Spring, 2000

68 U. Cin. L. Rev. 737

LENGTH: 11379 words

ARTICLE: HOW GREAT IS THY BOUNTY: RELATOR'S SHARE CALCULATIONS PURSUANT TO THE FALSE CLAIMS ACT

NAME: James B. Helmer, Jr.*

BIO:

*Member, Ohio and District of Columbia Bar. B.A., Denison University, 1972; J.D., University of Cincinnati, 1975.

LEXISNEXIS SUMMARY:
... Upon being served with the first qui tam suit that I filed in 1984, the defense counsel remarked to a reporter that the suit "looked like bounty hunting. ... The Department of Justice attacked the qui tam provisions of the False Claims Act arguing that qui tam actions should be eliminated entirely as potentially damaging to the war effort because effective law enforcement required such litigation to be solely in the control of the Attorney General. ...

TEXT:
[*737]

Upon being served with the first qui tam suit n1 that I filed in 1984, the defense counsel remarked to a reporter that the suit "looked like bounty hunting." n2 That single case eventually contributed to major changes in the False Claims Act to encourage other citizens to become bounty hunters and produced a record recovery for the United States. n3

With over three thousand qui tam suits filed since the 1986 amendments to the False Claims Act generating billions of dollars in recoveries for the United States, n4 the issue of the proper amount of compensation for whistleblowers arises frequently. n5 Unfortunately, very little has been written on this topic. This article will review the complex statutory scheme that rewards those who prosecute qui tam cases, the Congressional intent as to how the provisions are to be applied, and discuss the factors that should be weighed in properly evaluating an individual reward.

A basic tenet of civilization is to reward conduct that society wishes to encourage and to punish conduct that society hopes to discourage. [*738] Examples of such a carrot and stick approach abound throughout our legal system. The notion of paying an informer for information so that a police agency can obtain the evidence needed to investigate a possible crime, prosecute a wrongdoer, or avoid a dangerous consequence is widely accepted. The use of common citizens as additional resources to assist the Government in protecting its financial interest from being plundered can be traced to early English n6 common law as well as to the first United States Congress. n7 Such persons are commonly known as informers or relators.

The False Claims Act was originally enacted at the urging of President Abraham Lincoln during a time of national crisis in March of 1863. n8 The fate of the federal union was very much in doubt. n9 Actions by unscrupulous Government contractors in obtaining federal funds for substandard or even non-existent war supplies put both individual soldiers and whole commands in jeopardy. n10

[*739]

The original False Claims Act had three major components. First, the Act permitted private citizens to prosecute on behalf of the United States Government contractors who had cheated the taxpayers. n11 Second, as an appropriate punishment for such treasonous conduct, a guilty contractor was to repay the Government twice the amount stolen from the treasury, plus a hefty fine. n12 Third, to encourage private citizens to undertake bringing a Government contractor to justice, the successful informer was to receive a reward of 50% of the amount collected by the United States. n13 The wisdom of the Act was simple: unleash an army of enraged citizens who would at their own expense and risk, hunt down and cause nefarious Government contractors to repay the treasury twice the amount stolen, then turn around and incentivize the citizen with one half the proceeds as a reward, thus leaving the United States whole and without risk in the prosecution of the case. n14

By 1943, the United States faced another threat to its survival, this time from foreign powers. But, unlike the war between the states, the Attorney General was vigorously prosecuting defense contract profiteers. This vigorous prosecution would lead to a major rewrite of the False Claims Act and the virtual loss of this major weapon in the federal arsenal against Government contract cheaters.

In the early years of World War II, a few enterprising American citizens had rediscovered Lincoln's qui tam law. When a defense contractor was indicted by federal prosecutors, these citizens would immediately file a civil qui tam action against the same contractor. n15 Often the qui tam action was based on little more than the information contained in the original indictment or a newspaper account of the [*740] government's criminal prosecution. n16 Such conduct was labeled as "parasitic lawsuits." The practice quickly came to the attention of Attorney General Francis Biddle. General Biddle determined to stop these suits. n17 He would not have to wait long for his opportunity.

The United States indicted several defendants for fraud and obtained guilty pleas and fines of $ 54,000. n18 Relators brought a qui tam action against the same defendants, and after a lengthy trial, succeeded in obtaining a judgment for another $ 315,000 pursuant to the False Claims Act. n19 As a result of the relators' actions, the net recovery to the United States, even after payment of a 50% bounty, would exceed three times the fine collected by the United States in the criminal action with the relators bearing the entire risk of the civil action. Some would applaud the relators' efforts, but not General Biddle.

Perhaps smarting from the private bar's success in an action based upon investigation by his department, General Biddle wasted no time in accepting the invitation of the United States Supreme Court to submit an amicus curiae brief when this case, Marcus v. Hess, reached the high court in 1943. n20 The Department of Justice attacked the qui tam

provisions of the False Claims Act arguing that qui tam actions should be eliminated entirely as potentially damaging to the war effort because effective law enforcement required such litigation to be solely in the control of the Attorney General. n21

In a unanimous decision the Supreme Court upheld the relators' verdict and rejected the Department of Justice's arguments as ones more appropriately directed to the Congress. n22 General Biddle next went to Congress.

The qui tam provisions of the False Claims Act had worked exactly as it was designed with the relators in Marcus v. Hess supplementing efforts of the United States in recovering monies stolen from the treasury. No Attorney General had ever brought any action pursuant to the False Claims Act since its enactment in 1863 through 1942. n23 Nevertheless, General Biddle cited the Marcus v. Hess decision and nineteen other pending qui tam actions as warranting repeal of the False Claims Act. n24 He got prompt attention in the House of Representatives which, with [*741] only twenty-three members present, voted on April Fool's Day of 1943 to abolish all qui tam actions. n25 No debates were held and no witnesses were called n26 but the Marcus v. Hess decision was cited as the House's reason for repealing the qui tam provisions. n27

When the bill to repeal the qui tam provisions reached the Senate, General Biddle encountered resistance. Hearings were held and at least one qui tam relator, Gordon Coates, presented testimony demonstrating the need for the qui tam provisions. n28

The Senate refused to enact legislation repealing the qui tam provisions. Instead, again based on the Marcus v. Hess decision, the Senate version of amendments to the False Claims Act was specifically designed to stop the practice of "parasitic lawsuits" by relators. Eventually, Congress passed the Senate version, which was signed into law by President Franklin D. Roosevelt in 1943. n29

The 1943 Amendments to the False Claims Act did eliminate the "parasitic lawsuit." As amended, the False Claims Act now prohibited any qui tam suit if the government possessed any knowledge of the fraud when the suit was filed. n30 The Amendments also provided a sixty day window after a case was filed for the government to elect whether to prosecute the action. If such an election was made, the relator became a mere observer with the Department of Justice making all strategic decisions. If the Department of Justice elected not to proceed, the relator could then do so in the name of the United States but at his sole expense. n31

The guaranteed 50% bounty of the double damages in the original statute was eliminated. In its place, the amended False Claims Act [*742] provided that in those qui tam cases prosecuted by the Government, the relator could receive no more than 10% of the proceeds of the action. If the Government declined prosecution and the relator successfully concluded the case, he could receive a maximum of 25% of the recovery. n32

Gordon Coates' Congressman had warned that the 1943 Amendments were an "infamous conspiracy, [a] subtle scheme to set aside the only guaranty that has lasted for 80 years against unmitigated frauds perpetrated upon the Government and to substitute in its stead a feeble statute that does nothing but paralyze the efforts of an honest informer." n33 And that is exactly what happened.

