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The Law Firm

Fleming . Ruvoldt PLLC

250 Moonachie Road
Suite 501
Moonachie, NJ 07074
(201) 518-7878
(201) 518-7879 (fax)

Eric H. Jaso
(201) 518-7876 (Direct)
ejaso@flemingruvoldt.com

September 15, 2015

BY EMAIL
Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments on Report and Recommendations of Special Committee on Attorney Ethics and Admissions

Dear Judge Grant:

In accordance with the Notices to the Bar dated June 9, 2015 and July 31, 2015, the comments herein respond to the Report and Recommendations of the Special Committee on Attorney Ethics and Admissions (Report) submitted May 12, 2015.

By way of introduction, I am an attorney admitted in New Jersey, and have practiced law since 1993. Since 2008, I have represented whistleblowers in federal and state False Claims Act (FCA) lawsuits, IRS, SEC and other administrative claims, and pursuant to other statutory and regulatory provisions. I work closely with federal, state and local government attorneys and investigators in pursuing fraud cases. I have represented whistleblowers in cases that have recovered over $3 billion to the federal and state taxpayers, including *qui tam* cases against GlaxoSmithKline ($3 billion), McKesson Corp. ($365 million) and Forest Labs ($313 million). I served as an Assistant U.S. Attorney in the District of New Jersey from 2003 until 2008, prosecuting primarily securities and health care fraud, and was an appointee in the U.S. Departments of Justice and Education in Washington, D.C. during 2001-2003. At both the Education Department and at the Justice Department, I was involved in the prosecution of government-fraud cases, and in the development of policy with regard to such wrongdoing.

My decade-plus of experience both in government and private practice investigating and prosecuting fraud, and particularly representing whistleblowers in such cases (known in *qui tam* actions as "relators"), leads me to have great concern about the Special Committee's proposal to amend Rule 4.4(b). I believe the proposed amendment would

have an extremely negative, albeit unintended, impact on the ability and incentive of whistleblowers to obtain evidence of fraud and bring it to counsel, on the ability of counsel to advise whistleblower clients in a fully-informed and competent manner, and ultimately on the ability of whistleblowers and their counsel to bring evidence of fraud to the attention of the authorities for investigation and prosecution.

Whistleblowers play a necessary and increasingly important role in law enforcement and the policing of fraud against the government and in areas such as health care, banking and securities. The courts have long recognized the central role of statutes such as the federal and state False Claims Acts, not only to provide a means of redress for the government to punish fraud and recover ill-gotten gains from wrongdoers, but also to learn of otherwise secret fraudulent schemes from insiders and tipsters:

> Throughout [the legislative history of the False Claims Act's 1986 amendments] the message is clear: the Government is in dire need of information to enhance its ability to recover losses sustained as a result of fraud against it. The FCA is seen as the Government's primary litigative tool for combatting fraud, and the amendments were proposed "not only to provide the Government's law enforcers with more effective tools, but also to encourage *any individual knowing of Government fraud* to bring that information forward."

U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co. of Am., 736 F. Supp. 614, 621-22 (D.N.J. 1990) (Wolin, J.), *aff'd sub nom. U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991).

Central to the function of the False Claims Act (as well as other whistleblower provisions such as the IRS and SEC programs) is that the allegations are filed under seal, and under law remain secret to the defendant and the public for the duration of the government's investigation (which may also include a criminal investigation).

> By providing for the seal provision, Congress intended to strike a balance between "the purposes of *qui tam* actions [and] ... law enforcement needs [.]" S. Rep. No. 345, 99th Cong., 2d Sess. 24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289. The purpose of *qui tam* actions is to encourage more private false claims litigation. *See id., reprinted in* 1986 U.S.C.C.A.N. at 5288. The other side of the balance recognizes the need
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> > to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action.

> *Id., reprinted in* 1986 U.S.C.C.A.N. at 5289. The seal provision provides an appropriate balance between these two purposes by allowing the *qui tam* relator to start the judicial wheels in motion and protect his litigative rights, while allowing the government the opportunity to study and evaluate the relator's information for possible intervention in the *qui tam* action or in relation to an overlapping criminal investigation. *Id.*

U.S. ex rel. Lujan v. Hughes Aircraft Co., 67 F.3d 242, 245 (9th Cir. 1995). *See also, e.g., Am. Civil Liberties Union v. Holder,* 652 F. Supp. 2d 654, 663 (E.D. Va. 2009) *aff'd*, 673 F.3d 245 (4th Cir. 2011) ("The FCA's seal provisions are analogous to grand jury proceedings insofar as both are aimed at preserving the integrity of criminal investigations. . . . Safeguarding the integrity of these investigations requires secrecy, as Congress recognized when it amended the statute in 1986.").

The U.S. Justice Department reported that it recovered nearly $6 billion through False Claims Act enforcement in fiscal year 2014; approximately $40 billion has been recovered in *qui tam* cases since the Act was amended in 1986 to enhance relators' ability to bring and sustain cases. More recent enactments of whistleblower provisions have enabled the Internal Revenue Service to recover up to $600 million annually in unpaid taxes, penalties and interest, and the SEC to recover millions for defrauded shareholders.[1] New Jersey's False Claims Act, enacted in 2008, has already been employed to recover millions to the state Treasury.[2]

Specifically, the Special Committee recommends that Rule 4.4(b), governing the return of inadvertently produced privileged documents, be amended to include such documents that were "wrongfully obtained." *See* Report at 32 *et seq*. The Committee states that this amendment is appropriate because "[g]iven modern technology, electronic information is more easily intercepted or misappropriated than traditional paper documents." *Id.* at 33-34. The Report notes that the amended rule "would not expressly apply to documents taken from employers to support discrimination claims, false claims [*sic*] or the like, unless those documents contain lawyer-client communications involving an adverse or third party." *Id.* at 34-35. The amended Rule further provides that "if the lawyer has questions as to his or her obligations, the lawyer may promptly bring the matter to the attention of the appropriate court [and] may preserve the documents or information (and not return it or delete it) pending review and disposition by the court." *Id.* at 35.

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[1] Press Release, *Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014* (Nov. 20, 2014) (available at doj.gov); IRS Whistleblower Program Fiscal Year 2014 Report to the Congress (available at irs.gov); 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program (available at sec.gov).

[2] *See, e.g.*, Press Release, *Acting Attorney General Hoffman Announces $740,000 Settlement of False Claims Act Litigation with United Parcel Service* (May 19, 2015) ("The $740,000 settlement with UPS is the largest non-Medicaid-related False Claims Act settlement by New Jersey since the New Jersey False Claims Act took effect in March 2008.") (available at nj.gov).

According to the Report, the proposed Rule is intended to expand the reach of the attorney's obligation regarding the receipt of potentially privileged documents and/or information beyond material that was merely "inadvertently sent" to material that the lawyer knows or has reason to believe was "wrongfully obtained." *Id.* at 32-33. As currently drafted, the proposed Rule does not reflect or take into account the practices and procedures followed in preparing, filing and litigating such cases. As discussed, a principal and vital aspect of False Claims Act and similar whistleblower actions is that they are initially filed in secrecy, without the defendant being served or otherwise receiving notice of the action. The proposed Rule would impose an affirmative duty upon counsel who received potentially privileged information that may have been "wrongfully obtained" a duty to "promptly notify the lawyer whose communications are contained in the document or information and . . . return the document or information to the other lawyer[.]" Report at 36.

However, as will be discussed, this obligation appears to hinge on the necessarily subjective question of what documents are "wrongfully obtained" -- in the view of a corporation accused of committing fraud, the answer will surely be "all of them." Further, this ethical obligation is imposed on attorneys (both whistleblower counsel and government lawyers) who have a professional duty to review, distill and analyze documents, sometimes voluminous, obtained and turned over by a whistleblower who, in all likelihood, lacks a law degree or sophistication in determining the nuances of privilege or ascertaining relevance in the context of framing a legal action. As written, the proposed Rule threatens to make "radioactive" any and all documentation obtained by a whistleblower as evidence of fraud, with the result being that neither private counsel nor government attorneys will risk ethical charges to evaluate and prosecute whistleblower cases.

Similarly, the amended Rule would have potentially devastating negative effects on whistleblowers and their counsel who are investigating fraud, compiling documentary and other evidence to prepare a complaint and provide evidence of the whistleblower's allegations to the government, and/or prosecuting and litigating a filed *qui tam* case or other whistleblower action. In short, the amended Rule would give corporations accused of committed fraud a Damocles' Sword to dangle over the heads of potential relators and their counsel: citing employment contracts, corporate codes of conduct, confidentiality agreements, and/or federal and state employment law, such corporations would claim that any and all documents and evidence obtained by a whistleblower were "wrongfully obtained," and, citing the potential for privileged information to be reflected therein, claim violations of the Rule. *See generally* Joel D. Hesch, *The False Claims Act Creates a 'Zone of Protection' that Bars Suits Against Employees Who Report Fraud Against the Government*, 62:2 Drake L. Rev. 361 (Winter 2014) ("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.")

1. The current Rule is sufficient.

The Special Committee acknowledges that the current Rule has been interpreted by the New Jersey Supreme Court as applying beyond only those documents or information which were "inadvertently sent." The Report cites and discusses *Stengart v. Loving Care*, 201 N.J. 300 (2010), in which an employer argued that Rule 4.4(b) did not apply to privileged emails which the company retrieved from an employee's work computer because the employee "left the e-mails behind on her laptop and did not send them inadvertently." *Id.* at 325. However, the Court correctly focused not on how and whether documents were "sent" (nor with what state of mind) but on the substance of the Rule, which prohibits attorneys from accessing and reading privileged communications between a person and her attorney, and creates an ethical responsibility to either delete the document and/or notify the proper owner of the document: "We find that the Firm's review of privileged e-mails between Stengart and her lawyers, and the use of the contents of at least one e-mail in responding to interrogatories, fell within the ambit of RPC 4.4(b) and violated that rule." *Id.* at 326.

Indeed, the Court noted that the Rule applied to an attorney who obtains privileged documents *regardless* of whether such documents were, to use the language of the proposed amendment, "wrongfully obtained":

> To be clear, the Firm did not hack into plaintiff's personal account or maliciously seek out attorney-client documents in a clandestine way. Nor did it rummage through an employee's personal files out of idle curiosity. Instead, it legitimately attempted to preserve evidence to defend a civil lawsuit. Its error was in not setting aside the arguably privileged messages once it realized they were attorney-client communications, and failing either to notify its adversary or seek court permission before reading further. There is nothing in the record before us to suggest any bad faith on the Firm's part in reading the Policy as it did. Nonetheless, the Firm should have promptly notified opposing counsel when it discovered the nature of the e-mails.

Id. Thus, the New Jersey Supreme Court has already made clear that if an attorney were to engage in, direct or condone wrongdoing in order to obtain privileged documents and *then* read them, that would be equally (if not more) sanctionable behavior under the existing Rule, even though the transmission of the documents in those circumstances are not technically "inadvertent." (The Committee itself recognizes that there are legal sanctions well beyond those for violating professional obligations for "wrongfully obtain[ing] documents." Report at 35 n.5). In short, the proposed amendment to the Rule seems to be a solution in search of a problem.

2. *The proposed Rule would discourage the legitimate collection of evidence, which would ultimately undermine and hinder government investigation and prosecution of fraud.*

Whistleblowers can and must collect documentary and other tangible evidence of fraud, not only to convince counsel of the merits of their claims, but more importantly so that the whistleblower and her counsel can convince the government of the merits, and if necessary, convince a jury. If a whistleblower is still employed by the company engaged in fraud, she may seek the guidance of counsel to determine what documents she may turn over to counsel and what additional documents she may properly obtain within the course of her continued employment. Any experienced (and ethical) *qui tam* lawyer will advise the client not to take or turn over any documents or communications that they have reason to believe may be privileged, and government attorneys routinely remind counsel of this responsibility, since they have no desire to receive privileged material either, since exposure to privileged material can "taint" the investigative team.

However, counsel can and should advise the client that she may take and turn over any evidence of fraud that she would normally have access to during the normal course of business, but that she should not "gumshoe" or attempt to access files, computers, drives/servers, documents or material that she would not normally have reason to access. That being said, counsel should also advise the client of the legal risks of taking documents in potential violation of employment contracts, confidentiality agreements, company policy, and possible state or federal law, and remind the client that courts have differed in their interpretations of what legal protections exist, and the reach of those protections, for whistleblowers who obtain documents ostensibly in violation of legal duties and prohibitions. *See, e.g., U.S. ex rel. Notorfransesco v. Surgical Monitoring Assoc., Inc.*, No. CIV.A. 09-1703, 2014 WL 7008561, at *5 (E.D. Pa. Dec. 12, 2014) ("[P]rohibiting Notorfransesco's use of any confidential materials and demanding their return to SMA may be improper if such materials are 'reasonably necessary' to pursuing her FCA claim. . . . In such cases, 'confidentiality policies must give way to the needs of FCA litigation for the public's interest[.]' It is possible, however, that Notorfransesco is in possession of information that is not related to proving her claim, in which case SMA's requested injunctive relief would be appropriate.").

In short, counsel must advise the client based on circumstances and the law that may apply in her state or federal district, and remind her that merely being a bona fide whistleblower with a good-faith belief that fraud is being committed does not cloak her in an absolute protection against liability or sanction. Based on current law and rules (including ethical rules, the existing system works and is flexible, requiring due respect for an employer's rights (including any attorney-client privilege) while allowing whistleblowers to obtain evidence of fraud, have counsel evaluate it, and if the evidence supports fraud allegations, to prepare a complaint, file an action, and submit material evidence to the government for investigation and prosecution. The proposed amended Rule threatens to upend that process, as it would expose both private counsel and

government attorneys to the risk of ethical violation merely for doing the necessary job of reviewing, analyzing and evaluating raw documentation to determine if evidence of fraud exists, and how compelling that evidence is.

The proposed Rule thus threatens to interfere with the ability of government attorneys to work with relators and their counsel in investigating and prosecuting fraud. The proposed Rule potentially thwarts the relator's statutory duty to submit a detailed disclosure of evidence to the government when a *qui tam* or other whistleblower case is filed. For example, the federal and New Jersey False Claims Acts require a relator to submit "*substantially all* material evidence and information the person possesses" to the Department of Justice and the U.S. Attorney's Office (or state Attorney General) upon filing a *qui tam* case. 31 U.S.C. § 3730(b)(1) (emphasis added). When a *qui tam* case is filed, the relator and her counsel will typically meet with government attorneys and agents, to present evidentiary proof of the claims and allow the government to evaluate the credibility of the whistleblower. Absent extremely unusual circumstances, the government will decline to even investigate a *qui tam* case where the relator lacks solid documentary or other tangible evidence of fraud. Likewise, The proposed Rule also threatens to hogtie relators, their counsel, and/or government attorneys who litigate False Claims Act cases, because the courts require the complaint to "state with particularity the circumstances constituting fraud[.]" Fed. R. Civ. P. 9(b); *see generally, e.g., Foglia v. Renal Ventures Mgmt, LLC*, 754 F.3d 153, 158 (3d Cir. 2014) (relator must plead "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."). Thus, without detailed, solid evidence obtained pre-discovery, a *qui tam* case that ends up being litigated faces the likely prospect of dismissal at the pleading stage.

3. The term "wrongfully obtained" is overly broad, vague, and subjective.

Although no ethical attorney would engage in, direct or condone wrongful activity to obtain documents from an opposing or third party, much less documents containing privileged communications, the meaning of the term "wrongful" is frequently in the eye of the beholder. Therein lies the rub for the proposed amendment as it would surely be applied in whistleblower cases: for every whistleblower who keeps, collects, obtains or otherwise acquires documents from her employer for the purposes of proving the existence of a fraudulent scheme and bringing evidence to the authorities, there is a corporation (and its able counsel) to insist that those documents were "wrongfully obtained," in violation of confidentiality provisions in her employment contract, in the company code of conduct, or in state or even federal statutes.

