CASE NO. 07-1485(L)
IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA *ex rel.*
BRUCE G. LOWMAN, M.D.,

Plaintiff-Appellant,

v.

HILTON HEAD HEALTH SYSTEM, L.P., *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of South Carolina
Beaufort Division
The Honorable Patrick Duffy

BRIEF *AMICUS CURIAE* OF TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF APPELLANT AND REVERSAL

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 4th Cir. R. 26.1, *Amicus Curiae* Taxpayers Against Fraud Education Fund makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?
   No
2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome?
   No

_____ _____

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

In 1986, after a General Accounting Office report detailed rampant fraud draining the U.S. Treasury, the United States Congress revitalized the federal False Claims Act (FCA), enlisting private citizens to guard federal funds from fraudfeasing individuals and corporations. In the twenty years since these amendments, FCA whistleblower, or *qui tam*, suits have become the primary weapon against fraud, returning nearly 80% of all dollars recovered under the FCA during the most recent fiscal year. Thankfully for the federal fisc, courts have largely honored the underlying congressional intent and broadly interpreted the provisions of the FCA. In the case at bar, however, a 2007 South Carolina district court constricted the language of the FCA tolling provision, greatly reducing the time that a *qui tam* relator could bring an action against a fraudfeasor.

Taxpayers Against Fraud Education Fund is a nonprofit public interest organization dedicated to combating fraud against the U.S. Treasury through the promotion of the *qui tam* provisions of the False Claims Act. It has a profound interest in ensuring that the laws are appropriately utilized. The issue here is the applicability of the FCA three-year tolling provision to *qui tam* actions and whether the tolling period commences when the relator or a certain government official learns of the underlying fraud. The decision below gravely undermines the efficacy of the FCA in policing fraud, because it greatly shortens the statute of limitations period for a large percentage of *qui tam* actions.

STATEMENT OF THE ISSUE

Whether the district court erred in ruling that the False Claims Act's three-year tolling period commences when the private citizen-relator discovers the fraud.

SUMMARY OF THE ARGUMENT

This case presents the question of whether the False Claims Act's statute of limitations provision means what it says. If an alleged False Claims Act (FCA) violation occurred more than six years ago, an FCA action may still be brought if it is filed within three years of 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 no more than ten years after the date the violation was committed. 31 U.S.C. § 3731(b)(2) (emphasis added). Despite this plain language, the court below, relying on a single decision of a distant circuit, concluded that this three-year tolling period commences upon the date of discovery of the fraud "*by the qui tam relator.*"

Section 3731(b)(2) unambiguously provides that the three-year tolling provision applies to all FCA actions and is triggered by knowledge of an official of the victim government, not by knowledge of a private *qui tam* relator. While the court need look no further than the statute's plain text, that reading is also consistent with the overall structure and purpose of the statute. The statute seeks to enhance the government's ability

to fight fraud by drawing on the knowledge and resources of private citizens with information about fraud. When a dishonest corporation is able to mask its fraudulent activity for over six years, the tolling provision encourages private citizens to still bring information about fraud to the government's attention, knowing that the government will still have three full years to consider and investigate their allegations.

In contrast, the lower court's interpretation of section 3731(b) both contravenes the plain text of the FCA and undermines its effectiveness by dramatically curtailing the pool of individuals who would be eligible to bring a case on the government's behalf. Contrary to the lower court's impression, a whistleblower who promptly files an action as soon as he discovers the fraud is the exception, not the rule. The majority of whistleblowers bring cases only after having endured years of frustration from trying to get their employer to address the problem, having lost their job in the process. As courts and commentators have recognized, such individuals face the "Hobson's choice" of remaining silent and thereby becoming an unwilling participant in the unlawful conduct, or speaking out and further risking careers, financial stability, and personal relationships. And even once such an individual chooses to speak out, he or she must still learn of the False Claims Act, identify lawyers who handle these cases, and persuade a lawyer to take the case. Whistleblowers must often navigate these unfamiliar waters while also trying to put their lives back together. Congress was fully aware of these realities, and it is therefore unsurprising that, in the case of the fraudfeasor who successfully hides its

misconduct for six years, it would provide that the tolling provision not only applies to FCA *qui tam* actions, but that is measured by the victim government's knowledge of the fraud.

