

NOTES

ENCOURAGING INDIVIDUALS TO REPORT GOVERNMENT CONTRACTING FRAUD: THE ANTI-RETALIATION PROVISION OF THE FEDERAL FALSE CLAIMS ACT SHOULD PROTECT EVERYONE WHO REPORTS OR HELPS PROSECUTE FRAUDULENT CONDUCT

I. INTRODUCTION

Fraud upon the federal government has occurred at least since the Civil War,¹ and perhaps since the birth of the nation.² To combat the fraudulent conduct of Union Army military suppliers during the Civil War, Congress passed the False Claims Act of 1863 (the “Act” or the “False Claims Act”).³ The Act prescribed penalties for defrauding the United States government, allowing both the government and regular citizens to file suit.⁴ A regular citizen who initiates a lawsuit under the False Claims Act sues both on his own behalf and on behalf of the government.⁵ Such a lawsuit is commonly known as a *qui tam* action,⁶ and the citizen bringing suit is a *qui tam* relator.⁷ To encourage

1. See Robert E. Johnston, *1001 Attorneys General: Executive-Employee Qui Tam Suits and the Constitution*, 62 GEO. WASH. L. REV. 609, 612 (1994); John R. Phillips, *Qui Tam Litigation: A New Forum for Prosecuting False Claims Against the Government*, 14 J. LEGAL MED. 267 (1993).

2. See James B. Helmer, Jr. & Robert Clark 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 in the United States ex rel. Gravitt v. General Electric Co. Litigation*, 18 OHIO N.U. L. REV. 35, 36 n.8 (1991).

3. See *id.* at 36 (construing Act of Mar. 2, 1863, ch. 67, 12 Stat. 696). The False Claims Act was re-enacted as sections 3490-94 of the Revised Statute, U.S. REV. STAT. tit. 36, § 3490-94 (1875), section 5438, *id.* tit. 70, § 5438, which was later codified in 1982 under sections 3729 to 3731 of Title 31 of the United States Code, 31 U.S.C. §§ 3729-31 (1982). See Helmer, at note 8. This legislative history is described in Helmer & Neff, *supra* note 2, at n.8. Fraud was pervasive during the Civil War. “[T]he Congress of the United States was receiving alarming reports from the battlefield. These reports concerned Union soldiers opening crates of muskets only to find them filled with sawdust instead of arms. Reports of the same horses and mules being sold to the United States cavalry three and four times further demonstrated a serious problem with war profiteers.” *Id.* at 35. See also Johnston, *supra* note 1, at 612 n.20.

4. See Johnston, *supra* note 1, at 612-13.

5. See Pamela H. Bucy, *Where to Turn in a Post-Punitive Damages World: The “Qui Tam” Provisions of the False Claims Act*, 58 ALA. LAW. 356, 356-57 (1997).

6. *Qui tam* comes from the Latin phrase “*qui tam pro domino rege quam pro si ipso in hac parte*

citizens to bring qui tam actions, the Act provided monetary rewards for the successful qui tam plaintiff.⁸

When Congress passed the 1986 amendments to the Act, it added an anti-retaliation provision in an effort to revitalize the qui tam provisions of the Act.⁹ The anti-retaliation provision protects an employee from retaliation by an employer when an employee brings a qui tam action or participates in any way to expose or prosecute the fraudulent activity of an employer.¹⁰ An action under the anti-retaliation provision is separate from a qui tam action; and the filing of a qui tam action is not a prerequisite for action under the anti-retaliation

sequitur,” which means “who sue on behalf of the King as well as for himself.” BLACK’S LAW DICTIONARY 1251 (6th ed. 1990). There is some debate as to the constitutionality of a qui tam action. Much of the criticism of the qui tam action argues that the unitary executive theory precludes the viability of the qui tam action. See Johnston, *supra* note 1, at 611. While this debate is an interesting one, it has no bearing on the proposal of this Note. Even if the False Claims Act were amended to outlaw qui tam actions, there would still be a need for anti-retaliation protection for individuals who assist the government in their investigation or prosecution, as well as for individuals who benevolently inform the government of fraudulent activities.

7. See Helmer & Neff, *supra* note 2, at 37 n.22.

8. See Johnston, *supra* note 1, at 613. “To encourage the vigorous prosecution of fraud, the 1863 Act provided the prosecutor, whether district attorney or citizen, a bounty of one-half the total recovery.” *Id.*

9. See 31 U.S.C. § 3730 (1994) and explanatory notes. The qui tam provisions of the False Claims Act provide that “[a] person may bring a civil action for a violation of [the Act] . . . for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.” *Id.* § 3730(b)(1). The provisions also provide that “[t]he Government may elect to intervene and proceed with the action.” *Id.* § 3730(b)(2). Furthermore, “[i]f the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action.” *Id.* § 3730(c)(1). “If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.” *Id.* § 3730(c)(3). If the Government proceeds with the action, the person who initiated the action receives “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.” *Id.* § 3730(d)(1). “If the Government does not proceed with an action . . . 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.” *Id.* § 3730(d)(2).