Defendants in *qui tam* and other whistleblower actions frequently raise such claims in employing the tactic of attacking the relator/whistleblower/plaintiff, who defense counsel may paint as a disgruntled former employee. For this reason, Congress has enacted a wide array of protections and incentives for whistleblowers:

> 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.

Hesch, *supra* at 366. For example, federal law provides exemptions for whistleblowers in privacy statutes, most notably in the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Patient health information (PHI) that is otherwise protected from disclosure by HIPAA may be disclosed to authorities or to an attorney by a whistleblower who "believes in good faith that the [employer] has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions provided by the [employer] potentially endangers one or more patients, workers, or the public[.]" 45 C.F.R. § 164.504(j).

The New Jersey Supreme Court has generally supported the rights of whistleblowers and plaintiffs pursuing employment claims over allegations by their employers that plaintiffs have violated their general, contractual or statutory duties of loyalty and confidentiality by taking documents and using them in litigation. Under precedents of the New Jersey Supreme Court, a whistleblower who suspects that her employer is committing fraud, can, under certain circumstances, obtain documents from an employer and provide them to an attorney or the government, without incurring liability for purportedly (or actually) violating an employer's policies, employment contract or an employee's general duty of loyalty. A seminal case in this regard is *Quinlan v. Curtiss-Wright Corporation*, 204 N.J. 239 (2010). Plaintiff had obtained some 1800 documents from her employer to support her employment discrimination claim; the trial court affirmed the jury's verdict for the plaintiff, applying a balancing test and concluding that although the plaintiff was wrong in obtaining some of the documents (for example, those containing confidential information about other employees), the plaintiff's obtaining and using some documents (notably, the performance appraisal of a male who was promoted over her) was permissible. The Appellate Division reversed, in part because it concluded that plaintiff's obtaining and using the documents was not protected activity. "The [appellate] court expressed its concern that adopting the trial court's approach would encourage 'employees to go through their employers' files and copy confidential material, secure in the knowledge that employers could do nothing so long as that material was later used in litigation.'" *Id.* at 255 (internal citation omitted).

The New Jersey Supreme Court rejected that holding. Indeed, the Court recognized that the actions used to obtain incriminating documents need not be "innocent." *See id.* at 264 ("Although courts have tended to be more protective of the employees who innocently stumble on documents evidencing discrimination, it is not universally true that innocence is

required.") While acknowledging that businesses have an interest in protecting confidential information and disciplining or terminating employees who violate their policies, the Court gave great weight to the public interest in enforcing anti-discrimination laws. In adopting a multi-part test, the Court stressed that a court's analysis must "advance the [discrimination statute's] strong remedial purposes even as it seeks to carefully balance the legitimate business interests of employers against the means and methods used by employees seeking to effectuate the [statute]s] goals and the obligations of the attorneys who represent them." *Id.* at 268.

Similarly, the courts have consistently held that State privacy law cannot be invoked to stymie the application of federal law, including the HIPAA exception for whistleblowers. *See, e.g., United States ex rel. Camillo v. Ancilla Systems, Inc.*, 233 F.R.D. 520, 522-23 (S.D. Ill. 2005) ("[A] more restrictive state law cannot be used in a federal-question action such as this to hamstring the enforcement of federal law.") (citing *Northwestern Mem. Hosp. v. Ashcroft*, 362 F.3d 923, 925 (7th Cir. 2004); *accord United States ex rel. Stewart v. Louisiana Clinic*, No. Civ. A. 99-1767, 2002 WL 31819130 *5 (E.D. La. Dec. 12, 2002).

4. The Proposed Amendment Includes No Exception for Whistleblowers

The Special Committee states that the amended rule "would not expressly apply to documents taken from employers to support discrimination claims, false claims [*sic*] or the like, unless those documents contain lawyer-client communications involving an adverse or third party." Report at 34-35. However, the amended language of the proposed Rule contains no such exception, nor does the accompanying Official Comment. *See id.* at 36. At a minimum, the rule itself (not merely the commentary) should include an express exception. The HIPAA exception for health-care-fraud whistleblowers to take documents containing patient-health information and provide it to counsel or directly to the government may provide a useful template for amending the proposed rule. *See* 45 C.F.R. § 164.502(j).

5. The Judicial-Review Provision of the Proposed Amendment Would Be Unworkable in Whistleblower Cases

As discussed, the False Claims Act and similar statutes and provisions require that a whistleblower's allegations initially be filed in court under seal, or otherwise secret from the defendant and the public (*e.g.*, administrative filings of tax fraud to the IRS and securities fraud to the SEC are done *ex parte* and are maintained in secrecy by the agency). This procedure enables the government to evaluate and investigate the claims without tipping off the defendant; it benefits defendants to the extent they need not respond to claims that turn out to lack merit, and avoids public airing of such allegations before they can be properly vetted. *See, e.g., U.S. ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 998-99 (2d Cir. 1995) (Congress included seal period because "[t]he government was concerned, however, that *qui tam* claims might overlap with or tip a

defendant off to pending criminal investigations" and "to prevent defendants from having to answer complaints without knowing whether the government or relators would pursue the litigation."). The seal is strictly enforced; violations of the seal (which would include the whistleblower lawyer informing counsel for the defendant of the existence of a pending *qui tam* lawsuit) can result in sanctions, including partial or total forfeiture of the whistleblower award or outright dismissal of the case. *See generally U.S. ex rel. Bibby v. Wells Fargo Home Mortg., Inc.*, 76 F. Supp. 3d 1399 (2015) (surveying caselaw and imposing monetary sanction rather than dismissal for seal violations).

Although the seal provision only applies once a case is filed, the whistleblower's attorney is duty-bound (indeed, even before accepting the representation) to review and evaluate the evidence to determine whether a viable case exists. Perhaps needless to say, whistleblowers range in age, experience, education, levels of sophistication from the mail-room worker to the executive; even those with higher levels of experience and seniority may lack the knowledge and judgment to make an independent determination of whether evidence is relevant to an eventual claim, or whether it is potentially privileged or confidential. Commonly, the whistleblower is concerned about the fraud she is witnessing, about retribution or termination for blowing the whistle internally, or about the prospect of evidence being destroyed or deleted before it can be obtained by the authorities, and so she may be more focused on collecting and preserving evidence than on what particular documents contain.

If the whistleblower has already consulted with counsel, then her lawyer can attempt to guide her as to what documents she can and cannot take, as well as how to identify and avoid or segregate potentially privileged material. However, in many cases the whistleblower undertakes to collect evidence independently (perhaps with an eye to an eventual retaliation claim or to prove that her firing was pretextual, rather than in preparation for filing a *qui tam* action, which many people remain unfamiliar with) and therefore her collection is less than focused. While plainly there is no public interest in encouraging wholesale intrusions on attorney-client privilege, neither should the ethics rules discourage or prevent counsel from reviewing documents and evidence, no matter how voluminous or haphazardly obtained, provided by a whistleblower who professes to have proof of fraud. Similarly, the Rule should not discourage government attorneys from reviewing evidence provided by counsel, or even by an unrepresented individual who walks in to report a fraud. Were the Rule to require counsel to inform the alleged perpetrator of fraud (or at least their counsel) the moment a suspicion arises that privileged material might reside in a whistleblower's hard drive, laptop or other medium, the procedural structure that Congress enacted in amending the False Claims Act would be wholly undermined.

Similarly unworkable is the provision in the proposed amendment which contemplates that an attorney who "has questions as to his or her obligations . . . may promptly bring the matter to the attention of the appropriate court." While this could be an option if these "questions" were to arise in the course of a pending lawsuit, in the absence

of an active, filed case it would appear unworkable, particularly given the unusual posture of most whistleblower actions. First, many administrative whistleblower provisions, such as the IRS and SEC programs, do not involve the filing of a lawsuit, but instead require the whistleblower to prepare a disclosure of evidence (both narrative and documentary, as appropriate) and submit it to the responsible agency, where investigators review the file and take action as warranted.

Second, when a whistleblower has knowledge of fraud being committed at his employer, he will (or should) consult with counsel experienced in evaluating and litigating such cases. As the Special Committee recognizes, most "documents" today are electronic, and often are easily obtainable and portable *en masse* by an employee, regardless of their motivation. Thus, most whistleblowers who walk into counsel's office bring their evidence in files contained on a thumb drive, CD, or laptop. However, it may take a significant amount of time and effort for counsel to review and evaluate the evidence before he can even determine whether a potential claim or lawsuit exists, and furthermore where such a claim can or should be venued. Likewise, when counsel is handed a medium containing electronic evidence, he has no idea whether and to what extent privileged and/or confidential information exists, and unless the whistleblower is fairly sophisticated in legal matters, counsel may not be able to trust the whistleblower's assurances that "there's nothing privileged in there."

In those very common circumstances, what is the "appropriate court" where counsel should go to get answers to "questions as to his or her obligations" under the amended Rule? And at what point does counsel properly seek judicial intervention? Before even downloading a prospective client's computer files? And must counsel at that point give notice to the potential defendant? Could a court -- perhaps one unfamiliar with False Claims Act practice -- compel such notification, even though (as discussed previously) the statute provides that *qui tam* cases be filed under seal to afford the government an opportunity to investigate the case without the knowledge of the defendant? *See, e.g., A.C.L.U. v. Holder*, 673 F.3d 245, 250 (4th Cir. 2011) (mandatory seal required, *inter alia*, "to prevent an alleged fraudster from being tipped off about an investigation"). Many *qui tam* lawyers (including myself) have national practices; does the Special Committee intend that I darken the door of the understaffed and overworked Bergen County Superior Court before I can evaluate a potential *qui tam* case to be filed (if at all) in federal court in Arizona? And how long must I wait for the court's "review and disposition"? The False Claims Act and most other whistleblower provisions contain a "first to file" rule which entitles only the first whistleblower to file a complaint or report to get a reward if the case is successful. *See, e.g.*, 31 U.S.C. § 3130(b)(5) ("When a person brings an action under this subsection, no person . . . may intervene or bring a related action based on the facts underlying the pending action."). The proposed Rule amendment raises these questions, but woefully fails to answer them.

CONCLUSION

In sum, the proposed Rule puts whistleblowers, their counsel, and the federal and state attorneys who investigate and prosecute False Claims Act and other whistleblower claims in reasonable fear that any collection of fraud evidence from a corporation or other entity may result in ethics referrals, counterclaims, and other aggressive defensive measures. At a minimum, the proposed Rule threatens to severely undermine the incentive of whistleblowers to obtain material documentation and information about wrongdoing, hamstrings the ability of attorneys who represent whistleblowers to exercise due diligence in evaluating cases and provide counsel to their clients, and creates a disincentive for government attorneys to receive fraud evidence. Although plainly well-intentioned, the Committee evidently did not consider the unique interests, practices and procedures of whistleblower lawyers in private practice and government service.

I welcome any questions or further consultation on this issue.

Respectfully submitted,

/s Eric H. Jaso
Eric H. Jaso

Attachment – law review 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), which is the primary antifraud 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 are the qui tam *provisions, which allow a private person to bring a lawsuit, known as a* qui tam *suit, on behalf of the DOJ against companies accused of cheating the government. So far, whistleblowers have recovered for the government more than $38 billion in* qui tam *cases and received rewards of $4.2 billion. In response, employers have begun filing counterclaims against their whistleblower employees who secretly*

* Professor of Law, Liberty University School of Law; J.D., The Catholic University of America, 1988. From 1990 through mid-2006, Hesch was a trial attorney with the Fraud Section of the Civil Division of the Department of Justice in Washington, D.C., which is the office responsible for nationwide administration of the *qui tam* provisions of the False Claims Act (FCA). He handled FCA and *qui tam* cases throughout the nation in many different circuits, including the trial aspects of *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007). He is the author of WHISTLEBLOWING: REWARDS FOR REPORTING FRAUD AGAINST THE GOVERNMENT (2013); REWARD: COLLECTING MILLIONS FOR REPORTING TAX EVASION (2009); *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 (2012); *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 (2011); and *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 LIBERTY U. L. REV. 111 (2006). He extends a special note of thanks to his research assistants, Kristie Pierce (J.D. Candidate, Liberty University, 2014) and Jonathan Sater (J.D., Liberty University, 2013), who provided valuable assistance in researching and writing this Article.

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. As a result, 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 hanging over a 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 demonstrate both "substantial public interests" and "uniquely 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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I. INTRODUCTION

The False Claims Act (the FCA),[1] a *qui tam*[2] statute, is the federal government's primary tool in combating fraud against the government,[3]

1. 31 U.S.C. §§ 3729–3733 (2012).

2. "*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, 768 n.1 (2000).

3. *See, 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." (quoting United States *ex rel* Marcy v. Rowan Cos., 520 F.3d 384, 388 (5th Cir. 2008))); Avco Corp. v. U.S. Dep't of Justice, 884 F.2d

which has led to the recovery of more than $38 billion in taxpayer money.[4] The FCA *qui tam* provisions authorize private individuals, called relators[5] (also referred to as *qui tam* plaintiffs 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.[6] Today, nearly 70 percent of all federal government FCA actions are initiated by relators filing *qui tam* cases.[7] 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 1980s when the military paid "$600 for toilet seats and $748 for pliers."[8]

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* action, or to grant contract and tort damages based upon nondisclosure 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 in 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 regarding whether to permit or dismiss state law counterclaims against relators who file FCA *qui*

621, 622 (D.C. Cir. 1989) ("The False Claims Act is the government's primary litigative tool for the recovery of losses sustained as the result of fraud against the government.").

4. Between October 1987 and September 2013, the Department of Justice recovered $38.9 billion through the False Claims Act. CIVIL DIV., U.S. DEP'T OF JUSTICE, FRAUD STATISTICS-OVERVIEW 1–2 (2013), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf. Of this amount, $27.2 billion (69.85 percent) was from *qui tam* cases brought by relators. *See id.*

5. A "relator" is one who relates an action on behalf of the government. *See* United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 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.'" (alteration in original) (quoting BLACK'S LAW DICTIONARY 1289 (6th ed. 1990))).

6. 31 U.S.C. § 3730(d)(1). This award can be as low as 15 percent of the settlement or judgment or as high as 25 percent. *Id.*

7. *See* CIVIL DIV., *supra* note 4, at 2. Furthermore, almost 70 percent of the total funds recovered in FCA actions between 1987 and 2013 came from *qui tam* suits. *Id.*; Joel D. 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).

8. Hesch, *supra* note 7, at 231.

tam complaints.[9] 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.[10]

With the threat of damages, attorney fees, and costs incurred by a defendant company hanging over a 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 sufficient detail to determine 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 uniquely federal interests should apply and preempt state law causes of action. 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. Part II begins by demonstrating that six provisions of the FCA demonstrate both substantial public interests and uniquely federal interests in protecting employees filing FCA *qui tam* cases, including utilizing internal company documents for 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 Part concludes by offering a uniform definition of the zone of protection for courts to adopt. Although subpart II.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

9. *See* discussion *infra* Part II.A–B (exploring the inconsistency in dismissing contract counterclaims).

10. *See* discussion *infra* Parts III.B, IV.A.

Article address additional analyses of contract and tort claims. Specifically, Part III tackles how courts have incorrectly ruled on 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. Part IV 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 in which tort claims may continue because the conduct is outside of the zone of protection.

