SETTLING HEALTH CARE QUI TAM ACTIONS

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Over $7.8 billion has been recovered in qui tam cases under the False Claims Act since 1986. About two thirds of that amount - $5.1 billion - has been recovered in health care cases, and the vast majority of those recoveries have come from settlements. Understanding the process of settling a health care case is thus of critical importance to all committed False Claims Act practitioners.

Naturally, however, the process is not easy. At least four players are integral to any settlement - the Department of Justice, the affected federal agency, the defendant, and the relator. Oftentimes additional parties also play a role (e.g., state governments, other relators, multiple agencies, multiple defendants, etc.). Each of the participants potentially has the ability to challenge or block a resolution of the underlying FCA allegations sought by the others, which may involve court intervention. And even when agreement is reached on all the FCA issues, the process is still far from complete. Other issues tangential to the underlying FCA case remain to be resolved, including the relator's claims to a share of the proceeds, the affected agency's exclusion claims against the defendants, the relator's claims for attorney's fees and costs, and, in some cases, the relator's claims for retaliation against the defendants.

This article attempts to bring clarity to the settlement process by examining the law relevant to the above issues under five broad headings: I. Resolving False Claims Act Allegations; II. Corporate Integrity Agreements; III. The Relator's Share; IV. Attorney's Fees and Costs; and V. Protection for the Relator.

I. RESOLVING FALSE CLAIMS ACT ALLEGATIONS

A. The Government's Ability to Settle Without the Relator's Consent

If the United States intervenes in an action, and subsequently wishes to settle the case, it is standard practice for the Government to obtain the consent of the relator before doing so. If the relator objects to the proposed compromise, the Government has the ability to settle the case over the relator's objections, with authorization by the court. The relevant statutory language reads as follows:

> The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

31 U.S.C. 3730(c)(2)(B).[1]

Few cases have been reported on this issue. The first reported decision was Gravitt v. General Electric Co., 680 F. Supp. 1162, 1163-64 (S.D. Ohio), appeal dismissed, 848 F.2d 190 (6th Cir.), cert. denied, 488 U.S. 901 (1988). In Gravitt, the court rejected a settlement proposed by the Government, based on, inter alia, a lack of discovery done by the government, the limited role given to relator's counsel in negotiation of the settlement, and the assumption that the settlement did not adequately consider the increased damages and reduced standards of proof available under the 1986 Amendments to the Act.

Subsequent decisions have granted discovery rights to relators seeking to challenge Government settlements with defendants. See United States ex rel. McCoy v. California Review, 133 F.R.D. 143, 148 (N.D. Cal. 1990) (holding the right to limited discovery was a "corollary to plaintiff's right to object to the settlement"); see also United States ex rel. Coughlin v. International Business Machines Corp., 992 F. Supp. 137, 139 (N.D.N.Y. 1998).

But despite these discovery rights, more recent relator challenges to Government settlements have been largely unsuccessful. See e.g. United States ex rel. Sharma v. University of Southern California, 217 F.3d 1141 (9th Cir. 2000) (rejecting relator's objection to district court revising settlement agreement to exclude attorney's fees from proceeds of settlement); United States ex rel. Runion v. Fairchild Industries, No. CV 88-2898-WDK (Jrx) (C.D. Cal.) (unsuccessful objection to amount of settlement); but see United States ex rel. Smith v. Gilbert Realty Co., 9 F. Supp. 2d 800 (E.D. Mich. 1998 and United States ex rel. Smith v. Gilbert Realty Co., 34 F. Supp. 2d 527, 528 (E.D. Mich. 1998) (awarding relator's share and attorney's fees in case where Government settled case after judgment, without notice to the relator, for an amount substantially less than the judgment).

B. The Government's Ability to Dismiss Without the Relator's Consent

Though it rarely exercises the power, the Government has the authority under the False Claims Act, in specified circumstances, to dismiss cases without the consent of the relator.

> The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

31 U.S.C. § 3730(c)(2)(A).

The statutory language authorizing Government dismissal falls under the broader heading of "Rights of the Parties to Qui Tam actions" where the Government "proceeds with the action." 31 U.S.C. § 3730(c). Despite the implication from this context that intervention should precede

any request for dismissal, some courts have allowed the Government to seek dismissal without first intervening. See United States ex rel. Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992); Juliano v. Federal Asset Disposition Ass'n, 736 F. Supp. 348 (D.D.C. 1990); but see United States v. TRW, Inc., 4 F.3d 417 (6th Cir. 1993) (intervention preceded request for dismissal).

The substantive rights of the Government to dismiss a qui tam action were addressed in United States ex rel. Sequoia Orange Co. v. Sunland Packing, 912 F. Supp. 1325 (E.D. Cal. 1995), a case involving alleged misrepresentations by citrus firms to avoid payment of regulatory fines and assessments to the Government for overshipments. The Government intervened in the suit, but after the Government's intervention, the regulations authorizing the fines were ruled invalid. Id. at 1332-33. The Government consequently sought the dismissal of the action, despite the fact that the underlying claims might still be meritorious. Id. at 1333-34. In doing so, the Government argued that its decision to dismiss was nonreviewable as an exercise of prosecutorial discretion. Id. at 1338. The district court disagreed. Pointing to the fact that Congress had created a hearing requirement out of "concern about the government's improper dismissal of FCA cases," the district court concluded that it could review the motion to dismiss. Id. The court then applied a two-step analysis "to test the justification for dismissal: (1) identification of a valid government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose." Id. at 1341 Ultimately, it concluded that the Government's request was justified under that standard, on the basis that "amnesty serves to facilitate adoption of new marketing orders, conserve industry and government resources, and achieve equity among all industry law violators." Id. at 1353. The Ninth Circuit agreed, holding, consistent with the district court's opinion, that when "the government offers reasons for dismissal that are rationally related to a legitimate government interest, the qui tam action may be dismissed." United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,151 F.3d 1139, 1147 (9th Cir. 1998). See also United States ex rel. Ridenour v. Kaiser-Hill Co., Civ. No. 97-WM-2191 (D. Colo. 2001) (following Sequoia, court held that FCA permitted Government to dismiss qui tam concerning security services provided at weapons grade plutonium and uranium facility, even if action was meritorious, so long as Government could demonstrate that dismissal was rationally related to accomplishment of a valid governmental purpose).

C. The Relator's Ability to Settle Without the Government's Consent

If the United States declines to intervene in a case, and the relator reaches a compromise with the defendants, the settlement is subject to review by both the Government and the court. Section 3730(b)(1) states that a qui tam action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."

1. Lack of Notice

One seemingly straightforward objection asserted by the United States has been to relators failing to give notice of settlement terms. For example, in United States ex rel. McGough v. Covington Tech., 967 F.2d 1391, 1394 (9th Cir. 1992), the United States objected to a settlement

reached between the relator and defendant without notice to the Government. The Government moved to intervene upon learning of the dismissal, requesting that the dismissal of the case be without prejudice to the United States' ability to pursue the action in the future. Id. at 1393. The district court denied both requests, id., but the Ninth Circuit reversed, explaining its holding as follows:

> It is one thing for the government to rely on the quality of the *qui tam* plaintiffs' representation in pursuing a case to judgment. It is quite another to hold the government bound by a deal made by the *qui tam* plaintiffs, without the government's knowledge or consent, to voluntarily dismiss its claims, with prejudice, against one of the defendants. When this occurs, it cannot be said that the *qui tam* plaintiffs' representation of the government's interests was adequate.