10. The anti-retaliation provision of the False Claims Act, 31 U.S.C. § 3730(h) (1994) provides that: “[a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had, but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.” *Id.* § 3730(h).

provision.¹¹

When Congress enacted the 1986 amendments to the False Claims Act, including the anti-retaliation provision, Congress used the term “employee” to describe who was protected, and the term “employer” to describe from whom the employee was protected.¹² However, the Act never defines the term “employee.”¹³ To determine whether or not an individual is an employee, the courts have applied the common law agency test mandated by the Supreme Court.¹⁴

The Fourth Circuit, in defining the scope of the word “employee” in the anti-retaliation provision, held that the provision does not protect independent contractors.¹⁵ This holding conforms with prior district court rulings regarding the applicability of the anti-retaliation provision.¹⁶ This restricted definition of the term “employee,” however, reduces the protection afforded by the anti-retaliation provision of the False Claims Act. As a result, the provision does not protect an independent contractor who may be just as vulnerable as an employee, and who may suffer just as much harm due to retaliation by a qui tam defendant.¹⁷

This Note proposes that the anti-retaliation provision of the False Claims Act should be expanded to protect from retaliation any individual who exposes fraud perpetrated on the United States government or who assists in a governmental investigation. This Note will not address the scope of whistleblower provisions in other federal statutes, because the different contexts and individual policy considerations embodied in each statute dictate the scope of each whistleblower provision.¹⁸

Part II of this Note discusses the history of the anti-retaliation provision of

11. *See id.*

12. *See id.*

13. *See* Vessell v. DPS Associates of Charleston, Inc., 148 F.3d 407, 411 (4th Cir. 1998).

14. Courts must apply the common law agency test if the term “employee” is not defined specifically. *See* Shapiro v. Sutherland, 835 F. Supp. 836, 837 (E.D. Pa. 1993) (citing Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992)). *See infra* note 75 for a definition of the common-law agency test. *See infra* note 78 for an example of the application of the common law agency test.

15. *See* Vessell, 148 F.3d at 413.

16. *See* Hardin v. DuPont Scandinavia (ARA-JET), 731 F. Supp. 1202, 1205 (S.D.N.Y. 1990) (stating in dicta that independent contractors are not employees, and therefore are not protected by the whistleblower provisions of the False Claims Act). *See also* Mruz v. Caring, Inc., 991 F. Supp. 701, 709 (D.N.J. 1998) (“Everything about the plain language of section 3730(h) reflects a legislative intent to operate exclusively in the area of the ‘employment relationship.’”).

17. *See infra* notes 87-88 and accompanying text.

18. *See infra* note 47 for specific examples of whistleblower provisions contained in other federal statutes.

the False Claims Act, and explores the purposes and effectiveness of the provision. Part III analyzes the legislative history behind the anti-retaliation provision of the Act and recent court decisions interpreting the provision. This analysis will show that, based on the legislative history, the courts have correctly interpreted the word “employee.”¹⁹ However, this Note argues that Congress should have gone further in protecting individuals involved in actions under the False Claims Act. Part IV proposes an amendment to the anti-retaliation provision of the Act, to afford protection to any individual who participates in an action or potential action under the False Claims Act, or who assists the government in its investigation or prosecution of fraudulent activity. Part V applies the proposed amendment to a recently decided Fourth Circuit case in order to show how the proposed amendment would affect the outcome of that case.²⁰ Finally, this Note demonstrates that the hypothetical outcome resulting from the proposed amendment would have provided the whistleblower a judicial remedy for the damages he suffered due to retaliation.

II. HISTORY

A. *Legislative History of the Anti-Retaliation Provision of the False Claims Act*

Congress passed the False Claims Act in 1863 to combat the fraudulent practices of Union Army suppliers during the Civil War.²¹ The Act specifically allowed a regular citizen who discovered fraudulent conduct to bring a *qui tam* suit both on his or her own behalf and on behalf of the government.²² The Act, as passed in 1863, had provisions for both civil and criminal sanctions, but in 1874 Congress separated the civil provisions from the criminal provisions.²³

In its original form, the Act imposed upon a defendant double the damages caused by his or her fraudulent acts, and also assessed a two thousand dollar penalty for every false claim submitted to the United States government.²⁴ In

19. See *infra* notes 103-106 and accompanying text.

20. See *Vessell*, 148 F.3d 407.

21. See *supra* note 3 and accompanying text. While Congress passed the False Claims Act to combat fraud during the Civil War, the problem of wartime profiteering dates back to the birth of the nation. For example, in 1791, profiteers supplied substandard boots and tents to American troops conducting a campaign against Native Americans in the Northwest Territory. See Helmer & Neff, *supra* note 2, at 36 n.8 (citing BIL GILBERT, GOD GAVE US THIS COUNTRY, 145-52 (1989)).

22. See *supra* notes 4-8 and accompanying text.

23. See Helmer & Neff, *supra* note 2, at 36.

24. See *id.* at 36.

addition, the Act generously awarded a successful qui tam relator with fifty percent of the total recovery in the suit.²⁵ Furthermore, the Act provided the qui tam relator a vested right in the suit, so the government could not preempt the citizen or prevent the suit from going forward.²⁶

During the middle of this century, the United States government strongly disfavored qui tam actions.²⁷ This disfavor stemmed from the practice of unscrupulous citizens who would wait until the government filed criminal fraud actions against government contractors and then file qui tam suits based on the same allegations, solely to collect the statutory reward.²⁸ Because of these abuses, Congress amended the False Claims Act in 1943.²⁹ These amendments significantly reduced the incentives for a citizen to bring a qui tam action.³⁰

After the passage of the 1943 amendments, a citizen could not maintain a qui tam action if the government already knew of the fraud at the time the lawsuit was filed.³¹ Furthermore, a citizen bringing a qui tam action had to produce for the government all the evidence in his or her possession so the government could decide whether it wanted to prosecute the defendant.³² If the government decided to prosecute, the Department of Justice—not the citizen—would handle the suit.³³ The amendments also significantly reduced the monetary reward that a successful qui tam litigant could collect.³⁴

Thus, the 1943 amendments to the False Claims Act essentially eliminated

25. *See id.*

26. *See id.* at 37.

