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False Claims Act and Qui Tam Quarterly Review

Inside...

The *False Claims Act and Qui Tam Quarterly Review* is published by Taxpayers Against Fraud, The False Claims Act Legal Center (TAF). This publication provides an overview of major False Claims Act and *qui tam* developments including case decisions, DOJ interventions, and settlements.

TAF is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the *qui tam* provisions of the False Claims Act (FCA). TAF's mission is both activist and educational. Established in 1986, TAF serves to: (1) collect and evaluate evidence of fraud against the Federal Government and facilitate the filing of meritorious FCA *qui tam* suits; (2) work in partnership with *qui tam* plaintiffs, private attorneys, and the Government to effectively prosecute *qui tam* suits; (3) inform and educate the general public, the legal community, and other interested groups about the FCA and its *qui tam* provisions; and (4) advance public, legislative, and government support for *qui tam*.

TAF is based in Washington, D.C., where it maintains a comprehensive FCA library for public use and a staff of lawyers and other professionals who are available to assist anyone interested in the False Claims Act and *qui tam*.

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Constitutionality

U.S. ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health System Corp. et al., Opinion and Order, No. 4-96-734 (D.Minn. March 16, 1999)

Applying the assignment theory of relator standing, a Minnesota district court ruled that a relator lacks constitutional standing where the Government has not suffered economic damages. According to the court,if the Government has not suffered economic injury, it does not satisfy the injury-in-fact requirement for Article III standing, and therefore has no standing to assign to a *qui tam* relator. The court also held that an organization which obtains information about fraud directly from its members, and not through its own institutional actions, does not qualify as an original source which can overcome the statute's public disclosure bar.

The Minnesota Association of Nurse Anesthetists (MANA), a Minnesota based trade association of Certified Registered Nurse Anesthetists (CRNA's), alleged in its *qui tam* suit that numerous anesthesiologists, hospitals, and billing services submitted or conspired to submit false claims which failed to comply with Medicare regulations in order to increase their Medicare reimbursement. MANA further alleged that, as a result, some CRNA's failed to receive Medicare reimbursement for services they had provided.

Prior to filing its *qui tam* suit on November 8, 1994, MANA filed suit alleging violations of federal antitrust law, the Sherman Act and the Clayton Act. Some of the defendants named in the antitrust suit were also named in the *qui tam* complaint.

In a March 1997 ruling, a Minnesota district court ruled that it had subject matter jurisdiction over the *qui tam* action. Here, the defendants asked the court to reconsider its earlier ruling.

Siller Definition of "Based Upon" Rejected

In its earlier ruling, after performing a public disclosure analysis pursuant to § 3730(e)(4)(A), the district court held that the allegations in MANA's complaint were not based upon public disclosures which included the previously filed antitrust complaint and newspaper articles reporting on that action. However, in light of post-March 1997 decisions by the 5th, 6th, 7th, and 9th Circuits which adopted a more expansive interpretation of the phrase "based upon," the court reversed itself on its earlier subject matter jurisdiction ruling.

In its March 1997 decision, the district court adopted the construction of the phrase "based upon publicly disclosed allegations" expressed by the 4th Circuit in U.S. ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir. 1994), cert. denied, 513 U.S. 928 (1994), that "based upon" means "derived from." Here, in the face of "mounting federal precedent" lending support to the defendants' position that "based upon" means "supported by" or "substantially similar to," the court ruled in the defendants' favor. The court, reversing its earlier ruling, found that the allegations in the previously filed antitrust complaint "mirror[ed] the essential elements of the claims" in MANA's complaint. The court further found that the allegations of fraud in the *qui tam* lawsuit were publicly disclosed in the press coverage accompanying the antitrust lawsuit.

Organization Does Not Qualify as Original Source

Because of its organizational status and the manner in which it had learned of the fraud, the court ruled that MANA could not qualify as an original source pursuant to § 3730(e)(4)(B). The court pointed to other courts which have been reluctant to allow organizations to proceed with claims based upon information compiled directly by the group's members. In support of its argument that it should be considered an original source, MANA relied upon those cases where organizations were permitted to proceed if the information upon which the complaint was based arose directly from an investigation conducted on behalf of the organization or company. However, according to the court, MANA did not directly acquire knowledge of the alleged fraud through its own institutional actions, but rather by the individual efforts of its members.

The court distinguished MANA's situation from that of the individual plaintiff or group of plaintiffs who risk their job security for the public benefit. The court stated, "By allowing a collective association like MANA to proceed as the named plaintiff, the individual CRNA's have not assumed the same direct risks undertaken by other whistleblowers." The court further asserted that MANA was using the *qui tam* provisions "not to blow a whistle to save the public from a dangerous practice, but rather as a tool in a marketplace battle between anesthesiologists and nurse anesthetists in their long fought struggle over the allocation of health care dollars."

Where Government Has Suffered No Injury, Relator Lacks Constitutional Standing

The court next addressed the defendants' argument that the *qui tam* provisions are unconstitutional. The court ruled that MANA lacked Article III standing to bring its *qui tam* action because the Government did not suffer economic injury.

The court reviewed the three requirements a plaintiff must meet to have constitutional standing and thus litigate only a "case or controversy": (1) the plaintiff must suffer an injury-in-fact that is "concrete and particularized" and "actual or imminent"; (2) there must be a causal connection between the injury and the action which is the subject of the lawsuit; and, (3) it must be likely that the injury asserted will be redressed by a favorable decision.

Following the assignment theory of standing — that the Government, as the real party in interest in a *qui tam* suit, assigns its claim to relators — the court analyzed whether the United States had suffered an injury-in-fact in this case. Despite MANA's assertion that the FCA does not require actual damages as an element of the prima facie case, the court found that MANA had not produced evidence to support any actual damages suffered by the United States. According to the court, without such economic injury the Government failed to satisfy Article III standing requirements, and thus MANA could not proceed on its claims.

Relators Fail to Prove Knowledge, Conspiracy Elements of Case

Despite having ruled that it lacked subject matter jurisdiction to hear MANA's claims and that MANA lacked Article III standing, the court moved on to the merits of MANA's case. The court then held that MANA could not prove its § 3729(a)(1) claim that the defendants knowingly submitted false claims because the Medicare regulations in question in this case were open to "such a wide range of reasonable interpretations." The court noted that the defendants billed in accordance with advice given them by Medicare carriers and thus by government agents. Finally, the court ruled that MANA failed to produce evidence to support its § 3729(a)(3) claim that the defendants engaged in a conspiracy to submit false claims.

U.S. ex rel. Chandler v. The Hektoen Institute for Medical Research et al., *1999 WL 90631 (N.D.Ill. Feb. 9, 1999)*

An Illinois district court held that the *qui tam* provisions of the FCA do not violate the Constitution's Article III standing, separation of powers, or Appointments Clause requirements. The court also ruled that states are "persons" who may be liable under the FCA and that the statute's treble damages provision, because it is not punitive in nature, may be applied against municipalities.

Janet Chandler brought this *qui tam* action alleging that Hektoen Institute for Medical Research (Hektoen), Cook County, and Cook County Hospital (CCH) failed to comply with the terms of a $5 million federal research grant to study drug-dependent pregnant women. Specifically, Chandler alleged that the defendants reported on "ghost" research subjects and submitted false progress reports to the Government. In addition, Chandler alleged that the defendants failed to follow the mandatory scientific protocol for research on human subjects, did not obtain informed consent or thorough medical histories from the participants, provided the women with substandard care, and failed to keep accurate records. Finally, Chandler alleged violations of the FCA's retaliatory discharge provision.

After the Government declined to intervene in the suit, the defendants filed motions to dismiss the relator's complaint on the grounds that the *qui tam* provisions of the FCA are unconstitutional, that Cook County is not a "person" that can be sued under the FCA, that Cook County is a municipality that cannot be subject to the statute's treble damages provision, and that Chandler failed to state a claim for retaliatory discharge. The court granted a motion to dismiss CCH as a defendant because it was not a separate entity from Cook County.

Qui Tam Provisions Satisfy Constitutional Requirements

The defendants, relying exclusively upon U.S. ex rel. Riley v. St. Luke's Episcopal Hospital, 982 F.Supp. 1261 (S.D.Tex.1997), 12 TAF QR 1 (Jan. 1998) (holding that the FCA *qui tam* provisions are unconstitutional because the relator lacks standing), argued that Chandler's complaint should be dismissed on constitutional grounds because: (1) *qui tam* relators do not have Article III standing to bring a FCA claim; (2) the *qui tam* provisions violate separation of powers principles; and, (3) the *qui tam* provisions violate the Constitution's Appointments Clause. The district court, rejecting Riley, responded, "The overwhelming majority of courts that have considered the issue have upheld the *qui tam* provisions of the FCA in the face of identical constitutional challenges." The court then rejected each one of the defendants' constitutional challenges in turn.

The court first ruled that Chandler satisfied the injury-in-fact requirement to have Article III standing. The court followed the assignment theory, which reasons that the FCA effectively assigns the Government's claims to *qui tam* plaintiffs, who then may sue based upon an injury to the federal treasury. The court cited to U.S. ex rel. Hall v. Tribal Dev. Corp., 49 F.3d 1208 (7th Cir.1994), in which the 7th Circuit described requiring an additional showing of injury on the part of the *qui tam* relator as "an analytical redundancy" because the United States has suffered an injury in fact and is "the entity on whose behalf and in whose name [the] suit was brought."

The district court also rejected the defendants' argument that the FCA's *qui tam* provisions violate the principle of separation of powers because they grant to Congress exclusive control over executive functions. The court held that an action by a relator does not unconstitutionally transfer executive rights to the legislature because of the numerous provisions in the FCA safeguarding the control of the executive branch. These include, among others, § 3730(b)(2), which gives the Attorney General the authority to intervene in and conduct the action, § 3730(c)(2), which grants the Government authority to dismiss a *qui tam* action despite the relator's objections, and § 3730(c)(3), which allows the Government to intervene in an action it had previously declined at any time for good cause.

Finally, the court rejected the defendants' argument that the *qui tam* provisions violate the Appointments Clause, which vests exclusive power in the executive branch to appoint officers to execute federal laws. Although Hektoen analogized relators to special prosecutors, the court noted that the 7th Circuit had never considered relators to be the equivalent of executive officers. The district court stated:

> [R]elators are unlike prosecutors because they are suing to protect private rights, not just the public interest, and because they stand to reap private financial gain. Moreover, because the government retains the right to intervene in a relator's suit at any time, relators do not wield enough governmental power to be officers under the Appointments Clause.

"Persons" Includes States and Their Political Subdivisions

In a case of first impression within the 7th Circuit, the district court held that Cook County may be sued as a "person" under the FCA. The court noted that while § 3729(a) of the statute renders liable "any person" who submits false claims to the federal government, that section does not define "person." However, the FCA's civil demand section, § 3733, defines person to include "any State or political subdivision of a State." Therefore,applying the normal rules of statutory construction, the court concluded that Congress intended the word "person" to have the same meaning in each section in which it is used. For further support of its holding, the court looked to the statute's legislative history, as well as other cases which have held that the FCA applies to states and local governments. Finally, the court noted other courts which have held that states are among the "persons" who may sue as plaintiffs under the Act.

Statute's Treble Damages Provision Not Punitive

In another matter never decided by the 7th Circuit, the court ruled that the treble damages allowed by the FCA are not punitive in nature. The court rejected Cook County's assertion that it was not liable because the FCA's treble damages provision is punitive and municipalities are immune from punitive damages.

The defendants argued that the 1986 amendments to the FCA created a punitive statute by increasing the damages from double to treble. The defendants also asserted that the case on which the court relied, United States v. Halper, 490 U.S. 435 (1989), overruled on other grounds by Hudson v. United States, 522 U.S. 93 (1997), no longer applied because its ruling that the FCA is not punitive was based on the pre-1986 damages provision. In rejecting this argument, the court noted that Halper focused on whether the damages were proportionally related to the Government's loss. Concluding that the change from double to treble damages did not "render the relationship between loss and recovery irrational," the court held that treble damages under the FCA are compensatory in nature and not punitive.

Section 3730(h) Liability Operates Exclusively Within Employment Relationship

The district court granted Cook County's motion to dismiss Chandler's claim of retaliatory discharge for failure to allege sufficient facts from which the court could determine she was employed by the County. The court agreed with the defendants' reliance on Mruz et al. v. Caring, Inc. et al., 991 F.Supp. 701 (D.N.J.1998), 13 TAF QR 11 (Apr. 1998), which held that § 3730(h) liability cannot be extended to non-employers on the basis of a conspiracy.

Chandler had been hired by Hektoen, reported the alleged FCA violations to Hektoen and Cook County, and was chastised by both, including having some of her duties removed by one Cook County employee. However, Chandler ultimately was fired by Hektoen. The court found that, at best, Chandler had alleged a conspiracy between Hektoen and a CCH employee to retaliate against her. The court examined the language of the FCA and, citing Mruz, concluded, "[T]he plain language of § 3730(h) reflects a legislative intent to operate exclusively in the area of the employment relationship."

Public Disclosure Bar and Original Source Exception

U.S. ex rel. Mathews v. Bank of Farmington, 166 F.3d 853 (7th Cir. Jan. 20, 1999)

The 7th Circuit adopted the minority view that "based upon," for purposes of § 3730(e)(4) public disclosure analysis, means "derived from," not "supported by." According to the court, the "derived from" definition gives greater effect to the statute's plain meaning and better serves the public policy behind the statute. However, the court dismissed the relator's *qui tam* suit for lack of subject matter jurisdiction because the relator did not qualify as an original source.

Relator Eunice Mathews' *qui tam* suit emerged from a state action she took against the Bank of Farmington. Although Mathews had personally guaranteed her son's farm loan, the Bank, in violation of federal regulations, also obtained a Farmers' Home Administration (FmHA) guaranty without disclosing to the agency the existence of Mathews' guaranty. Upon the son's default, the Bank obtained indemnification from FmHA,again without revealing Mathews' guaranty. The Bank then sued Mathews to enforce her guaranty, during which proceedings she learned that her guaranty had not been revealed to the FmHA. After ultimately losing her case in state court, in 1997 Mathews filed her *qui tam* suit.

Unfiled Discovery Material Not Publicly Disclosed

During discovery proceedings in the state action, Mathews subpoenaed Victor Rhea, the FmHA employee principally responsible for the agency's guaranty of the son's loans. In a subsequent telephone call to the Bank, Rhea learned for the first time from a Bank employee about the existence of Mathews' guaranty.

The 7th Circuit agreed with the district court that these facts gave rise to a public disclosure, but disagreed with the reasoning employed by the lower court. The appellate court noted, "[T]he purpose of the *qui tam* provision is to encourage and reward the exposure of fraud against the government," but opined that Mathews' effort to recoup the losses she suffered in state court by bringing an action under the FCA was "not the kind of whistleblowing which the statute was designed to encourage." Nevertheless, the court concluded that her suspect motivations alone were not enough to serve as a jurisdictional bar to her case.

In ruling that the lower court incorrectly determined that a public disclosure occurred at the time the Bank released information to Mathews pursuant to her discovery request, the court followed U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C.Cir.1994), which held that discovery material which has not been filed with the court and is only theoretically available upon the public's request is not publicly disclosed within the meaning of the FCA.