Id. at 1396. The case was thus remanded to the district court for the entry of dismissal without prejudice. Id. at 1397. See also United States ex rel. Stinson, Lyons v. Provident Life & Accident Ins. Co., 811 F. Supp. 346, 347 (E.D. Tenn. 1992) ("Section(s) 3730(b)(1) when read in the context of the statute as a whole, is intended to ensure that legitimate claims brought by a qui tam plaintiff are not dismissed before the United States has been notified of the claims and has had an opportunity to decide whether the United States should take over the conduct of the action").

2. Allocation of Settlement Proceeds

The United States has asserted objections to allocations of settlement proceeds with mixed results. Early district court decisions focused on the Government's failure to intervene in a case as the basis for overriding Government objections to settlements. See U.S. ex rel. Pedicone v. Mazak Corp., 807 F.Supp. 1350, 1352 (S.D. Ohio 1992) (district court rejected Government's objections to the amount of funds being allocated to attorney's fees, stating that "Congress did not intend to give the United States a veto power over actions in which it has previously declined to intervene");[2] United States ex rel. Stinson, Lyons v. Provident Life & Accident Ins. Co., 811 F. Supp. 346, 347 (E.D. Tenn. 1992) (holding that Government's decision not to intervene in case was "tantamount to consent . . . to have the action dismissed").

More recent decisions, however, have declined to follow this approach. Instead, two new lines of authority have emerged: The Ninth Circuit has held that the Government has a right to object to dismissal of a non-intervened case, but only upon a showing of good cause. The Fifth and Sixth Circuits have ruled that the right to object is absolute.

a. Qualified right to object to dismissal

In United States ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994), the Government asserted an absolute right to object to settlements under Section 3730(b)(1). The Court rejected this argument by reference to the 1986 amendments to the False Claims Act, holding that "Congress' intent to place full responsibility for False Claims Act litigation on private

parties, absent early intervention by the government or later intervention for good cause, is fundamentally inconsistent with the asserted 'absolute' right of the government to block a settlement and force a private party to continue litigation." Id. at 722. The court went on to hold, however, that "[t]he government, although it chooses not to fully intervene in the action, retains the right, upon a showing of good cause, to object to a proposed settlement." Id. at 723.[3]

In a companion case, United States ex rel. Gibeault v. Texas Instruments, 25 F.3d 725 (9th Cir. 1994), the Ninth Circuit reached essentially the same conclusion, holding "the government may not both withhold its consent to the settlement and refuse to intervene, thus forcing [the private parties] to continue litigating." Id. at 728. Nevertheless, under Killingsworth, the court held that the Government, on a showing of "good cause," is entitled to a hearing before the district court. Id. [4]

In at least two "good cause" hearings, the United States' objections have been heard but overruled. In United States ex rel. Pratt v. Alliant Techsystems, Inc., 50 F. Supp. 2d 942, 948-949 (C.D. Cal. 1999), the United States challenged a settlement agreement between the relator and the defendant on the basis that the releases were allegedly too broad and because the agreement did not prohibit the defendants from including the settlement costs in overhead costs that would later be billed to the Government. The district court disagreed, holding that the release was not unfair, unreasonable or inadequate under the circumstances, and further concluding, in light of the guidance available under federal regulations concerning the allowability of defendant's settlement costs, that "the absence of a disallowance provision fails to demonstrate the Settlement's unfair or unreasonable terms." Id.

Similarly, in United States ex rel. Summit v. Michael Baker Corp., 40 F. Supp. 2d 772, 775-776 (E.D. Va. 1999), the court addressed a Government challenge to a settlement based on the allegation that funds attributed to a wrongful discharge claim were actually misallocated False Claims Act proceeds. The court rejected the Government's arguments, holding that the relator had demonstrated the settlement proceeds were "solely for the recovery of lost wages and other relief appropriate to the wrongful discharge." Id. at 776.

b. Absolute right to object to dismissal

The Fifth and Sixth Circuits, by contrast, have accepted the Government's argument that dismissal may only be granted if the Attorney General gives "written consent to the dismissal" as provided in Section 3730(b)(1).

In Searcy v. Philips Electronics North America Corp., 117 F.3d 154 (5th Cir. 1997), the Fifth Circuit, rejecting the Ninth Circuit's reliance on the 1986 Amendments, emphasized the fact that Section 3730(b)(1) had been in place since the FCA's initial passage in 1863. "If Congress meant to repeal the government's power to consent to voluntary settlements, it needed to say so explicitly. Otherwise, we must follow our ususal procedure of reading the statute and enforcing its dictates if its language is clear." Id.

The Sixth Circuit, in United States v. Health Possibilities, 207 F.3d 335, 343 (6th Cir. 2000), followed the Fifth Circuit's holding, concluding that the "plain language" of Section 3730(b)(1) required the Government's consent prior to settlement. In reaching its decision, the court observed that "private opportunism and public good do not always overlap . . . ." Id. In the court's view, "the power to veto a privately negotiated settlement of public claims is a critical aspect of the government's ability to protect the public interest in *qui tam* litigation." Id. "Without the power to consent to a proposed settlement of an FCA action, the public interest would be largely beholden to the private relator, who - absent 'good cause' government intervention - would retain sole authority to broadly bargain away government claims." Id.

The obvious difficulty with the rule espoused by the Fifth and Sixth Circuits is that it theoretically would permit the Government to compel a relator and defendant to continue litigating a case declined by the United States that both parties wished to settle. As a practical matter, though, the real effect of these holdings will be to give the Government greater leverage to challenge the allocation of funds in declined cases, to compel the use of narrower releases and boilerplate provisions more in line with the Government's standard settlement agreements, and to force some defendants simply to accept dismissal with prejudice by only the relator in return for their settlement payment.

D. Impact of General Releases By Relator in Non-FCA Settlements

It is not uncommon for a relator to resolve a non-FCA claim against an entity then later file an FCA suit against the same entity. In the course of resolving their non-FCA claims, relators have occasionally entered into settlement agreements which contain broad general releases. In cases declined by the United States, defendants have often sought to rely upon such general releases in seeking dismissal of the relators' claims. The courts, however, have generally refused to enforce such releases, except in limited circumstances where the public policies underlying the FCA would not be undermined.

