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THE FALSE CLAIMS ACT CREATES A 'ZONE  
OF PROTECTION' THAT BARS SUITS  
AGAINST EMPLOYEES WHO REPORT  
FRAUD AGAINST THE GOVERNMENT

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## ARTICLE

### THE FALSE CLAIMS ACT CREATES A “ZONE OF PROTECTION” THAT BARS SUITS AGAINST EMPLOYEES WHO REPORT FRAUD AGAINST THE GOVERNMENT

Joel D. Hesch\*

## ABSTRACT

May employees copy internal company documents and turn them over to the U.S. Department of Justice as part of applying for a whistleblower reward for reporting fraud against the Government? This is one of the most hotly contested issues facing whistleblowers and employers, and the answer will affect the future of the Government’s primary whistleblower reward program.

Each year, companies are cheating the military and Medicare by billions of dollars. To combat fraud, Congress enacted the federal False Claims Act (FCA),<sup>1</sup> which is the primary anti-fraud tool used by the Department of Justice (DOJ) and the fastest growing area of federal litigation. A unique and particularly effective component of the FCA is the *qui tam* provisions, which allow a private person to bring a lawsuit, known as a *qui tam* suit, on behalf of DOJ against companies accused of cheating the government. So far, whistleblowers have recovered for the Government over \$35 billion in *qui tam* cases, and received rewards of \$4 billion. In response, employers have begun filing counterclaims against its whistleblower employees who secretly copy company documents to give to the Government, including claims of breach of contract and a host of tort claims, such as conversion, libel, tortious interference with contracts, and malicious prosecution. Therefore, courts are increasingly being asked to balance the interests of the Government, the relator and the company under a wide variety of situations stemming from employees copying internal company documents for use in filing a *qui tam* case. Unfortunately, due to a lack of a proper framework, court rulings are inconsistent regarding whether to permit or dismiss state law counterclaims against federal whistleblowers. With the threat of damages

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<sup>1</sup> 31 U.S.C. §§ 3729-3733 (2012).

hanging over whistleblower’s head, many potential future whistleblowers are unlikely to risk reporting fraud against the Government.

The core problem is that no court has examined all of the relevant FCA provisions and policy implications in sufficient detail to determine whether and to what extent the FCA creates federal privileges or protections for federal whistleblowers. This Article balances the competing interests and takes the position that six key provisions of the FCA demonstrates both “substantial public interests” and “unique federal interests” in protecting employees filing FCA *qui tam* cases, and therefore federal law should apply. Next, it defines the level of protections flowing from the substantial public and federal interests, which are referred to as the “zone of protection.” Finally, this Article guides the courts through the application of the zone of protection to a series of complex and difficult scenarios.

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### INTRODUCTION

The False Claims Act (FCA),<sup>2</sup> a *qui tam*<sup>3</sup> statute, is the federal Government's primary tool in combating fraud against the Government,<sup>4</sup> which has led to the recovery of over \$35 billion in taxpayer's dollars.<sup>5</sup> The FCA *qui tam* provisions authorize private individuals, called relators (also referred to as *qui tam* plaintiffs<sup>6</sup> or whistleblowers), to receive a reward or a portion of the amount recovered based upon filing a *qui tam* action on behalf of the Government against a fraudfeasor.<sup>7</sup> Today, over 70 percent of all federal Government FCA actions are initiated by relators filing *qui tam* cases.<sup>8</sup> Without relators, fraud against the Government would return to the days of the Civil War when contractors provided the military with sand instead of sugar, or the

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<sup>2</sup> 31 U.S.C. §§ 3729–3733 (2012).

<sup>3</sup> “*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means ‘who pursues this action on our Lord the King’s behalf as well as his own.’” Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000). A *relator* is one who relates the fraud action on behalf of the Government. See United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 226 n.7 (1st Cir. 2004) (“A ‘relator’ is ‘[a] party in interest who is permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official.’” (quoting BLACK’S LAW DICTIONARY 1289 (6th ed. 1990))).

<sup>4</sup> E.g., United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 (5th Cir.2010); (“The FCA is the Government’s primary litigation tool for recovering losses resulting from fraud.”); Avco Corp. v. U.S. Dep’t of Justice, 884 F.2d 621, 622 (D.C. Cir.1989) (“The False Claims Act is the Government’s primary litigation tool for recovering losses sustained as the result of fraud.”).

<sup>5</sup> Since 1986, the DOJ has recovered over \$35 billion under the False Claims Act. *Fraud Statistics – Overview, Oct. 1, 1987 – Sept. 30, 2012*, U.S. DEP’T OF JUSTICE (Oct. 24, 2012), <http://www.taf.org/DoJ-FCA-statistics-2012.pdf>. Of this amount, over \$24 billion or 70% was from *qui tam* cases brought by relators. See *id.*

<sup>6</sup> *Qui tam* is short for the Latin phrase “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,” which means “who as well for the king as for himself sues in this matter.” Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 769 n.1 (2000).

<sup>7</sup> A “relator” is one who relates the fraud action on behalf of the Government. United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 (1st Cir. 2004) (“A ‘relator’ is ‘[a] party in interest who is permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official.’ Black’s Law Dictionary 1289 (6th ed. 1990).”).

<sup>8</sup> Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. COOLEY L. REV. 217, 229 (2012) (“Whistleblower *qui tam* suits have become the Government’s chief anti-fraud tool and account for about 70% of all funds the DOJ recovers from defrauders.”).

1980's when the military paid \$600 for toilet seats and \$748 for pliers.<sup>9</sup>

Recently, however, in response to a rise in employees filing *qui tam* actions, employers are engaging in aggressive legal maneuvers, such as asking courts to force the return of documents, to dismiss the *qui tam*, or to grant contract and tort damages based upon non-disclosure agreements in employment contracts and confidentiality provisions in settlement agreements. Therefore, courts are increasingly being asked to balance the interests of the Government, the relator and the company under a wide variety of situations stemming from employees copying internal company documents for use in filing a *qui tam* case. However, due to a lack of a proper framework, court rulings are inconsistent court rulings regarding whether to permit or dismiss state law counterclaims against relators who file FCA *qui tam* complaints. In fact, because some courts are exclusively applying state law defenses they are improperly refusing to dismiss counterclaims against the whistleblower at the pleading stage and a few courts appear to improperly require that fraud be proven in court as a condition of dismissing counterclaims.<sup>10</sup>

With the threat of damages, attorney fees, and costs incurred by a defendant company hanging over whistleblower's head, many whistleblowers are unlikely to risk reporting fraud against the Government. This strikes at the very heart and future of the FCA. Indeed, the FCA is premised on information revelation. Whistleblowers are valuable because they have what the Government lacks – information. Remove that, and the FCA statute does not work. Unless courts recognize a zone of protection flowing from the FCA, the information will dry up and fraud against the Government will rise as it goes undetected.

The core problem is that no court has examined all of the relevant FCA provisions in

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<sup>9</sup> Id. (citing to Lisa A. Estrada, *Congress to Consider Dramatic Expansion of False Claims Act: How will a Bigger, Stronger False Claims Act Impact Compliance Officers?*, J. HEALTH CARE COMPLIANCE, Mar.–Apr. 2008, at 5.).

<sup>10</sup> See *infra* Sections II(B) and III(A).

sufficient detail to determine the extent whether and to what extent the FCA creates privileges or protections for relators filing *qui tam* cases based upon either (1) a substantial public interest that voids as against public policy contract provisions and associated tort actions, or (2) federal common law flowing from the unique federal interests should apply and preempt state law causes of actions. This Article addresses both issues and provides the courts with a proper framework for addressing the competing interests between a company's right to maintain confidential information, the Government's need for information regarding suspected fraud, and a relator's need for protection when it seeks to comply with the FCA's invitation to file a *qui tam* case in order to receive an award for reporting fraud against the Government. Section I begins by demonstrating that six provisions of the FCA demonstrates both "substantial public interests" and "unique federal interests" in protecting employees filing FCA *qui tam* cases, including utilizing internal company documents in support. It also addresses the level of protections and privileges flowing from the substantial public and federal interests, which are referred to as the "zone of protection." This section concludes by offering a uniform definition of the zone of protection for courts to adopt. Although Section I(C) explains why the zone of protection applies to both contract and tort claims, because some courts have treated these claims differently, separate sections of this Article address additional analyses of contract and tort claims. Specifically, Section II tackles how courts have incorrectly ruled upon contract counterclaims and provides additional reasons why confidentiality agreements or other contract provisions cannot be enforced when they interfere with an employee engaging in an activity covered by the zone of protection. It concludes by discussing the boundaries of the zone of protection in a variety of difficult situations facing the courts. Section III addresses how courts have incorrectly permitted certain tort counterclaims and further explains why the same substantial public policy

and federal interests also provide a zone of protection from tort claims. It ends by providing guidance to the courts by distinguishing situations where tort claims may continue because the conduct is outside of the zone of protection.

#### I. THE FCA DEMONSTRATES BOTH A SUBSTANTIAL PUBLIC INTEREST AND UNIQUE FEDERAL INTEREST IN PROTECTING EMPLOYEES FILING QUI TAM CASES AND PROVIDING COPIES OF INTERNAL DOCUMENTS TO THE GOVERNMENT

The FCA establishes both a substantial public policy interest and need for protections required by the unique federal interests in protecting whistleblowers for reporting suspected fraud against the Government or filing *qui tam* cases under the FCA, including when they use internal company documents to support their allegations. Stated conversely, substantial public policy and federal interests would be improperly impaired if whistleblowers are not exempt from state-based legal actions by employers based upon or flowing from filing a *qui tam* case.

As discussed in more detail in Section I(C), there are two separate lines of Supreme Court cases, which individually would create a federal privilege or zone of protection for relators from counterclaims flowing from filing a *qui tam* case. First, in the seminal case of *Town of Newton v. Rumery*, the Supreme Court made it clear that it is a defense to contract enforcement that a term of a contract is against public policy.<sup>11</sup> According to *Rumery*, “a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.”<sup>12</sup> Thus, when a court is asked to invoke public policy to trump a contract provision (or bar a tort claim),<sup>13</sup> it must balance the competing public interests. Because the stronger the public interest, the greater the zone of protection, the first step is determining the strength of the public interests. Here, the public interest of courting and protecting

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<sup>11</sup> *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

<sup>12</sup> *Id.*

<sup>13</sup> Similarly, as explained in more detail in Section III, the same substantial public interest should exempt a person from a tort claim when engaging in a zone of protection as defined in this Article.

whistleblowers who report suspected fraud against the Government is substantial because it flows directly from numerous provisions of the federal False Claims Act.<sup>14</sup>

Second, the Supreme Court in *Boyle*, ruled that where “uniquely federal interests” exist, it is appropriate to create federal common law which pre-empts and replaces state law to the point where state tort claims are barred.<sup>15</sup> As established in Section I(C) below, the same six FCA provisions are clearly designed to protect unique federal interests by enlisting whistleblowers to report fraud against the Government. Therefore, the *qui tam* provisions of the FCA fit this narrow class of areas where federal common law should be applied.

Accordingly, there are two alternative bases for courts recognizing the zone of protection that bars claims against relators. The following subsections outline and discuss the relevant FCA provisions, which establish not only substantial public policy interests but also unique federal interests in protecting relators who file *qui tam* actions, either of which alone creates a “zone of protection.”

#### *A. FCA: A Brief History and Outline of Key Provisions*

Fraud against the Government is an age-old problem—a problem that the United States Government has been plagued with for hundreds of years.<sup>16</sup> Benjamin Franklin aptly observed, “There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government.”<sup>17</sup> Congress and President Lincoln enacted the False Claims Act (“FCA”) in 1863 to combat this problem,<sup>18</sup> which imposes liability on companies

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<sup>14</sup> 31 U.S.C. §§ 3729–3733 (2012). It is also augmented by several other federal whistleblower protection statutes.

<sup>15</sup> *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504, (1988) (citations omitted).

<sup>16</sup> Pamela H. Bucy, *Growing Pains: Using the False Claims Act to Combat Health Care Fraud*, 51 Ala. L. Rev. 57 (1999) (“The FCA is aimed at the ‘world’s second oldest profession . . . stealing . . . .’” (citation omitted)).

<sup>17</sup> 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, 35 (1991).

<sup>18</sup> 132 CONG. REC. H9382-03 (daily ed. Oct. 7, 1986) (statement of Rep. Daniel Glickman).



and individuals who defraud the Government.<sup>19</sup> By enacting the FCA, President Lincoln and Congress encouraged “‘whistleblowers’ to act as ‘private attorneys-general’ . . . in pursuit of an important public policy.”<sup>20</sup> From targeting contractor fraud during the Civil War to today’s healthcare fraud, the ability of individuals to serve as relators and protect the interests of the Government remains critical.<sup>21</sup>

While the *qui tam* concept dates back to the English common law,<sup>22</sup> the FCA, enacted in 1863, is the first statute of its kind in the United States to bring otherwise unknown fraud to light.<sup>23</sup> Although the FCA lay largely dormant for decades during the twentieth century because it failed to provide sufficient incentive for whistleblowers to step forward, Congress, in response to escalating fraud losses, revived the FCA by significantly amending it in 1986.<sup>24</sup> Since then, the FCA has become the leading weapon for fighting fraud against the federal Government.<sup>25</sup> Because it is estimated that as much as 10 percent of all federal Government spending is lost due to fraud, it is vital that the *qui tam* provisions be given their full effect of enlisting and protecting whistleblowers who report suspected fraud against the Government.<sup>26</sup>

There are six key FCA provisions that together demonstrate well-defined and dominant substantial public policy and unique federal interests in recruiting and protecting relators who

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<sup>19</sup> 31 U.S.C. §§ 3729-3733 (2011).

<sup>20</sup> *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1042 (6th Cir. 1994).

<sup>21</sup> *United States v. Cancer Treatment Centers of Am.*, 350 F. Supp. 2d 765, 769-70 (N.D. Ill. 2004).

<sup>22</sup> Dan D. Pitzer, Note, *The Qui Tam Doctrine: A Comparative Analysis of its Application in the United States and the British Commonwealth*, 7 TEX. INT’L L.J. 415, 418 (“The first British statutes were enacted in the fourteenth century . . .”).

<sup>23</sup> 132 CONG. REC. H9382-03 (daily ed. Oct. 7, 1986) (statement of Rep. Daniel Glickman); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1042 (6th Cir. 1994) (noting that the FCA’s authorization of *qui tam* actions encourages “‘whistleblowers’ to act as ‘private attorneys-general’ . . . in pursuit of an important public policy”). In recent years, Congress has also adopted whistleblower statutes for tax fraud, securities fraud, and commodity futures trading fraud. 26 U.S.C. § 7623 (2010) (tax); 15 U.S.C. § 78u-6 (2010) (securities); 7 U.S.C. § 26 (2010) (commodity futures trading).

<sup>24</sup> For a discussion of the history of the FCA, see *Hesch, Restating the “Original Source Exception” to the False Claims Act’s “Public Disclosure Bar,”* 1 LIBERTY U. L. REV. 111, 114-120 (2006); see also discussion in *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1406-07 (2010).

<sup>25</sup> See *supra* notes 3 & 7. In addition to the federal statute, more than 30 states have enacted similar false claims statutes in recent years.

<sup>26</sup> See S. Rep. No. 99-345, at 3 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5268 (“The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget.”). see also Dayna Bowen Matthew, *Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act*, 76 IND. L.J. 525, 526 (2001) (noting that a House Report estimated that 10% of total healthcare costs were lost to fraud or abuse).

file *qui tam* actions. First, the FCA requires each relator to supply the Government with a statement of material evidence (“SME”) containing all information and documents they possess that support the FCA allegations, which necessarily includes company documents within their control.<sup>27</sup> Second, the FCA requires that the relator file the *qui tam* complaint with the court under seal and only serve the complaint and SME upon the Attorney General in order to allow the Government time to investigate both potential crimes and civil violations of the FCA violations without tipping off the defendants.<sup>28</sup> Third, the FCA’s public disclosure bar operates to reward information that is not publicly available, such as internal company documents, because it dismisses *qui tam* cases that are based upon public information unless the relator is also an original source of the allegations in the *qui tam* and thus in a position to provide useful information to the Government.<sup>29</sup> Fourth, the FCA provides relators with monetary incentives by using a sliding scale for their compensation based on two criteria: their contribution in litigating the action and their provision of inside, first-hand knowledge, which more highly rewards inside information.<sup>30</sup> Fifth, the FCA contains an anti-retaliation provision, which allows a relator to recover, in addition to his award for reporting fraud, double damages plus attorney fees for any acts of retaliation for reporting fraud against the Government.<sup>31</sup> Sixth, and finally, the FCA dictates when a remedy is available to a defendant relating to the filing of a *qui tam* case and specifically limits it to when defendants can prove that the relator acted “clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.”<sup>32</sup>

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<sup>27</sup> 31 U.S.C. § 3730(b)(2). See *infra* Section I(A)(1) FCA: The Statement of Material Evidence.

<sup>28</sup> *Id.* See *infra* Section I(A)(2) FCA: The Seal Provisions.

<sup>29</sup> 31 U.S.C.A. § 3730(e)(4)(A). See *infra* Section I(A)(3) FCA: The Public Disclosure Bar.

<sup>30</sup> 31 U.S.C. § 3720(d). See *infra* Section I(A)(4) FCA: Incentives Based on Participation.

<sup>31</sup> 31 U.S.C. § 3730(h). See *infra* Section I(A)(5) FCA: Anti-Retaliation Provisions.

<sup>32</sup> 3730(d)(4). See *infra* Section I(A)(6) FCA: Remedy Provision for Defendants When a Relator Acts Unreasonably. Therefore, by implication, a defendant may not bring any alternative claims against a relator.

Each of these six FCA provisions is discussed in detail below. Combined, they demonstrate a well-defined and dominant substantial public and federal interest in encouraging and protecting relators who step forward to report possible violations of the FCA. Therefore, the FCA creates a “zone of protection” for relators when they file a *qui tam* case, including a prohibition on filing contract or tort counterclaims based on reporting fraud or producing internal company information and documents to the DOJ.<sup>33</sup>

### 1. FCA: The Statement of Material Evidence

The FCA requires the relator to serve on the DOJ a copy of the *qui tam* complaint and a separate statement of material evidence (“SME” or disclosure statement), which the FCA defines as a “written disclosure of substantially all material evidence and information the person possesses.”<sup>34</sup> At least one court noted, “The purpose of the written disclosure requirement ‘is to provide the United States with enough information on alleged fraud to be able to make a well-reasoned decision on whether it should participate in the filed lawsuit or allow the relator to proceed alone.’”<sup>35</sup> To serve the statutory purpose of informing the intervention decision, disclosure statements should be “as complete, detailed, and thoughtful as possible.”<sup>36</sup>

Indispensable to the SME are documents that support the fraud allegations.<sup>37</sup> “There are few things better than giving DOJ a smoking gun document, such as an internal company

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<sup>33</sup> In addition, there are over 30 other federal statutes containing whistleblower protections that add additional support that there exists at least a strong public interest in protecting whistleblowers in general. See *infra* Section I(B).

