FUNDAMENTALS OF THE FALSE CLAIMS ACT - 2004

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INTRODUCTION

The False Claims Act, 31 U.S.C. § 3729 et seq. ("FCA" or "the Act"), was enacted in 1863 during the height of the Civil War to curtail abuse of public funds by unscrupulous suppliers of materiel for the war effort. The Act allows the federal government to recover treble damages plus penalties of up to $5,500 to $11,000 per violation from any person or entity that knowingly submits false claims for payment to the federal government.

The Act also permits private citizens (called "relators") to file suit on behalf of the Government and in return for their efforts receive a share of the Government's recovery. These suits are called qui tams, which comes from the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," which refers to those "who sue on behalf of the king as well as themselves."

In 1986, the False Claims Act was amended to strengthen its qui tam, liability, and damage provisions. Since that time, recoveries under the Act have increased dramatically. Over $12 billion has been recovered under the Act since 1986. Of that amount, over $7.8 billion has been recovered in cases with an associated qui tam claim. Relators have received over $1 billion from those recoveries.

I. LIABILITY

The False Claims Act provides liability for any person who:

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the

Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

. . . .

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

31 U.S.C. 3729(a).

A. Definition of "Person"

1. Individuals

With limited exceptions applicable to certain government officials, any individual can be held liable under the FCA.

2. Corporations

Corporations can be held liable under the Act for the actions of their employees within the scope of their employment under the doctrine of *respondeat superior*. *Grand Union Co. v. United States*, 696 F.2d 888, 891 (11th Cir. 1983); *United States v. Ridglea State Bank*, 357 F.2d 495, 500 (5th Cir. 1966).

3. States

In *Vermont Agency of Natural Resources v. United States ex rel Stevens*, 529 U.S. 765 (2000), the Supreme Court resolved a conflict amongst the circuits on the question of whether States were "persons" subject to liability under the False Claims Act in actions brought by qui tam plaintiffs. The Court held that "the False Claims Act does not subject a State (or state agency) to liability in such actions." Id. at 787-788. *See also Donald v. Regents of the University of California*, 329 F.3d 1040 (9th Cir. 2003) (relators have no right to a share of proceeds from a FCA case against a state or state agency).

According to Justice Ginsburg's concurring opinion in *Stevens*, however, the Court's decision did not rule out suits under the FCA by the federal government against states. 529 U.S. at 789. At least one court has since held that the federal government can still bring such claims. *United States v. University Hospital at Stony Brook*, 97-CV-3463, 2001 WL 1548797, at *3 (E.D.N.Y. Oct. 26, 2001). *But see Donald v. University of California Board of Regents*, 329 F.3d 1040, 1042 (9th Cir. 2003) (remarking that *Stevens* leaves the issue "somewhat unclear").

4. Local Governments

In *Cook County v. United States ex rel. Chandler*, 538 U.S. 119 (2003), the Supreme Court held that, notwithstanding its ruling in *Stevens*, local governments are "persons" subject to suit in qui tam actions brought under the False Claims Act.

B. Knowledge Requirement

"Knowing" and "knowingly" are defined by the Act to mean that a person:

> (1) has actual knowledge that a statement or claim is false;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information,

31 U.S.C. § 3729(b). No proof of specific intent to defraud is required. *Id.*; *See also Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992).

Proof of Government knowledge is not a defense to liability under the False Claims Act, but may be relevant to whether the defendant acted "knowingly." *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991); *United States ex rel. Costner v. United States*, 317 F.3d 883 (8th Cir. 2003) (Government knowledge negated scienter); *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284 (4th Cir. 2002) (same).

C. What is a Claim?

The False Claims Act covers both affirmative false claims for payment and also so-called "reverse false claims" that are designed to avoid or reduce obligations to the Government.

1. Affirmative False Claims

The Act defines claims against the Government to include "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c).

The foregoing language has properly been interpreted to cover virtually any claim for payment or transfer of Government money or property, such as an invoice, progress payment request, loan application, or other bill requesting payment that is submitted to the federal government. *See e.g. United States v. Bornstein*, 423 U.S. 303 (1976) (invoice); *United States v. Neifert-White Co.*, 390 U.S. 228 (1968) (loan application); *United States v. Alperstein*, 183 F. Supp. 548 (S.D. Fla. 1960), *aff'd*, 291 F.2d 455 (5th Cir. 1961) (Claims for services).