In United States ex rel. Green v. Northrop Corp., 59 F.3d 953 (9th Cir. 1995), the relator executed a general release as part of a settlement of an employment termination dispute then filed a subsequent qui tam action against his former employer. The Ninth Circuit held the release was unenforceable, relying on the Supreme Court's decision in Town of Newton v. Rumery, 480 U.S. 386, 392 (1987), which set forth the federal common law principle that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." Green, 59 F.3d at 958. In Green, the court reasoned that enforcing a general release barring a *qui tam* claim would impair the substantial public interest in "encouraging insiders privy to a fraud on the government to blow the whistle on the crime." Green, 59 F.3d at 964 (internal quotation and citation omitted). Enforcement would both defeat the Congressionally sanctioned incentives for relators to file suit, by which means the Government learns of fraud, and also eliminate the deterrence effect of *qui tams* on the perpetrators of the fraudulent conduct. Id. at 965

The Ninth Circuit, in United States ex rel. Hall v. Teledyne Wah Chang Albany, 104 F.3d

230 (9th Cir. 1997), created a narrow exception to its holding in Green. In Hall, the relator settled a state court action against the defendant, his former employer, and executed a broad general release, but did so long after the Government had been notified of the allegedly fraudulent conduct and had completed its investigation of the same. In these circumstances, the Ninth Circuit held that the public policy concerns underlying the decision in Green were not implicated, since the public's interest in disclosure of information regarding government fraud would not be affected by enforcement of the post-disclosure release, and the public's interest in the use of *qui tam* suits to deter fraud would not be diminished, since the government had investigated the relator's allegations prior to his execution of the release. Id. at 233.[5]

In United States ex rel. Gebert v. Transport Administrative Services, 260 F.3d 909 (8th Cir. 2001), the Eighth Circuit carved out another narrow exception to the rule set forth in Green for a situation where the relator had released claims against the defendant as part of a settlement entered into during the relator's prior bankruptcy proceedings. In the circumstances of that case, which would have "exceedingly narrow application," the court held that the public policy concerns raised by Green would not be implicated, since the relator did not stand to obtain a reward through his suit, the proceeds of which "would go to the bankruptcy estate." Id. at 917.

The exceptions created in Hall and Gebert, however, do little to diminish the rule that public policy reasons generally preclude the enforcement of pre-suit releases in the FCA context. This is reflected in district court decisions on the subject. For example, in United States ex rel. Bahrani v. ConAgra, Inc., 183 F. Supp. 2d 1272 (D. Colo. 2002), the District Court for the District of Colorado reviewed the Green and Hall decisions and applied the general rule set forth in Green, holding that the general release of claims by the relator in a settlement agreement with his former employer could not be enforced, since the Government had no prior knowledge of the relator's allegations and did not have an opportunity to investigate the allegations before the release was executed. See also United States ex rel. Pogue v. American Healthcorp Inc., No. 3-94-0515, 1995 U.S. Dist. LEXIS 16710 (M.D. Tenn. Sept. 14, 1995) (following Green); United States ex rel DeCarlo v. Kiewit/AFC Enter., 937 F. Supp. 1039 (S.D.N.Y. 1996) (same).

II. CORPORATE INTEGRITY AGREEMENTS

The Department of Health and Human Services' Office of Inspector General ("HHS OIG") often requires health care providers settling health FCA cases to enter into parallel corporate integrity agreements ("CIAs") with HHS OIG. Providers are compelled to cooperate with HHS OIG, for it has the authority, pursuant to 42 U.S.C.1320a-7(b)(7), to seek the exclusion of the health care provider from participation in Medicare, Medicaid or other Federal health care programs. Moreover, HHS has the ability to withhold its approval of settlements proposed by the Department of Justice, which can derail the settlement.[6]

A. Determining Whether a Corporate Integrity Agreement is Required

Until recent times, HHS OIG had insisted on a CIA as a corollary to its approval of any FCA settlement. On November 20, 2001, however, former HHS Inspector General Janet Rehnquist issued new guidelines concerning when CIAs would be required of providers seeking to resolve an FCA case. Under the new guidelines, while HHS OIG and the Department of Justice will generally attempt to resolve the permissive exclusion issue at the same time as the FCA settlement, under certain circumstances HHS will permit providers to resolve their permissive exclusion liability independently from or subsequent to the resolution of the underlying FCA case. Indeed, in some cases, HHS OIG will agree to release its right to seek administrative exclusion of the provider without a corporate integrity agreement.

The factors cited by former Inspector General Rehnquist in her November 20, 2001 letter as determinative of whether a corporate integrity agreement will be required, and, if so, what will be required, are as follows:

(1) whether the provider self-disclosed the alleged misconduct;

(2) the monetary damage to the Federal health care programs;

(3) whether the case involves successor liability;

(4) whether the provider is still participating in the Federal health care programs or in the line of business that gave rise to the fraudulent conduct;

(5) whether the alleged conduct is capable of repetition;

(6) the age of the conduct;

(7) whether the provider has an effective compliance program and would agree to limited compliance or integrity measures and would annually certify such compliance to the OIG; and

(8) other circumstances, as appropriate.

The practical effect of this new policy has been to facilitate the more rapid resolution of FCA cases. Historically, providers have been reluctant to enter into CIAs due to concerns about the financial burdens associated with implementing a CIA. Under the new regimen, it has been possible, in some cases, for providers to resolve the FCA case first then negotiate the terms of the CIA with HHS OIG. In circumstances where providers wish to ensure they are not excluded shortly after paying out funds on an FCA settlement, they still have the option of entering into both agreements concurrently.

B. Provisions of Corporate Integrity Agreements

As the provisions of the agreements are designed to prevent the submission of future false claims by the same provider, they will normally include some unique provisions aimed at the specific misconduct giving rise to the underlying claims. In addition, though, the agreements will often include more standard requirements to:

(1) Hire a compliance officer and/or appoint a compliance committee;

(2) Prepare written standards and policies;

(3) Introduce a comprehensive employee training program;[7]

(4) Review claims submitted to Federal health care programs by either an Independent Review Organization ("IRO") or by internal audit staff with IRO verification;

(5) Create a confidential disclosure program;

(6) Prevent employment of ineligible persons; and

(7) Submission of reports to the OIG.

The claims review requirement (item no. 4) has been the subject of much discussion by providers seeking to reduce the administrative burden associated with compliance. In response to these concerns, HHS OIG recently modified the requirement. Until recently, providers had been required to use a statistically valid sample to review claims or to use a probe sample and, based on the results of that sample, review a larger sample in accordance with certain confidence and precision levels. Under the revised claims review procedures, providers or their IROs must now just randomly select a discovery sample of 50 sampling units for review. If the sample's net financial error rate equals or exceeds 5%, then the provider or the IRO must conduct a statistically valid random sample and a systems review. A statistically valid random sample is defined as a sample large enough to estimate overpayments in the population within a 90% confidence and 25% precision level. See HHS OIG's November 20, 2001 Summary of New CIA Claims Review Procedures.

The foregoing change in the claims review requirement was generally welcomed by the provider community. But while the change in policy answers some of the providers' concerns about administrative burdens associated with claims review, it also inevitably must reduce the probability that improper billing will be detected. Greater reliance is placed on the fact that the mere taking of samples alone will deter misconduct. It remains to be seen whether this reliance on the deterrence effect of the claims review procedure is well placed.

