

SETTLEMENT OF A *QUI TAM* ACTION

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Slogging through the process of settling a qui tam action is enough to convince anyone that Yogi Berra was right: “It’s ain’t over till it’s over.” Qui tam actions under the False Claims Act, 31 U.S.C. § 3729 *et seq.* (“FCA or Act”), are uniquely complicated to settle. Under the terms of the Act, at least three parties are integral to the settlement of a qui tam: the government, the defendant(s), and the relator. Each of these parties has the ability to challenge or block a resolution of the underlying FCA allegations sought by the other two parties. Court involvement may also be required. Once the FCA case is settled, it is necessary to resolve the claims of the relator to a share of the proceeds. Yet additional proceedings may then be needed to address the relator’s claims to attorney’s fees and costs. While the process can go smoothly, there are often skirmishes along the way. The purpose of this article is to review the current state of the law in standard cases where disputes have arisen, so that counsel can most expeditiously arrive at the point where they can truly proclaim, “It’s over!” (Or it ain’t. This article does not address the settlement of ancillary wrongful termination or retaliation claims, nor does it deal with corporate integrity agreements that may be associated with an FCA settlement).

I. RESOLUTION OF THE 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).

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 usual 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.

II. 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 principal guidance relied upon by courts in determining the relator's share in intervened cases is 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, 5293.⁵

In United States ex rel. Alderson v. Quorum Health Group, Inc., No. 8:99-CV-413-T-23TGW, slip. op at 20-21 (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.⁶ 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., No. 8:99-cv-413-T-23TGW, slip. op at 24, 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., No. 8:99-cv-413-T-23TGW, slip. op at 24, 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"). Nonetheless, even despite these weaknesses, as the Quorum court noted, "the DOJ guidelines retain some influence." Quorum, slip. op at 24 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.” Slip op. at 27, n. 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.

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, No. 8:99-cv-413-T-23TGW, slip. op at 31 (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.”

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., No. 8:99-cv-413-T-23TGW, slip. op at 28 (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 12. 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. at 28.

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." Slip op. at 31. 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.⁷

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. For comparative purposes, the court first summarized the arguments of the government and the relator concerning the interplay between Sections 3730(d)(1) and 3730(e)(4)(A) as follows:

If the government’s view is accepted, we believe that the permissible ranges of recovery for various types of cases is captured by the following table:

TABLE A

Relator's Share	Types of Cases
15-25%	1. relator brings an action that is not "based upon" publicly disclosed information

	2. "original source" brings an action that is "based upon" but not "primarily based" on publicly disclosed information
	3. "original source" brings an action that is "primarily based" on publicly disclosed information, but the "original source" provided the information
≤10%	"original source" brings an action that is "primarily based" on publicly disclosed information, and "original source" did not provide that information
0%	relator brings an action that is subject to dismissal under § 3730(e)(4)

Id. at 104-105.

The court then summarized the potential recovery ranges under the relators' position in another table:

TABLE B

Relator's Share	Types of Cases
15-25%	1. relator brings an action that is not "based upon" publicly disclosed information 2. relator brings an action that is "based upon" but not "primarily based" upon publicly disclosed information 3. relator brings an action that is "primarily based" upon publicly disclosed information but relator provided the information
0-10%	relator brings an action that is "primarily based" upon publicly disclosed information, and the relator did not provide the information

Id. at 105.

The court found the "government's position much more persuasive," noting the following:

Under this view, sections 3730(e)(4) and 3730(d)(1) provide a descending scale of recovery ranges that are proportional to the public service provided by the relators. The highest range (15-25%) is reserved for the relators who provide the greatest public service - relators whose claims are not "based upon" a public disclosure and most relators who qualify as "original sources." The lesser range (up to 10% of the proceeds) is provided for the (presumably unusual) cases in which an "original source" relator asserts a claim that is "primarily based" on information that has been publicly disclosed and that the relator did not provide.

Id.

The court was simultaneously critical of the relator's position, based on, inter alia, the following:

In contrast with the government's position, the relators' position produces results that we do not think that Congress intended. First, this interpretation provides a potentially huge windfall - 15-25% of the total recovery - for most relators whose claims would have been dismissed under section 3730(e)(4) if the government had not intervened. It is hard to see why Congress might have wanted the fortuity of government intervention to make such a difference - or why Congress might have wanted to provide such a large reward to such a relator, who provides little if any public service. . .