Congress meant what it said when it provided that, when a fraudfeasor conceals its misconduct for more than six years, an FCA action is still timely filed as long as it is brought within three years of "the official of the United States charged with responsibility to act in the circumstances" understanding the fraud. The lower court's interpretation both ignores the plain language of the statute and undermines one of its central purposes. This court should reverse.

ARGUMENT

THE DISTRICT COURT ERRED IN RULING THAT THE FALSE CLAIMS ACT'S THREE-YEAR TOLLING PERIOD COMMENCES NOT WHEN A STATUTORILY PRESCRIBED GOVERNMENT OFFICIAL LEARNS OF THE FRAUD BUT, INSTEAD, WHEN A PRIVATE CITIZEN-RELATOR UNCOVERS THE FRAUD.

This case presents a question of statutory interpretation, the purpose of which is to ascertain and give effect to the intent of the legislature. "[W]hen the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms." *Lamie v. United States Tr.,* 540 U.S. 526, 124 S.Ct. 1023, 1030, 157 L.Ed.2d 1024 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. 1, 6, 120 S.Ct. 1942, 1947, 147 L.Ed.2d 1 (2000)). The language should be given its usual and ordinary meaning, and courts should

"not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48, 114 S.Ct. 655, 662-63, 126 L.Ed.2d 615 (1994). When the language of a statute is reasonably susceptible to more than one meaning, a variety of extrinsic aides, including the statutory scheme, the apparent purposes underlying the statute, and the legislative history, may be considered in an effort to discern the legislature's intended meaning. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 808-09, 109 S.Ct. 1500, 1504-05, 103 L.Ed.2d 891 (1989).

A. The District Court's Interpretation Ignores The Plain Meaning Of The False Claims Act, Which Provides That The Three-Year Tolling Period Is Triggered By Knowledge Of A Government Official, Not Knowledge Of A *Qui Tam* Relator.

The plain language of section 3731(b)(2) specifies that the three-year tolling period commences only upon discovery of the fraud by certain government officials. Section 3731(b) states that:

> A civil action under Section 3731 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 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.

31 U.S.C. 3731(b) (emphasis added). This section describes two relevant time periods for the initiation of any civil action under section 3731. First, as a general rule, an action may

not be commenced more than six years after the violation was committed. Second, however, when a fraudfeasor has been able to evade detection for over six years, the action may still be filed, as long as it is filed within three years of when "***the official of the United States charged with responsibility to act in the circumstances"*** knew or should have known about the fraud.

Section 3731(b) unambiguously provides that the three-year tolling period commences when "the official of the United States charged with responsibility to act in the circumstances" knows or should have known about the fraud. The phrase "the official of the United States charged with responsibility to act in the circumstances" is not subject to more than one interpretation with respect to whether the person whose knowledge is relevant must be an official of the government. The term "official" ordinarily means "a person holding office, esp[ecially] public office." (*Webster's New World Dictionary of the American Language* (D. Guralnik, ed., 2d ed. 1980), at p. 988.) A relator does not hold an office, but rather is authorized to initiate a single lawsuit on the government's behalf. *See United States ex rel. Kelly v. The Boeing Co.*, 9 F.3d 743, 758 & fn. 21 (9th Cir. 1993).

Reaching outside of the circuit to embrace the rationale behind *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996), the court below found ambiguity in the phrase "the official of the United States charged with responsibility to act in the circumstances," based on the FCA's *qui tam* provisions, which authorize the

qui tam relator to stand in the shoes of the government for purposes of pursuing the government's fraud claim. In the court's view, this structure suggests that the relator is essentially deemed a government official, because the relator prosecutes the case on the government's behalf. Merely permitting a private citizen to bring a lawsuit on behalf of the government, however, does not automatically transmute that individual into a government official. Before the relator's suit can even go forward, the relator is required to give actual government officials the opportunity to pursue the government's claim, and it is only if those officials decline that the relator may go forward on his own. *See United States ex rel. Salmeron v. Enterprise Recovery Systems, Inc.*, 2006 U.S. Dist. LEXIS 86977 (N.D. Ill. 2006) (rejecting argument that the relator's ability to file suit transforms the relator into an official of the United States.) Apart from having the ability to file a *qui tam* action, a relator has none of the other crucial authority or power at the disposal of government officials, such as the pre-litigation authority to investigate by issuing a subpoena, the ability to execute a search warrant, conduct consensual monitoring, administratively audit, or conduct interviews under the threat of criminal sanctions for false statements -- all of which powers put true government officials in a far better position than a relator to file suit within 3 years of first obtaining knowledge of a scheme.