After the 1943 Amendments, the qui tam suit virtually disappeared as an effective weapon in combating fraud against the Government. The elimination of the guaranteed bounty and the reduction of the amount of the potential reward disincentivized citizens from using the False Claims Act. But what really killed such actions was the

government knowledge jurisdictional bar. Some Government official with knowledge of the fraud could always be found by an unscrupulous government contractor. Once this information was pointed out to the court, even if the government's knowledge had come from the whistle blowing relator himself, the court was required to dismiss the qui tam action. n34

While neither fraud against the United States nor lapses in effective prosecution of such conduct ceased after the 1943 Amendments, the use of the qui tam provisions died. n35 The handful of actions, which were brought were quietly dismissed. For over four decades the statute lie dormant, buried in the banking regulations of the United States Code.

We stumbled across this nearly extinct cause of action in 1984 while searching for a remedy for an honest Vietnam War veteran who refused to participate in a scheme by defense contractor General Electric [*743] Company to cheat the taxpayers on the B-1B bomber program. n36 The rare qui tam action we brought in 1984, which defense counsel described as "bounty hunting," produced the back drop for sweeping changes in the False Claims Act and the 1986 Amendments to it, signed by President Ronald Reagan.

With billions and billions of federal dollars being poured into defense contracts and government health subsidies in the 1980's, the opportunity for fraud upon the taxpayers proved overwhelming for many government contractors. While the media focused on outrageous examples such as $ 400 hammers, Congressional analysis demonstrated that government prosecutors were simply overwhelmed by the level of fraud now taking place. n37 With such high stakes involved, corporate giants easily outspent the resources of government prosecutors and investigators. Indeed, the United States General Accounting Office was forced to conclude that while most fraud went undetected, even that which was detected rarely resulted in prosecution or recovery for the United States: "[f]or those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . The sad truth is that crime against the Government often does pay." n38

Led by Senator Charles Grassley and Congressmen Howard Berman and Dan Glickman, a record was developed in both Houses of Congress demonstrating rampant government contractor fraud and abuse and the need for further assistance for government prosecutors. Highly decorated combat veterans John Gravitt and Robert Wityczak were subpoenaed by committees of both Houses to describe labor vouchering schemes to defraud the United States by defense contractors Rockwell International and the General Electric Company. n39 Both men described how they had been personally retaliated against for refusing to cooperate in the false vouchering schemes. In addition, Mr. Gravitt, who had the only qui tam case pending in the country while Congress debated amending the False Claims Act, described how his efforts to recoup the losses to the United States had been thwarted by government prosecutors who reached a sweetheart settlement with General Electric [*744] rather than vigorously pursue the fraud he divulged. n40 Congress was also amazed to realize that, based on the 1943 Amendments to the False Claims Act, any whistleblower who assisted the government before actually filing a qui tam action was automatically forever barred from bringing a qui tam action by the "any Government knowledge" jurisdictional bar. n41

Against this background, Congress passed and submitted to the President sweeping changes in the False Claims Act. These changes were designed to encourage greater use of qui tam actions with a goal of making fraud against the United States no longer a profitable enterprise. While the details of all of the changes to the False Claims Act are set out elsewhere, n42 please note that Congress demonstrated its goal of increased use of qui tam actions by increasing the penalty amounts recoverable, n43 adding to the statute a treble damages provision, guaranteeing awards to whistleblowers except in very limited situations, adding whistleblower protection for employees, n44 making the prevailing relator's attorneys fees recoverable from the government contractor n45 and expressly providing for a role for the relator to play even when the Department of Justice determines to prosecute the qui tam case itself. n46

The 1986 Amendments to the False Claims Act have produced spectacular results. In 1985, the year prior to the Amendments, the entire Department of Justice recovered roughly $ 26 million for fraud. By 1999, more than 3,000 qui tam suits had been brought recovering in excess of $ 3.5 billion. Acting Assistant Attorney General David Ogden has declared that the qui tam provisions of the False Claims Act "have provided a remarkable return for the tax payers of this country" and an [*745] "untold deterrent effect" upon those who would cheat the United States. n47

While more than $ 500 million has been paid to relators since the 1986 Amendments, very little has been written to provide assistance to courts and practitioners concerning how the amount of the relator's award should be calculated. There are five provisions of the False Claims Act which deal with the calculation of the relator's award. While these provisions establish the parameters of the calculation, they provide scant guidance for the exercise of a court's discretion within those parameters. For such guidance, legislative history is useful.

I. A Relator Criminally Convicted for Conduct Arising from a Violation of the False Claims Act Is Entitled to No Reward

While the concept of using "a rogue to catch a rogue" is firmly entrenched in the logic of the original False Claims Act, n48 Congress was not willing to let criminals profit from their violation of the False Claims Act. In 1988 Congress amended the Act to provide: "[i]f the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action." n49

This provision was added to avoid any criticism that the False Claims Act would enrich criminals by encouraging the "principal wrongdoers to file false claims actions solely motivated by the desire to profit from their own previous wrongdoing." n50 The Senate sponsor of the Amendment was concerned that the Act be clarified by expressly stating "that in an extreme case where the qui tam plaintiff is a principal architect of a scheme to defraud the Government, that plaintiff would not be entitled to any minimum guaranteed share of the proceeds of the action." n51

[*746]

Not permitting a relator-convicted criminally for participating in violating the False Claims Act-to benefit does not seem controversial. It does, however, raise important issues for the practitioner's first advice to a potential relator concerning obtaining immunity from prosecution before the relator blows the whistle to the Government. At least one court has determined that a relator who obtains immunity cannot qualify as an "original source" under the Act because information provided to the Government pursuant to a grant of immunity is not "voluntary." n52 Thus, while obtaining a grant of immunity may insure that the relator client is not later prosecuted and self-incriminated by coming to the Government with information of false claims, such action may well result in the relator's inability to claim a reward even though he is not criminally convicted.

It has been the author's experience that a careful analysis of the potential relator's role in the submission of false claims to the United States must be made before arranging for a client to blow the whistle to Government prosecutors. If some question exists concerning the extent of a client's participation in criminal conduct, a thorough explanation of the risks to the client is in order. Assuming the potential relator still wishes to go forward (and most do), we have enjoyed great success by engaging in a frank and complete discussion of the issue with the appropriate Government investigative agency. Such investigators do not generally burn their sources and can often be convinced that your client is not the mastermind of the fraud and is now trying to do the right thing by coming forward with information, which will stop the theft of government funds.

The next step is to meet with the prosecutor. No prosecutor will obtain immunity for someone without knowing what is being given in return. However, there is an intermediate protection, known as a "proffer," which allows a person to disclose their knowledge of a crime while limiting by contract the Government's ability to use such information to self-incriminate the discloser.

II. The Relator Who Plans and Initiates a False Claims Act Violation Has No Minimum Award Guaranteed and May Receive No More than a Ten Percent Share

In the 1988 Amendments to the False Claims Act, Congress also dealt with the Relator who is not criminally convicted, but does more than participate in the fraud:

[*747]

Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. n53

Thus, even masterminds of fraud upon the Government can receive awards for bringing a qui tam action if they are not criminally convicted for their conduct. The amount of the reward is not, however, guaranteed. Within the discretion of the court, the award could be zero.