Information Provided to Responsible Public Official is Public Disclosure

The court did hold that if information relevant to the action is disclosed to a competent public official who has managerial responsibility for the very claims alleged, then a public disclosure has occurred. Therefore, the court concluded that a public disclosure took place when the Bank told Rhea over the telephone about the existence of Mathews' guaranty. The court stated:

> The point of public disclosure of a false claim against the government is to bring it to the attention of the authorities, not merely to educate and enlighten the public at large . . . . Since a public official in his official capacity is authorized to act for and to represent the community, and since disclosure to [such official] effectuates the purpose of disclosure . . . [then] disclosure to a public official with direct responsibility for the claim in question of allegations or transactions upon which a qui tam claim is based constitutes public disclosure within the meaning of [the FCA].

In reaching this conclusion, the court specifically rejected the 10th Circuit ruling in U.S. ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000 (10th Cir.1996), 8 TAF QR 3 (Jan. 1997), under which a public disclosure occurs "if the allegations are disclosed to any single member of the public not previously informed thereof." The court disagreed with this limited definition of public disclosure and concluded, "The disclosure, if not actually made to the public at large, must be to a public official. Private persons do not represent the public."

The court also looked to the language of § 3730(e)(4)(A) to determine whether a disclosure through a telephone call falls into or arises from one of the enumerated means in the public disclosure provision. Rejecting the lower court's analysis that the phone call was a "hearing," the appellate court determined that the conversation between Rhea and the Bank employee was properly characterized as an "administrative investigation," because Rhea was investigating the reasons for Mathews' subpoena concerning a farm guaranty on which his agency had paid. In reaching this decision, the court reasoned that investigations "may be informal or casual inquiries so long as they are undertaken by authorized officials with official purposes."

Siller Definition of "Based Upon" Adopted

The court next considered whether Mathews' *qui tam* action was "based upon" the public disclosure. In a matter of first impression, the 7th Circuit followed the 4th Circuit minority view that "based upon" means "derived from." The court then ruled that Mathews' complaint was based upon the public disclosure.

The court specifically rejected the majority view that a *qui tam* action is based upon a public disclosure when the supporting allegations are the same as those that have been publicly disclosed, regardless of where the relator obtained his information. Instead, the court followed the 4th Circuit's decision in U.S. ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir.1994), which held that "based upon" means "derived from," not "similar to." The court concluded that the 4th Circuit's rationale gives greater effect to the plain meaning of the text of the FCA, and better serves the public policy behind the statute. The court stated, "[A] lawsuit based upon information which happens to be similar or identical to publicly disclosed allegations or transactions, but which derives from some other source than the public disclosure, is not parasitic, and should not be barred by a provision meant to bar parasitic lawsuits."

Claims Barred Where Fact of Disclosure is Essential Element of FCA Allegations

The court determined that Mathews' claim was based upon a public disclosure because it derived from the phone conversation between Rhea and the Bank employee. The court found that the information disclosed served as part of the *qui tam* claim and was cited in the complaint. Moreover, because the disclosure took place for the first time well after the FmHA had paid on the son's default,and was a necessary element to show the Bank's fraudulent behavior, the court ruled that Mathews' claim was based on the public disclosure. The court held, "If the public disclosure from which the information is actually derived is essential to a *qui tam* claim, then the claim is based upon the public disclosure for the purpose of the jurisdictional bar."

The court next examined whether Mathews could, pursuant to § 3730(e)(4)(B) of the statute, escape the public disclosure jurisdictional bar as the original source of that information. The court determined that Mathews was not an original source because her knowledge was not independent of the public disclosure. The court found that the essential element of Mathews' claim was based upon the Bank's public disclosure and her knowledge of the information derived entirely from Rhea's state level testimony about the telephone conversation.

Mathews argued she was the original source because but for her state lawsuit bringing the facts to light, the pattern of the fraud would never have been revealed. In rejecting this argument, the court conceded it might well work in an exceptionally complicated allegation of fraud that would remain hidden even if all of the elements were publicly disclosed, but concluded the Mathews' case was merely a matter of "putting two and two together" to reveal a simple fraud.

Court Rejects Extra-Textual Original Source Requirement

The circuit court specifically rejected the extra-textual statutory requirement imposed by some courts that the relator must have been the source of the public disclosure to be an original source. The court rejected the extra requirement as having no basis in the text or legislative history of the FCA. The court found that the problem with Mathews' assertion was not that she herself failed to disclose the information to the public, but that she had no independent knowledge of the fraud outside of the public disclosure.

Finally, the court determined that the Bank itself was the source of the public disclosure to the federal agency and that Mathews' "position in the causal chain [was] insufficient to create jurisdiction." Because of what it called an "odd quirk[] of timing," the court dismissed Mathews' claim, but postulated that had she informed Rhea of her hitherto undisclosed guaranty before the Bank did, she might have qualified as the original source. Upon examining whether this result fit with Congressional intent and public policy, the court concluded that the goals of the FCA were indeed "promoted by a jurisdictional rule requiring early divulgence of allegations of fraud."

U.S. ex rel. Lamers v. City of Green Bay,
168 F.3d 1013 (7th Cir. Feb. 22, 1999)

After performing a § 3730(e)(4) public disclosure bar analysis, the 7th Circuit affirmed a lower court's ruling that the relator's complaint was based upon publicly disclosed "essential elements" of the fraud, but that the relator qualified as an original source. However, the appellate court also affirmed the district court's ruling that the relator failed to prove the "falsity" and "knowledge" elements of his FCA case.

On June 26, 1995, Allen Lamers brought a *qui tam* action alleging that the City of Green Bay instituted a plan to bus school children which did not comply with federal law, while at the same time representing to the Federal Transit Administration (FTA) that it was in compliance. Prior to the filing of Lamers' *qui tam* suit, the FTA had issued a decision based on an administrative complaint made by Lamers which found that city-owned and operated Green Bay Transit (GBT) was conducting some prohibited school bus services. Nevertheless, it granted the City's application for funding.

The district court held that the relator's complaint was based upon publicly disclosed "essential elements" of the fraud, but that the relator qualified as an original source. However, the district court went on to hold that the relator failed to prove the "falsity" and "knowledge" elements of his FCA case and granted the City's motion for summary judgment. The 7th Circuit affirmed.

Relator's Investigation Was of Type Congress Anticipated

On appeal, the first of two issues raised was whether Lamers' suit was barred for lack of subject matter jurisdiction pursuant to § 3730(e)(4). The appellate court concluded that Lamers' claim was based upon information publicly disclosed in the FTA administrative decision, but also held that Lamers was an original source pursuant to § 3730(e)(4)(B).

In reaching its decision that Lamers was the original source, the court considered the purpose of the original source exception — to avoid parasitic lawsuits. The court reasoned that Lamers' fact finding method of walking the city streets and observing the buses in action provided assistance to the FTA in determining whether the City's new busing plan violated federal regulations. The 7th Circuit concluded that this investigation, although small and independent, was of the type anticipated by Congress, and held that Lamers was the original source of information on which he based his fraud claim.

Falsity, Knowledge Standards Not Met

The second issue on appeal was whether the district court appropriately granted the City's summary judgment motion. In a de novo review, the 7th Circuit determined summary judgment was appropriate because Lamers failed to allege facts sufficient to meet the FCA standard that the City knowingly made false or fraudulent statements.

The City filed federally mandated Standard Assurances with the FTA, which the court determined qualified as statements made to the Federal Government in order to obtain money. Because the first Standard Assurance was filed before the pilot student busing program commenced, however, the court concluded it was not a knowingly false statement, and stated, "There is absolutely no reason to believe that the City intended to violate the regulations from the get-go."

Lamers contended that letters from the City containing assurances that GBT would merely extend preexisting routes instead of completely redesigning them to accommodate school children were fraudulent statements because the City knew the routes were in fact being redesigned. However, the court determined that this distinction was immaterial because the FTA did not require extension as opposed to redesign of existing routes. The court, relying upon U.S. ex rel. Berge v. Bd. of Trustees, 104 F.3d 1453 (4th Cir.1997) (holding materiality to be a required element of FCA suits), concluded that even if the City knowingly lied on this issue, such statements were not fraudulent under the FCA because the FTA did not rely on them in reaching its decision.

FCA Does Not Trump Agency Discretion in Policing Regulatory Compliance

Lamers asserted that the subsequent annual Standard Assurances filed with the FTA by the City were fraudulent because it knew of ongoing violations being committed by GBT. The court concluded that the FTA violations committed by GBT were simply the normal problems of a new bus program,and cited to U.S. ex rel. Hopper v. Anton, 91 F.3d 1261 (9th Cir.1996), 7 TAF QR 8 (Oct. 1996), in which the 9th Circuit ruled that not all minor regulatory violations give rise to an FCA claim. Moreover, because the FTA granted GBT's application despite its own knowledge of these violations, the court concluded that the FCA was not a proper mechanism for policing technical compliance with administrative regulations and could not preempt the FTA's discretion in choosing to refrain from pursuing regulatory penalties against the City.

Reverse False Claims Count Fails

Finally, the court held that because there was no fraud in the first place, there could be no § 3729(a)(7) reverse false claims violation. The court therefore affirmed the district court's summary judgment in favor of the City.

U.S. ex rel. Schwedt v. Planning Research Corp., Inc., 1999 WL 15311 (D.D.C. March 11, 1999)

A D.C. district court ruled that as a matter of law a government Field Information Officer cannot "voluntarily" report fraud to the Government, as required to be an original source under § 3730(e)(4)(B) of the Act. The court held that the relator's position as a high level government manager put him under a specific duty to report fraud.

Mervyn Schwedt, former director of the Pension and Welfare Benefits Administration's Office of Information Management, filed a *qui tam* suit against Planning Research Corporation (PRC) in 1992, alleging that on four occasions PRC knowingly presented to the Government nonfunctional and noncompliant software while representing in progress reports that the software was functional. The Government declined to intervene. PRC moved to dismiss the case for lack of subject matter jurisdiction.

Audit Report Disclosed Critical Essential Elements of the Fraud

At issue was a government audit report issued five months before Schwedt filed his complaint. The court applied the "X + Y = Z" analysis established in U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645 (D.C.Cir.1994), in which the D.C. Circuit reasoned that if either "X (the alleged state of facts) plus Y (the true state of facts)" or "Z" (the allegation of fraud) were in the public domain, then there had been a public disclosure of the allegations and transactions. The court noted that while the audit report did not conclude explicitly that PRC submitted false or fraudulent claims for payment (the "Z"), it did detail the critical essential elements of the allegedly fraudulent transactions (the "X + Y"). Thus, the court ruled that the report publicly disclosed the "allegations and transactions" making up the fraud.

"Based Upon" Means "Supported By"

In next ruling that the relator's complaint was "based upon" the publicly disclosed allegations or transactions, the court followed D.C. Circuit precedent in U.S. ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675 (D.C.Cir.1997), 9 TAF QR 1 (Apr. 1997), which established that "based upon" means "supported by." The court held that the relator's claims were clearly supported by the OIG audit report, despite the relator's argument that the audit report referred to § 3729(a)(1) violations, while his complaint alleged § 3729(a)(2) violations. Citing U.S. ex rel. McKenzie v. BellSouth Telecomm., 123 F.3d 935 (6th Cir. 1997), cert. denied, 118 S.Ct. 855 (1998), 11 TAF QR 2 (Oct. 1997), the court stated, "Where all of the material elements of the fraudulent transaction are already in the public domain, relator's production of additional evidence incriminating the defendant cannot clear the jurisdictional hurdle."

High Level Government Manager Cannot "Voluntarily" Report Fraud

The court next analyzed whether Schwedt was an original source pursuant to § 3730(e)(4)(B). After determining that Schwedt did not have direct knowledge of the information and that he could not have voluntarily provided his information to the Government, the court ruled that Schwedt was not an original source.

PRC asserted that Schwedt's knowledge of the allegations or transactions was independent of the public disclosure, but the knowledge was not direct because he learned of the information from subordinates and outside contractors. The court agreed, holding that "first-hand"means "direct," and thus that knowledge obtained from subordinates or outside contractors could not be direct knowledge.

In also holding that Schwedt could not have "voluntarily" provided information to the Government, the court analogized to those cases in which government auditors were held as a matter of law not to have voluntarily provided information to the Government because of the inherent nature of their duties and responsibilities. The court stated:

> Just as an auditor's investigative duties require her to report suspected fraud, Schwedt's managerial responsibility to implement a Field Office Information System obligated him to report suspected contractor wrongdoing. As a matter of law, he could not have "voluntarily" provided to the government information concerning alleged fraud, and thus cannot qualify as an "original source" within the meaning of [§ 3730(e)(4)(B)].

The court rejected Schwedt's argument that this holding "subverts" the purposes of the FCA because if he could not have voluntarily provided information to the Government,then no government employee ever could, as all are required by Executive Order to "disclose waste, fraud, abuse, and corruption." The court distinguished this case in that Schwedt was a "high-level manager vested with primary responsibility over a vast project [who] learned of the alleged fraud in the course of performing his managerial duties." Thus, the court found Schwedt to be differently situated from other federal employees. In addition, Schwedt was bound by special Department of Labor regulations.

U.S. ex rel. Minnesota Association of Nurse Anesthetists v. Allina Health System Corp. et al., Opinion and Order, No. 4-96-734 (D.Minn. March 16, 1999)

See "Constitutionality" above at page 1.

U.S. ex. rel. Johnson et al. v. Shell Oil Company et al., 33 F.Supp.2d 528 (E.D.Tex. Jan. 16, 1999)

Because the information in the public domain was enough to allow the Government to decide whether to investigate or prosecute the fraud, a Texas district court found that a public disclosure had occurred pursuant to

§ 3730(e)(4)(A). However, the court held that the relators had sufficient firsthand knowledge and detailed insider information to qualify as § 3730(e)(4)(B) original sources who could overcome the public disclosure bar.

In 1996, relators J. Benjamin Johnson, Jr. and John Martineck brought a *qui tam* suit against Shell Oil Company and 13 other major oil companies alleging the underpayment of royalties owed to the United States for production of oil on federal and Indian lands. The Government intervened as to several of the defendants. The defendants filed a motion to dismiss for lack of subject matter jurisdiction under the § 3730(e)(4)(A) public disclosure bar.

Public Disclosure Need Only Support Investigation and Decision to Prosecute

After performing a public disclosure analysis pursuant to § 3730(e)(4)(A) of the Act, the court ruled that there had been numerous public disclosures of the "allegations and transactions" in the relators' case. These included public disclosures within every category enumerated in § 3730(e)(4)(A).

Johnson and Martineck argued that the allegations and transactions on which they based their FCA suit had not been publicly disclosed because their complaint named additional defendants and listed specific geographic regions, time frames, and federal oil leases which had not been publicly disclosed. The court rejected this assertion, stating that the FCA does not require this degree of detail in the public disclosure, but merely requires information "sufficient to enable the government adequately to investigate the case and to make a decision whether to prosecute." The court found that the public disclosures listed above were sufficient to "set the government squarely on the trail of the alleged fraud without the assistance of relators."

Siller Definition of "Based Upon" Rejected

The district court then addressed whether the *qui tam* action was "based upon" the publicly disclosed allegations. After analyzing the various circuits' interpretations of "based upon," the court held that the relators' complaint was based upon the public disclosures.

