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ARTICLE

ALLOWING WHISTLEBLOWERS TO COPY COMPANY DOCUMENTS TO FILE *QUI TAM* COMPLAINTS UNDER THE FALSE CLAIMS ACT WHEN REPORTING MEDICARE FRAUD

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ABSTRACT

The *qui tam* provisions of the False Claims Act, which pay whistleblower rewards of up to 30% of the funds recovered back, have become the government's most powerful tool in combating rising fraud under the Medicare program. Today, 95% of all Medicare fraud recoveries are the result of whistleblowers filing *qui tam* lawsuits. Reporting fraud is most effective when whistleblowers provide the government with documents supporting fraud allegations. The Article argues that a strong public policy flowing from several federal statutes and regulations allows employees to copy company documents and use them to file *qui tam* lawsuits notwithstanding any company policy or contract provision prohibiting employees from disclosing company documents. The Article also suggests amendments to the False Claims Act and Medicare program codifying this strong public policy.

I. INTRODUCTION

Medicare costs are exploding. To compound matters, Medicare reimbursement claims are ripe with fraud. The False Claims Act (FCA) has become the federal government's primary tool for combating Medicare fraud.[1] Under the FCA, a defendant must pay triple damages for falsely

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†† Mr. Hesch extends a special note of thanks to his research assistant, Jillianne Engen (J.D. 2020), who provided valuable assistance in researching and writing this article.

1. Avco Corp. v. U.S. Dep't of Justice, 884 F.2d 621, 622 (D.C. Cir. 1989) ("The False Claims Act is the government's primary litigative tool for the recovery of losses sustained as

claiming reimbursement from Medicare or for knowingly retaining Medicare overpayments.[2] What makes the FCA most successful is its unique approach of enlisting whistleblowers through *qui tam*[3] provisions and paying them a portion of the recovery.[4] Because Medicare fraud is the lion's share of all fraud against the government, it is important to understand and correctly apply the modern FCA's *qui tam* provisions to this sector.

Section I introduces the issues. Section II outlines the scope of Medicare fraud and the need for whistleblowers. Section III discusses the *qui tam* filing requirements and anti-retaliation provisions. Section IV analyzes the public policy considerations associated with the propriety of employees copying documents when reporting Medicare fraud. It includes a discussion of four existing federal statutes and regulations that prohibit employers in general from restricting employees from reporting fraud against the government, which establishes a strong public policy against restricting employees from using company documents when reporting Medicare fraud. Therefore, this Article argues that courts should find that there exists a strong public policy exception in the Medicare context that operates to void any contract provision restricting employees from providing documents to the government (or counsel in anticipation of filing a *qui tam* lawsuit) when reporting Medicare fraud. Similarly, courts should dismiss any claim by an employer against an employee arising from the use of documents in reporting Medicare fraud. Section V proposes that Congress should amend the FCA both to prohibit, under statutory penalty, such contract provisions and to render them void. That would place the FCA whistleblower protections on an equal footing with whistleblowers protected under existing SEC rules. It also proposes that Congress mandate, as a condition of participating in Medicare, that providers not include in any handbook, policy, contract, or severance agreement any restrictions on using company documents when reporting Medicare fraud, similar to existing Department of Defense (DOD) regulations. It's time that the FCA and Medicare participation rules provide

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the result of fraud against the government."). The FCA is also the chief enforcement tool for fraud under all other federal programs. Although this Article focuses on Medicare fraud, the same principles apply equally to fraud under every federal program.

2. 31 U.S.C. § 3729 (2017).

3. "The term '*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."'" Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar"*, 1 LIBERTY U. L. REV. 111, 112 n.6 (2006) (quoting Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 769 n.1 (2000)).

4. S. REP. NO. 99-345, at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273 and *codified at* 31 U.S.C.A. §§ 3729-3733 (2017).

the protections already existing for whistleblowers reporting military fraud and SEC violations.

II. THE SCOPE OF MEDICARE FRAUD

Federal healthcare spending is on the rise and, unfortunately, so is Medicare fraud. Congress has discovered that the best tool for combating Medicare fraud is empowering whistleblowers and paying them a share of the recovery. This section outlines the extent of Medicare fraud and the need for whistleblowers.

A. The Extent of Medicare Fraud

In 2017, Medicare gross spending grew to $708 billion, up from $460 billion ten years earlier (in 2008).[5] In addition, in 2017, the federal portion of Medicaid spending was $492 billion,[6] for a combined total of $1.2 trillion in federal Medicare and Medicaid spending. Medicare spending is projected to grow at an annual rate of 7.4% over the next decade and Medicaid at a rate of 5.8%.[7] By 2023, Medicare spending alone will likely top $1 trillion, with another projected $600 billion in Medicaid spending. Thus, combined Medicare and Medicaid (collectively hereinafter Medicare) spending is set to eclipse $1.5 trillion a year.[8]

As if the amount of Medicare spending were not frightening enough, an estimated 10 percent of all claims submitted to Medicare are fraudulent.[9] At that fraud rate, in 2018 alone, the federal government would have lost $100 billion in undetected Medicare fraud.[10]

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5. *Government Spending Details*, USGOVERNMENTSPENDING.COM, https://www.usgovernmentspending.com/year_spending_2017USbn_XXbs7n_10 (last visited Feb. 3, 2019), and accompanying charts.

6. *Id.*

7. *See CMS Office of the Actuary Releases 2017–2026 Projections of National Health Expenditures*, CTRS. FOR MEDICARE & MEDICAID SERVS. NEWS ROOM (Feb. 14, 2018), https://www.cms.gov/newsroom/press-releases/cms-office-actuary-releases-2017-2026-projections-national-health-expenditures.

8. *See supra* note 5. The chart for the 2023 projections is located at *Government Spending Details*, USGOVERNMENTSPENDING.COM, https://www.usgovernmentspending.com/year_spending_2023USbn_20bs7n_10#usgs302 (last visited Mar. 26, 2019).

9. Joel D. Hesch, *Restating the "Original Source Exception" to the False Claims Act's "Public Disclosure Bar" in Light of the 2010 Amendments*, 51 U. RICH. L. REV. 991, 991 (2017).

10. Based upon 10% of $1 trillion in spending. *See supra* note 5.

B. *The Need for Whistleblowers*

The Civil Fraud Section of the Department of Justice (DOJ) is charged with recovering federal funds lost to fraud. To determine its effectiveness, the DOJ keeps track of statistics, including federal healthcare fraud recoveries each year.[11] In 2018, the DOJ recovered $2.5 billion in healthcare fraud cases.[12] Over the last ten years, the DOJ recouped $24.4 billion in healthcare fraud cases.[13]

The government also keeps track of the role and success of whistleblowers in these fraud recoveries. Of the $24.4 billion collected in the last 10 years, $21.9 billion was the result of *qui tam* cases filed by whistleblowers, which amounted to 90% of Medicare fraud recoveries stemming from *qui tam* cases.[14] The recent trend, however, shows an even greater reliance upon whistleblowers. In the last five years (2014–2018) the rate was 92% from *qui tam* cases.[15] That means less than 10% of all Medicare fraud cases was brought without the help of whistleblowers filing *qui tam* cases. Thus, the *qui tam* provisions are the heart and soul of detecting and pursuing Medicare fraud cases.