Rewarding people for planning or initiating fraud against the United States may at first blush appear to be creating an incentive for chicanery. That is not, however, the intent, design, or application of the statute. Persons with the most knowledge of false claims are those most likely to have participated (to some degree) in the fraudulent scheme; the heaviest participants having the most knowledge. Congress was convinced that having such knowledge brought forth was the best manner to produce effective prosecutions and recoveries.

Using a "rogue to catch a rogue" and incentivizing the rogue to come forward and do so underscores the original purpose of the False Claims Act. n54 Senator Grassley commented,

[w]e were mindful...that in some cases, only persons who participated in the false claims practice will have knowledge of the actions. It has long been recognized in both criminal and civil enforcement circles that granting a participant some benefit is often a necessary evil in order to achieve a successful prosecution. The same is true under the False Claims Act." n55

Senator Grassley went on to point out that the 1988 Amendment would demonstrate that "Congress did not intend that the qui tam amendments would encourage individuals to first be a party to a false claims practice or fraud and later bring a qui tam action against other participants or their employer with the expectation of receiving a [*748] substantial share of the suit's recovery." n56 On the House side, Representative Berman similarly noted that the planning and initiating provision was designed to "allay any criticism that the False Claim [sic] Act will encourage principal wrongdoers to file false claims actions solely motivated by the desire to profit from their own previous wrongdoing." n57

The 1988 Amendment adding section 3730(d)(3) can best be seen as balancing the original purpose of providing a monetary temptation to participants in fraud to encourage them to inform on co-conspirators with providing the court authority to limit recoveries for the principal instigators of the fraudulent scheme. Under the sliding scale of awards contemplated by Congress, the basement is clearly occupied by those relators whose conduct has been so reprehensible as to lead to a criminal conviction of the relator or a determination by the trial judge that substantially rewarding the relator would do great injury to public policy.

Should the court determine that the relator both planned and initiated the submission of false claims to the United States, then the court must weigh the total role the relator played in advancing the recovery by the United States and any relevant circumstances concerning the violation of the False Claims Act. Factors reflecting the relator's role in advancing the case will differ, depending on whether the United States has assumed the prosecution of the case or left such task entirely to the relator.

Where the relator, unaided by the United States, has been successful in recovering funds for the United States, the court must be mindful that: 1) the goal of returning misappropriated federal funds has been attained and 2) that the need to encourage future bad actors to straighten themselves out and come forward will not be fostered by blanking the rogue relator. On the other hand, in a case where the United States has prevailed with little more than a tip from a principal wrongdoer, the court should not hesitate to substantially reduce or even eliminate a reward. Additional factors to assist the court in the exercise of its discretion are set forth below.

[*749]

III. When the United States Leaves the Relator and His Counsel to Prosecute the Case, the Relator Should Receive an Award Between 25% to 30% of the Amount Recovered

The United States elects not to intervene in approximately three of every four qui tam cases filed. While many of the non-intervened cases have been voluntarily dismissed with no recovery for the United States, other such cases have resulted in hundreds of millions of dollars in recoveries. n58 The scale in the non- intervened case is set forth at *31 U.S.C. § 3730*(d)(2):

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

Thus, in the non-intervened case, when the relator successfully recovers money for the United States, he is entitled to a minimum of 25% of the total amount of penalties and triple damages recovered. The only exceptions to this guarantee are discussed above concerning criminal convictions for violating the False Claims Act or for planning and initiating the fraud.

In most non-intervened cases the relator and the Department of Justice have reached agreement absent court intervention on the appropriate amount to award the relator. Since the Government has left the relator to go it alone in these cases with any money recovered by the United States being done with little or no expense or risk to the sovereign, the Department of Justice has often reached agreement near the high end of the range. The most recent statistics from the [*750] Department of Justice show the average relator's share in non-intervened cases is 26%. n59

In one well-known non-intervened case, the Department of Justice and relator were unable to agree on an appropriate award. In United States ex rel. Pedicone v. Mazak Corp., n60 a low-level accountant discovered that his employer, a Japanese-owned machine tool manufacturer, was defrauding the United States. Mazak Corporation was importing Japanese-made machine tools, replacing the Japanese labels with "Made in the U.S.A." labels, and then selling the machines to the United States Air Force.

Mr. Pedicone spent considerable time trying to get his employer to stop its violations of the Buy American Act. When those efforts failed, he spent considerable time trying to get the United States Customs Department to correct these acts. He was unsuccessful on both counts, but he did manage to get himself fired for his efforts.

After two years of waiting for his Government to take action, Mr. Pedicone brought a qui tam case. Ignoring the requirement of an election by the Government in the False Claims Act, the Department of Justice neither intervened in the case nor declined to take the case over. The court unsealed the case and Mr. Pedicone proceeded to prosecute it on behalf of the United States.

It was not an easy case to construct. Many of the documents were in Japanese, translators were scarce, and disagreed as to the meaning of key statements. Some thirty-one depositions were taken in the case; several of them were conducted with Japanese translators because Mazak executives, whose English seemed to be fine for other purposes, refused to be questioned except in Japanese. The depositions were taken in many different states as the witnesses were scattered by the international nature of the fraudulent scheme. The relator incurred the entire burden of this discovery because the Department of Justice refused to make any of the results of its investigation available to the relator and even instructed relator's counsel that he could not contact the Government auditors familiar withthe corporation's activities. But the Government did more than just fail to cooperate. In many instances, the Government made the relator's efforts to acquire discovery more difficult by insisting on overly restrictive protective orders, delaying document production for months, destroying relevant [*751] documents and producing unprepared Government employees for depositions-unrepresented by counsel-to be cross-examined by the defendant.

Despite such conduct, Mr. Pedicone successfully negotiated what was at the time a record settlement in a non-intervened qui tam case of $ 2.39 million plus substantial attorney fees, costs, and whistleblower retaliation charges. What would be an appropriate award?

The Department of Justice argued that the relator should recover only 27% of the settlement because the case was settled before trial. The trial court, however, rejected that argument and instead awarded the full 30% permitted by the statute. Judge Beckwith stated:

This Court does not find any support for the government's position that the qui tam Plaintiff's share should differ depending upon whether the case is settled or tried. In fact, the language of the statute makes no distinction in providing for a 25 to 30 percent share whether or not the matter is resolved without a trial.