It also has been interpreted to cover a wide variety of indirect claims, including:

a. Claims submitted by subcontractors on Government contracts to prime contractors. *United States v. Bornstein*, 423 U.S. 303 (1976).

b. Claims submitted to private fiscal intermediaries (e.g. Medicare claims). *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir.), *cert. denied*, 423 U.S. 830 (1975).

c. Claims submitted to Government Corporations. *Rainwater v. United States*, 356 U.S. 590, 592 (1958).

d. Claims submitted to state programs that receive funding from the Federal Government (e.g., Medicaid). *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144, 1146-47 (S.D. Cal. 1976).

e. Claims submitted to financial institutions for federally guaranteed loans (e.g., loans guaranteed by the SBA, VA or HUD). *See United States v. First National Bank of Cicero*, 957 F.2d 1362 (7th Cir. 1992)(SBA loan).

The Act does not, however, apply to claims, records or statements made under the Internal Revenue Code of 1986. 31 U.S.C. § 3729(e).

2. "Reverse False Claims"

The Act covers false claims made to "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729(a)(7). The meaning of this language has been the subject of numerous conflicting opinions. In 1997, however, the Eighth Circuit articulated a definition that has since been accepted by other circuits. In *United States v. Q International Courier, Inc., et al.*, 131 F.3d 770 (8th Cir. 1997), the Eighth Circuit held the Government must show that "defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness." This reasoning has been explicitly approved by the Sixth Circuit and implicitly accepted by the Eleventh Circuit. *See American Textile Manufacturers Institute, Inc. v. The Limited, Inc., et al.,* 190 F.3d 729 (6th Cir. 1999) (concurring with Q International); *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234 (11th Cir. 1999) (en banc)(citing *Q International*).

D. What is a False Claim?

Many categories of false claims are intuitively apparent as such (e.g., claims for funds not due,

overstated claims, etc.). Several recent decisions, however, have focused on a somewhat less obvious form of false claim - implied certifications. These claims typically arise from requests for payment by a government contractor who failed to comply with a rule or regulation that was material to the contractor's claim to payment, but the contractor did not expressly certify to compliance before being paid. Some courts have held that such claims cannot be considered false, since the contractor did not explicitly represent compliance. See *e.g., Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001); *United States ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2000). The better reasoned decisions on this point, however, while recognizing "[i]t is true that the FCA cannot be used to enforce compliance with every federal law or regulation . . .," hold that "the FCA can be used to create liability where failure to abide by a rule or regulation amounts to a material misrepresentations *(sic)* made to obtain a government benefit." *United States ex re. Franklin v. Parke-Davis*, 147 F. Supp.2d 39, 51 (D. Mass. 2001). *See also Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519 (10th Cir. 2000) (defendant made implicitly false certification of compliance with environmental provisions in contract when seeking payment); *United States ex rel. Augustine v. Century Health Services, Inc.*, 289 F.3d 409, 414-416 (6th Cir. 2002) (defendant implicitly certified continuing compliance with certain program requirements for payments claimed in cost report); *United States v. Special Devices, Inc.*, No. CV 99-8298 SJO (C.D. Cal. 2003) (implicit certification of compliance with environmental and safety regulations relevant to payment).

E. What is a False Statement?

False statements can be found in any communications with the government that ultimately provide a basis for a claim to be paid or approved. Examples of false statements include false representations regarding goods or services allegedly provided, false certifications regarding performance on a contract, or false progress reports.

F. Standard of Proof

"In any action brought under section 3730, the United

States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." 31 U.S.C. § 3731(c).

G. Statute of Limitations

The Act bars suits filed:

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last."

31 U.S.C. § 3731(c).

According to the majority of courts, in cases brought by the United States, the "official of the United States charged with responsibility to act in the circumstances" is an official within the Department of Justice. *See United States v. Incorporated Village of Island Park*, 791 F. Supp. 354 (E.D.N.Y. 1992); *Kreindler & Kreindler*, 777 F. Supp. 195 (N.D.N.Y. 1991), *aff'd on other grounds*, 985 F.2d 1148 (2d Cir. 1993).