There is still much work ahead to keep fighting fraud against the government. But paying rewards to whistleblowers under the *qui tam* provisions is the right solution and has been working well. As explained in later sections, the reason why the reward program is so successful is that relators who properly file *qui tam* lawsuits receive between 15% and 30% of the government's recovery, based upon the relator's efforts. This reward system has made the *qui tam* provisions a huge success. From 1987 to 2018, 7,633 whistleblowers filed *qui tam* suits for reporting Medicare fraud,

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11. The government keeps track of all FCA cases and recoveries, including the amount paid to whistleblowers. The statistics are found here: *Fraud Statistics—Overview, October 1, 1986 – September 30, 2018*, CIVIL DIV., U.S. DEP'T OF JUSTICE (2018), https://www.justice.gov/civil/page/file/1080696/download (last visited Mar. 26, 2019). The DOJ statistics break out the cases and recoveries by area, such as healthcare fraud against the government (which is largely Medicare fraud).

12. *Fraud Statistics—Health and Human Services, October 1, 1986 – September 30, 2018*, CIVIL DIV., U.S. DEP'T OF JUSTICE, https://www.justice.gov/opa/press-release/file/1020116/download (last visited Mar. 26, 2019).

13. *Id.*

14. *Id.* In the last ten years (2009-2018), the percentage from *qui tam* cases was 90% ($21.0 billion out of $24.4 billion). *Id*.

15. *Id.* In the last five years (2014-2018), the percentage from *qui tam* cases was 92% ($11 billion out of $12 billion). *Id.*

resulting in $32 billion in total recoveries.[16] Out of the total recoveries, the DOJ paid whistleblowers rewards of $5.3 billion.[17] That amounts to an average award of $694,350 per *qui tam* filing ($5.3 billion divided by 7,633 filings). Here is how it works: If the government collects $10 million in a *qui tam* case, the reward will be between $1.5 million (15%) and $3 million (30%). In one instance of fraud by a large hospital chain, the DOJ recovered $641 million and paid the whistleblowers $154 million from those proceeds.[18] In that instance, the government netted $487 million (76%) in a case in which it had no idea it was being defrauded. Not a bad return on the investment on paying a reward.[19]

III. THE *QUI TAM* PROVISIONS

Although the FCA has been amended many times over the years, the basic concept has remained constant: recovering fraud by "deputizing"[20] private citizens to file *qui tam* cases and awarding them a share in the proceeds.[21] When the FCA was first enacted in 1863, Congress purposefully chose a *qui*

16. *Supra* note 12. This included both intervened and declined *qui tam* cases. It also included *qui tams* that were dismissed without any recovery or award.

17. *Id.*

18. While at the DOJ, Mr. Hesch worked on this case. The settlement was for $641 million from a single hospital chain, and the government paid the whistleblowers a combined $54 million. *See Justice Department Press Release*, U.S. DEP'T OF JUSTICE (Nov. 10, 2003), https://www.justice.gov/archive/opa/pr/2003/November/03_civ_613.htm.

19. The government wisely gives a portion of the recovery—without a cap—because paying large rewards deters fraud and ushers in new whistleblowers. Indeed, Congress realized through trial and error that whistleblowers are the key to rooting out fraud against the government. Most relators learn of the DOJ reward program from reading media reports of mega-whistleblower awards. Many employees are still unaware that whistleblower awards exist. But paying large *qui tam* awards brings about unprecedented media and public interest in the False Claims Act. In addition, companies that might be tempted to cheat will be forced to rethink their cost–benefit analysis. If a company believes its employees may become aware of rewards and find the right incentive to blow the whistle based on receiving a larger award, the cost of defrauding the government will go up, and the benefit will go down. In short, larger rewards are the best way for the government to recover funds lost to fraud. Finally, let's not forget history. When Congress tried reducing the award amount and restricting relators, fraud rose rampantly. It was a disaster. Reducing or capping rewards didn't work then, and it won't work now.

20. The FCA authorization of *qui tam* actions "encourag[es] 'whistleblowers' to act as 'private attorneys-general' . . . in pursuit of an important public policy." United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1042 (6th Cir.1994).

21. 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, 219 (2012) [hereinafter Hesch, *Breaking the Siege*].

tam mechanism that enables private citizens, referred to as "relators,"[22] to file lawsuits on behalf of the government against fraud doers.[23] In return for their help, the FCA promised relators a share or percentage of the recovery.[24]

The FCA sat largely dormant from 1943 to 1986 after Congress tightened the *qui tam* provisions, making them much too strict.[25] In response to increasing fraud, Congress relaxed the *qui tam* requirements and added anti-retaliation provisions.[26] As a result, the *qui tam* provisions have become the government's most effective tool for combating fraud.[27]

The FCA sets ranges of percentages for determining the relator's share, depending upon certain conditions and factors. In a standard case in which the government intervenes, the relator receives at least a 15% but not more than 25% share.[28] If the government declines to join the suit, the relator proceeds alone and incurs all of the litigation costs.[29] In those instances, the relator is entitled to a minimum of 25% and a maximum of 30% share.[30] Today, 95% of the government's Medicare fraud cases are *qui tam* cases,[31] which highlights the importance of protecting relators.

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22. "A 'relator' is one who relates the fraud action on behalf of the government." Hesch, *supra* note 3, at 112 n.6 (citing United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 (1st Cir. 2004) ("A 'relator' is '[a] party in interest who is permitted to institute a proceeding in the name of the People or the Attorney General when the right to sue resides solely in that official.' [*Relator*, BLACK'S LAW DICTIONARY (6th ed. 1990)].")).

23. S. REP. NO. 99-345, at 10 (1986). For a detailed discussion of the history of the *qui tam* provisions and changes, see Hesch, *Breaking the Siege*, *supra* note 21, at 219–21.

24. S. REP. NO. 99-345, at 10 (1986).

25. *Id.* at 12.

26. *Id.* at 13.

27. *See supra* note 1.

28. 31 U.S.C. § 3730(d)(1) (2017). For a detailed discussion of how the percentage is and should be calculated, see Hesch, *Breaking the Siege*, *supra* note 21. The exact percent depends "upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d)(1) (2017).

29. Hesch, *Breaking the Siege*, *supra* note 21, at 233.

30. 31 U.S.C. § 3730(d)(2) (2017). The exact percentage in declined cases is based on what "the court decides is reasonable." *Id.* As the real party in interest, the government is allowed to recommend a percentage to the court. In practice, the government and the relator negotiate the percentage in both intervened and declined cases, but the court still must approve the relator's share.

31. *See supra* notes 11-15 and accompanying text. The total recovery in health care cases from 1987-2018 was $38.8 billion, of which $32 billion was from *qui tam* cases. See *Fraud Statistics—Overview, October 1, 1986 – September 30, 2018*, *supra* note 11.