In U.S. ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir.1994), cert. denied, 115 S.Ct. 316 (1994), the 4th Circuit narrowly interpreted the "based upon" language, finding that the relator's knowledge of the fraud must actually be "derived from" the prior public disclosure to be jurisdictionally barred. The court rejected this reasoning, however, and instead applied 5th Circuit precedent in holding that "based upon" includes allegations in the complaint that are either "supported by" or "substantially similar to" the public disclosures, whether or not the relator was aware of the public disclosure.

Again, Johnson and Martineck argued that the public disclosures did not include at least one of the crucial elements of their case, and therefore that their case was not "based upon" the public disclosures. However the court, citing to U.S. ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675 (D.C.Cir.1997), cert. denied, 118 S.Ct. 172 (1997), 9 TAF QR 1 (Apr. 1997), found that the relators' allegations were based upon publicly disclosed information and merely "repeat[ed] what the public already knows, even though [they] had learned about the fraud independent of the public disclosures."

Court Rejects Extra-Textual Original Source Requirement

Next, the court analyzed whether the relators qualified as original sources pursuant to § 3730(e)(4)(B) of the statute, thereby overcoming the public disclosure bar. Noting that the 5th Circuit had not addressed this issue, the district court specifically rejected the extra-textual requirement imposed on the original source analysis by the 2nd, 9th, and D.C. Circuits. These circuits held that the relator must be the source of the public disclosures to qualify as an original source. The court stated, "We decline to follow the District of Columbia Circuit's lead in adding a temporal requirement as this extra requirement could discourage citizen involvement, even when the citizen has direct and independent knowledge of the fraud."

After examining the ways in which each relator obtained his knowledge of the fraud, the court held that Johnson and Martineck were original sources. The court concluded that relators Johnson and Martineck had direct and independent knowledge of the material elements of the alleged fraud which they had gained first-hand through their own labors, not through public disclosures. The court highlighted the various positions that the relators held in the oil industry, their close contacts with the defendants, and their expertise in determining oil values. Furthermore, pursuant to the requirements of § 3730(e)(4)(B), the relators had voluntarily disclosed their information to the Government well before filing suit.

State Entities as FCA Defendants

U.S. ex rel. Foulds v. Texas Tech University et al., 1999 WL 170139 (5th Cir. March 29, 1999)

Contrary to decisions by the other circuits which have addressed the issue, the 5th Circuit ruled that states are immune from suit under the FCA where the Government has declined to intervene. According to the court, *qui tam* relators are not acting as deputies of the United States or surrogates of responsible federal officers, and thus states cannot be forced to surrender 11th Amendment sovereign immunity to them. Furthermore, the Government's "passive" role in such suits and the relator's control over the litigation process demonstrate that such suits "impinge upon" a state's sovereign immunity.

Relator Carol Rae Cooper Foulds worked as a dermatology resident at the Texas Tech University Health Sciences Center (TTHC). In August 1995, Foulds brought a *qui tam* suit alleging that TTHC staff physicians billed Medicare and Medicaid for services rendered by unsupervised medical residents. Foulds alleged that staff physicians routinely signed patient charts and Medicare/Medicaid billing forms certifying that the services were personally performed by the physicians or by employees under the physicians' personal direction. Foulds further alleged that she suffered retaliation as a result of blowing the whistle to the chairman of the dermatology department.

The district court ruled that the Government is the true plaintiff in *qui tam* actions, and thus Texas could not enjoy sovereign immunity from suit. The district court also ruled that states are "persons" subject to suit under the FCA, and that states are immune from § 3730(h) actions. The defendants appealed.

Relator Commences or Prosecutes Suit Where Government Has Not Intervened

The 11th Amendment of the United States Constitution states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The 5th Circuit began its analysis differently from that of the other circuit courts which have considered the sovereign immunity issue. Rather than first determining if the United States is the "real party in interest" in a *qui tam* suit, the court began by analyzing whether Foulds "commenced or prosecuted" the suit as per the language of the 11th Amendment. The court ultimately ruled that in a *qui tam* suit where the Government has not intervened, it is the private citizen, not the United States, who has "commenced or prosecuted" the suit. The suit is thus barred pursuant to the 11th Amendment.

In a prior *qui tam* suit, Searcy v. Philips Elec. North America Corp., 117 F.3d 154 (5th Cir.1997), the 5th Circuit had ruled that the United States, although the real party in interest, was not a party for purposes of appeal on the issue of whether the Government could appeal a district court's settlement approval when the Government had never intervened in the action. Here, in keeping with its earlier ruling, the court preliminarily noted that even though the United States might be a relevant "party" in a non-intervention suit for some purposes of the litigation, the United States is not the acting party of record. Thus, the court stated, "Where the United States has opted for this passive role, it is difficult to treat it as the party that has 'commenced or prosecuted' the suit."

Relators Are Not Deputies of the United States

The appellate court rejected the argument that the FCA establishes Foulds as a "deputy" of the United States, noting, "The Supreme Court has made clear . . . that Congress cannot delegate to private citizens the United States' sovereign exemption from 11th Amendment restrictions." Furthermore, the court found that the FCA contains no clear expression by Congress of its intent to abrogate 11th Amendment immunity for purposes of suits by private parties.

The court further ruled that *qui tam* plaintiffs cannot qualify as surrogates of responsible federal officers of the United States, the only individuals authorized to act on behalf of the Federal Government when state sovereignty is surrendered to the United States. In support of its holding, the court noted statements such as that made by the Supreme Court in Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S.939 (1997), 10 TAF QR 1 (July 1997), wherein the Court stated, "[J]ust because a *qui tam* suit is brought by a private party 'on behalf of the United States,' does not alter the fact that a relator's interests and the Government's do not necessarily coincide." In addition, according to the court, the fact that some individuals believe relators are motivated by money rather than the public good is further evidence that relators cannot be deputized as responsible federal officers to whom the states have surrendered their sovereign rights.

Relator Control Over Litigation "Plainly Impinges Upon State Sovereignty"

Finally, the court found that the "chimerical" presence of the United States in the Foulds case and the relator's significant control over the litigation process indicated that the litigation "plainly impinges on state sovereignty." The court stated:

> It is Foulds — not the United States as sovereign — who controls all strategic litigation decisions in the case such as how, when and in what manner to make demands on a state, whether to sue a state, how far to push the state toward a jury trial in extended litigation, whether to settle with a state and on what terms, etc.; and it is Foulds who maintains sole responsibility for financing the litigation and for its costs. The fact that the government has not a penny staked in this case plays an important role in

determining which party has commenced and prosecuted the suit for Eleventh Amendment purposes.

Therefore, the court ruled that when the United States has not "actively intervened" in a *qui tam* action, the 11th Amendment bars relators from instituting suits against the sovereign states in federal court.

No Congressional Intent to Abrogate States' Sovereign Immunity

Following the two part test established by the Supreme Court in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the 5th Circuit asked: (1) whether in the FCA Congress unequivocally expressed its intent to abrogate the states' sovereign immunity; and, (2) whether Congress acted pursuant to a valid exercise of power. Upon failing to find the necessary unequivocally expressed Congressional intent in the FCA, the court did not even reach the second part of the analysis.

States Immune from § 3730(h) Claims

The court further held that Foulds' retaliation claims under § 3730(h) should be dismissed as well. The court rejected Foulds' argument that here, too, the United States is the real party in interest. The court stated that, even if it were to accept that analysis, the fact that the *qui tam* plaintiff keeps all the proceeds from any successful § 3730(h) claim means that the claim is barred by the 11th Amendment. The court stated, "Any collateral interest the United States might have in protecting *qui tam* plaintiffs cannot trump the 11th Amendment."

U.S. ex rel. Chandler v. The Hektoen Institute for Medical Research et al., 1999 WL 90631 (N.D.Ill. Feb. 9, 1999)

See "Constitutionality" above at page 3.

FCA Liability/Releases

U.S. ex rel. Chandler v. Swords to Ploughshares et al., 1999 WL 144868 (N.D.Cal. March 11, 1999)

A California district court barred a relator from proceeding with a *qui tam* suit against his former employer where he had executed a general release of his employer in a prior state action. However, the court distinguished this case, where the Government had an opportunity to investigate the relator's claims prior to the filing of his *qui tam* action, from those where the release was entered into without the knowledge or consent of the Government.

Relator Gregory Chandler was formerly employed as a staff attorney at Swords to Ploughshares (STP),a pro bono legal organization. He brought a *qui tam* suit against STP and many of its employees alleging that STP knowingly made misrepresentations in applying for federal grant money. According to the complaint, STP made false progress reports to government grant administrator Legal Services Corporation (LSC) and the Court of Veteran's Appeals (COVA) regarding the legal representation it provided to veterans in claims before COVA. The court granted STP's motion for summary judgment and barred Chandler's claim because of a settlement he had already reached with the defendants.

The court held that the release entered into by Chandler and STP stemming from Chandler's state wrongful termination action was valid and that it barred Chandler from pursuing his *qui tam* claim. Chandler and STP agreed upon the release after Chandler's state court complaint, which contained essentially the same allegations that he would later use in his *qui tam* suit, was dismissed on summary judgment. The agreement included a "release on his complaint of all known and unknown claims arising out of his employment and these causes of action" and was given in exchange for STP's agreement to drop its cross claim, motion for costs, and all other future claims.

Releases Enforceable Where Government Informed and Has Opportunity to Investigate

In reaching its decision, the court followed U.S. ex rel. Hall v. Teledyne Wah Chang Albany, 104 F.3d 230 (9th Cir.1996), 9 TAF QR 7 (Apr. 1997), which held that a release entered into by a relator that covers allegations made in a subsequent *qui tam* action will be enforced to bar that action where the Government was informed of the relator's allegations and had an opportunity to investigate them. In this case, Chandler had several conversations with LSC and COVA in which he made nearly all of the allegations that he later included in his *qui tam* complaint. In addition, because COVA declined to renew the grant based on an LSC audit which found that STP had performed inefficient case work and kept inadequate timesheets and financial records, the court concluded that the Government both knew of and had an opportunity to investigate Chandler's claims.

Chandler argued that Hall should be distinguished from his case because in his case there was no express Government finding of wrongdoing. However, the court concluded that Hall required only that the Government be given an opportunity to investigate the allegations. Therefore, the court held that it could not deny effect to an otherwise binding settlement agreement and granted the defendants' motion for summary judgment.

The court also distinguished this case from U.S. ex rel. Green v. Northrop Corp., 59 F.3d 953 (9th Cir.1995), 3 TAF QR 1 (Oct. 1995), in which the court held the release of a *qui tam* claim to be unenforceable because it was entered into without the knowledge or consent of the United States and prior to the filing of any action based on those same claims.

Falsity of Claim/Knowledge

U.S. ex rel. Lamers v. City of Green Bay, 168 F.3d 1013 (7th Cir. Feb. 22, 1999)

See "Public Disclosure Bar and Original Source Exception" above at page 7.

Statute of Limitations/Rule 9(b)

U.S. ex rel. Bidani v. Lewis et al., 1999 WL 163053 (N.D.Ill. March 12, 1999)

Where the Government declines to intervene in a *qui tam* suit, the applicable statute of limitations period is measured by the relator's knowledge, ruled an Illinois district court. In the instant action, the court held the relator to those claims which fell within the six-year limitations provision of § 3731(b)(1) because the Government did not intervene and the relator had knowledge of the violations at issue more than three years prior to filing suit.

Anil Bidani brought a *qui tam* action against his former employer, Edmond Lewis, and two Lewis-owned entities, American Medical Supply Corporation (AMS) and Circle Medical Management Corporation (CMM). The lawsuit alleged that Lewis, in violation of Medicare regulations, used related corporate entities to obtain excessive Medicare reimbursement for kidney dialysis supplies. In an opinion reconsidering its earlier decision, the district court examined two issues: (1) whether to reinstate Bidani's claim that AMS failed to qualify as a dialysis supplier because it was held in common ownership with dialysis facility CMM;

and, (2) whether Bidani as a relator could benefit from the 10-year statute of limitations period under the FCA.

Rule 9(b) Pleading Required Despite "Alter Ego" Allegation

Because related corporate entities cannot be used to avoid regulatory limitations, the court reinstated Bidani's claim regarding the AMS qualification as a Medicare reimbursed dialysis supplier. The court determined that Bidani had alleged with sufficient Fed. R. Civ. P. 9(b) specificity that AMS was too closely linked to CMM to qualify as a separate dialysis supplier under Medicare regulations. Although Bidani's complaint seemed to seek a piercing of the corporate veil, the court held it to the Rule 9(b) standard for pleading fraud because common ownership was a key aspect in Bidani's false claims allegations. The court further concluded that finding alter ego liability between Lewis, AMS, and CMM did not require the typical showing of abuse of corporate form because the fiction of corporate entity was being used to circumvent a Medicare supplier qualification statute. The court held that, on the facts alleged, AMS was clearly established to thwart Medicare regulations and reinstated this issue for trial.

Court Rejects Holding 10-Year Repose Period Applicable to Relators in All Cases

Section 3731(b) of the Act provides:

> A civil action under section 3730 may not be brought —
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

Also before the court for reconsideration was the issue of whether the six-year statute of limitations period of § 3731(b)(1), or the 10-year limitations period of § 3731(b)(2), should be applied to Bidani's case. Bidani asked the court to reconsider its earlier ruling that he should be subject to the six-year provision. After examining three lines of statute of limitations cases, the court ruled that in a case such as Bidani's where the Government declined to intervene, the applicable statute of limitations period is measured by the relator's knowledge. Because Bidani had knowledge of the violations at issue more than three years prior to filing his *qui tam* suit, the court affirmed its earlier decision to hold Bidani to those claims which fell within the § 3731(b)(1) six-year limitations period.

In reaching its ruling, the court rejected the first line of cases represented by <u>U.S. ex rel. Colunga v. Hercules</u>, 1998 WL 310481 (D.Utah Mar. 9, 1998), which held that the three-year limitation arises only when the appropriate government official has knowledge, but that the relator may take advantage of the 10-year statute of repose in all cases. In the instant action, however, the court concluded that it would be "highly unusual" to allow Bidani, who had the requisite knowledge more than three years prior to filing suit, to benefit from a tolling provision intended to be used only in the absence of knowledge.

The court next focused on two lines of cases in which the 10-year repose period does not apply to relators, and chose to follow the latter. In the first, represented by <u>U.S. ex rel. El Amin v. George Washington Univ.</u>, 26 F.Supp.2d 162 (D.D.C.1998), the court held that if the Government does not join the suit, the relator is always subject to the six-year limitations provision. Only if the Government intervenes does the three-year provision apply. The court declined to follow this reasoning because it found it to be "a purely legal ruling regarding the applicability of [the statute of limitations] and does not depend on the facts alleged."

Where Government Declines to Intervene, Limitations Period Measured By Relator's Knowledge

The court chose instead to follow the decision reached in U.S. ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211 (9th Cir.1996), 7 TAF QR 10 (Oct. 1996), which held that when the action is brought by a relator without government intervention, the three years is measured by the relator's knowledge because he is the party bringing the action in the Government's name. Here, because the Government declined to intervene in Bidani's suit and because Bidani had the requisite knowledge more than three years prior to filing his complaint, the court allowed Bidani to pursue only those claims which fell within the six-year limitations provision.