<sup>34</sup> 31 U.S.C. § 3730(b)(2).

<sup>35</sup> U.S. ex rel. Bagley v. TRW, Inc., 212 F.R.D. 554, 557, 56 Fed. R. Serv. 3d 638 (C.D. Cal. 2003) (citations omitted). See also United States ex rel. Purcell v. MWI Corp., 209 F.R.D. 21, 26 (D.D.C. 2002) (“The FCA aims to advance the twin goals of (1) rejecting suits which the Government is capable of pursuing itself while (2) promoting those which the Government is not equipped to bring on its own.”) (emphasis in original).

<sup>36</sup> Bagley, 212 F.R.D. at 557. Some courts have outright dismissed a *qui tam* complaint if the relator failed to supply DOJ with a separate SME document outlining the fraud allegations. U.S. ex rel. Made in the USA Foundation v. Billington, 985 F. Supp. 604, 608 (D. Md. 1997).

<sup>37</sup> HESCH, WHISTLEBLOWING: REWARDS FOR REPORTING FRAUD AGAINST THE GOVERNMENT xxx (2013), at 108 (“Documents are the heart of a case. It is rare for a defendant to simply admit to wrongdoing and offer to repay millions of dollars.”). The requirement to plead fraud with particularity also makes detailed documentation indispensable. See FED. R. CIV. P. 9(b). “[E]very regional circuit has held that a relator must meet the requirements of Rule 9(b) when bringing [FCA] complaints on behalf of the Government.” *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1310 (Fed. Cir. 2011) (collecting cases).

memorandum outlining or admitting the fraud.”<sup>38</sup> Memories fade or grow cloudy, but documents never suffer from lack of recall.<sup>39</sup> Thus, the internal documents created within the company at the time of the fraud are essential to proving the relator’s allegations. According to Representative Howard Berman, House sponsor of the modern *qui tam* provisions, “Without the help of insiders *who brought the Government documents and other hard evidence of the fraud*, it would have been extremely difficult for the Government to develop sufficient evidence to establish liability in many of the successful FCA cases.”<sup>40</sup> Fraud, by its very nature, is intentionally difficult to detect.<sup>41</sup> Thus, those on the inside are the only witnesses capable of gathering the documents that are the key to a successful FCA case.<sup>42</sup>

In 2004, the Department of Justice filed an amicus brief in a FCA *qui tam* case outlining its position on the purpose of the FCA statute, and in particular the implication of the FCA’s requirement that a relator submit a statement of material evidence when applying for a reward. According to the DOJ:

It has long been understood that ‘the purpose [of] the *qui tam* provisions of the Act is to encourage those with knowledge of fraud to come forward.’ *Neal v. Honeywell*, 826 F. Supp. 266 (N.D. Ill. 1993), *aff’d*, 33 F.3d 860 (7<sup>th</sup> Cir. 1994) (citing H.R. Rep. No. 660, 99<sup>th</sup> Cong. 2d Sess. 22 (1986)). Implicit in the very purpose of the statute is an assumption that individuals who become *qui tam* relators possess and are willing to disclose to the government **inside evidence of fraud** – whether in the form of documents or other information – that their employers or other potential FCA defendants would rather that the relators not

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<sup>38</sup> HESCH, *supra* note 36, at 109.

<sup>39</sup> “[A]nyone who represents whistleblowers knows the value of documents in bringing their allegations to light. Documents often provide key evidence of wrongdoing and make it more likely that resource-starved regulators will take an interest in the whistleblower’s allegations in the first place.” David J. Marshall & Andrew Schroeder, *The Big Chill: The Computer Fraud and Abuse Act and Whistleblower Disclosures*, NAT’L L. J., Nov. 1, 2011. In addition, Virtually every fraud case at the DOJ, involves someone who lied or suffered from intentional amnesia when questioned about the alleged fraud. HESCH, *supra* note 34, at 108.

<sup>40</sup> 155 CONG. REC. E1297 (daily ed. June 3, 2009) (statement of Rep. Howard Berman) (emphasis added). *See also* 132 CONG. REC. H9388 (October 7, 1986) (statement of Rep. Berman) (recommending substantial reward to relator who “carefully develops all the facts *and supporting documentation* necessary to make the case and presents it in a thorough and detailed fashion to the Justice Department”) (emphasis added). Presenting the evidence and law to the Justice Department in the most compelling manner “often means culling through voluminous amounts of material and emphasizing those facts *and documents* that tell the most compelling narrative.” United State ex rel. Green v. Corporation, 59 F.3d 953, 964 (9th Cir. 1995) (emphasis added) (quoting Erika Kelton).

<sup>41</sup> 155 CONG. REC. E1297 (daily ed. June 3, 2009) (statement of Rep. Harold Berman). [short cite]

<sup>42</sup> *Id.*

disclose to the government. In fact, in order to proceed with an FCA action, the FCA requires that relators disclose to the United States alone ‘substantially all material evidence and information the person possesses,’ 31 U.S.C. § 3730(b)(2), and ties relator’s share to the importance of her participation in the action and the relevance of the information she provided. *United State ex rel. Green v. Corporation*, 59 F.3d 953, 964 (9<sup>th</sup> Cir. 1995).<sup>43</sup>

The DOJ emphasized both the need for and authorization of a relator producing to the DOJ inside evidence of fraud, including internal company documents, as part of the process of reporting fraud against the Government under the FCA.

In short, Congress intentionally requires that to be eligible for a reward under the *qui tam* provisions of the FCA, the relator must privately produce to DOJ a statement of material evidence<sup>44</sup> containing all information—including documents—in their possession, custody or control.<sup>45</sup> Therefore, this FCA provision demonstrates a substantial public interest in enlisting relators to produce internal company documents to the DOJ as part of reporting suspected fraud against the Government by filing a *qui tam*.<sup>46</sup>

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<sup>43</sup> Submission of the United States as *Amicus Curiae* in Support of Relator’s Motion to Dismiss the Counterclaims of Defendant Midwestern Regional Medical Center, Inc., available on Pacer at *U.S. ex rel. Grandeau v. Cancer Treatment Centers of Am., et al.*, No. 99-cv-8287 (N.D. Ill.) (dismissed Apr. 25, 2006); Docket No. 102, dated Apr. 2, 2004, at p.7 (emphasis added).

<sup>44</sup> The goal of the SME provision is to require the relator to provide the Government with all of the information it has to support the allegations. “The purpose of the written disclosure requirement ‘is to provide the United States with enough information on alleged fraud to be able to make a well reasoned decision on whether it should participate in the filed lawsuit or allow the relator to proceed alone.’” *United States ex rel. Bagley v. TRW Inc.*, 212 F.R.D. 554, 555 (C.D.Cal.2003) (Quoting *United States ex rel. Woodard v. Country View Care Center, Inc.*, 797 F.2d 888, 892 (10th Cir.1986); and gathering cases discussing the purpose of the SME).

<sup>45</sup> To supplement the clear language of the statute, we may look to other legislation for support that the Government values the actions of relators in turning over documents that provide evidence of fraud. Indeed, the contractors are required to turn over such evidence. The statutory mandate for document disclosure has been clearly addressed in the Federal Acquisition Regulations (FAR) which governs the conduct of Government contractors. Several provisions in FAR specify that contractors may be suspended and/or barred for failing to disclose “credible evidence” of criminal violations, False Claims Act violations, or “significant overpayments” to the Government. FAR 3.1003 (a)(2) and (3) and FAR 9.406-2 and 9.407-2. Accordingly, FAR requires document production as part of the duty of disclosing FCA violations to authorities. Although that not all FCA cases fall within FAR, the goal of protecting the public fisc remains the same.

<sup>46</sup> The Federal Rules of Civil Procedure provides further support the conclusion that relators need to possess and disclose all material evidence proving fraud, including relevant documents, as part of filing a *qui tam* case under the FCA. For all complaints, the rules require a short and plain statement of the claim. FED. R. CIV. P. 8(a)(2). For fraud cases, however, the rules also require that the statement be made with particularity regarding the “time, place, and content of the false misrepresentations, the fact[s] misrepresented, and . . . [the] consequence of the fraud.” FED. R. CIV. P. 9(b). The circuits are unanimous that an FCA relator must meet this particularity requirement in his *qui tam* complaint. “[E]very regional circuit has held that a relator must meet the requirements of Rule 9(b) when bringing [FCA] complaints on behalf of the Government.” *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1310 (Fed. Cir. 2011) (collecting cases). See also Charis Ann Mitchell, Comment, A Fraudulent Scheme’s Particularity Under Rule 9(b) of the Federal Rules of Civil Procedure, 4 LIB. U. L. REV. 337, 347-51 (2010). Many *qui tam* cases are dismissed each year because plaintiffs fail to possess and assert facts with sufficient particularity. See *id.* Thus, a relator

## 2. FCA: The Seal Provisions

The FCA also requires that the relator file the *qui tam* complaint with the court under seal and only serve the complaint and SME upon the Attorney General.<sup>47</sup> Specifically, the Act reads,

The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.<sup>48</sup>

By mandating that the complaint be filed under seal, Congress further indicated that it intended to establish a substantial public interest in privately obtaining inside information from employees when reporting fraud by their employers. The need for secrecy was explained in an amicus brief by the United States,

Not only does the FCA contemplate that relators will share evidence with the government, but also that **they will do so in secrecy**. The FCA requires relators to file their complaints under seal and not to serve the complaint on defendants ‘until the court so orders.’ 31 U.S.C. § 3730(b). The complaint must remain under seal for at least 60 days and the seal is subject to extension for good cause shown by the United States. ‘The purpose of these provisions is to ‘protect the Government’s interest in criminal matters,’ by enabling the government to investigate the alleged fraud **without ‘tipping off investigation targets’** at ‘a sensitive stage.’” *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 743 (D.C. Cir. 1998) (quoting S. Rep. No. 99-345, at 24, reprinted in 1986 U.S.C.C.A.N. at 5289.<sup>49</sup>

The DOJ correctly emphasized that not only is a relator authorized to produce inside information to the Government, but he should and must do so in “secrecy” and without tipping of his

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who is unable to provide sufficiently detailed evidence in his *qui tam* complaint may be dismissed for failing to meet the requirements of the federal rules. Again, documents are a primary way of supporting allegations.

<sup>47</sup> 31 U.S.C. § 3730(b). A copy is also served on the U.S. Attorney where the action is filed.

<sup>48</sup> *Id.*

<sup>49</sup> Submission of the United States as *Amicus Curiae* in Support of Relator’s Motion to Dismiss the Counterclaims of Defendant Midwestern Regional Medical Center, Inc., available on Pacer at *U.S. ex rel. Grandeau v. Cancer Treatment Centers of Am., et al.*, No. 99-cv-8287 (N.D. Ill.) (dismissed Apr. 25, 2006); Docket No. 102, dated Apr. 2, 2004, at pp. 7-8 (emphasis added).

employer. In fact, when a relator files a *qui tam*, he privately provides a copy of the complaint and SME to the U.S. Attorney General.<sup>50</sup> Because the Attorney General is responsible for investigating both criminal and civil fraud violations of U.S. laws, whenever the Attorney General receives a copy of a *qui tam* complaint, he shares the complaint with both the civil and criminal divisions of the DOJ. Hence, when a person files a *qui tam*, she is simultaneously reporting possible civil and criminal violations for fraud against the government. Thus, the public interest in protecting relators who file *qui tam* suits is even more heightened because of the potential criminal violations.<sup>51</sup> Indeed, the Federal Circuit Court of Appeals noted that “the public policy interest at stake the reporting of possible crimes to the authorities is one of the highest order and is indisputably ‘well defined and dominant’ in the jurisprudence of contract law.”<sup>52</sup>

In sum, because Congress intentionally required relators to file the *qui tam* under seal and in *secret* produce all available evidence of fraud to the DOJ, this FCA provision further demonstrates a statutory framework that creates a substantial public interest and uniquely federal interest in enlisting relators to secretly producing internal company documents to the DOJ as part of filing a *qui tam*.

### 3. FCA: The Public Disclosure Bar

The FCA structure also demonstrates that Congress is intentionally seeking and rewarding “insider” information. Specifically, the FCA contains a public disclosure bar that calls for dismissal of a *qui tam* plaintiff if the complaint is “based upon the public disclosure of

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<sup>50</sup> 31 U.S.C. § 3730(a)(2).

<sup>51</sup> In addition, the U.S. Department of Justice, headed by the Attorney General, is the only entity permitted by law to settle criminal or civil claims of fraud against the government. Thus, reports of fraud against the U.S. must be investigated and actions taken by the DOJ. E.g., See 31 U.S.C. § 3730 (stating that False Claims Act claims can only be brought by the Attorney General or a private person suing in the name of the United States); 31 U.S.C. § 3711(b)(1) (providing that agencies are permitted to settle and compromise certain claims, but not fraud claims); 28 C.F.R. § 0.45(d) (assigning common law fraud claims to the Assistant Attorney General, Civil Division).

<sup>52</sup> *Fomby-Denson v. Department of the Army*, 247 F.3d 1366, 1377 (Fed. Cir. 2001) (citing *W.R. Grace and Co., v. Local Union 759*, 461 U.S. 757, 766 (1983)).

allegations or transactions in” certain specified proceedings, reports, or the media, unless the relator “is an original source of the information” on which the allegations are based.<sup>53</sup> “The purpose of the FCA is ‘to discourage fraud against the government’ and, ‘[c]oncomitantly, the purpose of the *qui tam* provision of the [FCA] is to encourage those with knowledge of fraud to come forward.’”<sup>54</sup> Thus, the FCA both encourages insiders to step forward and discourages those without original source information from bringing a *qui tam* action and even barring those without original source information in certain situations.<sup>55</sup> Accordingly, this FCA provision further demonstrates that there is a substantial public and federal interest in obtaining insider information from relators.

#### 4. FCA: Incentives Based on Participation

The FCA establishes an incentive based *qui tam* structure to attract would-be whistleblowers, which favors inside informants. Under the FCA, if the Government intervenes, a relator receives a minimum of 15% and up to 25% of the judgment amount,<sup>56</sup> and if the Government declines to join the suit they receive an even higher amount of 25% to 30%.<sup>57</sup> “It is commonly recognized that the central purpose of the *qui tam* provisions of the FCA is to ‘set up incentives to supplement Government enforcement’ by ‘encouraging insiders privy to a fraud on the Government to blow the whistle on the crime.’”<sup>58</sup> Courts have deemed the incentive structure to be a vital aspect of the FCA in order to attract insiders to report fraud against the

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<sup>53</sup> 31 U.S.C.A. § 3730(e)(4)(A).

<sup>54</sup> United States ex rel. Head v. Kane Co., 668 F. Supp. 2d 146, 152 (D.D.C. 2009 (citing Neal v. Honeywell, Inc., 826 F. Supp. 266, 269 (N.D. Ill.1993) (citing H.R. Rep. No. 660, 99th Cong., 2d Sess., 22 (1986)).

<sup>55</sup> Northrop at p. 965 (noting that the public disclosure bar is an important aspect of the purpose of the FCA to attract insiders and that “grafting a requirement that ‘a *qui tam* plaintiff ... have played some part in his allegation's original public disclosure,’ *id.* at 1418, was in accord with Congress's purpose ‘of encouraging private individuals who are aware of fraud being perpetuated against the Government to bring such information forward,’ *id.* at 1419 (internal quotations omitted), because it ‘discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time,’ *id.* (quoting United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 18 (2d Cir.1990))”.

<sup>56</sup> 31 U.S.C. § 3730(d)(1).

<sup>57</sup> § 3730(d)(2).

<sup>58</sup> United States ex rel. Green v. Northrop Corp., 59 F.3d 953, 963 (9th Cir. 1995) (citations omitted).



Government.<sup>59</sup>

Many courts, including the Supreme Court, similarly recognize that the decision to file a *qui tam* is “motivated primarily by prospects of monetary reward rather than the public good.”<sup>60</sup>

The Supreme Court has also recognized the *qui tam* statute as an effective fraud prevention tool:

*Qui tam* statutes are passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.<sup>61</sup>

The FCA went a step further in enlisting employees of a company committing fraud against the Government by establishing a sliding scale for determining the amount of reward with the participation by the relator and strength of information a key factor.<sup>62</sup> The Ninth Circuit

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<sup>59</sup> Id. at 963 (“The vital importance of this incentive effect is demonstrated by the reasons set forth by Congress in 1986 in undertaking the first extensive revision of the Act since its enactment in 1863. Congress expressed its judgment that “sophisticated and widespread fraud” that threatens significantly both the federal treasury and our nation’s national security only could successfully be combatted by “a coordinated effort of both the Government and the citizenry.” S. Rep. No. 345, 99th Cong., 2d Sess. 2-3 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5267-68 [hereinafter Senate Report]. Emphasizing both difficulties in detecting fraud that stem largely from the unwillingness of insiders with relevant knowledge of fraud to come forward, see id. at 4, reprinted in 1986 U.S.C.C.A.N. at 5269, and “the lack of resources on the part of Federal enforcement agencies” that often leaves unaddressed “[a]llegations that perhaps could develop into very significant cases,” id. at 7, reprinted in 1986 U.S.C.C.A.N. at 5272, Congress sought to “increase incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government,” id. at 2, reprinted in 1986 U.S.C.C.A.N. at 5267. Congress’s overall intent, therefore, was “to encourage more private enforcement suits.” Id. at 23, quoted in 1986 U.S.C.C.A.N. at 5288-89; see also Killingsworth, 25 F.3d at 721 (“The amended Act ‘increased incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government.’” (quoting Senate Report, supra, at 2, reprinted in 1986 U.S.C.C.A.N. at 5267)).”).

<sup>60</sup> See Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. COOLEY L. REV. 217, 229 (2012) (quoting *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997)). See also id. (“The Supreme Court has previously recognized that the *qui tam* statute as an effective fraud prevention: ‘*Qui tam* statutes are] passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.’” (Hughes, citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885))); see also *United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1212 (7th Cir. 1994) (“[T]he only motivation in bringing the suit is to recover a piece of the action given by statute.”)). For a general discussion on the policy implications of paying monetary rewards to whistleblowers, see Sean Hameral, *Lincoln’s Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL’Y 89, 98–100 (1997).