A. *Filing Requirements*

To obtain a reward under the FCA, a relator must follow a particular protocol.[32] For instance, a whistleblower will not receive a reward simply by informally reporting fraud against the government; rather, she must file a detailed *qui tam* complaint in court.[33] The relator must file the *qui tam* under seal and serve it only upon specified government officials.[34] In addition, the FCA requires the relator to submit to the government a statement of material evidence (SME) containing a "written disclosure of substantially *all material evidence and information the person possesses*."[35]

The *qui tam* complaint remains sealed for a minimum of sixty days, during which time the government investigates the relator's allegation.[36] Congress allowed for extensions of the seal period to give the government sufficient time to finish its investigation of the relator's fraud allegations.[37] It can take anywhere from three years in a typical case, to six or eight years in large or complex fraud cases, for the government to make an intervention decision.[38] Once the investigation is complete, the government makes a decision to either intervene or decline. If it declines, the relator may typically proceed on behalf of the government.[39]

B. *Anti-Retaliation Provisions*

In some cases, employers have sought to silence whistleblowers through retaliation. However, the FCA whistleblower protection provisions create a cause of action allowing an employee to recover double damages when his

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32. For a detailed discussion of the process of filing a *qui tam*, see Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for* Qui Tam *Complaints Filed Under the False Claims Act*, 38 SEATTLE U. L. REV. 901, 905, 912 (2015) [hereinafter Hesch, *It Takes Time*].

33. *Id.* at 905.

34. 31 U.S.C. § 3730(b)(1), (2) (2017). *See also* Hesch, *It Takes Time*, *supra* note 32, at 912 ("Copies of the complaint are given only to the United States Department of Justice (DOJ), including the local United States Attorney, and to the assigned judge of the district court.") (citation omitted). The relator may not disclose the existence of the case while it remains under seal. *Id.*

35. 31 U.S.C. § 3730(b)(2) (2018) (emphasis added).

36. *Id.*

37. Hesch, *It Takes Time*, *supra* note 32 at 905.

38. *Id.* at 906 n.32.

39. *Id.* at 912. That article also details the government process of assessing the allegations and the role of the affected government agency. *Id.* at 917-21. While sixty days is the minimum allotted time for a complaint to remain under seal, the statute places no limit on how long the case may remain under seal. *Id.* at 912.

employer retaliates for reporting fraud or seeking to stop a company from cheating the government.[40] The retaliation provision, commonly referred to as a "Section (h) claim," protects employees from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" because of steps they have taken to file or consider filing a potential *qui tam* complaint or to stop the fraud.[41] The right to bring a retaliation claim under the FCA vests solely with the employee and is not dependent upon filing a *qui tam* suit. An employee may file a Section (h) claim either as part of a *qui tam* lawsuit or as a stand-alone suit in state or federal court.[42] Because the provision applies to efforts to stop a violation, the employee does not need to either file or prevail on a *qui tam* case. It is sufficient that the employee was seeking to curtail what she, in good faith, believed was an FCA violation, which may include internal reporting of fraud.[43] The protection even "includes the process of investigating or determining whether fraud occurred."[44] In short, protected activities apply when an employee "has a good faith appreciation that he is investigating or raising concerns regarding whether his employer is violating the FCA."[45]

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40. 31 U.S.C. § 3730(h) (2018). For a more complete discussion of the FCA's anti-retaliation provisions, see 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, 55–63 (2011) [hereinafter Hesch, *Whistleblower Rights*].

41. 31 U.S.C. § 3730(h)(1) (2018). Courts have identified three elements for a Section (h) claim: (1) she falls within the scope of the FCA's protection, i.e., was an employee or other protected class; (2) she was engaged in an activity protected by the statute; (3) she was retaliated against; and (4) the retaliation was "because of" the protected activity. *E.g.*, Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 186 (3d Cir. 2001) (restating elements of the statute). The statute of limitations for a retaliation claim is three years. 31 U.S.C. § 3730(h)(3) (2018).

42. Hesch, *Whistleblower Rights*, *supra* note 40, at 62.

43. *See* Mackey v. Fluor Intercontinental Inc., No. 4:15-CV-01913, 2015 WL 6125984, at *3 (S.D. Tex. 2015) (order denying motion to dismiss) (reporting of concerns about deviation from regulations to superiors is a protected activity); Thomas v. EmCare, Inc., No. 4:14-cv-00130-SEB, 2015 WL 5022284, at *4 (S.D. Ind. 2015) (order denying motion to dismiss) (internal reporting may be a protected activity); Pencheng Si v. Laogai Research Found., 71 F. Supp. 3d 73, 100–101 (D.D.C. 2014) (employee's statements about improper spending create a plausible inference that he was engaged in a protected activity) ; Dutcher v. Mid Iowa Reg'l Hous. Auth., No. 12-CV-3081-DEO, 2014 WL 1165856, at *14–15 (N.D. Iowa 2014) (order denying motion for summary judgment) ("There is no magic word requirement regarding protected activity" and employee reporting that he thought something was wrong with the way the defendant was using federal funds is a protected activity).

44. Hesch, *Whistleblower Rights*, *supra* note 40, at 59 (citation omitted).

45. *Id.*

If an employee satisfies all of the elements, she is entitled to a broad array of relief.[46] For instance, if an employee was fired, she is entitled to reinstatement.[47] If she was demoted or overlooked for a promotion, she is entitled to the same status she would have had absent the retaliation.[48] If she was damaged financially in any manner, she is entitled to "2 times the amount of back pay, interest on the back pay, and compensation for any special damages" flowing from the retaliation.[49]

IV. STRONG PUBLIC POLICY MANDATES PROTECTING EMPLOYEES COPYING DOCUMENTS FOR USE IN FILING *QUI TAM* LAWSUITS

This section demonstrates why a strong public policy mandates protecting whistleblowing employees when they copy company documents for use in reporting fraud against the government. First, Congress enacted several laws that form a strong public policy providing for protection of whistleblowers reporting Medicare fraud. Second, there are two separate lines of Supreme Court cases granting courts the power to both void contract clauses and bar state court claims when they run counter to strong public interests. Accordingly, courts should (1) treat confidentiality contract provisions as unenforceable to the extent that they limit, in any manner, providing information to the government regarding fraud against the government, and (2) prevent state claims against whistleblowers based upon such confidentiality provisions.

As noted, the FCA is the government's chief tool for combating fraud against the government.[50] In addition to the FCA, another federal regulation applies to the Medicare fraud context that strengthens the public policy argument favoring protection of whistleblowers when reporting Medicare fraud. Specifically, HIPAA regulations permit whistleblowers to disclose protected health information when reporting suspected Medicare fraud to their counsel or the government.[51]

Congress and agencies did not stop there. As discussed in subpart c below, they mandated that no procurement contract can be entered into with any company that uses any confidentiality provision chilling employees from

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46. 31 U.S.C. § 3730(h)(2) (2018).

47. *Id.*

48. *Id.*

49. *Id.* A prevailing employee is also entitled to costs and reasonable attorney fees. *Id.*

50. *See supra* notes 1 and 27. The FCA applies not only to Medicare fraud, but to fraud against every government program.

51. *See infra* note 86 and accompanying text.

reporting government fraud. As discussed in subpart d below, the SEC enacted similar regulations. Because similar language does not appear in the FCA or Medicare regulations, Medicare providers continue to include in contracts a prohibition against disclosing company documents to anyone, including the government. Employers wrongfully use these "gag clauses"[52] to sue employees for violating such provisions even when the employee limited disclosure to the government in filing a *qui tam* complaint.[53] Although Section V urges Congress to protect relators by enacting similar laws to apply to Medicare, this Section argues that "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."[54] Thus, even under the current laws, there exists a zone of protection exempting relators in *qui tam* cases from claims relating to copying company documents supporting Medicare fraud allegations. There are two separate lines of Supreme Court cases establishing this protection.