The Court finds that the qui tam Plaintiff has pursued the action at considerable personal and professional expense to himself. An award of 30 percent of the settlement would encourage other potential whistleblowers to take risks similar to those taken by the qui tam Plaintiff in this matter to expose fraud against the United States. n61

In exercising her discretion to award the high end of the non-intervened scale to Relator Pedicone, Judge Beckwith was impressed with his dogged pursuit of an important matter not vigorously pursued by our Government and the

personal sacrifices Pedicone made, which included losing his job and home. The court also correctly noted that Congress intended to encourage whistleblowers to conduct themselves in the fashion Mr. Pedicone had and that by awarding the maximum permitted by the statute, she would be so doing. n62

IV. When the Government Does Intervene to Prosecute a Qui Tam Case, the Court Must First Determine the Basis of the Action

The one in four qui tam cases in which the United States does intervene and prosecute present a two step analysis for the court in calculating an appropriate relator's share. Before the court can weigh [*752] the substantiality of the contribution to the action by the relator, the court must first determine the basis of the action:

Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. n63

In those cases where the Government has proceeded with the action and the court does not find the action to be based primarily on the disclosure of specific information as enumerated above, then the court must award the relator at least 15% of the proceeds and can award as much as 25% of the proceeds "depending upon the extent to which the person substantially contributed to the prosecution of the action." n64

To understand what Congress has done, please remember the problem of the parasitical lawsuit that led to the 1943 Amendments with its devastating "any Government knowledge" jurisdictional bar. While Congress in 1986 eliminated the any Government knowledge jurisdictional bar, it attempted to limit truly parasitical lawsuits with two provisions: the no more than 10% limitation in section 3730(d)(1) and the public disclosure bar found in section 3730(e)(4)(A). n65 While these two provisions were drafted at different times and in different Houses of Congress, when read together, it becomes clear that they are designed to apply to different relators. The jurisdictional bar of section 3730(e)(4)(A) would bar the truly parasitical qui tam relator (that is, the non-original source who brought his action based on the enumerated public disclosures) from recovering any award unless the Government intervened to prosecute. Section 3730(d)(1) serves to limit the recovery only of those relators in whose case the Government did elect to proceed to no more than 10%, when it is determined that the relator's case is based primarily on specific information disclosed in the fashion [*753] enumerated in the statute and that the information was not provided by the relator to the disclosing entity.

The legislative history of how these two provisions were enacted demonstrates the accuracy of this analysis. To deal with the issue of parasitical suits, the initial House Amendments provided that a qui tam relator could proceed with a False Claims Act case that was based solely on public disclosure if the Government had been aware of the information for six months and had failed to act or if the Government had elected to intervene in the qui tam suit. n66 In addition, if the Government intervened and it was determined that the case was based solely on publicly disclosed information, the relator's award was to be capped at 10%. n67 The Senate version of the Amendments initially proposed a 10% cap to apply to both intervened and non-intervened cases where the action was "based solely on disclosures of specific information relating to allegations or transactions in a criminal, civil, or administrative hearing, a Congressional or Government Accounting Office report or hearing, or from the news media . . ." n68 No original source provision was contained in the initial version of the Senate Amendments. The commentary concerning this provision states that this

section:

...prohibits a suit based solely on previous public disclosures unless the Government has failed to act within 6 months of the public disclosure. The Committee recognizes that guaranteeing monetary compensation for individuals in this category could result in inappropriate windfalls where the relator's involvement with the evidence is indirect at best. However, in the event an action of this type results in a Government recovery, subsection (d)(4) provides that the court may award up to 10 percent of the proceeds, taking into account the significance of the information and the role of the person in advancing the case to litigation. The Committee believes a financial reward is justified in these circumstances if but for the relator's suit, the Government may not have recovered.

[*754]

On August 11, 1986, Senator Dole proposed amendments to Senate Bill 1562 on behalf of Senator Grassley. These amendments included changing the language in proposed *31 U.S.C. § 3730*(d)(4) so that the 10% cap applied to actions based "primarily" on disclosures of specific information relating to allegations or transactions disclosed publicly. n69 These amendments also introduce for the first time the original source provision. n70

Thus, the Senate dropped the six month waiting provision and replaced it with an original source provision. The Senate kept its 10% cap provision but changed it from application to cases based solely on public disclosure to cases based "primarily" on public disclosures. Senator Grassley made the following comments concerning the 10% capping provision:

The amendments also limit the possible portion of the judgment recoverable by a qui tam plaintiff to 10 percent or less when the action is based primarily on public information. This limitation will affect those persons who have brought a qui tam action based almost entirely on information of which they did not have independent knowledge but had derived from a public source. n71

On September 9, 1986, the House passed House Bill 4827. The House then amended Senate Bill 1562 by inserting the text from House Bill 4827 and passed Senate Bill 1562 as amended and tabled House Bill 4827.

The Senate then took a last crack at the bill on October 3, 1986. Senator Stevens offered Amendment No. 3214 on behalf of Senator Grassley. n72 That amendment contained the identical language in the 10% capping provision in the current statute as well as the original source provision. n73 Senator Grassley made the following comments concerning the 10% cap:

[*755]

The portion of awards allowed for such plaintiffs when the Government has entered the case is increased to 15-25 and 25-30 percent when the Government has not entered the action. When the qui tam plaintiff brings an action based on public information, meaning he is an "original source" within the definition under the act, but the action is based primarily on public information not originally provided by the qui tam plaintiff, he is limited to a recovery of not more than 10 percent. In other words a 10- percent cap is placed on those "original sources" who bring cases based on information already publicly disclosed where only an insignificant amount of that information stemmed from that original source. n74

On October 7, 1986, the House then passed the False Claims Act Amendments Act of 1986. That legislation contained the current 10% capping provision found in *31 U.S.C. § 3730*(d)(1), as well as the original source provision in

31 U.S.C. § 3730(e)(4). This legislation was described as a "compromise between the Senate and House Bills." n75 Representative Berman made the following comments, which he described as "legislative history for the record."

The final bill adopts the House version of the percentage of recovery provided for the person initiating the action. If the Government comes into the case, the person is guaranteed a minimum of 15% of the total recovery even if that person does nothing more than file the action in federal court. This is in the nature of a "finder's fee" and is provided to develop incentives for people to bring the information forward. The person need do no more than this to secure an entitlement to a minimum 15%. In those cases where the person carefully develops all the facts and supporting documentation necessary to make the case and presents it in a thorough and detailed fashion to the Justice Department as required by law, and where that person continues to play an active and constructive role in the litigation that leads ultimately to a successful recovery to the United States Treasury, the Court should award a percentage substantially above 15% and up to 25%. The only exception to this minimum 15% recovery is in the case where the information has already been disclosed and the person qualifies as an "original source" but where the essential elements of the case were provided to the government or news media by someone other than the qui tam plaintiff. In that case, the court may award up to 10% of the total recovery to the qui tam plaintiff. n76

An analysis of this legislative history led one court to conclude:

[*756]

The legislative history discloses that Congress included [§ 3730(d)(1)] to provide for "the case where the information has already been disclosed and the person qualifies as an 'original source' but where the essential elements of the case were provided to the Government or news media by someone other than the qui tam plaintiff." n77

The "disclosures of specific information" required by section 3730(d)(1) are not governed by the public disclosure standard of section 3730(e)(4), but by a more precise standard which requires disclosure of the "essential elements" of the case.

V. What to Consider in Establishing the Percentage of the Award

As we have seen, the court must first determine where the relator fits in the statutory scale. Criminally convicted relators get nothing. Relators who, though not convicted, were the masterminds of the false claims by planning and initiating the fraud fall into the zero to 10% range. Relators who based their qui tam suit primarily on publicly disclosed information for which they were not the discloser and in whose case the United States has elected to proceed also fall into the zero to 10% range. Those relators in whose case the United States has elected to proceed and whose case is not based primarily upon publicly disclosed information or is based on publicly disclosed information provided by the relator himself should receive between 15 and 25% of the recovery. Finally, the relator who successfully recovers money for the United States in a qui tam case in which the Government does not proceed is to receive between 25 and 30% of the recovery.