27. When Congress passed the False Claims Act of 1943, they “placed significant impediments upon the use of qui tam suits by denying jurisdiction over any claim of which the government had knowledge prior to the commencement of the relator’s suit. Courts interpreted the jurisdictional bar very strictly and even denied jurisdiction over suits brought by whistleblowers who had the misfortune to disclose the information forming the basis of their claim prior to bringing their suit.” Johnston, *supra* note 1, at 613 n.27.

28. Prior to the enactment of the 1943 amendments to the Act, courts “upheld the right of citizens to copy the allegations contained in criminal fraud actions brought by the government and to bring qui tam actions based on information the government already possessed and was acting upon through criminal prosecutions.” *Id.* *See also* Helmer & Neff, *supra* note 2, at 38.

29. *See* Helmer & Neff, *supra* note 2, at 38. The 1943 amendment to the Act served two main purposes. *See id.* First, the amendments prevented individuals from bringing qui tam actions based on press accounts of criminal indictments. *See id.* at 38-39. Second, the 1943 amendments prevented a race to the courthouse between citizens and the government. *See id.* at 39.

30. *See id.* at 38-39.

31. *See id.* at 39.

32. *See id.*

33. *See id.*

34. *See id.* After the enactment of the 1943 amendments to the False Claims Act, a citizen who initiated a qui tam suit taken over by the government could only collect ten percent of the recovery, and a citizen who proceeded on his own could only collect twenty five percent of the recovery. *See id.*

the usefulness of a qui tam action as a tool for exposing those who defraud the government.³⁵ The amendments lowered the monetary rewards to a level which discouraged citizens from suing and the provision barring qui tam actions when the government already knew of the fraud kept most qui tam litigators out of court.³⁶

With the 1986 amendments³⁷ to the Act, however, Congress revitalized the viability of qui tam actions³⁸ by protecting employees from retaliation³⁹ when they exposed fraud perpetrated on the United States government by their employers.⁴⁰ Before the passage of the amendments, there was debate over whether the anti-retaliation provision should be included.⁴¹ The legislative history shows that the purpose of the provision was to protect employees from retaliation by their employers because employees risked their livelihoods by exposing the fraudulent activities of their employers.⁴²

The Senate Judiciary Committee Report issued in conjunction with the vote on the 1986 amendments to the False Claims Act detailed the need for, and the

35. See Helmer & Neff, *supra* note 2, at 39.

36. See *id.* at 39-40.

37. See 31 U.S.C. § 3730 (Supp. IV 1986). The False Claims Act was also amended in 1988 but the amendments were mainly "technical changes" with no bearing on the application of the anti-retaliation provision. See Helmer & Neff, *supra* note 2, at 50. Of note, however, is the addition of a paragraph in the 1988 amendments that

eliminate[d] a guaranteed share of the recovery for a qui tam plaintiff who was the 'principal architect' of a scheme to defraud the government. The 1988 amendments also eliminate[d] any share for a qui tam plaintiff who was convicted of criminal conduct for having any part in the fraudulent practice at issue.

Id. at 50-51.

38. See S. REP. NO. 99-345 (1986).

The 1986 amendments strengthened the False Claims Act in several significant respects. First, the amendments made it clear that the applicable standard of proof was a preponderance of the evidence and not a clear and convincing or clear and unequivocal standard as applied by some courts. Second, the amendments clarified the degree of knowledge and intent necessary to file a claim under the False Claims Act... Third, the 1986 amendments increased the qui tam relator's role in actions in which the government intervened as well as the relator's share of proceeds recovered. Finally, the 1986 amendments increased the damages and penalties recoverable under the False Claims Act.

Helmer & Neff, *supra* note 2, at 44-45.

39. See *supra* note 10 for the text of the whistleblower provision of the False Claims Act.

40. See Phillips, *supra* note 1, at 271. The Center for Law in the Public Interest was instrumental in the passage of the 1986 amendments to the Act. See *id.* at 269. The Center for Law established a False Claims Act project after John R. Phillips, co-director at the Center, happened upon the False Claims Act and the qui tam provisions and realized its potential for serving the public interest by allowing citizens to expose fraud against the government. See *id.* at 268-69. To realize that potential, however, the Act needed to be substantially revised. See *id.* Various proposals were drafted, and the Center then enlisted the aid of Senator Charles Grassley, a Republican from Iowa, and Congressman Howard Berman, a Democrat from California. See *id.* at 269. Senator Grassley and Congressman Berman were ultimately successful in pushing the legislation through Congress. See *id.*

41. See S. REP. NO. 99-345 at 25-27 (1986).

42. See 132 CONG. RECORD 29,315, 29,322 (1986).

purposes behind, their passage.⁴³ According to the Judiciary Committee, the main purpose of the 1986 amendments was to improve the government's ability to recoup losses suffered as a result of the fraudulent conduct of government contractors.⁴⁴ In order to achieve this objective, the committee deemed it essential to motivate citizens to expose fraud by revitalizing the *qui tam* provisions of the Act.⁴⁵ As part of this revitalization, the committee recommended the approval of a provision protecting whistleblowers from retaliation.⁴⁶ In drafting the anti-retaliation protections, the committee relied on whistleblower provisions found in other federal statutes,⁴⁷ and indicated a desire

43. See S. REP. NO. 99-345 (1986).

44. See *id.* at 1.

While it may be difficult to estimate the exact magnitude of fraud in Federal programs and procurement, the recent proliferation of cases among some of the largest Government contractors indicates that the problem is severe. This growing pervasiveness of fraud necessitates modernization of the Government's primary litigative tool for combatting fraud; the False Claims Act.

Id. at 1-2.

45. See *id.* at 2.

The proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring the information forward. In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds.

Id.

46. *Id.* at 34.

The Committee recognizes that few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation. With the provisions in [the amendments] . . . the Committee seeks to halt companies and individuals from using the threat of economic retaliation to silence 'whistleblowers', as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts.