First, the Court in *Town of Newton v. Rumery* ruled that contracts cannot be enforced if they violate public policy.[55] 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."[56] Further, when a court is asked to void a contract provision based upon public policy, it must balance the competing public interests.[57] Thus, the initial step is determining the strength of the claimed public interest.[58] The stronger the public interest, the stronger the protection.

Second, the Supreme Court in *Boyle v. United Technologies Corporation* held that when "uniquely federal interests" exist, courts may create federal common law that preempts state law and bars claims.[59] The same federal

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52. These types of provisions are referred to as "de facto gag clauses." Jennifer M. Pacella, *Silencing Whistleblowers by Contract*, 55 AM. BUS. L.J. 261, 272 (2018).

53. See cases cited in Joel D. Hesch, *The False Claims Act Creates a "Zone of Protection" That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 DRAKE L. REV. 361 (2014) [hereinafter Hesch, *Zone of Protection*].

54. *Id.* at 366.

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

56. *Id.*

57. *See Rumery*, 480 U.S. at 392. *See also* Hesch, *Zone of Protection*, *supra* note 53, at 367.

58. *See Rumery*, 480 U.S. at 399–401 (O'Connor, J., concurring) (explaining the case-by-case approach of balancing public interests). *See also* Hesch, *Zone of Protection*, *supra* note 53, at 367.

59. 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)). *See also* Hesch, *Zone of Protection*, *supra* note 53, at 367.

statutes and regulations provisions similarly classify as protecting "uniquely federal interests" by recruiting relators to file *qui tam* lawsuits. In short, a strong federal public interest flowing from *qui tam* provisions created a federal common law that should bar state contract and tort claims relating to copying company documents for use in reporting fraud against the government to the government.

Combined, these two lines of cases provide complete protection for whistleblowers reporting fraud against the government. Under *Rumery*, confidentiality contract provisions are unenforceable to the extent that they limit in any manner providing information to the government regarding fraud against the government. The *Boyle* line of cases goes one step further and prevents state claims against whistleblowers based upon such confidentiality provisions when a whistleblower uses company documents to report fraud to the government.[60]

The starting point for both lines of cases is examining relevant federal statutes and regulations because "[f]ederal 'public policy' is typically found in the Constitution, treaties, federal statutes and regulations, and court cases."[61] Under the public-policy exception flowing from *Rumery*, most courts correctly treat confidentiality agreements as unenforceable to the extent they seek to prevent relators from filing *qui tam* cases.[62] One district

60. Under *Rumery*, any cause of action based upon a contract provision that is void would be foreclosed. Under *Boyle*, any cause of action under State common law would be similarly foreclosed.

61. Thomas James Assocs., Inc. v. Jameson, 102 F.3d 60, 66 (2d Cir. 1996) (citations omitted). "[W]hile violations of public policy must be determined through definite indications in the law of the sovereignty, courts must not be timid in voiding agreements which tend to injure the public good or contravene some established interest of society" *Id.* (citations omitted).

62. *See* Hesch, *Zone of Protection*, *supra* note 53, at 387. *See also* United States v. Northrop Corp., 59 F.3d 953, 961–63 (9th Cir. 1995) (discussing rule in FCA case where private agreement which provided for release of relator's claims was held unenforceable); United States *ex rel.* Ruhe v. Masimo Corp., 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012) ("[T]he strong public policy [of the FCA] would be thwarted if [a company] could silence whistleblowers and compel them to be complicit in potentially fraudulent conduct."); United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146, 152 (D.D.C. 2009) ("In the absence of an expression of Congressional intent to the contrary, a private agreement is unenforceable on grounds of public policy if its enforcement is clearly outweighed by a public policy against such terms. . . . Enforcing a private agreement that requires a qui tam plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose of this provision."); X Corp. v. Doe, 805 F. Supp. 1298, 1310 n.24 (E.D. Va. 1992) (noting that a confidentiality agreement would be void as against public policy if, when enforced, it would prevent "disclosure of evidence of a fraud on the government").

court case illustrates this point by summarizing the federal common law in this area:

> [S]everal courts have recognized a public policy exception to the enforcement of nondisclosure agreements and similar contractual obligations related to information used in pursuit of False Claim Act investigations. . . . Most federal courts acknowledge this public policy exception. . . .
>
> Courts have also noted that Congress, in passing the FCA, contemplated the need for relators to produce and obtain confidential corporate documents. . . .
>
> The Seventh Circuit has similarly recognized a "broad" policy interest in fostering employee actions under the False Claims Act. . . . In the context of assessing a retaliation claim based on the plaintiffs claim under the False Claims Act, the Seventh Circuit recognized the policy importance of not discouraging whistleblowers from undertaking investigative efforts that might expose fraud against the government. . . . This recognition is consistent with "the FCA's unique structure," which some argue, "mandates that the relator produce internal company information as part of filing a *qui tam* case."[63]

In the *Schmushkovich* case, the relator retained company documents on his laptop computer that he used at home for job related duties.[64] He used these documents as part of filing a *qui tam* case.[65] Upon termination of the relator's employment, the company had requested the return of all company documents.[66] Based upon the public policy arguments cited above, the court did not require the relator to return any documents.[67] Rather, the relator was ordered to destroy documents not relevant to the *qui tam* allegations and retain any copies he and his counsel determined were relevant.[68] The only relief the court granted to the company was requiring the relator to produce a copy of all documents retained, which would enable the company to ask the

63. Shmushkovich v. Home Bound Healthcare, Inc., No. 12 C 2924, 2015 WL 3896947, at *1–2 (N.D. Ill. June 23, 2015) (citations omitted).

64. *Id.* at *1.

65. *Id.* at *1–3.

66. *Id.* at *1.

67. *Id.* at *3. Although the case did not specifically state the stage of the *qui tam* case, the motion and ruling occurred after the complaint was unsealed. *Id.* at *1.

68. *Id.* at *3.

court to order the return or destruction of documents that it contended were irrelevant or privileged.[69]

Although this decision and many like it that allow a relator to use company documents for reporting fraud are clearly correct, few, if any, courts have fully acknowledged the complete scope of the strength of the public policy argument and therefore have not consistently applied the full measure of protection to whistleblowers reporting fraud against the government. First, there are even stronger public policy arguments flowing from the FCA than those stated in the *Schmushkovich* case. Second, the court did not address the additional public policy interests flowing from other statutes and regulations. Third, most courts have not considered the additional federal interests and protections extending from the *Boyle* line of cases that preempts state law claims when they conflict with federal interests.

This Article argues that the public policy protections are much stronger than recognized in most cases because no court has yet to analyze or discuss all of the relevant federal statutes and regulations shaping the strength of public policy protections for whistleblowers when reporting Medicare fraud.

A. The FCA Contains Six Policy Provisions Protecting Whistleblowers

Although most courts have cited to the FCA as the basis for determining the strength of the government's public policy need for enlisting and protecting whistleblowers, none have actually identified or applied all of the protections flowing from the FCA. As outlined below, there actually 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."[70]

First, the FCA expressly requires each relator to supply the government with a statement of material evidence (SME) containing *all information and documents* he possesses that support the FCA allegations, which necessarily includes company documents within his control.[71] The purpose of an SME "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

69. *Shmushkovich*, No. 12 C 2924, 2015 WL 3896947, at *3. In addition, to the extent any retained documents are privileged, the court would hold a hearing to assess the privilege or determine if there are any actual damages or injury from retaining such privileged documents. *Id.*

70. Hesch, *Zone of Protection*, *supra* note 53, at 369. The policy arguments are stated in greater detail in that article. This Article summarizes these points.