II. THE FCA DEMONSTRATES BOTH A SUBSTANTIAL PUBLIC INTEREST AND A UNIQUELY 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 a need for protections required by the uniquely federal interests in protecting whistleblowers 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. 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 subpart II.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.[11] 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."[12] Thus, when a court is asked to invoke public policy to trump a contract provision—or bar a tort claim[13]—it must balance the

11. Town of Newton v. Rumery, 480 U.S. 386, 392 (1987).

12. *Id.*

13. Similarly, as explained in more detail in Part IV, the same substantial public interest should exempt a person from a tort claim when engaging in a zone of

competing public interests.[14] Because a stronger public interest leads to a greater zone of protection, the first step is determining the strength of the public interest.[15] Here, the public interest of courting and protecting whistleblowers who report suspected fraud against the government is substantial because it flows directly from numerous provisions of the FCA.[16]

Second, the Supreme Court, in *Boyle v. United Technologies Corporation*, ruled that when "uniquely federal interests" exist, it is appropriate to create federal common law that preempts and replaces state law to the point that state tort claims are barred.[17] As established in subpart II.C below, the same six FCA provisions are clearly designed to protect uniquely 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 in which 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 uniquely 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 has plagued the U.S. government for hundreds of years.[18] Benjamin Franklin aptly observed, "[T]here is no kind of dishonesty into which

protection as defined in this Article.

14. *See Rumery*, 480 U.S. at 392.

15. *See id.* at 399–401 (O'Connor, J., concurring) (explaining the case-by-case approach of balancing public interests).

16. *See* 31 U.S.C. §§ 3729–3733 (2012). It is also augmented by several other federal whistleblower protection statutes. *See generally* Joel D. 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 (2011).

17. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (internal quotation marks omitted)).

18. *See* Pamela H. Bucy, *Growing Pains: Using the False Claims Act to Combat Health Care Fraud*, 51 ALA. L. REV. 57, 57 (1999) ("The FCA is aimed at the 'world's second oldest profession . . . stealing' . . . ." (quoting 132 CONG. REC. 22,339 (1986) (statement of Rep. Bedell))).

otherwise good people more easily and frequently fall, than that of defrauding the government."[19] To combat this problem, in 1863 Congress and President Lincoln enacted the FCA,[20] which imposes liability on companies and individuals who defraud the government.[21] By enacting the FCA, President Lincoln and Congress "encourage[d] 'whistleblowers' to act as 'private attorneys-general' . . . in pursuit of an important public policy."[22] "From targeting . . . contractor fraud during the Civil War to halting healthcare fraud today," the ability of individuals to serve as relators and protect the interests of the government remains critical.[23]

While the *qui tam* concept dates back to English common law,[24] the FCA was the first statute of its kind in the United States to bring otherwise unknown fraud to light.[25] Although the FCA largely laid dormant for decades during the 20th 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.[26] Since then, the FCA has become the leading weapon for fighting fraud against the federal government.[27] Because it is estimated that as

19. Benjamin Franklin, Letter to the Editor, "*F.B.*": *On Smuggling*, LONDON CHRON. (Nov. 21–24, 1767), *reprinted in* 14 THE PAPERS OF BENJAMIN FRANKLIN 315 (Leonard W. Labaree ed., 1970).

20. 132 CONG. REC. 29,321 (1986) (statement of Rep. Daniel Glickman).

21. 31 U.S.C. §§ 3729–3733.

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

23. United States *ex rel.* Grandeau v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765, 769–70 (N.D. Ill. 2004).

24. *See* Dan D. Pitzer, Comment, *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 (1972).

25. *See* 132 CONG. REC. 29,321 (1986) (statement of Rep. Daniel Glickman). In recent years, Congress has also adopted whistleblower statutes for tax fraud, securities fraud, and commodity futures trading fraud. 7 U.S.C. § 26 (commodity futures trading); 15 U.S.C. § 78u-6 (securities); 26 U.S.C. § 7623 (tax).

26. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153; *see also* Graham Cnty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280, 294 (2010). For a brief discussion of the history of the FCA and its subsequent amendments, see generally Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar,"* 1 LIBERTY U. L. REV. 111, 116–18 (2006).

27. *See supra* notes 3–7 and accompanying text. In addition to the federal statute, more than 30 states have enacted similar false claims statutes in recent years. ARK. CODE. ANN. §§ 20-77-901 to -911 (2001 & Supp. 2013); CAL. GOV'T CODE §§ 12650–12656 (West 2011 & Supp. 2014); COLO. REV. STAT. §§ 25.5-4-303.5 to -310

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.[28]

There are six key FCA provisions that together demonstrate well-defined, dominant substantial public policy and uniquely federal interests in recruiting and protecting relators who 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.[29] Second, the FCA requires that the relator file the *qui tam* complaint with the court under seal and only

(2013); CONN. GEN. STAT. ANN. §§ 17b-301 to -301b (West 2006 & Supp. 2013) (providing for recovery of false claims under the state children's health insurance plan); DEL. CODE ANN. tit. 6, §§ 1201–1209 (2014); D.C. CODE §§ 2-381.01–.09 (LexisNexis 2001 & Supp. 2012); FLA. STAT. ANN. §§ 68.081–.09 (West 2012); GA. CODE ANN. §§ 23-3-120 to -126 (West 2013 & Supp. 2013); HAW. REV. STAT. §§ 46-171 to -181 (Supp. 2014); 740 ILL. COMP. STAT. ANN. §§ 175/1–/8 (West Supp. 2013); IND. CODE ANN. §§ 5-11-5.5-1 to -18 (LexisNexis 2006 & Supp. 2013); IOWA CODE §§ 685.1–.7 (2014); LA. REV. STAT. ANN. §§ 46:438.1–:440.3 (2010 & Supp. 2014); MD. CODE ANN., HEALTH–GEN. §§ 2-601 to -611 (LexisNexis Supp. 2013) (providing for recovery of false claims against state health programs and plans); MASS. GEN. LAWS ANN. ch. 12, §§ 5A–O (West 2010 & Supp. 2013); MICH. COMP. LAWS ANN. §§ 400.601–.613 (West 2008 & Supp. 2013), MINN. STAT. ANN. §§ 15C.01–.16 (West 2013 & Supp. 2014); MO. ANN. STAT. §§ 191.900–.914 (West 2011 & Supp. 2013) (governing health care fraud prevention and recovery); MONT. CODE ANN. §§ 17-8-401 to -416 (2013); NEV. REV. STAT. §§ 357.010–.250 (2013); N.H. REV. STAT. ANN. §§ 167:58–:61-e (LexisNexis 2010 & Supp. 2013) (providing for recovery of false Medicaid claims and Medicaid fraud); N.J. STAT. ANN. §§ 2A:32C-1 to -17 (West 2010 & Supp. 2013); N.M. STAT. ANN. §§ 27-14-1 to -15 (2007); N.Y. STATE FIN. LAW §§ 187–194 (McKinney Supp. 2014); N.C. GEN. STAT. ANN. §§ 1-605 to -618 (West 2013); OHIO REV. CODE ANN. § 5111.03 (LexisNexis 2011) (creating liability for false Medicare claims); OKLA. STAT. ANN. tit. 63, §§ 5053–5053.7 (West Supp. 2014); R.I. GEN. LAWS §§ 9-1.1-1 to -9 (2012); TENN. CODE ANN. §§ 4-18-101 to -108 (2011 & Supp. 2013); TEX. HUM. RES. CODE ANN. § 32.039 (West 2013) (providing recovery of Medicaid false claims); VA. CODE ANN. §§ 8.01-216.1 to .19 (2007 & Supp. 2013); WASH. REV. CODE ANN. §§ 74.66.005–.130 (West 2013); WIS. STAT. ANN. § 20.931 (West Supp. 2013) (providing for recovery of false Medicaid claims).

28. *See* S. REP. NO. 99-345, at 3 (1986), *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* H.R. REP. NO. 104-496, at 69 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1865, 1869 ("According to the General Accounting Office (GAO), as much as 10 percent of total health care costs are lost to fraudulent or abusive practices by unscrupulous health care providers.").

29. 31 U.S.C. § 3730(b)(2); *see also* discussion *infra* Part II.A.1.

serve the complaint and SME upon the Attorney General in order to allow the government time to investigate potential crimes and civil violations of the FCA without tipping off the defendants.[30] 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* action—and thus in a position to provide useful information to the government.[31] 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, with higher rewards inside information.[32] Fifth, the FCA contains an antiretaliation 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.[33] 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 brought an action that was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[34]

Each of these six FCA provisions are 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.[35]

30. 31 U.S.C. § 3730(b)(2); *see also* discussion *infra* Part II.A.2.

31. 31 U.S.C. § 3730(e)(4)(A); *see also* discussion *infra* Part II.A.3.

32. 31 U.S.C. § 3730(d); *see also* discussion *infra* Part II.A.4.

33. 31 U.S.C. § 3730(h); *see also* discussion *infra* Part II.A.5.

34. 31 U.S.C. § 3730(d)(4); *see also* discussion *infra* Part II.A.6. Therefore, by implication, a defendant may not bring any alternative claims against a relator. *See* 31 U.S.C. § 3730(d)(4).

35. *See* discussion *infra* Part II.C. In addition, there are more than 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 generally* Hesch, *supra* note 16 (categorizing federal whistleblower-protection statutes).

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."[36] 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.'"[37] To serve the statutory purpose of informing the government's decision of whether to intervene, disclosure statements should be "as complete, detailed, and thoughtful as possible."[38]

Indispensable to the SME are documents that support the fraud allegations.[39] "There are few things better than giving the DOJ a smoking gun document, such as an internal company memorandum outlining or admitting the fraud."[40] Memories fade or grow cloudy, but documents never suffer from lack of recall.[41] Thus, the internal documents created

36. 31 U.S.C. § 3730(b)(2).

37. 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 Ctr., 797 F.2d 888, 892 (10th Cir. 1986)); *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 omitted) (citing United States *ex rel.* Springfield Terminal Ry. v. Quinn, 14 F.3d 645, 651 (D.C. Cir. 1994))).

38. *Bagley*, 212 F.R.D. at 557. Some courts have outright dismissed a *qui tam* complaint if the relator failed to supply the DOJ with a sufficient SME document outlining the fraud allegations. *See, e.g.*, United States *ex rel.* Made in the USA Found. v. Billington, 985 F. Supp. 604, 608–09 (D. Md. 1997).

39. JOEL D. HESCH, WHISTLEBLOWING: REWARDS FOR REPORTING FRAUD AGAINST THE GOVERNMENT 108 (2013) ("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).

40. HESCH, *supra* note 39, at 99.

41. "[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) (LEXIS). In addition, virtually

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."[42] Fraud, by its very nature, is intentionally difficult to detect.[43] Thus, those on the inside are the only witnesses capable of gathering the documents that are the key to a successful FCA case.[44]

In 2004, the DOJ filed an amicus brief in an 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 an SME when applying for a reward.[45] 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." 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

every fraud case at the DOJ involves someone who lied or suffered from intentional amnesia when questioned about the alleged fraud. HESCH, *supra* note 39.

42. 155 CONG. REC. 12697 (2009) (emphasis added) (quoting *False Claims Act Correction Act of 2007: Hearing on H.R. 4854 Before the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Shelley R. Slade, Att'y)); *see also* 132 CONG. REC. 29322 (1986) (statement of Rep. Howard Berman) (recommending substantial reward to a 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 [DOJ]" (emphasis added)). Presenting the evidence and law to the DOJ 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." Shannon Green, *Qui Tam Case Looked Like a Winner—and Was It Ever*, NAT'L L.J., Oct. 4, 2010, at 15 (emphasis added) (quoting *qui tam* counsel, Erika Kelton) (internal quotation mark omitted).

43. 155 CONG. REC. 12697 (statement of Rep. Howard Berman).

44. *Id.*

45. 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. at 7–9, United States *ex rel.* Grandeau v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765 (N.D. Ill. 2004) (No. 99 C 8287), *available at* http://www.bostonwhistleblowerlawyerblog.com/images/US ex rel Grandeau v. Cancer Treatment Centers of America.pdf [hereinafter United States Amicus Curiae Brief].

> relators not 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" and ties relator's share to the importance of her participation in the action and the relevance of the information she provided.[46]

The DOJ emphasized both the need for and authorization of relator-produced inside evidence of fraud, including internal company documents, as part of the fraud reporting process under the FCA.[47]

In short, Congress intentionally makes rewards under the *qui tam* provisions of the FCA contingent on the relator privately producing to the DOJ an SME containing all information—including documents—in the relator's possession, custody, or control.[48] 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* action.[49]

46. *Id.* at 7 (citations omitted).

47. *Id.*

48. 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. Federal Acquisition Regulations, 48 C.F.R. § 3.1003(a)(2)–(3) (2013). The statutory mandate for document disclosure has been clearly addressed in the Federal Acquisition Regulations (the FAR), which governs the conduct of government contractors. Several provisions in the FAR specify that contractors may be suspended or disbarred for failing to disclose "credible evidence" of criminal violations, FCA violations, or "significant overpayments" to the government. *See, e.g.*, *id.* §§ 9.406-2, 9.407-2. Accordingly, the FAR requires document production as part of the duty of disclosing FCA violations to authorities. Although not all FCA cases fall within the FAR, the goal of protecting the public treasury remains the same.

49. The Federal Rules of Civil Procedure provide further support for 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." United States *ex rel.* Brown v. Aramark Corp., 591 F. Supp. 2d 68, 74 (D.D.C. 2008) (first alteration in original) (quoting United States *ex rel.* Joseph v. Cannon, 642 F.2d 1373, 1385 (D.C. Cir. 1981)) (internal quotation marks omitted); *see* FED. R. CIV. P. 9(b). The circuits are unanimous that an FCA relator must meet this particularity requirement in any *qui tam* complaint. *See 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 LIBERTY U. L. REV. 337, 347–51 (2010) (arguing the dangers of applying Rule 9(b) to *qui tam* FCA actions). Many *qui tam* cases are dismissed each year because plaintiffs fail to possess and assert facts with sufficient particularity. *See* Mitchell, *supra*, at 351. Thus, relators who are unable to provide sufficiently detailed evidence in their *qui tam* complaints may be dismissed for failing to meet the requirements of the federal rules. *See id.* Again, documents are a primary way of supporting allegations.

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.[50] 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.
>
> . . . 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.[51]

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.[52] 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." The complaint must remain under seal for a period of 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

50. 31 U.S.C. § 3730(b)(2) (2012).

51. *Id.* § 3730(b)(2)–(3).

52. *See id.*

> Government's interest in criminal matters,' by enabling the government to investigate the alleged fraud *without 'ap[ping] off investigation targets'* at 'a sensitive stage.'"[53]

The DOJ correctly emphasized that not only are relators authorized to produce inside information to the government, but relators should and must do so in secrecy and without tipping off their employer.[54] In fact, a relator who files a *qui tam* action privately provides a copy of the complaint and SME to the Attorney General.[55] Because the Attorney General is responsible for investigating both criminal and civil fraud violations of federal laws, whenever the Attorney General receives a copy of a *qui tam* complaint, he or she shares the complaint with both the civil and criminal divisions of the DOJ. Hence, when relators file a *qui tam* action, they are simultaneously reporting possible civil and criminal violations for fraud against the government. The public interest in protecting relators who file *qui tam* suits is heightened because of the potential criminal violations.[56] Indeed, the Federal Circuit Court of Appeals noted that "the public policy interest at stake [in] 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."[57]

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

53. United States Amicus Curiae Brief, *supra* note 45, at 7–8 (alteration in original) (emphasis added) (citation omitted) (quoting United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731, 743 (D.C. Cir. 1998)).

54. *See id.*

55. 31 U.S.C. § 3730(b)(2).

56. In addition, the DOJ, headed by the Attorney General, is the only entity permitted by law to settle criminal or civil claims of fraud against the government. *Id.* § 3711(a)–(b)(1) (providing that agencies are permitted to settle and compromise certain claims, but not fraud claims). Thus, reports of fraud against the United States must be investigated and controlled by the DOJ. *See id.* § 3730(a)–(b) (stating that FCA claims can only be brought by the Attorney General or a private person suing in the name of the United States); 28 C.F.R. § 0.45(d) (2013) (assigning common law fraud claims to the Assistant Attorney General, Civil Division).