Id.

47. See *id.* The Committee utilized provisions from the "Federal Surface Mining Act, 30 U.S.C. 1293, Energy Reorganization Act, 42 U.S.C. 5851, Clean Air Act, 42 U.S.C. 7622, Safe Drinking Water Act, 42 U.S.C. 300j-9, Solid Waste Disposal Act, 42 U.S.C. 6971, Water Pollution Control Act, 33 U.S.C. 1367, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610, and Toxic Substances Control Act, 15 U.S.C. 2622." *Id.*

The whistleblower provision of the Federal Surface Mining Act provides that "[n]o person shall discharge, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter." 30 U.S.C. § 1293(a) (1994).

The whistleblower provision of the Energy Reorganization Act provides that: "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) . . . notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954; . . . refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer; . . . testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954; . . . commenced, caused to be commenced, or is about to

commence or caused to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended; . . . testified or is about to testify in any such proceeding or; . . . assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.” 42 U.S.C. § 5851(a)(1) (1994).

The whistleblower provision of the Clean Air Act provides that “[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) . . . commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or any applicable implementation plan, . . . testified or is about to testify in any such proceeding, or . . . assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.” 42 U.S.C. § 7622(a) (1994).

The whistleblower provision of the Safe Drinking Water Act provides that “[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has . . . commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State, . . . testified or is about to testify in any such proceeding, or . . . assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.” 42 U.S.C. § 300j-9(i)(1) (1994).

The whistleblower provision of the Solid Waste Disposal Act provides that “[n]o person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.” 42 U.S.C. § 6971 (a) (1994).

The whistleblower provision of the Water Pollution Control Act provides that “[n]o person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.” 33 U.S.C. § 1367(a) (1994).

The whistleblower provision of the Comprehensive Environmental Response, Compensation, and Liability Act provides that “[n]o person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.” 42 U.S.C. § 9610(a) (1994).

The whistleblower provision of the Toxic Substances Control Act provides that “[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has . . . commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter; . . . testified or is about to testify in any such proceeding; or . . . assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.” 15 U.S.C. § 2622(a) (1982).

that the anti-retaliation provision have a broad scope.⁴⁸

Most of the debate over the proposed amendments to the False Claims Act focused on restructuring the qui tam provisions.⁴⁹ Of all the testimony and evidence that the Senate and the House of Representatives considered when debating the amendments, the testimony of only one individual who had used the qui tam provisions of the False Claims Act was heard.⁵⁰ This testimony was that of John Gravitt, who had filed a qui tam suit against his employer, General Electric Company,⁵¹ for allegedly falsifying time cards submitted to the federal government.⁵² Mr. Gravitt testified before the House Subcommittee on Administrative Law and Governmental Relations.⁵³ In addition to his testimony about the need to expand the rights of the qui tam plaintiff,⁵⁴ Mr. Gravitt testified that the qui tam plaintiff should be afforded protection against retaliation by the defendant, the fraudulent government contractor.⁵⁵

48. See S. REP. NO. 99-345, at 34 (1986). “[T]he committee believes protection should extend not only to actual qui tam litigants, but those who assist or testify for the litigant, as well as those who assist the Government in bringing a false claims action. Protected activity should therefore be interpreted broadly.” *Id.*

49. See generally *id.*

50. See Helmer & Neff, *supra* note 2, at 43.

51. See *Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio 1988).

52. See *False Claims Act Amendments: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong. 340 (1986).

53. See *id.* at 339.

54. See *id.* at 341-42, 349. Mr. Gravitt stated that

[i]t is important that the United States Government make the False Claims Act law stronger. If the law was stronger, it would be used more and more lawyers and employees of Government contractors would be aware of it. . . . I also support the proposed changes that help make sure that if my lawsuit is successful, that I would receive some compensation for my efforts for sticking my neck out. If it was not for the fact that my wife and I are both employed with steady work, we could not have taken on the financial and time demands of this lawsuit. As it is, we have taken on the financial risk with no assurance that our efforts will be compensated. Also, I believe it is good that the proposed legislation creates a minimum compensation for whistleblowers who bring fraud False Claims Act cases and gives the Judge more discretion to determine the appropriate amount of compensation for False Claims Act plaintiffs, depending upon the contribution that has been made. This seems to be a fair provision that insures that no one will be overly compensated, but that each False Claims Act plaintiff will be fairly compensated.

Id. at 349.

55. See *id.* at 387. In response to a question from Dan Glickman, the chairman of the House subcommittee on Administrative Law and Governmental Relations, Mr. Gravitt replied:

I think the primary issue there, sir, is that a citizen who brings the action will be protected. . . . [T]he people that have additional information at this time want to remain anonymous. They won't give us their names. They will call in and tell us things but they won't give us their names, because there is no protection for them.

Id. Mr. Gravitt also stated that if the whistleblower provision were passed that “[w]histle-blowers’ like myself would also have protection from losing their jobs. While this protection would be too late to help me, it would protect the other employees who have reported fraudulent practices to me and my lawyer.” *Id.* at 349.

John Phillips, the Executive Director of the Center for Law in the Public Interest, also testified before the House Subcommittee on Administrative Law and Governmental Relations.⁵⁶ Mr. Phillips was very concerned with the lack of protection for qui tam plaintiffs, and supported the adoption of the anti-retaliation provision in the 1986 amendments to the False Claims Act.⁵⁷ Mr. Phillips believed that the anti-retaliation provision would encourage the reporting of fraud by protecting those individuals who could expose wrongdoing or assist the government in its investigation of fraudulent conduct.⁵⁸

B. Judicial Interpretation of the term “Employee” in the Anti-Retaliation Provision of the False Claims Act

Much of the controversy in the courts over the anti-retaliation provision of the Act has focused on the definition of “employee,”⁵⁹ specifically whether an independent contractor is considered an “employee.”⁶⁰ The few courts addressing the issue have all concluded that, based on the plain language of the anti-retaliation provision of the Act, an independent contractor is not an “employee” under the Act, and therefore is not protected under the Act.⁶¹ The courts also have emphasized that, given the plain meaning of the Act, the sole context triggering its anti-retaliation provision is the employee-employer relationship.⁶²

56. *See id.* at 392.