The tolling provision has also been found to apply to *qui tam* actions, but the relator has been treated as the "official" in some cases for purposes of determining when the Government gained knowledge of the alleged fraud. *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996).

H. Service of Process

The False Claims Act provides for nationwide service of process. 31 U.S.C. 3731(a).

II. DAMAGES

A person who violates the False Claims Act will be liable for "a civil penalty of not less than $5,000 and not more than $ 10,000, plus 3 times the amount of

damages which the Government sustains because of the act of that person . . . ." 31 U.S.C. § 3729(a).

A. Single Damages

The measure of single damages (subject to trebling under the Act) is generally the amount of additional money the United States had to pay as a result of the false statement or claim. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966). The precise method of determining the amount of the Government's overpayment varies depending on the type of case. *See e.g., United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637 (6th Cir. 2002) (damages equal to value of helicopter that crashed as result of defective part). Consequential damages are generally not recoverable. *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1001 (5th Cir. 1972).

B. Treble Damages

In *Stevens*, the Supreme Court described treble damages under the False Claims Act as "essentially punitive in nature." 529 U.S. at 784. In *Cook County*, however, the Court clarified its statement in *Stevens*, observing that "treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives." 538 U.S. 119, 130 (2003). The Court thus held that the FCA's treble damages provision "certainly does not equate with classic punitive damages." Id. at 132.

C. Penalties

Violations of the FCA occurring prior to September 29, 1999, are subject to mandatory penalties of between $5,000 and $10,000 per false claim. 31 U.S.C. § 3729(a). False Claims violations occurring after September 29, 1999 are subject to penalties of between $5,500 and $11,000. *See* 28 U.S.C.A. § 2461 note (2002); 28 C.F.R. § 85.3(9) (2000).

While damages are not necessarily required for penalties to be awarded, *United States v. Cherokee Implement Company*, 216 F. Supp. 374, 375 (D. Iowa 1963), large penalty awards may be limited by the Double Jeopardy Clause in cases where the defendant has already had a

prior criminal conviction. *United States v. Halper*, 490 U.S. 435 (1989). Penalties in combination with treble damages may also be potentially limited by the Eighth Amendment's prohibition against excessive fines and penalties. *United States v. Mackby*, 261 F.3d 821 (9th Cir. 2001) (case remanded for Eighth Amendment analysis by district court); *see also Hays v. Hoffman*, 325 F.3d 982 (8th Cir. 2003) (penalties reduced from $1.68 million to $80,000).

D. Voluntary Disclosure

A defendant's exposure for damages under the Act may be limited to double damages plus costs under the following circumstances:

> (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
>
> (B) such person fully cooperated with any Government investigation of such violation; and
>
> (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

31 U.S.C. § 3729(a).

III. QUI TAM PROVISIONS

A. Who Can File A Qui Tam?

The False Claims Act permits actions to be filed under the Act by either the United States Attorney General or by private citizens. Actions brought by private persons (referred to as "relators") are brought "for the person and for the United States Government" but

are "brought in the name of the Government." 31 U.S.C. § 3730(b)(2).

The only persons expressly precluded from filing a *qui tam* under the Act are "former or present member[s] of the armed forces" who bring suit against a member of the armed forces based a claim "arising out of such person's service in the armed forces." 31 U.S.C. § 3730(e)(1).

In practice, courts have frequently also barred suits by government employees on public disclosure grounds. *See e.g. United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.2d 740 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1877 (1996). No court, however, has accepted the argument that government employees *per se* can never be relators. *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500-01 (11th Cir. 1991); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419-20 (9th Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990); *United States ex rel. Givler v. Smith*, 760 F. Supp. 72, 75 (E.D. Pa. 1991); *United States v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158, 1161 (S.D. Fla. 1990), aff'd, 963 F.2d 384 (11th Cir. 1992).

Suits by attorneys have also tended to be disfavored. *See e.g. United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149 (3rd Cir. 1991) (attorney); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993), *cert. denied*, 508 U.S. 973 (1993) (same).