71. 31 U.S.C.A. § 3730(b)(2) (2017).

the filed lawsuit or allow the relator to proceed alone."[72] Accordingly, the FCA has emphasized the need for (and expressly authorized the production of) inside evidence of fraud from the relator, including internal company documents, as part of filing a *qui tam* lawsuit.[73]

Second, the FCA also requires that the relator file the *qui tam* complaint with the court under seal and serve the complaint and SME only 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.[74] Mandated to file lawsuits that meet Rule 9(b),[75] relators must rely upon specific evidence that often exists only in company documents.

Third, the FCA rewards only information that is not publicly available (e.g., 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.[76] This is called the public disclosure bar.

Fourth, the FCA provides relators sliding scale monetary incentives by basing compensation on two criteria: (i) their contribution in litigating the action; and (ii) their provision of inside, first-hand knowledge, with higher rewards for inside information.[77] Thus, relators who produce company documents receive a higher relator share.

Fifth, the FCA contains an anti-retaliation provision, which allows a relator to recover, in addition to his award for reporting fraud, double damages plus attorney fees for any acts of retaliation.[78] Suing a relator for filing a *qui tam* based upon company information is the classic retaliation the FCA is designed to defeat.

Sixth and finally, the FCA controls what remedies are available to a defendant related to the filing of a *qui tam* case and specifically limits it to the narrow instances when defendants can prove that the relator brought an

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72. E.g., 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 (10th Cir. 1986)).

73. *See supra* notes 69-71 and accompanying text.

74. 31 U.S.C.A. § 3730 (b)(2) (2017).

75. "It has been universally held that Rule 9(b) applies to a *qui tam* complaint." Charis Ann Mitchell, *A Fraudulent Scheme's Particularity Under Rule 9(b) of the Federal Rules of Civil Procedure*, 4 Liberty U. L. Rev. 337, 345 (2010). Courts often require a relator to specify "'who, what, where, when, and how' of the alleged fraud." *Id.* at 358.

76. 31 U.S.C.A. § 3730(e)(4)(A) (2017).

77. *Id.* at § 3730(d).

78. *Id.* at § 3730(h).

action that was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment."[79]

In short, two lines of Supreme Court cases not only allow employees to provide the government with internal company documents, but protect relators from retaliation and lawsuits. Under *Rumery*, these six FCA provisions demonstrate a strong public policy that operates to void gag clauses in contracts. Under *Boyle*, lawsuits themselves against relators for using company documents as part of filing *qui tam* complaints are preempted. This is because these six provisions amount to a well-defined and substantial public interest designed to protect a uniquely federal interest, by encouraging and protecting relators who step forward with documents to report fraud against the government.[80] By its plain language, the FCA protects relators filing *qui tam* cases by necessarily including and expressly requiring relators to produce internal company information and documents to the DOJ to investigate the fraud, as well as the other policy interests stated above.[81]

B. HIPAA Exempts Whistleblowers When Reporting Fraud

The public policy aims explicitly stated in the FCA alone would be a sufficient basis for a public policy exception that voids confidentially agreements and protects relators from suits relating to copying company documents. Notwithstanding that, there is another Medicare specific regulation that further establishes that the public policy interest is very strong in protecting whistleblowers and permitting the use of company documents when filing a *qui tam* complaint.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) was enacted on August 21, 1996 to protect patient information.[82] HIPAA contains a "Privacy Rule," which protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information "protected health information."[83] It includes things such as the individual's "past, present, or future physical or

79. *Id.* at § 3730(d)(4). Therefore, by implication, a defendant may not bring any alternative claims against a relator. *See id.* at § 3730(d)(4).

80. Hesch, *Zone of Protection*, *supra* note 53, at 382.

81. *Id.*

82. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

83. 45 C.F.R. § 160.103 (2019).

mental health or condition."[84] It also covers a patient's name, address, birth date, and Social Security Number.[85]

It would be nearly impossible for a whistleblower to report Medicare fraud without disclosing protected health information, such as reporting incorrect billing based upon the diagnosis of patients, without identifying the patient or the diagnosis. Therefore, the law recognizes an important exemption. A person doesn't violate HIPAA for copying and giving protected health information to an attorney for help in reporting fraud, applying for a DOJ reward, or giving the information directly to the government as part of reporting suspected Medicare fraud. Specifically, the whistleblower exemption in HIPAA states:

> (1) Disclosures by whistleblowers. A covered entity is not considered to have violated the requirements of this subpart if a member of its workforce or a business associate discloses protected health information, provided that:
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> (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, or that the care, services, or conditions provided by the covered entity potentially endangers one or more patients, workers, or the public; and
>
> (ii) The disclosure is to:
>
> (A) A health oversight agency or public health authority authorized by law to investigate or otherwise oversee the relevant conduct or conditions of the covered entity or to an appropriate health care accreditation organization for the purpose of reporting the allegation of failure to meet professional standards or misconduct by the covered entity; or
>
> (B) An attorney retained by or on behalf of the workforce member or business associate for the purpose of determining the legal options of the workforce member or business associate with regard to the conduct described in paragraph (j)(1)(i) of this section.[86]

84. *Id.*

85. *See id.*

86. 45 C.F.R. § 164.502(j) (2019).

The key point is that even with respect to the most private of information, the federal government's policy of reporting Medicare fraud is so strong that HIPAA contains a specific exemption allowing whistleblowers to use health records in the possession of employers. By specifically allowing employees to copy and produce patient information to the government provides a clear statement of a strong public policy; namely, that employees must be protected when producing company internal documents as part of reporting Medicare fraud. Because this regulation is in the Medicare context, it applies directly to Medicare providers and their employees, and it should be used in conjuncture with the six provisions within the FCA. Together, the FCA and HIPAA regulations comprise a strong public policy mandating that employers may not restrict employees from using company documents when filing a *qui tam* complaint alleging Medicare fraud.

C. Procurement Law Prohibits Use of Confidentiality Agreements Restricting Reporting Fraud

In addition to the FCA and HIPAA laws, Congress has spoken in another context that further informs that the public policy interest is strong in allowing employees to rely on company documents when reporting Medicare fraud. In fact, Congress could not have made a stronger public policy statement than it did in December 2014, by enacting a law prohibiting the federal government from even doing business with any company that requires employees to sign confidentiality agreements that prohibit reporting fraud against the government. Specifically, the statute provides:

> None of the funds appropriated or otherwise made available by this or any other Act may be available for a contract, grant, or cooperative agreement with an entity that requires employees or contractors of such entity seeking to report fraud, waste, or abuse **to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or cont[r]actors from lawfully reporting such waste, fraud, or abuse** to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.[87]

87. Consolidated and Further Continuing Appropriations Act 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014) (emphasis added).

