provisions broadly gag the relator from speaking. In *ACLU v. Holder*, 673 F.3d 245 (4th Cir. 2011), the ACLU and other public interest organizations sued the DOJ to challenge the sealing provisions of the FCA on First Amendment grounds. They argued not only that the sealing provisions violated the public's right of access to judicial proceedings, but also that the seal provisions "gag" relators from speaking about their *qui tam* complaints.

In its defense, the DOJ interpreted the sealing provisions narrowly, stressing that the relator was barred from speaking only about the *qui tam* filing and the government's investigation; even while under seal, the government explained, "a relator is free to speak about the facts underlying his allegations of fraud to anyone he wishes, including the press, the public or even the defendant." *Id*. While the Justice Department acknowledged that the sealing provisions operate, in practice, to bar the relator from disclosing the existence of the *qui tam* suit, it characterized that restriction not as a "gag order" imposed by the FCA, but rather as a voluntary choice by the relator: In exchange for the right to bring suit in the name of the United States (and to potentially receive a share of the proceeds), the relator chooses to give up the right to speak publicly about the suit until the matter is unsealed.

> "Relators are permitted to bring suit on behalf of the United States, and to share in the government's recovery, subject to particular conditions necessary to allow the United States to adequately protect its interests by evaluating *qui tam* suits before they go public. One of those conditions is that a relator must refrain from speaking about his lawsuit until the matter is unsealed and served on the defendant. Allowing a private citizen to litigate for the United States contingent on such a limitation does not implicate the First Amendment."

Brief for United States as Defendants-Appellants, American Civil Liberties Union et al. v. Holder, et al., No. 09-2086 (4th Cir. Filed Jan. 17, 2010), at 30.

The U.S. Court of Appeals for the Fourth Circuit agreed with that argument when it held that the ACLU lacked standing to assert that the seal provisions violated the

First Amendment by "gagging" relators from speaking about the *qui tam* complaint, and therefore did not address this issue on the merits; the court adopted the DOJ's reasoning, however, in its response to the dissenting opinion. *ACLU*, 673 F.3d at 256. The court there observed that the FCA's sealing provisions do not bar the relator from discussing the underlying fraud, and that they "only preclude the relator who wants to use the FCA to recover money from discussing the FCA complaint for a brief period of time." *ACLU*, 673 F.3d at 256.

Of course, the DOJ's rationale, with which the Fourth Circuit seemed to agree, does not apply equally — or at all — to the defendant. Unlike relators, defendants obviously do not choose to become parties to *qui tam* suits, and at no time do they agree to sacrifice their First Amendment rights in exchange for anything. Accordingly, even to the extent the FCA operates in practice as a "gag order" on relators — in the sense that relators voluntary choose not to speak in exchange for the potential to recover money — it does not operate the same way on defendants.

The Risk of Contempt

So if the FCA's sealing provisions do not themselves operate to bind a defendant, may a defendant freely disclose the existence of the *qui tam* suit once it learns about it? According to the DOJ, the answer is still "no."

When the government wants to disclose the *qui tam* complaint to the defendant, it does so only after requesting permission from the court and obtaining a court order "partially" unsealing the *qui tam* complaint. While the FCA's sealing provisions are ministerial in nature and bind only the relator, the DOJ treats the FCA seal as imposing a gag order that applies to all parties, including itself.

That position, it seems, stems not from the statute, but from the court's sealing order itself. Although a court order is not strictly required for the clerk's office to maintain the complaint under seal for the initial 60-day period (the statute itself authorizes that much), the FCA contemplates that the case will remain under seal thereafter only if the court enters an order extending the seal. Accordingly, when (as in most cases) the DOJ has not completed its investigation within the 60-day window, it applies for a court order extending the seal.

The DOJ has taken the position that "[a]ny violation of the seal requirement that occurs after the initial 60 day period necessarily violates the court's order as well." Brief for the United States as Amicus Curiae Supporting Respondents, in *State Farm Fire & Cas. Co. v. U.S.*, No. 15-513 (Sup. Ct. Sept. 2016) at 14. Again, the Supreme Court seems to agree with the government. When the Court held last year that district courts enjoy discretion to impose a remedy for violating the FCA seal, it observed that district courts have "inherent power" to impose sanctions "for violations of court orders." *State Farm*, 137 S. Ct. at 444. Perhaps for this reason, when the Justice Department discloses a "partially unsealed" *qui tam* complaint to a defendant, it typically alerts the defendant that the matter remains "under seal," and admonishes the defendant, in words or substance, to "proceed accordingly."