Although applied to the facts of the instant case Hyatt would have reached the same conclusion as El Amin — that pursuant to § 3731(b)(1) Bidani can only bring claims against the defendants for fraudulent behavior conducted within six years prior to the filing of his lawsuit — the court chose to take the analysis one step further to determine whether generally § 3731(b)(2) applies to *qui tam* relators. The court reasoned that interpretation of a statute should include its entire context, not merely a superficial examination of the plain language. Noting several places in the FCA where the term "government" includes the *qui tam* plaintiff, the court concluded that Congress also intended the relator to be subject to the three-year limitation in § 3731(b)(2).

In holding that Bidani could not benefit from the 10-year provision, the court noted that Congress intended relators to act promptly in order to avoid vexatious and harassing *qui tam* suits. The court stated,"[I]t is highly doubtful that Congress intended that a relator could take advantage of the 10-year repose period regardless of when [he] first learned the pertinent facts." Because Bidani had knowledge of the violations at issue more than three years before filing his lawsuit, the court determined that allowing him to take advantage of the 10-year statute of repose would run afoul of Congressional intent.

Retroactivity

U.S. ex rel. Newsham et al. v. Lockheed Missiles and Space Company, Inc., Opinion, Nos. 97-16704, 98-15111 (9th Cir. March 24, 1999)

Finding that a district court had failed to properly apply the 1986 version of the FCA to the relators' post-1986 *qui tam* claims, the 9th Circuit reversed a lower court's dismissal of those claims. The court then held that it had subject matter jurisdiction over the post-1986 claims.

In the 1980's, relators Margaret A. Newsham and Martin Overbeek Bloem worked in Lockheed Missiles and Space Company, Inc.'s (LMSC) Sunnyvale, California plant. In January 1988, the relators filed a *qui tam* suit alleging that LMSC submitted millions of dollars of false claims for excessive nonproductive labor costs on government projects, including claims for employees' personal and unrelated business activities and time attributed to "icebox" employees, so called because they were awaiting authorization by the Government for access to work on high security government contracts. In February 1989, the Government declined to intervene in the *qui tam* case.

The relators appealed two district court rulings in their case: (1) dismissal for lack of subject matter jurisdiction under the pre-1986 False Claims Act; and, (2) refusal to award attorneys' fees under California's Anti-SLAPP statute for the dismissal of LMSC's counterclaims.

1986 FCA Does Not Apply to Pre-1986 Conduct

The 9th Circuit first ruled that by failing to distinguish between pre-1986 claims and post-1986 claims, the district court had erroneously dismissed the entire action. The appellate court divided the relators' claims into two groups: (1) the original claims charging LMSC with billing the Government for excessive nonproductive work time before October 1986 (pre-1986 claims); and, (2) claims that excessive charges continued after 1986 and that LMSC made false statements and misrepresentations to the Defense Contract Audit Agency (DCAA) during audits initiated in 1984 based on the relators' information (post-1986 claims).

The 9th Circuit began by determining which jurisdictional bar to apply to the pre-1986 claims. In Hughes Aircraft Co. v. U.S. ex rel. Schumer, 520 U.S. 939 (1997), 10 TAF QR 1 (July 1997), the Supreme Court ruled on the issue of retroactivity that the 1982 version of the FCA should be applied to pre-1986 conduct. Recently, in U.S. ex rel. Lujan v. Hughes Aircraft Co., 162 F.3d 1027 (9th Cir.1998), the 9th Circuit decided the issue left unresolved by the Supreme Court in Schumer — that the relevant conduct for purposes of the retroactivity analysis is the submission of the false claim, and not the public disclosure of that fact. Here, then, the court applied the 1982 version of the FCA to LMSC's pre-1986 conduct.

The appellate court affirmed the district court's dismissal of the relators' pre-1986 claims based on its application of § 3730(b)(4) of the 1982 FCA. At that time, § 3730(b)(4) required dismissal of the *qui tam* action if it was "based on evidence or information the Government had when the action was brought." Here, the relators had contacted government officials and reported their observations in 1984, four years before they filed their *qui tam* action. Although the Government declined to prosecute the relators' claims, the DCAA found their information to be sufficient to start an investigation and conduct audits targeted to respond to the relators' allegations. Therefore, according to the court, the Government clearly was in possession of the information when the *qui tam* action was brought.

No Public Disclosure of Relators' Post-1986 Claims

The district court had refused to allow the relators to file a proposed amended complaint which contained their two post-1986 allegations. The appellate court overruled that decision, holding that the post-1986 amended complaint could be considered based on a continuation of the jurisdiction originally exercised by the district court. However, pursuant to the defendant's motion to dismiss the amended complaint for lack of subject matter jurisdiction, the court performed a public disclosure bar analysis on it pursuant to § 3730(e)(4) of the 1986 FCA.

With very little analysis, the court ruled that there was never any public disclosure of the post-1986 claims. The court adopted the relators' argument that these allegations were first publicly disclosed in their proposed amended complaint. In addition, despite not having to reach this part of the analysis, the court held that the relators were original sources of the post-1986 allegations. Thus, the court ruled that the relators could pursue their post-1986 *qui tam* claims.

The appellate court further remanded the case to the district court for application of

California's Anti-SLAPP statute to the relators' motions to strike LMSC's counterclaims and their motion for fees and costs on those claims.

Section 3729(a)(7) Reverse False Claims

U.S. v. Pemco Aeroplex, Inc., 166 F.3d 1311 (11th Cir. Feb. 8, 1999)

In a case of first impression in the 11th Circuit, the court upheld a district court's dismissal of a § 3729(a)(7) "reverse false claims" action because the defendant did not have a specific obligation or present duty to pay the Government. The court held that a mere potential liability to the Government is insufficient to create reverse false claims liability under the Act. In dissent, one judge concluded that the government contract in question was sufficient to give rise to a specific obligation.

The United States filed a False Claims Act suit against Pemco Aeroplex, Inc., an aircraft maintenance contractor, alleging a § 3729(a)(7) "reverse false claim." In a case of first impression in the 11th Circuit, the appellate court upheld the district court's dismissal of the action for failure to state a claim.

Pemco had in its possession various parts belonging to the Government, including five airplane wings worth over $2 million. Pemco did not need the wings to complete an Air Force contract and submitted a special form advising the government of this fact pursuant to federal regulations,upon receipt of which the Government had several options regarding the use or disposal of the property. Pemco allegedly used the inventory numbers of older and less valuable wings on the form, and made an offer to buy the wings from the Government as scrap for $1,875. After purchasing the wings for this amount, Pemco resold two of the wings for about $1.5 million.

Specific Obligation Required for Reverse False Claims Action

The Government contended the lower court had erred in dismissing the reverse false claims case because Pemco knowingly misidentified the wings on the inventory schedule and caused the Government to sell the wings at a price far below true value. In rejecting this argument,the appellate court relied on U.S. v. Q International Courier, Inc. et al., 131 F.3d 770 (8th Cir.1997), 12 TAF QR 8 (Jan. 1998), which held that the Government must show it was owed "a specific, legal obligation at the time that the alleged false record or statement was made, used, or caused to be made or used," in order to recover under the reverse false claims provision. Holding a mere potential liability to be insufficient, the Q International Courier court stated, "[A] defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness." The 11th Circuit adopted this specific obligation requirement.

The circuit court also examined the specific obligation requirement in terms of the legislative history of the FCA. Noting that the legislative history twice refers to "money owed" under the false claims provision as the type of duty that the reverse claims provision addresses, the court concluded a reverse false claim must be premised upon a specific, legal obligation at the time a defendant used or caused to be used an alleged false claim.

Regulatorily Mandated Procedure Merely Gives Rise to Potential Obligation

The court concluded that Pemco's filing of the inventory schedule did not create a specific, legal obligation or a present duty to pay money. According to the court, the submission of the inventory schedule merely initiated a federally regulated plant clearance procedure, during which the appropriate government official follows certain procedures before allowing the sale or other disposition of government property. Even if Pemco submitted the inventory schedule knowing it contained false information and an offer well below market value, the court reasoned that the offer was at best a potential liability because the Government could not accept it until it followed the proper procedures. Therefore, the court held that Pemco's inventory schedule alone was insufficient to give rise to a reverse false claims action.

Q International Courier Distinguished

In dissent, one judge determined that Pemco did have such a specific, legal obligation based on its contract with the Air Force. The dissenting judge maintained that under the terms of the contractual agreement with the Government, Pemco was obligated either to "return" or "purchase" the government property. The judge reasoned that these terms corresponded with the language used in § 3729(a)(7) reverse false claims provision of the FCA, which applies to "an obligation to pay ('purchase') or transmit ('return') money or property to the Government." He concluded this obligation to return or purchase the wings was ongoing during the life of the contract, therefore giving rise to a specific,legal obligation on which a reverse false claims action could be based. The dissent distinguished the United States' case against Pemco from the 8th Circuit's holding in Q International Courier, because Pemco involved a government contract and therefore had written contractual obligations, whereas the courier in the 8th Circuit case did not.

Section 3730(h) Retaliation Claims

U.S. ex rel. Eberhardt v. Integrated Design and Construction, Inc. et al., 167 F.3d 861 (4th Cir. Feb. 10, 1999)

An employee engages in protected activity for purposes of § 3730(h) if his actions make it clear that litigation is a "distinct possibility," ruled the 4th Circuit. However, where the employer has requested the employee to investigate allegations of fraud, the employee must take additional action to put the employer on notice that a *qui tam* suit is a reasonable possibility.

Integrated Design and Construction, Inc. (IDC) was an architectural, engineering, and construction firm which managed the design and construction of embassy facilities for the State Department. In 1996 Ronald G. Eberhardt, former Senior Vice President of IDC, brought a *qui tam* suit alleging that IDC and its majority owner, Albert McCoubrey, had invoiced the State Department for incomplete work in order to alleviate its cash flow problems. Eberhardt also alleged that IDC retaliated against him for acts he took in furtherance of the *qui tam* action.

The Government intervened in the action in October 1996 and the false claims case was settled in January 1997. Eberhardt's retaliation claim proceeded to trial, where a jury returned a verdict in his favor of $417,700.99 and the district court entered a judgment on the verdict. In July 1997, IDC filed a motion for judgment as a matter of law under Fed. R. Civ. P. 50, or, in the alternative, a motion for new trial under Rule 59. In September 1997, IDC and McCoubrey filed Rule 60(b) motions for relief from the judgment. In October 1997, the district court denied IDC's motions but dismissed McCoubrey from the action pursuant to his Rule 60(b) motion. IDC and Eberhardt appealed.

Employer On Notice if Litigation is "Distinct Possibility"

IDC claimed that denying its motion for judgment as a matter of law was error because the relator had failed to make out a prima facie case for retaliation under § 3730(h). Specifically, IDC noted that it had, as Eberhardt's employer, requested Eberhardt to make an internal investigation on his complaints. For this reason, according to IDC, Eberhardt's investigation could not constitute "protected activity."

The 4th Circuit disagreed, finding that Eberhardt's internal investigation did rise to the level of protected activity. The court looked to cases from the 7th, 9th, 11th, and D.C. Circuits which have held that an employee need not have filed a *qui tam* suit, or even have known about the protections of § 3730(h), in order to engage in protected activity. These courts required only that litigation be a "distinct possibility."

The court also held, however, that an employee asked by his employer to do an internal investigation of fraud against the Government cannot bring a § 3730(h) action for retaliation unless the employee puts the employer on notice that a *qui tam* suit under section § 3730(h) is a reasonable possibility. The 4th Circuit followed those courts which have held that an employee must make it clear that the employee's actions go beyond the assigned task in order to overcome the presumption that the employee is acting solely within his employment obligations.

The court held that such notice can be accomplished not only by expressly stating an intention to bring a *qui tam* suit, but also "by any action which a factfinder reasonably could conclude would put the employer on notice that litigation is a reasonable possibility." As examples of such actions, the court listed "characterizing the employer's conduct as illegal or fraudulent or recommending that legal counsel become involved."

Investigation Must Concern False or Fraudulent Claims

The court further stated that it would not suffice to simply report the concern of a mischarging to the Government to one's supervisor. It would also not be enough to investigate nothing more than the employer's noncompliance with federal or state regulations. The court stated, "The investigation must concern 'false or fraudulent' claims or it does not fall under the False Claims Act. But once an investigation involves such claims and the employee expresses concern to his employer that there actually is a likelihood of fraud or illegality, then the notice requirement is met."

Section 3730(h) Mandates Award of Prejudgment Interest

Finally, the appellate court ruled that the district court judge had not erred in adding an award of prejudgment interest to the jury's verdict, because § 3730(h) mandates such an award.

U.S. ex rel. Chandler v. The Hektoen Institute for Medical Research et al., *1999 WL 90631 (N.D.Ill. Feb. 9, 1999)*

See "Constitutionality" above at page 3.

U.S. ex rel. Farrell v. SKF, USA, Inc. (WD NY No. 97-CV-7157)

In January 1999, a New York district court affirmed on review a magistrate judge's ruling that the United States is no longer a litigating party subject to the discovery rules when it declines to intervene in a *qui tam* suit, despite being the real party in interest. The court also upheld a protective order releasing the Government from participation in party discovery even though defendant SKF argued that obtaining the documents it needed to mount a defense from the Government as a non-party would be overly burdensome. In reaching its decision, the court reasoned that ruling the U.S. remained subject to party discovery "would effectively remove from the [FCA] the government's ability to choose not to intervene." Rejecting the defendant's assertion that a relator acts as a government attorney and should therefore control discovery requests, the court cited cases holding that *qui tam* relators are not officers within the meaning of the Appointments Clause of the U.S. Constitution, and concluded that such a position would result in private attorney generals with no obligation to protect the overall interests of the U.S. Relator Charles Farrell's suit alleges that his former employer SKF, USA, Inc.d/b/a MRC Bearings sold below-specification aerospace bearings to the Department of Defense.

U.S. ex rel. Alderson v. Columbia/HCA Healthcare Corp. (MD FL No. 97-2035-CIV-T-23E)

U.S. ex rel. Alderson v. Quorum Health Group Inc. (MD FL No. 99-413-CIV-T24B)

U.S. ex rel. Schilling v. Columbia/HCA Healthcare Corp. (MD FL No. 96-1264-CIV-T-23B)

In February 1999, the Judicial Panel on Multi-District Litigation in Washington, D.C. denied DOJ's request to consolidate six unsealed *qui tam* lawsuits and several other sealed actions pending against Columbia/HCA, the nation's largest health care provider. DOJ asked the panel to consolidate the lawsuits in the U.S. District Court for the District of Columbia. Reportedly, the judicial panel contended that it was not authorized to permit the ex parte proceedings that would have been necessary because of those suits still under seal. The panel further contended that proper service under the panel's rules was impossible with a mix of sealed and unsealed cases.

Columbia/HCA and Quorum Health Group/Quorum Health Resources (Quorum), the nation's largest manager of nonprofit hospitals, have been the targets of a widespread criminal and civil investigation of alleged Medicare fraud since 1993. That year James F. Alderson, a former chief financial officer at a Quorum-managed hospital, filed a *qui tam* action alleging that Columbia/HCA and Quorum made false statements on Medicare cost reports and defrauded other federally funded health insurance programs. Alderson's suit was unsealed in October 1998 on the same day that DOJ intervened. In December 1998, DOJ intervened in a *qui tam* action filed by John W. Schilling, a former reimbursement manager for Columbia/HCA, which alleged that over 100 Columbia/HCA hospitals committed Medicare cost report fraud.