Within those ranges the statute provides scant guidance for the court. The court is instructed to consider the "extent to which the person substantially contributed to the prosecution of the action" in assessing the 15 to 25% range, n78 to award what is "reasonable" in the 25 to 30% range cases, n79 to award what the court "considers appropriate" by "taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation" in the primarily based upon public disclosure and intervened cases n80 and, finally, in the planning and initiating cases to take "into account the role [*757] of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation." n81

While such language clearly provides the court with broad discretion in setting the amount within the applicable range, the court should not lose sight of the fact that Congress increased the statutory recovery from the 10% unguaranteed cap in the 1943 version of the False Claims Act expressly to hold out the reward as an encouragement for qui tam suits to be brought. Thus, a court would be most consistent with Congressional intent to set awards near or at the higher end of the range than the lower end.

The Department of Justice has developed internal guidelines for use in analyzing an appropriate share for relators. These guidelines, for the most part, enjoy neither support in the legislative history nor from court opinions. Rather, the guidelines are a common sense approach to establishing a checklist for use in negotiations with relators and their counsel. The checklist is as follows:

The legislative history suggests that the 15 percent should be viewed as the minimum award-a finder's fee-and the starting point for a determination of the proper award. When trying to reach agreement with a relator as to his share of the proceeds, or proposing an amount or percentage to a court, we suggest that you begin your analysis at 15 percent. Then consider if there are any bases to increase the percentage based on the criteria set forth below. Having done this, consider if that percentage should be reduced based on the second set of criteria. Of course, absent one of the statutory bases for an award below 15 percent discussed at the end of these guidelines, the percentage cannot be below 15 percent (or 25 percent if we did not intervene).

Items for Consideration for a Possible Increase in the Percentage:

1. The relator reported the fraud promptly.

2. When he learned of the fraud, the relator tried to stop the fraud or reported it to a supervisor or the Government.

3. The qui tam filing, or the ensuing investigation, caused the offender to halt the fraudulent practices.

4. The complaint warned the Government of a significant safety issue.

5.The complaint exposed a nationwide practice.

6. The relator provided extensive, first-hand details of the fraud to the Government.

7. The Government had no knowledge of the fraud.

8. The relator provided substantial assistance during the investigation and/or pretrial phase of the case.

[*758]

9. At his deposition and/or trial, the relator was an excellent, credible witness.

10. The relator's counsel provided substantial assistance to the Government.

11. The relator and his counsel supported and cooperated with the Government during the entire proceeding.

12. The case went to trial.

13. The FCA recovery was relatively small.

14. The filing of the complaint had a substantial adverse impact on the relator.

Items for Consideration for a Possible Decrease in the Percentage:

1. The relator participated in the fraud.

2. The relator substantially delayed in reporting the fraud or filing the complaint.

3. The relator, or relator's counsel, violated FCA procedures:

4. Complaint served on defendant or not filed under seal.

5.The relator publicized the case while it was still under seal.

6. Statement of material facts and evidence not provided.

7.The relator had little knowledge of the fraud or only suspicions.

8.The relator's knowledge was based primarily on public information.

9.The relator learned of the fraud in the course of his Government employment.

10.The Government already knew of the fraud.

11.The relator, or relator's counsel, did not provide any help after filing the complaint, hampered the Government's efforts in developing the case, or unreasonably opposed the Government's position in litigation. n82

As noted above, one court has rejected the Department of Justice's view that a case must actually go to trial to command the top award. Another court in setting a $ 52 million award has rejected the Department of Justice's view that the size of the recovery is a significant factor with larger recoveries mandating smaller percentages than smaller recoveries:

. . . an Act of Congress provides for substantial awards in order that persons who acquire first-hand knowledge of false claims being presented to the Government will come forth and file meritorious qui tam complaints. The success of

this legislation in continuing to achieve its goals can only be assured by unstintingly providing the qui [*759] tam awards dictated by Congress, irrespective of the size of the awards. n83

In another case, the Department of Justice attempted to reduce the relator's share by arguing that the whistleblower had waited too long to bring the suit. In that case, which resulted in a record recovery for the United States, the court heard testimony that the whistleblower, who was on assignment in a foreign nation, was concerned that a high ranking foreign military officer who was at the center of the fraud would retaliate against anyone who came forward with incriminating evidence. Indeed, the officer pled guilty to hiring a hit man to harm another whistleblower who came forward. The court determined that the whistleblower's conduct in pursuing the case was exemplary, but did make a slight reduction (2 %) from the maximum percentage, due to the delay in coming forward. n84

In another case, the court noted the failure of the relator to cooperate with the Government as justifying a minimum 15% reward. The relator had opposed the Government's requests for time extensions and the proposed settlement and had delayed reporting the fraud until after he had retired from the defendant Government contractor. n85

Finally, there is one recent reported case in which the court determined that the only standard it had in determining the relator's share was "reasonableness," but did consider the guidelines set out by the Department of Justice. The court weighed the pros and cons of a relator who refused to make monitored phone calls to the defendants, waited until after defendants terminated him to report the false claims, made no effort to stop the fraud while an employee, and insisted upon criminal immunity before agreeing to speak with Government counsel. The court determined, however, that an award of 20% (the mid-point in this intervened case) was appropriate because relator's efforts were significant in bringing about a settlement. The relator had endured some personal and professional hardship, and the settlement of the case "could deter future instances of health care fraud." n86

To date, the Department of Justice has settled most relator share issues without intervention by the courts. I do not believe generosity by [*760] the Department of Justice accounts for this phenomenon. n87 By the time the relator's share issue is reached, many relators have already spent years complaining about or litigating the contractor's fraud. Another fight, about the amount of the relator's share with the very Government the relator has tried to assist, is both distasteful and difficult. The same Department of Justice lawyers who relied upon the whistleblower's assistance now must act to minimize the relator's contribution. We have even seen the convicted Government contractor assist the Department of Justice in seeking to reduce or eliminate the relator's share, n88 thus giving a modern twist on the historical practice of killing the messenger who brought the bad news to the king.

When the relator does receive a favorable ruling from the trial court, a lengthy and risky appeal may follow. Unlike all other litigants, the United States neither has to post a bond to appeal nor to pay interest on a judgment. One court, ignoring the plain language of the False Claims Act, has absolved the defendant of responsibility for paying the relator's attorneys fees expended on litigation over the relator's share. n89 All of these factors, plus the length and uncertainty of the appellate process n90 make it a rare relator who can withstand even an underwhelming offer from the Department of Justice. I suspect that such practical considerations have far more to do with the lack of judicial decisions concerning relator share amounts than the generosity of the Department of Justice.