57. *See id.* at 405. Mr. Phillips stated that

the existing False Claims Act does not provide any protection whatsoever for the person bringing a lawsuit on behalf of the Government. After filing a suit, such person might be immediately fired by his employer, threatened or harassed by supervisors or co-workers, and blackballed from the industry in which he works. Thus, most individuals would be very reluctant to risk their jobs, their livelihood, and their personal security to expose either through filing a lawsuit or providing testimony [of] the fraudulent practices of their employer or former employer.

Id.

58. *See id.* at 406. Mr. Phillips stated that “[t]his new provision would go far in ending the ‘conspiracy of silence’ which often surrounds a company and intimidates its employees into compromising their ethical standards.” *Id.*

59. *See Shapiro v. Sutherland*, 835 F. Supp. 836, 837 (E.D. Pa. 1993).

60. *See Hardin v. DuPont Scandinavia (ARA-JET)*, 731 F. Supp. 1202, 1205 (S.D.N.Y. 1990). Other courts have addressed the distinction between an employee and independent contractor without specifically addressing the issue of whether an independent contractor would be protected by the anti-retaliation provision of the Act. *See Godwin v. Visiting Nurse Ass’n Home Health Services*, 831 F. Supp. 449, 453 (E.D. Pa. 1993).

61. *See Hardin*, 731 F. Supp. at 1205; *Vessell v. DPS Associates of Charleston, Inc.*, 148 F.3d 407, 413 (4th Cir. 1998).

62. *See Mruz v. Caring, Inc.*, 991 F. Supp. 701, 709. *See also infra* text accompanying notes 99-102.

The first case to examine the scope of protection afforded by the anti-retaliation provision of the Act was *Hardin v. DuPont Scandinavia (ARA-JET)*.⁶³ In *Hardin*, the plaintiff filed a pro se complaint alleging tax fraud on the part of the defendants.⁶⁴ The court ultimately dismissed the action based on the plaintiff's failure to state a claim,⁶⁵ specifically dismissing her claim under the anti-retaliation provision due to her failure to allege that she was an employee of the defendants.⁶⁶ The court indicated that the plaintiff was either an independent contractor or a partner of the defendants.⁶⁷ Furthermore, the court, in dicta, limited the definition of "employee" in the anti-retaliation provision of the False Claims Act, and indicated that independent contractors and partners are not considered employees for purposes of the provision.⁶⁸

Three years later, in *Shapiro v. Sutherland*,⁶⁹ the court for the Eastern District of Pennsylvania addressed the issue of how to define the scope of the term "employee" as used in the anti-retaliation provision of the False Claims Act.⁷⁰ In *Shapiro*, the plaintiff uncovered fraud while he was a "consultant"⁷¹ for the defendants.⁷² The defendants moved for summary judgment, alleging that the plaintiff was not their employee and thus did not have standing to sue under the anti-retaliation provision of the Act.⁷³ The court stated that relief under the anti-retaliation provision of the Act is limited to "employees," and that the Act fails to define the term "employee."⁷⁴ The court concluded that because the Act

63. 731 F. Supp. 1202 (S.D.N.Y. 1990).

64. *See id.* at 1203.

65. *See id.* at 1205. The court dismissed the plaintiff's case for failure to state a claim under the False Claims Act because income tax cases are not covered by the Act. *See id.* at 1204.

66. *See id.* at 1205.

67. *See id.* In support of the contention that the plaintiff failed to allege that she was an employee of defendants, the court noted that "plaintiff alleges that . . . her 'business partner' continued to do business after she refused to participate in the [illegal] scheme; and . . . that she was a 'sub-contractor.'" *Id.*

68. *See id.* The court specifically stated that "[b]y definition, independent contractors and partners are not employees. Moreover, the Supreme Court recently stated unequivocally that 'when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine.'" *Id.* (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)). *See infra* note 75 for a definition of the common law agency test. *See infra* note 78 for an example of the application of the common law agency test.

69. 835 F. Supp. 836 (E.D. Pa. 1993).

70. *See id.* at 837-38.

71. Plaintiff was a "shareholder, officer and director" of a corporation which was bought by the defendants. *Id.* at 836. Plaintiff argued that he became an employee of the defendants pursuant to a "Consulting/Noncompete Agreement." *See id.*

72. *See id.* The fraud involved in *Shapiro* concerned the defendants' attempt to fraudulently represent itself as a Women's Business Enterprise in order to obtain government contracts. *See id.*

73. *See id.* at 837.

74. *See id.* The court stated that "[r]elief under 31 U.S.C. § 3730(h) is limited to employees by the

does not define the term “employee,” the common-law agency test⁷⁵ should determine whether the plaintiff is an employee for purposes of the anti-retaliation provision of the Act.⁷⁶ Using this test, independent contractors are specifically excluded from using the anti-retaliation provision of the Act as a basis for a lawsuit against a *qui tam* defendant.⁷⁷ Ultimately, the court found insufficient evidence negating the plaintiff’s claim that he was an employee of the defendants.⁷⁸ The court denied the defendants’ motion for summary

plain language of the statute.” *Id.*

75. The court noted that the Supreme Court in *Darden* set forth the distinction between employee and independent contractor as follows:

In determining whether a hired party is an employee under the general common-law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 837-38 (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992)).