The Government recently agreed to sever Quorum from the Alderson litigation with Columbia/HCA. However, prior to severing the case, the Government filed an amended complaint against Quorum realleging the comprehensive cost report fraud, and raising the damages claimed from $50 million or more to $70 million or more, although the total damages could be larger.

Also in February, the Government filed a motion to stay the civil suit against Columbia/HCA pending resolution of the criminal proceedings started in 1996. In June 1997, four Columbia officials were indicted in United States v. Jarrell (MD FL No. 97-52-CR-FTM-24(D)), although to date no criminal charges have been brought against the company itself. DOJ is requesting the stay to preserve the integrity of the ongoing criminal investigation. Representing the Government is Marie O'Connell of DOJ Civil Division. Representing relators Alderson and Schilling is Stephen Meagher of Phillips & Cohen (San Francisco, CA). Schilling is also being represented by W. Christian Hoyer of James Hoyer Newcomer Foricz & Smiljanich (Tampa, FL).

SPOTLIGHT

Liability and Measure of Damages Issues Under § 3730(h) of the False Claims Act

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INTRODUCTION

Section 3730(h) of the False Claims Act provides relators and potential relators with remedies if they become the victims of retaliation at the hands of their employers. If a § 3730(h) case is to be successfully defended, the defendant must show the plaintiff is not in the protected class described by the statute. If the plaintiff can prevail on that issue, jury sympathy, shifting burdens of proof and liberal measures of damages create a slippery slope for the defendant.

I. PROTECTED ACTIVITY AND NOTICE

Liability. As the language of § 3730(h) suggests, to make out a claim of retaliation, an employee must demonstrate that (1) she engaged in protected activity, that is, "acts done . . . in furtherance of an action under this section" and (2) she was discriminated against "because of" this activity. To establish the second element, the employee must make two additional showings. The employee must show that (a) "the employer had knowledge that the employee was engaged in protected activity" and (b) that "the retaliation was motivated, at least in part, by the employee's engaging in [that] protected activity." *Yesudian v. Howard Univ.*, 153 F.3d 731,736 (D.C.Cir. 1998).

Persons sued under § 3730(h) are not limited to employers. In *U.S. ex rel. Kent v. Aiello*, 836 F.Supp. 720, 722 (E.D.Cal. 1993), the plaintiff alleged that her former employer influenced her subsequent employer to discharge her, in violation of § 3730(h). In *Kent*, the question presented on a Rule 12(b)(6) motion was whether an action lies against those who at the time of the conduct complained of caused the plaintiff's discharge but were not then the plaintiff's employer. *Id.* at 723. The court, reasoning that the statute says nothing about the class of defendants, denied the motion to dismiss. *Id.* at 724. Moreover, the fact that the statute provides for "reinstatement" as one form of relief did not persuade the court that the legislative intent was only to permit suits against immediate past employers. *Id.* at 724-725. The court also held that if a § 3730(h) plaintiff seeks only monetary relief, it could be ordered against any defendant contributing to an injury cognizable under the statute, and under such circumstances plaintiff's immediate employer would not be an indispensable party. *Id.* at 725.

What is protected activity? The statute gives examples of protected activity, including investigation, initiation of a suit and testimony to expose conduct that violates the False Claims Act. But these examples are not exclusive and the legislative history indicates that "[p]rotected activity should . . . be interpreted broadly." S.REP.NO. 99-345, at 35 (1986).

Protected activity does not require proof of false claims. "[P]rotected activity" requires only that the plaintiff has engaged in "acts done. . . in furtherance of an action under this section [§ 3730]." *Yesudian* at 741. "An action under this section" is one by the government or a private individual empowered to bring an action on behalf of the government for fraudulent overcharging under a government contract, fraudulently supplying substandard products or services, false negotiation, including bid rigging and defective pricing, and false certification. *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996).

How much does a plaintiff need to know about the fraudulent claim? *Yesudian* held that since § 3730(h) expressly includes "investigations for . . . an action filed or to be filed," this manifests Congress' intent to protect employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together. *Yesudian* at 739-740. Other courts agree. *See Childree v. UAP/G.A. AG Chem., Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996) (requiring only a "distinct possibility" of suit); *Hopper* at 1269 (holding that "plaintiff must be investigating matters which are calculated, or reasonably could lead, to a viable FCA action"); *Neal v. Honeywell, Inc.*, 33 F.3d. 860, 864 (7th Cir. 1994) (holding that § 3730(h) covers situations where the litigation was a "distinct possibility" or "could be filed legitimately").

Even a tip can be protected activity. In *Robinson v. Jewish Center Towers, Inc.* 993 F.Supp. 1475 (M.D.Fla. 1998), Robinson, a bookkeeper, was responsible for recording entries and disbursements and preparation of monthly compliance reports to the United States Department of Housing and Urban Development (HUD). Robinson's employer was subsidized by HUD. In November 1996, an independent auditor approved by HUD began to review the employer's year-end financial information as a step in preparing an audit for HUD. Robinson, suspecting that money was being funneled to family members of her supervisor by the use of falsified time cards, tipped off the auditor to review those very documents. The auditor ultimately concluded the time cards were fraudulent and reported that to HUD and to the employer's Board of Trustees. Robinson was fired and later brought an action against her former employer under § 3730(h). The *Robinson* court concluded that at the time Robinson rendered her assistance to the auditor, a FCA suit was a "distinct possibility." *Id.* at 1478. Thus, Robinson was in the protected class under § 3730(h). *Id.* at 1477-78.

Can a jury determine whether plaintiff engaged in protected activity? The foregoing measures of protected activity from *Yesudian, Childree, Hopper* and *Neal* are easy enough for a district judge to apply upon a Rule 12(b)(6) motion to dismiss or when deciding a Rule 56 motion for summary judgment. The court makes the decision with the benefit of legal research, familiarity with the FCA and,in addition, in close cases the judge may indulge presumptions in favor of the party opposing the motion. However, if the issue of whether the plaintiff is in the protected class finds its way to a jury, the aforementioned measures are substantially more problematic in application if language is lifted directly out of these court opinions and incorporated into jury instructions. Is it reasonable, for example, to ask a lay jury to decide whether the evidence presents a "distinct possibility" of a False Claims Act suit by the government or relator?[i] Instead, it may be more reasonable for the trial judge to enter partial judgment on the statutory coverage issues and leave the jury with issues framed in language it can understand.[ii]

What is not protected activity. If the plaintiff's investigation concerns nothing more than the employer's non-compliance with federal or state regulations, that is not protected activity. *Zahodnick v. IBM Corp.*, 135 F.3d 911, 914 (4th Cir. 1997); *Hopper* at 1269; *U.S. ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1522-23 (10th Cir. 1996). In addition, a complaint about the waste of government funds is not protected activity. *Moor-Jankowski v. Bd. of Trustees of New York Univ.*, No. 96 Civ. 5997 (JFK), 1998 U.S. Dist. LEXIS 12305 (S.D.N.Y. Aug. 10,1998). Furthermore, in *Luckey v. Baxter Health Care Corp.*, 2 F.Supp. 2d 1034, 1053 (N.D. Ill. 1998), the court ruled that the plaintiff's effort to secure methods to guarantee that plasma samples were not contaminated or improperly diluted was not protected activity. The court reasoned that the plaintiff employee,unlike the plaintiff in *Neal*, was not investigating Baxter's alleged falsification of test results. *Id.* at 1053.

Does a plaintiff have to know that her investigation or report could lead to a False Claims Act suit? Knowledge of the False Claims Act at any time is not necessary. *Childree* at 1143, 1145-46 (noting that the employee never considered bringing a False Claims Act case and had not heard of the Act at the time of discharge); *Hopper* at 1269 (protected activity does not require "specific awareness of the FCA"); *Neal*, 33 F.3d at 864 (noting that plaintiff was not informed that she could file a *qui tam* action). Were the law otherwise, only lawyers would be protected by the statute as only they would know from the outset that what they were investigating could lead to a FCA prosecution. *Yesudian* at 741.

However, there are cases holding to the contrary. In *Hopkins v. Actions Inc. of Brazoria County*, the court found that an intra-corporate complaint about fraud against the government is protected activity "so long as the employee intends to file [a *qui tam*] action and informs management clearly of that intention in accordance with *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948 (5th Cir. 1994)." 985 F.Supp. 706, 709 (S.D.Tex. 1997). *Robertson* concluded that the plaintiff's complaints to his employer about allegedly fraudulent activity did not constitute a protected activity because "he never used the terms 'illegal,' 'unlawful,' or '*qui tam* action'." *Robertson* at 951.

Is it protected activity if the activity falls within the plaintiff's job description? The *Robertson* court concluded that the plaintiff's investigative activities were within the scope of his employment and his employer therefore had no reason to know that such investigations extended beyond the requirements of his position and were in furtherance of a *qui tam* action. *Id.* at 952. Moreover, there are other cases in which the plaintiff's regular job duties influenced the court's decision as to whether or not she was engaged in protected activity. In *Ramseyer*, for example, the court concluded that plaintiff's retaliation claim was properly dismissed because her alleged protected activities were part of her employment duties and she had not otherwise indicated an intent to pursue a *qui tam* action or to report alleged fraud to government officials. *Ramseyer* at 951.

Notice: What must the employer know? The kind of knowledge that the defendant must have mirrors the kind of activity in which the plaintiff must be engaged. *Yesudian* at 742. In other words, the employer must know that the employee is engaged in activity that reasonably could lead to a False Claims Act case. But, like the employee, the employer need not know or be advised that the alleged false claims would be violations of the False Claims Act. Likewise, plaintiff is not required to tell her employer or threaten the employer that she will report allegations to the government or to anyone outside her place of employment. *Id.* at 743, *citing Mikes v. Strauss*, 889 F.Supp. 746, 753 (S.D.N.Y. 1995) ("To insist upon an express or even an implied threat of such action would impose a requirement which is wholly unrealistic in an employment context."). A plaintiff must show that her employer was aware of her protected activity. Merely grumbling to the employer about job dissatisfaction or regulatory violations does not satisfy the requirement – just as it does not constitute protected activity in the first place. *Yesudian* at 743.

In *Robinson*, notice came only indirectly from the employee. *Robinson* at 1478. Robinson's tip to the independent auditor to examine family member time cards was done privately. *Id.* Nevertheless, the district court believed the employer was "on notice of a distinct possibility that Robinson was assisting the government in a possible False Claims Act action." *Id.* The evidence was that Robinson refused to issue a check to the administrator's son because she believed it was a step in defrauding the government. *Id.* Also, the auditor discussed the improprieties with the president of the employer. The president, in turn, instructed the administrator to put a freeze on all payroll adjustment checks. *Id.* The administrator was evidently aware that Robinson was responsible for the order because he then told the auditor that Robinson's job was in jeopardy. *Id.* The auditor also told the administrator that Robinson intended to talk to an attorney. Ultimately, the court found that the employer was put on notice that Robinson was assisting in an investigation, or that there was a distinct possibility that either Robinson or HUD could file a FCA action. *Id.*

Insufficient notice. Examples of cases where employees arguably engaged in protected activity but did not prove their employers were aware of it include *Hopper, Robertson*, and *Ramseyer.* In *Hopper*, the plaintiff, a special education teacher, complained to the school district that it was not in compliance with state and federal laws governing special education but made no allegations of fraud. *Hopper* at 1263, 1269-70. The court stated, "Unless the employer is aware that the employee is investigating fraud, the employer could not possess the retaliatory intent necessary to establish a violation of § 3730(h)." *Id.* at 1269.

In *Robertson*, the plaintiff, a contract administrator employed by Bell, became concerned about a "lack of verification" for maintenance and repair charges Bell was making on a government contract. *Robertson* at 949. He reported his concerns to his superiors and requested additional information but he never told his superiors he was concerned about possible fraud. *Id.* at 949-50. This, along with the fact that the concerns Robertson raised were part of his job, led the court to find that his employer was not aware that his investigations were in furtherance of a *qui tam* action. *Id.* at 952.

Similarly, the plaintiff in *Ramseyer* complained of "non-compliance" and "shortcomings" without mentioning fraud. *Id.* at 1523. And,like the plaintiff in *Robertson*, the "monitoring and reporting [of] activities described in her [Ramseyer's] complaint were exactly those activities plaintiff was required to undertake in fulfillment of her job duties." *Id.* at 1523.

One court, however, observed that investigation and reporting are protected activities subject to § 3730(h) protection whether or not they are within the ordinary scope of the employee's duties. *Wilkins ex rel. U.S. v. State of Ohio*, 885 F.Supp. 1055, 1066 (S.D. Ohio 1995). An employee can be acting on her own behalf in investigating matters in furtherance of a *qui tam* action even though she would also at the same time be conducting the same investigations on behalf of the employer. *Id.* The court cited § 3730(h), noting that it applies to employees who engage in lawful acts "on behalf of the employee or others." *Id.* At most, the court concluded, plaintiff's job might give rise to an issue of fact of whether the defendant knew the plaintiff was engaged in protected activity. *Id.*

What is evidence that the retaliation was motivated, at least in part, by the employee's protected activity? The courts of appeals have ruled on at least two § 3730(h) cases that had gone to trial.[iii] Neither of these cases address evidentiary or burden of proof issues under § 3730(h). However, *Mikes* provides some insight on what one court believed would make out an issue of fact on the plaintiff's retaliation claim. The plaintiff in *Mikes* filed an affidavit in opposition to summary judgment declaring that subsequent to her confrontations with the defendant, she was "increasingly alienated by the defendants, not invited to meetings in which patients were discussed, [and] subjected to hostile remarks and harassing behavior by Strauss privately and at meetings in which the other defendants were present." *Mikes* at 754. This was enough to defeat a summary judgment motion claiming no retaliation. *Id. Mikes* also ruled that once the plaintiff makes an issue of fact of the discriminatory reason for the discharge, the burden of proof shifts to the defendant to prove affirmatively by a preponderance of the evidence that the same decision would have been made even if the plaintiff had not engaged in the protected activity. *Id.* *Mikes* is consistent with the legislative history of the FCA. According to the Senate report on the 1986 amendments:

> [O]nce these elements [employer's knowledge of protected activity and retaliation motivated at least in part by the protected activity] have been satisfied, the burden shifts to the employer to prove affirmatively that the same decision

> would have been made even if the employee had not engaged in protected activity. S. REP. NO. 99-345, at 35 (1986).

Of course, the foregoing discussion on burden of proof shifting applies when the employer provides a legitimate non-discriminatory reason for whatever action it took against the employee. However, if the employee pleads discrimination that the employer denies, e.g. threats, failure to promote, or subtle forms of intimidation, the burden of proof would appear to remain with the employee.

II. MEASURE OF DAMAGES, ATTORNEYS' FEES, AND COSTS

What is doubled? Back pay or back pay less mitigation? Under § 3730(h), the plaintiff is entitled to "2 times the amount of back pay [and] interest on the back pay" as part of her award of "relief necessary to make the employee whole."[iv] The first "back pay" issue is whether the term, as used in the statute, means the pay that a plaintiff would have earned but for the discrimination against her or whether it means that amount of money reduced by mitigation.[v]

Although mitigation is not mentioned in either the language of § 3730(h) or its legislative history, it is difficult to construct an argument that it should be ignored in view of the statutory objective "to make the employee whole." 31 U.S.C. § 3730(h). The issue narrows to whether the doubling of back pay is done *before deducting interim earnings* or whether it is doubled *after back pay is reduced by interim earnings*. Neither the legislative history of § 3730(h) nor case law interpreting this section affords guidance on this issue. However, the Supreme Court has addressed the issue under § 3729(a) of the FCA, which awards the Government three times the amount of damages.