If the courts are to carry out Congressional intent to encourage qui tam suits to be brought, n91 then attractive relator's shares should be [*761] awarded. With the triple damage provisions and the enhanced penalty provisions of the False Claims Act, even generous awards will still leave the United States more than whole. Ultimately, it is the wrongdoing contractor who is paying the relator's share. Thus, recovery of a full relator's share not only serves as an encouragement for citizens to file and prosecute qui tam actions, it would also serve as a disincentive for Government

contractors to cheat the United States. Although the 1986 Amendments to the False Claims Act have recovered billions for the taxpayers and reduced Government contracting fraud by several more billion dollars, there remains much to do. n92 Congress got it right in 1986. Now the courts should do so.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployer LiabilityFalse Claims ActCoverage & DefinitionsJurisdictional BarLabor & Employment LawEmployer LiabilityFalse Claims ActCoverage & DefinitionsQui Tam ActionsLabor & Employment LawEmployer LiabilityFalse Claims ActRemediesCivil Penalties

FOOTNOTES:

n1 The shorthand term qui tam is derived from the Latin phrase qui tam pro domino rege quam pro si ipso in hac parte sequiter which means he who sues on behalf of the king as well as for himself. See Black's Law Dictionary 1262 (7th ed. 1999).

n2 James B. Helmer, Jr., et al., False Claims Act: Whistleblower Litigation (Lexis 2d Ed. 1999). Fifteen years later, when the United States Supreme Court entertained argument on whether qui tam suits are constitutional, both defense counsel and Justices of the Supreme Court referred to such cases as bounty hunting. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens, 1999 WL 1134650,* at *5 (U.S. S. Ct. transcript of argument, Nov. 29, 1999).

n3 See James B. Helmer, Jr. & Robert C. Neff, Jr., War Stories: A History of the Qui Tam Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and their Application to the United States ex rel. Gravitt v. General Electric Co. Litigation, *18 Ohio N.U. L. Rev. 35 (1991).*

n4 The most recent Department of Justice statistics reflect that more than 3,000 qui tam suits have been filed since 1986 and that the United States has recovered more than $ 3.5 billion pursuant to such cases. See Justice Department Recovers Over $ 3 Billion in Whistleblower False Claims Act Awards and Settlements (visited Apr. 17, 2000) <http://www.usdoj.gov/opa/pr/2000/February/079civ.htm> [hereinafter Justice Department Recovers Over $ 3 Billion].

n5 To date, the largest qui tam recovery has been $ 385 million paid by Fresenius Medical Care for Medicare fraud. The Department of Justice agreed to pay the whistleblowers nearly $ 65.9 million of this recovery as an award. The Department of Justice also collected a record criminal fine of $ 101 million in the case. See Remarks of Eric H. Holder, Jr., Deputy Attorney General (visited Apr. 17, 2000) <http://www.usdoj.gov/dag/speech/nmichaelhealthremarks.htm>. Settlement of the Columbia/HCA False Claims Act cases, which should be completed by the end of 2000, is expected to reach nearly $ 1 billion. See Wall St. J., May 19, 2000.

n6 See J. W. Ehrlich, Ehrlich's Blackstone 545 (1959); *United States ex rel. Marcus v. Hess, 317 U.S. 537, 541 n.4 (1943)* ("[s]tatutes providing for actions by a common informer, who himself has no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in

this country ever since the foundation of our Government") (citation omitted).

n7 The first Continental Congress, which included as members drafters of our Constitution, enacted several qui tam statutes which did not restrict who could bring the action and provided for an equal sharing of any recovery between the Government and the relator. See Act of Mar. 1, 1790, ch. 2, § 3, *1 Stat. 101, 102* (census); Act of July 5, 1790, ch. 25 § 1, *1 Stat. 129* (extending census provisions as to Rhode Island); Act of July 20, 1790, ch. 29, §§ 1, 4, *1 Stat. 131, 133* (regulation of seamen); Act of July 22, 1790, ch. 33, § 3, *1 Stat. 137-138* (trade with Indians). See also Act of Feb. 20, 1792, ch. 7, § 25, *1 Stat. 232, 239* (Post Office); Act of Mar. 1, 1793, ch. 29, § 12, *1 Stat. 329, 331* (trade with Indians); Act of Mar. 22, 1794, ch. 11, §§ 2, 4, *1 Stat. 349* (slave trade) (applied in *Adams, qui tam v. Woods, 6 U.S. (2 Cranch) 336 (1805)).* Other statutes passed by the first Congress entitled an informer to share in a recovery with the United States but did not specify whether the informer could himself bring a suit. See Act of July 1, 1789, ch. 5, § 29, *1 Stat. 29, 45* (customs duties); Act of Sept. 1, 1789, ch. 11, § 21, *1 Stat. 55, 60* (registration of vessels); Act of Aug. 4, 1790, ch. 35, § 55, *1 Stat. 145, 173* (import and tonnage duties). Additional early Congresses also enacted qui tam statutes. See Act of Feb. 20, 1792, ch. 7, § 25, *1 Stat. 232, 239* (2d Cong.; Post Office); Act of Mar. 1, 1793, ch. 19, § 12, *1 Stat. 329, 331* (2d Cong.; trading with Indians); Act of Mar. 22, 1794, ch. 11 § 4, *1 Stat. 347, 349* (3d Cong.; foreign slave trade); Act of May 19, 1796, ch. 30, § 18, *1 Stat. 469, 474* (4th Cong.; trading with Indians); Act of May 3, 1802, ch. 48 § 4, *2 Stat. 189, 191* (7th Cong.; mail carriers); Act of Mar. 26, 1804, ch. 38, § 10, *2 Stat. 283, 286* (8th Cong.; Louisiana slave trade); Act of Mar. 2, 1807, ch. 22, § 3, *2 Stat. 426* (9th Cong.; slave trade). See also *Adams, qui tam v. Woods, 6 U.S. (2 Cranch) 336, 340 (1805)* ("Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt [by a qui tam plaintiff] as well as by information [by a public prosecutor].").

n8 Act of Mar. 2, 1863, ch. 67, *12 Stat. 696.* The False Claims Act was reenacted as §§ 3490-94 of the Revised Statutes, U.S. Rev. Stat. Title 36 §§ 3490-94 (1875), § 5438, id., Title 70, § 5438, which was later codified under §§ 231-235 of Title 31 of the United States Code, *31 U.S.C. §§ 231*-235 (1976), and finally recodified in 1982 under §§ 3729-3731 of Title 31 of the United States Code, *31 U.S.C. § 3729*-31 (1982).

n9 T. Lewis, The Guns of Cedar Creek 24 (1988).

n10 Reports of munitions filled with sawdust rather than explosives and boots made of cardboard rather than leather abounded. Cong. Globe, 37th Cong., 3d Sess. 955 (1863). Union soldiers opened crates of muskets, only to find them filled with sawdust instead of firearms. 132 Cong. Rec. 22,339 (1986) (Remarks of Rep. Berman). Michigan Senator Jacob M. Howard observed: The country, as we know, has been full of complaints requesting the frauds and corruptions practiced on obtaining pay from the Government during the present war; and it is said, and earnestly urged upon our attention, that further legislation is pressingly necessary to prevent this great evil; and I suppose there can be no doubt that these complaints are, in the main, well founded.Cong. Globe, 37th Cong. 3d Sess. 925 (1863).

n11 See Act of Mar. 2, 1863, ch. 67, § 4, *12 Stat. 696.*

n12 See id. § 3.

n13 See id. § 6.

n14 As one court noted in 1885: [The False Claims Act] is intended to protect the treasury against the

hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory...that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting...under the strong stimulus of personal ill will or the hope of gain.*United States v. Griswold, 24 F. 361, 366 (D. Or. 1885).*

n15 See generally S. Rep. No. 99-345, at 10-12 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5275-76.

n16 See id.

n17 See id.

n18 See *United States ex rel. Marcus v. Hess, 317 U.S. 537, 545 (1943).*

n19 See *Marcus, 317 U.S. at 540.* See also 89 Cong. Rec. 10,741 (1943) (remarks of Sen. Langer).

n20 *Marcus, 317 U.S. at 539.*

n21 *Id. at 546-47.*

n22 *Id. at 547, 552-53.*

n23 See 89 Cong. Rec. 10697 (1943) (remarks of Sen. Langer).

n24 See 89 Cong. Rec. 7570-71 (1943).