C. Period of Agreement

A comprehensive CIA will normally have a five-year term. There are generally two exceptions to this rule. First, in situations where the claims at issue are being prosecuted as part of a national initiative, the term is often three years. Second, if the provider already has a comprehensive compliance program in place and self-discloses the relevant misconduct, HHS OIG will frequently reduce the term of the CIA from the usual five year period to three years. See http://oig.hhs.gov/fraud/cia/docs/assessment.htm

D. Independence of Auditor

Following the passage of the Sarbanes-Oxley Act of 2002, HHS OIG has offered guidance to providers regarding the standards Independent Review Organizations should meet to assure their independence. In brief, the OIG has adopted the standards for auditor independence set forth in the General Accounting Office (GAO) Government Auditing Standards (2003 Revision) (aka "the Yellow Book"). Independent Review Organizations will thus now be subject to the same independence standards historically applicable to audit organizations performing performance audits. See http://oig.hhs.gov/fraud/cia/docs/ciafaqiro.pdf

The Yellow Book standards include requirements that audit organization have systems in place to determine whether individual auditors have any conflicts (e.g., financial or familal relationships) that might affect their impartiality or appearance of impartiality. The standards also require that if an IRO performs CIA-related services beyond just CIA reviews, then the CIA must satisfy the same independence standards applicable to an auditor providing non-audit services for an audit client. The two main prohibitions in this context are that 1) auditors should not engage in management functions or management decisions on behalf of clients; 2) IROs should not review their own work nor should they audit matters where their own nonaudit services are material to the subject of the audit. The mere fact that different individuals within a particular IRO are responsible for handling audit and non-audit functions will not cure the conflict. See GAO Yellow Book, Subchapters 2.09-3.18

III. THE RELATOR'S SHARE

Upon the settlement of a qui tam action, the relator is normally entitled to a share of the recovery. The statute provides for different relator shares depending on the circumstances of the individual case:

- If the Government intervenes in the case, and the case is not primarily based on

certain categories of publicly disclosed information, the relator generally receives between 15 percent and 25 percent of the proceeds of the action. 31 U.S.C. § 3730(d)(1).

- If the Government intervenes, but the case is based primarily on certain categories of publicly disclosed information, the relator may receive up to 10 percent of the proceeds. Id.

- If the Government does not intervene in the case, the relator will generally receive between 25 and 30 percent of the proceeds. 31 U.S.C. § 3730(d)(2).

- Irrespective of whether the Government intervenes, if the relator planned and initiated the violation of Section 3729 upon which the action was brought, then the court may exercise its discretion to reduce the share which the relator would otherwise receive. If the relator is convicted of criminal conduct arising from his or her role in the violation of section 3729, the relator will be dismissed from the action and not receive a share of the proceeds. 31 U.S.C. § 3730(d)(3).

- If the action is against a state entity, the relator potentially may not receive any share of the recovery, even if the Government intervenes.

A. Government Intervenes in Case That is Not Primarily Based on Publicly Disclosed Information

The principle guidance relied upon by courts in determining the relator's share in intervened cases are statutory language, legislative history, Department of Justice ("DOJ") guidelines, and common sense.

1. The Statute

The relevant section of the False Claims Act provides as follows:

> If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially

contributed to the prosecution of the action.

31 U.S.C. 3730(d)(1). Thus, the only explicit factor in the False Claims Act to determine the appropriate amount between 15 and 25 percent is "the extent to which the person substantially contributed to prosecution of the action." Id.

2. Legislative History

The legislative history of the House version of Section 3730(d)(1) reads in pertinent part:

> In those cases where the person carefully develops all the facts and supporting documentation necessary to make the case required by law, and where that person continues to play an active and constructive role in the litigation that leads ultimately to a successful recovery to the United States Treasury, the Court should award a percentage substantially above 15% and up to 25%.

132 Cong. Rec. H9382-03 (Oct. 7, 1986) (Westlaw ed.) (statement of Rep. Berman).

The legislative history of the Senate version of the bill lists the following factors that a court should examine in determining the relator's share:

(1) The significance of the information provided to the government by the *qui tam* plaintiff;

(2) The contribution of the *qui tam* plaintiff to the result; and

(3) Whether the information in the suit provided by the relator was previously known to the government.

S. Rep. No. 99-345, at 28 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5293.[8]

In United States ex rel. Alderson v. Quorum Health Group, Inc., 171 F. Supp.2d 1323, 1332 (M.D. Fla. 2001), the court combined the considerations enumerated by the House and Senate into three categories as follows: "The first House factor and the first Senate factor focus on the significance and development of information . . . The second House and Senate factors

address the qui tam plaintiff's contributions to the result. . . . The third Senate factor focuses on the government's independent knowledge, if any, of the wrongful conduct revealed by the relator." The court did not, however, place particular emphasis on one of the factors over the others. Id.

3. Department of Justice Guidelines

Department of Justice attorneys rely upon an internal set of informal guidelines in determining the Government's position on relator's share.[9] The guidelines include two separate lists of factors, which, according to the Government, separately justify either increasing or decreasing the relator's share.

Factors cited by the Government as weighing in favor of a higher relator's share are the following:

1. The relator reported the fraud promptly.
2. When he learned of the fraud, the relator tried to stop the fraud or reported it to a supervisor or the Government.
3. The *qui tam* filing, or the ensuing investigation, caused the offender to halt the fraudulent practices.
4. The complaint warned the Government of a significant safety issue.
5. The complaint exposed a nationwide practice.
6. The relator provided extensive, first-hand details of the fraud to the Government.
7. The Government had no knowledge of the fraud.
8. The relator provided substantial assistance during the investigation and/or pre-trial phases of the case.
9. At his deposition and/or trial, the relator was an excellent, credible witness.
10. The relator's counsel provided substantial assistance to the Government.
11. The relator and his counsel supported and cooperated with the Government during the entire proceeding.
12. The case went to trial.
13. The FCA recovery was relatively small.
14. The filing of the complaint had a substantial adverse impact on the

relator.

Factors cited by the Government as bases for lowering the relator's share are the following:

1. The relator participated in the fraud.
2. The relator substantially delayed in reporting the fraud or filing the complaint.
3. The relator, or relator's counsel, violated FCA procedures:
    a. complaint served on defendant or not filed under seal.
    b. the relator publicized the case while it was under seal.
    c. statement of material facts and evidence not provided.
4. The relator had little knowledge of the fraud or only suspicions.
5. The relator's knowledge was based primarily on public information.
6. The relator learned of the fraud in the course of his Government employment.
7. The Government already knew of the fraud.
8. The relator, or relator's counsel, did not provide any help after filing the complaint, hampered the Government's efforts in developing the case, or unreasonably opposed the Governments' position in litigation.
9. The case required a substantial effort by the Government to develop the facts to win the lawsuit.
10. The case settled shortly after the complaint was filed or with little need for discovery.
11. The FCA recovery was relatively large.

