

**IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY FLORIDA**

**STATE OF FLORIDA, ex rel,
SAMUEL McDOWELL,**

Plaintiffs,

v.

Case No.: 2006-CA-0003
Civil Division - Judge Bateman

**CONVERGYS CUSTOMER
MANAGEMENT GROUP, INC.,**

Defendant.

**STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS'
MOTION TO INTERVENE**

The State of Florida, Department of Legal Affairs (the "Department"), by and through undersigned counsel, moves to intervene, pursuant to §§ 68.083(3) and (6), Fla. Stat. (2005), and Rule 1.230, Fla. R. Civ. P., and become primarily responsible for prosecuting this action. In support of this Motion, the Department states as follows:

1. The *qui tam* Complaint in this action was filed with the Court by Relator Samuel McDowell on December 29, 2005.
2. The Department received the subject *qui tam* Complaint and required evidentiary disclosures on January 3, 2006. Section 68.083(3), Fla. Stat. (2005), gives the Department 90 days within which to evaluate the case filed by the Relator in order to decide whether to proceed with the action on behalf of the State. That 90 day period normally would have run on April 2, 2006; however, because that day was a Sunday, the period officially expired on April 3, 2006.

3. On March 31, 2006, after 5:00 p.m., the Department submitted by e-mail¹ a Motion for Enlargement of Time to continue its ongoing investigation and to make an informed determination whether to intervene in this cause. The Motion for Enlargement of Time was filed with the Clerk's Office on April 4, 2006.

4. On April 5, 2006, the Court entered an Order Denying Department of Legal Affairs' Motion for Enlargement of Time and Order Requiring Plaintiff to Serve Complaint on Defendant or to Show Cause Why Cause Should Not Be Dismissed for Lack of Service of Process. In its Order, the Court denied the Department's requested enlargement of time, apparently concluding that by requesting and securing a March 25, 2006 order unsealing the matter, the Department had foregone its statutory ability to intervene and take over the matter.²

5. By acting to unseal the matter, the Department did not intend to forego its ability to proceed with the action pursuant to §§ 68.083(3) and (6)(a), Fla. Stat. (2005).³ Additionally, the Department did not intend that its actions be perceived as an affirmative "notification to the court that it declined to take over the action" pursuant to §68.083(6)(b), Fla. Stat. (2005).

¹ The Motion for Enlargement of Time was submitted by e-mail directly to the Court because counsel believed that the Court permitted and preferred such documents to be filed in that manner.

² A March 29, 2006, revised order unsealed the matter *nunc pro tunc* to March 25, 2006, and clarified the Department's intent to continue its investigation and to either proceed with or decline the prosecution of the lawsuit.

³ As set forth more fully below, the 90 day evaluation period is not jurisdictional in nature.

6. In response to the Court's April 5, 2006, Order and in order to correct any misimpression the Department may have given the Court regarding the Department's intentions, the Department immediately filed a Notice of Appearance in this matter and filed a request for a status conference.

7. On April 11, 2006, the Court entered an Order to Show Cause that, *inter alia*, discussed the Department's party-status in this action in the context of discretionary and subordinate intervention pursuant to Fla.R.Civ.P. 1.230. The Department filed its response to the Order to Show Cause on April 14, 2006.

8. The Department now files this Motion to Intervene and obtain primary responsibility for this action, pursuant to §§ 68.083(3) and (6), Fla. Stat. (2005), and Rule 1.230, Fla. R. Civ. P.

9. Granting this Motion to Intervene will in no way prejudice the Defendant in the action, who has not yet been served with the Complaint. Moreover, the Relator does not object to the Department assuming primary responsibility for this action. Finally, the Department believes that the interests of the State of Florida will best be served if the Department takes over primary responsibility for this false claims lawsuit on behalf of the State of Florida.

MEMORANDUM OF LAW

A. The Department Seeks To Take Primary Responsibility For This Action Pursuant to Sections 68.083(3) and (6), Florida Statutes.

As noted above, the Department moved to unseal this case prior to informing the Court of its intention to proceed with the case. Additionally, the Court's denial of the Department's Motion for Enlargement of Time meant that the 90 day evaluation period expired before the Department filed its Notice of Appearance and request for status conference. However, as set forth below, the fact that the

Department has not affirmatively moved to intervene or proceed with the case previously, is not jurisdictional, is without prejudice to the Defendant and is not opposed by the Relator.

Because § 68.083(6), Fla. Stat. (2005), is modeled on a section of the Federal False Claims Act, 31 U.S.C. § 3730(b)(4), and because there are no cases interpreting the Florida provision, cases interpreting the parallel federal statute help guide construction of the state statute. Florida's *qui tam* statute initially provides the Department with 90 days to evaluate the relator's complaint and supporting evidence; the federal *qui tam* statute provides the federal government 60 days to do so. Title 31 U.S.C. § 3730(b)(4).