But what does that mean? If the issue boils down to a potential violation of a court order, it depends on what the court order says. And because the government typically does not disclose the partial unsealing order to the defendant, the defendant does not know what it says.

In all likelihood, however, the court's sealing order does not gag the defendant.

Sealing Orders: What They Say And Do Not Say

When the court enters a sealing order at the outset of the False Claim Act (FCA) case, such an order typically directs that the complaint and all other papers simply be filed "under seal." *See, e.g.*, Order, *United States ex rel. Boyd v. Riverpoint 714 LLC et al.*, 15 Civ. 1406 (E.D. Cal. Aug. 28, 2015) ("The plaintiff's complaint shall be filed *in camera* and under seal."); Order, *U.S. ex rel. Littlewood v. King Pharmaceuticals, Inc.*, 10 Civ. 973 (D. Md. Apr. 21, 2010) ("IT IS, THEREFORE, ORDERED that the Court shall maintain the Complaint and all other papers filed in this case UNDER SEAL until further Order of the Court."); *United States ex. Rel. Johnson v. Walmart Stores, Inc.*, 13 Civ. 2277 (E.D. Ca. Nov. 6, 2013) (granting motion to "seal the matter"); *U.S. ex rel. Arkfeld v. Bleiberg*, 08 Civ. 106460 (E.D.Mich. Feb. 14, 2008) ("Having considered Relators' Motion to File The Complaint under Seal, the motion is granted and it is ORDERED that the Complaint of Plaintiffs/Relators, Ted A. Arkfled, D.C. and Ann Myers be filed, under seal, in paper format, with the Clerk of Court, in accordance with U.S.C. § 3730(b)(2) of the False Claims Act.").

It is hard to see how a defendant could ever violate such an order, which is not even directed at the defendant and not disclosed to the defendant. *In re False Claims Act Proceedings*, 98 Civ. 825 (S.D. Ohio Oct. 30, 1998) ("This case … shall be filed *in camera* and shall remain under seal for at least 60 days, pursuant to 31 U.S.C. §3730(b)(2). No documents, pleadings or other materials in this case, including the Relator's Statement, shall be provided to or served on Defendant until the Court so orders or at least sixty (60) days have expired pursuant to 31 U.S.C. §3730(b)(2). Under no circumstances shall the names of the parties or the existence of the lawsuit be publicly disclosed to otherwise disclosed to Defendant, in any manner, while this Order remains in effect.").

Furthermore, an order "partially unsealing" a *qui tam* complaint typically authorizes the government to disclose the *qui tam* complaint to the defendant, and directs that the complaint "remain under seal." *See, e.g., United States ex rel. Johnson v. Walmart Stores, Inc.*, 13 Civ. 2277 (E.D. Cal. May 8, 2015) ("The complaint and all other filings shall remain under seal, except insofar as the seal has been partially lifted by this Court."); *United States ex rel. Creekside Hospice II, LLC*, 13 Civ. 167 (D. Nev. Sept. 23, 2013) ("AND FURTHER ORDERED that the seal shall remain in place in all other respects."); *U.S. ex rel. James Moran v. Automotive Testing Laboratories, Inc.*, 98 Civ. 825 (S.D. Ohio Dec. 16, 2004) ("It is HEREBY ORDERED that the United States' application for partial lifting of the seal is granted and the United States is permitted to disclose the relator's complaint to Defendant Automotive Testing Laboratories, Inc.; … IT IS FURTHER ORDERED that, except as provided herein, the record in this lawsuit, including this Order and the United States' Unopposed Application for Partial Lifting of Seal and Motion for Four Month Extension of Time to Make Elec-

tion Whether to Intervene and Memorandum in Support, shall remain under seal until further order of this Court.").

While the DOJ refers vaguely to the (undisclosed) unsealing order as the source of the defendant's non-disclosure obligation with respect to the complaint, the typical partial unsealing order on its face is not directed at the defendant and it certainly does not, by its terms at least, purport to "gag" the defendant. Indeed, if the government intended to impose a non-disclosure order on a defendant, it would presumably be required to justify such a gag order with evidence sufficient to overcome the defendant's First Amendment right to speak. But because a sealing order is ministerial in nature and binds, at most, the filer (and perhaps the clerk's office), a "partial unsealing" order that does no more than merely "extend" or "maintain" the case "under seal" arguably adds nothing to the obligations on the defendant.