Some courts have considered the Government's guidelines in determining relator's share. See United States ex rel. Fox v. Northwest Nephrology Assoc., P.S., 87 F. Supp. 2d 1103, 1111 (E.D. Wash. 2000); United States ex rel. Alderson v. Quorum Health Group, Inc., 171 F. Supp.2d 1323, 1334, n.34 (M.D. Fla. 2001). But there has also been criticism of the guidelines as well. See e.g. United States ex rel. Alderson v. Quorum Health Group, Inc., 171 F. Supp.2d 1323, 1334, n.34 (M.D. Fla. 2001) (characterizing guidelines as internally contradictory and "merely an indiscriminate enumeration of more or less obvious factors, unaccompanied by any indication of comparative weight and more useful as a checklist for negotiation than a rule of decision in an adjudication"). See also United States ex rel. Johnson-Pochardt v. Rapid City Regional Hospital, 2003 U.S. Dist. LEXIS 5344 (D.S.D. Feb. 26, 2003). Nonetheless, even despite these

weaknesses, as the Quorum court noted, "the DOJ guidelines retain some influence." 171 F. Supp.2d at 1334, n.34

a. Size of recovery

One specific Government guideline that has drawn criticism is the size of the FCA recovery. In the Government's view, a smaller recovery should result in a larger relator's share and a larger recovery should result in a smaller share. This factor has been a source of dispute between relators and the Government in cases involving large recoveries.

Available authority appears to support the view that the size of recovery should not dictate the amount of the relator's share. In Quorum, the court observed that "the statutory language and the legislative history are markedly silent on this, instead focusing only on the relator and his contribution." 171 F. Supp.2d at 1335, 37. It also noted that "Congress could have capped the relator's share or established a sliding scale to graduate the available percentages as the size of the recovery increases," but it did neither. Id.

Similarly in United States ex rel. Merena v. Smithkline Beecham Corp., 52 F. Supp. 2d 420, 434 (E.D. Pa. 1998), rev'd on other grounds, 205 F.3d 97 (3d Cir. 2000), the court held that no provision of the FCA "suggests that the amount of the total recovery is, or should be, an appropriate consideration in determining the percentage range" of the relator's share. See also United States ex rel. Johnson-Pochardt v. Rapid City Regional Hospital, 2003 U.S. Dist. LEXIS 5344 (D.S.D. Feb. 26, 2003) (same).

b. Whether the case goes to trial

The Government has argued both before and since the adoption of its guidelines that larger shares should be reserved for cases that go to trial. Authority on this factor is mixed. In U.S. v. Covington Technologies Co., 1991 WL 643048, *1 (C.D.Cal. 1991), the court held that "the maximum recovery should be reserved for those cases where substantial assistance on the part of the relators continues throughout discovery and trial rather than where settlement is achieved," because otherwise "there would be no way to encourage and reward a relator who assists throughout complex pretrial proceedings and a lengthy trial." See also United States ex rel. Coughlin v. Int'l Bus. Mach. Corp., 992 F. Supp. 137, 142 (N.D.N.Y. 1998). In United States ex rel. Pedicone v. Mazak Corp., 807 F. Supp. 1350, 1353 (S.D. Ohio 1992), however, the court held that there was no support for "the government's contention that the qui tam Plaintiff's share should differ depending upon whether the case is settled or tried." Similarly, in United States ex rel. Anderson v. Quorum Health Group, 171 F. Supp.2d 1323, 1337 (M.D. Fla. 2001), the court rejected this as a significant factor, noting that the parties had spent nearly two years mediating

the case, and that the relator's share should not be diminished "because this exemplary effort in dispute resolution was a success." See also United States ex rel. Johnson-Pochardt v. Rapid City Regional Hospital, 2003 U.S. Dist. LEXIS 5344 (D.S.D. Feb. 26, 2003).

c. Conduct of the relator

Another factor long emphasized by the Government is relator complicity in wrongdoing. In United States v. General Electric, 808 F. Supp. 580, 584 (S.D. Ohio 1992), the Government argued that the relator participated in the fraud and delayed reporting the wrongful conduct at issue. Though the court was generally unreceptive to the Government's assertions, it did hold that "[a]wards of the full 25 percent fee should be reserved for only those individuals whose conduct in disclosing the fraud is virtually flawless." The court thus awarded the relator 22.5 percent of the recovery. Id.

4. Other Factors

Other common sense factors considered by courts include the following:

a. Role played by relator in persuading Government to intervene

In United States ex rel. Alderson v. Quorum Health Group, Inc., 171 F. Supp.2d 1323, 1336 (M.D. Fla. 2001), the court specifically noted that the Government was allegedly hesitant to intervene in the case and that relator's counsel promised to take the lead role in the case. The court stated that the Government "openly signaled its intention to decline prosecution" on two occasions only to be persuaded by the relator "to persevere." Id. The court also wrote that DOJ sought specific assurances from relator's counsel "to undertake the principal role in prosecuting the litigation" prior to agreeing to intervene in the case. Id. at 1329. In the court's opinion, "[t]hese exertions, which depended for their credibility and force upon the willingness, resources, and persistence of [relator's] counsel, proved crucial to the survival of this litigation, which resulted in a significant recovery to the United States." Id. See also United States ex rel. Johnson-Pochardt v. Rapid City Regional Hospital, 2003 U.S. Dist. LEXIS 5344 (D.S.D. Feb. 26, 2003) (same).

b. Personal hardship of the relator

Several courts have placed great emphasis on the personal hardships suffered by a relator. In Quorum, for instance, the court said that it attached "much importance to the oppressive burden borne by [the relator] in initiating and sustaining his case." Id. at 1337. Similarly, in

United States ex rel. Burr v. Blue Cross and Blue Shield of Fla., Inc., 882 F. Supp. 166, 169 (M.D. Fla. 1995), the court stated that "[a] relator may be entitled to the statutory maximum percentage in situations where the relator has suffered personal or professional hardship." See also United States v. NEC Corp., 11 F.3d 136, 138-39 (11th Cir. 1993) (court held that part of the award's purpose is to "compensate[] the relator for the substantial time and expense involved in bringing a qui tam action").

B. 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).

Much of the case-law analyzing section 3730(d)(1) has focused on the interplay between that section and Section 3730(e)(4)(A). On the one hand, Section 3730(e)(4)(A) potentially bars any case based on "public disclosure of the allegations or transactions unless the qui tam plaintiff is the original source of the allegations." On the other hand, Section 3730(d)(1) provides for an award of up to 10% of the recovery in cases "based primarily on disclosures" of certain categories of public information.

In United States v. Northrop Corp., 5 F.3d 407, 410 (9th Cir. 1993), the court reconciled the two provisions by observing that "when a qui tam suit taken over by the government is 'based *primarily* on disclosures of specific information' for which the plaintiff was *not* an original source . . . the qui tam plaintiff is limited to 10% of the recovery." The Ninth Circuit's reasoning thus arguably does not require that the relator be an "original source," in order to qualify for the 10% share.[10]

Recently, however, the Third Circuit, in United States ex rel Merena v. SmithKline Beecham Corporation, 205 F.3d 97, 106 (3d Cir. 2000), held that "that a relator whose claim is subject to dismissal under section 3730(e)(4) may not receive any share of the proceeds attributable to that claim," regardless of whether the Government intervenes in the case. Accordingly, in the Third Circuit, if a case is primarily based upon publicly disclosed information, even if the Government intervenes in the case, the relator must still be an "original source" to be eligible for the 10% recovery available under Section 3730(d)(1).