57. Fomby-Denson v. Dep't of the Army, 247 F.3d 1366, 1375 (Fed. Cir. 2001) (quoting W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983)).

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 "substantially the same allegations or transactions as alleged in [the complaint] were publically disclosed" in certain specified proceedings, reports, or the media, unless the relator "is an original source of the information" on which the allegations are based.[58] "The purpose of the FCA is 'to discourage fraud against the government' and, '[c]oncomitantly, the purpose of the qui tam provision of the Act is to encourage those with knowledge of fraud to come forward.'"[59] Thus, the FCA both encourages insiders to step forward and discourages those without original-source information from bringing a *qui tam* action, and even bars those without original-source information in certain situations.[60] 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*

To attract would-be whistleblowers, the FCA establishes an incentive-based *qui tam* structure which favors inside informants.[61] Under the FCA, a relator receives a minimum of 15 percent and up to 25 percent of the judgment amount if the government intervenes[62] and an even higher

58. 31 U.S.C. § 3730(e)(4)(A).

59. United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146, 152 (D.D.C. 2009) (alteration in original) (quoting Neal v. Honeywell, Inc., 826 F. Supp. 266, 269 (N.D. Ill. 1993)).

60. United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 965 (9th Cir. 1995). The public disclosure bar is an important aspect of the purpose of the FCA to attract insiders. As the Ninth Circuit noted,

> engrafting a requirement that "a *qui tam* plaintiff . . . have played some part in his allegation's original public disclosure," 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" because it "discourages persons with relevant information from remaining silent and encourages them to report such information at the earliest possible time."

Id. at 964 (alteration in original) (citations omitted) (quoting Wang v. FMC Corp., 975 F.2d 1412, 1418–19 (9th Cir. 1992)).

61. *See* 31 U.S.C. § 3730(d).

62. *Id.* § 3730(d)(1).

amount of 25–30 percent if the government declines to join the suit.[63] "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' of the Act by 'encourag[ing] insiders privy to a fraud on the government to blow the whistle on the crime.'"[64] Courts have deemed the incentive structure to be a vital aspect of the FCA in order to attract insiders to report fraud against the government.[65]

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."[66] 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.[67]

63. *Id.* § 3730(d)(2).

64. *Green*, 59 F.3d at 963 (alterations in original) (citations omitted).

65. As the Ninth Circuit noted:

> 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." Emphasizing both difficulties in detecting fraud that stem largely from the unwillingness of insiders with relevant knowledge of fraud to come forward 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," Congress sought to "increase incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government." Congress's overall intent, therefore, was "to encourage more private enforcement suits."

Id. (alteration in original) (citations omitted) (quoting S. REP. NO. 345, at 2–4, 7, 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267–69, 5272, 5288–89).

66. Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997); *see* Hesch, *supra* note 7, at 228–29.

67. *Hughes Aircraft Co.*, 520 U.S. at 949 (alteration in original) (quoting

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 participation by the relator and strength of the information as key factors.[68] The Ninth Circuit 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.[69]

One of the factors the 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."[70] In other words, the greater the insider information provided, the greater the potential for larger monetary rewards. As discussed earlier, producing internal company documents is a

United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 n.5 (1943) (internal quotation marks omitted)); *see* Hesch, *supra* note 7; *see also* United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208, 1212 (7th Cir. 1994) ("[The] only motivation in bringing the suit is to recover a piece of the action given by statute."). For a discussion on the policy implications of paying monetary rewards to whistleblowers, see generally Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, KAN. J.L. & PUB. POL'Y, Winter 1997, at 89, 98–101.

68. *See* 31 U.S.C. § 3730(d)(1).

69. *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:

> Providing the relator a right to recover, a role in the action when the government intervenes, and a right to object to a dismissal or settlement by the government 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."

Id. at 964 n.8 (alterations in original) (citations omitted) (quoting S. REP. NO. 99-345, at 25–26, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267–68).

70. Taxpayers Against Fraud, False Claims Legal Act Ctr., *DOJ Relator's Share Guidelines*, 11 FALSE CLAIMS ACT & QUI TAM Q. REV., Oct. 1997, at 17, 19, *available at* www.taf.org/system/files/publications/qui_tam/Volume%2011.pdf. The Author was working in the DOJ office at the time the relator's share guidelines were established. For a detailed discussion on how relator shares are determined and the problems inherent in the guidelines, see generally Hesch, *supra* note 7, at 244–47.

key to providing credible first-hand details of the fraud.[71] For example, one court gave a relator a larger reward, in part, because the relator produced more than 700,000 pages of internal company documents as part of his SME to the DOJ.[72]

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

5. *FCA: Antiretaliation Provisions*

In addition to the *qui tam* provisions that pay awards for reporting fraud, the FCA contains antiretaliation provisions.[73] 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.[74] Specifically, the FCA antiretaliation provision states:

> 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.[75]

A prior version of this antiretaliation provision was first included in

71. *See supra* Part II.A.1.

72. United States *ex rel.* Rille v. Hewlett-Packard Co., 784 F. Supp. 2d 1097, 1101 (E.D. Ark. 2011). The court in *Rille* did not discuss the relator's entitlement to this data or explicitly address the data's 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.*

73. 31 U.S.C. § 3730(h). To prevail on a § 3730(h) retaliation claim, the relator must establish 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. *Id.* § 3730(h)(1).

74. *Id.* § 3730(h)(1)–(2).

75. *Id.* § 3730(h)(1) (emphasis added).

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.[76]

In 2009, Congress amended the language to strengthen and broaden the scope of protection to make clear that the protection extends to all types of employees as well as others assisting them in reporting an FCA violation.[77]

Although the antiretaliation provisions do not fully define "lawful acts," this portion of 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."[78] Even under the 1986 version, "a plaintiff [was] not required to show that the defendant actually committed a False Claims Act violation."[79] Rather, the antiretaliation 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.'"[80] In addition,

76. S. REP. NO. 99-345, at 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299.

77. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(d), 123 Stat. 1624; CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 5:12 (2d ed. 2010).

78. 31 U.S.C. § 3730(h)(1).

79. SYLVIA, *supra* note 77, § 5:15. As Claire Sylvia has aptly summarized,

> 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.

Id.

80. *Id.* (quoting United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d

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 they gathered information as part of deciding whether to report fraud against the government to the government.[81] Accordingly, the antiretaliation 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.[82]

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

Finally, the FCA sets forth an exclusive remedy to a defendant when a relator fails to possess a reasonable belief that fraud was occurring when bringing a *qui tam* case. According to the FCA:

> 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.[83]

In short, the FCA specifically defines when a remedy exists and

731, 739–40 (D.C. Cir. 1998)). 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.* § 5:12.

81. *See, e.g.*, Robinson v. Jewish Ctr. Towers, Inc., 993 F. Supp. 1475, 1478 (M.D. Fla. 1998). Further, at least one court has rejected the argument that the FCA retaliation provisions provide the exclusive remedy to a whistleblower. Boone v. Mountainmade Found., 857 F. Supp. 2d 111, 115–16 (D.D.C. 2012).

82. However, the courts should not equate the level of protection to a relator with the standards in § 3730(h) of the FCA. Even though it serves a similar purpose of prohibiting retaliation, because § 3730(h) provides a cause of action to the relator, the relator can only recover based upon the right specified in § 3730(h). That does not mean that 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. *See* discussion *infra* Part II.C. Indeed, if the FCA did not contain an affirmative right of recovery, the statutory scheme would nonetheless provide the same level of protection and immunity from civil actions by the employer as proposed in this Article.

83. 31 U.S.C. § 3730(d)(4).

provides the exclusive remedy for instances in which a defendant alleges that the relator acted inappropriately when filing a *qui tam* case.[84] First, there is no remedy against a relator for merely filing a *qui tam* case.[85] 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."[86] 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.[87] Finally, the defendant must prevail in the action to be entitled to the fees and expenses.[88]

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.[89] Otherwise, relators would not be willing to risk informing the government of fraud. At the same time, Congress recognized that if the DOJ declined a *qui tam* case and a relator continued the case in bad faith, a remedy would exist.[90] 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 a well-defined and substantial public interest, as well as a uniquely federal interest, in encouraging and protecting relators who step forward to report fraud against the government. Therefore, the FCA creates a zone of protection for relators when filing *qui tam* cases, which includes producing internal company information and documents to the DOJ.[91]

B. *Other Relevant Federal Statutes and Regulations*

In addition to the FCA, there are more than 30 federal whistleblower-

84. *See id.*
85. *See id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See id.*
90. *See id.*
91. *See* discussion *infra* Part II.C.1.

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.[92] Several of these statutes are highlighted below.

One of these statutes is the Whistleblower Protection Act (WPA),[93] 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."[94] According to the WPA,

> [i]t 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) an abuse of authority; or (v) a substantial and specific danger to public health or safety.[95]

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."[96]

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.[97] In 1996, Congress passed the Health Insurance Portability and Accountability Act (HIPAA),[98] which has within it a privacy rule with the primary purpose of

92. Hesch, *supra* note 16, at 54–55 (grouping the 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").

93. 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. Act of Oct. 29, 1994, Pub. L. No. 103-424, 108 Stat. 4361.

94. Hesch, *supra* note 16, at 63.

95. *Id.* at 64–65.

96. *Id.* at 65.

97. *See* 45 C.F.R. § 164.502(j)(1)(i), (ii)(B) (2013).

98. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936. Some commentators refer to HIPAA as HIPPA, perhaps due

"safeguard[ing] the privacy of medical protected health information."[99] One aspect of HIPAA is that it prohibits certain entities from disclosing certain health information.[100] However, The Department of Health and Human Services 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.[101] More specifically, HIPAA provides:

> 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 or clinical standards . . . ; and
>
> (ii) The disclosure is to . . .
>
> . . . .
>
> (b) [a]n attorney retained by or on behalf of the workforce member or business associate for the purpose of determining the legal

to spelling the acronym as the term is typically pronounced.

99. Prot. & Advocacy Sys., Inc. v. Freudenthal, 412 F. Supp. 2d 1211, 1220 (D. Wyo. 2006). At least one commentator disagrees that the primary purpose was privacy, even though they do not dispute that it has that effect. 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*, 27 SYRACUSE J. SCI. & TECH. L. 55, 90 (2012). According to Sgambati,

> (HIPAA) was the first real attempt at federal regulation that sought to control and regulate the sharing of health information traditionally contained in a patient medical record. . . . 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.

Id. (footnotes omitted).

100. 45 C.F.R. § 164.502(a).

101. *Id.* § 164.502(j)(1)(i), (ii)(B).

> options of the workforce member or business associate with regard to the conduct described in paragraph (j)(1)(i) of this section.[102]

Clearly, the government 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.[103] Moreover, if a whistleblower's legal counsel assists in bringing an FCA case, the Department of Health and Human Services also intended that a whistleblower could produce such company documents to appropriate government officials.[104] 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.[105] It is a criminal offense for an employer (or even counsel for an employer) to obstruct criminal investigations of health care fraud.[106] 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 charges. 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."[107] The definition of "criminal investigator" includes anyone who conducts or engages in

102. *Id.*
103. *See id.*
104. *See id.* § 164.502(j)(1)(ii)(A).
105. 18 U.S.C. § 1518(a) (2012). In addition to this statute, whoever

> falsifies, conceals, or covers up by any trick, scheme, or device a material fact; or . . . 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

shall be subject to criminal penalties. *Id.* § 1035(a).

106. *See id.* § 1518(a).
107. *Id.*

investigations for prosecutions of health care offenses,[108] which necessarily includes the U.S Attorney's Office and the U.S. Department of Justice, collectively the 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* action based upon healthcare violations, which account for 70 percent of all *qui tams* today,[109] the relator is simultaneously reporting possible criminal violations of federal healthcare fraud statutes. 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."[110] 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.[111] 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 an important federal interest.

C. *The FCA Provisions Demonstrate Both a Substantial Public Interest and a Uniquely Federal Interest That Create a Zone of Protection for Relators, Which Shields Them from State-Based Contract or Tort Claims*

It is well-settled by the Supreme Court that "a court may not enforce

108. *Id.* § 1518(b).
109. *See* CIVIL DIV., *supra* note 4, at 2; CIVIL DIV., U.S. DEP'T OF JUSTICE, FRAUD STATISTICS—HEALTH AND HUMAN SERVICES 2 (2013), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.
110. 18 U.S.C. § 1518(a). Likewise, when an employer seeks to prohibit the reporting of healthcare fraud through an employment agreement or confidentiality agreement, they are arguably violating this criminal statute by attempting to prevent or delay communications of healthcare fraud allegations to the DOJ. *See id.*
111. *See id.*

a collective-bargaining agreement that is contrary to public policy."[112] According to the Court, "[i]f the contract . . . violates some explicit public policy, we are obliged to refrain from enforcing it."[113] In guiding the lower courts, the Supreme Court noted that "[s]uch a public policy . . . 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.'"[114] 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.[115] Again, Congress specifically chose the filing of a *qui tam* civil suit in court as the mandatory mechanism for obtaining a reward and further required that it be done not only in secret and under seal, but mandated production of all information and documents within the relators control in order to allow the government to investigate both civil and criminal FCA allegations.[116] In addition, the eligibility for and amount of the relator's award is tied to the extent to which the information is truly valuable and not otherwise publicly available.[117] 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.[118] Accordingly, the FCA provisions demonstrate a substantial public interest in protecting relators who file *qui tam* cases.[119] 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* action.[120]

The same substantial public interest also creates a zone of protection shielding relators from state-based tort claims. Indeed, a tort is merely a remedy for a wrong,[121] and complying with a substantial public interest

112. W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983).
113. *Id.* (citing Hurd v. Hodge, 334 U.S. 24, 35 (1948)).
114. *Id.* (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).
115. *See supra* Part II.A.
116. *See supra* Part II.A.1–3.
117. *See supra* Part II.A.4.
118. *See supra* Part II.A.5–6.
119. The numerous additional non-FCA statutes reinforce the substantial public interest in protecting whistleblowers who report fraud against the government. *See supra* Part II.B.
120. *See* discussion *infra* Parts III–IV.
121. "A civil wrong, other than breach of contract, for which a remedy may be obtained, usu[ally] in the form of damages . . . ." BLACK'S LAW DICTIONARY 1626 (9th ed. 2009).

cannot be viewed as a wrong that permits a sanction in contract or tort. In other words, by definition, engaging in a federally 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,[122] 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. Otherwise, the substantial public policy interest of protecting those who produce documents to the government is erased.

By way of an example, if an employee receives an internal e-mail in which his supervisor instructs him to upcode every bill to Medicare, and the employee provides a copy of the e-mail to the government as part of reporting fraud, it is clear that the substantial public policy interests would trump an employment contract that attempts to prohibit the employee from giving this document to the government. The same result 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 prosecution, or any other creative cause of action the employer can contemplate.[123] 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.[124] Federal common law is warranted because courts currently apply a piecemeal approach to counterclaims against relators because they look

122. *See supra* notes 113–121 and accompanying text.
123. *E.g.*, United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146, 150 (D.D.C. 2009) (noting 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"); United States *ex rel.* Madden v. Gen. Dynamics Corp., 4 F.3d 827, 829 (9th Cir. 1993) (noting employer brought eight counterclaims against relator, 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).
124. *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

to and rely 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 disparate results when deciding whether to permit state tort counterclaims against relators because they are applying state law defenses to the counterclaims.[125] Therefore, the protection of federal relators has inappropriately depended upon not only whether state law alone protects federal whistleblowers filing federal FCA *qui tam* cases, but even upon which state a relator gathers documents as part of filing the *qui tam* case. For instance, 28 states plus the District of Columbia have anti-Strategic Lawsuit Against Public Participation (SLAPP) laws,[126] which prohibit claims and 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.[127] Although they vary in application and reach, they provide at least some basis for dismissal

125. *See* discussion *infra* Part IV.A.