n25 See 89 Cong. Rec. 2800-01 (1943); see also 89 Cong. Rec. 10848 (1943) (remarks of Rep. Miller).

n26 See 89 Cong. Rec. 7578 (1943) (remarks of Sen. Langer).

n27 See 89 Cong. Rec. 2801 (1943) (remarks of Rep. Kefauver).

n28 The case of Gordon Coates demonstrates the perils of being a whistleblower. Mr. Coates' business had been the low bidder on a federal contract to supply building materials for an ordnance plant in St. Louis, Missouri. After its first shipment of materials, his company was displaced by another more politically connected company which had submitted its bid fourteen days after the bid deadline and at a cost exceeding Coates' proposal by more than $ 100,000. When the second contractor defaulted, Coates complained to the Attorney General. After nine months of getting the run-around, Coates brought a qui tam action. Coates was called as a witness before the Senate Judiciary Committee which was reviewing the House of Representatives' effort to abolish qui tam cases completely. When the Senate later rejected the House's attempt to nullify qui tam cases, Representative Costello, the Chairman of the House Military Affairs Committee made sure that Coates' selective service draft classification was re-classified to 1-A. See 89 Cong. Rec. 7572 (1943) (remarks of Sen. Van Nuys);

see also 89 Cong. Rec. 10,698- 99 (1943) (remarks of Sen. Langer). Rather than being a provider of war materials, it appears that Coates soon became a consumer of war materials.

n29 See Act of Dec. 23, 1943, ch. 377, *57 Stat. 608* (codified as amended at *31 U.S.C. § 232* (1976)).

n30 Id.

n31 Id.

n32 See id.

n33 89 Cong. Rec. 10,848 (1943) (remarks of Rep. Miller).

n34 See *United States ex rel. Wisconsin Department of Health & Social Services v. Dean, 729 F.2d 1100, 1103 (7th Cir. 1984); Safir v. Blackwell, 579 F.2d 742, 746 (2d Cir. 1978),* cert. denied, *441 U.S. 943 (1979); Pettis ex rel. United States v. Morrison- Knudsen Co., 577 F.2d 668, 669 (9th Cir. 1978); United States v. Aster, 275 F.2d 281, 283 (3d Cir. 1960),* cert. denied, *364 U.S. 894 (1960); United States ex rel. Lapin v. IBM Corp., 490 F. Supp. 244, 246 (D. Hawaii 1980).*

n35 "[I]t soon became apparent [after the 1943 Amendments] that by restricting qui tam suits by individuals who brought fraudulent activity to the government's attention, Congress had killed the goose that laid the golden egg and eliminated the financial incentive to expose frauds against the government." *United States ex rel. Findley v. FPC-Boron Employees' Club, 105 F.3d 675, 680* (D.C. Cir.), cert. denied, *522 U.S. 865 (1997).* See also *United States ex rel. Doe v. Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992)* (stating that the 1943 Amendments produced a "flaccid enforcement tool").

n36 See Helmer & Neff, supra note 3.

n37 See 132 Cong. Rec. 22340 (1986) (remarks of Rep. Bedell). See S. Rep. No. 99-345, at 7-8 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5272-73.

n38 S. Rep. No. 99-345 at 3, 1986 U.S.C.C.A.N. at 5268 (quoting GAO Report to Congress, Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled? (1981) (emphasis in original)).

n39 False Claims Reform Act: Hearing on S. 1652 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 99th Cong. 1st Sess. 49, 80 (1985), False Claims Act Amendments: Hearings Before the Subcommittee on Administrative Law and Government Relations of the House Judiciary Committee, 99th Cong., 2d Sess. 340-50 (1986). The author also testified before both Committees.

n40 False Claims Act Amendments: Hearings Before the Subcommittee on Administrative Law and Government Relations of the House Judiciary Committee, 99th Cong., 2d Sess. 340-50 (1986). See also *United States ex rel. Gravitt v. General Electric Co., 680 F. Supp. 1162, 1164* (S.D. Ohio), appeal dismissed, *848 F.2d*

190 (6th Cir.), cert. denied, *488 U.S. 901 (1988).*

n41 See *United States ex rel. Wisc. Dep't of Health & Soc. Services v. Dean, 729 F.2d 1100, 1103 (7th Cir. 1984); Safir v. Blackwell, 579 F.2d 742, 746 (2d Cir. 1978),* cert. denied, *441 U.S. 943 (1979); Pettis ex rel. United States v. Morrison- Knudsen Co., 577 F.2d 668, 669 (9th Cir. 1978); United States v. Aster, 275 F.2d 281, 283 (3d Cir. 1960),* cert. denied, *364 U.S. 894 (1960); United States ex rel. Lapin v. IBM Corp., 490 F. Supp. 244, 246 (D. Hawaii 1980).*

n42 See Helmer, supra note 2, at § 2.6(b)-(f).

n43 The 1986 Amendments increased the civil penalty per false claim from $ 2,000 contained in the original 1863 False Claims Act to not less than $ 5,000 and not more than $ 10,000 per false claim. *31 U.S.C. § 3729*(a) (1994). In accordance with the inflation adjustment procedures prescribed in Section 5 of the Federal Monetary Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, civil monetary penalties of not less than $ 5,500 and not more than $ 11,000 shall be imposed for violations of the False Claims Act occurring on or after September 29, 1999. See Adjustments to Penalties, *28 C.F.R. § 85.3(a)(9)*.

n44 See *31 U.S.C. § 3730*(h) (1994).

n45 See id. § 3730(d).

n46 See id. § 3730(c).

n47 See Justice Department Recovers Over $ 3 Billion, supra note 4.

n48 The effect of [rewards] is simply to hold out to a confederate a strong temptation to betray his co-conspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator . . . [the bill is based] upon the old-fashioned idea of holding out a temptation and "setting a rogue to catch a rogue," which is the safest and most expeditious way I have discovered of bringing rogues to justice.Cong. Globe, 37th Cong., 3d Sess. 955-56 (remarks of Sen. Howard).

n49 *31 U.S.C. § 3730*(d)(3).

n50 34 Cong. Rec. H10,641 (daily ed. Oct. 20, 1988) (Statement of Rep. Berman).

n51 134 Cong. Rec. S16,704-05 (daily ed. Oct. 18, 1988) (Statement of Sen. Grassley)

n52 *United States ex rel. Clay v. Amwest Sav. Ass'n, 999 F. Supp. 852, 857 (N.D. Tex. 1997).*

n53 *31 U.S.C. § 3730*(d)(3) (1994).

n54 CONG. GLOBE, 37th Cong., 3rd Sess. 955-56 (1863) (comments of Senator Howard, sponsor of the original qui tam provisions in the False Claims Act). See also S. Rep. No. 345 at 4 (1986) (Act designed to encourage "the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity").

n55 134 Cong. Rec. S16, 705 (daily ed. Oct. 18, 1988).

n56 Id.

n57 134 Cong. Rec. H10,641 (daily ed. Oct. 20, 1988).