In reaching its holding, the Third Circuit disregarded arguments by both the Government and relator concerning subject matter jurisdiction and based its decision upon statutory interpretation of Sections 3730(d)(1) and 3730(e)(4)(A) and upon the sections' legislative history. Based on the foregoing reasoning, the appellate court reversed the district court's decision and remanded the case for further proceedings consistent with its opinion. Id.

On remand, the district court held that several of the multiple relators in the case were not entitled to any share of the recovery, as a result of either the public disclosure bar in Section 3730(e)(4) or the first-to-file bar in Section 3730(b)(5). United States ex rel. Merena v. SmithKline Beecham Corp., 115 F. Supp. 2d 352 (E.D. Pa. 2000). It then concluded that the "automated chemistry" allegations of the remaining relator, Robert Merena, were primarily based upon prior public disclosures of the type specified in 3730(d)(1), noting that "at whatever date [Merena] first communicated with and disclosed substantive information to the government, by that time, the government had started its broad ranged investigation . . . against most of the national medical testing laboratories, specifically including SmithKline . . . ." Id. at 388. By definition, therefore, it would seem that the government had all of the essential and necessary information from the prior public disclosures . . . ." Id. In light of these conclusions, and finding itself "limited by the ten percent maximum range," the court awarded the relator a ten percent share on his automated chemistry claims.[11] Id. at 388.

While a relator thus ultimately received some reward in the SmithKline matter, the obvious difficulty with the Third Circuit's reasoning is that it makes possible the following scenario: A relator files an action, the Government intervenes, and the relator expends the very substantial time and money necessary to effectively assist the United States in bringing about a successful conclusion to the case for the benefit of taxpayers. Then, after recovery is assured, the Government files a motion under Section 3730(e)(A)(4) and, as a result, the relator is left with nothing to show for a formidable, potentially multi-year effort that has resulted in a recovery for the United States. Such a result is manifestly unjust, particularly in light of the fact that the Government has the ability to request that a relator be dismissed at or before the time the Government intervenes in the case, and prior to the expenditure of resources by a private party for the benefit of taxpayers.[12]

C. Relator's Share in Cases Declined by the United States

> If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds.

31 U.S.C. § 3730(d)(2).

In United States ex rel. Pedicone v. Mazak Corp., 807 F. Supp. 1350 (S.D. Ohio 1992), a case in which the Government had failed to make a decision on intervention by the court ordered deadline, the appropriate percentage was determined by reference to factors similar to those relied upon in cases where the Government had intervened. In particular, the court emphasized the fact that the "relator had pursued the case at "considerable personal and professional expense" and the need to "encourage other potential whistleblowers" as bases for a 30% award. Id. at 1353. The court also rejected the argument that a lesser award was appropriate since the case had been settled short of trial. Id.

D. Relator's Share Where Relator Planned and Initiated Fraud

Regardless of whether the Government proceeds with the action, "if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds . . . ." 31 U.S.C. § 3730(d)(3)[13] "If the person bringing the action 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.

In United States ex rel. Barajas v. Northrop, No. CV 87-7288-KN, slip op. at 22-27 (C.D. Cal. May 15, 1992), the district court dealt with allegations of relator wrongdoing in connection with testing by applying a two-step analysis. The court first held that, putting aside the relator's wrongdoing, the award would be 18%. Id. at 26. The court also concluded, however, that the relator planned and initiated at least part of the fraud, by falsifying a significant number of tests on his own initiative and failing to report his conduct to his superiors. Taking these facts into consideration, the court reduced the 18% by 40% to arrive at a total of 10.8%. Id. at 31.

E. Relator's Share in Cases Against State Entities

In Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000), the Supreme Court held that private individuals may not bring suit in federal court on behalf of the United States against a State (or state agency) under the FCA. Since the Supreme Court's decision in Stevens, the Ninth Circuit has also concluded that relators are not entitled to a share of recoveries in qui tam actions against state entities, even if the United States recovers in those actions. Donald v. Regents of the University of California, 329 F.3d 1040 (9th Cir. 2003) . But see Cook County v. United States ex rel. Chandler, 538 U.S. 119 (2003) (holding that local governments are "persons" subject to suit in qui tam actions brought under the FCA).

F. What Qualifies as "Proceeds" from the Action

Two recent cases have addressed the definition of "proceeds" under the False Claims Act. In United States ex rel. Thornton v. Science Applications International Corporation, 207 F.3d 769 (5th Cir. 2000), the defendants, in addition to paying funds, released contract claims and transferred certain software code to the Government. The Fifth Circuit agreed with the relator's argument that the "released claim and transfer of the software code" were part of the 'proceeds' of the settlement. Id. at 770. It further held that the value of these items should be determined at the time the district court determines the fairness of the settlement, so the Government could evaluate whether it wished to proceed in light of the "net cash value" of the settlement to the Government. Id. at 772. In order to accomplish this, the court held that the relator should be advised by the Government at the time it gives notice of its intention to settle as to the value, in the Government's view, of the total settlement. Id. The relator would then have the burden of disproving the Government's estimate of value. Id. at 773.

In United States ex rel. Alderson v. Quorum Health Group, Inc., 171 F. Supp.2d 1323, 1339, n.34 (M.D. Fla. 2001), the Government argued that $5 million of the $85.7 million paid by defendants was "not 'proceeds of the case or settlement of the claim,'" from which [the relator] should recover but was "consideration for the release of certain 'administrative recoupment claims' putatively unrelated to Alderson's fraud claims." The court, however, referred to language in the settlement agreement that indicated the $5 million was included in the "settlement amount." Id. at 1339. The court also noted that the False Claims Act release did not exclude the alleged "administrative recoupment claims." Id. Finally, the court noted "[any exclusion of the $5 million should have been manifested in the language of the settlement agreement, especially in view of the extraordinary pains taken in reaching the agreement and the plain language of the 'Settlement Amount' provision." Id. at 1340. Accordingly, the court included the entire $5 million in the proceeds of the settlement. Id.

G. Relator's Share of an Alternate Remedy

Title 31 U.S.C. § 3730(c)(5) provides as follows:

> Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section.

An important decision on this provision was issued by the Ninth Circuit in U.S. ex rel. Barajas v. Northrop, 258 F.3d 1004 (9th Cir. 2001) ("Barajas IV"). In Barajas IV, the court explained that "[a]n alternate remedy under § 3730(c)(5) is a remedy achieved through the government's pursuit of a claim after it has chosen not to intervene in a qui tam relator's FCA action." Id. at 1006; see also United States ex rel . Bledsoe v. Community Health Systems, Inc., 342 F.3d 634, 649 (6th Cir. 2003); United States ex rel. Lacorte v. Wagner, 185 F.3d 188, 192 (4th Cir. 1999); United States ex rel. Dunleavy v. County of Delaware, 123 F.3d 734, 739 (3d Cir. 1997). "If the government chooses to intervene in a relator's action, and if the government recovers any proceeds in the action, the relator has a right to a share of those proceeds." Barajas, 258 F.3d at 1006. "If the Government chooses not to intervene in the relator's action but, instead, chooses to pursue 'any alternate remedy,' the relator has a right to recover a share of the proceeds of the 'alternate remedy' to the same degree that he or she would have been entitled to a share of the proceeds of an FCA action." Id.