126. ARIZ. REV. STAT. ANN. §§ 12-751 to -752 (Supp. 2013); ARK. CODE ANN. §§ 16-63-501 to -508 (2005); CAL. CIV. PROC. CODE §§ 425.16–.18 (West 2004 & Supp. 2014); DEL. CODE ANN. tit. 10, §§ 8136–8138 (2013); D.C. CODE §§ 16-5501 to -5505 (LexisNexis Supp. 2012); FLA. STAT. ANN. § 768.295 (West 2011); GA. CODE ANN. § 9-11-11.1 (2011); HAW. REV. STAT. §§ 634F-1 to -4 (2014); 735 ILL. COMP. STAT. ANN. 110/1–/99 (West 2011); IND. CODE ANN. §§ 34-7-7-1 to -10 (LexisNexis 2008); LA. CODE CIV. PROC. ANN. art. 971 (Supp. 2014); ME. REV. STAT. ANN. tit. 14, § 556 (Supp. 2013); MD. CODE ANN., CTS. & JUD. PROC. § 5-807 (LexisNexis 2013); MASS. GEN. LAWS ANN. ch. 231, § 59H (West 2000); MINN. STAT. ANN. §§ 554.01–.05 (West 2010); MO. ANN. STAT. § 537.528 (West Supp. 2013); NEB. REV. STAT. ANN. §§ 25-21,241 to -21,246 (LexisNexis 2013); NEV. REV. STAT. §§ 41.635–.670 (2013); N.M. STAT. ANN. §§ 38-2-9.1 to -9.2 (Supp. 2012); N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (McKinney 2009); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2010); OR. REV. STAT. ANN. §§ 31.150–.155 (West 2013); 27 PA. CONS. STAT. ANN. §§ 7707, 8301–8303 (West 2009) (providing environmental law anti-SLAPP); R.I. GEN. LAWS §§ 9-33-1 to -4 (2012); TENN. CODE ANN. §§ 4-21-1001 to -1004 (2011); TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001–.011 (West Supp. 2013); UTAH CODE ANN. §§ 78B-6-1401 to -1405 (LexisNexis 2012); VT. STAT. ANN. tit. 12, § 1041 (Supp. 2013); WASH. REV. CODE ANN. §§ 4.24.500–.525 (West 2005 & Supp. 2014).

127. *See* David A. Barry & William L. Boesch, *Massachusetts Legal Malpractice* Cases 2000–2009, 93 MASS. L. REV. 321, 339 (2011) (defining anti-SLAPP laws as "statute[s] 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 (2003) ("[A]nti-SLAPP laws . . . prohibit plaintiffs from using the legal system to silence opposition and chill free speech."); CAL. ANTI-SLAPP PROJECT, http://www.casp.net (last visited Mar. 18, 2014) (noting that SLAPPs are commonly disguised as defamation, libel, slander, malicious prosecution, or abuse of process claims).

of retaliatory claims. 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 by and uniformity of state law strengthens the justification and need for a zone of protection for federal relators reporting fraud against the federal government based upon the uniquely federal interests flowing from the FCA statutory scheme.

The Supreme Court, in *Texas Industries, Inc. v. Radcliffe Materials, 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.[128] 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.[129]

In short, the Court determined that even without direct congressional authorization, federal common law should be applied when substantial rights or obligations of the government are at risk and when the authority or duties of the government are intimately involved.[130] Thus, federal common law protection trumps state law, including barring state tort claims, as was recognized in a subsequent Supreme Court case.

The Supreme Court provided further guidance to lower courts regarding when federal common law could be applied to a new area in *Boyle v. United Technologies Corp.*, such as advanced in this Article.[131] In *Boyle*, the Court noted "that a few areas, involving '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

128. *Tex. Indus., Inc.*, 451 U.S. at 641.

129. *Id.* (footnotes omitted).

130. *Id.*

131. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

necessary, by federal law of a content prescribed . . . by the courts—so-called 'federal common law.'"[132]

Here, as outlined in subpart II.A, the six key FCA provisions clearly demonstrate not only a well-defined and dominant substantial public interest, but also a substantial and uniquely federal interest in recruiting and protecting relators who file federal *qui tam* actions under the FCA, and therefore this is the precise type of narrow class of cases in which federal common law applies.[133] Again, the FCA is the government's chief tool for combatting fraud against the government and recovering funds wrongfully taken from the public treasury.[134] Because almost 70 percent of all successful FCA cases are *qui tam* cases,[135] 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 the filing of a *qui tam* action frustrates this vital federal interest because it chills future relators from stepping forward and filing FCA *qui tam* cases. Moreover, as explained above, the FCA's unique structure mandates that the relator produce internal company information to the DOJ as part of filing a *qui tam* case,[136] but it also contains antiretaliation provisions.[137] Finally, Congress mandated that whistleblowers filing *qui tam* suits to strictly comply with all of the unique FCA procedures in order to be eligible for a reward.[138] Therefore, protecting relators from counterclaims flowing from actions associated with filing FCA *qui tam* complaints is one of those few uniquely federal interests that demand application of federal common law.

The *Boyle* Court also addressed the effect of federal common law upon state claims and provided the basis for shielding relators from state common law counterclaims, whether in contract or tort, when acting within the FCA's zone of protection as defined in the next subsection.[139] According to the Court, when federal common law applies it acts to

132. *Id.* (citation omitted) (quoting *Tex. Indus., Inc.*, 451 U.S. at 640).
133. *See id.*
134. *See supra* notes 1–4 and accompanying text.
135. *See supra* note 7 and accompanying text.
136. *See supra* Part II.A.1.
137. *See supra* Part II.A.5.
138. *See supra* Part II.A.4.
139. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 505–07 (1988); *see also* United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 961–62 (9th Cir. 1995) (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).

preempt state law, even to the point of barring affirmative state tort claims against nongovernment persons and corporations, when it would interfere with a government program.[140] The Court went on to rule that, as a matter of law, federal common law displaces state law and mandated dismissal of a state law tort claim against a federal defense contractor.[141] In that case, a military copilot drowned when the helicopter crashed in the ocean.[142] The copilot's estate brought a suit against the helicopter's manufacturer claiming the escape hatch was defectively designed.[143] Although the jury had ruled in favor of the estate under a state law tort claim,[144] the Supreme Court overturned the decision because it found that there federal common law existed that preempted the state law claim.[145] 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).[146]

In other words, the Court reasoned that exposing contractors to liability for state law negligence claims interferes with the government's legitimate balancing of safety features against military efficacy in designing war material.[147] Thus, when federal common law applies, state law tort claims are preempted.

Here, because federal common law should apply to *qui tam* actions filed under the FCA, it should operate to bar defendants from bringing state law claims, whether contract or tort, against a relator for any activity relating to filing a *qui tam* case because permitting those counterclaims would thwart the vital federal interests underlying the FCA. 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

140. *Boyle*, 487 U.S. at 506–07.
141. *Id.* at 505–06, 509.
142. *Id.* at 502.
143. *Id.* at 503.
144. *Id.*
145. *Id.* at 509, 511–12.
146. *Id.* at 509. This became known as the government-contractor doctrine.
147. *Id.* at 511.

mandate recognition of a zone of protection afforded to relators under the FCA. Either line of cases standing alone would operate to bar state law claims or counterclaims against a relator, whether couched in contract or tort, for activities associated with filing a *qui tam* case.

The next subpart 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 uniquely federal interests in enlisting and protecting relators willing to combat fraud against the government creates a zone of protection. This zone of protection immunizes or exempts a whistleblower from all contract or tort claims[148] by an employer[149] that are bound up with or flow from an act of reporting suspected fraud against the government as long as the employee possesses a reasonable belief that suspected fraud or FCA violations occurred and regardless of whether fraud or violations of the FCA are ultimately established.[150]

148. This includes all state claims brought by an employer, regardless of whether they are grounded in contract or tort, flowing from statute or common law. *See supra* Part II.C.

149. The zone of protection continues to apply to protected activities after the employee leaves the company, and hence extends to former employees.

150. This proposed reasonable-belief test does not include any additional "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. *See supra* Part II.A.4. As stated earlier, the Supreme Court has recognized that the decision to file a *qui tam* is "motivated primarily by prospects of monetary reward rather than the public good." Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939, 949 (1997); *see supra* notes 67–68 and accompanying text. It is money—not a charitable motive—that moves a whistleblower to risk retaliation and step forward. It takes a rogue to catch a rogue, and the FCA pays rewards regardless of whether the relator's primary goal was to obtain a reward. *See* 31 U.S.C. § 3730(d) (2012). In the words of Senator Jacob Howard, the FCA's sponsor, "I have based the [provisions] upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice." CONG. GLOBE, 37TH CONG., 3D SESS. 956 (1863); *see also* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775 (2000) (noting early *qui tam* statutes "allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves"). Thus, the reasonable-belief test includes no requirement that the relator act out of altruistic motives. The zone of

The zone of protection, which bars all contract and tort claims against the relator, extends to all related activities of an employee while they investigate 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.[151] 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) 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.[152] 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 to file a *qui tam* case.[153] 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 the court's authority and controlled by the Federal Rules of Civil Procedure.[154] 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.[155] However, even after the complaint is served, a relator may continue to use appropriate informal discovery techniques, including

protection has its own limits designed to protect the employer from harm, including the requirement that disclosures must be made to the government, and not to third parties, to remain under the protective umbrella of the public interest aspects of the FCA. *See supra* Part II.A.1–3, 6.

151. *See* Hesch, *supra* note 16, at 59.

152. *Id.*

153. 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. United States*, 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). The Court highlighted the importance of a client providing all potentially relevant information to counsel as part of seeking help from counsel by noting, "[t]he 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.

154. 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.

155. *See* FED. R. CIV. P. 26(b).

obtaining documents from former employees and engaging in other informal discovery techniques permitted by local practices or the Federal Rules of Civil Procedure.

III. 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 uniquely 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.[156] 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.[157] As a result, there are mixed results, and some courts appear to be 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.[158]

Because no court has yet applied the proper framework, this Part 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.[159] Afterward, it proposes how courts should apply this Article's definition of zone of protection in a variety of difficult situations facing the courts.[160]

156. *See* discussion *infra* Part III.A.
157. *See* discussion *infra* Parts III.B, IV.A.
158. *See* discussion *infra* Parts III.B, IV.A.
159. *See* discussion *infra* Part III.A–B.
160. *See* discussion *infra* Part III.C–D. Although the same principles apply to tort claims, because courts have incorrectly treated them separately, Part IV provides additional analysis of tort claims.

A. *Cases Dismissing Contract Counterclaims*

Several courts have dismissed claims by an employer that relied upon employment-related contract provisions to bar an employee or former employee from using relevant, nonprivileged 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 determined that the strong policy goals of the FCA were sufficient to invalidate a separation 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.[161]

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.[162] Upon learning that the relator retained company documents and provided them to the DOJ when filing the *qui tam* action, the company brought a dozen counterclaims against the relator,[163] including two for breach of the separation agreement based upon the relator's actions of filing a *qui tam* complaint.[164] The relator and the DOJ moved to dismiss these counterclaims as a violation of the public policy of exposing fraud against the federal government.[165]

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."[166] The court also stated that "[t]he purpose of the FCA is 'to discourage fraud against the government' and, '[c]oncomitantly, the purpose of the qui tam provision of the Act is to encourage those with knowledge of fraud to come forward.'"[167] The court also noted that the FCA required the relator to submit an SME and held that at least one of those two counterclaims "must be dismissed as contrary to public policy."[168] The court also properly

161. United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146, 152 (D.D.C. 2009).
162. *Id.* at 149.
163. *Id.* at 149–50.
164. *Id.* at 151–52.
165. *Id.* at 151.
166. *Id.* at 152.
167. *Id.* (second alteration in original) (emphasis removed) (quoting Neal v. Honeywell, Inc., 826 F. Supp. 266, 269 (N.D. Ill. 1993)).
168. *Id.*

dismissed the counterclaim[169] for contractual indemnification on a provision in the separation agreement, as void based on public policy.[170]

Other courts have similarly voided nondisclosure agreements when defendants have sought to enforce them against a former employee who has sued the employer in an FCA action.[171] 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 nondisclosure agreement.[172] In *United States ex rel. Ruhe v. Masimo Corp.*, three former sales representatives filed an FCA case against the corporation.[173] The relators filed their *qui tam* complaint and attached copies of documents to an amended complaint.[174] 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.[175] The defendant company moved to strike as scandalous any use of the documents in the FCA case.[176] The defendant argued that a scandal existed because the relator gathered the documents in violation of a nondisclosure agreement.[177]

The *Ruhe* court began its analysis by noting that the documents did not fit the definition of "scandalous," which means "allegations that cast a cruelly derogatory light on a party."[178] The court concluded that it was not scandalous for a relator to expose fraud.[179] Next, the court addressed the

169. Part III.B, *infra*, discusses how the court addressed the remaining tort-related counterclaims filed in this *qui tam* case.

170. *Head*, 668 F. Supp. 2d at 154. However, another two claims, which dealt with the relator's breach of the nondisparagement provision in the separation agreement, were not dismissed as they did "not implicate [the d]efendant's liability under the FCA." *Id.* at 153.

171. 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. *See, e.g.*, United States *ex rel.* Miller v. Bill Harbert Int'l Constr., Inc., 505 F. Supp. 2d 20, 29 (D.D.C. 2007).

172. United States *ex rel.* Ruhe v. Masimo Corp., 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012).

173. *Id.* at 1035.

174. *Id.*

175. *Id.* at 1038.

176. *Id.*

177. *Id.*

178. *Id.* (quoting *In re* 2TheMart.com, Inc. Sec. Litig., 114 F. Supp. 2d 955, 965 (C.D. Cal. 2000)) (internal quotation marks omitted).

179. *Id.* at 1038–39.

public policy exception to contractual provisions, including a nondisclosure agreement.[180] Because the court determined that the relator was exposing fraud against the 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." Obviously, 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 [r]elators to be exempt from liability for violation of their nondisclosure agreement. Such 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.[181]

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 a well-defined and dominant substantial public policy.[182] Moreover, these cases did not attempt to define a zone of protection.[183] Consequently, even these correctly decided 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 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 to define the zone of protection. As a result, 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 *United States ex rel. Wildhirt*

180. *Id.* at 1039.

181. *Id.* (citations omitted).

182. *See supra* Part II.A.

183. *See supra* Part II.C.

v. AARS Forever Inc. faced a motion to dismiss five breach of contract counterclaims against a relator.[184] These counterclaims were based upon the employer's employment agreements containing provisions that (1) prohibited employees from providing company documents or orally disclosing internal company information to anyone, including the government; (2) required employees to notify management of any fraud allegations prior to notifying the government; (3) prohibited employees from being reimbursed for filing or assisting in an FCA *qui tam* case; and (4) required disgorgement of all proceeds or awards received in a successful *qui tam* case against the company.[185] The primary facts alleged by the defendants were that the relator lied in the *qui tam* complaint about there being FCA violations and breached the contract by disclosing internal company information to the government and to private insurers that were also allegedly defrauded.[186]

Because of the lack of a proper approach, the *Wildhirt* court did not strike any of these offensive and overreaching contract provisions void as against public policy or even discuss whether some of these provisions violate criminal laws if the provisions were construed as an "attempt[] 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"[187] through contract provisions that (1) prohibit filing of or assisting the DOJ in an FCA *qui tam* case, or (2) require advance notice to the company before reporting fraud to the government.[188]

Rather, the starting point for the court was the principle that FCA defendants are barred from filing indemnification claims against a

184. United States *ex rel.* Wildhirt v. AARS Forever, Inc., No. 09 C 1215, 2013 WL 5304092, at *4 (N.D. Ill. Sept. 19, 2013).