B. How to File a Qui Tam Action?

Relators must file both a complaint and a written disclosure statement under seal to begin a *qui tam* action. Both are served on the Government pursuant to the Federal Rules of Civil Procedure.

1. Complaint

The complaint in a False Claims Act action is subject to review under Fed. R. Civ. P. 9(b), which provides that "in all averments of fraud or mistake, circumstances constituting fraud or mistake shall be stated with particularity." *See*

United States ex rel. Gold v. Morrison-Knudsen Co., 68 F.3d 1475 (2nd Cir. 1995), *cert. denied*, 116 S.Ct. 1836 (1996). It is thus generally required that the complaint describe "the outline of the fraudulent scheme and facts identifying 'who, what, when and where' of the fraud." *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 832 (1993). Successful motions under Rule 9(b), however, normally only result in dismissal without prejudice, if leave to amend has not previously been granted. *Id.*

2. Written Disclosure Statement

The disclosure statement consists of a "written disclosure of substantially all material evidence and information the person possesses." 31 U.S.C. § 3730(b)(2). This generally means a detailed description of the parties, the fraud, applicable legal authority, and any relevant documents in the possession of the relator, along with a list of any relevant witnesses, and a list of relevant documents not in the relator's possession. The basic objective is to provide the Government with as clear and complete a presentation of the facts as possible to facilitate an intervention decision by Government attorneys who are often burdened by numerous cases competing for their attention.

Although disclosure statements may include work product, some courts have held that they are not protected by the work product doctrine or any other privilege. *See e.g. United States ex rel. Burns. V. A.D. Roe Co., Inc.*, 904 F. Supp. 592 (W.D. 1995).

3. Seal Requirement

The complaint in a *qui tam* action is filed under seal. 31 U.S.C. § 3730(b)(2). Service of the complaint on the defendant is prohibited "until the court so orders." *Id.*

The appropriate method for filing an action under seal can vary by district. In some districts, simply including a cover sheet that omits the names of the parties is sufficient. Other districts require that pleadings be submitted in a

sealed manilla envelope. Yet others require that a motion to file under seal be submitted along with the complaint. Reference should be made to local rules on this point.

Once the complaint is filed, maintaining the seal is important, for a breach of the seal may lead to dismissal of the complaint with prejudice. *See United States ex rel. Erickson v. Amer. Institute of Bio. Sciences*, 716 F. Supp. 908, 912 (E.D. Va 1989); *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2nd Cir. 1995); *but see United States ex rel. Lujan v. Hughes Aircraft*, 67 F.3d 242 (9th Cir. 1995) (reversing dismissal, directing district court to consider three factors: actual harm to government, nature of the violation, and whether the violation involved bad faith or willfulness).

4. Service of the Complaint

The Act states that the complaint and disclosure statement "shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure." Service on the United States is no longer covered by this rule; Fed. R. Civ. P. 4(i) now governs. Rule 4(i) requires that the complaint and disclosure statement be delivered to the United States Attorney General and to the United States Attorney in the district where the case is filed. Service can be made on the United States Attorney General by registered or certified mail. Service can be made on the United States Attorney by hand service on the United States Attorney (or his or her official designee) or by registered or certified mail on the civil process clerk at the United States Attorney's office. Sending the complaint by registered or certified mail to the United States Attorney is not sufficient.

C. Government's Investigation and Intervention Decision

The Act provides that the complaint "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2). During this period, the Government investigates the allegations in

the complaint and disclosure statement.

"The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information." *Id.* As a practical matter, however, the Government rarely makes intervention decisions within the original 60 days. The Government is permitted to request extensions of the 60 day period "for good cause shown," *id.*, and frequently does so. The length of extension sought varies by case and by district. In most jurisdictions, the Government's first request is almost always granted, and subsequent requests are often granted as well. The Government normally seeks the relator's consent when requesting an extension. It is generally in the relator's interest to concur with such requests, for if the Government is forced to make an intervention decision before it is ready to do so, it is likely to decline intervention. Not surprisingly, in most cases Government participation in a case facilitates both litigation and settlement.