In *United States v. Bornstein*, 96 S.Ct. 523, 530 (1976), the Court held that Congress intended the "double-damages [now treble damages] provision to play an important role in compensating the United States" in order to ensure that the Government would be "made completely whole." The mitigation issue in *Bornstein* made a drastic difference in the amount of damages awarded. The underlying fraud was by a subcontractor that charged $45.00 each for radio tubes that were worthless. But by the time the government sued the subcontractor, the contractor made up the government's damages less 15¢ per tube. The issue was whether the subcontractor's damages were measured by the thousands of tubes at $45.00 or at 15¢. The Court observed that § 3729(a) of the statute "speaks of doubling *damages* and not doubling *net damages* or *uncompensated* damages." *Id.*, n.10. Likewise, § 3730(h) speaks of "twice the amount of back pay" as the award for damages. Furthermore, the balance of the Court's reasoning also applies to § 3730(h):

> First, this method of computation comports with the congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims. Second, the rule that damages should be doubled prior to any deductions fixes

> the liability of the defrauder without reference to the adventitious actions of other persons. The position adopted by the Court of Appeals would mean that two subcontractors who committed similar acts and caused similar damage could be subjected to widely disparate penalties depending upon whether and to what extent their prime contractors had paid the Government in settlement of the Government's claims against them. Just as fortuitous acts of the prime contractor should not determine the liability of the subcontractor under the forfeiture provision of the Act, so likewise the prime contractor's fortuitous acts should not determine the liability of the subcontractor under the double-damages provision. Third, the reasoning of the Court of Appeals and the District Court would enable the subcontractor to avoid the Act's double-damages provision by tendering the amount of the undoubled damages at any time prior to judgment. This possibility would make the double-damages provision meaningless. Doubling the Government's actual damages before any deduction is made for payments previously received from any source in mitigation of those damages forecloses such a result.[vi] *Id.* at 530.

Sections 3729 and 3730(h) both have the purpose of making the victim whole. Section 3729's damages provision is *exactly the same* as that found in § 3730(h), except that the former provides for treble the amount of damages and the latter provides for double the amount of back pay.[vii]

Interest on back pay before or after doubling? Section 3730(h) provides for "two times the amount of back pay [and] interest on the back pay." However, it does not provide for interest on the doubled back pay. Thus,the statutory language seems to answer the question and it was so held.[viii] The legislative history of § 3730(h) provides that "the interest payable is to be calculated before the back pay is doubled." *See* H.R.Rep. No. 99-660, at 23 (1986). *See also Fortino v. Quasar Co.*, 950 F.2d 389, 397-98 (7th Cir. 1991) (refusing to award prejudgment interest on liquidated portion of damages award because the liquidated portion is punitive).

Interest on back pay or net back pay? In *Neal*, the district court reasoned that the interest must be on the net back pay, "otherwise [plaintiff] would receive interest on every dime she would have made if she had stayed at Honeywell for the last ten years despite having fared as well at the University of New Haven over the last nine years." The case holds that interest must be calculated on net back pay from the date that mitigation commenced.[ix] *Neal*, 995 F.Supp. at 897.

Interest: Simple or compound and at what rate? The Seventh Circuit has suggested that the prime rate is appropriate where there is no statutory interest rate. *Gorenstein Enters., Inc. v. Quality-Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989). As to the issue of simple versus compound interest rate, in employment cases prejudgment interest is usually compounded annually. *Merk v. Jewel Food Stores,* 813 F.Supp. 1324, 1330 (N.D.

Ill. 1992). In *Neal*, the court held that the interest must be compounded to make the plaintiff whole — a clear purpose of the remedial section of § 3730(h).[x]

Should prejudgment interest be awarded on other compensatory damages? The district court in *Neal* reasoned that "where a plaintiff suffers actual out-of-pocket losses such as lost pay or moving expenses, the plaintiff is deprived of the time value of the money and the defendant is unjustly enriched by having its use over the same time period."[xi] According to the court, however, damages for emotional distress have nothing to do with economic loss or unjust deprivation of money. Thus, the same rationale for prejudgment interest disappears. *See Marshall v. Security State Bank of Hamilton*, 970 F.2d 383, 385 (7th Cir. 1992).[xii] Further, a jury's award of damages for mental suffering speaks in terms of present dollars intended to compensate the plaintiff at the time of the verdict.[xiii] For these reasons, the *Neal* court denied an interest award on damages arising out of emotional distress. *Neal* at 897.

It also appears that prejudgment interest runs from the time of the injury to the day of entry of the judgment order. "By committing a tort, the wrongdoer creates an involuntary creditor. It may take time for the victim to obtain an enforceable judgment, but once there is a judgment the obligation is dated as of the time of the injury." *Matter of Oil Spill By The Amoco Cadiz*, 954 F.2d 1279, 1331 (7th Cir. 1992).

Front pay. The remedy provision within § 3730(h) specifically provides that the "make whole" relief available to whistleblowers includes "reinstatement with the same seniority status such employee would have had but for the discrimination." When reinstatement is not feasible, the plaintiff is free to seek an award of "front pay" in lieu of reinstatement to make her whole by putting her in the identical financial position that she would have occupied had she been reinstated to her position with defendant after trial. *Avitia v. Metropolitan Club of Chicago, Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995), *citing McNeil v. Economics Lab., Inc.*, 800 F.2d 111, 118 (7th Cir. 1986).

In *Avitia*, the Seventh Circuit approved reinstatement, a "make whole" remedy under the Fair Labor Standards Act, for a victim of retaliation. *Avitia* at 1223. Front pay in lieu of reinstatement when reinstatement is impossible was available as an issue of first impression for the *Avitia* court. *Id.* at 1231. The court could not "think of any reason why it cannot be done in a retaliation case under that act since the victim of retaliation is expressly entitled to all relief necessary to make the employee whole." *Id.; see Downes v. Volkswagen of America, Inc.*, 41 F.3d 1132, 1141 (7th Cir. 1994) (Age Discrimination in Employment Act case); *Maxfield v. Sinclair Int'l*, 766 F.2d 788, 796 (3rd Cir. 1985) (same).

Are punitive damages recoverable? Section 3730(h) does not expressly provide for, nor does it prohibit, punitive damages. Protection of whistleblowers is an integral part of the legislative scheme to protect public funds from deceitful contractors. With respect to the availability of punitive damages, § 3730(h) differs from other employment discrimination statutes in that the statutory language makes no mention of the subject. Without a punitive damage remedy, contractors may calculate little downside risk for retaliation against whistleblowers. It has been held that the double back pay provision of § 3730(h) is not a punitive remedy. *See United States v. Stocker*, 798 F.Supp. 531, 535 (E.D. Wis. 1992). Specifically:

> [The] Court also notes that the provisions of the False Claims Act which are addressed today are primarily remedial and not punitive in nature. *See Bornstein* at 530-531 ("Double damages are necessary to compensate the government completely for the costs, delays, and inconveniences occasioned by fraudulent claims.").

The logic of *Stocker* is that the amount of double back pay bears no relation to the appropriate amount of punishment. *Stocker* at 535.

"That a statute does not authorize the remedy at issue in so many words is no more significant than the fact that it does not in terms authorize execution to the issue on a judgment." *Franklin v. Gwinnett County Pub. Schools*, 112 S.Ct. 1028, 1034 (1992), *citing Deckert v. Independence Shares Corp.*, 61 S.Ct. 229, 233 (1940). "We presume the availability of all appropriate remedies unless Congress has *expressly indicated otherwise*." *Franklin* at 1032 (emphasis added). The First Circuit applied *Franklin* to allow punitive damages in *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir. 1994). The Court was called upon to decide whether money damages, including punitive damages, were proper remedies for a retaliatory discharge claim under OSHA.[xiv] The Court of Appeals found that punitive damages were an appropriate monetary remedy. *Id.* at 1191. "Moreover, given the expansive language in *Franklin* ... it is difficult to exclude even exemplary damages where otherwise justified in particular circumstances." *Id.* But in Reich, the court was interpreting a statute which provided for "all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay." 29 U.S.C. § 660(c)(2). Section 3730(h) contains a detailed list of specific remedies but omits the all encompassing "all appropriate relief" language under which the *Reich* court approved punitive damages.

The legislative history sheds light on this issue. First, the legislative history reveals that the original Senate version of the FCA amendments included the clause "if appropriate under the circumstances, the court shall award punitive damages." S.Rep. NO. 99-345, at 353 (1986) (proposing § 3734 to the FCA). The provisions enacted into law, however, were from the House version, which did not authorize punitive damages.

Further, § 3730 is extensive and specific in spelling out its remedies. The whistleblower is entitled to bring a *qui tam* action entitling her to recover up to twenty-five percent of the settlement with the government. 31 U.S.C. § 3730(d)(1). A whistleblower is entitled to doubled back pay as well as interest on the back pay. 31 U.S.C. § 3730(h). A whistleblower receives compensatory damages, moving expenses, attorneys' fees and costs. *Id.* Thus, Congress appears to identify the specific remedies it has in mind in its statutory scheme. Notwithstanding *Bornstein* and *Stocker,* double damages is arguably punitive in nature.

The conclusion that punitive damages are not available under § 3730(h) is further supported by other provisions of the FCA that authorize civil penalties for making false claims against the government. Specifically, 31 U.S.C. § 3729(a) provides for civil penalties of $5,000 to $10,000 per false claim, irrespective of the damages sustained by the government. Because Congress explicitly authorized punitive relief in one section of the FCA, the absence of such authorization in the FCA's anti-retaliation provision must be presumed to be intentional.

Other federal statutes such as the Age Discrimination in Employment Act ("ADEA") provide for liquidated damages. 28 U.S.C. § 626(b). When liquidated damages are available, punitive damages are not. *See, e.g., Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981). Indeed, the Supreme Court has held that liquidated damages under the ADEA are "punitive in nature." *Trans World Airlines, Inc. v. Thurston,* 105 S.Ct. 613, 624 (1985). "Double back pay seems to bear an eerie resemblance to liquidated damages."[xv] Furthermore:

> [I]t is also significant that insofar as we can discern, all other federal whistle-blowing statutes include a specific provision for exemplary damages when such are deemed appropriate by Congress. *See* 42 U.S.C. § 5851(d) (which protects whistleblowers at nuclear facilities); 15 U.S.C. § 2622(d) (toxic substances); 42 U.S.C. § 300j-9(i)(4) (public water systems); 42 U.S.C. § 7622(d) (air pollutants). Indeed, in the statute we are considering, 31 U.S.C. § 3729(a), specific civil penalties, between $5,000 to $10,000 per claim, are provided for the government irrespective of any damage it might have sustained. We believe it is telling that no similar mention of penalties or liquidated damages is found in the provisions of that same statute that deal with the protection of whistleblowers.[xvi]

Should judge or jury decide reasonable attorneys' fees? The Supreme Court supports a determination of reasonable attorneys' fees by the court, not the jury. *Hensley v. Eckerhart,* 103 S.Ct. 1933,1941 (1983). Because § 3730(h) contains a fee shifting provision as a statutory exception to the "American Rule," the Supreme Court has mandated that "if it be assumed that it is proper to make an award of attorneys' fees, *the amount lies in the discretion of the district court.*" MOORE'S FEDERAL PRACTICE ¶ 54.79 (2d ed. 1996), *citing Hensley* at 1941 (emphasis added). The Supreme Court reasoned that the court rather than the jury has the discretion to determine the reasonable amount of attorneys' fees under principles of equity. *Hensley* at 1941.

To entrust the calculation of reasonable attorneys' fees to the court rather than the jury is logical given the fact that the *Hensley* lodestar calculation of fee computation must be used under this as well as all other federal "fee-shifting" statutes. *Id.* at 1939-41; *City of Burlington v. Dague,* 112 S.Ct. 2638, 2641 (1992); *Blum v. Stenson*, 104 S.Ct. 1541, 1550,

n. 16. *See also*, MOORE'S FEDERAL PRACTICE ¶ 54.190[1][2] (3d ed. 1997).[xvii] As the Supreme Court recognized, this method of fee calculation warrants the "general rule" for calculating fees under fee shifting statutes, namely that, "*the district court has discretion in determining the amount of a fee award.*" *Hensley* at 1941 (emphasis added). This is appropriate in view of the district court's superior understanding of the litigation and desirability of avoiding frequent appellate review of what are "essentially factual matters." *Id.* Therefore, under the clear direction of the Supreme Court, plaintiff's reasonable attorneys' fees should be determined by the Court.

Are "reasonable attorneys' fees" special damages under § 3730(h)? Section 3730(h) says relief is designed to make plaintiff whole. The "whole relief" includes reasonable attorneys' fees. If attorneys' fees are "special damages" under § 3730(h), then the amount is arguably limited to the successful plaintiff's liability for the payment of attorneys' fees. If the fee agreement only obligated the plaintiff to pay a fee based upon a percentage of the recovery, the fee might be limited to the contingent fee percentage of the plaintiff's recovery.

Under the "American Rule," the plaintiff must traditionally bear her own attorneys' fees unless there is an express statutory authority to the contrary. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 95 S.Ct. 1612, 1616 (1975). Congress enacted § 3730(h) with a "fee shifting" provision as one of many remedies afforded whistleblowing employees who disclose fraud perpetrated against the Government. H.R.REP. NO. 99-660 at 23 (1986). In doing so, Congress intended to further the public policy of protecting the Government from fraud as well as protecting those who aid the Government in disclosing this fraud from adverse employment decisions. *Id.* "Where Congress has chosen to rely heavily on private actions to enforce important public policy choices, it is reasonable that Congress might also choose to authorize fees to the prevailing party in order to encourage those private suits" as an exception to the "American Rule." MOORE'S FEDERAL PRACTICE ¶ 54.170 (3d ed. 1997). Congress, by providing the fee shifting provision in § 3730(h), provided the statutory authority for attorneys' fees as an exception to the "American Rule," thus guaranteeing the plaintiff recovery of reasonable attorneys' fees once she has proven her claim of discrimination. H.R.REP. NO. 99-60, at 23 (1986).

The term "reasonable attorneys' fees" appears four times in the FCA. In the first three instances in which the term is used in the FCA, the term clearly means that attorneys' fees are shifted to the defendant and determined by the lodestar (rate times time) method. There is no good reason to suppose Congress meant something different in the fourth instance, i.e. in § 3730(h).