76. *See id.* at 837. The court stated that “the term ‘employee’ is not defined helpfully anywhere within the Act. Consequently, the court must apply the common law agency test to determine if Shapiro was an employee.” *Id.* (citing *Darden* at 323). In *Darden*, the Supreme Court articulated the basis for using the common law agency test to determine if an individual is an employee when a particular statute fails to define the term “employee.” *See Darden*, 503 U.S. at 322-23. The Court stated

[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms. . . . In the past, when Congress has used the term “employee” without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.

Id. (citations omitted). The Court noted that it took a different approach in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). *See Darden*, 503 U.S. at 324-25. In *Hearst*, the Supreme Court determined that the term “employee” as used in a federal statute “derives meaning from the context of that statute, which ‘must be read in light of the mischief to be corrected and the end to be attained.’” *Hearst*, 322 U.S. at 124 (quoting *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940)). The *Darden* Court noted, however, that whenever the Supreme Court interpreted the statutory use of the term employee “to imply something broader than the common law definition . . . Congress amended the statute so construed to demonstrate that the usual common-law principles were the keys to meaning.” *Darden*, 503 U.S. at 324-25. The Court concluded by stating that use of the common law agency test to determine whether an individual is an employee is appropriate because “[a]gency law principles comport . . . with our recent precedents and with the common understanding, reflected in those precedents, of the difference between an employee and an independent contractor.” *Id.* at 327.

77. *See Shapiro*, 835 F. Supp. at 837.

78. *See id.* at 838-39. In applying the common law agency test, the court found that there were some factors present that indicated the plaintiff was an employee of defendant Ecotech. *See id.* at 838. The court noted that “[t]he Agreement [between plaintiff and defendant] states that the ‘Company [Ecotech] shall employ Consultant [Shapiro] and Consultant shall accept such employment. . . . Ecotech paid Shapiro a bi-weekly salary plus commission, Shapiro had no authority to hire or pay assistants, and each new client accepted by Shapiro was subject to Ecotech’s approval.’” *Id.* at 838. The court also noted that Ecotech in some ways “controlled the manner and means of Shapiro’s work by requiring that all advertising materials

judgment,⁷⁹ but in so doing, expressly limited the protection afforded by the anti-retaliation provision of the Act.⁸⁰

The Fourth Circuit Court of Appeals, in *Vessell v. DPS Associates of Charleston, Inc.*,⁸¹ was the first circuit court to define the scope of the term “employee” as used in the anti-retaliation provision of the False Claims Act. In *Vessell*, the plaintiff was a lawn care worker who brought suit against a real estate agency and certain managers of the agency.⁸² The plaintiff maintained the lawns for houses owned by the government but managed by defendants.⁸³ His contract with the defendants was his main source of income.⁸⁴ After discovering the fraudulent practices of the defendants, the plaintiff reported the conduct to the FBI.⁸⁵ As a result of the plaintiff’s tip, the FBI conducted a “‘sting’

be approved by Ecotech before use and by requiring Shapiro to use forms and quote prices and terms approved by Ecotech.” *Id.*

However, the court indicated that certain factors cut against a finding that Shapiro was an employee of Ecotech. The court indicated that the agreement between Shapiro and Ecotech “specifically states ‘Consultant [Shapiro] shall not be an employee of Company [Ecotech]’” and that when “[r]ead as a whole, the Agreement seems to have provided Shapiro with the freedom to structure his own day-to-day activities and to choose which prospective clients to target.” *Id.* The court also noted “that the marketing, sales and management duties performed by Shapiro required specialized skill.” *Id.*

The court indicated that factors both supported and refuted the contention that plaintiff was an employee of defendant Ecotech. *Id.* Specifically, the court noted that “[a]lthough Ecotech provided Shapiro with the benefit of an automobile expense allowance, there is no indication that Ecotech provided Shapiro with health, pension or other benefits”; that “[a]lthough the location of Shapiro’s work was not mandated . . . , Shapiro was required to report to the ‘main office’ whenever Ecotech requested”; and that although “Shapiro was required to work ‘full time’ and keep detailed time records subject to company inspection . . . specific working hours were not mandated.” *Id.*

Finally, the court noted the lack of evidence relating to other important factors of the common law agency test. *See id.* The court noted that “[n]o evidence was presented regarding the tax treatment of Shapiro, whether Ecotech could or did assign additional duties to Shapiro or whether the duties performed by Shapiro were part of the ‘regular business’ of Ecotech.” *Id.*

79. *See id.* at 839. The court stated that “[b]ecause the evidence is conflicting or ambiguous, and differing inferences may reasonably be drawn regarding the evidence, the court concludes that there is a genuine issue of fact as to whether Shapiro was an employee of Ecotech.” *Id.* at 838.

80. *See id.* at 837.

81. 48 F.3d 407 (4th Cir. 1998).

82. *See id.* at 408-09.

83. *See id.* at 408. The plaintiff, George Vessell, started a landscaping business after being an agent for defendant Re/Max Professional Realty. *See id.* at 409. Re/Max managed and sold properties owned by the federal government through the government’s Housing Assistance Program (“HAP”). *See id.* at 408. Vessell submitted a bid to Re/Max for maintaining the lawns of the properties. *See id.* at 409. Re/Max altered the bid and submitted it to the government. *See id.* The altered bid was for an amount less than that to which Vessell had agreed. *See id.* Re/Max was awarded the contract by the government, but Vessell refused to cut the lawns at the amount specified by Re/Max. *See id.* At this point Tom Gibbons, an agent of Re/Max, told Vessell to recoup the difference between the bids by “bid-rigging” and stealing appliances from the properties. *See id.* Gibbons also told Vessell that “landscapers were easy to come by and that Vessell would not get the HAP job if he did not cooperate.” *Id.*

84. *See id.* at 409.