D. Litigating and Otherwise Resolving The Case

If the Government intervenes in the case, then it takes on "primary responsibility for prosecuting the action . . . ." 31 U.S.C. § 3730(c)(1). The relator may still participate in the action, *id.*, but the Government may request the Court to place limits on the relator's participation in the case. 31 U.S.C. § 3730(c)(2)(C). The Government may also settle the case, notwithstanding the objections of the relator, "if the court determines after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B).

If the Government declines intervention in the case, the relator "shall have the right to conduct the action." 31 U.S.C. § 3730(c)(3). The relator, however, does not then take on the powers and privileges of the Government. The relator litigates the case as if it were any other private lawsuit. *See United States ex rel. Lamers v. City of Green Bay, Wis.*, 924 F. Supp. 96 (E.D. Wis. 1996). Moreover, the relator's control of the case is not guaranteed; the court may always "permit the Government to intervene at a later date upon a showing of good cause." 31 U.S.C. § 3730(c)(3).

E. Public Disclosure Bar & Original Source Exception

One of the most litigated provisions of the False Claims Act is its public disclosure bar. The provision reads as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> 31 U.S.C. § 3730(e).

Some of the key issues of general relevance are reviewed briefly below. Individual cases, however, should be analyzed in the context of decisions that involve similar types of disclosures, which may not be reviewed here.

1. When is a disclosure a "Public Disclosure"?

Per the language of the Act, relevant disclosures are those made 1) in a criminal, civil, or administrative hearing; 2) in a congressional, administrative, or Government Accounting Office (sic) report, hearing, audit or investigation, or 3) in the news media. 31 U.S.C. § 3730(e).

Courts have differed on who must have received information for it to have been publicly disclosed. *See United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999) (information must be disclosed to either "a public official" whose duties extend to the claim in question or to the "public at large"); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 682-85 (D.C. Cir.), *cert. denied*, 118 S.Ct. 172 (1997) (discovery information not filed with the court is only theoretically available upon the public's

request); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000 (10th Cir. 1996) (public disclosure occurs "if the allegations are disclosed to any single member of the public not previously informed thereof").

2. Disclosure of "Allegations or Transactions"

In *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994), the Court of Appeals for the District of Columbia Circuit established the following equation for determining whether a disclosure exposes the "allegations or transactions" that form the basis of the FCA complaint:

> [I]f X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements. In order to disclose the fraudulent *transaction* publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed. . . . [*Q*]*ui tam* actions are barred only when enough information exists in the public domain to expose the fraudulent transaction (the combination of X and Y), or the allegation of fraud (Z).

Id. at 654. Other courts have since adopted this same framework. *See U.S. ex rel. Foundation Aiding the Elderly v. Horizon West,* Inc., 265 F.3d 1011 (9th Cir. 2001); United *States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1514 (8th Cir. 1994); *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 741 (3d Cir. 1997); *Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 330 (6th Cir. 1998); .

3. What Action is "Based Upon" a Public Disclosure?

Courts have also reached varying decisions regarding the meaning of the phrase "based upon" in the Act. In *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994), the

Fourth Circuit held that “a relator's action is ‘based upon’ a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based.” *See also United States ex rel. v. Mathews v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999) (same). Other circuits considering the issue, however, have held that "based upon" means "supported by" or "substantially similar to," so that the relator's independent knowledge of the information is irrelevant. *See Minnesota Association of Nurse Anesthetists v. Allina Health System* Corp., 276 F.3d 1032 (8th Cir. 2002); United *States ex rel. Biddle v. Board of Trustees of the Leland Stanford, Jr. Univ.*, 147 F.3d 821, 828 (9th Cir. 1998); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992). *See also United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 682-85 (D.C. Cir.), *cert. denied*, 118 S. Ct. 172 (1997) (holds that a *qui tam* action is based upon public disclosures if it relies on the same allegations or transactions as those in the public disclosure; rejects the Fourth Circuit's approach "because it renders the ‘original source' exception to the public disclosure bar largely superfluous"); *Mistick PBT v. Housing Auth. of the City of Pittsburgh, et al.*, 186 F.3d 376 (3rd Cir. 1999) (recognizing conflict between ordinary meaning of the phrase "based upon" and precept that a statute should be construed if possible so as not to render any of its terms superfluous, but electing to adhere to majority interpretation that “based upon” means “supported by”).

