

DOES IMMUNITY EXIST?

When determining whether immunity exists, [the Fifth Circuit uses a three-part inquiry](#). See *Conroe Creosoting Co. v. Montgomery County, Tex.*, 249 F.3d 340 (5th Cir. 2001).

1. **First**, a court must examine whether the plaintiff has alleged the violation of a constitutional right. See *Conroe Creosoting Co. v. Montgomery County, Tex.*, 249 F.3d 340 (5th Cir. 2001)

- A. A taking of the relator's property without remuneration.
- B. SUCCESSION: QUI TAM AWARDS - *U.S. v. Florida-Vanderbilt Development Corp.*, D.C. Fla., 326 F.Supp. 289, 290. (It is an action brought by a relator, under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action **and the remainder to the state or some other institution**. It is called a "qui tam action" because the plaintiff states that he sues as well for the state as for himself.)

2. **Second**, a court must determine whether the constitutional right was clearly established at the time the defendant acted. See *Conroe Creosoting Co. v. Montgomery County, Tex.*, 249 F.3d 340 (5th Cir. 2001)

- A. "For a right to be clearly established, there does not have to be a prior case directly on point, but the unlawfulness of the precipitating acts must be apparent in light of the existing law." *Hassen v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995).
- B. Such an inquiry requires an assessment of whether, at the time of the alleged violation, the right was so clearly established that a "reasonable person in the defendant's situation would have understood that his conduct violated that right. See *Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991); *Conroe Creosoting Co.*, 249 F.3d at 340; *Brewer v. Wilkinson*, 3 F.3d 816, 820 (5th Cir. 1993), cert. denied, 510 U.S. 1123 (1994).
- C. The established destination of all False Claims Act "proceeds of the action or settlement of the claim" is the public treasury. Qui Tam "Proceeds" Are Paid To The U.S. Treasury's "General Funds" Account.

U.S. ex rel Gibeault v. Texas Instruments, 104 F.3d 276 (9th Cir. 1997) - "...were in part proceeds of the action and due to the public treasury."

U.S. ex rel Kelly v. Boeing Corp., 9 F.3d at 769 (All penalties and government recoveries from defense industries' fraud, under the qui tam statute, were originally intended to be deposited in the federal treasury's "general funds" account which is sometimes called the "miscellaneous receipts account".)

U.S. ex rel Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994) (qui tam provisions are meant to encourage insiders with "genuinely valuable information" which will return money to the Federal Treasury).

U.S. ex rel Jane Doe 1 et al. v. X, Inc. et al., 2000 WL 305742 (E.D. Va. March 23, 2000) - "The court noted that, even without intervention, the United States receives the majority of any amount recovered and retains significant rights over the litigation."

"Moreover, in the course of the qui tam proceedings, any findings of fact which show a potential for increased return to the Federal Treasury are material to the court's application of Section 3730(b)(5), (Comment added: Section 3730(b)(5) is the "first-to-file" bar)." Source: Page 3 - Brief of Taxpayers Against Fraud, The False Claims Act Legal Center as AMICUS CURIAE Supporting Appellant in *United States of America, ex rel. Linda A. Lujan, Appellant, vs. Hughes Aircraft Company, Appellee*, No. 00-55328, in the United States Court of Appeals For The Ninth Circuit.

- ("...the courts will inquire as to whether the action taken was within the agency official's statutory authority, whether there was evidence before him/her in support of his/her determination to satisfy elementary standards of fairness and reasonableness.) See *Lloyd Sabaudo Societa Anomina Per Azioni v. Elting*, 287 U.S. 329 (1932).
- Reference: DOJ, US Attorney's Manual (DOJ), § 4-4.110 - Civil Fraud Litigation, ¶ 4, Sentence 4 (Rev.06/98.) - "Flagrant frauds, justifying the initiation of suits for multiple damages and penalties

under relevant statutes generally, should not be compromised for less than multiple damages and some forfeitures."