Finally, even if a court were to enter a more substantive unsealing order that purported to gag the defendant, it is hard to envision why a court would sanction a defendant for disclosing the *qui tam* complaint. As the Justice Department has explained, the seal requirement of the FCA was intended to protect the government's enforcement interests by keeping the defendant in the dark about the investigation, thereby protecting the government from "potential evasive action" by FCA defendants. Brief for the United States as Amicus Curiae Supporting Respondents, in *State Farm Fire & Cas. Co. v. U.S.*, No. 15-513 (Sup. Ct. Sept. 2016) at 16. For that reason, the government takes the position that the choice of sanction imposed by the court for breach of the seal should be influenced by whether the disclosure undermined those enforcement interests. *Id*. at 24-25.

As the Justice Department explained, a "severe breach" of the seal — such as one that is likely to "tip off a defendant to a pending investigation" — should be treated differently from "selective disclosure of the suit to a single person who is not affiliated with the defendant," as the latter breach "is far less likely to interfere with a government investigation." *Id*. at 26, 28.

When the government itself has chosen to "tip off" the defendant to the existence of the *qui tam* suit, as it does when it seeks a partial unsealing order, a defendant's further disclosure of a *qui tam* complaint is not likely to undermine those interests, at least in the absence of other co-defendants who are not aware of the *qui tam*. While one defendant in a multi-defendant *qui tam* case arguably would face risk in disclosing a sealed *qui tam* complaint to another defendant, one in a single-defendant case that merely discloses the *qui tam* complaint to its shareholders, investors or insurers should face little to no risk of court sanction, as such "selective disclosures" could not reasonably be said to undermine the government's FCA enforcement interests. *Id*. at 26, 28.

But What About the Justice Department?

At least some targets should therefore face little likelihood of being held in contempt from privately and selectively disclosing the existence of a partially unsealed *qui tam* complaint. (If the government does not provide a copy of the partial unsealing order to the defendant, that defendant can also argue that it cannot be held in contempt because it lacks actual knowledge of the terms of the order. *See* Michael G. Scheininger and Daniel L. Russell Jr., SEC Rules and the "Partially Unsealed" *Qui Tam* Complaint: Conflicting Obligations of Confidentiality and Disclosure?, American Bar Association's Civil False Claims Act and *Qui Tam* Enforcement 2008 CLE, at B-10, 11.) That is not to say, however, that even selective disclosure is without risk.

While the defendant that elects to disclose a partially unsealed *qui tam* has the law on its side, the fact remains that the Justice Department does not see it the same way. And when the government lawyer discloses the *qui tam* to the defendant with instructions to "proceed accordingly," it is fair to assume that the government does not expect the defendant to simply ignore the sealed status of the complaint and disclose the complaint to anyone it chooses. Rather, the government expects the defendant to treat the sealed *qui tam* complaint as the government itself does, and therefore not disclose it. So while the disclosing defendant in a single-defendant case would probably not be held in contempt of court, it is usually not advisable in FCA investigations to antagonize the Justice Department during the course of an investigation by ignoring or defying its expectations.

Before further disclosing the *qui tam* complaint, therefore, the better course in most cases would be to notify the government in advance as to the nature of the disclosure and ensure that the government has no objection. Or, if the court is known, the defendant could apply to the court for an explicit grant of permission to disclose aspects of the sealed complaint to select persons or entities. *Id*. at B-20.

Conclusion

At least in single-defendant FCA cases, companies that learn about the existence of a *qui tam* case from the Justice Department face almost no risk of a court-imposed sanction by privately and selectively disclosing the existence of that complaint as necessary to the conduct of their business, such as to shareholders, investors, insurance carriers or others. The FCA's sealing provisions arguably don't bind or gag defendants, and defendants face little risk of contempt from further disclosing the *qui tam* suit or investigation in a manner that does not undermine the government's enforcement interests.

At the end of the day, however, the government believes that it — and not defendants — decides what those enforcement interests are, and whether a disclosure interferes with those interests. It may therefore be the wiser course in most cases to seek the government's permission before disclosing, lest the company risk antagonizing an agency with the power to pursue the draconian FCA remedies of treble damages and penalties.

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Reprinted with permission from the December 2017, January 2018 and February 2018 editions of the LAW JOURNAL NEWSLETTERS, consolidating the following articles respectively: "The False Claims Act Seal: Does It Bind and Gag the Defendant?", "The False Claims Act Seal: The DOJ's Position" and "The False Claims Act Sealing Orders".