185. *Id.* at *1–2. The agreement also required indemnification of the company for any costs, expenses, and attorney fees relating to any unauthorized disclosures of internal information. *Id.* at *2.

186. *Id.* at *3. 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 Veterans Administration because the company failed to perform required competencies, gave patients the wrong equipment, and did not provide required education or supplies. *Id.* 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 nongovernmental entities. *See id.* at *5–7.

187. 18 U.S.C. § 1518(a) (2012).

188. *See Wildhirt*, 2013 WL 5304092, at *5–7.

relator.[189] Although this is a correct premise, the problem is that this is not the only aspect of the zone of protection.[190] Because the court began with a narrow view of protection—merely 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 "is not dependent on a finding that the qui tam defendant is liable."[191] Based upon this model, the court identified two types of permissible independent damages counterclaims:

> 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. 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.[192]

According to the court, the first category primarily consists of breach of contract claims, such as violations of a confidentiality agreement, which are addressed in this subpart.[193] Specifically, in *Wildhirt*, two of the five counterclaims alleged that the relators breached an employment agreement by taking home private company documents before they even contemplated filing a *qui tam* action and by later using the documents to disclose fraud to the government and to private insurers.[194]

189. *Id.* at *5.

190. *See supra* Part II.C.

191. *Wildhirt*, 2013 WL 5304092, at *5 (quoting United States *ex rel.* Miller v. Bill Harbert Int'l Constr., Inc., 505 F. Supp. 2d 20, 26 (D.D.C. 2007)) (internal quotation mark omitted).

192. *Id.* (alterations in original) (quoting *Miller*, 505 F. Supp. 2d at 27–28) (internal quotation marks omitted).

193. *Id.* The second category of independent claims primarily involves tort claims and will be discussed in the next subpart. *Id.*

194. *Id.* at *6. Count IV alleged that the defendants were not told about fraud being committed by the company in advance of the filing of charges and, therefore, were deprived of an opportunity to correct the fraud; the defendants sought to require the relators to pay all ensuing costs associated with their failure to stop the misconduct

The court refused to dismiss these claims because at the pleading stage it must presume the truth of the allegations,[195] which included a claim that the "retentions [of documents] and disclosures went beyond the scope of those necessary to pursue their *qui tam* suit."[196] The court held that because defendants "pleaded facts that place their counterclaims comfortably in at least one of the two categories [of independent claims], the counterclaims cannot be dismissed on the pleadings as contrary to public policy."[197] The court reasoned that the "counterclaims are independent of the FCA claim because, particularly given the extremely broad scope of documents and communications that [r]elators 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."[198]

Under this approach, which disregarded the substantial public interests at stake and did not attempt to recognize or define any zone of protection, the court seemed content leaving several breach of contract claims, which left the possibility of paying the defendant's costs and attorney's fees hanging over the relator's head.[199] Such an approach actually thwarts the purpose of the FCA.[200] Filing of an FCA case clearly falls within the zone of protection and exempts the relator from such

sooner. *Id.* at *7. Counts III and VI requested indemnification and reimbursement for damages. *Id.* at *6.

195. Even assuming the truth of the allegations that the relators shared confidential information with the government when reporting fraud, the breach of contract claims clearly fall within the zone of protection and the claims should have been dismissed. *See supra* Part II.C. 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.

196. *Wildhirt*, 2013 WL 5304092, at *6.

197. *Id.* at *5.

198. *Id.* at *6. The court relied on *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, which held 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.'" *Id.* (alterations in original) (quoting *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1062 (9th Cir. 2011)). For a discussion 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, see discussion *infra* Part III.D.

199. *See id.* at *8.

200. *See supra* Part II.A.

counterclaims.[201]

Moreover, and equally distressing, the opinion leaves room for the potential that the only way relators could defeat the counterclaims and thereby avoid indemnifying their employer for all costs in defending the fraud allegations, would be through a finding that the company actually violated the FCA.[202] This is hardly what Congress had in mind when it set up a reward program under which the relator had no choice but to file a *qui tam* complaint to claim a reward for reporting fraud against the government.[203] Any decision that reserves protected conduct to instances when fraud is proven would frustrate the substantial public and uniquely federal interests involved, and would thwart the entire framework of the FCA that is designed to invite relators to bring forward fraud allegations. 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 will dry up. Even when a relator hires counsel and files a *qui tam* action, 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.[204]

In addition, a "wait and see" approach to 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.[205] In these cases, no findings are made regarding liability, and settlement agreements often contain language in which the defendant denies liability.[206] Second, the DOJ declines to intervene in over three-fourths[207] of all *qui tam* cases due to lack of resources.[208] Relators also often lack the

201. *See supra* Part II.C.

202. *See id.* at *5 ("[A]n FCA defendant found liable of FCA violations may not pursue a counterclaim that will have the equivalent effect of contribution or indemnification." (quoting United States *ex rel.* Miller v. Bill Harbert Int'l Constr., Inc., 505 F. Supp. 2d 20, 26 (D.D.C. 2007)) (internal quotation marks omitted)).

203. *See supra* Part II.A.4.

204. *See Wildhirt*, 2013 WL 5304092, at *5.

205. Hesch, *supra* note 7, at 272 & n.301.

206. The typical language of the DOJ's settlement agreement states: "This Agreement is neither intended by the parties to be, nor should be, interpreted as an admission of liability." Cell Therapeutics Inc. v. Lash Grp. Inc., 586 F.3d 1204, 1211 (9th Cir. 2009).

207. *See* Hesch, *supra* note 7, at 237.

208. *Id.* at 257; *see* United States *ex rel.* Chandler v. Cook Cnty., Ill., 277 F.3d

necessary resources to continue when the DOJ declines a case.[209] Thus, if counterclaims are allowed to proceed absent a finding of liability, relators face the threat of a counterclaim simply for filing a *qui tam* suit. 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 when the fraud is not ultimately established.

In addition, the problem with defining "independent claims" based upon essential elements of a cause of action, as the *Wildhirt* court did,[210] is that the elements required for finding liability for counterclaims for breach of an employment contract (or a similar claim couched in a tort mantle) and finding liability under the FCA will virtually never overlap. The essential element for any such counterclaim is the relator providing confidential information to the government, whereas the essential element for an FCA claim is the defendant's act of defrauding the government. Thus, counterclaims for breach of an employment contract will never have overlapping elements to an FCA claim.[211] As such, the definition proposed

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*, 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).

209. "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 et al., *FERA and the New World of False Claims Act Risks*, J. HEALTH CARE COMPLIANCE, Jan.–Feb. 2010, at 5, 6.

210. *See* United States *ex rel.* Wildhirt v. AARS Forever, Inc., No. 09 C 1215, 2013 WL 5304092, at *5 (N.D. Ill. Sept. 19, 2013).

211. The *Wildhirt* court and the defendants tacitly agreed that their approach is wrong because the defendants and court both agreed that the breach of contract claims must be dismissed if the company were found liable. *Id.* at *3, *5. Thus, the court indirectly conceded that the breach of contract counterclaims flow from or are bound up with reporting fraud against the government. *See id.* at *5. 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. *See id.*

by the court in *Wildhirt* offers no real protection to *qui tam* relators.[212]

In sum, the *Wildhirt* court, and those decisions it relied upon, begin with the wrong framework. As set forth above, when approaching counterclaims against relators in a *qui tam* case, the first step is to determine that there is either a substantial public interest or a uniquely federal interest under the FCA.[213] Next, the court must determine the zone of protection afforded the relator, which is defined in this Article.[214] Only then would a court be in a position to determine which claims should be dismissed at the pleading stage.[215]

The next subpart proposes how courts should apply this Article's definition of zone of protection in a variety of difficult situations.

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

When relators fall within the FCA's zone of protection,[216] it immunizes or exempts them from all tort and contract claims that are bound up with or flow from reporting fraud or filing a *qui tam* case, which includes the activities of producing documents to the DOJ regardless of whether some of the documents turn out to be privileged or contain a trade secret.[217] Nevertheless, whistleblowers should not intentionally provide documents to the government that are protected by the attorney-client privilege.[218] However, at times it can be especially difficult for a relator to

212. *Id.*

213. *See supra* Part II.A.

214. *See supra* Part II.C.

215. As stated in subpart II.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.

216. As stated in subpart II.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.

217. The same is true for producing potentially irrelevant documents, as discussed in subpart III.D, *infra*.

218. In FCA cases, sometimes there exists a "crime–fraud exception" to the attorney–client privilege. As Claire Sylvia described:

> 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 [of] a crime or fraud of a serious enough nature to warrant abrogation of the privilege. The party asserting this

determine if a privilege applies or whether the crime–fraud exception erases the privilege.[219] Indeed, the issue of the existence of a privilege (or any exception) is determined by a court on a case-by-case basis,[220] 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 does not remove a relator from the zone of protection. Rather, if the return of documents or a sanction is warranted, the issue is determined by the court in the *qui tam* case pursuant to Rule 26 of Federal Rules of Civil Procedure (Rule 26).[221] The next two subparts and section address how a court should treat the production of privileged documents or trade secrets and the production of nonrelevant information.

1. *Attorney–Client Privilege*

As a starting point, once the zone of protection applies, all state-based counterclaims against a relator are barred. Nevertheless, a relator should not intentionally produce to either counsel or the DOJ documents that are protected by the attorney–client privilege,[222] and relator's counsel should not intentionally review,[223] rely upon, or produce to the DOJ

> "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.

SYLVIA, *supra* note 77, § 10:89. Furthermore, courts have noted,

> 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. Doe, 805 F. Supp. 1298, 1307 (E.D. Va. 1992).

219. Thus, relators should not be expected to make a privilege determination on their own.

220. *Id.* at 1305.

221. *See* FED. R. CIV. P. 26.

222. 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.

223. 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.

privileged documents. Perhaps best practices would be for counsel to advise a relator not to provide documents on law firm letterhead or an e-mail 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 normal business document—it is not 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.[224] 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.[225] In appropriate instances, courts have ordered other reasonable and appropriate sanctions, depending upon the degree of bad faith and prejudice.[226] 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.[227] Indeed, under the FCA there are

224. *See supra* Part II.C.

225. *See* FED. R. CIV. P. 26(b)(5)(B); United States v. Comco Mgmt. Corp., No. SACV 08-0668-JVS, 2009 WL 4609595, at *1, *5 (C.D. Cal. Dec. 1, 2009). In *United States v. Comco Management Corp.*, a whistleblower provided the IRS Whistleblower Office with 25 boxes of documents, which contained some privileged documents. *Id.* at *1, *4. 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 nonprivileged documents. *Id.* at *4–5. With respect to the nonprivileged documents, the court did require the IRS to allow the defendant to obtain a copy of them. *Id.* at *1, *4.

226. For example, in *United States ex rel. Frazier v. Iasis Healthcare Corp.*, the court sanctioned *qui tam* counsel with fees and costs associated with the defendant's attempt to get its privileged documents back. United States *ex rel.* Frazier v. Iasis Healthcare Corp., No. 2:05-cv-766-RCJ, 2012 WL 130332, at *15 (D. Ariz. Jan. 10, 2012). The court was concerned and issued sanctions because *qui tam* counsel did not contact the defendant about the privilege issue after the case was unsealed. *Id.* The court also stated that dismissal was not an appropriate sanction because the facts did not establish "extraordinary circumstances of bad faith" by *qui tam* counsel. *Id.*

227. 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. *See id.* (disqualifying *qui tam* counsel "from assisting or representing [the relator] or any other party adverse to [the defendant]" due to counsel's failure to inform the court that it had privileged

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.[228] One of the roles of *qui tam* counsel is to screen documents for privilege before producing them to the DOJ in the SME.[229] Thus, the first safeguard is that the relator's attorney, who is an officer of the court and bound by ethical rules, will assist in flagging potentially privileged documents and refrain from using them.[230]

In addition, and more significantly, the FCA's zone of protection applies only when producing documents to the government and its *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.[231] 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 DOJ has its own protocol for addressing potentially privileged documents, which acts as a second safeguard for FCA defendants in *qui tam* cases. Specifically, the DOJ has a general policy of appointing a "taint team" in *qui tam* cases when privileged documents are proffered or produced to it.[232] A DOJ attorney that is not working on that

documents before serving the unsealed complaint and later feigning ignorance as to their existence when the defendant requested their return).

228. *See* Georgakis v. Ill. State Univ., 722 F.3d 1075, 1077 (7th Cir. 2013) ("But to maintain a suit on behalf of the government, the relator . . . has to be either licensed as a lawyer or represented by a lawyer . . . . A nonlawyer can't handle a case on behalf of anyone except himself.").

229. Donald H. Caldwell, Jr., Qui Tam *Actions: Best Practices for Relator's Counsel*, 38 J. HEALTH L. 367, 388 (2005).

230. *See id.* 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.

231. 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 nongovernment agencies.

232. Although there are no cases discussing the DOJ's use of a taint team in the FCA context, the Author worked at the DOJ in the Civil Fraud Section for 16 years and confirms that the DOJ used taint teams on *qui tam* cases similar to the DOJ's Criminal Division use of taint teams. *See* United States v. Taylor, 764 F. Supp. 2d 230, 233 n.14 (D. Me. 2011) (providing the DOJ's taint team policy); United States v. SDI Future Health, Inc., 464 F. Supp. 2d 1027, 1033 (D. Nev. 2006) (describing the DOJ's taint team procedures). Moreover, it is a general practice of the DOJ to inform a

qui tam case is assigned to review potential privilege issues and ultimately decides either that the privilege does not apply or litigates the privilege issue.[233] 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.[234]

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 to return 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 sanction, other than the return of a document or the 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 those of the relator's counsel and the DOJ attorneys, both of whom are bound by ethical standards and neither of whom 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.[235] 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.[236] 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 confidential

relator's counsel at the start of a *qui tam* case of any potentially privileged documents, to segregate them, and to produce them to the DOJ in a sealed envelope.

233. *Cf. Taylor*, 764 F. Supp. 2d at 233 n.14; *SDI Future Health, Inc.*, 464 F. Supp. 2d at 1033.

234. *Cf. SDI Future Health, Inc.*, 464 F. Supp. 2d at 1033.

235. 18 U.S.C. § 1905 (2012).

236. *See* FED. R. CIV. P. 26(c)(1).

documents in support.[237] Moreover, in the event that some confidential information provided to the DOJ is determined to be irrelevant, the court can order the documents be returned.[238]

D. *Application of the Zone of Protection to Potentially Irrelevant 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 irrelevant. 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 FCA violations occurred.[239] 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 irrelevant to the FCA allegations. Rather, any remedy for producing irrelevant 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

237. *E.g.*, United States *ex rel.* Purcell v. MWI Corp., 209 F.R.D. 21, 27–28 (D.D.C. 2002). Even if the parties stipulate to a protective order, they still must show the court that public disclosure would cause significant harm, and the order must be sufficiently narrow that it does not restrict more discovery than is necessary. *See* United States *ex rel.* Barko v. Halliburton Co., 952 F. Supp. 2d 108, 118 (D.D.C. 2013) (vacating protective order that allowed parties upon mere belief to designate any document as "confidential information").

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

239. *See supra* Part II.C.

discovery appears reasonably calculated to lead to the discovery of admissible evidence."[240] 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, sanctions are rarely issued in openly litigated cases in which overproduction is an issue, and it is even more rare that overproduction warrants dismissal. With respect to FCA cases, it is typical for the government and defendant to produce hundreds of thousands, even millions, of pages of documents in large *qui tam* cases.[241] In short, overproduction is a product of the American rule of open discovery in civil cases.[242]

However, 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 the DOJ as part of the SME. Therefore, 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 showing that their employer is defrauding the government. Again, a court's first step must be to determine if the zone of protection applies.[243] If not, 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 federal circuit court case to address the issue of overproduction of documents involved such egregious facts that the court chose not to even address whether a public policy exception exists for a breach of contract counterclaim against a relator who filed a *qui tam* case.[244] Instead, the Ninth Circuit, in *United States ex rel. Cafasso v. General Dynamics C4 Systems, Inc.*, affirmed the grant of summary judgment in

240. FED. R. CIV. P. 26(b)(1).

241. During his 16 years working at the DOJ, the Author worked on several *qui tam* cases in which more than 1 million pages of documents were produced during discovery.