<sup>61</sup> Id. (citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.5 (1943) (quoting *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885))); see also *United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1212 (7th Cir. 1994) (“[T]he only motivation in bringing the suit is to recover a piece of the action given by statute.”)). For a general discussion on the policy implications of paying monetary rewards to whistleblowers, see Sean Hameral, *Lincoln’s Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL’Y 89, 98–100 (1997).

<sup>62</sup> 31 U.S.C. § 3730(d) (“the extent to which the person substantially contributed to the prosecution of the action”).

summed it up this way:

The right to recovery clearly exists primarily to give relators incentives to bring claims. Moreover, the extent of the recovery is tied to the importance of the relator's participation in the action and the relevance of the information brought forward. This demonstrates not only the importance of the incentive effect, but that Congress wished to create the greatest incentives for those relators best able to pursue claims that the government could not, and bring forward information that the government could not obtain.<sup>63</sup>

One of the factors DOJ uses when determining what percentage to pay a relator is whether the “relator provided extensive, first-hand details of the fraud to the Government.”<sup>64</sup> In other words, the greater the insider information provided, the greater the potential for a higher monetary reward. As discussed earlier, producing internal company documents are a key to providing credible first-hand details of the fraud. For example, one court considered the fact that a relator produced as part of his SME to the DOJ over 700,000 pages of internal company documents as a reason for giving a higher award.<sup>65</sup>

In short, the FCA gives higher rewards for greater contributions, including insider information, and the best contribution consists of providing internal company documents that help prove the fraud. Accordingly, the incentive structure of the FCA further demonstrates a substantial public and federal interest protecting relators who bring forth inside information and internal company documents through filing *qui tam* cases.

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<sup>63</sup> Green, 59 F.3d at 963-64 (footnotes omitted). The Ninth Circuit also recognized the importance of granting the relator a right to participate in the *qui tam* case and even pursue it should the DOJ decline to do so. *Id.* (“Providing the relator a right to recover, a role in the action when the Government intervenes, see 31 U.S.C.A. § 3730(c)(1) (giving the relator a right ‘to continue as a party’ notwithstanding the Government’s decision to proceed with the action), and a right to object to a dismissal or settlement by the Government, see *id.* § 3730(c)(2)(A), (B), also serve the additional purpose of giving a relator the incentive to ‘act [ ] as a check that the Government does not neglect evidence, cause undu[e] delay, or drop the false claims case without legitimate reasons.’, Senate Report, *supra*, at 25-26, reprinted in 1986 U.S.C.C.A.N. at 5290-91.”).

<sup>64</sup> DOJ Relator’s Share Guidelines, FALSE CLAIMS ACT & QUI TAM Q. REV. (Oct. 1997), at 17–19, available at <http://www.taf.org/publications/PDF/oct97qr.pdf>. The author was working in that DOJ office at the time the guidelines were established. See Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. COOLEY L. REV. 217, 229 (2012) (detailed discussion of how relator shares are determined).

<sup>65</sup> U.S. ex rel. Rille v. Hewlett-Packard Co., 784 F. Supp. 2d 1097, 1099 (E.D. Ark. 2011). The court in *Rille* did not discuss the relator’s entitlement to this data or explicitly address its proper use in the *qui tam* action, but the court noted the “700,000 pages of incriminating documents that [relator] took” as one of the important factors in determining the relators’ share of the *qui tam* settlement. *Id.* at 1101.

## 5. FCA: Anti-Retaliation Provisions

In addition to the *qui tam* provisions that pay awards for reporting fraud, the FCA contains anti-retaliation provisions.<sup>66</sup> The FCA not only protects employees from retaliation for their efforts to assist the Government in combatting fraud, but also specifically provides relators with a personal claim of double damages for harm suffered.<sup>67</sup> Specifically, the FCA anti-retaliation provision reads:

(1) In general.— Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of **lawful acts** done by the employee, contractor, agent or associated others **in furtherance of** an action under this section or other **efforts to stop 1 or more violations** of this subchapter.<sup>68</sup>

A prior version of this anti-retaliation provision was first included in the 1986 FCA because, as the Senate Committee Report recognized, “few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment, or any other form of retaliation.... [T]he 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.”<sup>69</sup> In 2009, Congress amended the language to strengthen and broaden the scope of protection to make it clear that the protection extends to all types of employees as well as others assisting them in reporting a violation of the FCA.<sup>70</sup>

Although the anti-retaliation provisions do not fully define “lawful acts,” this portion of

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<sup>66</sup> 31 U.S.C. § 3730(h). To prevail on a § 3730(h) retaliation claim, the relator must establish these three elements: (1) the employee was engaging in conduct protected by the FCA, (2) the employer knew the employee was engaging in protected conduct, and (3) the employer discriminated against the employee because of his or her protected conduct.

<sup>67</sup> *Id.*

<sup>68</sup> 31 U.S.C. § 3730(h)(1) (emphasis added).

<sup>69</sup> S. Rep. No. 99-345, at 34 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5299.

<sup>70</sup> Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 5:12.

the FCA specifically provides a private cause of action that covers all efforts by an employee “in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.” Even under the 1986 version, “a plaintiff is not required to show that the defendant actually committed a False Claims Act violation.”<sup>71</sup> Rather, the anti-retaliation provisions “require[] only acts in ‘furtherance’ of a False Claims Act suit, including investigation of an action ‘to be filed.’ This language “manifests Congress's intent to protect employees while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together.”<sup>72</sup> In addition, many courts have held that the private cause of action exists even if the employee did not know of the existence of the FCA at the time that they gathered information as part of deciding whether to report fraud against the Government to the Government.<sup>73</sup> Accordingly, the anti-retaliation provisions of the FCA further support that Congress intended to fully protect relators from all forms of retaliation, including counterclaims, when filing a *qui tam* case.<sup>74</sup>

## 6. FCA: Remedy Provision for Defendants When a Relator Acts Unreasonably

Finally, the FCA sets forth the exclusive remedy to a defendant when a relator fails to

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<sup>71</sup> Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 5:15 (Statutory elements—Protected activity (updated April 2013)) (“The 2009 version of section 3730(h) refers to efforts to stop a violation of the False Claims Act. Similar issues may arise about whether the plaintiff must prove that the actions he or she attempted to stop actually did violate the False Claims Act. For the same policy reasons that courts have generally not imposed such a requirement under the 1986 version, the amended version should not be read to require that the plaintiff establish that a violation was occurring before being protected under the Act. Such a requirement would mean that only persons well versed in the law and with complete information would be protected from retaliation, contrary to Congress's intent.”).

<sup>72</sup> *Id.* (citations omitted). In addition, “[T]he new language makes clear that section 3730(h) protects not only actions taken in furtherance of a potential or actual *qui tam* action, but also steps taken to remedy fraud through other means, including internal reporting to a supervisor or compliance department, or refusals to participate in unlawful activity.” *Id.* at § 5:12 (Statutory elements—Protected activity).

<sup>73</sup> See, e.g., *Dookeran v. Mercy Hosp. of Pittsburgh*, 281 F.3d 105, 108 (3d Cir. 2002). At least one court has rejected the argument that the FCA retaliation provisions provide the exclusive remedy to a whistleblower. *Boone v. Mountainmade Foundation*, 857 F. Supp.2d 111, 115-16 (D.D.C. 2012).

<sup>74</sup> However, the courts should not equate the level of protection to a relator with the standards in Section h of the FCA. Even though it serves a similar purpose of prohibiting retaliation, because Section h provides a cause of action to the relator, the relator can only recover based upon such right as specified in Section h. That does not mean that overall, the FCA provides greater protection in the form of a defense by an employer for contract or tort claims. As demonstrated herein, the FCA provides a broad zone of protection from claims brought by an employer, which is larger than the affirmative cause of action granted to the relator. Indeed, if the FCA did not contain an affirmative right of recovery, the statutory scheme would none-the-less provide the same level of protection and immunity from civil actions by the employer as proposed in this Article.

possess a reasonable belief that fraud was occurring when bringing a *qui tam* case. According to the False Claims Act:

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.<sup>75</sup>

In short, the FCA specifically defines when a remedy exists and provides the exclusive remedy for instances when a defendant alleges that the relator acted inappropriately when filing a *qui tam* case. First, there is no remedy against a relator for merely filing a *qui tam* case. Second, the remedy only applies if three conditions are met: (1) the DOJ declines to intervene in the *qui tam* case, (2) the relator continues to pursue the FCA case on behalf of the Government, and (3) a court determines that the relator's claim was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." If a single one of these elements is missing, there is no remedy or claim allowed. In addition, the FCA limits the remedy to attorneys' fees and expenses in defending the FCA action incurred after the DOJ declined. Finally, the defendant must prevail in the action to be entitled to such fees and expenses.

It is clear that Congress did not want defendants bringing contract or tort claims against relators for activities associated with filing *qui tam* cases, even if the allegations are never established. Otherwise, relators would not be willing to risk informing the Government of fraud. At the same time, Congress recognized that should the DOJ decline the *qui tam* case and if a relator continued the case, but did so in bad faith, a remedy would exist. The fact that the FCA contains such structured protections for a relator and remedies for a defendant confirms that Congress intended to restrict all other forms of recovery or any counterclaims against a relator.

In sum, these six FCA provisions, together with the FCA's overall structure, demonstrate

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<sup>75</sup> 3730(d)(4).

a well-defined and dominant substantial public interest, as well as uniquely federal interest, in encouraging and protecting relators who step forward to report fraud against the Government.<sup>76</sup> Therefore, the FCA creates a zone of protection for relators when filing *qui tam* cases, including producing internal company information and documents to the DOJ, as defined in *supra* Section I(C)(1).<sup>77</sup>

### *B. Other Relevant Federal Statutes or Regulations*

In addition to the FCA, there are over thirty federal whistleblower protection statutes that provide “a loose patchwork of federal whistleblower protections or remedies” and solidify that Congress intended to provide extensive and broad protection to whistleblowers when engaged in certain protected activities flowing from federal laws.<sup>78</sup> Several of these statutes are highlighted below.

One of these statutes is the Whistleblower Protection Act (WPA),<sup>79</sup> which “strengthened and improved protection and rights of federal employees by preventing unlawful reprisals and eliminating wrongdoing within the Government by outlawing adverse employment actions against employees who report prohibited practices to the proper authorities.”<sup>80</sup> According to the WPA, it “is unlawful to take retaliatory personnel action against a protected federal employee because that employee discloses any information they ‘reasonably believe’ to be evidence of a (i) violation of any law, rule, regulation; (ii) gross mismanagement; (iii) gross waste of funds; (iv)

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<sup>76</sup> *Id.*

<sup>77</sup> In addition, there are over 30 other federal statutes containing whistleblower protections that add additional support that there exists at least a strong public interest in protecting whistleblowers in general. See *infra* Section I(B).

<sup>78</sup> Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 54-55 (2011) (grouping these federal whistleblower statutes into six categories: “(1) reporting fraud against the Government; (2) federal employees reporting violations of laws, waste or mismanagement; (3) reporting discrimination; (4) reporting violations of environmental laws; (5) reporting conduct adverse to health; and (6) reporting violations of securities law.”).

<sup>79</sup> Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16. The WPA is codified through numerous sections of Chapter 5 of the United States Code, Government Organizations and Employees. It was strengthened in 1994.

<sup>80</sup> Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 63 (2011).

an abuse of authority; or (v) a substantial and specific danger to public health or safety.”<sup>81</sup> The WPA protects the federal employee as long as they “possess a reasonable belief that the information they are conveying is both accurate and falls within one of the five above-listed areas of protected activities.”<sup>82</sup>

Another useful example is an exception built into a regulation permitting a potential whistleblower to provide confidential information to an attorney when considering blowing the whistle on fraud. In 1996, Congress passed The Health Insurance Portability and Accountability Act (HIPAA),<sup>83</sup> which has a primary purpose of safeguarding “the privacy of medical protected health information.”<sup>84</sup> One aspect of HIPAA is that it prohibits certain entities from disclosing certain health information. However, Congress built into the regulation a specific exception that allows a potential whistleblower to disclose patient information to both an attorney for assistance in evaluating the allegations and to pertinent Government officials provided that they have a good faith belief that the healthcare provider engaged in unlawful conduct.<sup>85</sup> More specifically, HIPAA provides:

Disclosures by whistleblowers. A covered entity is not considered to have violated the requirements of this subpart if a member of its workforce or a business associate discloses protected health information, provided that: (i) The workforce member or business associate believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional ...

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<sup>81</sup> Id. at 64-65.

<sup>82</sup> Id. at 65.

<sup>83</sup> 42 U.S.C. § 1320d, et seq. (Some commentators refer to HIPAA as HIPPA perhaps due to spelling the acronym as the term is typically pronounced.)

<sup>84</sup> Prot. & Advocacy Sys., Inc. v. Freudenthal, 412 F. Supp. 2d 1211, 1220 (D. Wyo. 2006). At least one commentators disagree the primary purpose was privacy, even though they do not dispute that it has that effect. 27 Syracuse J. Sci. & Tech. L. Rep. 55, 90-91, Stephanie Sgambati, NEW FRONTIERS OF REPROGENETICS: SNP PROFILE COLLECTION AND BANKING AND THE RESULTING DUTIES IN MEDICAL MALPRACTICE, ISSUES IN PROPERTY RIGHTS OF GENETIC MATERIALS, AND LIABILITIES IN GENETIC PRIVACY (Fall 2012)(“Although most people believe that the purpose of HIPAA is to improve patient privacy protections, the actual purpose was contemplation of what regulations and procedures would need to be in place to keep patient information secure as electronic medical records (EMR) became increasingly prevalent. (Footnote omitted) Given that HIPAA was not actually about patient privacy, it is reasonable to assume that genetic privacy was not fully contemplated in 1996 when the act was passed. Furthermore, genetic information is not specifically listed as a category of protected health information, although some pieces of genetic information might fall under the broader category of past, present or future health condition. (Footnote omitted).”

<sup>85</sup> 45 C.F.R. § 164.502(j).

and (ii) The disclosure is to: ... (A) A health oversight agency or public health authority authorized by law to investigate or otherwise oversee the relevant conduct ...; or (B) An attorney retained by or on behalf of the workforce member or business associate for the purpose of determining the legal options of the workforce member or business associate with regard to the conduct described in paragraph (j)(1)(i) of this section.”<sup>86</sup>

Clearly, Congress intended that would-be whistleblowers can and should freely produce information and documents, even if the documents contain confidential patient information, to their legal counsel for assistance in determining whether their employer was engaged in fraud. Moreover, if a whistleblower’s legal counsel assists in bringing a FCA case, Congress also intended that a whistleblower could ultimately produce such company documents to appropriate government officials. In short, this provision highlights the Government’s substantial public interest in recruiting and protecting whistleblowers who provide inside company documents to the Government as part of reporting suspected fraud against the Government.

In addition to the plethora of whistleblower protection statutes, there is a federal criminal statute that prohibits “obstruction of criminal investigations of health care offenses.”<sup>87</sup> It is a criminal offense for an employer (or even counsel for an employer) to obstruct criminal investigations of health care fraud. Generally, violations of the FCA overlap with criminal misconduct in the area of healthcare fraud. In other words, when an employee suspects Medicare fraud that violates the civil FCA, the same conduct may give rise to criminal health care fraud. The criminal statute applies to anyone who “willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator.”<sup>88</sup> The definition

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<sup>86</sup> 45 C.F.R. § 164.502(j).

<sup>87</sup> 18 U.S.C.A. § 1518. In addition, 18 U.S.C.A. § 1035, makes it a crime to “(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or (2) makes any materially false, fictitious, or fraudulent statements or representations, or makes or uses any materially false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry, in connection with the delivery of or payment for health care benefits, items, or services.”

<sup>88</sup> 18 U.S.C.A. § 1518.



of criminal investigator includes anyone who conducts or engages in investigations for prosecutions for violations of health care offenses, which necessarily includes the U.S Attorney's Office and the U.S. Department of Justice, collectively "DOJ." Thus, when a relator files a *qui tam* case and serves the complaint upon the Attorney General, the information is being transmitted to report both possible criminal and civil fraud violations. Again, the Attorney General automatically shares fraud allegations and copies of *qui tam* suits with both the Civil and Criminal Divisions of the DOJ. Hence, when a person files a *qui tam* based upon healthcare violations, which account for 70% of all *qui tams* today, the relator is simultaneously reporting possible criminal violations of federal healthcare fraud statutes.<sup>89</sup> Therefore, arguably, even bringing counterclaims against a relator for filing a healthcare *qui tam* case, is an attempt by an employer to muzzle the employee from assisting or further assisting in a *qui tam* case and parallel criminal investigation that would fall within the prohibition of "willfully prevents, obstructs, misleads, delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator." In short, any interference by an employer with an employee filing or proceeding with a healthcare *qui tam* case would violate the spirit if not the letter of this criminal obstruction statute. This further supports that Congress intended to bar counterclaims against relators who file *qui tam* cases or report fraud against the Government.

In sum, the multitude of non-FCA whistleblower protection statutes provides further evidence that protecting federal whistleblowers is a very important federal interest.

*C. The FCA Provisions Demonstrate both a Substantial Public and Federal Interest that Creates a Zone of Protection for Relators, which Shields them from State Based Contract*

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<sup>89</sup> Arguably, when an employer seeks to prohibit through an employment agreement or confidentiality agreement the reporting of healthcare fraud or by filing a legal action to bar dissemination of information to the DOJ, they are violating this criminal statute because they are attempting to prevent or delay communications of healthcare fraud allegations to the DOJ, which oversees both civil and criminal investigations of fraud against the Government.

*or Tort Claims*

It is well settled by the Supreme Court that a court may not enforce a contract that is contrary to public policy.<sup>90</sup> According to the Court “[i]f the contract as interpreted by [a party] violates some explicit public policy, we are obliged to refrain from enforcing it.”<sup>91</sup> In guiding the lower courts, the Supreme Court noted that “[s]uch a public policy, however, must be well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”<sup>92</sup> Without repeating all of the policy implications of the FCA provisions addressed above, there can be no doubt that the six separate FCA clauses create a well-defined and dominant public policy protecting relators who file *qui tam* cases. Again, Congress specifically chose as the mandatory mechanism for obtaining a reward is the filing of a *qui tam* civil suit in court and further required that it be done not only in secret and under seal, but mandated production to the Attorney General all information and documents within the relators control in order to allow the Government to investigate both civil and criminal FCA allegations. In addition, the eligibility for and amount of the relator’s award is tied to the extent the information is truly valuable and not otherwise publicly available. Moreover, the FCA specifically prohibits retaliation for filing a *qui tam* case and strictly limits available remedies to a defendant when claiming a relator acted inappropriately. Accordingly, the FCA provisions demonstrate a “substantial public interest” in protecting relators who file *qui tam* cases.<sup>93</sup> As a result, courts are obliged to refrain from enforcing any contract provision or other action by an employer that thwarts or impedes the process of filing a *qui tam*.<sup>94</sup>

The same substantial public interest also creates a zone of protection shielding relators

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<sup>90</sup> W.R. Grace and Co., v. Local Union 759, 461 U.S. 757, 766 (1983).

