UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA, ex rel., WILLIAM ST. JOHN LACORTE, M.D.,	*	CIVIL ACTION
	*	NO. 99-3807
Plaintiffs,	*	SECTION "I" (4)
v.	*	
MERCK & CO., INC.,	*	
Defendants.	*	

BRIEF OF TAXPAYERS AGAINST FRAUD EDUCATION FUND AS *AMICUS CURIAE*

INTRODUCTION AND INTEREST OF TAXPAYERS AGAINST FRAUD EDUCATION FUND

Taxpayers Against Fraud Education Fund ("TAF") is a nonprofit, tax-exempt organization dedicated to preserving effective anti-fraud legislation at the federal and state levels. The organization has worked to publicize the *qui tam* provisions of the False Claims Act, has participated in litigation as a *qui tam* relator and as *amicus curiae*, and has provided testimony to Congress about ways to improve the Act. TAF has a profound interest in ensuring that the Act is appropriately interpreted and applied. TAF strongly supports vigorous enforcement of the Act based on its many years of work focused on the proper interpretation and implementation of the Act.

In a February 11, 2008 ORDER in the above-captioned matter, the Court ordered the United States, the States, and the Relator to "submit memoranda regarding a) whether the Court has discretion to depart from the amount of relator's share when relator's share has been agreed upon between the federal and/or state government and the relator; and b) assuming it has such discretion, whether the Court may order an amount below 15%." February 11, 2008 Order, at 2 (Docket # 160). In accordance with its interests in continued proper interpretation of the False Claims Act, TAF hereby submits this brief, as *amicus curiae*, in response to the Court's questions.

ARGUMENT

I. In this Instance, the False Claims Act Does Not Confer Jurisdiction Over the Question of the Amount of the Relator's Share

Only one provision of the False Claims Act confers jurisdiction to courts for the purpose of reviewing and approving the terms of agreements that settle False Claims Act cases – including the settlement terms that establish the amount of the relator's share of the proceeds. That provision – 31 U.S.C. § 3730(c)(2)(B) – states that "[t]he Government may settle the action with the defendant *notwithstanding the objections of the person initiating the action* if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B) (emphasis added). It is unclear from the plain language of the statute whether courts are authorized to determine the fairness, adequacy, and reasonableness of False Claims Act settlements *only* when the relator objects, or whether courts retain such authority regardless of whether the relator objects. Neither the legislative history nor existing case law provides insight or guidance in resolving this question.

However, it seems clear that the purpose of section 3730(c)(2)(B) is to prevent relators from objecting to settlements of False Claims Act cases until the percentage of their respective

relator's share is increased, thereby unnecessarily interfering with the settlement process. But when the relator has consented to the settlement of a False Claims Act case and offers no objection, the need for additional judicial oversight dramatically decreases. Therefore, the False Claims Act only confers jurisdiction over the fairness of settlements in cases in which the relator objects to the settlement; only in such cases does the need for the hearing discussed in section 3730(c)(2)(B) arise. Conversely, in situations in which the Government, the defendant, and the relator all agree to the terms of the settlement – including the amount of the relator's share of the proceeds – then courts are without authority to review such settlements for fairness, adequacy, and/or reasonableness.

In the event that the Court finds a basis for reviewing settlements that have been presented without objection, we have submitted briefing on the Court's second question below.

II. In this Instance, the Court Does Not Have Discretion to Reduce the Relator's Share to an Amount Below the Statutorily-Mandated 15%

A. The Act explicitly establishes 15% as the minimum relator's share under these circumstances.

The False Claims Act provides that, when the United States government intervenes in a *qui tam* action and succeeds in obtaining a recovery, the relator "shall . . . receive *at least 15 percent* but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d)(1) (emphasis added). Notably, the Act states that the relator "shall" receive at least 15% of the proceeds, which explicitly establishes 15% as the very minimum amount of the relator's share, regardless of the amount of money that 15% translates to.[1]

[1] The False Claims Act does not include a dollar amount cap on the size of a relator's award. As one federal district court stated, "Congress did not establish 'a sliding scale to graduate the available percentages as the size of the

To be sure, the False Claims Act denotes the only circumstances under which a relator's share can dip below the statutorily-required 15% minimum. First, the Act provides that

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

31 U.S.C. § 3730(d)(1). This provision does not apply here, where the Court has not found the action to be based on information previously disclosed through a hearing, report, audit, investigation or the news media. Thus, in this case, section (d)(1) of the Act does not provide the Court with a statutory basis to reduce the amount of the relator's share below 15%.

Second, the Act provides that

> 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. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action.