242. *See* Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 44 (1992) (noting that, even prior to automatic disclosure rules, "attorneys frequently both request[ed] and produce[d] more documents than needed, primarily because of perceived ambiguities in the scope of the requests"), Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device with No Effects*, 21 PACE L. REV. 203, 217–18 (2000).

243. *See supra* Part II.C.

244. United States *ex rel.* Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1062 (9th Cir. 2011).

favor of the company on its counterclaim that the relator breached a confidentiality agreement by removing documents that included irrelevant documents, privileged documents, and trade secrets.[245] 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 counterclaims without first recognizing the existence of a substantial public interest in protecting relators, i.e. the zone of protection.[246] 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 acting outside of the zone of protection. It was the lack of a reasonable belief of fraud in *Cafasso*,[247] 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 a patent the company applied for, and in which she believed the government had an ownership interest.[248] When she discovered that she was being terminated, she vacuumed up as much information about the company as she could and copied roughly 21 CDs worth of pages pertaining to hundreds of unrelated patents just in case she might want to review them.[249] When the company discovered that she took the documents, they filed suit to obtain their return.[250] Two days later, the relator filed a six-page, conclusory *qui tam* complaint, and the government declined to intervene.[251] After discovery, the court dismissed the FCA allegations because the fraud was not actionable under the FCA.[252]

With respect to the counterclaim, the relator asked the court to create a public policy exception.[253] 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

245. *Id.*

246. *See, e.g.*, Siebert v. Gene Sec. Network, Inc., No. 11-cv-01987-JST, 2013 WL 5645309, at *8 (N.D. Cal. Oct. 16, 2013).

247. *See Cafasso*, 637 F.3d at 1057–58, 1060 n.12.

248. *Id.* at 1053.

249. United States *ex rel.* Cafasso v. Gen. Dynamics C4 Sys., Inc., No. CV 06-1381 PHX NVW, 2009 WL 1457036, at *5–6 (D. Ariz. May 21, 2009), *aff'd*, 637 F.3d 1047.

250. *Cafasso*, 637 F.3d at 1052.

251. *Id.*

252. *Id.* at 1053, 1058.

253. *Id.* at 1062.

an issue.[254] The court described this case as a "vast and indiscriminate appropriation of [company] files" because the relator took the documents without reading a single page before copying them.[255] 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 of the documents she copied.[256]

The relator not even reading 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 the relator 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.[257]

The case was further exacerbated 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, also "[s]wept 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."[258] 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, and seeking discovery of 110 inventions not named in the complaint.[259] The last straw was the fact that the relator admitted in interrogatory responses that she had no evidence in support of her FCA claims.[260] 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

254. *Id.*

255. *Id.*

256. United States *ex rel.* Cafasso v. Gene Dynamics C4 Sys., Inc., No. CV 06-1381 PHX NVW, 2009 WL 1457036, at *14 (D. Ariz. May 21, 2009), *aff'd*, 637 F.3d 1047.

257. *See Cafasso*, 637 F.3d at 1062.

258. *Id.*

259. *Id.* at 1052.

260. *Id.*

unreasonable, and cannot be sustained by reference to a public policy exception.[261]

Unfortunately, the opinion appeared to focus on the number and relevancy of the documents instead of providing a framework, such as advanced in this Article, which hinges upon whether the conduct was within the zone of protection that required a showing of 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 it is determined that an employee acted outside the zone of protection, the same framework and analysis needs to be applied. First, the court must recognize that the FCA creates a zone of protection.[262] Second, the court must determine whether a relator falls within it.[263] By skipping the recognition or definition of a zone of protection, courts will not produce uniform results and risk creating factors or reaching decisions contrary to substantial public and federal interests.

As matters stand, there is insufficient guidance for future whistleblowers, and courts might misuse the *Cafasso* case for the premise that copying a large number of documents somehow falls outside of a zone of protection.[264] Indeed, it is not the number of documents that warranted denial of the motion to dismiss the counterclaim in *Cafasso*. Rather, it was the relator's lack of reasonable belief that the company was defrauding the government that excluded her from the zone of protection.[265] 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 protection.[266] This is true even if an employee takes only one document instead of tens of thousands. An employee who takes a single document is shielded from counterclaims if the employee falls within the zone of

261. *Id.* at 1062.

262. *See supra* Part II.C.

263. *See supra* Part II.C.1.

264. In fact, this case led the district court in *Wildhirt* to incorrectly focus on the broad scope of documents collected as the basis for upholding a counterclaim rather than on whether the relator's actions fell within a zone of protection. *See* United States *ex rel.* Wildhirt v. AARS Forever, Inc., No. 09 C 1215, 2013 WL 5304092, at *6 (N.D. Ill. Sept. 19, 2013).

265. *See Cafasso*, 637 F.3d at 1052.

266. *See supra* Part II.C.

protection and is not shielded if he or she falls outsize the zone. The exact same rule applies when an employee takes 10,000 pages of documents.

The danger of focusing on the amount of documents, which in the *Cafasso* case consisted of tens of thousands of pages,[267] 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 as trial exhibits—or a similar argument that only 50 percent of the documents met some other relevancy standard—the relator is nevertheless liable for a tort or breach of contract claim when the defendant settles the case for millions of dollars. Defendants would almost certainly argue a relator's liability would always exist if the DOJ either turns down a case or there is no finding of an FCA violation. This would chill whistleblowers from reporting suspected FCA violations.

267. *Cafasso*, 637 F.3d at 1062. 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 holds four gigabytes of data, which is more than 4 billion keystrokes. *Understanding File Sizes*, GREENNET, http://www.gn.apc.org/support/understanding-file-sizes (last visited Mar. 18, 2014). One keystroke is one byte. *See id.* There are 1,024 bytes per kilobyte, 1,024 kilobytes per megabyte, and 1,024 megabytes per gigabyte. *Id.* This means there are 1,073,741,824 keystrokes per gigabyte. An average gigabyte of data consists of 64,782 pages of Microsoft Word files, or 677,963 pages of Text files. *Fact Sheet: How Many Pages in a Gigabyte?*, APPLIED DISCOVERY (2007), *available at* http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitepapers/adi_fs_pagesinagigabyte.pdf. The ease of gathering documents today can also come into play when determining the relator's share of the award or settlement. As stated previously, at least one court considered the fact that a relator produced as part of his SME to the DOJ more than 700,000 pages of internal company documents as a reason for giving a higher award instead of a punishment. United States *ex rel.* Rille v. Hewlett-Packard Co., 784 F. Supp. 2d 1097, 1101 (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.* Seven hundred thousand pages of Word documents is nearly 11 gigabytes of data—ironically, nearly the same amount of data was collected (albeit unreasonably) in *Cafasso*. *See Cafasso*, 637 F.3d at 1052. This comparison shows that it is not the amount of data collected by relators that courts should be concerned with when considering the dismissal of a counterclaim, but rather the reasonableness of the relator's actions. The collection in *Cafasso* was clearly unreasonable, while the collection in *Rille* was sufficient to convince the government to investigate and eventually settle the claim. *Compare id.* at 1052, *with Rille*, 784 F. Supp. 2d at 1098–99, 1101 n.23.

Creating a rule to limit production of documents based on ultimate relevancy or volume would be counter to the goals of the FCA, which encourages disclosure of documents and suspected fraud, because protection would be limited to cases in which fraud was established. Again, documents are the heart of proving a FCA case.[268] Most FCA cases involve many thousands of pages of documents, with many large cases topping a million pages of documents.[269] 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.[270] In addition, because of the heightened pleading requirements under Federal Rule of Civil Procedure Rule 9(b),[271] a relator must have evidence of the "'who, what, when, where, and how' of the alleged fraud."[272] 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.[273] In addition, a relator should not be forced to review every page of every document sitting on his or her office desk before providing them to

268. *See supra* Part II.A.1.

269. *See supra* note 244 and accompanying text. Furthermore, "the False Claims Act has the following provision: the[DOJ] 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." Symposium, *Reinvigorating Rule 502*, 81 FORDHAM L. REV. 1533, 1585 (2013) (statement by Hon. Paul S. Diamond); *see* 31 U.S.C. § 3733 (2012).

270. In the *qui tam* cases the Author worked on at the DOJ, several involved thousands of false claims.

271. *In re* BP Lubricants USA Inc., 637 F.3d 1307, 1310 (Fed. Cir. 2011); *see* FED R. CIV. P. 9(b).

272. United States *ex rel.* Ruhe v. Masimo Corp., 929 F. Supp. 2d 1033, 1037 (C.D. Cal. 2012) (quoting Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)); Mitchell, *supra* note 49, at 358.

273. In fact, some courts have held that the FCA requires the relator to hire independent counsel as part of pursuing a *qui tam* claim. *See, e.g.*, Georgakis v. Ill. State Univ., 722 F.3d 1075, 1077 (7th Cir. 2013) (holding that because an FCA claim involves no personal injury, a relator cannot maintain an FCA suit in an individual capacity and must either be an attorney or represented by counsel to maintain a suit on behalf of the government). "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." Caldwell, *supra* note 229, at 377–78.

counsel. Indeed, the relator should not be required to read every page of every file before copying a folder that likely contains relevant information. Not only would this waste company time and resources, but it would also tip off the defendant that the employee intended 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.[274] The relator should be able to use the attorney's professional judgment to 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 the case.[275] Rather, relators 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 an FCA action.

Disclosure to the DOJ of overbroad and unrelated documents 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.[276] 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 disclose face potentially stiff sanctions.[277] As discussed in section II.C.1, because the relator already has access to the documents, the mere disclosure of them to legal counsel or the 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

274. *See supra* Part II.C.1.

275. As noted above, in a large case, there are potentially tens of thousands of relevant documents. *E.g.*, United States *ex rel.* Rille v. Hewlett-Packard Co., 784 F. Supp. 2d 1097, 1099 (E.D. Ark. 2011).

276. *See supra* Part II.A.1–6. Again, even if the relator's document disclosure to the 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.

277. *See* 28 U.S.C. § 1927 (2012) (authorizing courts to sanction attorneys for bad-faith misconduct that "multiplies the proceedings in any case unreasonably and vexatiously"). The Author does not condone including privileged materials in the complaint, which may become public.

reasonable belief that fraud or violations of the FCA occurred prior to gathering documents, including 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,[278] the remedy for overproduction is the return of the documents or other sanctions governed by Rule 26 and not the displacement of the zone of protection when it otherwise applies.[279]

In sum, if an employee falls within the FCA's zone of protection, the employee is exempt from contract and tort claims even if some of the documents turn out to be irrelevant. Rather, the exclusive remedy is determined by the court pursuant to Rule 26, and the normal remedy and appropriate solution is to return irrelevant documents to the company, not to dismiss the *qui tam* case or otherwise remove the protections given the relator from the FCA for reporting suspected fraud against the government.[280]

1. *Not Restricting Gathering Documents to Discovery*

In an attempt to sidestep the strong public policy issues outlined in this Article,[281] a common tactic used by defense counsel is to ask the court to order the return of the documents in the relator's possession[282] or that the relator produced to the DOJ based upon the theory that only information, not documents, is needed to file a *qui tam* case, and the DOJ

278. *See supra* Part III.C.1–2.

279. 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, producing them 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 Federal Rule of Civil Procedure 9(b)). *See supra* Part II.C. 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 the media.

280. 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's conduct was within the zone of protection as defined in this Article. *See supra* Part II.C.

281. *See supra* Part II.

282. 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.

could obtain documents during discovery or issue a civil investigative demand (CID) under the FCA.[283] 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.[284] Although this generally occurs prior to filing of the *qui tam* case and before the DOJ is typically aware of the allegations, the relators have a continuing duty to cooperate with the DOJ and to provide information within their possession and control during the life of the *qui tam* case.[285] Thus, relators must supplement the SME with any new information or documents after submitting the initial SME.[286] Therefore, the FCA contemplates and condones gathering and producing documents prior to service of the complaint and the 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, the DOJ declines nearly 80 percent of *qui tam* cases and lacks resources to investigate every tip or complaint.[287] Thus, only when a relator steps forward with substantial evidence of fraud—usually documents—will the 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 nonintervened cases that the relator elects to litigate on behalf of the government.[288] 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.[289] Rather, the relator must possess the information at the pleading stage and not just the whereabouts of potentially relevant documents.[290] The substantial public

283. *See* 31 U.S.C. § 3733 (2012). Prior to 2009, when the statute was amended, 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 (2012). Even though the Attorney General has been allowed to delegate the issuance of CIDs to the U.S. Attorneys for each district, *see* 31 U.S.C. § 3733(a)(1), they have not become automatic or used in every *qui tam* case.

284. 31 U.S.C. § 3730(b)(2); *see supra* Part I.A.1.

285. *See* 31 U.S.C. § 3730(c)(1).

286. *See id.* 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.

287. *See* Hesch, *supra* note 7, at 237.

288. *See* Mitchell, *supra* note 49, at 339.

289. *See* Martin Merritt & Rachel V. Rose, *Pleading "Health Care Fraud and Abuse" Under the False Claims Act*, FED. LAW., May 2013, at 62, 64–65.

290. *See id.* at 65. As Martin Merritt and Rachel Rose described:

policy interest demands that whistleblowers step forward with inside information of fraud when filing a *qui tam* case and seek government intervention 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.

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 to provide to the DOJ as part of the SME when filing a *qui tam* case. A similar question was an issue in an FCA retaliation-only suit, in which an employee claimed to have been fired because he privately contacted the government to report fraud.[291] His report resulted in an audit of the company.[292] Once the employee was terminated, he brought a retaliation suit under the FCA, but did not bring a *qui tam* action.[293] To support the allegations of wrongful termination, the former employee asked a current employee to gather company documents on his behalf.[294] The former employee received some documents before filing the retaliation action and other documents after filing the action.[295] The company filed nine counterclaims and asked the court to dismiss the retaliation case as a sanction for stealing company documents.[296] The court noted that courts in other settings had considered similar actions to be

> [A] relator must plead as many facts as he or she is able, including details of the scheme, and either details of actual claims submitted, or facts providing sufficient indicia of reliability which reveal how, during the period the relator was employed, the relator came to know of facts, and which tend to establish the relator has personal knowledge of the submission of claims.

Id.

291. Glynn v. EDO Corp., No. JFM-07-01660, 2010 WL 3294347, at *1–2 (D. Md. Aug. 20, 2010).

292. *Id.* at *1.

293. *Id.* at *2. Thus, the case was not filed under seal.

294. *Id.* at *1.

295. The wrongful termination action was field 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.

296. *Id.* at *2.

stealing, but also concluded that those courts rarely dismissed the case as a result.[297] The court held that that the former employee improperly engaged in self-help discovery and received stolen documents.[298] Nevertheless, the court refused to dismiss the claim because it was too harsh a sanction and instead issued a $20,000 sanction.[299]

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 against either the relator or assisting employees.[300] As demonstrated earlier, an FCA *qui tam* case is unique because its sole purpose is to advance substantial public and federal interests.[301] While only one employee may actually file a *qui tam* case,[302] 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 antiretaliation provision in 2009 to broaden the protection to all persons, whether employees, contractors, or agents.[303] The FCA statute now reads:

> 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

297. *Id.* at *3–4. Such dismissals, the court noted, were "only warranted in extreme circumstances." *Id.* at *3.