After notice and comment, the DOD, General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) enacted regulations implementing the statute. The regulations read as follows:

> The Government is prohibited from using fiscal year 2015 and subsequent fiscal year funds for a contract with an entity that requires employees or subcontractors of such entity seeking to report waste, fraud, or abuse to **sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting such waste, fraud, or abuse** to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.[88]

Thus, no affected contractor may include in any policy or contract any language that might chill employees from reporting fraud against the government. In fact, the regulation went one step further to require any potential contractor to affirmatively represent to the government as a condition of being awarded a contract "that it will not require its employees or subcontractors to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse."[89]

Unlike typical government procurements, most federal healthcare programs often use a "pay and chase"[90] mechanism for delivering healthcare. Therefore, Medicare does not fall neatly within the framework of this procurement law. Unlike DOD contractors who sign contracts to provide goods or services, Medicare goes about it backwards. To allow for the prompt treatment of illnesses, the Medicare program allows providers to perform healthcare services to the needy and to later submit request for reimbursements.[91] Arguably, however, this federal law could be interpreted to reach Medicare providers. The statute prohibits using fiscal year funds for a contract with an entity.[92] Medicare appropriations are federal fiscal year

88. 48 C.F.R. § 3.909-1 (2019) (emphasis added). The law is continuing in nature and not limited to 2015 funding.

89. *Id.* at § 3.909–2.

90. United States v. Kinetic Concepts, Inc., No. CV 08-01885-BRO (AGRX), 2017 U.S. Dist. LEXIS 221777, at *3 (C.D. Cal. Mar. 6, 2017) ("This system is referred to as a 'pay and chase' system because Medicare accepts claims as being true representations that the claim qualifies for reimbursement and later follows up with the claimant if it is determined that the claim was not reimbursable.").

91. *Id.* at *2-3.

92. *See supra* note 88.

funds, and each Medicare provider enters into a program contract, even though there is not a separate contract for each service provided. In any event, even if the law is not squarely on point, the pronouncement by Congress is just as poignant; there is a strong objection to companies using confidentiality type agreements to chill reporting fraud against the government. In fact, it is so strong that the government won't even do business with such a company. Courts should be guided to determine federal policy from such federal statutes and regulations,[93] because they address whistleblower protections relating to reporting fraud against the government.

D. SEC Rules Prohibit the Use of Confidentiality Agreements Restricting Reporting Fraud

The SEC also enacted rules that impact public policy. One particular rule states:

> No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.[94]

Under this provision, one company was penalized $265,000 because "restrictive language forced employees leaving the company to waive possible whistleblower awards or risk losing their severance payments and other post-employment benefits."[95] Although the SEC rule by itself doesn't directly apply to most healthcare companies, it does inform the scope of the public policy argument that contracts should not be enforced anytime an employer seeks to dissuade employees from reporting fraud or providing the government with proof, including by copying company documents.

Assuming that some Medicare providers are publicly traded entities, they are already covered by this new rule. But the regulation, as written, only speaks of reporting fraud to the SEC, and therefore does not directly apply to

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93. *See supra* note 60-61 and accompanying text.

94. SEC Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-17 (2019).

95. *Company Paying Penalty for Violating Key Whistleblower Protection Rule*, U.S. SEC. & EXCH. COMM'N, (Aug. 10, 2016), https://www.sec.gov/news/pressrelease/2016-157.html.

a whistleblower filing a *qui tam* complaint. Nevertheless, this regulation provides yet further support that there exists a strong federal public policy against any potential chilling of whistleblowers reporting fraud.

E. Strong Public Policy Exists Allowing Employees to Copy Company Documents When Reporting Fraud

In sum, Congress and agencies have already addressed these concerns a multitude of times and each time clearly pronounced that entities should not restrict employees from reporting fraud to the government. Based upon the FCA and HIPAA alone, there exists a strong public policy in favor of whistleblowers producing company documents to legal counsel or the government as part of reporting suspected Medicare fraud. The public policy argument is only further strengthened by similar pronouncements in the procurement and SEC settings that prohibit the same contract clauses and protect whistleblowers for reporting other fraud to the government. Thus, courts should not only void confidentiality provisions but also dismiss any legal claims against a whistleblower when the production of documents is made only to legal counsel or the government as part of the process of filing a *qui tam* complaint. As discussed below, due to the safeguards contained within the framework of filing a *qui tam* case, this protection extends even when not all of the documents are relevant or includes some privileged materials.

1. Potentially Irrelevant Documents

Assuming a relator may properly use company documents when filing a *qui tam* complaint, some courts have questioned whether the protection extends to documents when a whistleblower also gathers potentially irrelevant documents.[96] Based upon *Rumery*, the protection should match the strength of the public interest.[97] As demonstrated, the public interest is very strong and needs broad protection, which should not be limited to only documents that later turn out to be relevant to the *qui tam* allegations.

If an employee believes that a court will second guess the level of protection based upon what a judge might later determine to be relevant documents, it will have the same chilling effect as the offending confidentiality clauses. In addition, when assessing this issue, courts should take note that the public policy interest is actually greater than stated in existing case law because those cases did not take into account the full strength of the government's interest in enlisting employees to provide

96. *See* Hesch, *Zone of Protection*, *supra* note 53, at 409-15.

97. *See supra* notes 55-58 and accompanying text.

company documents. Thus, courts should not blindly accept existing cases, even those that have offered protection, because the protections were understated. This section suggests the proper approach to address a company's concern that a whistleblower provided documents to the government that later turn out to be irrelevant to the fraud allegations.

As explained earlier, the FCA requires a whistleblower to produce documents to the government when filing a *qui tam* case.[98] In fact, the government may decline to take a case without documents because documents are the heart of proving fraud allegations and whistleblowers receive increased awards when producing documents.[99] The problem whistleblowers face is determining what documents might be relevant to proving fraud.

Unfortunately, the only federal court of appeals case addressing retaining irrelevant (and privileged) documents involved such egregious facts that the court upheld a claim against the purported whistleblower without even addressing whistleblower protections flowing from public policy.[100] Indeed, the court upheld a suit against the former employee for breach of confidentiality agreement due to a lack of a reasonable belief that the company was defrauding the government and not due to the amount of documents retained.[101] In that case, the relator believed her employer applied for a patent in which (she believed) the government had an ownership interest.[102] When she was about to be terminated, she randomly copied eleven gigabytes worth of documents just in case she might want to read them[103] and rushed to file a six-page *qui tam* complaint without reading a single page of those documents.[104] Included were attorney–client privileged communications, trade secrets, and a patent application subject to a secrecy order.[105] In addition, there were "numerous discovery abuses" during litigation, including attaching privileged documents to the amended complaint.[106] Finally, the relator ultimately admitted she had no evidence in

98. *See supra* notes 71-75 and accompanying text.

99. *See supra* note 77 and accompanying text.

100. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047 (9th Cir. 2011). This case was analyzed in greater depth in Hesch, *Zone of Protection*, *supra* note 53, at 410-413.

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

102. *Id.* at 1053.

103. United States *ex rel.* Cafasso v. Gen. Dynamics C4 Sys., Inc., No. CV-06-01381 PHX NVW, 2011 U.S. Dist. LEXIS 66740, at *5 (D. Ariz. Jun. 21, 2009), *aff'd*, 637 F.3d 1047 (9th Cir. 2011).

104. *Cafasso*, 637 F.3d at 1052, 1062.

105. *Id.* at 1062.

106. *Id.* at 1052.

support of her FCA claims.[107] It is no wonder the relator was not afforded any public policy exception. However, this case should not be used for the premise that the mere volume or lack of relevancy of documents retained diminishes the public policy exemption for copying potentially relevant documents as part of a *good faith* filing of a *qui tam* case.