<sup>91</sup> Id.

<sup>92</sup> Id.

<sup>93</sup> The numerous additional non-FCA statutes reinforce the substantial public interest in protecting whistleblowers who report fraud against the Government. See *infra* Section I(B).

<sup>94</sup> Id.

from state based tort claims. Indeed, a tort is merely a remedy for a wrong,<sup>95</sup> and complying with a substantial public interest cannot be viewed as a wrong that permits a sanction in contract or tort. In other words, by definition, engaging in a federal protected activity cannot be considered an actionable state tort because the conduct is not wrong, as a matter of law. Stated another way, because the Supreme Court considers void any contract language that would bar using internal company information when filing a *qui tam* case, the same public policy would prohibit using a state tort claim to accomplish the same thing. Hence, the same policy reasons addressing contract claims apply equally to barring claims couched in state tort law. In other words, because public policy demands that contract provisions be unenforceable to the extent that an employee breached the contract by providing internal documents to the Government when reporting fraud against the Government, the same substantial public policy bars the same claim wrapped up in a different cause of action. Otherwise, a substantial public policy interest creating a protected activity of producing documents to the Government is erased.

By way of an example, if an employee is sent an internal email where his supervisor instructs him to upcode every bill to Medicare and the employee provides a copy of the email to the Government as part of reporting fraud, it is clear that the substantial public policy interests would trump the employer's employment contract which prohibits him from giving this document to the Government. The same result of dismissal of a claim against the employee should occur regarding a counterclaim couched as a tort if it flows from the same conduct of producing internal documents to the Government, including tort claims such as breach of fiduciary duty, libel, defamation, fraud, conversion, misappropriation of trade secrets, malicious

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<sup>95</sup> "A private or civil wrong or injury, other than a breach of contract for which the state court will provide a remedy in the form of an action for damages is a common law tort. The elements of a tort are the existence of a legal duty from a defendant to a plaintiff, breach of the duty, and a damage as a proximate result." Black's Law Dictionary, 1660 (4th Ed.1968).

prosecution or any other creative cause of action the employer can contemplate.<sup>96</sup> Otherwise, the substantial public interest is thwarted because whistleblowers will refuse to risk being sued for tort claims for cooperating with civil or criminal investigations of fraud against the Government.

Alternatively, a court can and should find support for barring tort claims by recognizing a federal common law privilege, which trumps state claims. Federal common law is warranted because courts currently are applying a piecemeal approach to counterclaims against relators because they are looking to and relying upon conflicting and varying state law defenses to state law tort claims against relators. Consequently, under the current landscape and as highlighted throughout this Article, the courts are reaching differing results when deciding whether to permit state tort counterclaims against relators because they are applying state law defenses to the counterclaims. Therefore, the protection to federal relators has inappropriately depended not only whether only state law protects federal whistleblowers filing federal FCA *qui tam* cases, but even upon which state a relator gathers documents as part of filing a federal FCA *qui tam* case. For instance, approximately 20 states have anti-SLAPP laws, which prohibit claims or counterclaims, such as defamation, libel, slander, or malicious prosecution, which are really retaliatory claims or attempts to intimidate people from reporting misconduct to the government.<sup>97</sup> Although they vary in application and reach, they provide at least some basis for dismissal of retaliatory claims.

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<sup>96</sup> E.g., *United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146 (D.D.C. 2009) (Employer sued relator for defamation; tortious interference with economic advantage; intentional interference with contract; intentional interference with prospective economic advantage; malicious prosecution; libel; slander; breach of contract; and fraud.); *U.S. ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 829 (9<sup>th</sup> Cir. 1993) (The employer brought eight counterclaims, consisting of breach of duty of loyalty and breach of fiduciary duty; breach of implied covenant of good faith and fair dealing; violations of California Labor Code; libel; trade libel; fraud; interference with economic relations; and misappropriation of trade secrets.)

<sup>97</sup> Anti-SLAPP stands for Strategic Lawsuit Against Public Participation. See <http://www.casp.net> (“The California Anti-SLAPP Project (CASP) helps individuals, organizations and businesses defend themselves against SLAPPs (Strategic Lawsuits Against Public Participation). Some common claims disguising SLAPPs are: Defamation, Libel, Slander, Malicious Prosecution, Abuse of Process.”); See also David A. Barry, William L. Boesch, MASSACHUSETTS LEGAL MALPRACTICE CASES 2000-2009, 93 Mass. L. Rev. 321, 339 (Massachusetts Law Review, January 2011) (An anti-SLAPP law is a “statute designed to prevent lawsuits whose sole purpose is to intimidate citizens from petitioning government officials.”); Victoria Smith Ekstrand, UNMASKING JANE AND JOHN DOE: ONLINE ANONYMITY AND THE FIRST AMENDMENT, 8 Comm. L. & Pol’y 405, 416 (Communication Law and Policy, Autumn 2003) (“At least twenty states have anti-SLAPP laws that prohibit plaintiffs from using the legal system to silence opposition and chill free speech.”).

However, federal relators living outside of these states are unable to rely upon these and other defenses that vary between states when moving to dismiss state based counterclaims. The lack of protection and uniformity by state law strengthens the justification and need for a federal zone of protection for federal relators reporting fraud against the federal Government based upon the uniquely federal interests flowing from the federal FCA statutory scheme.

The Supreme Court in *Texas Industries, Inc.*, made it clear that, although applied in rare circumstances, if necessary to accomplish a federal statutory purpose and protect a substantial federal interest, courts have the authority to recognize federal common law.<sup>98</sup> According to the Court,

[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.<sup>99</sup>

In short, the Court determined that even without direct congressional authorization, where substantial rights or obligations of the Government are at risk, federal common law should be applied and that when the authority or duties of the Government are intimately involved state law cannot be used to resolve the controversies. Thus, federal common law protection trumps state law, including barring state tort claims as recognized in the following Supreme Court case.

The Supreme Court in *Boyle v. United Technologies Corp.*, provided further guidance to lower courts regarding when federal common law could be applied to a new area, such as advanced in this Article. In *Boyle*, the Court ruled that federal common law applies where

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<sup>98</sup> *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

<sup>99</sup> *Id.*

“‘uniquely federal interests,’ are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed ... by the courts—so-called ‘federal common law.’”<sup>100</sup>

Here, as outlined in Section I(C), the six key FCA provisions clearly demonstrate not only a well-defined and dominant substantial public interest, but a substantial and unique federal interest in recruiting and protecting federal relators who file federal *qui tam* actions under the federal FCA, and therefore this is the precise type of narrow class of cases where federal common law applies. Again, the FCA is the Government’s chief tool for combatting fraud against the Government and recovering funds wrongfully taken from the public fisc.<sup>101</sup> Because 70 percent of all FCA cases are *qui tam* cases,<sup>102</sup> there is a substantial federal interest in protecting relators and recouping fraudulently obtained federal funds. Therefore permitting state law claims against relators for actions flowing from or relating to filing a *qui tam* frustrates this vital federal interest because it would chill future relators from stepping forward and filing FCA *qui tam* cases. Moreover, as explained above, the FCA’s unique structure mandates that the relator must produce internal company information to the DOJ as part of filing a *qui tam* case,<sup>103</sup> and it contains anti-retaliation provisions.<sup>104</sup> Finally, Congress mandated that whistleblowers must file *qui tam* suits and strictly comply with all of the unique FCA procedures in order to be eligible for a reward. Therefore, protecting relators from counterclaims flowing actions associated with filing *qui tam* complaints under the FCA is one of those few uniquely federal interests demanding that federal common law be applied.

The Court in *Boyle* also addressed the effect of federal common law upon state claims

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<sup>100</sup> *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (citations omitted).

<sup>101</sup> *Supra* n. 3.

<sup>102</sup> *Supra* n. 5, 8.

<sup>103</sup> *Supra* Section I(A)(1).

<sup>104</sup> *Supra* Section I(A)(5).

and provides the basis for shielding relators from state common law counterclaims, whether contract or tort, when acting within the FCA's zone of protection, as defined in the next subsection.<sup>105</sup> According to the Court, when federal common law applies, it acts to preempt state law, even including barring affirmative state tort claims against non-government persons or corporations when it would interfere with a Government program.<sup>106</sup> In *Boyle*, the Court ruled that as a matter of law, federal common law displaces state law and mandated dismissal of a state tort claim against a federal government defense contractor.<sup>107</sup> In that case, a military copilot drowned when the military helicopter crashed in the ocean. The estate brought a negligence claim because the escape hatch could not open because it was obstructed by a piece of military equipment.<sup>108</sup> Although the jury had ruled in favor of the estate under a state law tort claim,<sup>109</sup> the Supreme Court overturned the decision because it found that there existed federal common law that preempted the state law claim.<sup>110</sup> According to the Court, "the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications)."<sup>111</sup> In other words, the Court reasoned that state law negligence claims interfere with the Government's legitimate balancing of safety features against military efficacy in designing war material.<sup>112</sup> Thus, when federal common law applies, state law tort claims are preempted.

Here, because federal common law should apply, it operates to bar defendants from

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<sup>105</sup> See *Green*, 59 F.3d at 961-2, discussing the basis for establishing a uniform federal common law and finding that the substantial public interest flowing from the FCA mandates a uniform rule.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504, (1988) (citations omitted).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 509. This became known as the government contractor doctrine.

<sup>112</sup> *Id.* at 511.

bringing state law claims, whether contract or tort, against a relator for any activity relating to filing a *qui tam* case because it would thwart the FCA if such counterclaims were permitted. This includes claims for breach of fiduciary duty, libel, defamation, fraud, conversion, misappropriation of trade secrets, malicious prosecution or any other cause of action.

In sum, there are two different lines of Supreme Court cases that mandate a recognition of a “zone of protection” afforded to relators flowing from the FCA. Either one of these lines of cases standing alone would operate to bar state law claims or counterclaims, whether couched in contract or tort, against a relator for activities associated with filing a *qui tam* case.

The next subsection provides a definition of the zone of protection offered by each of these substantial interests.

#### 1: Defining the Zone of Protection

The FCA’s substantial public policy and unique federal interests in enlisting and protecting relators combatting fraud against the Government creates a zone of protection. This zone of protection immunizes or exempts a whistleblower from all contract or tort claims<sup>113</sup> by an employer<sup>114</sup> that are bound up with or flow from a whistleblower’s reporting of suspected fraud against the Government to the Government, as long as the employee possesses a reasonable belief<sup>115</sup> that suspected fraud or violations of the FCA occurred regardless of whether

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<sup>113</sup> This includes all state claims or causes of action by an employer, regardless of whether they are grounded in contract or tort or flow from statute or common law. See supra Section I(C).

<sup>114</sup> The zone of protection continues after the employee leaves the company for activities within the zone of protection, and hence applies to former employees.

<sup>115</sup> The proposed reasonable belief test does not include any additional or separate “good faith” requirement. Rather the focus is upon whether a reasonable employee in the same position would have a reasonable suspicion that the company was defrauding the Government or violating the FCA. Congress intentionally established an incentive based structure that offers large monetary rewards to insiders for investigating and reporting fraud against the Government.<sup>115</sup> As stated earlier, the Supreme Court, recognize that the decision for filing a *qui tam* is “motivated primarily by prospects of monetary reward rather than the public good.” See infra note 59 (Hughes, 520 U.S. at 949). It is money not a charitable motive that moves a whistleblower to risk retaliation and step forward. The Supreme Court even noted that it takes a rouge to catch a rouge, and the FCA pays rewards regardless of whether the primary goal was to obtain a reward. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 769 n.1 (2000) (In the words of Senator Howard, the FCA’s sponsor, “I have based [the provisions] on the old fashioned idea of holding out a temptation, and ‘setting a rouge to catch a rogue,’ which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.” See Cong. Globe, 37th Cong., 3d Sess. 955–56 (1863), quoted in Issues and



fraud or violations of the FCA are ultimately established.

The zone of protection, which bars all contract and tort claims against the relator, extends to all related activities of an employee of a company while investigating the possibility of reporting suspected fraud or violations of the FCA to the Government and continues throughout the entire process of filing and pursuing a *qui tam* action to conclusion. Specifically, it includes gathering and producing to the Government potentially relevant internal company documents or confidential company information, provided the employee had reasonable access to the documents as part of their duties. The zone of protection applies even if: (1) an employee was not aware at the time of the existence of the FCA, (2) if an employee ultimately does not file a *qui tam* case, or (3) it turns out that the company did not actually commit fraud or violate the FCA.<sup>116</sup> The zone of protection also permits an employee to provide all potentially relevant confidential documents or information to an attorney for assistance in evaluating whether to report suspected fraud or violations of the FCA or file a *qui tam* case.<sup>117</sup> After the defendant has been served with the complaint and the litigation commences, normal discovery rules begin to apply and any violations are subject to court's authority and controlled by the Federal Rules of

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Developments in Qui Tam Suits, in *Citizen suits and Qui Tam Actions: Private Enforcement of Public Policy* 119, 121 (1996)). Thus, test is reasonableness of belief that the employer was defrauding the Government. The zone of protection has its own limits designed to protect the employer from harm, including that to be under the protective umbrella of the public interest aspects of the FCA the disclosures must be to the Government and not third parties.

<sup>116</sup> Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 59 (2011).

<sup>117</sup> It is an American tradition for people to be afforded the right to seek legal advice and aid in the process of making legal determinations. For instance, in *Upjohn Co. v. U.S.*, the Supreme Court noted that the attorney client "privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." 449 U.S. 383, 390 (1981) (citation omitted). The Court highlighted the importance of a client providing all potentially relevant information to counsel as part of seeking help from counsel in determining the value of the information by noting, "The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. *Id.* at 390-91 (citing ABA Code of Professional Responsibility, Ethical Consideration 4-1: "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.") (other citations omitted).

Civil Procedure.<sup>118</sup> For instance, once the complaint is served an employee may not continue to gather new documents from the defendant/employer outside of the discovery rules.<sup>119</sup> However, even after the complaint is served, a relator may continue to use appropriate informal discovery techniques, including obtaining documents from former employees and engaging in other informal discovery techniques permitted by local practices or the Federal Rules of Civil Procedure.

## II. APPLYING THE ZONE OF PROTECTION WHEN FACING A COUNTERVAILING PUBLIC INTEREST IN ENFORCING EMPLOYMENT CONTRACT PROVISIONS

Although some courts have concluded that the FCA creates a strong public interest and therefore bars contract counterclaims, no court has addressed all six FCA provisions or discussed all of the public policy implications or unique federal interests, and therefore no court has yet articulated that there exists a *substantial public interest* or a similar *substantial federal interest*. In fact, even the few courts that have found a strong public interest have not quantified or articulated the zone of protection afforded to relators or otherwise established a framework for addressing this issue.<sup>120</sup> On the other hand, some courts make only a passing reference to any federal or public interest and have instead focused primarily upon state common law defenses to the state counterclaims when addressing a relator's use of internal documents in support of a *qui tam* case. As a result, there is mixed results and some courts appear heading in the wrong direction to the point of suggesting that based upon state law defenses to state law counterclaims against relators for filing a FCA *qui tam* case, the claims should not be dismissed unless the relator ultimately proves a violation of the FCA.<sup>121</sup>

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<sup>118</sup> Again, the zone of protection bars all contract and tort claims throughout the entire process of the *qui tam* case, provided the relator falls within the zone of protection. Rather, the defendant's remedies are limited to normal discovery sanctions as outlined in this Article.

<sup>119</sup> *Id.*

<sup>120</sup> See Section II(A).

<sup>121</sup> See Sections II(B) and III(A).

The prior section of this Article establishes the proper framework for courts to evaluate counterclaims by defendants against relators who file *qui tam* cases. It begins by first determining two legal issues. First, does the FCA create either a substantial public interest or a unique federal interest? If so, then federal law, not state law should apply. Second, what zone of protection does the FCA afford a relator in general? This Article proposes the definition or parameters of the zone of protection afforded by the FCA, which provides a uniform and predictable basis for all courts to follow when addressing whether or when counterclaims are permitted against a federal relator filing a FCA *qui tam* case. That leaves each court to apply the facts of a case to the zone of protection. If the relator falls within the zone of protection, the counterclaims must be dismissed. If the relator is outside of the zone of protection, the counterclaims may continue.

Because no court has yet applied the proper framework, this Section begins by discussing how courts have, albeit incorrectly, addressed counterclaims by employers for breach of an employment contract or confidentiality agreement that are brought against an employee who uses internal company documents or information when filing a *qui tam* complaint. Afterwards, it proposes how courts should apply this Article's definition of zone of protection in a variety of difficult situations facing the courts.<sup>122</sup>

#### *A. Cases Dismissing Contract Counterclaims*

Several courts have dismissed claims by an employer that rely upon employment related contract provisions to bar an employee or former employee from using relevant, non-privileged internal documents to file a *qui tam* case or report fraud to the Government. For instance, in *United States ex rel. Head v. Kane Co.*, the District Court for the District of Columbia

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<sup>122</sup> Although the same principles apply to tort claims, because courts have incorrectly treated them separately, the next Section provides additional analysis of tort claims.

determined that the strong policy goals of the FCA were sufficient to invalidate a confidentiality agreement between an employer and its employee to the extent that it prohibited disclosing allegations of fraud to the DOJ as part of filing a *qui tam* case.<sup>123</sup>

In *Head*, the relator signed a separation agreement that stated that company documents are the sole property of the company and the relator warranted that he had turned over all documents to the company. Upon learning that the relator retained company documents and provided them to the DOJ when filing the *qui tam* case, the company brought a dozen counterclaims against the relator, including two for breach of the separation agreement based upon the relator's actions of filing a *qui tam* case.<sup>124</sup> The relator and the DOJ moved to dismiss these counterclaims as a violation of the public policy of exposing fraud against the federal Government.<sup>125</sup>

Citing *Rumery*, the court began its analysis with the proposition that “a private agreement is unenforceable on grounds of public policy if its enforcement is clearly outweighed by a public policy against such terms.”<sup>126</sup> The court also stated that “[t]he purpose of the FCA is ‘to discourage fraud against the government’ and, ‘concomitantly, the purpose of the *qui tam* provision of the Act is to encourage those with knowledge of fraud to come forward.’”<sup>127</sup> The court also noted that the FCA required the relator to submit a SME, and held that at least those two counterclaims “must be dismissed as contrary to public policy.”<sup>128</sup> The court also properly dismissed the contract based counterclaim<sup>129</sup> for contractual indemnification contained in the

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<sup>123</sup> United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146 (D.D.C. 2009).