- Reference: DOJ, US Attorney's Manual (DOJ), § 4-1.511 - Cases Delegated To United States Attorneys., ¶ 2, (Rev.06/98.) - "Disposition of delegated cases, like the disposition of nondelegated cases, must be accurately reported on the Department's statistical reporting system. In particular, all money and property collected for the government should be reported."
- Reference: DOJ, US Attorney's Manual, Title 4, 4-4.430 Collections. "A major responsibility of the Attorney General, the Civil Division, and the United States Attorneys is recovering sums owed the United States. "In particular, all referrals of money claims which come within the United States Attorneys' delegated authority up to \$1,000,000 should be made through the National Central Intake Facility. Referrals beyond that amount should continue to be made directly to the Commercial Litigation Branch of the Civil Division."
- "Qui tam" is abbreviation of the Latin phrase "qui tam pro domino rege quam pro si ipso in hac parte sequitur" meaning "Who sues on behalf of the King as well as for himself."

3. Finally, a court must "determine whether the record indicates that the . . . defendant actually engaged in the conduct that violated the clearly established right." *Conroe Creosoting Co.*, 249 F.3d at 340; see *Morris v. Dearborne*, 181 F.3d 657, 666 (5th Cir. 1999).

- A. Title 18 U.S.C. § 4 (**misprision of felony**). "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than \$500 or imprisoned not more than three years, or both."

When the Department of Justice and a defrauded government agency fraudulent convert the proceeds to fraudulent concealed alternate remedies, , the Public Fisc, in the form of the taxpayers' U.S. Treasury Department's General Fund, simultaneously loses a full 85% of the money discussed as the qui tam relator loses his or her 15%. The recovery is diverted back to the agency without Congressional review and oversight and takes the form of a concealed, windfall budget increase. The Congressional intent of the False Claims Act is evaded and the Executive Branch has successfully evaded the Checks and Balances effecting a knowingly induced "Aggrandizement" of their powers and "Impairment" of the duties of the U.S. Treasury and our U.S. Congress.

EXAMPLES:

Joyce Riley, Plaintiff - Appellant, v. St. Lukes Episcopal Hospital, et. al. Defendants - Appellees, No. 97-20948 in the United States Court of Appeals for the Fifth Circuit, before Smith, DeMoss, and Stewart, Circuit Judges, Opinion by Jerry E. Smith, Circuit Judge.

- Note 35. ...Qui tam actions, unlike title VII suits, aim to redress **purely public injuries**."

USA ex rel Covington, Sidicane v. Sisters of the Third Order of Saint Dominic of Hanford, California, d.b.a. - Sacred Heart Hospital, et. al., 61 F.3d 909, Unpublished Disposition, 1995 WL418311 (9th Cir. July 13, 1995)

- **The Government attempted to foreclose qui tam relators from receiving a share from a payment received from the defendant** because the government classified the payment as "restitution" as opposed to "damages".
- The appellate court succinctly **rejected the Government's argument**, pointing out that **such a rule would allow the Government to eliminate recovery for qui tam relators by simply characterizing the nature of the defendant's conduct**.

U.S.A. ex rel. Peter Jensen Thornton v. Science Applications International Corporation, et al., Order Awarding Statutory Share of Settlement And Denying Request For Attorney Fees, filed September 17, 1998, Civil Action No. 3:94-CV-0749-T, In The U.S. District Court for the Northern District of Texas, Dallas Division, defined ..qui tam proceeds and defined the requirements for the relator to successfully request and receive attorney's fees.

- **A qui tam plaintiff should receive between 15% and 20% of the proceeds**, depending on how much the person substantially contributed to the prosecution of the claim. See 31 U.S.C. 3730(d)(1).
- Based on (1) the plain meaning of the word "proceeds," (2) the terms of the settlement agreement, and (3) the representations of the parties, **the Court concludes that the claims released (or abandoned) by Defendants are**

included in the proceeds of the settlement. ...In sum, the Court concludes that the \$... cash and the claims abandoned by Defendants should be included as the proceeds of the settlement.