Further, the language of § 3730(h) refers to "compensation for any special damages sustained as a result of the discrimination,including litigation costs and reasonable attorneys' fees." This phrase could mean the plaintiff's compensation includes reasonable attorneys' fees. In other words, the "including attorneys' fees" phrase can be thought to modify the word "compensation" just as easily as the words "special damages" modify the word "compensation." Finally, commentators Helmer, Lugbill and Neff, in their work FALSE CLAIMS

ACT: WHISTLEBLOWER LITIGATION make the following comments about the 1986 amendment to the FCA, which added reasonable attorneys' fees to four provisions of the Act:

> § 1501. Introduction.
> Under the "American Rule," a party to a lawsuit generally bears its own attorneys' fees unless there is express-statutory authorization to the contrary.[xvii] In 1986, one of the significant amendments to the False Claims Act was the addition of fee shifting provisions. Such provisions were designed to encourage private counsel to initiate and participate in False Claims Act litigation, as well as to discourage frivolous lawsuits.[xix]
>
> § 15-1(a). Relator's Right to Attorneys' Fees.
> Congress intended in 1986 to make it clear that the relator's counsel should be compensated in any successful *qui tam* action. Whether the Attorney General decides to prosecute the *qui tam* action[xx] or whether the relator is required to pursue the *qui tam* action alone,[xxi] Congress determined that the relator is entitled to recover reasonable attorneys fees, costs, and expenses necessarily incurred in bringing the action.[xxii] Congress also determined that all such attorneys' fees, costs and expenses are to be awarded against the defendant.[xxiii]

The district court in *Neal* held § 3730(h) is a conventional fee shifting statute.[xxiv]

Are recoverable costs limited by 28 U.S.C.§1920? If § 3730(h) is an independent basis for the recovery of costs, it means all deposition costs and expert witness fees are covered subject only to the court concluding they are reasonable. The difference is quite substantial in practical terms. *See, e.g., Wahl v. Carrier Mfg. Co.*, 511 F.2d 209, 216 (7th Cir. 1975) (attorney travel expenses not taxable costs); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5th Cir. 1993), *cert. denied*, 510 U.S. 1195 (1994)(plaintiff's attorney's travel expenses not taxable costs; expert witness fees not taxable costs); *NFLC, Inc. v. Devcom Mid-America, Inc.*, 916 F.Supp. 751, 764 (N.D. Ill. 1996) (expert fees not taxable); *Wolf v. Planned Property Management*, 735 F.Supp. 882, 883 (N.D. Ill. 1990) (no entitlement to recover long-distance telephone charges as costs where costs statute does not list long-distance telephone charges as costs which court may tax. "The legal presumption is that if Congress did not list the item in § 1920, the court may not tax it.").

The statute is to be liberally construed in favor of protection of persons in the protected class. *Neal* at 862-863. "Litigation costs," as contemplated by the Act, should include *all* costs spent to pursue relief even if not generally recoverable pursuant to FED. R. CIV. P. 54(d) and 28 U.S.C. § 1920 (1982). By using the term "litigation" costs, Congress must have intended to allow recovery of those expenses of litigation not within the existing structure of the law. If recovery of costs pursuant to the Act were limited to 28 U.S.C. § 1920, there would be no need to explicitly provide for litigation costs in § 3730(h).

ENDNOTES

i A trial based on a § 3730(h) claim in the U.S. District Court for the Middle District of Florida in 1997 provided the following instructions to the jury:

What is required for protection [under § 3730(h)] is that the filing of a false claims action by the government or the employee be a "distinct possibility"at the time of the occurrence of a "lawful act" of the plaintiff. This is called the "distinct possibility" test.

If you determine that the filing of a False Claims Act action was a distinct possibility at the time of the occurrence of [plaintiff's] lawful act or acts,then [plaintiff] will be protected by the whistle blower provision of the False Claims Act. . . .If you determine that the filing of a false claims action was not a distinct possibility, you will return a verdict for the defendant.

Special Interrogatory No. 1, provided to the same jury, included the following:

> Has the plaintiff proven by a preponderance of the evidence that the filing of a False Claims Act action by the government or by himself was a "distinct possibility" at the time of the occurrence of such "lawful act" of the plaintiff?

The jury, evidently totally confused by the legalese,left the interrogatory unanswered. *Rehman v. ECC Int'l Corp.,* Civil Action No. 90-425-CIV-ORL-22 (M.D.Fla.).

ii For example, the key liability jury instruction in the trial of *Neal v. Honeywell, Inc.,* No. 93 C 1143 (N.D.Ill.) reads as follows:

If you find that Honeywell discriminated against plaintiff in the terms and conditions of her employment because of her Infoline call, you must determine an amount that is fair compensation . . . .

iii The two cases are *Yesudian,* in which the D.C. Circuit reversed the district court's entry of judgment notwithstanding the verdict in favor of the plaintiff,and *Robertson.*

iv Section 3730(h) of the FCA provides,in whole:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer 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, shall be entitled to all relief necessary to make the employee whole. Such relief shall include 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 attorney fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

v As a comparison, in Title VII of the Civil Rights Act, "back pay" does not mean lost income net of subsequent earnings. Rather, Title VII expressly provides that "back pay" is to be *reduced* by subsequent earnings. 42 U.S.C.§ 2000e.

vi *See also United States v. Stocker*, 798 F.Supp. 531, 536 (E.D. Wis.1992). The Supreme Court held that the actual damages to the government under this statute are to be doubled *before* any subtractions are made for defendant's mitigation of damages. *Bornstein* at 531.

vii The Seventh Circuit in *Neal*, 33 F.3d at 863-864,stated that "[w]ords take their meaning from context,and the language of §3730(h) shows that the word 'action' is used in the same sense as in other subsections." *Neal*, 33 F.3d at 863. Thus, the court construed "action" in § 3730(h) in the same manner as it did in the rest of § 3730. Similarly, it is reasonable to conclude that when Congress amended the FCA in 1986, the language it used in § 3730(h) was to be construed in the same way as the Supreme Court had previously done in § 3729(a).

viii *Neal v. Honeywell,* 995 F.Supp. 889,896 (N.D. Ill.1998).

ix *Id.*, 995 F.Supp. at 897.

x *Id.*

xi *Id.*

xii *Id.*

xiii *Id.*

xiv OSHA states, in part,that federal courts have the jurisdiction to "order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay." 29 U.S.C.§ 660(c)(2).

xv *Neal*, 995 F.Supp. at 896.

xvi *Id.*

xvii In *Hensley*, the Supreme Court merged the standards found in *Lindy Bros.Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973) (attorneys' fees determined by calculating the hours spent multiplied by the customary rate and later adjusted to the lodestar to account for the quality of the work, contingency, and other factors),and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (adopting a 12-factor test to determine the reasonableness of attorneys' fees) to establish a formula that the Court should take in determining reasonable attorneys' fees.

xviii *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S.240 (1975).

xix For a discussion of attorneys' fees, *see* J. Helmer & A. Lugbill, *Attorneys' Fees In Employment Cases*, *in* LITIGATING WRONGFUL DISCHARGE CLAIMS, §§ 8:22-29 (P. Tobias & S. Sobers, eds., 1993).

xx 31 U.S.C. § 3730(d)(1).

xxi *Id.* § 3730(d)(2).

xxii *Id.* § 3730(d)(1),(2).

xxiii *Id.*

xxiv 995 F.Supp. at 897.

ALLEGATION: MISCHARGING RADAR EQUIPMENT COSTS

U.S. ex rel. Doe et al. v. Comsat Corp. et al. *(MD FL No. 96-966-CIVT-24-A)*

In January 1999, DOJ intervened in a *qui tam* suit alleging that Comsat Corporation, a military contractor, defrauded the Government by billing costs incurred on commercial contracts to its contract with the Navy for the refurbishment of radar equipment on U.S.warships. According to the complaint, Comsat began shifting contract costs starting as far back as 1989. In addition to Comsat, the Government named as defendants Comsat subsidiary Radiation Systems Electro-mechanical Systems, Inc. (EMS), based in Largo, Florida, EMS president Kenneth Grannon, and two former EMS officials.

Washington, D.C. based Comsat Corporation is a global provider of satellite services and digital networking services and technology. The *qui tam* suit, filed in 1996 by seven former employees of EMS,alleges that Comsat learned of EMS' purported fraudulent billing scheme through an anonymous letter, but attempted to cover up the wrongdoing by conducting an internal investigation and then firing employees who said they had been directed to mischarge costs to the Navy. The case is being handled by Assistant U.S. Attorney Whitney Schmidt.

ALLEGATION: UNDERPAYMENT OF ROYALTIES BY OIL COMPANIES

U.S. ex rel. J. Benjamin Johnson et al. v. Shell Oil Company et al. *(ED TX No. 9:96CV66)*

In February 1999, DOJ announced that it intervened against two more major oil companies in a *qui tam* suit alleging that 14 companies underpaid royalties owed to the Government for oil extracted from federal and Indian lands. DOJ added BP America, Inc., and Unocal Corporation to the list of defendants against whom the Government has intervened, which already includes Amoco Corporation, Burlington Resources, Conoco, Inc., Shell Oil Company, and Texaco, Inc. BP America and Amoco have merged into a new Chicago-based company, BP Amoco, since the action was first filed.

The *qui tam* suit was originally brought in 1996 by J. Benjamin Johnson and John Martineck, former employees of oil company Atlantic Richfield Co. The lawsuit alleges that the oil companies have underpaid royalties on over 6,000 oil leases in 21 states. In August 1998, Mobil Oil Corporation settled with the Government for $45 million. The remaining defendants named in the original suit are still being investigated by the U.S. Attorney's Office for the Eastern District of Texas, the DOJ Civil Division, and the Department of the Interior. Michael Havard of Provost & Umphrey Law Firm (Beaumont, TX) is representing the relators. The Government is represented by U.S. Attorney Michael Bradford, Assistant U.S. Attorney O. Kenneth Dodd, and Dodge Wells of the DOJ Civil Division.

ALLEGATION: OVERCHARGING FOR JET ENGINES

United States v. United Technologies Corp. *(SD OH No. C-3-99-93)*

In March 1999, DOJ announced that it filed a False Claims Act suit against the Pratt & Whitney division of United Technologies Corporation alleging that the company overcharged the Air Force for jet engines. According to DOJ, between 1985 and 1991 the Air Force purchased F100-220 jet engines manufactured by Pratt & Whitney for its F-15 and F-16 high performance fighter jet aircraft. The lawsuit alleges that the company inflated the cost of parts from sole-source subcontractors by over $75 million and then withheld information that would have revealed this excess pricing practice to the Government. The complaint further alleges that the company falsely certified to the Government that the 1984 contract had been negotiated based on accurate, complete and current cost data, and as a result the Air Force did not discover the false certifications until 1997. United Technologies is a Delaware corporation headquartered in Hartford, Connecticut. Pratt & Whitney has its principal headquarters and facilities in Connecticut and Florida. Representing the Government are Assistant U.S. Attorney Dale Ann Goldberg and David Sadoff of the DOJ Civil Division.

ALLEGATION: UPCODING ONCOLOGY SERVICES

U.S. ex rel. Reppine v. University of Chicago et al. *(ND IL No. 96C8273)*

In March 1999, DOJ announced that it intervened in a *qui tam* suit against the University of Chicago, the University of Chicago Physicians Group, and the University of Chicago Hospitals (the University) alleging the upcoding of services billed to Medicare and Medicaid. The complaint, filed in December 1996 by oncology nurse Al Reppine, alleges that between 1991 and 1997 the University billed for a higher level of service than actually provided in 40 percent of its most expensive outpatient Medicare claims. The suit further alleges that doctors in the hematology and oncology clinics were forced to use billing sheets that contained spaces for only the two highest billing codes, regardless of the actual level of the services performed. The University also allegedly used the wrong procedure code in submitting claims to Medicaid for outpatient physician and clinic services for high-risk patients. According to the complaint, in 1995 that code accounted for 94 percent of the University's billings to Medicaid. The relator is being represented by Steven Cohen of Krasnow, Sanberg & Cohen (Chicago, IL). Assistant U.S. Attorney Linda Wawzenski is handling the case for the Government.

The Cancer Center

In January 1999, The Cancer Center, Inc. and The Cancer Center of Boston at Plymouth, Cape Cod, Inc. agreed to pay the Government $283,000 to settle claims that the company fraudulently billed for home infusion chemotherapy services. The Cancer Center provides outpatient chemotherapy services to cancer patients. According to DOJ, the center charged Medicare for each day a patient used a portable pump designed to provide home infusion of intravenous chemotherapy instead of billing only for the day the pump was installed by a doctor. This amounted to multiple billings for a service that was only provided once. The matter was investigated by the HHS OIG. Assistant U.S. Attorney Susan Winkler represented the Government.

Case Corporation

In January 1999, Case Corporation agreed to pay the Government $1.9 million to resolve allegations that it overcharged the Government for road building equipment. According to DOJ, Case failed to offer General Services Administration contract negotiators the same discounts it provided to other customers and failed to accurately and fully disclose its pricing practices, all in violation of federal law. The Racine, Wisconsin corporation also allegedly overbilled the Government on 24 invoices in connection with a 1990 contract. The overcharges were revealed during an audit of the Case Corporation contract by the GSA OIG. The Government was represented by Robert McAuliffe of the DOJ Civil Division.

U.S. ex rel. Falck v. Clark Equipment Company and Ingersoll-Rand et al. (D ND No. A3-98-8)

In January 1999, DOJ announced that Clark Equipment Company d/b/a the Melroe Company agreed to pay the Government $3 million to settle a *qui tam* suit alleging that it overcharged the General Services Administration for Bobcat brand earth-moving equipment. According to the lawsuit filed in 1997 by former Clark employee Steven Falck, Clark failed to provide the GSA with current, accurate, and complete pricing information on two contracts for the purchase of Bobcat trench diggers in violation of federal law. Clark, headquartered in Fargo, North Dakota, is a subsidiary of Ingersoll-Rand Corporation. The case was investigated by the GSA OIG. The relator's share is 17 percent or $510,000. The relator was represented by William J. Hardy of Karalekas & Noone (Washington, D.C.). Representing the Government were U.S. Attorney Jon Schneider and Patricia R.Davis of the DOJ Civil Division.

U.S. ex rel. Pratt v. Alliant Techsystems Inc. (CD CA No. CV 95-4812)

In January 1999, Alliant Techsystems Inc. and Hercules Inc. agreed to pay the Government $500,000 to settle a *qui tam* suit alleging that the companies overcharged the Government on missile defense contracts. The lawsuit was originally filed in 1995 by P. Robert Pratt, a former employee of Alliant and Hercules at their rocket motor manufacturing facility in Magna, Utah. The lawsuit alleged that the defendants mischarged the Government for labor costs and overcharged the Government on the Delta, Titan IV, Trident I and II, Pegasus, START Treaty, Peacekeeper (MX), Poseidon, and Polaris programs. In March 1998, Hercules paid $4.5 million to settle an earlier *qui tam* suit brought by Pratt involving contracts implementing the Intermediate-Range Nuclear Forces (INF) Treaty.

On January 25, a California district court approved the settlement over the Government's objections to the scope of the settlement's release of Alliant and Hercules from potential False Claims Act liability and the omission of a provision that would prevent the defendants from allocating settlement payments and litigation costs as overhead to other government contracts. DOJ also asserted that the relator's *qui tam* action was barred by the public disclosure of the allegations in U.S. ex rel. Hullinger et al. v. Hercules, Inc., which was filed in 1992 and approved for settlement in February 1999. The court observed that the allowability of Alliant's costs is already governed by the Federal Acquisition Regulations. The court also noted that DOJ had declined to intervene in Pratt's non-INF claims after investigating the case for nearly three years. Finally, the court held that it had subject matter jurisdiction because the parties, time periods, types of transactions, contracts, and programs in this suit were distinct from those of the Hullinger lawsuit.

The relator's share is 28 percent or $140,000. In addition, his estate will receive $500,000 to settle retaliatory action and wrongful termination claims and $150,000 for legal fees and expenses.