The issue before the court in Barajas IV was whether the relator should share in the value of benefits received by the Government in a settlement arising from suspension and debarment proceedings by the Air Force against the defendant, which followed the Government's decision not to intervene in relator's related False Claims Act action against the defendant. The Ninth Circuit held that the suspension and debarment proceeding could be treated as an "alternate remedy" entitling the relator to a share. Id. at 1012. The court acknowledged that "a suspension or debarment proceeding is significantly different from an FCA action" citing, inter alia, the fact that the Air Force has no authority over FCA actions and the Department of Justice has no authority over suspension and debarment proceedings. Id. at 1011. Nonetheless, the court held that "[d]espite the differences between an FCA action and a suspension or debarment proceeding, the government can, and sometimes does, seek a remedy in such a proceeding that effectively takes the place of the FCA remedy." Id. at 1012. The following events, in the case before the court, convinced it that just such a substitution of remedies had occurred:

> [T]he government first refused to intervene in Barajas' second action; then the government settled the first action, making it impossible for Barajas to proceed with that second action; finally, the government brought a suspension or debarment proceeding that allowed it to achieve essentially the same result it could have achieved by intervening in Barajas' second action. The notable consequence of this sequence is that the government now hopes to avoid paying Barajas the relator's share to which he would have been entitled if his second action had been permitted to go forward to a successful conclusion.

Id. at 1012.

The court thus interpreted the "'any alternative remedy' language of § 3730(c)(5) to mean what it says," and held that "the remedy achieved by the government in the Air Force Agreement is an alternate remedy within the meaning of the FCA." Id.[14] The court explained that this conclusion was consistent with the Act's purpose of "encouraging private individuals to come forward with information about fraud that might otherwise remain hidden." Id.[15]

IV. ATTORNEY'S FEES AND COSTS

A. Awards to Relators

Sections 3730(d)(1) and 3730(d)(2) provide for the award of attorneys fees and costs to successful relators. Under both sections, which govern intervened and non-intervened cases, respectively, the relator is entitled to "receive an amount for reasonable expenses which the court find to have been necessarily incurred, plus reasonable attorney's fees and costs." 31 U.S.C. § 3730(d)(1) & (2). "All such expenses, fees, and costs shall be awarded against the defendant." Id. The pertinent case law has focused primarily on attorney's fees and costs.

The threshold amount of reasonable attorney's fees is generally determined by reference to the lodestar amount, which is calculated by multiplying the number of hours times a reasonable hourly rate. See United States ex rel. Taxpayers Against Fraud v. General Electric, 41 F.3d 1032, 1048 ("[n]ormally, a district court award of attorney's fees should be based on the lodestar").

The determination of compensable hours includes all hours "reasonably expended on the litigation," including time spent on unsuccessful theories argued by the relator. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). "[I]f the plaintiff won substantial relief, and all of his claims for relief 'involve[d] a common core of facts' or were 'based on related legal theories,' so that '[m]uch of counsel's time w[as] devoted generally to the litigation as a whole, making it

difficult to divide the hours expended on a claim-by-claim basis,' there should be a fee award for all time reasonably expended." LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 763-764 (2nd Cir. 1998) (internal citations omitted); see also United States ex rel. Marcus v NBI, Inc., 142 B.R. 1 (D.D.C. 1992); United States ex rel. John Doe I and John Doe II v. Pennsylvania Blue Shield, Xact Medicare Services, Inc., 54 F. Supp. 2d 410 (M.D. Pa. 1999); but see United States ex rel. Averback v. Pastor Medical Associates, P.C., 2002 WL 31163850 (D. Mass. Sept. 27, 2002) (court deducted certain hours for non-core work spent on travel and attending a seminar on Stark II).

The rate should be based on "prevailing market rates." LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 763-764 (2nd Cir. 1998) (internal citations omitted). Given the unique complexity of qui tam cases, national standards may be the appropriate point of reference for prevailing market rates. See e.g. United States ex rel. Coughlin v. International Business Machines Corp., 992 F. Supp. 137, 139 (N.D.N.Y. 1998) (reviewing authority holding that national rates appropriate when, amongst other circumstances, special expertise of non-local counsel essential to the case, but applying local rates in case before it due to the lack of an evidentiary basis on which to fix national rates) (citations omitted).

Once the lodestar is determined, it is then potentially subject to a multiplier, depending on the facts of the given case. See United States ex rel. Garibaldi v. Orleans Par. School Bd., 46 F. Supp. 2d 546, 572 (E.D. La. 1999) (multiplier of 1.5 times the lodestar); United States ex rel. Poulton v. Anesthesia Associates, 87 F. Supp. 2d 351, 360 (D. Vt. 2000) (ten percent increase in the lodestar); United States v. Stern, 818 F. Supp. 1521, 1522 (M.D. Fla. 1993) (multiplier of 1.5 times the lodestar); LeBlanc-Sternberg v. Fletcher, 143 F.3d 748, 763-764 (2nd Cir. 1998) ("court may adjust the lodestar figure - upward or downward"). See also United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc., 89 F.3d 574 (9th Cir. 1996) (According to the one appellate decision on this issue, fees are awarded to the attorneys directly).

B. Awards to Defendants

Section 3730(d)(4) provides that "[i]f 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 the purposes of harassment."

The Eighth Circuit has held that Section 3730(d)(4) does not cover costs. In cases where a defendant prevails against non-frivolous claims by a relator, recovery of costs can thus still be had by a defendant under Fed. R. Civ. P. 54(b), notwithstanding the language of Section 3730(d)(4). United States ex rel. Costner v. U.S., 317 F.3d 889 (8th Cir. 2003).

V. 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).

"To prevail on a False Claims Act retaliation claim, a plaintiff must show that 1) the employee's conduct was protected under the FCA; 2) the employer knew that the employee was engaged in such conduct; and 3) the employer discharged or discriminated against the employee because of his or her protected conduct." U.S. v. Melrose-Wakefield Hospital, 360 F.3d 220, 240 (1st Cir. 2004); see also McKenzie v. BellSouth Telecomm., Inc., 219 F.3d 508, 514 (6th Cir. 2000); United States ex rel. Yesudian v. Howard Univ., 153 F.3d 731, 736 (D.C. Cir. 1998). "Once the employee has established a prima facie case of retaliation, the burden shifts to the employer to prove that the employee would have been terminated or subjected to other adverse action even if he or she had not engaged in the protected conduct." U.S. v. Melrose-Wakefield Hospital, 360 F.3d 220, 235 (1st Cir. 2004).

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); Wilkins v. St. Louis Housing Authority, 314 F.3d 927 (8th Cir. 2002) (following Ninth Circuit rule regarding protected activity).