Moreover, even if the court's highly expansive reading of the term "official" were plausible, the statute does not refer simply to an "official." The statute specifies the official "charged with responsibility to act in the circumstances." The phrase

"responsibility to act" suggests some type of obligation. *See Websters New World Dictionary, supra,* at p. 1211 (defining responsible as involving "obligation" or "accountability".) The relator cannot be the official "charged with responsibility to act in the circumstances." A relator, who can be any person with knowledge of the fraud, has *no* obligation to act. The FCA *authorizes* a person with knowledge of the fraud to bring a case in the government's name, but it does not require any one to do so. *Compare* 31 U.S.C. § 3730(a) ("The Attorney General diligently *shall* investigate violations under section 3729") *with* U.S.C. 3730(b)(1) ("A person *may* bring a civil action for a violation of section 3729 for the person and for the United States Government) (emphasis added).

The lower court, convinced that Congress really intended to tie to the tolling provision to *qui tam* relator's knowledge, offered a host of excuses for disregarding the plain meaning of the Act. In particular, the lower court viewed the plain meaning of the section as allowing a relator who was aware of fraud to delay bringing a case for ten years, allowing damages to increase and fraud to go unaddressed. But reading the statute as written would not lead relators to intentionally delay filing for ten years as the court speculated. The FCA contains a number of provisions that specifically address potential opportunistic behavior by relators and that make unwarranted delay on the part of a relator a risky proposition. For example, section 3730(b)(5) precludes any person from bringing an action under the FCA if another person has brought an action based on the same underlying facts. Similarly, section 3730(e)(4) precludes a *qui tam* action based on

fraud allegations or transactions that have been publicly disclosed in one of the ways specified in the statute, unless the relator was an original source of the information. Finally, section 3730(e)(3) precludes an action based on allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the government is already a party. Thus, a dilatory relator could be barred by another relator, a public disclosure, or a government action, providing ample incentive to come forward without undue delay.[1]

In addition to these provisions, which could bar a relator from proceeding at all, the relator's share of any recovery may be affected by purposeful delay. A court has some discretion to take into account the contribution of the relator, which could include both the positive and negative effects of the relator's role. *See* 31 U.S.C. § 3730(d)(1) (authorizing the court to award between 15 and 25 percent depending upon the extent to which the relator substantially contributed to the prosecution of the action); 31 U.S.C. § 3730(d)(2) (authorizing court to award an amount the court decides is reasonable between 25 and 30 percent); *see also* 31 U.S.C. § 3730(d)(3) (providing that if action is based on information from a person who participated in the fraudulent activity, the relator is not entitled to any minimum guaranteed recovery). Thus, a whistleblower who purposefully waits as long as possible before filing an action in order to increase his own reward does

[1] As noted *supra*, the statute of limitations itself provides yet another motivation to act promptly, for if a relator intentionally delays filing suit six years after the violations occurred, and the government is on notice of the fraud for three years, a *qui tam* action may be barred by the statute of limitations.

so at considerable risk to his own interests. While the court below did not seem to acknowledge the relator's reasons for failing to bring the case at bar sooner, the statute has worked as contemplated. The relator brought to the government's attention information of which it had previously been unaware. In short, the court offered no legitimate justification for disregarding the plain meaning of the statute.

B. The District Court's Reading Of The Statute Would Lead To Absurd Consequences That Congress Did Not Intend.

While applying the statute as written does not lead to absurd consequences, the lower court's revision of the statute *does* produce absurd results that Congress did not intend. First, the lower court's construction of the provision would mean that a different statute of limitations would apply to the claim, depending upon the fortuity of which person initiated the case on the government's behalf and when that person happened to have learned about the fraud.