U.S. ex rel. Tossell v. Orlando Regional Health System Inc. *(MD FL No. 98-436-CIV-ORL-22B)*

In January 1999, Orlando Regional Health System Inc. (ORHS) agreed to pay the Government $469,000 to settle a *qui tam* suit alleging that its South Seminole Hospital upcoded claims to Medicaid for psychiatric services or filed false claims for services that were never provided. Between 1995 and 1997 the hospital reportedly filed an estimated 2,000 false claims to Medicaid for psychiatric treatment of children and adolescents that failed to comply with federal billing requirements. The suit was filed in 1998 by nurse Mary Tossell, a former hospital employee. ORHS also has entered into a three year corporate integrity agreement with HHS OIG. The relator's share is 18 percent or $84,000 and the State of Florida will receive $192,000.

U.S. ex rel. Controulis v. Teledyne Inc. *(CD CA No. CV 96-2915)*

In January 1999, Allegheny Teledyne Inc. agreed to pay the Government $2.79 million to settle a *qui tam* suit alleging that it withheld information from the Air Force in settling a 1994 False Claims Act case. The recent law suit was filed by Philip Controulis, a former Teledyne internal audit department employee. According to this suit, Teledyne withheld testing cost data relating to APX-109 "identification of friend or foe" equipment while settling the earlier whistleblower case. Teledyne's failure to accurately disclose the data in the 1994 settlement negotiations resulted in an underpayment to the Government in that settlement. The FBI and DCAA jointly investigated the matter. The relator's share was 19.5 percent, or $474,240. The relator was represented by Kirkland W. Garey of Howard & Howard (Bloomfield Hills, MI). Representing the Government was Dennis Phillips of the DOJ Civil Division.

U.S. ex rel. Birge v. Bulldog Medical et al. *(MD FL No. 95-673-CIV-ORL-18)*

In February 1999, Bulldog Medical Corporation, Bulldog's owner/operator Terri Carroll, and Rocket Marine, Inc. d/b/a MLC Geriatric (MLC) stipulated to the entry of a consent judgment against them in the amount of $150 million to settle a *qui tam* suit alleging fraudulent billings for nonreimbursable goods. The Government previously collected from the defendants $34 million in alternate remedy relief arising out of the same action. Bulldog and MLC are both Florida based medical equipment supply companies owned by Carroll. The suit alleged that Bulldog and MLC billed Medicare for female urinary collection pouches which are reimbursable under Medicare, but in fact provided Medicare beneficiaries with adult diapers which are not reimbursable. Bulldog and MLC also allegedly submitted false claims for incontinence kits which were not medically necessary and therefore not reimbursable by Medicare. The suit was filed in 1994 by Bradley Birge.

The relator's share was $3.4 million. Representing the relator were Sidney R. Berger (Chicago, IL) and Tracy E. Tomlin of Otero Tomlin & Tomlin (Coral Gables, FL). Patricia Hanower of the DOJ Civil Division represented the Government.

Horizon West, Inc.

In February 1999, Horizon West, Inc. agreed to pay $4 million to the Government to settle claims that it misclassified medical supplies and submitted inflated bills to Medicare for unallowable expenses. Horizon, an owner and operator of numerous California nursing homes, billed Medicare for such unallowable items as tax preparation fees, gifts,flowers,cigarettes,lottery tickets, liquor for two company holiday parties, and items purchased from several department stores by the company president. As part of the settlement agreement, Horizon agreed to implement a corporate integrity program, a compliance committee, written compliance policies for submitting Medicare billings, and a confidential disclosure program for its employees. Horizon is headquartered in Rocklin, California. HHS OIG conducted the investigation. The Government was represented by Assistant U.S. Attorney Michael Hirst.

U.S. ex rel. Hullinger v. Hercules, Inc. *(D UT No. 2:92-CV-0085-S)*

In February 1999, Hercules Inc. agreed to pay the Government $600,000 to settle a *qui tam* suit alleging that it improperly billed federal agencies for work on space and strategic missile programs. The lawsuit was filed in 1992 by document supervisors Benny Hullinger and Ernest Martinez, engineer Roger Kreimeyer, and manager Royle Johnson, all former long time employees of the company. The lawsuit alleged that Hercules, a former Utah defense contractor, mischarged work performed on fixed price contracts to open ended missile program contracts. According to the suit, Hercules received $1 billion in government missile contracts between 1982 and 1991.

On January 21, a Utah district court approved the the terms of the settlement over DOJ's objections. DOJ asserted that $600,000 was inadequate to settle what it called "huge amounts of potential fraud," but the district court refused to allow DOJ to veto the settlement, noting that the Government declined to join the lawsuit after investigating the alleged wrongdoing and failed to track the litigation despite the enormous scope of the allegations involved. The settlement releases Hercules from liability for all mischarging since 1982 at any of its plants.

Hercules, based in Wilmington, Delaware, sold its aerospace division to Alliant TechSystems of Minnesota in 1995. In 1998, Hercules paid $55 million and $4.5 million to settle two prior *qui tam* suits. The relator's share is 25 percent or $150,000. Under the settlement, Hercules also must pay $3.6 million to resolve the relators' wrongful termination claims. Representing the relators were William Kelly Nash, Lance L. Long and Evan A.Schmutz of Hill Johnson & Schmutz

PC (Provo, UT). Rosemary A. Filou of the DOJ Civil Division represented the Government.

U.S. ex rel. Haskins et al. v. Omega Institute, Inc. et al. *(D NJ No. 95-265)*

In March 1999, a jury returned a $2.1 million verdict in a *qui tam* case against New Jersey's Omega Institute, Inc. (Omega), a private vocational school, alleging fraud under federally funded student assistance programs. The suit was originally filed in January 1995 by Diane Haskins, Beverlee Ralph, and Tamara Livingston, who attended the paralegal training program at Omega.

The suit alleged that Omega made false statements in documents filed with the Department of Education, thereby receiving financial aid funds to which it was not entitled. Specifically, the relators alleged that the school did not provide the number of instruction hours, quality of instructors, or attendance policies in keeping with the written statements it submitted to the DOE. The Government declined to intervene in the action.

The jury found that Omega falsified records pertaining to its paralegal program on 248 occasions between June 1992 and March 1994. The jury also found Lee Cobleigh,Omega's former president and executive director, and Clarita Eusebio-Kelly, Omega's former director of education, liable under the Act for falsifying accreditation documents and lying on student grant applications. The relators were represented by Philip Fuoco (Haddonfield, NJ).

U.S. ex rel. Thomas v. Infusion Management Systems Inc. *(ND TX No. 396-CV0684-T)*

U.S. ex rel. Brupbacher & Associates Inc. v. Infusion Management Systems Inc. *(ND TX No. 3-98CV1057G)*

In March 1999, Infusion Management Systems, Inc. agreed to pay the Government $10 million to settle two *qui tam* suits alleging that the company falsified Medicare reports, billed Medicare for services not rendered, and sought reimbursement for unallowable services. Infusion, purchased in June 1996 by HomeCare Concepts of America Inc., is one of the largest home health care companies operating in Texas. The first of the two *qui tam* lawsuits against Infusion was filed in 1996 by Jennifer Thomas, a former home health aide for the company. The settlement, which includes a corporate integrity agreement, resolves Thomas' *qui tam* suit as well as that filed by Brupbacher & Associates, Inc. (Brupbacher). DOJ declined to intervene in either action. Conducting the investigation were the FBI, the IRS, and HHS OIG. Relator Thomas' share is 11.75 percent, or $1.5 million. Brupbacher's relator's share is 1.25 percent, or $125,000. Relator Thomas was represented by Christopher L. Davis and Bill Funk (Dallas, TX) and Lee Kaplan and Carlos Soltero (Houston, TX). The Government was represented by Assistant U.S. Attorney Peter Winn and George Vitelli of the DOJ Civil Division.

U.S. ex rel. Loental et al. v. District Board of Trustees of Seminole Community College *(MD FL No. 96-595-CIV-ORL-18)*

In March 1999, Seminole Community College agreed to pay the Government and the State of Florida a total of $500,00 to settle a *qui tam* suit alleging that it fraudulently increased enrollment numbers in its vocational and job training classes to obtain more federal education funding. According to the lawsuit, the College conducted a scheme to defraud the Government of over $5 million by falsifying the numbers and identities of students on its enrollment reports and by submitting false claims in the form of grant and funding requests. The *qui tam* suit was filed in 1996 by Nancy Loental, a former secretary at the College, and Felisa Robinson, a former information systems trainer and staff assistant to the school's vice president. DOJ declined to intervene in the action. The relators' share is 28 percent or $140,000. Representing the relators were Joseph Egan of Egan, Lev & Siwica (Orlando, FL) and Andrew Grosso (Washington, D.C.).

U.S. ex rel. Norbeck v. Basin Electric Power Cooperative (D ND No. A1-95-003)

In March 1999, a North Dakota district court awarded the Government $39.1 million in a *qui tam* suit against Basin Electric Power Cooperative of Bismarck, North Dakota alleging multiple frauds under its contract with the Department of Energy's Western Area Power Administration (WAPA). The United States was also awarded $8,232,031 on its related breach of contract claims

The *qui tam* suit was originally filed in 1995 by Robert Norbeck, a former chief auditor for Basin. The court ruled that Basin, a power cooperative organized to build power plants and supply power to its member distribution cooperatives,misapplied the proceeds from the sale of a power unit that it should have used to retire debt costs used in the computation of costs to WAPA. This resulted in a $15,468,662 overcharge in power costs to WAPA. After Norbeck made an internal complaint, but prior to the filing of his *qui tam* suit, Basin acknowledged an overcharge in this area and paid a refund of $2.4 million to the Government.

The court ruled in the Government's favor on a number of related common law claims. Specifically, the court found that Basin used a 10-year amortization period for certain costs charged under the contract when it customarily used 20-year amortization periods for those same costs at other power plants, and in fact switched back to a 20-year period when the contract ended. As a result, WAPA paid a disproportionate share of costs. Furthermore, Basin used a wholly owned subsidiary, Dakota Coal Company, to charge profit margins to WAPA that were not allowed under the contract.

The court dismissed three of the Government's claims against Basin, including claims that Basin improperly billed the Government for lease payments and that it failed to pass along to the Government certain coal discounts. The court dismissed the relator's claims that Basin improperly imputed interest on equity capital, resulting in overcharges to the Government, and that it failed to credit coal costs to the Government with the proper total of tax credits received through its Freedom Coal Mine. Basin has expressed its intention to appeal the judgment. The Government was represented by Ben Vernia and Mina Rhee of the DOJ Civil Division. The relator was represented by Irv Nodland (Bismarck, ND).

North Adams Ambulance Service Inc.

In March 1999, DOJ announced that Massachusetts based North Adams Ambulance Service Inc. agreed to pay the Government $120,000 plus interest to settle claims that it upcoded its bills to Medicare. North Adams allegedly charged Medicare for advanced life support services when it actually provided basic life support services, thus increasing its Medicare reimbursement. According to DOJ, ambulance personnel checked off basic services on their trip tickets, but North Adams nonetheless billed Medicare for advanced services.

As part of the settlement, the company agreed that for the next five years it will only bill at the higher service level if an emergency medical technician certified in the procedure is present in the ambulance and all other compliance requirements are met. The Government has agreed to allow North Adams to continue participating in federally funded health care programs. This case was investigated by the HHS OIG. Representing the Government was Assistant U.S. Attorney Julie S. Schrager.

Novartis Pharmaceuticals

In March 1999, DOJ announced that Novartis Pharmaceuticals Inc. will pay the Government $8 million to settle claims that it overbilled the Department of Veterans Affairs for prescription drugs. Novartis' predecessor, Ciba-Geigy, Inc., allegedly failed over a five year period to offer the same price reductions to the VA that it offered its commercial customers, even though the company certified that it had provided accurate, complete, and current pricing information during contract negotiations. The overcharges were discovered by the VA OIG during an audit of government contracts with Ciba-Geigy dating from 1987 to 1991, under which the United States purchased over $50 million worth of pharmaceuticals. Novartis, which researches, develops, manufactures, and markets prescription drugs, is based in Summit, New Jersey, and was created in 1997 by the merger of Sandoz Pharmaceuticals Corp. and Ciba-Geigy. It is the U.S. affiliate of Switzerland based Novartis AG. Representing the Government were Patricia Davis of the DOJ Civil Division and Assistant U.S. Attorney Michael Chagares.

United States v. Truman Medical Center (WD MO No. 97-0977-CV-W-3)

In March 1999, Truman Medical Center, Inc. (TMC) and its billing company, Hospital Hill Health Services Corporation (HHH), agreed to pay the Government $242,500 to settle a *qui tam* suit involving false Medicare billings for electro-cardiograms and echo-cardiography (EKG) diagnostic tests. The lawsuit alleged that the companies used the tests to screen low income and elderly patients as part of pre-operative preparations for surgical procedures. Such pre-operative screenings by EKG are not reimbursable under Medicare regulations. The suit was originally filed in May 1997 by Monica Theis, a former senior secretary at TMC. TMC and HHH have entered into a corporate integrity agreement with HHS OIG and have also agreed to cooperate in an ongoing criminal investigation of health care fraud at the hospital. The investigation of this matter was handled by the FBI and HHS OIG. The relator was represented by Patrick F. Bottaro of Bottaro, McCormick & Morefield (Kansas City, MO). Assistant U.S. Attorney Andrew Lay represented the Government in the civil case.

TAF NEWS

FCA Conference Materials

- As part of its information clearinghouse activities, TAF has materials available for distribution at conferences and other programs. Information can be tailored to a legal or general audience. Resource material, including statistical information, is also available for those writing articles on the FCA.

Qui Tam Practitioner Guide

- The *TAF Qui Tam Practitioner Guide: Evaluating and Filing a Case* can be ordered at no charge by phone, fax, or mail. This "how to" manual includes sections on evaluating the merits and viability of a case, pre-filing and practical considerations, and preparing and filing the complaint.

TAF on the Internet

- TAF's Internet presence, designed to educate the public and legal community about the False Claims Act and *qui tam*, has expanded to highlight the growing health care trend and recent legislative developments. TAF's site is located at http://www.taf.org.

Previous Publications

- Back issues of the *Quarterly Review* are available in hard copy as well as on TAF's Internet site.

Quarterly Review Submissions

- TAF seeks submissions for future issues of the *Quarterly Review* (e.g., opinion pieces, legal analysis, practice tips). We thank William Holloway for his contribution in this issue. To discuss a potential article, please contact Staff Attorney Amy Wilken.

Anniversary Reports and Video

- To mark the anniversary of the 1986 FCA Amendments, TAF has available a variety of resources including a Tenth Anniversary Report, an Assessment of Economic Impact, and an educational video highlighting the effectiveness of the Act. These materials are available at no charge.

Call for Experts and Investigators

- In response to inquiries, TAF is working to compile a list of experts and investigators across an array of substantive areas. Please contact TAF with any suggestions you may have.

Qui Tam Attorney Network

- TAF is continuing to build and facilitate an information network for *qui tam* attorneys. For an Attorney Network Application or a description of activities, please contact TAF. Be sure to ask about TAFNET, our electronic mail system for Attorney Network members.

TAF Library

- TAF's FCA library is open to the public, by appointment, during regular business hours. Submissions of case materials such as complaints, disclosure statements, briefs,and settlement agreements are appreciated.

Acknowledgments

- TAF thanks the Department of Justice and *qui tam* counsel for providing source materials.