U.S. ex rel Neher, as Personal Representative of the Estate of Arthur P. Williams v. NEC Corp., No. 92-2854 (11th Cir. Apr. 28, 1995) recently defined the conditions of an illegal "de facto" intervention and termination of the lawsuit by the actions of the government lacking Court approval. It stated:

- The 11th Circuit characterized the Government's arguments as "specious" and as **an attempt "to take advantage of its blatant violations of the statute."**
- In a strongly worded opinion, **critical of the Government's handling of the case**, the appellate court concluded that the government's settlement with the defendant constituted an election to intervene in the lawsuit and that the estate of the deceased relator was entitled to 15 percent of the settlement.
- The court held that the Government's settlement with NEC constituted an election to intervene in the lawsuit and proceed with the action within the meaning of the False Claims Act.
- **...the settlement effectively terminated the lawsuit**, except for the determination of William's statutory share under 3730(d)(1) of between 15 and 25 percent (as well as attorneys' fees and expenses.)

U.S.A. ex. rel. Robert J. Merena v. SmithKline Beecham Corp., SmithKline Beecham Clinical Laboratories, Inc., Judgement, dated April 8, 1998, Civil Action No. 93-5974, originally filed on July 23, 1997, In The U.S. District Court for the Eastern District of Pennsylvania.

- Footnote # 10 - "The **Government did not elect to intervene until after it had agreed with (defendant) on specific settlement terms** to resolve all of the claims in the (plaintiffs') cases and long after the (date) agreement in principle had been negotiated."
- Page 30 - "The necessary element under the statute is not an investigation but rather public disclosure. Government investigations are ordinarily not publicly disclosed until they are completed. Merely because a qui tam complaint may make allegations that correspond with or parallel allegations that a Government agency may be investigating, the qui tam action is not barred, nor is the qui tam relator precluded from **an appropriate statutory share of any resulting recovery.**"
- Page 37 - "Were a qui tam action is filed, and the Government intervenes and expands the allegations of the complaint, or settles the action, including broader claims than alleged in the qui tam action, **this should not preclude the qui tam relator..from ..receiving the minimum statutory qui tam share of 15 percent of the entire settlement**, as well as a percent above the 15 percent minimum up to a maximum of 25 percent "...depending upon the extent to which the person (qui tam Relator) substantially contributed to the prosecution of the action."
- Page 41 - "There is absolutely no evidence on the record before me, beyond **the unacceptable waiver argument**, to establish any allocation among various claims. The Relators repeatedly sought explanation from the Government, both informally and in discovery, as to the Government's allocation calculations. The Government's only response is, and always has been, that the calculations were based on rational estimates of losses and complex negotiations among various governmental agencies and that the parties and the court are bound to accept the Government's calculations. It seems to me to be almost a "trust us, we are not wrong, we are correct" attitude. **The Government tries, at a minimum, to require Relators to prove the allocations are in error without providing Relators with any discovery on the issue, although such discovery was requested. This I cannot accept.** I conclude on this issue, that the Relators are not bound by the allocations assigned by the Government as to the... and the... qui tam allegations. **It is the Government that attempts to reduce the individual and total qui tam award shares by assigning particular values to various claims.**
- Page 70 - "I am left with the impression that **the attorneys in charge of the... investigation, conducted... by the DOJ seek to take far more credit for the overall success of the proceeds.**
- Page 72 - "Perhaps the reason the litigation has been presented in this light is because **the Government wants to minimize the contributions of the Relators in order to lower their ultimate award.**
- Page 72 - "I recognize that some of the arguments presented by the Government attorneys may have been caused by a sincere desire to save as much of the proceeds as possible for the Government. However, 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 tam awards dictated by Congress irrespective of the size of the awards."**