Second, the lower court wrongly assumed that the government's ability to cure an untimely *qui tam* case by taking over the case is sufficient to address problems created by a shortened tolling period for relators. But that assumes incorrectly that such a case would even be brought. The reality is that fraudfeasors oftentimes are successful in concealing fraudulent transactions for six years or longer. In these cases, if a relator is barred from initiating a case more than three years after the relator learned of the fraud, there would be no reason for a relator who ran up against the time limit would ever file

such a case. A central assumption underlying the FCA is that without a reward and a role in the case, a whistleblower will have no incentive to report fraud at all. *See* S. Rep. No. 99-345, *supra,* at p. 5, *reprinted in* 1986 U.S.C.C.A.N. at 5270 (discussing reasons why employees are unwilling to expose illegality). The purpose of the *qui tam* provisions is to encourage persons with information about fraud to come forward, notwithstanding considerable personal risk, so that information the government might not otherwise obtain will be brought to light. Taking away the right of a whistleblower to file a case more than three years after he or she learned of the fraud substantially diminishes the likelihood that the government will ever learn of the fraud in the first place. If the rule proposed by the court below is adopted, most of these potential relators will be advised by lawyers that may not even bring a case. As a result, there would be no case for the government to take over and pursue. In turn, the lower court's reading produces its own brand of absurdity-- different statute of limitations periods based on the relator's knowledge and the overall *discouragement* of FCA *qui tam* actions.

In reality, Congress sought to strengthen the government's hand in combating fraud by *encouraging* the participation of whistleblowers, while preserving the government's ultimate control over its claims. Reading the statute as written is consistent with those purposes and does not produce results Congress would not have intended. While there might be reasons to write a different statute, the court below was not free to do so. Indeed, the Supreme Court has repeatedly reminded the lower courts: "It is beyond

our province to rescue Congress from its drafting errors, and to provide for what we might think ... is the preferred result." *United States v. Granderson,* 511 U.S. 39, 68, 114 S.Ct. 1259, 1274-75, 127 L.Ed.2d 611 (1994). The court should give the words of section 3731(b) their plain and ordinary meaning by holding that the FCA tolling provision applies to all FCA actions, measured by the time that the "official of the United States charged with responsibility to act in the circumstances" knew or should have known about the fraud.

C. The Statutory Purpose And Real-World Experiences Of Relators Confirm The Plain Meaning Of The False Claims Act Tolling Provision.

Congress logically concluded that the FCA tolling provision should apply to all FCA actions and that it should commence only upon discovery of a violation by the *victim* of the fraud -- namely, the government. Although the Act authorizes relators to initiate cases on the government's *behalf,* the relator is not the victim of the fraud. An informant may not be in a position to bring a fraud case on the government's behalf within three years of discovery of the fraud, even if the victim government could have done so within that amount of time. *See supra,* at p. 7 (noting government investigative powers). The lower court assumed that the government and the relator are similarly situated, but as Congress was fully aware, they are not.

The FCA is premised on the view that whistleblowers, especially employees of an entity that engaged in the fraud, face significant barriers to bringing a lawsuit at all, let alone as quickly as the government would. As Congress noted when it examined the need to revise the FCA in 1986, a whistleblower-employee faces "the difficult choice of either keeping quiet ... or risking the loss of his job." S. Rep. No. 345, 99th Cong., 2d Sess. 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5270. Such choices can be especially complex for those with family members who depend upon them. *See id.* (testimony of Robert Wityczak) ("I agonized over my decision to step forward. I have a wife, five children and a house mortgage."). And even when the employee chooses to report the fraud, he or she may have difficulty getting anyone inside or outside the company to pay attention to the information. *Id.* ("The most frequently cited reason given [for not reporting fraud] was the belief that nothing would be done to correct the activity even if reported."). Congress's primary goal in amending the FCA in 1986 was ***not*** to ensure that whistleblowers report fraud *as soon as possible,* but rather to address the obstacles that had kept them *from reporting at all.*

Congress's assumptions are consistent with our organization's experience in consulting with whistleblowers and the case law recounting the experiences of whistleblowers. Often whistleblowers choose to first report fraud internally, which while time consuming, is unlikely to produce change and frequently leads to the loss of a job. *See* James Moorman, *The Whistleblower's Experience: The High Cost of Integrity*, 42