85. *Id.* at 409. The fraud involved bid rigging and stealing appliances from the properties managed

operation” against one of the defendants.⁸⁶

Subsequently, the defendants refused to allow the plaintiff to continue caring for the lawns of properties they managed.⁸⁷ The plaintiff had been maintaining approximately 180 lawns, and this loss of business forced him to close his landscaping company.⁸⁸ The plaintiff filed a lawsuit against the defendants, claiming, *inter alia*, that the defendants’ actions violated the anti-retaliation provision of the False Claims Act.⁸⁹

In evaluating plaintiff’s claim, the Fourth Circuit cited *Shapiro* approvingly⁹⁰ and applied the common-law agency test to determine whether the plaintiff was an “employee” for purposes of the anti-retaliation provision of the Act.⁹¹ Using the common law agency test, the court concluded that the plaintiff was not an employee of the defendants, but instead was an independent contractor.⁹² The court then analyzed whether the anti-retaliation provision of the Act covers independent contractors.⁹³ Relying on the plain language of the Act, the court held that independent contractors are not protected by the anti-retaliation provision of the False Claims Act.⁹⁴

The court noted that a strong public policy argument affords an independent contractor protection under the Act.⁹⁵ The court also noted, however, that an independent contractor normally has a breach of contract remedy not afforded to an employee-at-will.⁹⁶ The court concluded that the plaintiff, as an independent

by Re/Max. *See id.* The plaintiff had been involved in similar activities before, but he believed that the activities were legitimate. *See id.* He claimed that he did not have reason to believe that they were illegal until his dealings with Re/Max as an independent lawn contractor. *See id.*

86. *See id.* The sting operation was directed against only a member of defendant Re/Max’s staff, not Re/Max itself. *Id.* Ultimately, Re/Max kept their government contract, and even had it renewed for two years when the original contract expired. *See id.*

87. *See id.*

88. *See id.*

89. *See id.* The United States intervened in plaintiff’s suit and settled its claims with defendants. *See id.* “[Plaintiff’s] primary claim was that he should be permitted to carry out the terms of the contract he allegedly made with Re/Max. . . . He further argued that Re/Max retaliated against him in violation of the False Claims Act by refusing to carry out the terms of his contract.” *Id.*

90. *See id.* at 411.

91. *See id.* at 411. *See supra* note 75 for a definition of the common law agency test. *See supra* note 78 for an example of the application of the common law agency test.

92. *See id.* at 412.

93. *See id.*

94. *See id.* at 412-13. The court stated that “Congress was perfectly capable of extending the statute’s coverage as broadly as it desired. . . . [T]he anti-retaliation provision is limited by its express language to employees.” *Id.* at 412.

95. *See id.* The court stated that “[i]f an independent contractor were to learn of, and expose, the fraud of a principal contractor, the independent contractor should not lose its contract by virtue of having exposed wrongdoing any more than an employee should.” *Id.*

96. *See id.* The court stated that “independent contractors would have a breach of contract remedy,

contractor, was not protected by the anti-retaliation provision of the False Claims Act.⁹⁷ Therefore, the Fourth Circuit affirmed the district court's dismissal of the plaintiff's claim.⁹⁸

Recently, in *Mruz v. Caring, Inc.*,⁹⁹ the scope of the anti-retaliation provision arose in a slightly different context. In *Mruz*, the New Jersey district court decided the liability of an employer's co-conspirators under the anti-retaliation provision.¹⁰⁰ The court concluded that liability under the anti-retaliation provision applies only to the employer, not to the employer's conspirator, because of the critical "employment relationship" factor.¹⁰¹ Therefore, the court dismissed plaintiff's claims against those defendants that the court determined were not employers of the plaintiff.¹⁰²

III. ANALYSIS

The cases discussed above clearly illustrate the applicability of the anti-retaliation provision of the False Claims Act and the scope of the protection afforded qui tam litigators.¹⁰³ In practice, only individuals who are clearly employees, or who can pass the common-law agency test as set forth in *Shapiro*, will be afforded protection under the anti-retaliation provision of the False Claims Act.¹⁰⁴ Given the plain meaning of the statute, this is the only protection courts can provide.¹⁰⁵ Nonetheless, legislative history supports the courts' interpretation of the anti-retaliation provision.¹⁰⁶

As the facts of *Vessell* indicate, however, these limits on the protection

whereas an employee-at-will would not have such protection. The facts of this particular case demonstrate the principle. Had Vessell's contract not been permeated with fraud, he would have had a contractual remedy against [defendant]." *Id.*

97. *See id.* at 413.

98. *See id.*

99. 991 F. Supp. 701 (D.N.J. 1998).

100. *See id.* at 708-10.

101. *See id.* at 709. The court stated that "liability under section 3730(h) cannot be extended on the basis of a conspiracy; the hallmark of liability under section 3730(h) is an 'employment relationship.'" *Id.*

102. *See id.* at 710.

103. *See Vessell v. DPS Associates of Charleston, Inc.*, 148 F.3d 407 (4th Cir. 1998); *Mruz v. Caring, Inc.*, 991 F. Supp. 701 (D.N.J. 1998); *Shapiro v. Sutherland*, 835 F. Supp. 836 (E.D. Pa. 1993); *Hardin v. DuPont Scandanavia (ARA-JET)*, 731 F. Supp. 1202 (S.D.N.Y. 1990).

104. *See Shapiro*, 835 F. Supp. at 837-38; *see also Vessell*, 148 F.3d at 411-12.

105. *See Vessell*, 148 F.3d at 412.