<sup>124</sup> *Id.* at 151-52.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 152 (citing *Town of Newton v. Rumery*, 480 U.S. 386 (1987); *United States v. Northrop Corp.*, 59 F.3d 953, 958-59 (9th Cir.1995) (discussing rule in FCA case where private agreement which provided for release of relator's claims was held unenforceable); Restatement (Second) of Contracts § 178(1) (2009).).

<sup>127</sup> *Id.* (citing *Neal v. Honeywell, Inc.*, 826 F. Supp. 266, 269 (N.D.Ill.1993) (citing H.R. Rep. No. 660, 99th Cong., 2d Sess., 22 (1986)).

<sup>128</sup> *Id.* at 152.

<sup>129</sup> The next sub-section addresses how the court addressed the remaining ten counterclaims filed in this *qui tam* case.

separation agreement as void based on public policy.<sup>130</sup>

Other courts have similarly voided non-disclosure agreements when defendants have sought to enforce them against a former employee who has sued the employer in a FCA action.<sup>131</sup> For example, in 2012, the United States District Court for the Central District of California determined that the important policy goals of the FCA outweighed the need to enforce a company non-disclosure agreement.<sup>132</sup> In *Ruhe*, three former sales representatives filed an FCA case against the corporation.<sup>133</sup> The relators filed their *qui tam* complaint<sup>134</sup> and attached copies of documents to an amended complaint.<sup>135</sup> The documents, which contained information about the accuracy of one of the company's products, were copied from company hard drives before the relators left the company.<sup>136</sup> When the defendant read the exhibits to the amended complaint, the company moved to strike as scandalous any use of the documents in the FCA case that the relator provided to the DOJ as part of its SME.<sup>137</sup> The defendant argued that a scandal existed because the relator gathered the documents in violation of a non-disclosure agreement.<sup>138</sup>

The *Ruhe* court began its analysis by noting that the documents do not fit the definition of scandalous, which means “allegations that cast a cruelly derogatory light on the party.”<sup>139</sup> The court concluded that it is not scandalous for a relator to expose fraud.<sup>140</sup> Next, the court addressed the public policy exception to contractual provisions, including a non-disclosure agreement. Because the court determined that the relator was exposing fraud against the

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<sup>130</sup> Kane, 668 F. Supp. 2d at 154.

<sup>131</sup> In addition, some courts have similarly rejected a fiduciary duty owed to the company as a basis to prevent an employee from using internal documents to file a *qui tam* case. U.S. ex rel. Miller v. Harbert Int'l Constr., et al., 505 F. Supp.2d 20 (D.D.C. 2007).

<sup>132</sup> U.S. ex rel. Ruhe v. Masimo Corp., CV 10-08169-CJC JCGX, 2012 WL 7681937 (C.D. Cal. July 9, 2012).

<sup>133</sup> U.S. ex rel. Ruhe v. Masimo Corp., CV 10-08169-CJC JCGX, 2012 WL 7681937 (C.D. Cal. July 9, 2012)[short cite]

<sup>134</sup> The case involved the filing of the first amended complaint.

<sup>135</sup> U.S. ex rel. Ruhe v. Masimo Corp., CV 10-08169-CJC JCGX, 2012 WL 7681937 (C.D. Cal. July 9, 2012)[short cite]

<sup>136</sup> Id.

<sup>137</sup> Id. at 4.

<sup>138</sup> Id.

<sup>139</sup> Id. at 4.

<sup>140</sup> Id.

Government, it ruled that “this taking and publication was not wrongful, even in light of nondisclosure agreements, given ‘the strong public policy in favor of protecting whistleblowers who report fraud against the government.’”<sup>141</sup> The court continued, “[o]bviously, the strong public policy would be thwarted if [a company] could silence whistleblowers and compel them to be complicit in potentially fraudulent conduct. Indeed, the Ninth Circuit has stated that public policy merits finding individuals such as Relators to be exempt from liability for violation of their nondisclosure agreement.”<sup>142</sup> The court further reasoned, “[s]uch an exemption is necessary given that the FCA requires that a relator turn over all material evidence and information to the government when bringing a *qui tam* action.”<sup>143</sup>

In sum, even these courts that recognize a strong public interest did not examine all of the relevant FCA provisions, which actually demonstrate a substantial public interest and well-defined and dominant substantial public policy. Moreover, these cases did not attempt to define a zone of protection. Consequently, these cases do not provide a useful framework for addressing differing or complex facts in future cases.

#### *B. Cases Not Dismissing Counterclaims*

Unlike *Head* or *Ruhe*, other courts have refused to immediately dismiss all breach of contract counterclaims against a relator despite being associated with or flowing from filing a *qui tam* complaint. Instead, they apply an incorrect framework that fails to consider the substantial public interest at stake. Further, they fail to address the scope of protection afforded to relators by the substantial public interest of the FCA. Even with respect to the courts that have ultimately ruled in favor of the relator on contract based counterclaims, many have still failed to recognize that the FCA creates a substantial public interest or define the zone of protection. As a result,

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<sup>141</sup> Id. at 4 (citations omitted).

<sup>142</sup> Id. (citing *See United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061–62 (9th Cir. 2011)).

<sup>143</sup> Id. (citing 31 U.S.C. § 3730(b)(2)).

widespread uncertainty remains as to the scope of protection for whistleblowers who report fraud against the Government.

For instance, in 2013, the district court in *Wildhirt*<sup>144</sup> faced a motion to dismiss five breach of contract counterclaims<sup>145</sup> against a relator for filing a *qui tam* case. These counterclaims were based upon its employment agreements containing provisions that (1) prohibited employees from providing company documents or orally disclosing internal company information to anyone, including the Government,<sup>146</sup> (2) required employees to notify management of any fraud allegations prior to notifying the Government,<sup>147</sup> (3) prohibited employees from filing or assisting in a FCA *qui tam* case,<sup>148</sup> and (4) required disgorgement of all proceeds or awards received in a successful *qui tam* case against the company.<sup>149</sup> The primary facts alleged by the defendants were that the relator lied in the *qui tam* complaint about violations of the FCA and the relator breached the contract by disclosing internal company information to the Government and to private insurers that were also allegedly defrauded.<sup>150</sup>

Because of the lack of a proper approach, the *Wildhirt* court did not strike any of these offensive and overreaching contract provisions as void against public policy or even discussing whether some of these provisions violate criminal laws if they are construed as an attempt to “prevent[], obstruct[], mislead[], or delay[] or attempt[ed] to prevent, obstruct, mislead, or delay

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<sup>144</sup> U.S. ex rel. *Wildhirt v. AARS Forever, Inc., et al.*, 2013 WL 5304092 (N.D. Ill. Sept. 19, 2013).

<sup>145</sup> *Id.* at \*5 (“Counts I and II allege that Relators breached the Agreement through the unauthorized disclosure of confidential information outside the company; Count III seeks indemnification under the Agreement for damages suffered as a result of those disclosures; Count IV alleges that Relators breached the Agreement by failing to report suspect practices to Defendants before filing this lawsuit; Count V claims that Relators committed tortious interference with prospective economic advantage by making false statements to third parties about Defendants’ practices; and Count VI seeks reimbursement under the Agreement for legal costs and expenses should Defendants prevail in this lawsuit.”).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at \*2 (Agreement at paragraph 4.6).

<sup>148</sup> *Id.* at \*2 (Agreement at paragraph 4.6).

<sup>149</sup> *Id.* The agreement also required indemnification the company for any costs, expenses and attorney fees relating to any unauthorized disclosures of internal information. *Id.* at \*2 (Agreement at paragraph 4.2).

<sup>150</sup> The counterclaims alleged that the relator lied to Government officials and in the *qui tam* complaint when alleging that the company was fraudulently billing the Veteran’s Administration because the company was not performing required competencies, gave patients wrong equipment, and did not provide required education or supplies. *Id.* at \*3. It was unclear whether or to what extent the company was alleging that the relator disclosed the allegations to third parties. In any event, the court did not base its ruling upon disclosure to non-Government entities.

the communication of information or records relating to a violation of a Federal health care offense to a criminal investigator”<sup>151</sup> through contract provisions that (1) prohibit filing of assisting the DOJ in a FCA *qui tam* case, or (2) require advance notice to the company before reporting fraud to the Government.

Rather, the starting point for the court was the principle that FCA defendants are barred from filing “indemnification” claims against a relator.<sup>152</sup> Although this is a correct premise, the problem is that it is not the only aspect of the zone of protection. Because the court began with a narrow view of protection, i.e. protecting the relator when a defendant is found liable under the FCA, the court adopted an approach that some courts refer to as “independent damages,” in which a counterclaim is barred only if such “a claim that is not dependent on a finding that the *qui tam* defendant is liable.”<sup>153</sup> Based upon this model, the court identified two types of independent damage counterclaims that it would allow to be filed against a *qui tam* relator:

The first ... is where the conduct at issue is distinct from the conduct underlying the FCA case. This can be so even where there is a close nexus between the facts, so long as there is a clear distinction between the facts supporting liability against relator and the facts supporting liability against the FCA defendant.... These causes of action are truly independent of the FCA claims because none of them require as an essential element that the FCA defendant was liable—or not liable—in the FCA case. (citation omitted) The second category ... is where the defendant's claim, though bound up in the facts of the FCA case, can only prevail if the defendant is found not liable in the FCA case.... These claims have surfaced in the form of libel, defamation, malicious prosecution, and abuse of process—claims that succeed upon a finding that the relator's accusations were untrue.<sup>154</sup>

According to the court, the first category of “independent” claims primarily consists of breach of contract type claims, such as violations of a confidentiality agreement, which are addressed in

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<sup>151</sup> 18 U.S.C.A. § 1518.

<sup>152</sup> Wildhirt, 2013 WL 5304092 at \*5 (citing *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 505 F. Supp.2d 20,26 (D.D.C.2007)).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*



this section.<sup>155</sup> Specifically, in *Wildhirt*, Count I alleged that the relator took home company documents prior to contemplating filing a *qui tam* and Count II alleged that the relator breached the agreement by using company document when disclosing fraud to Government and to private insurers.<sup>156</sup>

The court refused to dismiss these claims because at the pleading stage it must presume the allegations are true,<sup>157</sup> which included a claim that “the retention of documents and disclosures went beyond the scope of those necessary to pursue their *qui tam* suit.”<sup>158</sup> The court held that because defendants “pleaded facts that place their counterclaims comfortably in at least one of the two categories, the counterclaims cannot be dismissed on the pleadings as contrary to public policy.”<sup>159</sup> The court reasoned that the “counterclaims are independent of the FCA claim because, particularly given the extremely broad scope of documents<sup>160</sup> and communications that relators are alleged to have retained and disclosed, the counterclaims' success does not require as an essential element that defendants are liable (or not liable) under the FCA.”<sup>161</sup>

Under this approach, without regard to substantial public interests at stake or attempting to recognize or define any zone of protection, the court seemed content leaving several breach of contract claims, which may carry the possibility of paying the defendant’s costs and attorney’s

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<sup>155</sup> The second category of independent claims primarily involves tort claims, and will be discussed in the next section.

<sup>156</sup> Id. at \*6. Count 4 alleged damages for not being told in advance of fraud being committed by the company and therefore was deprived of an opportunity to correct the fraud and sought to require the relator to pay all ensuing costs associated with not stopping the misconduct sooner. Id. Counts 3 and 6 merely consisted of requests for indemnification and cost for violating these contract provisions.

<sup>157</sup> Even assuming the truth of the allegations, that the relator shared confidential information with the Government when reporting fraud against the Government, the breach of contract claims clearly falls within the zone of protection and the claims should be dismissed.. This Article does not address the public policy implications in using company documents for reporting fraud against an insurance company. At a minimum, the claims pertaining to reporting fraud to the Government should have been immediately dismissed.

<sup>158</sup> Id. at \*6.

<sup>159</sup> Id.

<sup>160</sup> The issue of how to address allegations that although some documents were necessary, not all documents produced to the Government are deemed relevant to the FCA allegations is addressed in Section II(D).

<sup>161</sup> Id. at \*6 (relying on *See United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1062 (9th Cir.2011) (holding that the public policy doctrine “would not cover [the relator's] conduct given her vast and indiscriminate appropriation of [the defendant's] files,” given that the relator could not explain “why removal of the documents was reasonably necessary to pursue an FCA claim”).

fees associated with defending FCA allegations, hanging over the relator's head. Such an approach actually thwarts the purpose of the FCA. Filing of a FCA case clearly falls within the zone of protection and exempts the relator from such counterclaims.

Moreover, and equally distressing, the opinion leaves room for the potential that the only way a relator could defeat the counterclaims and thereby avoid indemnifying its employer for all costs in defending allegations that it defrauded the Government, would be if there is a ruling by a court that the company actually violated the FCA. This is hardly what Congress had in mind when it set up a reward program where the relator had no choice but to file a *qui tam* complaint to claim a reward for reporting fraud against the Government. Any decision that reserves protected conduct to instances when fraud is proven would frustrate a substantial public and unique federal interests and thwart the entire framework of the FCA that is designed to invite relators to bring forward allegations of fraud against the Government. For instance, this approach might also mean that an employee is not entitled to protection if they call a hotline to report suspected fraud against the Government unless the Government ultimately proves that fraud occurred. Thus, even tips of fraud against the Government will dry up. Even when a relator hires counsel and files a *qui tam*, which is the only mechanism Congress permits to pay a whistleblower reward, the *Wildhirt* court failed to create any zone of protection from suits by employers absent a legal finding of a violation of the FCA.

In addition, a “wait and see” approach liability is unworkable because a finding of liability is extremely rare in the FCA context. First, nearly every case in which the DOJ intervenes ends in settlement. In these cases, no findings are made regarding liability and settlement agreements often contain language that the defendant denies liability.<sup>162</sup> Second, the

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<sup>162</sup> Typical language is found in *Cell Therapeutics, Inc. v. Lash Group, Inc.*, 586 F.3d 1204, 1211 (9<sup>th</sup> Cir. 2009), (“This Agreement is neither intended by the parties to be, nor should be, interpreted as an admission of liability”).

DOJ declines over three-fourths<sup>163</sup> of all *qui tam* cases due to lack of resources.<sup>164</sup> When a case is declined, relators also often lack the necessary resources to continue.<sup>165</sup> Thus, if counterclaims are allowed to remain absent a finding of liability, relators face the threat of a counterclaim simply for filing a *qui tam*. This result frustrates the purpose of the FCA and discourages would-be relators from bringing a *qui tam* case. Accordingly, the zone of protection must apply to the relator gathering information and reporting suspected fraud, even when the DOJ declines to intervene or the fraud is not ultimately established.<sup>166</sup>

In addition, the problem with defining “independent” claims based upon essential elements of a cause of action, as the *Wildhirt* court did, is that the elements will virtually never overlap between counterclaims for breach of employment contract (or a similar claim couched in a tort mantle) and a finding of liability under the FCA. The essential element to the counterclaim is the relator’s action of providing confidential information to the Government whereas the essential element to the FCA claim is the company’s acts of defrauding the Government. Thus, counterclaims for breach of an employment contract will never have overlapping elements to a FCA claim.<sup>167</sup> As such, the definition proposed by the court in *Wildhirt* offers no real protection to *quit tam* relators.

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<sup>163</sup> Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. COOLEY L. REV. 217, 237 SHORT cite (DOJ declines 80% of cases”).

<sup>164</sup> *Id.* at 256. Cf. *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 974 n.5 (7th Cir. 2002) (stating that there are many reasons the government would allow the relator to pursue the action, such as confidence in the relator's attorney and lack of resources, and that the government's declination to prosecute is in no way a comment on the merits of the case), *aff'd* on other grounds, 538 U.S. 119 (2003); *United States ex rel. Bidani v. Lewis*, No. 97 C 6502, 2002 WL 31103459, at \*2 (N.D. Ill. Sept. 19, 2002) (denying the plaintiff's attempt to allude that, because he is pursuing the action, he has the sanction of the government, and stating that the plaintiff must not lead the jury to believe the government has any position on the merits of a *qui tam* case simply because it allowed the relator to prosecute the action).

<sup>165</sup> “In most cases in which the DOJ declines intervention, plaintiff relators drop FCA litigation, though they may continue litigation unless the DOJ obtains a dismissal of the litigation on grounds that it lacks merit.” Robert G. Homchick, Lisa R. Hayward, David V. Marshall, *FERA AND THE NEW WORLD OF FALSE CLAIMS ACT RISKS; Hypotheticals Help Illustrate What Constitutes “Knowing and Improper.”* 12 No. 1 J. Health Care Compliance 5 (January-February, 2010).

<sup>166</sup> “The employee need not even be aware of the FCA at the time, and he never needs to ultimately file a *qui tam* suit.” Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 59 (2011).

<sup>167</sup> The *Wildhirt* court and the defendants tacitly agree that the approach is wrong because the defendants and court both agreed that should the company be found liable, the breach of contract claims must be dismissed. *Id.* Thus, the court indirectly conceded

In sum, the *Wildhirt* court, and those decisions it relied upon, begin with the wrong framework. When approaching counterclaims against relators in a *qui tam* case, as set forth above, the first step is to determine that there is either a substantial public interest or a uniquely federal interests under the FCA. Next, the court must determine the zone of protection afforded the relator, which is defined in this Article.<sup>168</sup> Only then would a court be in a position to determine which claims should be dismissed at the pleading stage.<sup>169</sup>

The next subsection proposes how courts should apply this Article’s definition of zone of protection in a variety of difficult situations facing the courts.

### *C. Application of the Zone of Protection to Privileged Documents*

When a relator falls within the FCA’s zone of protection<sup>170</sup> it immunizes or exempts him from all tort and contract claims that are bound up with or flow from reporting fraud or filing a *qui tam* case, including activities of producing documents to the DOJ regardless of whether some of the documents turn out to be privileged or containing a trade secret.<sup>171</sup> Nevertheless, whistleblowers should not intentionally provide documents to the Government that are protected by the attorney-client privilege.<sup>172</sup> However, at times it can be especially difficult for a relator to

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that the breach of contract counterclaims flow from or are bound up with reporting fraud against the Government. Accordingly, the claims are not truly independent after all, and therefore fall within the zone of protection advanced by this Article. However, the court erred by hinging dismissal upon a finding of liability.

<sup>168</sup> See discussion supra Section I(C).