4. The “Original Source” Exception

Decisions concerning the “original source” exception to the public disclosure bar are largely fact based. The statute reads in pertinent part as follows:

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4).

a. What is "information on which the allegations are based"?

There is a division amongst the Circuits on whether the "original source" exception to the public disclosure bar requires direct and independent knowledge of the information in the complaint or direct and independent knowledge of the information on which any publicly disclosed allegations were based. The Third, Ninth, and Tenth Circuits have indicated that, to qualify as an original source, a relator must have direct and independent knowledge of each false claim alleged in the complaint. *See United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999); *United States ex rel. Mistick v. Housing Auth. of the City of Pitts.*, 186 F.3d 376, 388-89 (3d. Cir. 1999); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993) (referencing knowledge of allegations in complaint, but also holding that relator deemed to have direct and independent knowledge of facts in complaint that were uncovered by government in investigation prompted by relator); see also *Seal v. Seal*, 255 F.3d 1154 (9th Cir. 2001) (limiting *Barajas*).

The Fourth, Fifth, Sixth, Eighth and D.C. Circuits have rejected this approach; rather than requiring that the relator have direct and independent knowledge of each false claim alleged in the complaint, these courts have

concluded the relator only need show he has direct and independent knowledge of the information on which any publicly disclosed allegations are based. *See United States ex rel. Laird v. Lockheed Martin Eng.*, 335 F.3d 346, 353 (5th Cir. 2003); *Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1048 (8th Cir. 2002); *United States ex rel. Grayson v. Advanced Mgmt. Tech. Inc.*, 221 F.3d 580, 583 (4th Cir. 2000); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997); *United States ex rel. McKenzie v. Bellsouth Tele., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997).

b. Direct Knowledge

While the law on this point is not unanimous, several courts have held the relator must have come by the information without an intervening agency or instrumentality. *See e.g. United States ex rel. Stone v. Rockwell Int'l* Corp., 282 F.3d 787, 799 (10th Cir. 2002); United *States ex rel. Stinson v. Prudential Ins.*, 944 F.2d 1149, 1160 (3rd Cir. 1991); *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699, 703 (8th Cir. 1995).

c. Independent Knowledge

Most courts have interpreted the term "independent" to require that the relator have obtained his "knowledge" through some source other than the public disclosure. *See United States ex rel. Laird v. Lockheed Martin Eng.*, 335 F.3d 346, 353 (5th Cir. 2003)*; Minn. Ass'n of Nurse Anesthetists*, 276 F.3d at 1048 (8th Cir. 2002); *United States ex rel. Grayson v. Advanced Mgmt. Tech. Inc.*, 221 F.3d 580, 583 (4th Cir. 2000); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 690 (D.C. Cir. 1997); *United States ex rel. McKenzie v. Bellsouth Tele., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997); *Houck on Behalf of United States v. Folding Carton Admin.*, 881 F.2d 494, 505

(7th Cir. 1989), *cert. denied*, 494 U.S. 1025 (1990); *Wang v. FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992); *but see United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir.), *cert. denied*, 114 S.Ct. 1543 (1994).

d. Voluntarily Provided Information to Government

The Act requires that the relator have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4). The courts have reached varying conclusions on when an individual has "voluntarily" provided information to the Government. *See United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699, 704 (8th Cir. 1995) (relator who only revealed information after a government investigator approached him deemed not an original source); *but see United States ex rel. Pentagen Technologies Int'l Ltd.*, No. 94-CIV. 2925 (RLC), 1995 WL 693236 (S.D.N.Y. Nov. 22, 1995) (party disclosing information through deposition could still be original source).