Potential defendants in a § 3730(h) proceeding may include any public or private employer, such as a private corporation, U.S. ex rel. Siewick v. Jamieson Science 7 Engineering, Inc., 322 F.3d 738 (D.C. Cir. 2003), or a local government. Wilkins v. St. Louis Housing Authority, 314 F.3d 927 (8th Cir. 2002). Individual supervisors, however, cannot be held liable as an "employer" under the Act. Siewick, 322 F.3d at 740. Nor will an owner of a closely-held corporation be held liable unless there is a basis in the pleadings to pierce the corporate veil. Id.

There is a division in authority on the statute of limitations applicable to retaliation claims, in light of the lack of explicit guidance in the Act. The Fourth and Sixth Circuits have applied the six-year limitations period under § 3731(b)(1) to retaliation claims. See U.S. v. Graham County Soil and Water Conservation District, No. 03-1122 (4th Cir. May 10, 2004); Neal v. Honeywell,

Inc., 33 F.3d 860, 865-66 (7th Cir. 1994). The Ninth Circuit has applied state law to determine the issue. United States ex rel. Lujan v. Hughes Aircraft Co., 162 F.3d 1027, 1034 (9th Cir. 1998).

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.

ENDNOTES

1. The original Senate Bill required that the relator demonstrate "substantial and particularized need" to be given an evidentiary hearing on any objections to the proposed settlement between the Government and defendant, S. Rep. No. 345, 99th Cong., 2d Sess. 26 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5291, but this requirement was eliminated from the final version of the statute.

2. The court relied, however, on the fact that the Government had failed either to intervene or decline to intervene in the case in compliance with Section 3730(b)(4). Id. at 1352.

3. The court held that "the government's consent to dismissal is only *required* during the initial sixty-day (or extended) period in which the government may decide whether to [proceed with the action]." Id. at 723 (emphasis added).

4. This same reasoning was relied upon outside the Ninth Circuit in United States ex rel. Hullinger v. Hercules, 80 F. Supp. 2d 1234 (D. Utah 1999). In Hullinger, the court held that "requiring the Attorney General's written consent to a dismissal is limited to the initial period in which the government is deciding whether to intervene." Id. at 1240-41. "Granting the government an absolute right to prevent the consummation of a settlement, by withholding its consent, would appear to be inconsistent with granting the relator the right to conduct and settle the suit." Id. The court believes that, were the government to have such a right, it would have the power to hold the relator and the defendant hostage indefinitely, forcing the litigation to continue, regardless of the fact that a settlement had been reached." Id.

5. See also Coleson v. Inspector Gen. Of Dep't of Defense, 721 F. Supp. 763 (E.D. Va. 1989) (holding, in case brought by relator in pro per, that the prior release by relator, an ex-federal employee, of claims against his former federal agency employer was effective to bar his later retaliation action under Section 3730(h) against the same agency).

6. While the Department of Justice has ultimate authority to decide whether to resolve a matter, its normal practice is to obtain agency approval before proceeding with a settlement.

7. Some recognition will generally be given to pre-existing voluntary compliance programs operated by providers.

8. The Senate version of the 1986 amendments provided for an award of between 10% and 20%. Id. The house version of Section 3730(d)(1), however, was ultimately passed.

9. A copy of the guidelines can be found in 11 False Claims Act and *Qui Tam* Quarterly Review 17-19 (Oct. 1997), a publication produced by Taxpayers Against Fraud in Washington, D.C.

10. The issue before the court in United States v. Northrop Corp., 5 F.3d 407 (9th Cir. 1993) was defendants' motion to dismiss under Section 3730(e)(A)(4) based on the public disclosure of the allegations in the relator's amended complaint. The allegations in the complaint were "based

on information disclosed by the United States in a criminal indictment returned after the plaintiff filed the original complaint." Id. at 408. The relator's original complaint dealt with "testing and inspection fraud" about which the relator had "direct and independent" knowledge but his amendment made allegations regarding "deficient damping fluid" that he obtained from the Government's criminal indictment. Id. at 409. In deciding defendants' motion under Section 3730(e)(A)(4), the court made the foregoing comments regarding Section 3730(d)(1).

11. This was a reduction from the 17% originally awarded by the court on all the claims. United States ex rel. Merena v. SmithKline Beecham Corp., 115 F. Supp. 2d 352 (E.D. Pa. 2000). The court also increased the relator's award on his other claims to 20%, remarking on the significant contribution made by the relator on those claims. Id. at 371.

12. See also United States v. CAC-Ramsay, Inc., 744 F. Supp. 1158 (S.D. Fla. 1990), aff'd mem., 963 F.2d 384 (11th Cir. 1992) (court found that action by former government employee and related organization was "based primarily on disclosures, albeit not public, of specific information other than information provided by the relators on their own" and thus concluded they were "limited to a maximum of 10% of the settlement according to § 3730(d)(1)."); United States v. Stern, 818 F. Supp. 1521, 1522 (M.D. Fla. 1993) (court found that case "based upon the Government's criminal indictment" but declined to apply the 10% cap, since the relator contributed "substantially and independently" to the recovery, which lead to the overall recovery increasing from $37,000 to over $240,000).

13. This provision is not one that can be relied upon by defendants seeking to counterclaim against the relator. See Mortgages, Inc. v. United States District Court for the District of Nevada (Las Vegas), 934 F.2d 209, 213 (9th Cir. 1991) ("The FCA is in no way intended to ameliorate the liability of wrongdoers by providing defendants with a remedy against a qui tam plaintiff with 'unclean hands'"); United States ex rel. Mikes v. Strauss, 931 F. Supp. 248, 261-62 (S.D.N.Y. 1996) (dismissing defendants' counterclaim under Section 3130(d)(3) on basis that defendants lacked standing to assert claim).

14. The court limited its holding as follows: "We do not hold that a suspension or debarment proceeding is always an 'alternate remedy' within the meaning of the FCA. Indeed, we believe it rarely will be. We do hold, however, that in some circumstances, a suspension or debarment proceeding *can* be an alternate remedy." Barajas IV, 258 F.3d at 1012.

15. See also United States ex rel. LaCorte v. Wagner, 185 F.3d 188 (4th Cir. 1999) (rejecting relator's claim to a share in the settlement of second qui tam suit that arose from a corporate integrity audit initiated as a result of the relators' previously settled qui tam action); Stinson, Lyons & Bustamente, P.A. v. United States, 33 Fed. Cl. 474 (1995), aff'd, 79 F.3d 136 (Fed. Cir. 1996) (court rejected claim by relator who, after having FCA case dismissed on public disclosure grounds, attempted to claim share of "recoupment costs" recovered by Government in settlement of Claims Court action); United States ex rel. Duquette v. Centennial Health Care Corp., No. 96-75710 (E.D. Mich July 18, 2002) (rejecting relator's claim to share of monies that Government recovered in annual administrative audits of defendants' cost reports); United States ex rel. Burr

v. Blue Cross and Blue Shield, 153 F.R.D. 172 (M.D. Fla. 1994) (rejecting relator's motion to intervene in second qui tam action to obtain part of recovery); United States ex rel. Walsh v. Eastman Kodak Co., 98 F. Supp. 2d 141, 149 (D. Mass. 2000) (held that relators do not have "right to assert common law claims on behalf of United States").