<sup>169</sup> As stated in supra Section I(C), counterclaims that are bound up with or flow from filing the *qui tam* case can and should be dismissed. As demonstrated above, the FCA is designed to encourage whistleblowers to report suspected fraud and to create a zone of protection when they step forward—and not only when they are successful in proving fraud. Because the zone of protection is not dependent upon an actual finding of fraud, the courts can and should dismiss counterclaims at the pleading stage.

<sup>170</sup> As stated in supra Section I(C)(1), the zone of protection applies as long as the employee possesses a reasonable belief that suspected fraud or violations of the FCA occurred.

<sup>171</sup> The same is true for producing non-relevant documents, as discussed supra Section I(D).

<sup>172</sup> In FCA cases, sometimes there exists a “crime-fraud exception” to the attorney client privilege. See Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 10:89 (“The attorney-client privilege does not protect the communications made by either the client or the attorney for the purpose of providing or receiving advice or assistance in furtherance or a crime or fraud of a serious enough nature to warrant abrogation of the privilege. The party asserting this ‘crime/fraud’ exception has the burden of showing that: (1) a crime or fraud existed; and (2) the communications were made with respect to or in furtherance of the illegal acts involved.”). “To overcome an established privilege using the crime-fraud exception, the party opposing the privilege need make only a prima facie showing that the communications either (i) were made for an unlawful purpose or to further an illegal scheme or (ii) reflect an ongoing or future unlawful or illegal scheme or activity. The purported crime or fraud need not be proved.” *X Corp. v. John Doe*, 805 F. Supp. 1298, 1307 (E.D.Va.1992) (citations omitted).

determine if a privilege<sup>173</sup> applies or whether the crime-fraud exception erases the privilege. Indeed, the issue of the existence of a privilege (or any exception) is determined by a court on a case-by-case basis,<sup>174</sup> and even attorneys often mistakenly produce privileged documents during litigation. In any event, the production of a privileged document or trade secret to the DOJ as part of reporting fraud to the Government does not remove a relator from the zone of protection. Rather, if the return of documents or a sanction is warranted, it is an issue to be determined by the court in the *qui tam* case pursuant to Federal Rule of Civil Procedure 26. The next two subsections address in particular how a court should treat the production of privileged documents or trade secrets, followed by a new Section addressing the production of non-relevant information.

#### 1. Attorney Client Privilege

As a starting point, once it applies, the zone of protection bars all state-based counterclaims against a relator. Nevertheless, a relator should not intentionally produce to either his counsel of the DOJ documents that are protected by the attorney client privilege,<sup>175</sup> and relator's counsel should not intentionally review,<sup>176</sup> rely upon, or produce to the DOJ privileged documents. Perhaps best practices would be for counsel to advise a relator not to provide documents on law firm letterhead or an email sent from a lawyer. However, because of the difficulty sometimes in determining when a privilege exists, i.e. the routine practice of including an attorney as a carbon copy (cc) to an otherwise obvious normal business document, it is not

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<sup>173</sup> Thus, a relator should not be expected to make a privilege determination on his own. In addition, inadvertent production of privileged documents happens with some frequency even by counsel for a party.

<sup>174</sup> *X Corp. v. John Doe*, 805 F. Supp. 1298, 1305-06 (E.D.Va.1992) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

<sup>175</sup> Assuming that a relator had access to privileged documents during his normal course of duties, it is not improper for a relator to have read privileged documents. However, a relator should not provide his *qui tam* counsel with privileged documents or information as part of reporting fraud against the Government to the Government.

<sup>176</sup> One role of *qui tam* counsel is to review documents for privilege. Hence, the *qui tam* attorney should review documents provided by a relator for privilege prior to producing the documents to the DOJ. Upon locating a privileged document, the best practice is to stop reading the privileged document and return it to the relator.

always clear whether there are any violations of any ethical rules. In any event, as stated above, the zone of protection applies equally to the production of a privileged document. In other words, a relator remains exempt from any contract or tort cause of action notwithstanding that some of the documents produced to the DOJ contain privileged information. Rather, assuming that a relator is within the zone of protection as defined in this Article, any remedy would flow from Rule 26 and be determined by the court in the *qui tam* case.

The normal remedy under Rule 26 is ordering the return of any privileged documents.<sup>177</sup> In appropriate instances, courts have ordered other reasonable and appropriate sanctions, depending upon the degree of bad faith and prejudice.<sup>178</sup> Given the substantial public interest in the FCA context, it would not be an appropriate sanction to dismiss the *qui tam* case or remove the relator from the case.<sup>179</sup> Indeed, under the FCA there are many safeguards built into the *qui tam* process that limit harm to the defendant if the relator provides privileged documents to the DOJ in a disclosure statement. As an initial matter, the filing of a *qui tam* case generally requires that a relator use the services of an attorney.<sup>180</sup> One of the roles of a *qui tam* counsel is to screen documents for privilege before producing them to the DOJ in the SME. Thus, the first safeguard is that the relator's attorney, who is an officer of the court and bound by ethical rules, will assist

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<sup>177</sup> See *U.S. v. Comco Management Corp.*, 2009 WL 4609595 (C.D. Cal. Dec. 1, 2009). In *Comco*, A whistleblower provided the IRS Whistleblower Office with 25 boxes of documents, which contained some privileged documents. *Id.* at 1. The company sought return of not only the privileged documents, but all documents. *Id.* at 1-2. The court ordered return of the privileged documents, but not the non-privileged documents. *Id.* at 4-5. With respect to the non-privileged documents, the court did require the IRS to allow the defendant to obtain a copy of them. *Id.* at 4-5.

<sup>178</sup> In *U.S. ex rel. Frazier v. Iasis Healthcare Corp.*, 2012 WL 130332 (D. Az. Jan. 10, 2012), the court sanctioned *qui tam* counsel with fees and costs associated with getting its privileged documents back. The court was concerned and issued sanction because *qui tam* counsel did not contact the defendant about the privilege issue after the case was unsealed. The court also stated that dismissal was not an appropriate sanction.

<sup>179</sup> Again, the relator likely had access to the privileged information and therefore his access was not improper. In certain cases, it may be appropriate to recuse one or more of the relator's counsel who actually read the privileged document assuming there is sufficient prejudice and lack of good faith.

<sup>180</sup> E.g., *Georgakis v. Illinois State University*, 722 F.3d 1075, 1077 (7<sup>th</sup> Cir. 2013) (dismissing *qui tam* filed by *pro se* whistleblower and ruling that non-lawyer may not file *qui tam* actions).

in flagging potentially privileged documents and refrain from using privileged documents.<sup>181</sup>

In addition, and more significantly, the FCA's zone of protection applies only when producing documents to the Government and their *qui tam* counsel as part of reporting fraud against the Government, and does not apply to producing documents to third parties, such as the press or competitors.<sup>182</sup> Thus, the court should not order significant sanctions, such as dismissal, when production of privileged documents is limited to turning them over to the DOJ as part of the FCA's required SME.

Moreover, the second safeguard for FCA defendants is the fact that the DOJ has its own protocol for addressing potentially privileged documents produced in a *qui tam* case. Specifically, the DOJ has a general policy of appointing a "taint team" in *qui tam* cases where privileged documents are proffered or produced to it.<sup>183</sup> A separate DOJ attorney that is not working on that *qui tam* case is assigned to review potential privilege issues and ultimately decide that the privilege does not apply at all, or litigate the privilege issue.<sup>184</sup> Only once it is determined that the document is not privileged will the DOJ attorney assigned to the *qui tam* case be allowed to view or use the document in the FCA case.<sup>185</sup>

In sum, because of the safeguards built into the DOJ's *qui tam* practice, even if a relator wrongly produced a privileged document to the DOJ, the document would not be exposed to the public or even used in the *qui tam* case. Accordingly, the normal remedy would be the return of

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<sup>181</sup> Again, under best practices, counsel for the relator should not read obviously privileged documents, but return them to the client and instruct him not to provide similar types of documents.

<sup>182</sup> It is beyond the scope of this Article whether there are similar public interests or zones of protection for reporting fraud committed against insurance companies or other non-Government agencies.

<sup>183</sup> Although there are no cases discussing DOJ's use of a "taint team" in the FCA context, the author worked at DOJ in the Civil Fraud Section for 16 years and confirms that DOJ used similar to "taint teams" on *qui tam* cases as described in cases addressing DOJ's Criminal Division use of "taint teams." See *U.S. v. SDI Future Health, Inc.*, 464 F. Supp.2d 1027 (D. Nev. 2006) (describing the taint team procedures and gathering cases addressing DOJ's use of taint team in criminal cases); *U.S. v. Taylor*, 764 F. Supp.2d 230 (D. Me. 2011) (same). Moreover, it is a general practice of the DOJ to inform counsel for a relator at the start of a *qui tam* case to notify it of any potentially privileged documents and to segregate any potential privileged documents and produce them to the DOJ in a sealed envelope.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

the documents, and would never include dismissal of the *qui tam* case.

## 2. Trade Secrets

The production of a trade secret to the DOJ as part of reporting fraud to the Government does not remove a relator from the zone of protection and continues to bar a defendant from bringing a contract or tort claim against the relator. Again, should a trade secret be improperly produced to the Government, it is an issue to be determined by the court pursuant to Rule 26. In this context, it is even clearer that no remedy or sanctions, other than return of a document or issuance of a protective order, is proper when a relator discloses documents to the DOJ that contain trade secrets or confidential information. Again, apart from the relator who initially had proper access to these documents, the only eyes viewing the information are counsel for the relator and the DOJ attorneys; both of whom are bound by ethical standards and neither of which are competitors of the defendant. In fact, the Trade Secrets Act prohibits Government employees from disclosing trade secrets learned during the course of employment or official duties and carries with it a punishment of up to one year in jail.<sup>186</sup> In addition, it is typical to use documents containing trade secrets or confidential information in FCA cases. The parties simply enter into protective orders during an FCA case when there is a claim of trade secrets or confidential information. Thus, once the *qui tam* complaint is unsealed and served, the defendant is able to obtain a standard protective order prior to any use or disclosure of the documents in support.<sup>187</sup> Moreover, in the event that some confidential information provided to the DOJ is determined to

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<sup>186</sup> 18 U.S.C.A. § 1905.

<sup>187</sup> E.g., U.S. ex rel. Purcell v. MWI Corp., 209 F.R.D. 21, 27 (D.D.C. 2002) (“A protective order requires that ‘a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way.’ FED.R.CIV.P. 26(c)(7). A trial court possesses broad discretion in issuing a protective order and in determining what degree of protection is required. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); see also *United States v. Microsoft Corp.*, 165 F.3d 952, 959 (D.C.Cir.1999).”); The court “adopts the defendants’ alternative proposal for a protective order limiting disclosure to the Government and the relator’s counsel.”); U.S. ex rel. Barko v. Halliburton Co., 2013 WL 3369074 at \*6 (D.D.C. 2013) (Granting a protective order covering documents that the parties say could disclose “confidential, trade secret, or other proprietary business or financial information.”).



be irrelevant the court can order that the documents be returned.<sup>188</sup>

*D. Application of the Zone of Protection to Potentially Non-Relevant Documents*

In the process of gathering relevant documents for supporting their FCA case, some relators have also produced to the DOJ information or documents that later turn out to be irrelevant to the fraud. Given the substantial public interest and unique structure of the FCA, the balance clearly favors the relator when some information or documents gathered are not relevant. Thus, the zone of protection applies equally to the entire activity of gathering documents, as long as the employee possessed a reasonable belief that suspected fraud or violations of the FCA occurred. Accordingly, a defendant is not permitted to bring a contract or tort claim against a relator when engaging in activities falling within the FCA's zone of protection merely because some of the documents produced to the DOJ turn out to be non-relevant to the FCA allegations. Rather, any remedy for producing non-relevant documents as part of the SME is determined by the court under Rule 26.

In evaluating the issue, the relevancy standard under Rule 26(b)(1) is fairly light: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Because relevancy is such a low standard, large quantities of documents are relevant to potential claims or defenses even though only a small fraction of documents produced end up being court exhibits or truly essential to proving a case. Therefore, rarely are sanctions issued in open litigated cases where overproduction is an issue, and even more rare, if ever, would it warrant dismissal. With respect

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<sup>188</sup> Although it may seem at first blush that it is contradictory to allow a relator to copy and produce trade secrets to DOJ while at the same time recognizing additional restrictions apply regarding producing attorney client privileged documents to the DOJ as part of the SME, but the result in both categories hinges upon whether DOJ would be able to use the documents. If so, the relator should be able to copy both types of documents as part of preparing to file a qui tam. Practically speaking, assuming relevancy, DOJ is able to use in a FCA case documents containing trade secrets subject to appropriate protective orders. However, unless there is an exception, such as crime fraud or the defendant relies upon advice of counsel, DOJ is not able to use attorney client privileged documents. Hence, the same guidance is provided to relators; if DOJ would be able to use the documents, they can be produced to DOJ as part of the SME.

to FCA cases, it is typical in large *qui tam* cases for the Government and defendant to produce hundreds of thousands of pages of documents, and even millions of pages of documents.<sup>189</sup> In short, overproduction is a product of the American rule of open discovery in civil cases.<sup>190</sup>

However, because courts have thus far lacked a proper framework for addressing the substantial public interest at stake in an FCA case when a relator produces documents to DOJ as part of the SME, there is a real risk that they will reach incorrect results when addressing relators who have been overly inclusive while gathering for or submitting to the DOJ documentary evidence supporting that their employer is cheating the Government. Again, the courts' first step must be to determine if the zone of protection applies, as defined in this Article. If not, then the defendant may have a cause of action based in contract or tort. However, if the zone of protection applies, it immunizes the relator from all state causes of action, and therefore any remedy would be solely limited to remedies under Rule 26.

Unfortunately, the only Circuit Court of Appeals case to address the issue of overproduction of documents, the Ninth Circuit in *Cafasso v. General Dynamics C4 System, Inc.*, involved such egregious facts that the court chose not to even address if a public policy exception exists for a breach of contract counterclaim against a relator who filed a *qui tam* case.<sup>191</sup> Instead, the Ninth Circuit, in *Cafasso*, affirmed the grant of summary judgment in favor of the company on its counterclaim that the relator breached a confidentiality agreement by removing documents that included non-relevant documents, privileged documents, and trade

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<sup>189</sup> The author worked on several *qui tam* cases during his 16 years working at the DOJ where more than one million pages of documents were produced during discovery.

<sup>190</sup> See 21 PACELR 203, 218 n. 105, MANDATORY DISCLOSURE: A CONTROVERSIAL DEVICE WITH NO EFFECTS (Fall 2000) ("In the current discovery process, attorneys frequently both request and produce more documents than needed, primarily because of perceived ambiguities in the scope of the requests.") (quoting Griffin B. Bell et al., Automatic Disclosure in Discovery-- The Rush to Reform, 27 Ga. L. Rev. 1, 21-39 (1992) at 43-44). In addition, the author worked on several *qui tam* cases while at DOJ where more than one million pages were produced during discovery.

<sup>191</sup> U.S. ex rel. *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047 (9th Cir. 2011).

secrets.<sup>192</sup> Regrettably, some lower courts have begun to cite this case for the incorrect proposition that copying either large amounts of documents or irrelevant documents is a basis for refusing to dismiss breach of confidentiality clauses without first recognizing the existence of a substantial public interest in protecting relators, i.e. the zone of protection. The proper approach would have been for the Ninth Circuit to first determine whether the relator lacked a reasonable belief that the defendant was committing fraud and thus was acting outside of the zone of protection. It was the lack of a reasonable belief of fraud in *Cafasso*, not the volume of documents *per se*, that would allow a state counterclaim to continue.

In *Cafasso*, an employee believed that her company was defrauding the Government by concealing one patent the company applied for in which she believed the Government had an ownership interest.<sup>193</sup> When she discovered that she was being terminated, she vacuumed up as much information about the company as she could and copied roughly 21 CD's worth pages pertaining to hundreds of unrelated patents just in case she might want to review them. When the company discovered that she took the documents, they filed suit to obtain their return. Two days later, the relator filed a six page, conclusory *qui tam* complaint, which the Government declined to intervene.<sup>194</sup> After discovery, the court dismissed the FCA allegations because the fraud was not actionable under the FCA.<sup>195</sup>

With respect to the counterclaim, the relator asked the court to create a public policy exception. Although the Ninth Circuit noted that there was "some merit in the public policy exception," the court left open the issue of public policy for another day in a case that more fairly raised it as an issue.<sup>196</sup> The court described the case as a "vast and indiscriminate appropriation

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at xx.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1062.

of [company] files,” because the relator took the documents without reading a single page before copying them. Even more telling and compelling to the issue, the trial court noted that the relator actually **filed** the *qui tam* action **before** reading a single page from the documents she copied.<sup>197</sup>

Having not even read a single page of documents prior to filing a *qui tam* complaint shows that the removal of documents was not truly part of the process of reporting fraud to the Government. Unfortunately, the Ninth Circuit did not have or apply a proper framework, such as the one advanced in this Article, or it would have held that she was not acting within the zone of protection and therefore counterclaims were appropriate. Rather, the court focused too heavily upon the amount of documents taken.

The case was further exasperated by other misconduct by the relator. The Ninth Circuit went on to note that in addition to failing to read or rely upon the documents when filing a *qui tam* case, also “swept up in this unselective taking of documents were attorney-client privileged communications, trade secrets ... and at least one patent application that the Patent Office had placed under a secrecy order.”<sup>198</sup> Moreover, the Ninth Circuit pointed out that there were “numerous discovery abuses” during the litigation of the FCA case, including attaching privileged documents to the amended complaint, failing to identify documents, seeking discovery of 110 inventions not named in the complaint.<sup>199</sup> The last straw was the fact that the relator admitted in interrogatory responses that she had no evidence in support of her FCA claims.<sup>200</sup> Therefore, the Ninth Circuit concluded,

Although courts perhaps should consider in particular instances for particular documents whether confidentiality policies must give way to the needs of FCA litigation for the public's interest, Cafasso's grabbing of tens of thousands of documents here is overbroad and unreasonable, and cannot be sustained by

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<sup>197</sup> 2009 WL 1457036 at \*14 (D. Ariz. May 21, 2009).

<sup>198</sup> Cafasso, 637 F.3d at 1062.

<sup>199</sup> Id. at 1052.

<sup>200</sup> Id. at xxx.

reference to a public policy exception.<sup>201</sup>

Unfortunately, the opinion appeared to focus on the amount and relevancy of the documents instead of providing a framework, such as advanced in this Article, which hinges upon whether the conduct was within zone of protection that required a showing of a reasonable belief that the company was violating the FCA. The court could and should have stated that she did not possess a reasonable belief that the company violated the FCA and therefore did not fall within the zone of protection. This would have created a more proper framework for future courts.