Lastly, the Third Circuit referenced the Act's legislative history, stating that "two of the primary sponsors of the 1986 False Claims Act amendments described the cases to which this range would apply, and both stated clearly that this range would apply only to 'original sources.'" Id. at 106. 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.⁸ 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.

As for the Third Circuit’s concerns about relators receiving a “windfall” of 15-25% of the government’s recovery as a result of the “fortuity of government intervention,” two points are worth considering: First, the maximum available under Section 3730(d)(1), if a case is based primarily on publicly disclosed information, is 10% of the recovery, so the amount of the relators’ recovery would be severely limited in cases where the relator was deemed not to be an original source. Second, in real practice, government intervention in a case is not a fortuitous event; it is generally a result of substantial effort by the relator to present a case to the government sufficiently persuasive to justify intervention. When that endeavor is successful and the relator then expends the extensive effort necessary to obtain a recovery, a 10% share cannot fairly be characterized as a windfall, regardless of whether the relator meets the original source criteria.⁹

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)¹⁰ “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, at least one court has concluded that relators are not entitled to a share of recoveries in qui tam actions against state entities. In the consolidated cases United States ex rel. Medley v. The Regents of the University of California, No. C-96-1703 WHO (N.D. Cal. Sept. 18, 2001) and United States ex rel. Cooper v. The Regents of the University of California, No. C-01-1893 WHO (N.D. Cal. Sept. 18, 2001), the District Court for the Northern District of California ruled that the relators were not entitled to any share of a \$22.5 million payment by the University of California to settle the two matters. Slip op. at 8-9. Though the government had intervened in both cases, the court held that “intervention does not cure the defect in the relator’s claims.” Id. at 7. Accordingly, the relators’ joint motion for a share of the settlement proceeds was denied. Id. at 9.

In United States ex rel. MacGregor v. The Regents of the University of California, et al., No. C-99-4148 WHO (N.D. Cal. May 16, 2001), the same court reached a similar conclusion in a situation where the government had not intervened. In MacGregor, the relator filed a complaint

in September 1999 against the University of California and Anthony Hunt. During the government's investigation, the University of California "returned a portion of the overcharges." Slip op. At 2. Thereafter, the government declined to intervene in the case. In February 2001, after the Stevens decision, the relator's allegations against the University of California were dismissed. The relator thereafter attempted to obtain a share of the government's recovery and a hearing on the adequacy of the settlement, but the court disagreed, holding that the relator "had no right to bring the action against the University, and so has no right to dictate the terms on which the University may be dismissed from the case." Slip op. at 3.

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., Case No. 8:99-cv-413-T-23TGW, slip op. at 34-35 (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 35. 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 37. Accordingly, the court included the entire \$5 million in the proceeds of the settlement. Id. at 37-38.

G. Relator's Share of an Alternate Remedy

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.

The most recent 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. 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.*¹¹ 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.*¹²

III. ATTORNEY’S FEES AND COSTS

Sections 3730(d)(1) and 3730(d)(2) provide for the award of attorney’s 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 finds 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).

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”).¹³

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. 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.
6. 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.
7. 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).
8. 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.
9. 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 led to the overall recovery increasing from \$37,000 to over \$240,000).

10. 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).
11. 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.
12. See also United States ex rel. Covington v. Sisters of the Third Order of St. Dominic, 61 F.3d 909, 1995 WL 418311 (9th Cir. Cal.) at *3 (court rejected "the United States" argument that the relators could not recover because the government accepted a restitution payment as a recovery," explaining that "[t]his argument would allow the government to eliminate recovery for relators by simply characterizing the nature of the conduct"); 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 & Bustamante, 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. 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"); United States ex rel. Bledsoe v. Community Health Systems, Inc., No. 2:00-0083, slip op. at 13-14 (M.D. Tenn. Sept. 18, 2001) (holding that "because the Government has neither intervened nor released the Relator's claims through an administrative settlement in any administrative venue the Relator is not entitled to a share in a separate settlement by the United States").
13. According to the one appellate decision on this issue, fees are awarded to the attorneys directly. United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc., 89 F.3d 574 (9th Cir. 1996).