298. *Id.* at *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, therefore circumventing the restrictions on contacting represented parties and the discovery process. *See id.* at *6.

299. *Id.* at *6, *8.

300. Although asking current employees to copy internal company documents 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.

301. *See supra* Part II.

302. The "first to file" rule bars a subsequent relator from bringing a second *qui tam* case based upon the same allegations of transactions. 31 U.S.C. § 3730(e)(3) (2012). Although somewhat rare, it is possible for two relators to join together to file a single *qui tam* case.

303. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4(d), 123 Stat. 1624, 1624–25 (codified as amended at 31 U.S.C. § 3730(h)(1)).

of an action under this section or other efforts to stop 1 or more violations of this subchapter.[304]

Although there are no cases defining "associated others," it is clear that Congress intended to protect not only the person who files a *qui tam* case, but also those who assist the relator in reporting fraud or bringing an FCA case.[305]

In short, the zone of protection for FCA cases covers any employee who gathers documents for the purpose of either reporting suspected fraud against the government or assisting another in reporting the fraud. Although these nonfiling employees are just conduits for other whistleblowers who turn the documents over to the government, the same substantial public interest is still served. Indeed, a nonfiling employee has the same right as the relator 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* action is often made public.[306] Moreover, the FCA *qui tam* provisions pay a reward only to the first to file a *qui tam*,[307] but the need for information from multiple people is apparent. Indeed, the antiretaliation provisions of the FCA apply to every employee, regardless of whether they are the ones to file a FCA *qui tam* case.[308] Therefore, the zone of protection under the FCA extends to other employees 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 explained above, after the defendant has been served with the complaint and the litigation commences, normal discovery rules apply and any violations are subject to court's authority and controlled by the Federal Rules of Civil Procedure.[309] In other words, although the defendant may not bring a state claim against the relator or a nonfiling employee providing assistance to the relator, normal discovery rules begin to apply

304. 31 U.S.C. § 3730(h)(1) (emphasis added).

305. The Congressional Record includes a speech by Representative 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." 155 CONG. REC. 12,699 (2009).

306. *See* Under Seal v. Under Seal, 326 F.3d 479, 486 (4th Cir. 2003) (noting 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).

307. 31 U.S.C. § 3730(d), (e)(4).

308. 31 U.S.C. § 3730(h).

309. *See supra* Part II.C.1.

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.[310] Therefore, the protections to employees are not extended at the total expense of a defendant's privacy. Rather, the safeguards built into the definition of the zone of protection and remedies discussed above provide for proper protection of the defendant's rights as well.

IV. 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.[311] As discussed in subpart II.C, there should be no distinction between the protection offered to a relator filing a *qui tam* action, whether the immunity from an action by an employer is based in contract or in tort. In that subpart, this Article outlined two distinct lines of Supreme Court cases that both independently would demand that a zone of protection be afforded to relators, whether the protection stems from a substantial public policy interest that voids contract provisions (as well as couching contract claims under tort law) or flows from certain unique federal common law interests that displace state tort law.[312]

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.[313] That court was correct. Recently, several courts have missed the mark by refusing to dismiss tort

310. *See supra* Part II.C.1.

311. *See supra* Part III.

312. Under *Rumery*, courts cannot enforce any contract as void against public policy that hinders a relator from filing a *qui tam* case because the FCA's substantial public policy interests create a zone of protection for relators. *See* Town of Newton v. Rumery, 480 U.S. 363, 392 (1987). Similarly, this public policy reasoning requires that the zone of protection apply equally to tort claims because, otherwise, clever counsel could couch the same conduct as a tort. Under *Boyle*, a court should recognize that federal common law exists that bars all tort claims because the FCA creates substantial and uniquely federal interests in protecting the public that would be thwarted if relators were exposed to the claims. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

313. United States *ex rel.* Miller v. Bill Harbert Int'l Constr., Inc., 505 F. Supp. 2d 20, 26 (D.D.C. 2007).

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.[314] Others courts appear to reserve dismissal of tort claims to instances in which FCA violations are proven in court.[315] However, the correct approach is to apply the zone of protection to all counterclaims, including torts.[316] In other words, the zone of 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 federal circuit court 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 on whether the public interest at issue is substantial or what protection flows from the FCA to relators.[317] Simply put, the Ninth Circuit failed to adopt the correct test for determining whether to allow tort counterclaims against a relator. As a result, several lower courts are applying the wrong standard.

In 1993, in *United States 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.[318] The district court dismissed all of the counterclaims because they would "discourage qui tam plaintiffs from filing suit."[319] The Ninth Circuit reversed and held that "qui tam defendants can bring counterclaims for *independent* damages."[320] The court reasoned that the defendants have a

314. *See* discussion *infra* Part IV.A.

315. *See* discussion *infra* Part IV.A.

316. *See, e.g.*, Burch *ex rel.* United States v. Piqua Eng'g, Inc., 145 F.R.D. 452, 457 (S.D. Ohio 1992) (allowing defendant to bring compulsory counterclaims).

317. *See* United States *ex rel.* Madden v. Gen. Dynamics Corp., 4 F.3d 827, 830–31 (9th Cir. 1993).

318. *Id.* at 829. The eight counterclaims included:

> 1) breach of duty of loyalty and breach of fiduciary duty, 2) breach of implied covenant of good faith and fair dealing, 3) violations of [the] California Labor Code . . . , 4) libel, 5) trade libel, 6) fraud, 7) interference with economic relations, and 8) misappropriation of trade secrets.

Id.

319. *Id.* at 830.

320. *Id.* at 831 (emphasis added).

due process right to bring compulsory counterclaims that would be lost if not raised.[321]

The Ninth Circuit, almost in passing, noted that its decision—which 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.[322] The court, nevertheless, summarily declined to bar counterclaims beyond what it considered to be dependent claims.[323] The court reasoned:

> [W]e 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. 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.[324]

According to the Ninth Circuit, "if a qui tam defendant is found not liable, the counterclaims can be addressed on the merits."[325]

As discussed in Part III, which more poignantly addressed contract claims,[326] the same problems occur in the tort context 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.[327] This approach is also unworkable because a finding of liability is extremely rare in the FCA context.[328]

The court should have begun by recognizing the substantial public interest, followed by determining whether the FCA creates a zone of protection. This framework would have permitted the court to uphold any

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* (emphasis added) (citation omitted).

325. *Id.*

326. *See supra* Part III.

327. *See supra* Part II.C.1.

328. *See supra* notes 208–12 and accompanying text.

counterclaims based upon a finding that the relator acted outside of the zone of protection.[329]

Because *Madden* is the only appellate decision, many lower courts since have unfortunately applied this flawed approach of determining whether the counterclaims are dependent or independent of the company's FCA liability. In other words, the Ninth Circuit's prophesy is being fulfilled; its decision is encouraging FCA *qui tam* defendants to bring counterclaims cast in the form of independent damages or tort claims.[330] 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.[331]

For example, in 2009, the U.S. District Court for the District of Columbia in *Head* faced a decision on how to rule on a dozen counterclaims against the relator in an FCA case.[332] As mentioned earlier, the court readily dispatched two counterclaims based on breach of contract for reporting fraud because they violated public policy.[333] The court, however, faced eight more tort related counterclaims,[334] which were the type of disguised counterclaims predicted by the Ninth Circuit in *General Dynamics*.[335]

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.[336] It also failed to adopt a federal common law zone of protection.[337] Consequently, the court relied on a variety of different state law rules to suggest dismissing most, but not all of the counterclaims.[338]

329. *See supra* Part II.C. The same safeguards previously discussed apply equally here.

330. *See Madden*, 4 F.3d at 831.

331. *See, e.g.*, United States *ex rel.* Battiata v. Puchalski, 906 F. Supp. 2d 451, 460 (D.S.C. 2012) (stating that a defendant may bring counterclaims for independent damages "that would exist regardless of defendant's liability on the qui tam action"); United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146, 153 (D.D.C. 2009).

332. *Head*, 668 F. Supp. 2d at 151.

333. *Id.* at 152–54; *see supra* notes 169–73 and accompanying text.

334. *Head*, 668 F. Supp. 2d at 153–54.

335. *See Madden*, 4 F.3d at 831.

336. *See Head*, 668 F. Supp. 2d at 152–54.

337. *See id.*

338. *Id.* at 155–56. However, only one of these counterclaims was ultimately dismissed. *Id.* at 156. The court recognized that the defendant had failed to state a claim for seven of the eight tort counterclaims (and one of the contract counterclaims) and noted that they should be dismissed under Federal Rule of Civil Procedure 12(b)(6). *Id.* Nonetheless, the court granted leave to amend these counterclaims "because the arguments made by the United States and [the relator] in opposing [amendment we]re not persuasive." *Id.* Thus, only one of the tort counterclaims—malicious prosecution—was dismissed merely as premature. *Id.*

Indeed, *Head* provides a good illustration of the extent to which a relator faces retaliatory tort claims flowing from actions related 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 common law counterclaims against the relator.[339] For instance, at the pleading stage, the court refused to dismiss the defamation, libel, and slander counterclaims and effectively stayed them until the result of the FCA case because they were contingent upon exoneration of the defendant.[340] The court reasoned that these claims would be dismissed later if the defendant was found liable because the plaintiff would be entitled to the defense of truth.[341] 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."[342] 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.[343] 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.[344] However, the very nature of the unique *qui tam* statute demands an exemption from malicious prosecution when covered by the zone of

339. *See id.* at 151–56.

340. *Id.* at 153–54.

341. *Id.* at 153.

342. *Id.* at 155.

343. *See supra* Part II.C.

344. *Head*, 668 F. Supp. 2d at 156.

protection.[345] Hence, the only way for a relator to be eligible for a reward is to actually file a *qui tam* complaint in court.[346] 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.[347] Again, it is rare to ever obtain such a finding of liability.[348] In any event, the definition of the zone of protection provides the claimed protection needed by defendants in that it requires a reasonable belief of an FCA violation.[349] 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 flowing from engaging in an activity within the zone of protection.[350] Failure to dismiss these tort counterclaims thwarts the very heart and purpose of the FCA's *qui tam* provisions.

Another example of courts applying the incorrect independent damage framework includes a 2013 case in which the court refused to dismiss the claim of tortious interference with prospective economic advantage based upon reporting suspected fraud against the government to the government.[351] The *Wildhirt* 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 that time that the relator acted in good faith in filing the case.[352] Again, hinging dismissal on a finding of fraud improperly thwarts the FCA's purpose.

In sum, these cases highlight and demonstrate the need for a uniform federal approach. Moreover, they show why a uniquely federal interest is being thwarted by applying of state law tort claims. Protecting a federal relator reporting fraud against the federal treasury through 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

345. *See supra* Part II.C.
346. *See* 31 U.S.C. § 3730(b)(1), (d) (2012).
347. *See supra* Part II.A.
348. *See* Hesch, *supra* note 7, at 272; *supra* notes 208–12 and accompanying text.
349. *See supra* Part II.C.1.
350. *See supra* Part II.C.1.
351. United States *ex rel.* Wildhirt v. AARS Forever, Inc., No. 09 C 1215, 2013 WL 5304092, at *7–8 (N.D. Ill. Sept. 19, 2013).
352. *Id.*

and displace state law claims.[353]

B. *Applying the Zone of Protection to Torts*

The correct approach is to recognize that the FCA creates either substantial public or uniquely federal interests, and to adopt this Article's definition of the zone of protection as the formula for determining whether a contract or tort claim can be pursued against a relator. In short, similar to contract claims,[354] courts should find a general exemption from tort claims when a relator meets the definition of a zone of protection associated with filing a *qui tam* case. Because this Article has established that there are both substantial public and federal interests, the courts can and should create or apply a federal privilege against counterclaims that exempt relators from all tort claims that are bound up with or flow from engaging in an activity within the zone of protection afforded by the FCA.[355]

In sum, because of the lack of recognition of a substantial public interest—or a uniquely federal interest—and the resulting zone of protection, courts have reached a variety of inconsistent results when addressing tort counterclaims, such as malicious prosecution and libel, against relators.[356] The courts also incorrectly rely upon state defenses or privileges instead of recognizing federal defenses or privileges flowing from the FCA.[357] The current case law provides little guidance and often less protection from tort counterclaims related to reporting fraud against the government.[358] This Article corrects these errors by demonstrating that a relator is exempt from all tort claims that are connected with or flow from engaging in an activity within the zone of protection afforded by the FCA.

With respect to protecting a defendant from overreaching, ample protections are already built into the FCA framework. First, the FCA requires allegations be filed under seal to allow the DOJ to investigate the allegations.[359] Second, the DOJ has the option to intervene or decline the *qui tam* case.[360] If it intervenes, the company faces allegations by the

353. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 504, 509 (1988).
354. *See supra* Part III.
355. *See supra* Part II.
356. *See supra* Part IV.A.
357. *See supra* Part IV.A.
358. *See* SYLVIA, *supra* note 77, § 11:94; *supra* Part IV.A.
359. 31 U.S.C. § 3730(b)(2) (2012); *see supra* Part II.A.2.
360. 31 U.S.C. § 3730(b)(2).

government itself, which eliminates the main concerns.[361] If the DOJ declines, the government can move to dismiss the case or allow the relator to proceed.[362] If the relator proceeds alone, there are additional safeguards. Specifically, the FCA has a built-in remedy for defendants allowing the recovery of costs:

> 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.[363]

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.[364]

In sum, the zone of protection applies equally to tort claims. The next section 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 are not 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.[365]

For instance, one court correctly found that an employee breached an independent fiduciary duty to her employer because when she 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

361. *See id.* § 3730(b)(4)(A).
362. *Id.* § 3730(b)(4)(B).
363. *Id.* § 3730(d)(4).
364. *See* FED. R. CIV. P. 11(c).
365. 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.[366] 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.[367]

Similarly, a company may bring a claim against an employee who alters or destroys company records.[368] Although the activity of producing internal company records to the government is protected, destroying documents clearly is not.[369] 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* case for serious litigation abuses during litigation once the complaint is served.[370]

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 that are bound up with or flow from the entire process of gathering company documents and information to report suspected fraud to the government or to file a *qui tam* complaint.

V. CONCLUSION

The FCA creates both substantial public and uniquely 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 definition of the zone of protection,

366. United States *ex rel.* Grandeau v. Cancer Treatment Ctrs. of Am., No. 99 C 8287, 2005 WL 300414, at *1 (N.D. Ill. Feb. 4, 2005).
367. *See id.*
368. United States *ex rel.* Hartman v. Allegheny Gen. Hosp., No. Civ. A 02-1948, 2005 WL 2106627, at *2 (W.D. Pa. Aug. 26, 2005).
369. *See id.* at *2, *4 (finding that, regardless of whether the plaintiff had destroyed the company documents purposefully or by mistake, the plaintiff was not engaged in "protected conduct").
370. *See, e.g.*, United States *ex rel.* Scott v. Metro. Health Corp., No. 1:02-CV-485, 2005 WL 3434830, at *7 (W.D. Mich. Dec. 13, 2005) (finding the purpose of plaintiff's retaliation claim was merely to harass and extort the defendant company, and awarding attorneys' fees to company totaling over $1.6 million).

which includes a privilege against counterclaims relating to producing internal company information or documents to the government, as long as the employee possessed a reasonable belief that the suspected fraud or FCA violations occurred or are occurring.[371] 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 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.[372]

371. *See supra* Part II.C. The zone of protection extends to the following situations: the entire process of considering whether to report suspected fraud or file a *qui tam* case, even if an employee was not aware at the time of the existence of the FCA; when an employee ultimately does not file a *qui tam* case; and when it turns out that the company did not actually commit fraud or violate the FCA. 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. When an employee falls within the zone of protection, they are exempt from any claim that is bound up with or flows from carrying out this protected activity.

372. *See supra* Parts III–IV.