This Article advances that even when an employee is ultimately determined to act outside of the zone of protection, the same framework applies and analysis needs to be undertaken. First, the court must recognize that the FCA creates a zone of protection, as defined in this Article.<sup>202</sup> Second, the court must determine if a relator falls within it. By skipping the recognition or definition of a zone of protection, this any other courts will not produce uniform results and risks creating factors or reaching decisions contrary to the substantial public and federal interests.

As matters stand, there is not insufficient guidance for future whistleblowers, and courts might misuse the *Cafasso* case for the incorrect premise that copying large amounts of documents somehow falls outside of a zone of protection.<sup>203</sup> Indeed, it is not the amount of the documents that warranted denial of the motion to dismiss the counterclaim in *Cafasso*. Rather, it was the relator's lack of a reasonable belief that the company was defrauding the Government that excluded her from the zone of protection. In other words, the only way a court can permit a counterclaim against a relator is to find that the relator's activities did not fall within the zone of

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<sup>201</sup> Id. at 1062.

<sup>202</sup> See discussion supra Section I(C).

<sup>203</sup> In fact, this case led the *Wildhirt* court to focus on the broad scope of documents collected as a basis for upholding a counterclaim rather than if the actions fall within a zone of protection.

protection as defined in this Article. This is true even if the employee only took one document instead of tens of thousands. If she meets the zone of protection she is exempt from counterclaims for taking one document, but if she does not meet the zone of protection she is not exempt from a counterclaim by taking one document. Conversely, if she meets the zone of protection, she is exempt from all counterclaims even if taking ten thousand pages of documents, as otherwise addressed in this Article.

The danger of focusing on the amount of documents, which in the *Cafasso* case consisted of tens of thousands of pages,<sup>204</sup> is that the courts may end up incorrectly setting as a standard that a document may be copied and produced to the DOJ only if it could be used as a trial exhibit. If that is the standard, then a company that is liable for fraud might still argue that because only 10 percent of documents were worthy of trial exhibits (or perhaps a similar argument that only 50 percent of the documents met some other relevancy standard) that the relator is nevertheless liable for a claim of breach of contract or tort when the Defendant settles the case for millions of dollars. Defendants would almost certainly argue that relator's liability would always exist if the DOJ either turns down a case or if no finding of a FCA violation results. This would chill whistleblowers from reporting suspected FCA violations.

Creating a rule to limit production of documents based on ultimate relevancy or volume would be counter to the goals of the FCA that encourages disclosure of documents and suspected fraud, because protection would be limited to cases where fraud was established. Again, as stated

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<sup>204</sup> The reality is that in this electronic age it is relatively easy to gather a lot of documents because a single DVD-ROM disk or even a small USB flash drive or memory stick holds 4 GB of data, which is 4 million key strokes. Understanding file sizes, <http://www.gn.apc.org/support/understanding-file-sizes>. An average GB of data consists of 64,782 pages of Word files or 677,963 pages of Text files. How Many Pages in a Gigabyte? [http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitepapers/adi\\_fs\\_pagesinagigabyte.pdf](http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitepapers/adi_fs_pagesinagigabyte.pdf). As stated previously, at least one court considered the fact that a relator produced as part of his SME to the DOJ over 700,000 pages of internal company documents as a reason for giving a higher award instead of a punishment. *U.S. ex rel. Rille v. Hewlett-Packard Co.*, 784 F. Supp. 2d 1097, 1099 (E.D. Ark. 2011). The court in *Rille* did not discuss the relator's entitlement to this data or explicitly address its proper use in the qui tam action, but the court noted the "700,000 pages of incriminating documents that [relator] took" as one of the important factors in determining the relators' share of the qui tam settlement. *Id.* at 1101.

earlier, documents are the heart of proving a FCA case. Most FCA cases involve many thousands of pages of documents, with many topping a million pages of documents in large cases.<sup>205</sup> There are often hundreds, if not thousands, of individual false claims in many *qui tam* cases, each of which must be established by sufficient evidence.<sup>206</sup> In addition, because of the heightened Rule 9(b) pleading requirements, a relator must have evidence of the “who, what, when, where, and how of the alleged fraud.”<sup>207</sup> To do so, a relator usually gathers and produces a significant amount of documents to support FCA allegations and survive a motion to dismiss.

Moreover, the whistleblowing employee should not be required to know the relevancy rules or determine which documents may be legally significant in supporting allegations of suspected fraud or violations of the FCA.<sup>208</sup> In addition, a relator should not be forced to review every page of every documents sitting at her office desk before providing them to her counsel. Indeed, the relator should not read every page of every file before copying a folder that likely contains relevant information. That would not only waste company time and resources, but would also tip off the defendant that they intend to report fraud, which is contrary to the purpose and provisions of the FCA.

A relator is also entitled to the aid of counsel to determine what documents are relevant to the fraud claim.<sup>209</sup> The relator should be able to use their attorney’s professional judgment to

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<sup>205</sup> “And, interestingly, the False Claims Act has the following provision: they will serve on the company a civil investigative demand where potentially millions of pages of documents will be turned over before any claim is filed.” Panel Discussion, Evidence Rules Committee: Symposium On Rule 502, REINVIGORATING RULE 502, 81 Fordham L. Rev. 1533, 1585 (March 2013) (statement by Judge Diamond).

<sup>206</sup> In cases the authored worked on at the DOJ on *qui tam* cases, several cases involved thousands of false claims and during discovery more than a million pages were produced in those *qui tam* cases.

<sup>207</sup> E.g., *U.S. ex rel. Ruhe v. Masimo Corp.*, CV 10-08169-CJC JCGX, 2012 WL 7681937 (C.D. Cal. July 9, 2012) (cites omitted). See also Charis Ann Mitchell, Comment, A Fraudulent Scheme's Particularity Under Rule 9(b) of the Federal Rules of Civil Procedure, 4 LIB. U. L. REV. 337 (2010).

<sup>208</sup> In fact, some courts have held that the FCA requires that the relator hire independent counsel as part of pursuing a *qui tam* claim. “The relator’s counsel focuses on presenting to the Government information, documents, damage theories, lists of witnesses, and the names of potential expert witnesses as a part of its initial disclosure statement. [The relator’s counsel] does so with an eye to maximizing the Government’s interest in the case.” Donald H. Caldwell, Jr., *Qui Tam Actions: Best Practices for Relator's Counsel*, 38 J. Health L. 367, 377-78 (2005).

<sup>209</sup> See *supra* Section II(C)(1).

determine a document's relevancy. It makes little sense to place the responsibility solely on the whistleblower, who may, as a consequence, spend valuable company time combing through voluminous records to develop their case.<sup>210</sup> Rather, the relator should be permitted to gather and disclose all *potentially* relevant files that they have reasonable access to as part of their duties to their attorney, who then decides which particular documents to produce to the DOJ. Thus, a court should not limit the zone of protection by requiring a whistleblower to discern and only copy what in hindsight a court may consider to be relevant to a FCA action.

Disclosure of overbroad and unrelated documents to the DOJ should not be a basis to displace the zone of protection. The safeguards previously mentioned prevent any improper disclosure of documents not relevant to the *qui tam* claim to the public or competitors.<sup>211</sup> The relator's attorney and DOJ attorneys working on a *qui tam* case have no interest in disclosing the confidential documents outside of the litigation, and those that do face potentially stiff sanctions.<sup>212</sup> As discussed in Section II(C)(1), because the relator already has access to the documents, and the mere disclosure of them to legal counsel or DOJ means that there is limited potential for significant actual harm. When this low risk is weighed against the substantial interest in protecting whistleblowers who provide information to the Government, the balance weighs heavily in favor of protecting whistleblowers who possess a reasonable belief that suspected fraud or violations of the FCA occurred prior to gathering documents, including gathering files or folders that appear to contain relevant information to provide to counsel for a determination of which documents to produce to the Government. Moreover, much like the privilege and trade secret discussions above, the remedy for over-production is the return of the

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<sup>210</sup> In a large case, there are potentially tens of thousands of relevant documents.

<sup>211</sup> Again, even if the relator's document disclosure to DOJ is overbroad and includes irrelevant documents, the relator's disclosure should still fall within the zone of protection because all disclosed documents will only be seen by officers of the court: the relator's attorney and the DOJ.

<sup>212</sup> The author does not condone including privileged materials in the complaint, which may become public.



documents or other sanctions governed by Rule 26 and not the displacement of the zone of protection when it otherwise applies.<sup>213</sup>

In sum, if an employee falls within the zone of protection of the FCA, they are exempt from contract and tort claims even if some of the documents turn out to be non-relevant. Rather, the exclusive remedy is determined by the court pursuant to Rule 26, and the normal remedy and appropriate solution is to return non-relevant documents to the company, but not to dismiss the *qui tam* case or otherwise remove the protections to the relator flowing from the FCA for reporting suspected fraud against the Government.<sup>214</sup>

### 1. Not Restricting Gathering Documents to Discovery

A common tactic by defense counsel to attempt to sidestep the strong public policy issues outlined in this Article is to ask the court to order return of documents in the relator's possession<sup>215</sup> or that relator produced to DOJ based upon the theory that only information, not documents, are needed to file a *qui tam* case and that DOJ could obtain documents during discovery or issue a civil investigative demand (CID) under the FCA.<sup>216</sup> As demonstrated earlier, an important aspect of the FCA is the unique provision requiring the relator to turn over all information supporting the FCA allegations as part of filing for a reward.<sup>217</sup> Although this generally occurs prior to filing of the *qui tam* case and before DOJ is typically aware of the

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<sup>213</sup> Again, this Article limits the zone of protection to gathering documents from the defendant/employer and producing them to an attorney for purposes of considering reporting fraud against the Government, to the DOJ as part of the relator's SME and continuing duty to provide information to the Government, or using them in eventual litigation, e.g., to meet the particularity requirements of Rule 9(b). This Article does not address or take a position on whether it is a protected activity to gather documents for other purposes, such as to support non-FCA actions or to provide copies to those not part of reporting fraud to the Government, such as to the media.

<sup>214</sup> When a *qui tam* attorney elects to operate outside of these parameters, the remedy may include sanctions, but the normal course is not dismissal of a *qui tam* case based upon disclosing documents to the DOJ provided that the relator was engaged in a zone of protection as defined in this Article.

<sup>215</sup> Such a request often occurs after the DOJ elects not to intervene in a case, the case is unsealed and the relator litigates the case independently.

<sup>216</sup> See 31 U.S.C. § 3733. Prior to 2009, when the statute was amended, civil investigative demands (CIDs) were seldom used because they had to be approved by the Attorney General. Joseph M. Makalusky, BLOWING THE WHISTLE ON THE NEED TO CLARIFY AND CORRECT THE MASSACHUSETTS FALSE CLAIMS ACT, 94 Mass. L. Rev. 41, 52-53 (March 2012). Even though the Attorney General has been allowed to delegate the issuance of CIDs to the U.S. Attorneys for each district, they have not become automatic or used in every *qui tam* case.

<sup>217</sup> 31 U.S.C. § 3730(b)(2). See *infra* Section I(A)(1) FCA: The Statement of Material Evidence.

allegations, the relator has a continuing duty to cooperate with the DOJ and to provide information within its possession and control during the life of the *qui tam* case. Thus, a relator must supplement its SME with any new information or documents after submitting the initial SME.<sup>218</sup> Therefore, the FCA contemplates and condones gathering and producing documents prior to service of the complaint and beginning of formal discovery.

In addition, to deny the relator the ability to support the *qui tam* case would frustrate the strong public policy and federal interests. Again, DOJ declines nearly 80% of *qui tam* cases and lacks resources to investigate every tip or complaint. Thus, only when a relator steps forward with substantial evidence of fraud, usually documents, will DOJ intervene or discovery take place. In addition, defendants frequently file motions to dismiss a *qui tam* under Rule 9(b) in advance of discovery, particularly in non-intervened cases that the relator elects to litigate on behalf of the Government. It is insufficient to survive a motion to dismiss for a Relator to merely inform the court that discovery would supply the “who, what, when, how and why” of the allegations. Rather, the relator must possess the information at the pleading stage, and not just the whereabouts of potentially relevant documents. The substantial public policy interest demands that whistleblowers to step forward with inside information of fraud when filing a *qui tam* case and seeking to get the Government to intervene in the case prior to service of the complaint upon the defendant. Therefore, courts should reject these types of arguments that seek to sidestep the zone of protection and would improperly inhibit relators from producing internal documents to the government as part of the continuing duty of supporting *qui tam* cases prior to service of the complaint on defendants.

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<sup>218</sup> The relator has a continuing duty to cooperate with the DOJ and to provide information within its possession and control during the life of the *qui tam* case. Thus, a relator must supplement its SME with any new information or documents after submitting the initial SME. It is not uncommon for a relator to amend the SME multiple times after filing a *qui tam* and prior to serving the complaint on the defendant.

### *E. When Relators Ask Others to Gather Documents*

Although there are no FCA *qui tam* cases on point, a potential thorny issue is what a court should do if a relator asks other current employees to gather company documents for them to provide to the DOJ as part of the SME when filing a *qui tam* case. A similar question was an issue in a FCA retaliation only suit, where an employee claimed to have been fired because he privately contacted the Government to report fraud, which resulted in an audit of the company.<sup>219</sup> Once the employee was terminated, he brought a retaliation suit under the FCA, but did not bring a *qui tam* action.<sup>220</sup> To support the allegations of wrongful termination, the former employee asked a current employee to gather company documents on his behalf.<sup>221</sup> The former employee received some documents before filing the retaliation action and other documents after filing the action.<sup>222</sup> The company filed nine counterclaims and asked the court to dismiss the retaliation case as a sanction for stealing company documents.<sup>223</sup> The court noted that other courts in other settings had considered similar actions to be stealing, but also concluded that courts rarely dismissed the case as a result.<sup>224</sup> The court held that that the former employee improperly engaged in self-help discovery and received stolen documents.<sup>225</sup> Nevertheless, the court refused to dismiss the claim because it was too harsh a sanction and issued a \$20,000 sanction.<sup>226</sup>

This Article demonstrates that the zone of protection applies to a relator asking other current employees to gather company documents and therefore bars any contract or tort claim

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<sup>219</sup> Glynn v. EDO Corp., 2010 WL 3294347 (D. Md. August 20, 2010).

<sup>220</sup> Id. at \*2. Thus, the case was not filed under seal.

<sup>221</sup> Id.

<sup>222</sup> The wrongful termination action was filed on June 21, 2007. Id. at \*2. An employee provided documents to the plaintiff on February 20, 2007, April 7-9, 2007, August 21, 2007, September 18, 2007, and February 5, 2008. Id. at \*5.

<sup>223</sup> Id.

<sup>224</sup> Id. at \*3-4.

<sup>225</sup> Id. at \*3-5. This case is further distinguishable from a *qui tam* case because the other employees giving the former employee documents knew that there was an ongoing lawsuit and that they were helping an adversary in known litigation, and circumventing the restrictions on contacting represented parties and discovery rules.

<sup>226</sup> Id. at \*4-5.

against either the relator or assisting employees.<sup>227</sup> As demonstrated earlier, an FCA *qui tam* case is unique because its sole purpose is to advance substantial public and federal interests. While only one employee may actually file a *qui tam* case,<sup>228</sup> the goal and purpose of the FCA is to protect all employees who gather documents as part of reporting fraud against the Government. In fact, Congress amended the FCA’s anti-retaliation provision in 2009 to broaden the protection to all persons, whether employees, contractors, or agents. The amendments also include protection for “associated others” when a relator reports fraud against the Government. The FCA statute now reads:

(1) In general. Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or **associated others** in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.<sup>229</sup>

Although there are no cases defining the term “associated others,” it is clear that Congress intended to protect more than just the person who files a *qui tam* case, but also all of those who assist the relator in reporting fraud or bringing a FCA case.<sup>230</sup>

In short, the zone of protection for FCA cases covers any employee who gathers documents for the purpose of reporting suspected fraud against the Government or assisting another in reporting the fraud. Although these non-filing employees are just a conduit for another

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<sup>227</sup> Although asking current employees to copy internal company documents in a case once the complaint is served on the defendant could be viewed as questionable, particularly in FCA retaliation cases where the relator is not prosecuting fraud allegations on behalf of the government, the zone of protection would nonetheless apply and any sanction would be assessed by the court under Rule 26.

<sup>228</sup> In fact, the “first to file” rule bars a second relator from bringing a second *qui tam* case. 31 U.S.C. § 3730(e)(3) (“In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.”). Although somewhat rare, it is possible for two relators to join together to file a single *qui tam* case.

<sup>229</sup> 31 U.S.C. § 3730(h)(1) (emphasis added).

<sup>230</sup> The Congressional record includes a speech by Rep. Howard Berman in which he said, “This language is intended to deter and penalize indirect retaliation by, for example, firing a spouse or child of the person who blew the whistle.” Reprinted at FCAG APP A-3 (Congressional Record (May 18, 2009)).

whistleblower who turns the documents over to the Government, the same substantial public interest is still being served. Indeed, a non-filing employee has the same right to report the fraud but may have chosen not to risk becoming a relator in a *qui tam* case because of the stigma attached to whistleblowers or the fact that the name of the relator who files a *qui tam* is often made public.<sup>231</sup> Moreover, the FCA *qui tam* provisions only pay a reward to the first to file a *qui tam*,<sup>232</sup> but the need for information from multiple people is apparent. Indeed, the anti-retaliation provisions of the FCA apply to every employee regardless of whether they are the ones to file a FCA *qui tam* case. Therefore, the zone of protection under the FCA extends to another employee being asked for documents in support of allegations that the employer is defrauding the Government.

This does not mean that there are no remedies for discovery abuses. As stated in the definition of the zone of protection, “After the defendant has been served with the complaint and the litigation commences, normal discovery rules begin to apply and any violations are subject to court’s authority and controlled by the Federal Rules of Civil Procedure.”<sup>233</sup> In other words, although the defendant may not bring a state claim against the relator or non-filing employee providing assistance to the relator, normal discovery rules begin to apply upon serving the complaint and “once the complaint is served an employee may not continue to gather new documents from the defendant/employer outside of the discovery rules.”<sup>234</sup> Therefore, the protections to employees are not extended at the total expense of defendant’s privacy. Rather, the safeguards built into the definition of the zone of protection and remedies discussed above

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<sup>231</sup> See *Under Seal v. Under Seal*, 326 F.3d 479, 486 (4th Cir. 2003) (There is a presumption in favor of unsealing *qui tam* complaints, but the seal may be retained by a showing of a significant countervailing interest.).

<sup>232</sup> See *supra* Note 225.