The dilemma facing whistleblowers as to what documents to copy was summed up in a prior law review article by the author, as follows:

> [L]arge 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.
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> 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. Most FCA cases involve many thousands of pages of documents, with many large cases topping a million pages of documents. 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. In addition, because of the heightened pleading requirements under Federal Rule of Civil Procedure Rule 9(b), a relator must have evidence of the "'who, what, when, where, and how' of the alleged fraud." To do so, a relator usually gathers and produces a significant amount of documents to support FCA allegations and survive a motion to dismiss.[108]

Thus, the evils of overproduction are overstated because bad faith filings of *qui tam* complaints are never protected by public policy, and good faith

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107. *Id.*

108. Hesch, *Zone of Protection*, *supra* note 53, at 410, 415 (citations omitted).

filings have several layers of protections. Even if a large quantity of documents is ultimately decided to have been irrelevant, there is no real harm. First, a good faith whistleblower is producing only those documents that she had access to in the normal course of her duties. In fact, even if she did not turn over any documents, she could still provide the same "information" to the government as contained in the documents without violating the company's gag clause restricting the disclosure of company documents. Of course, not everyone has a photographic memory, which is why the FCA encourages whistleblowers to turn over documents when filing *qui tam* cases. But the point is that the information produced in good faith filings of *qui tam* cases is not protected from disclosure and should not be shielded through gag clauses. Second, the government can obtain the exact same documents in discovery, further establishing a lack of any real harm. Courts have recognized that "it would be inefficient and a waste of resources to have the plaintiff return the 'misappropriated documents' only to then have them produced in discovery."[109]

In addition, it is unjustified to expect a lay person to determine by herself the relevancy of documents. As stated in the author's previous article,

> 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. 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 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.
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> . . . . 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

109. *E.g.*, United States *ex rel.* Gohil v. Sanofi U.S. Servs. Inc., No. CV 02-2964, 2016 WL 9185141, at n.3 (E.D. Pa. Sept. 29, 2016) (citing X Corp. v. Doe, 805 F. Supp. 1298, 1311-12 (E.D. Va. 1992)) ("denying request for return of misappropriated corporate documents because would be inefficient and no irreparable harm possible under the parameters of discovery disclosure"); Shmushkovich v. Home Bound Healthcare, Inc., No. 12 C 2924, 2015 WL 3896947, at *3 (N.D. Ill. Jun. 23, 2015) ("[C]ourts, however, have recognized the inefficiency of ordering return of documents that formed the basis of a relator's claims and that will inevitably be recovered in discovery." (citations omitted)).

> may, as a consequence, spend valuable company time combing through voluminous records to develop the case. 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.[110]

Indeed, as aptly stated by the Seventh Circuit Court of Appeals, "Congress intended to protect employees from retaliation while they are collecting information about a possible fraud, before they have put all the pieces of the puzzle together."[111] Generally, the only way for a whistleblower to put the pieces of the puzzle together is to hire legal counsel. Thus, it is entirely permissible for a whistleblower to produce to legal counsel all potentially relevant documents and obtain assistance in sifting through documents and determining actual relevancy. There is no real harm in having legal counsel review large quantities of documents to determine relevancy. That is precisely what happens in all forms of litigation on a daily basis. Again, the whistleblower is reviewing only those documents she had access to as part of her employment. She is simply asking legal counsel to help review them to determine relevancy. To expect a whistleblower to journey alone in reporting her employer is unfair and would defeat the purpose of encouraging whistleblowers to step forward.

Finally, the protection applies only when the documents are provided to legal counsel for assistance in evaluating fraud allegations and then turning over any such documents to the government. It does not extend to a whistleblower producing company documents to third parties. The process of allowing counsel to have access to files that may contain relevant information serves an important public policy while also protecting the rights of the company to weed out irrelevant or privileged documents when submitting the FCA's required statement of material evidence to the government.

Several recent cases have understood and properly applied these points. As discussed earlier, one court allowed a former employee to retain his computer hard drive and to produce relevant documents to the government as part of filing a *qui tam* case and was simply ordered to destroy any irrelevant documents.[112] In doing so, the employee was allowed the assistance of legal counsel when determining relevancy. In another case, when

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110. Hesch, *Zone of Protection*, *supra* note 53, at 415-16 (citations omitted).

111. Fanslow v. Chicago Mfg. Ctr, Inc., 384 F.3d 469, 481 (7th Cir. 2004).

112. Shmushkovich v. Home Bound Healthcare, Inc., No. 12 C 2924, 2015 WL 3896947, at *3 (N.D. Ill. June 23, 2015). *See supra* notes 64-69 and accompanying text.

dismissing counterclaims related to the production of documents to the government, the court noted that both federal and state law "recognize a public policy that protects whistleblowers from retaliation for actions they take in investigating and reporting fraud to the government" and that there exists a "strong policy of protecting whistleblowers who report fraud against the government."[113] The court also endorsed allowing legal counsel to aid in determining the scope of relevancy and deciding what documents to produce to the government when filing a *qui tam* case. According to the court,

> It is unrealistic to impose on a relator the burden of knowing precisely how much information to provide the government when reporting a claim of fraud, with the penalty for providing what in hindsight the defendant views as more than was needed to be exposure to a claim for damages. Given the strong public policy encouraging persons to report claims of fraud on the government, more is required before subjecting relators to damages claims that could chill their willingness to report suspected fraud.[114]

In short, overproduction of documents that an employee had authorized access to is not a reason to avoid the strong public policy protections for an employee when producing documents to the government. Again, the protection only applies when the documents are produced to counsel in contemplation of reporting fraud and to the government as part of filing a *qui tam* complaint. It also applies only to documents the employee had access to as part of her duties. Thus, there is no harm that confidential documents are used for any other purpose than reporting fraud against the government. Indeed, allowing a whistleblower to provide access to all potentially relevant documents to legal counsel is not only prudent but a good way of refining fraud allegations and ultimately producing to the government those documents that are most likely to be germane to the government's evaluation of the fraud allegations.

2. Potentially Privileged Documents

This subsection addresses whether the zone of protection applies when privileged documents are turned over to legal counsel or the DOJ as part of the relator's required SME. Again, the FCA mandates that a relator produce copies of all potentially relevant documents in support of allegations

113. United States *ex rel.* Ciezynski v. Lifewatch Servs., Inc., WL 2771798, at *3 (N.D. Ill. May 13, 2016).

114. *Id.* at *5.

contained in a *qui tam* complaint.[115] Thus, relators will be producing documents to the DOJ attorneys assigned to investigate the *qui tam* allegations. The question is how to balance the very strong public policy interest in producing documents with the danger that some documents might be privileged. This subsection guides the courts in this area.

Mistakes happen, and privileged documents have been known to have been inadvertently produced to opposing counsel during all forms of litigation. The same mistakes can happen when a whistleblower turns over documents to his counsel or the government as part of filing a *qui tam* complaint. However, there are many safeguards built into the *qui tam* process that reduce mistakes and lessen the impact of mistakes. In a prior law review article, the author outlined the safeguards, as follows:

> As an initial matter, the filing of a qui tam case generally requires that a relator use the services of an attorney. One of the roles of qui tam counsel is to screen documents for privilege before producing them to the DOJ in the SME. Thus, the first safeguard is that the relator's attorney, who is an officer of the court and bound by ethical rules, will assist in flagging potentially privileged documents and refrain from using them.
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> . . . .
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> 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. A DOJ attorney that is not working on that 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. 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.[116]

Therefore, the mere fact that a potentially privileged document is turned over to a whistleblower's attorney or contained within production to the government does not erase the zone of protection afforded to whistleblowers. It can be extremely difficult for a whistleblower to know if a document is

115. *Supra* notes 71-75.