Some courts have additionally required that the relator have been the source of the publicly disclosed information. *See Wang v.* FMC Corp., 975 F.2d at 1418; *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990). But the majority have not required such proof. *See Stinson*, 944 F.2d at 1160 (3d Cir.); *U.S. ex rel. Siller* v. Becton *Dickinson*, 21 F.3d 1339, 1355 (4th Cir.), *cert. denied,* 115 S.Ct. 16 (1994); *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999); *see also United States ex rel. Findley v. FPC-Boron*, 105 F.3d 675 (D.C. Cir. 1997). (rejecting requirement that the relator be the source of the entity making the public disclosure but requiring that the information have been voluntarily provided to the

Government before the public disclosure).

F. Relator's Share

1. Government Intervenes In Action

If the Government intervenes in a *qui tam* action, the relator is normally entitled to between 15% and 25% of the proceeds of the action or settlement, "depending upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d)(1). *See United States ex rel. Alderson v. Quorum Health Group, Inc.,* 171 F. Supp.2d 1323, at 1332 (M.D. Fla. 2001) (24% awarded to relator).

If the court finds that the action is "based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation." 31 U.S.C. § 3730(d). *See United States v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158 (S.D. Fla. 1990) (5% awarded).

2. Government Declines to Intervene

If the Government does not intervene in the case, the relator shall receive not less than 25 and not more than 30 percent of the proceeds of the action or settlement. 31 U.S.C. § 3730(d)(2). *See United States ex rel. Pedicone v. Mazak Corp.*, 807 F. Supp. 1350 (S.D. Ohio 1992) (30% awarded).

3. Relator Plans or Initiates Fraud

If the court concludes that the relator "planned and initiated the violation of section 3729 upon which the action was brought," the court may

reduce the relator's share under paragraphs (d)(1) and (d)(2) "to the extent the court considers appropriate." 31 U.S.C. § 3730(d)(2); *United States ex rel. Barajas v. Northrop*, No. CV-87 7288-KN (Kx) (C.D. Cal. May 15, 1992) (wrongdoing relator, who made "small but meaningful contribution," awarded 10.8%). If the relator "is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action." *Id.*

4. Government Intervenes in Case That is Based Primarily on Publicly Disclosed Information

Section 3730(d)(1) provides for a reduced relator's share in cases primarily based on the following categories of publicly disclosed information:

> Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.

31 U.S.C. 3130(d)(1).

5. Statistics

According to Department of Justice statistics, in *qui tam* cases resolved since the 1986 Amendments through September 2003, the average relator's

share has been approximately 15% in cases where the Government has intervened, and 25% in cases where the Government has declined to intervene.

G. Attorney's Fees and Costs

Whether the Government intervenes or not, if the *qui tam* action is successful, the relator "shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs." 31 U.S.C. § 3730(d)(1)-(2).

"If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action, and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(1)-(2).

H. Protection for the Relator

The FCA protects employee-relators against any retaliation by employers "because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section . . . ." 31 U.S.C. 3730(h). Circuit court decisions interpreting the scope of protected activity have produced differing results. *See Neal v. Honeywell*, 33 F.3d 869, 865-66 (7th Cir. 1994) (holding that Section 3730(h) applies to intracorporate complaints of fraud); *Robertson v. Bell Helicopter, Inc.* 32 F.3d 948, 951 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1110 (1995) (internal reporting of concerns about charges to the Government by a contractor employee is not protected activity where employee never used terms "illegal," "unlawful," or "*qui tam* action"); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996) (reports of non-compliance not sufficient if employee's job was to report non-compliance); *Moore v. California Institute of Technology Jet Propulsion Laboratory*, 275 F.3d 838, 845 (9th Cir. 2002) (relator's activity protected when relator in good faith believes and a reasonable person

in the same circumstances might believe the employer was committing fraud against the Government).

If an employer is found to have retaliated against an employee in violation of the Act, the employee "shall be entitled to all relief necessary to make the employee whole." 31 U.S.C. § 3730(h). The relief provided under the statutes includes "reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees." *Id.* Cases interpreting this provision have concluded that the damages available are limited to those forms of relief specified in the Act. *See In re Visiting Nurse Association*, 176 B.R. 748 (Bankr. Ed. Pa. 1995); *Neal v. Honeywell*, 995 F. Supp. 889 (N.D. Ill. 1998) (punitive damages not available). Additional forms of relief, such as punitive damages, however, may be available under state law in the jurisdiction where the suit is filed.