False Claims Act and Qui Tam Quarterly Review 73, 75 (July 2006) (discussing choices confronting the typical whistleblower); *see also, e.g., Neal v. Honeywell*, 191 F.3d 827, 829 (7th Cir. 1999) ("For her services as whistleblower [reporting fraud to company's internal hotline], Neal received the reward of resentful mistreatment, including drastic reduction of responsibilities and threats of physical harm."). In some cases, whistleblowers may be reticent to report wrongdoing because they fear for their personal safety. *See, e.g., United States v. General Electric*, 808 F. Supp. 580, 583 (S.D. Ohio 1992) (recounting relator's testimony about his concerns in filing suit given his knowledge of the company's treatment of another employee who reported fraud and that one of the person's involved in the fraud had been indicted for paying to kidnap and harm a witness). The financial and emotional strain of being a whistleblower not infrequently leads to family upheaval and physical ailments. (*See. e.g., United States ex rel. Johnson-Pouchardt v. Rapid City Regional Hospital*, 252 F. Supp. 2d 892, 902 (D.S.D. 2003) (noting that relator suffered the loss of a job and prestige in the community, experienced isolation because she was unable to discuss her situation with friends and family, separated from her spouse, and experienced stress-related illness). It is therefore unremarkable that a person would think long and hard before choosing to be a whistleblower.

Once a whistleblower decides to report the fraud outside of the company, he or she may not know where to turn and may not even be aware of the False Claims Act. (*See* Moorman, *supra,* 42 False Claims Act and Qui Tam Quarterly Review at 73; *see also, e.g.*, Henry Scammel, The Giant Killers 27-29 (2004) (recounting story of whistleblowers who, after years of frustration, reported defense contractor fraud to the FBI assuming that that agency would know how to handle the situation, but were completely unaware of the federal FCA). And even after a whistleblower learns of the FCA and decides that filing a lawsuit is an option, he or she must identify a lawyer with knowledge of the FCA, which is no easy undertaking. "The procedure to comply with the FCA is sophisticated. Not every attorney is versed in the process." *United States ex rel. Colunga v. Hercules, Inc.*, 1998 U.S. Dist. LEXIS 21811, at *15 (D. Utah Mar. 6, 1998). Even when the person identifies a lawyer who does this kind of work, persuading the lawyer to take the case can take time. *Qui tam* cases can involve a substantial investment of resources for a long period of time and a law firm may need time to evaluate the case.

In light of these realities, as a number of courts have recognized, it is unsurprising that a relator would take years to bring a case after learning of the fraud. Thus, for example, in considering the government's argument that a relator should receive a smaller share of the recovery because she delayed in bringing her *qui tam* case, the court in *Johnson-Pouchardt,* 252 F. Supp. 2d 892, found that a period of four years between a relator's discovery of fraud and filing a *qui tam* action was not unreasonable. The court

noted that the relator initially followed the internal chain of command in the hopes the matter would be corrected without resort to a lawsuit, and came forward while still employed, which put her at risk for retaliation and termination. Her report, four years after discovery, was "as prompt as could be expected under the circumstances." *Id.; see also General Electric. supra.* 808 F. Supp. at 583 (finding that the relator performed a valuable service to the United States in reporting the fraud, which would not have learned of the fraud otherwise and expressing unwillingness to second guess the whistleblower's reasons for not reporting the fraud earlier, although not awarding the maximum reward). In light of these realities, Congress logically concluded that a three-year tolling period was needed for all actions filed under the FCA and that the tolling period should begin once the relevant *government* official knows or should have known of the fraud.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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August 6, 2007

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)(B)(i)

Pursuant to Rule 32(a)(7)(C), I hereby certify that *Amicus Curiae* Taxpayers Against Fraud Education Fund's Brief complies with the type-volume limitation in Rule 32(a)(7)(B), Fed. R. App. P. Excluding the portions exempted by Rule 32(a)(7)(B)(iii), the brief contains 4,106 words as reported by the word count function of Microsoft Word. The brief was prepared in Microsoft Word in Times New Roman font, 14-point type for both text and footnotes.

_____ _____

James W. Moorman Date
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CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief *Amicus Curiae* of Taxpayers Against Fraud Education Fund, were served by first-class mail, postage prepaid, this 6th day of August, 2007, upon:

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This 6th day of August, 2007.

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