116. Hesch, *Zone of Protection*, *supra* note 53, at 407-08.

privileged, especially since many companies routinely copy attorneys on business documents, and there exist exceptions to the privilege, such as the crime-fraud exception.[117] In fact, courts typically address the scope of privilege on a case-by-case basis.[118] Thus, a whistleblower needs the assistance of legal counsel when assessing both the relevancy and potential privilege of documents. That helps explain why the law requires a whistleblower to not only produce relevant documents to the government as part of the SME, but also hire legal counsel to file the *qui tam* case.[119]

Because of the safeguards built into the *qui tam* process, the risk of any actual harm from a relator inadvertently turning over potentially privileged documents to her counsel is minimal. In addition, any actual damage is reduced to almost zero because the DOJ will not rely upon any privileged documents produced by a relator due to the taint team protocols identified above. Thus, the government attorneys handling the *qui tam* case will not actually see any privileged documents that might be supplied by the relator. In short, the fear of actualized harm related to the production of privileged documents in a *qui tam* case is overstated in all but instances of bad faith, which is outside of the scope of protection. Accordingly, unless the relator produced privileged documents to third parties, he remains within the zone of protection from claims for reporting fraud to the government, even if some privileged documents are inadvertently produced to the government.

In sum, not only is copying company documents to give to the government exempt from HIPAA and encouraged by the FCA and other federal statutes, the public policy exemptions from *Rumery* and *Boyle* each independently void contract clauses and bar a company from bringing a suit against an employee for providing legal counsel or the government with company documents.[120] Thus, the combination of the FCA and other statutes provides a "zone of protection, which includes a privilege against

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117. *Id.* at 404-05 ("[A]t times it can be especially difficult for a relator to determine if a privilege applies or whether the crime-fraud exception erases the privilege").

118. *Id.* at 405 ("Indeed, the issue of the existence of a privilege (or any exception) is determined by a court on a case-by-case basis, and even attorneys often mistakenly produce privileged documents during litigation.").

119. Courts uniformly dismiss *qui tam* cases filed pro se. *See, e.g.*, U.S. *ex rel.* Mergent Servs. v. Flaherty, 540 F.3d 89 (2d Cir. 2008); Timson v. Sampson, 518 F.3d 870, 873–874 (11th Cir. 2008); U.S. *ex rel.* Brooks v. Lockheed Martin Corp., 237 Fed. Appx. 802 (4th Cir. 2007); Stoner v. Santa Clara City. Office of Educ., 502 F.3d 1116 (9th Cir. 2007).

120. *See* Hesch, *Zone of Protection*, *supra* note 53, at 366 ("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.").

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."[121] In addition, the zone of protection applies to the production of potentially irrelevant documents and potentially privileged information.[122] Therefore, courts should void any contract provision that restricts employees from providing documents to the government (or counsel in anticipation of filing a *qui tam* lawsuit) when reporting fraud against the government.

V. LEGISLATIVE FIXES

Because employers continue to include in employment handbooks and agreements restrictions on retaining or disclosing company documents, which are seemingly broad enough to include for use in reporting Medicare fraud, Congress should amend the FCA to render such contract provisions void and enable the government to sanction companies that have offending contract provisions. This is similar to existing SEC rules. In addition, Congress should vest the DOJ with authority to fine or sanction offenders. Congress should also require that, as a condition of participating in Medicare, providers will affirmatively represent that they have not included in any handbook, policy, contract, or severance agreement any restrictions on using company documents when reporting Medicare fraud. This is similar to existing DOD regulations. It's time that the FCA and Medicare participation rules be amended to clearly provide the legislative protections already existing for whistleblowers reporting DOD fraud and SEC violations.

Modeled after the 2014 procurement law and other relevant regulations discussed above, Congress should amend the FCA to further clarify the strong public policy of allowing employees to provide company documents to the government. Here is a proposed amendment to the FCA:

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121. *Id.* at 430-31.

122. *Id.* at 404–05

> When relators fall within the FCA's zone of protection, 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. Nevertheless, whistleblowers should not intentionally provide documents to the government that are protected by the attorney-client privilege. However, at times it can be especially difficult for a relator to determine if a privilege applies or whether the crime-fraud exception erases the privilege.

Id. (explaining the scope of protection pertaining to privileged documents). *Id.* at 410-11 (explaining the scope of protection pertaining to irrelevant documents).

> No person may receive payment under any government program if such person asks any employee or former employee to sign or agree to confidentiality agreements or statements prohibiting or otherwise restricting such employee or former employee from using company documents obtained within the scope of employment for use in (1) filing a *qui tam* complaint, (2) providing to an attorney retained to consider whether to file a *qui tam* complaint, or (3) reporting suspected fraud directly to the government. Any agreement that acts to prohibit or restrict an employee or former employee in one of these ways violates a strong public policy and should be treated as void. In addition, the Department of Justice is vested with authority to seek a civil penalty in the amount designated under this Act for each agreement signed by each employee or former employee that violates this provision.

In addition, Congress should also enact a law mandating that, as a condition of participating in the Medicare program (or other government healthcare programs),[123] all providers must represent that they will not restrict employees from providing documents to the government when reporting Medicare fraud. Here is a proposed law:

> In order for a provider or supplier to participate in and receive payment from the Medicare program or other federal healthcare programs, it must represent that it will not ask an employee or former employee to sign confidentiality agreements or statements prohibiting or otherwise restricting any employee or former employee from using company documents (1) for reporting suspected fraud to government officials, (2) for the use in filing a *qui tam* complaint under the False Claims Act, or (3) for seeking assistance of an attorney retained by a potential whistleblower for the purpose of considering reporting suspected fraud.

VI. CONCLUSION

The *qui tam* provisions of the False Claims Act have become the government's most powerful tool in combating rising fraud under the Medicare program. This Article argued that employees are shielded by a strong public policy flowing from the FCA, HIPAA, and other federal

123. The law should apply to Medicare, Medicaid, and all other government healthcare programs, such as Amerigroup, TRICARE/CHAMPUS, Blue Cross/Blue Shield—CHIP, and Veterans Administration (VA).

statutes and regulations from claims related to producing company documents to legal counsel or the government as part of considering filing a *qui tam* lawsuit. Thus, courts should find that any agreement that acts to prohibit or restrict an employee or former employee from filing a *qui tam* complaint or using documents in support of filing a *qui tam* complaint violates a strong public policy and should be treated as void. Similarly, any claim against an employee or former employee related to using documents to file a *qui tam* complaint should be dismissed. Finally, to ensure these goals are fully met, Congress should amend both the FCA and the conditions of participation in the Medicare program to prevent companies from asking employees to sign internal confidentiality agreements or statements prohibiting or otherwise restricting the use of company documents for filing a *qui tam* complaint. When amending the FCA, Congress should vest the Department of Justice with authority to seek a civil penalty for each employment agreement violating these restrictions. Proposed legislative amendments are contained in Section V.