31 U.S.C. § 3730(d)(3). Again, in this case, the Court has not found that the relator planned and/or initiated the False Claims Act violation, nor has the relator been convicted of any criminal conduct arising from a role in the violation. Therefore, the provisions of section (d)(3) do not

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recovery increases . . . . [T]he conspicuous absence of an explicit cap or mechanism to taper the available percentage argues forcefully against the government's position that the size of the recovery is a factor warranting consideration.'" U.S., ex rel., Johnson-Pochardt v. Rapid City Reg. Hosp., 252 F. Supp. 2d 892, 897 (D.S.D. 2003), *quoting* U.S., ex rel., Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323, 1335, n.37 (M.D. Fla. 2001). In U.S. ex rel., Johnson-Pochardt, the court made clear that the relator "and her attorneys deserve compensation that correlates to their significant contribution rather than a reduced amount due to the size of the settlement." 252 F. Supp. 2d at 903.

provide the Court with a statutory basis for reducing the amount of this relator's share below 15%.

B. The legislative history supports a minimum award of 15%.

The legislative history of the 1986 amendments to the False Claims Act makes clear that the minimum 15% relator's share is a floor, noting that a 15% share should be paid "even if [the relator] does nothing more than file the action in federal court." 132 Cong. Rec. H9382-03 (Oct. 7, 1986) (statement of Rep. Berman). In fact, when the Act was amended in 1986, specific measures were taken to increase the minimum percentage of a relator's share to 15% – the Act had previously only stated that relators could receive up to a 10% share, which allowed for the possibility that relators could receive a *zero percent* share. Congress recognized the need to incentivize whistleblowers to come forward, and decided to guarantee relators some share of the proceeds from successfully prosecuted False Claims Act cases. The Senate Report discussing the 1986 amendments to the False Claims Act notes that "[i]f a potential plaintiff reads the [pre-1986] statute and understands that in a successful case the court may arbitrarily decide to award only a tiny fraction of the proceeds to the person who brought the action, the potential plaintiff may decide it is too risky to proceed in the face of a totally unpredictable recovery."[2] S. Rep. No. 99-345, at 28, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5293.

Moreover, the United States Department of Justice has consistently recognized the 15% minimum in enforcing the False Claims Act. Indeed, the United States Department of Justice has published the internal guidelines it relies upon when recommending the percentage of recovery a relator should receive. Those guidelines reiterate that a 15% recovery "should be

[2] As is reflected in Senate Report 99-345, the Senate originally sought to establish a 10% minimum award to relators who qualified under section 3730(d)(1). However, Congress presumably determined that a guaranteed 10% share of the proceeds was insufficient to incentivize whistleblowers to come forward and, as a result, the final amendments to the Act include a minimum 15% relator's share.

viewed as the minimum award - a finder's fee - and the starting point for a determination of the proper award." Department of Justice "Relator's Share Guidelines," December 10, 1996.

As was noted in U.S. v. General Elec., 808 F. Supp. 580, 584 (S.D. Ohio 1992), "[w]histleblowers in general perform services to the United States. It is at least naïve to believe that an appeal to 'patriotism' alone will cause disclosures of fraud. The Congress of the United States has determined that whistleblowing should be encouraged by monetary rewards." As noted above, in 1986, Congress established a 15% minimum award to incentivize whistleblowers to come forward and expose fraud against the United States government. The Court does not have discretion to depart from congressional intent in this regard.

C. The case law supports a minimum award of 15%.

We have found several cases involving 31 U.S.C. § 3730(d)(1), in which federal courts have been asked to resolve disputes between the government and a relator over the percentage of a relator's share. However, in none of those cases did a court reduce a relator's share below the 15% statutory minimum. In fact, in most of those cases, the various courts recognized the fact that the 15% minimum cannot be reduced, unless one of the exceptions listed in section II(A), *supra*, is present. See e.g., U.S., ex rel. Johnson, 252 F. Supp. 2d at 897, *citing* U.S., ex rel. Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323, 1331 (M.D. Fla. 2001) (court noted that "[a] 15 percent minimum share is usually considered a finder's fee"); U.S., ex rel. Fox v. Northwest Nephrology Assocs., P.S., 87 F. Supp. 2d 1103, 1112 (E.D. Wash. 2000) (court awarded relator a 20% share after concluding that "he is clearly entitled to an award in excess of the minimum 15%"); U.S., ex rel. Burr v. Blue Cross & Blue Shield of Fla., Inc., 882 F. Supp. 166, 169 (M.D. Fla. 1995) (court was obligated to award relator a 15% share of the proceeds

even after determining that "although the Relator may have initiated this action, her contribution to the successful settlement of this matter was minimal at best").

Consistent with the existing case law, the relator in this case is entitled, at a minimum, to a 15% share of the proceeds of this action. The Court is without authority to reduce the relator's share below that amount.

CONCLUSION

With respect to the Court's first question, the Court is without authority to review the terms of the settlement for fairness, adequacy or reasonableness, since all interested parties have agreed to the terms of the settlement.

With respect to the Court's second question, there is no statutory basis or legal precedent for the Court to take the extraordinary measure of reducing the relator's share below 15 %, since the action was not primarily based on previously disclosed information, the relator did not plan or initiate the False Claims Act violation, and the relator was not criminally convicted for playing a role in that violation.

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