n58 The Department of Justice maintains its statistics in a curious fashion which makes it impossible to know how many dollars have actually been recovered in non-intervened cases. The Department of Justice counts dollars recovered in cases in which it wanted to intervene-but did not do so-as dollars recovered in intervened cases. In this manner, the amount of dollars recovered by the United States in intervened cases has been inflated by the Department of Justice and the amount of money recovered by qui tam relators without intervention has been greatly underestimated. The problem with keeping statistics in this misleading fashion, is that it incorrectly allows opponents of the qui tam provisions to point to Department of Justice statistics and argue that there is no need for allowing a qui tam case to proceed if the Government elects not to intervene in it. For an example of a commentator unaware of the inaccuracies in the Department of Justice's statistics making just such an argument, see Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, *78 N.C. Law Rev. 539, 617, 623 (2000).* In any event, even the Department of Justice with its misleading statistics acknowledges that relators have recovered in excess $ 211 million in non-intervened cases. See Justice Department Recovers Over $ 3 Billion, supra note 4.

n59 See id. This percentage will likely be higher when the Department of Justice includes the relator's share in United States ex rel. Boisvert v. FMC, Inc., in which the relator successfully obtained a huge jury verdict.

n60 *807 F. Supp. 1350 (S.D. Ohio 1992).* This case was the subject of extensive media coverage including an award- winning three-part segment by Cincinnati's WCPO and nationally by the CBS program, Sixty Minutes. The author was trial counsel in this case.

n61 *Id. at 1353.*

n62 Accord *United States ex rel. Fox v. Northwest Nephrology Associates, P.S., 87 F. Supp. 2d 1103, 1111-1112 (E.D. Wash. 2000)* (maximum award can be made in rare cases which do not go to trial).

n63 *31 U.S.C. § 3730*(d)(1) (1994).

n64 Id.

n65 The original source and public disclosure provisions of § 3730(e)(4)(A) have produced numerous conflicting judicial interpretations which have led to at least a four way conflict of interpretation by the various

Courts of Appeal. See Frederick M. Morgan, Jr. & Julie Webster Popham, The Last Privateers Encounter Sloppy Seas: Inconsistent Original Source Jurisprudence Under the Federal False Claims Act, *24 Ohio N.U. L. Rev. 163 (1998).*

n66 H.R. 4827 proposing *31 U.S.C. § 3730*(5) (June 26, 1986).

n67 H.R. Rep. No. 660, 99th Cong., 2d Sess. 23 (1986) explained the provision: H.R. 4827 contains a provision which states that a qui tam action which is based solely on public information, such as Congressional hearing, the news media, or criminal indictments, shall be dismissed. However, if the Government has had the information for six months before the qui tam action was filed, the section provides that the qui tam suit shall not be dismissed solely because the Government has not brought the case. As an additional deterrent to unwarranted suits, the bill also provides that when a qui tam suit is based solely on public information, the award available to the relator may not exceed 10%. This limitation applies only to qui tam cases in which the Government enters the suit.

n68 Senate Bill 1562, S. Rep. No. 345, 99th Cong., 2d Sess. 16 (1986).

n69 See 132 Cong. Rec. 20,531 (daily ed. Aug. 11, 1986).

n70 See *31 U.S.C. § 3730*(e)(5) (1994) (as proposed in 132 Cong. Rec. 20531).

n71 132 Cong. Rec. 20,536 (daily ed. Aug. 11, 1986). That version of the 10% cap being discussed by Senator Grassley was very similar to the provision eventually enacted except that it applied to both intervention and non-intervention cases. It provided: Where the persons brought an action based primarily on disclosures of specific information relating to allegations or transactions in a criminal, civil, or administrative hearing, a congressional or Government Accounting Office report or hearing, or from the news media, the court may award such sums as it deems appropriate, not to exceed 10 percent of the recovery and taking into account the significance of the information and the role of the person in advancing the case to litigation.

n72 See 132 Cong. Rec. 28,575 (daily ed. October 3, 1986).

n73 See id at 28,576.

n74 132 Cong. Rec. 28,580 (daily ed. Oct. 3, 1986) (statement of Sen. Grassley) (emphasis added).

n75 132 Cong. Rec. 29,321 (daily ed. Oct. 7, 1986)

N76 132 Cong. Rec. 29,322 (daily ed. Oct. 7, 1986) (statement of Rep. Berman) (emphasis added).

n77 *Federal Recovery Services, Inc. v. United States, 72 F.3d 447, 452 (5th Cir. 1995)* (quoting 132 Cong. Rec. H9389 (statement of Rep. Berman)).

n78 *31 U.S.C. § 3730*(d)(1) (1994).

n79 Id. § 3730(d)(2).

n80 Id. § 3730(d)(1).

n81 Id. § 3730(d)(3).

n82 Reprinted in Helmer, supra note 2, at § 14- 2(f).

n83 *United States ex rel. Merena v. SmithKline Beecham Corp., 52 F.Supp.2d 420, 450 (E.D. Pa. 1998),* rev'd on other grounds, *205 F.3d 97 (3d Cir. 2000).*

n84 See *United States ex rel. Taxpayers Against Fraud v. General Electric Co., 808 F. Supp. 580 (S.D. Ohio 1992),* appeal on other issues, *41 F.3d 1032 (6th Cir. 1994).* The author was trial counsel for the relators in this case.

n85 See *United States ex rel. Coughlin v. IBM Corp., 992 F. Supp. 137 (N.D.N.Y. 1998).*

n86 *United States ex rel. Fox v. Northwest Nephrology Associates, P.S., 87 F.Supp.2d 1103, 1114 (E.D. Wash. 2000).*

n87 See Helmer, supra note 2, at § 1-4.

n88 See *General Electric Co., 41 F.3d at 1045-46.*

n89 See id. General Electric is a good example of the wisdom of settlement. Although awarded a 22 1/2% share of a $ 59.5 million recovery by the trial court, the relator settled with the Department of Justice while the Department of Justice's appeal was pending for $ 1.5 million less than what the trial court had awarded him.

n90 A relators' award of 17%, totaling $ 52,049,126 of a $ 333,976,266 recovery, was recently overturned by a Court of Appeals, leaving in doubt the relators' ability to recover any share. See *United States ex rel. Merena v. SmithKline Beecham Corp., 205 F.3d 97 (3d Cir. 2000).* The conduct of the relators in that case was described as exemplary by the trial judge, the F.B.I., and the U.S. Attorney's Office. The message sent to other potential relators by the Department of Justice's successful appeal would seem to be twofold: first, either do not bother with bringing a qui tam action, and second, if you do, accept whatever is offered by the Department of Justice as a reward. Neither message is consistent with Congressional intent.

n91 S. Rep. No. 99-345, at 23-24 (1986) (False Claims Act Amendments were "designed to encourage more private enforcement suits."). See also *United States ex rel. Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 538 (10th Cir. 2000)* (describing a main goal of the FCA "to encourage individuals who know of government fraud to come forward with that information"); *United States ex rel. Prawer & Co. v. Fleet Bank of Maine, 24*

F.3d 320, 327 (1st Cir. 1994): Clearly, the 1986 Amendments, insofar as they were responding to a regime in which the preclusion of opportunistic litigation was too heavily weighted, had as perhaps their central purpose an expansion of opportunities and incentives for private citizens with knowledge of fraud against the government to come forward with that information. Id. See also *United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994)* (stating that the False Claims Act seeks to provide "adequate incentives for whistle-blowing insiders with genuinely valuable information" to help uncover frauds perpetrated on the Government).

n92 See Remarks of Eric H. Holder, Jr., Deputy Attorney General (visited Apr. 17, 2000) http://www.usdoj.gov/dag/speech/nmichaelhealthremarks.htm (noting that medicare fraud has been cut by $ 11 billion through the vigorous use of the False Claims Act, but still remains at $ 12 billion annually).