In *United States ex rel. Siller v. Becton Dickinson & Company*, 21 F.3d 1339, 1344-45 (4th Cir. 1994), the Fourth Circuit Court of Appeals concluded that this 60-day time frame was not jurisdictional, because the statute imposed no consequences for failure of the United States Department of Justice to comply with the time frame for making the election to proceed with the matter and an analysis of Congressional intent did not reflect an intention that the 60-day time frame be jurisdictional. The Fourth Circuit therefore reversed a trial court decision dismissing the government as a party plaintiff.

Here, the same result should follow. Chapter 68, Fla. Stat., does not provide a consequence if the Department fails to notify the Court that it intends to proceed with the action within the 90-day time period (or any granted extension of time). In fact, the statute only obligates the Department to expressly notify the Court where it declines to take over the action. § 68.083(6)(b), Fla. Stat. (2005).⁴ There is no similar express requirement that the Department notify the Court that it agrees to proceed with the action pursuant

⁴ Even where the Department initially declines to take over a *qui tam* lawsuit, Florida's False Claims Act authorizes the Department to intervene at a later date. §§ 68.084(3) and (6), Fla. Stat. (2005).

to § 68.083(6)(a), Fla. Stat. (2005). Moreover, there is no evidence that the Florida Legislature intended the 90-day time frame to be jurisdictional.

The Department therefore respectfully suggests that § 68.083(6)(a), Fla. Stat. (2005), provides it the authority to assume primary responsibility for this action separate and apart from the operation of Fla. R. Civ. P. 1.230, and respectfully requests that the Court defer to the executive's exercise of its statutory option to assume primary responsibility for this matter.

B. Alternatively, Rule 1.230 Permits Intervention That Is Not Subordinate To The Relator

Rule 1.230, Fla. R. Civ. P., provides that intervention is subordinate to the main proceeding "unless otherwise ordered by the court in its discretion." The interest that entitles a party to intervene "must be that created by a claim to the demand in suit or some part thereof, or a claim to, or lien upon, the property or some part thereof, which is the subject of the litigation." *Union Central Life Ins. Co. v. Carlisle*, 593 So.2d 505, 507 (Fla. 1992). In deciding whether to permit intervention, the court should consider a number of factors, including "the derivation of the interest . . . and any other relevant circumstances." *Id.* at 507-08.

As set forth below, the Department has a unique interest in this lawsuit by virtue of it being a *qui tam* case. Moreover, the Department believes that intervention in a capacity other than as the entity primarily responsible for this action would not allow it to adequately protect and prosecute the State's interests.

Lawsuits filed pursuant to the Florida False Claims Act are brought "in the name of the State of Florida," § 68.083(2), Fla. Stat. (2005), and the Department has a significant interest in appearing in and assuming primary responsibility for prosecuting this matter on behalf of the citizens of the State. Indeed, even in cases such as this, where relators are represented by able counsel, the likelihood of recovery

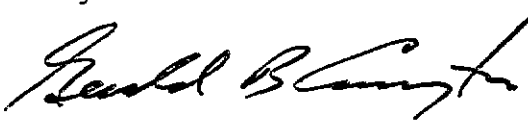
increases substantially when the government entity assumes primary responsibility for prosecuting the matter.⁵ Additionally, as noted above, the Relator does not object to the Department's assumption of primary responsibility, and the Court has not yet exercised jurisdiction over the Defendant.⁶

The Department therefore respectfully requests, pursuant to Rule 1.230, that the Department be permitted to intervene and assume primary responsibility for prosecuting the action.

Wherefore, the State of Florida, Department of Legal Affairs, pursuant to §§ 68.083(3) and (6), Fla. Stat. (2005), and Rule 1.230, Fla. R. Civ. P., requests that this Court enter an order permitting the Department to intervene in, and assume primary responsibility for, prosecution of this action.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General


GERALD B. CURINGTON
Deputy Attorney General
Chief, Civil Litigation
Florida Bar No.: 224170

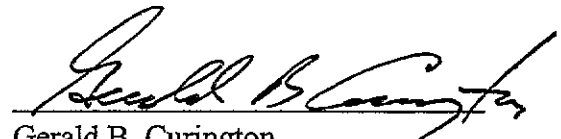
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⁵ For example, 95% of federal *qui tam* recoveries occur in those cases where the government takes primary responsibility for the matter. See Boese, John, *Civil False Claims and Qui Tam Actions* (Aspen Publishers). The government's familiarity with investigations and lawsuits of this type may help to explain this phenomenon.

⁶ In *qui tam* cases where the Department assumes primary responsibility for the prosecution of the action, a non-prevailing relator is protected from § 68.086(3)'s fee shifting provisions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by Facsimile and U.S. mail on: Steven R. Andrews, Esq. and David W. Moye, Esq., **Andrews & Moye, LLC**, 822 North Monroe Street, Tallahassee, FL 32303, on the 2nd day of May, 2006.


Gerald B. Curington