<sup>233</sup> See Section (C)(1) Defining the Zone of Protection.

<sup>234</sup> *Id.* Nevertheless, “even after the complaint is served, a relator may continue to use appropriate informal discovery techniques, including obtaining documents from former employees and engaging in other informal discovery techniques permitted by local practices or the Federal Rules of Civil Procedure.” *Id.*

provide for proper protection of the defendant's rights as well.

### III. BALANCING THE FCA'S ZONE OF PROTECTION AGAINST THE COUNTERVAILING PUBLIC INTEREST IN ALLOWING TORT CLAIMS AGAINST A RELATOR

Just as the courts' reliance on the independent damages approach for breach of contract counterclaims is misplaced, their reliance on that same approach for tort counterclaims is also misplaced for the same reasons. As discussed in Section I(C), there should be no distinction between the protection offered to a relator filing a *qui tam* whether it is immunity from an action by an employer based in contract or tort. In that section, this Article outlined two distinct lines of Supreme Court cases which both independently would demand that a zone of protection be afforded to relators, whether stemming from a substantial public policy interest that voids contract provisions (as well as couching contract claims under tort law), or flowing from the uniquely federal interests, which creates federal common law that displaces state tort law.<sup>235</sup>

In 2007, a court predicted that limiting dismissal to contract counterclaims under the *Rumery* line of cases would simply result in clever defendants seeking tort counterclaims.<sup>236</sup> That court was correct. Recently, several courts have missed the mark by refusing to dismiss tort counterclaims against relators. Those courts incorrectly established an "independent damages" model, which seemingly allows tort counterclaims to continue if the elements of the tort claims are different from elements of the FCA claims, while others appear to reserve dismissal of tort claims to instances where FCA violations are proven in court. However, the correct approach is to apply the zone of protection to all counterclaims, including torts. In other words, the zone of

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<sup>235</sup> Under *Rumery*, courts cannot enforce any contract as void against public policy that hinders a relator from filing a *qui tam* case because the substantial public policy interests of the FCA creates a zone of protection for relators. Similarly, the same public policy reasoning requires that the zone of protection apply equally to tort claims based on the same conduct that, as a matter of law, cannot breach a contract or it would nullify the policy simply because clever counsel could couch any claim as a tort. Under *Boyle*, a court should recognize that federal common law exists because the FCA creates unique and substantial federal interests in protecting the public fisc that would be thwarted and therefore shields relators from state tort claims.

<sup>236</sup> U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc., 505 F. Supp. 2d 20, 26 (D.D.C. 2007) (noting that "these courts have been alert to the likelihood that clever defendants will seek what federal law denies them under the guise of affirmative state law rights of action, and have held that 'there can be no right to assert state law counterclaims that, if prevailed on, would end in the same result'").

protection applies to all activities that are bound up with or flow from reporting suspected fraud against the Government to the Government.

*A. Cases Incorrectly Applying Independent Damages Approach to Torts*

Unfortunately, the only circuit court of appeals case addressing availability of tort claims against relators in the *qui tam* context failed to apply a proper framework when approaching the issues and therefore did not rule whether the public interest at issue is substantial or what protection flows from the FCA to relators.<sup>237</sup> Simply put, the Ninth Circuit Court of appeals failed to adopt the correct test for determining whether to allow tort counterclaims against a relator.<sup>238</sup> As a result, several lower courts are applying the wrong standard.

In 1993, in *U.S. ex rel. Madden v. General Dynamics Corp.*, an employer responded to a *qui tam* case by a former employee by bringing eight counterclaims, consisting of a mix of contract and tort claims.<sup>239</sup> The district court dismissed all of the counterclaims because they would “discourage *qui tam* plaintiffs from filing suit.” The Ninth Circuit reversed and held that “*qui tam* defendants can bring counterclaims for **independent** damages.”<sup>240</sup> The court reasoned that the defendants have a due process right to bring compulsory counterclaims that would be lost if not raised.<sup>241</sup>

The Ninth Circuit, almost in passing, noted that its decision that seemingly allows independent counterclaims “may act to encourage *qui tam* defendants to bring counterclaims” cast in the form or nature of independent damages instead of the prohibited class of those seeking indemnity.<sup>242</sup> The court nevertheless summarily declined to bar of counterclaims beyond what it

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<sup>237</sup> *U.S. ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 829 (9<sup>th</sup> Cir. 1993).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* (duty of loyalty and breach of fiduciary duty; breach of implied covenant of good faith and fair dealing; violations of California Labor Code; libel; trade libel; fraud; interference with economic relations; and misappropriation of trade secrets).

<sup>240</sup> *Id.* at 831 (emphasis added).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

considered to be dependent claims. The court reasoned,

we are not persuaded that it is necessary to bar counterclaims in *qui tam* actions in order to provide relators with the proper incentive to file suit. The bounty provisions of the FCA already serve this purpose. See 31 U.S.C. § 3730(c). Rather, we believe that some mechanism must be permitted to insure that relators do not engage in wrongful conduct in order to create the circumstances for *qui tam* suits and to discourage relators from bringing frivolous actions. Counterclaims for independent damages serve these purposes.<sup>243</sup>

According to the Ninth Circuit, “if a *qui tam* defendant is found not liable, the counterclaims can be addressed on the merits.”<sup>244</sup>

The same problems occur in the tort context as discussed in the prior section that more poignantly addressed contract claims addressing when the protection to relators hinges upon a finding of liability instead of a reasonable belief that fraud is afoot when reporting suspected fraud. As discussed earlier, an approach that requires waiting to see if the defendant is found liable leaves counterclaims hanging over the relator’s head and chills potential whistleblowers from stepping forward. This approach is also unworkable because a finding of liability is extremely rare in the FCA context.

The court should have begun by recognizing the substantial public interest, followed by determining that the FCA creates a zone of protection. This framework would have permitted the court to still uphold any counterclaims upon a finding that the relator acted outside of the zone of protection.<sup>245</sup>

Because this is the only appellate decision, many lower courts have unfortunately applied this flawed approach of determining whether the counterclaims are dependent or independent of the company’s FCA liability.<sup>246</sup> In other words, the Ninth Circuit’s prophesy is being fulfilled; its

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<sup>243</sup> Id.

<sup>244</sup> Id.

<sup>245</sup> See discussion supra Section I(C). The same safeguards discussed in the prior sections apply equally here.

<sup>246</sup> According to a treatise that has gathered cases in this area of the law, “Some district courts have held that the False Claims Act bars such independent counterclaims because such claims would discourage *qui tam* actions, contrary to the purposes of the



decision is encouraging FCA *qui tam* defendants to bring counterclaims cast in the form of independent damages or tort claims. As a result, many courts are following the independent counterclaim standard and thwarting the purpose of the FCA to encourage and protect relators who report fraud against the Government.

The Ninth Circuit's forecast of clever defendants bringing numerous tort claims against a relator for providing information to the Government as part of filing a *qui tam* case has proven true.<sup>247</sup> For example, in 2009, the district court for the District of Columbia in *Head*<sup>248</sup> faced a decision on how to rule on a dozen counterclaims against the relator in a FCA case.<sup>249</sup> As mentioned earlier, the court readily dispatched the two claims based on breach of contract for reporting fraud because they violated public policy. The court, however, faced ten more tort related counterclaims, which were the type of disguised counterclaims predicted by the Ninth Circuit in *Madden*.

Although the *Head* court initially recognized a strong public policy interest in attracting whistleblowers to file *qui tam* cases, it failed to go deeper in its analysis and find that the interest was actually a substantial public interest. It also failed to adopt a federal common law zone of protection. Consequently, the court relied on a variety of different state law rules to dismiss most, but not all of the counterclaims. Indeed, *Head* provides a good illustration of the extent to which a relator faces retaliatory tort claims flowing from his actions relating to bringing an FCA claim.

Because the court did not define the zone of protection or acknowledge federal common law, the court looked solely to state law defenses when ruling on a motion to dismiss the state

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False Claims Act. Other courts have allowed such counterclaims to proceed or considered the claims on the merits and dismissed them." FCAG § 11:94.

<sup>247</sup> General Dynamics Corp., 4 F.3d at 829.

<sup>248</sup> This case was discussed at supra Section II(A).

<sup>249</sup> United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146 (D.D.C. 2009) (including defamation; tortious interference with economic advantage; intentional interference with contract; intentional interference with prospective economic advantage; malicious prosecution; libel; slander; breach of contract; and fraud).

common law counterclaims against the relator. For instance, the court refused to dismiss at the pleading stage the defamation, libel, and slander counterclaims and effectively stayed them until the result of the FCA case and being contingent upon exoneration of the defendant.<sup>250</sup> The court reasoned that claims would be dismissed later if the defendant was found liable because the plaintiff would be entitled to the defense of truth.<sup>251</sup> At the end of the opinion, however, the court noted that “[t]o the extent that Defendant relies upon any allegation made by Head in pleadings filed in this Court or in support of the Government's investigation, its counterclaims are barred by absolute privilege.”<sup>252</sup> It is not clear what claims of libel or slander the court considered viable, such as reporting fraud to federal or state agencies apart from the actual complaint, which would also fall within the zone of protection. Failing to dismiss such claims at the pleading stage chills potential relators. The correct approach would be to immediately shield the relator from all tort claims within the zone of protection.

Next, the *Head* court dismissed the counterclaim for malicious prosecution without prejudice as premature because one element of the claim requires that the case be terminated in favor of the defendant.<sup>253</sup> However, the very nature of the unique *qui tam* statute demands an exemption from malicious prosecution when covered by the zone of protection as defined herein. Hence, the only way for a relator to be eligible for a reward is to actually file a *qui tam* complaint in court.<sup>254</sup> To allow a malicious prosecution claim to proceed if the relator fails to prove the FCA claim in court strikes at the very heart of the *qui tam* statute. Again, it is rare to ever obtain such a finding of liability. In any event the definition of zone of protection provides the claimed

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<sup>250</sup> Id. at xx.

<sup>251</sup> Id.

<sup>252</sup> Id. at 155 (citing *Finkelstein, Thompson & Loughran v. Hemispherx Biopharma, Inc.*, 774 A.2d 332, 338 (D.C.2001) (“Along with the overwhelming majority of the States, the District of Columbia has long recognized an absolute privilege for statements made preliminary to, or in the course of, a judicial proceeding, so long as the statements bear some relation to the proceeding”); *Brown v. Collins*, 402 F.2d 209, 212 (D.C.Cir.1968); Restatement (First) of Torts § 587 (2009)).

<sup>253</sup> *Kane Co.*, 668 F. Supp. 2d at 156.

<sup>254</sup> See 31 U.S.C. § 3730(b)(1) (requiring relator to file *qui tam*); see also U.S. ex rel. *Babalola v. Sharma*, Slip Copy, 2013 WL 431821 \*3 (S.D. Tex. Feb. 1, 2013) (“relator must file her *qui tam*” to be eligible for an award).

protection needed by defendants in that it requires a reasonable belief of a violation of the FCA. If that is met, the federal common law should mandate an absolute privilege or bar from a malicious prosecution claim or any similar tort claims, including libel. In fact, relators are entitled to an exemption from tort liability from all claims bound up in or flow from engaging in an activity within the zone of protection. Failure to dismiss these tort counterclaims thwarts the very heart and purpose of the *qui tam* provisions of the FCA.

Another example of courts applying the incorrect independent damage framework includes a 2013 case in which the court in *Wildhirt* refused to dismiss the claim of tortious interference with prospective economic advantage based upon reporting suspected fraud against the Government to the Government. The court reasoned that, under state law, the absolute privilege for statements made in a legal proceeding, such as a *qui tam* complaint, is an affirmative defense and not ripe for review at the motion to dismiss stage because there is no finding at this time that the relator acted in good faith in filing the case.<sup>255</sup> Again, hinging dismissal on a finding of fraud improperly thwarts the purpose of the FCA.

In sum, these cases highlight and demonstrate the need for a uniform federal approach. Moreover, they show why a unique federal interest is being thwarted by the application of state law tort claims. Protections to a federal relator reporting fraud against the federal fisc through the unique FCA *qui tam* provisions should not be dependent upon what state law defenses exist. Rather, as in *Boyle*, the courts should recognize federal common law and displace state law claims.

#### *B. Applying the Zone of Protection to Torts*

The correct approach is to recognize that the FCA creates either a substantial public or uniquely federal interests and adopt this Article's definition of zone of protection as the formula

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<sup>255</sup> *Wildhirt v. AARS Forever, Inc., et al.*, 2013 WL 5304092 at \*xxxx.

for determining whether a contract or tort claim can be pursued against a relator. In short, similar to contract claims, courts should find a general exemption from tort claims where a relator meets the definition of a zone of protection associated with filing a *qui tam* case. Because this Article has established that there exists both a substantial public and federal interests, the courts can and should create or apply a federal privilege against counterclaims that exempt from all tort claims which are bound up with or flow from engaging in an activity within the zone of protection afforded by the FCA.<sup>256</sup>

In sum, because of the lack of recognition of a substantial public interest (or a unique federal interest) and resulting zone of protection, courts have reached a variety of inconsistent and varied results when addressing tort counterclaims, such as malicious prosecution, and libel, against relators. The courts also incorrectly rely solely upon state defenses or state privileges instead of recognizing federal defenses or privileges flowing from the FCA. The current case law provides little guidance and often less protection from tort counterclaims related to reporting fraud against the Government.<sup>257</sup> This Article corrects these errors by demonstrating that a relator is exempt from all tort claims which are bound up with or flow from engaging in an activity within the zone of protection afforded by the FCA.

With respect to protecting defendant from overreaching, there already are ample protections built into the FCA framework. First, the FCA requires that the allegations be filed under seal to allow the DOJ to investigate the allegations. The Government has the option to intervene or decline the *qui tam* case. If it intervenes, the company is facing allegations by the Government itself, which eliminates the main concerns. If the DOJ declines, the Government can move to dismiss the case or allow the relator to proceed. If the relator proceeds alone, there are

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<sup>256</sup> Boyle v. United Technologies Corp., 487 U.S. 500, 504 (1988) (citations omitted).

<sup>257</sup> Additional cases are gathered in a treatise, False Claims Act: Fraud Against The Government, available on Westlaw at Claire M. Sylvia, The False Claims Act: Fraud Against the Government § 11:94 (Counterclaims against relator) (updated April 2013).

additional safeguards. Specifically, the FCA has a built-in remedy for defendants allowing the recovery of costs:

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.<sup>258</sup>

In addition, the court has inherent powers to address vexatious litigation through Federal Rule of Civil Procedure 11 sanctions against the relator or relator's counsel.

In sum, the zone of protection applies equally to tort claims. The next subsection provides examples of actions that are not flowing from the zone of protection in which a tort claim would be allowed to be maintained.

#### 1. Examples of Actions Not Flowing from the Zone of Protection

If a claim against a relator is based upon actions that do not flow from or bound up with the zone of protection, a court could still allow a state tort claim. However, by definition, it would not be a compulsory counterclaim or even permitted in the *qui tam* action because it is truly independent from the process of a relator gathering information and reporting the allegations that their company defrauded the Government, which is what a *qui tam* action alleges.<sup>259</sup>

For instance, one court correctly found that an employee breached an independent fiduciary duty to its employer because when he received a copy of a subpoena from the Government addressed to the company (even though it resulted from the fact that the employee filed a *qui tam*) she failed to inform the company of the subpoena but produced company

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<sup>258</sup> 3730(d)(4).

<sup>259</sup> Even if the action against the relator were filed in a separate action, it would be limited to conduct that is not bound up with or flowing from gathering information for reporting suspected fraud or filing a *qui tam* case.

documents to the Government herself, purportedly on behalf of the company.<sup>260</sup> The court reached the correct result because the tort was not the act of producing documents to the DOJ when she suspected fraud against the Government, but concealing a subpoena addressed to the company.<sup>261</sup>

Similarly, a company may bring a claim against an employee who alters or destroys company records.<sup>262</sup> Although the activity of producing internal company records to the Government is protected, destroying documents clearly is not. Finally, the zone of protection does not prevent a court from issuing discovery sanctions occurring during litigation after the complaint is served. In short, although a defendant may not bring a tort suit, a court may properly issue costs as sanctions against a relator in a *qui tam* for serious litigation abuses during litigation once the complaint is served.<sup>263</sup>

In sum, the zone of protection created by the FCA's substantial public and federal interests in protecting whistleblowers creates an exemption from tort claims which are bound up with or flow from the entire process of gathering company documents and information to report suspected fraud to the Government or filing a *qui tam* complaint.

#### IV. CONCLUSION

The FCA creates both a substantial public policy and unique federal interests in enlisting and protecting relators who report fraud against the Government or file FCA *qui tam* cases, and either interest standing alone would mandate the creation of a “zone of protection” that immunizes whistleblowers from all contract or tort claims that are bound up with or flow from reporting suspected fraud against the Government to the Government. This Article proposes a

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<sup>260</sup> United States ex rel. Grandeau v. Cancer Treatment Centers of America, 2005 WL 300414, Civil Action No. 99–8287 (N.D. Ill. 2005).

<sup>261</sup> Id.

<sup>262</sup> United States ex rel. Hartman v. Allegheny General Hospital, 2005 WL 2106627, 2005 U.S. Dist. LEXIS 18321 at \*15, Civil Action No. 02–1948 (W.D. Pa. 2005).

<sup>263</sup> United States ex rel. Scott v. Metropolitan Health Corp., 2005 WL 3434830, Civil Action No. 02–485 (W.D. Mich. 2005).

definition of the “zone of protection,” which includes a privilege against counterclaims relating to producing internal company information or documents to the Government, as long the employee possessed a reasonable belief that suspected fraud or violations of the FCA occurred or are occurring.<sup>264</sup> This framework provides a fair and predictable zone of protection afforded by the FCA that will guide future whistleblowers before they step forward to report suspected fraud against the Government and aid courts in making proper rulings upon any legal claims an employer may consider against an employee who uses internal documents or information when reporting suspected fraud against the Government to the Government. Finally, this Article provides guidance on how to apply the zone of protection to complex and difficult scenarios.

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<sup>264</sup> The zone of protection activity extends to the entire process of considering reporting suspected fraud or filing a *qui tam* case, and applies even if an employee was not aware at the time of the existence of the FCA, if they ultimately do not file a *qui tam* case, or if it turns out that the company did not actually commit fraud or violate the False Claims Act. The protection also permits an employee to provide potentially relevant internal documents to an attorney for assistance in evaluating whether to report suspected fraud to the Government or for evaluating whether to file a *qui tam* case.<sup>264</sup> When an employee falls within the zone of a protection, they are exempt from any claim that is bound up with or flows from carrying out such a protected activity.