106. 132 CONG. RECORD 29,315, 29,322 (1986). The record states that

[T]he whistleblower protection of the bill is extremely important and is designed to protect the person from any retaliatory action taken by his employer. This section is intended to afford full protection to the employee if the retaliatory action is in any way connected to a person's activities pursuant to [the Act].

Id. (emphasis added).

available under the False Claims Act can cause great injustice.¹⁰⁷ In *Vessell*, the plaintiff was forced to close his business because of the retaliatory actions of the defendant.¹⁰⁸ Under the current version of the anti-retaliation provision of the False Claims Act, the Fourth Circuit was powerless to provide relief to the plaintiff.¹⁰⁹ The government is grossly mistreating those individuals who are trying to help the government prosecute fraud. As the Fourth Circuit stated in *Vessell*, there is no reason why retaliation is intolerable when directed against an employee but tolerable when directed against an independent contractor.¹¹⁰

The *Vessell* court argued that an independent contractor often has a breach of contract claim.¹¹¹ However, as in *Vessell*, this remedy is unavailable if the particular contract is unenforceable.¹¹² In such a situation, the person who exposes fraud has no recourse against retaliation by the defendant.

The common-law agency test used by the courts is of little help in protecting individuals who expose fraud or assist the government in exposing fraud.¹¹³ Generally, the test will merely confirm the nature of the independent contractor relationship as perceived by the parties involved rather than recharacterizing the relationship as an employer/employee relationship.¹¹⁴

Unfortunately, there is no judicial solution to this problem, as the court in *Vessell* plainly indicates.¹¹⁵ What is needed is an amendment to the current anti-retaliation provision of the False Claims Act. Only through such an amendment can a *qui tam* litigant be fully protected from retaliation, and the goals of the 1986 amendments be fully realized.

IV. PROPOSAL

Because of the inequity and shortcomings of the anti-retaliation provision of

107. Because the plaintiff in *Vessell* was an independent contractor, and his contract with defendant Re/Max was "tainted with fraud," the court had no means to compensate him for losing his business due to the retaliatory acts of Re/Max. See *Vessell*, 148 F.3d at 412-13.

108. See *id.* at 409.

109. See *id.* at 412-13. The court bluntly stated that "[t]he anti-retaliation provision of the False Claims Act does not extend to independent contractors, and *Vessell* is therefore not covered." *Id.* at 413.

110. See *id.* at 412. See also *supra* note 95 and accompanying text.

111. See *Vessell*, 148 F.3d at 412.

112. See *id.*

113. See *Shapiro v. Sutherland*, 835 F. Supp. 836 (E.D. Pa. 1993); *Vessell*, 148 F.3d 407.

114. No recorded cases construing the False Claims Act have found that the relationship was that of employee/employer when the parties had characterized the relationship as being independent contractor/primary contractor.

115. See *Vessell*, 148 F.3d at 412. The court stated that "*Vessell*'s public policy argument is not wholly unpersuasive. . . . Nevertheless, the statutory language is plain and does not, by its terms, extend to independent contractors." *Id.*

the False Claims Act as currently worded, this Note proposes an amendment to the Act that would expand its protections for whistleblowers. Specifically, 31 U.S.C. § 3730(h) should be amended to read as follows:

*Any individual who is discriminated against, either in terms and conditions of employment, preference in awarding contracts, or is otherwise economically injured by a defendant because of lawful acts done by the individual on behalf of the individual or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section shall be entitled to all relief necessary to make the individual whole. Such relief shall include compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An individual may bring an action in the appropriate district court of the United States for the relief provided in this subsection.*¹¹⁶

If Congress enacted this amendment, courts would have the ability to look beyond the Act's rigid terms and truly evaluate whether a qui tam defendant has retaliated against and injured a qui tam relator. Specifically, courts would be able to provide relief for individuals who are independent contractors, sub-contractors, limited partners, and others similarly situated.

V. PRACTICAL APPLICATION

Passing the amendment proposed above would constitute another significant step toward eliminating fraud in governmental contracting. More importantly, the proposed amendment would provide complete protection for those who help the government uncover and eliminate the fraudulent practices of government contractors. Such an amendment would have provided the plaintiff in *Vessell* the recourse he deserved.

The proposed amendment would force a court to focus on a defendant's actions and motivations rather than analyzing a plaintiff's status. If the proposed amendment to the Act was in effect when *Vessell* was decided, the fact that the plaintiff was an independent contractor would not have barred his retaliation claim against the defendants. The key issue would have instead focused on whether the defendants retaliated against the plaintiff because the

116. Italicized words are new language, or changes to language presently used in the anti-retaliation provision of the False Claims Act.

plaintiff assisted the government in its investigation of the fraudulent practices of the defendants. Once that determination was made, the court then could have determined whether the plaintiff was harmed economically by the defendants' retaliatory acts. Finally, after reaching positive conclusions on these key issues, the court could have provided relief to the plaintiff.

The proposed amendment provides an effective framework for courts to follow when determining whether a plaintiff is entitled to relief under the anti-retaliation provision of the Act. As shown above, the court would look first to see whether the defendant retaliated against the plaintiff because of the plaintiff's role in uncovering or prosecuting the fraudulent activities of the defendant. The court would determine whether those retaliatory acts economically injured the plaintiff. If the plaintiff were so injured, the court would then have the power to afford appropriate relief.

VI. CONCLUSION

The anti-retaliation provision of the False Claims Act, while effective in protecting employees from wrongful treatment by their employers, is not broad enough to accomplish the goals of the 1986 amendments to the False Claims Act. Therefore, the Act must be amended so that any individual who uncovers fraud perpetrated on the United States government will be able to come forward, or assist a governmental investigation, without fear of retaliation.

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