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Court Lifts Seal in Qui Tam Case Against Company After 10 Prior Extensions

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By **Jeffrey Campolongo** | October 25, 2018

For anyone who has ever litigated under the federal False Claims Act, also referred to as qui tam claims, you would know how tricky these cases can be. The name “qui tam” comes from the Latin phrase “qui tam pro domino rege quam pro se ipso in hac parte sequitur,” which translates to “who pursues this action on our Lord the King’s behalf as well as his own.” While the party in interest is the government, the action itself is on behalf of an employee,



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known as a relator, acting as a private attorney general. The matter typically proceeds in private until the government determines whether it will intervene on the relator's behalf.

A Chester County pharmaceutical company is facing serious allegations of misconduct as outlined in a recent decision *qui tam* from the Eastern District of Pennsylvania. Pentec Health, Inc. (Pentec), a local specialty infusion company, was under investigation by the federal government for allegations under the False Claims Act. The lawsuit, captioned *United States Brasher v. Pentec Health*, No. 13-05745, 2018 WL 5003474 (E.D. Pa. Oct. 16, 2018) (Robreno, J.), was filed under seal five years ago. The matter remained under seal that entire time with all parties, including the government, the relator and the company all joining in renewed requests for the case to remain private.

On Oct. 16, the court rejected the government's eleventh request for an extension of the seal so that it could continue to investigate 5-year-old allegations brought by employee Jean Brasher under the False Claims Act. The court ruled that the parties failed to show good cause for the extension, holding that "courts have grown increasingly impatient with the Government's repeated requests for extension of the seal in *qui tam* actions."

The opinion sets forth the following two threshold questions: First, how long may the government take to investigate a False Claims Act *qui tam* claim before it decides whether or not to intervene? And second, how long should the matter remain under seal while the government investigates?

The False Claims Act mandates that a relator file his complaint under seal and for the case to be kept sealed initially for up to 60 days to allow the government to evaluate whether it will elect to intervene. The 60-day period under seal may be extended for good cause shown including to prevent retaliation against the relator or to prevent unfair prejudice against the defendant. In this case, Brasher, the relator, filed a complaint under seal on Oct. 1, 2013. Brasher alleged that Pentec

defrauded and conspired to defraud government health insurance programs. At the request of the government, the court issued orders that resulting in ten extensions to the seal and evaluation period.

As a result of the 10th request for extension, the government disclosed to the court that Pentec was the subject of a criminal investigation which ended in November 2017. Upon the termination of the criminal investigation, civil investigators resumed their work on the fraud claims between November 2017 and February 2018.

According to the opinion, the government met with Pentec's attorneys to present the government's theory of the case regarding False Claims Act claims and kickback claims in late February 2018. In light of those allegations, Pentec provided documents to the government in response to civil investigative demands.

These activities, the government contended, necessitated the tenth extension of the seal. The court begrudgingly granted that extension, while noting concerns about the secrecy and pendency of the case, including concerns about the lack of meaningful deadlines, and that the need for transparency and accountability were not being met by the repeated extensions of the seal and evaluation period.

Following this extension, the parties joined in a request for an eleventh extension of the seal. The government argued three points in asking for yet another extension: the harm to Pentec; the policy behind sealing at least the extension requests; and the effect on the current settlement negotiations. It was the third argument that was most curious. The government stated that the parties were negotiating a settlement, the "allegations will affect financing of a resolution," and the settlement may now be in jeopardy because unsealing the case may put Pentec at financial risk. The government argued that potential financiers may withdraw upon learning of the previous criminal investigation.

Pentec argued that the financial health of the company was at issue, and that a "senior lender" *may* back out of financing Pentec if it learned that Pentec had been the subject of a criminal investigation. The relator joined in the request, as well,

contending that she would be less likely to suffer recriminations if her qui tam was resolved because, at that point, the relator's allegations would have been vindicated.

The lifting of the seal in a qui tam action can have far reaching consequences. Once made a matter of public record, there are potential ramifications for retaliation to the relator and potential prejudice to the defendant as a result of reputational harm. Once the court lifts the seal on the case, the question of whether or not to keep the seal on any extension requests and other filings is a matter of the court's discretion. As noted by the court, the public has a strong interest in such matters, and "has a right to monitor the activities of government agencies and the courts." To the extent that the reputational harm to a defendant is a relevant factor, a defendant in such a position "would not be particularly different from any other defendant that believes it was unfairly accused or sued," and "that alone is not a basis for secrecy."

The court evaluated several factors in determining if "good cause" existed for extending the seal for an eleventh time in five years. First, the existence of a criminal investigation did not support a finding of good cause, nor does the mere possibility of a lender backing out of a financing deal with the defendant. The possibility of losing financing amounted to "sheer speculation" according to the opinion.

Second, the court said, there would be little to no reputational or other harm to the relator by making the allegations public. The parties represented to the court that Brasher was no longer employed by Pentec, and, eventually, her identity would be known anyway.

Third, settlement negotiations per se cannot become a justification for keeping a case under seal. The court said the purpose of the sealing provision is not intended to allow the government to negotiate a settlement under the cloak of secrecy. Rather, the purpose is to investigate the allegations and then to determine whether it is electing to intervene.

Lastly, the government failed to identify any sensitive investigational techniques that were discussed in the extension requests, nor was there any ongoing investigation that could be jeopardized. As a result, the court denied the parties' request to extend the seal and ordered the government to decide whether to intervene or not within thirty days.

It was remarkable to see the court take such a narrow approach to the purported privacy concerns of the parties. Clearly, the court found there to be an overriding interest of the public in safeguarding the "citizen's desire to keep a watchful eye on the workings of public agencies." Even in the face of jeopardizing a potential settlement, the court refused to stand pat and allow the parties to dictate the length and duration of the cloak of secrecy.

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