General Releases in Employment Contracts Cannot Bar Employees from Filing or Participating in *Qui Tam* Cases Under the False Claims Act

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Introduction

It is typical for employers to require terminated employees to sign general releases when they separate as a condition of receiving a severance package or final paycheck. Unfortunately, general releases can be viewed with such a broad scope as to encompass every possible cause of action, including the filing of, or participation in, *qui tam* suits under the False Claims Act (FCA).[1] Under the FCA, the government pays whistleblower rewards to employees for reporting fraud against the government. The *qui tam* provisions of the FCA have become one of the most important tools for the federal government to combat fraud committed against it.[2] Naturally, it would be unlawful for an employer

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[1] The FCA permits a private individual to bring an action on behalf of the federal government and share in the recovery. 31 U.S.C. § 3730(b)(1) (2018). "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) [hereinafter Hesch, *Original Source Exception*] (quoting Vt. Agency of Nat. Res. v. United States *ex rel*. Stevens, 529 U.S. 765, 769 n.1 (2000)).

[2] Avco Corp. v. U.S. Dep't of Justice, 884 F.2d 621, 622 (D.C. Cir. 1989) ("The

to pay employees in exchange for promising not to report fraud against the government.[3] The circuit courts of appeals that have examined the issue of enforcing releases against *qui tam* claims have generally refused to enforce the releases based on public policy; that is, they rule in line with this common principle. However, a few circuit courts addressing this issue have wrongfully adopted a "government knowledge" standard as the limit of public policy.[4] These courts have required employees to be dismissed from *qui tam* cases on a case-by-case basis depending upon the stage of the government's investigation at the time the release is entered.[5] Thus, those courts have unwittingly accomplished by operation of law that which the company could not directly negotiate with the departing employee—namely, requiring employees to promise not to seek government rewards through the filing of *qui tam* suits under the FCA in order to receive a severance package or final check.

Unfortunately, those courts that have adopted a government knowledge approach focused solely upon the public policy interest in notifying the government of fraud. They failed to recognize that the FCA contains several specific provisions that create an equally strong public interest of inviting whistleblowers to fully participate in the entirety of the *qui tam* suit, long after a government investigation has concluded.[6] Indeed, the reward structure of the FCA's *qui tam* provisions offer rewards on a sliding scale which pays higher rewards for higher levels of participation throughout the entire case.[7]

False Claims Act is the government's primary litigative tool for the recovery of losses sustained as the result of fraud against the government.").

[3] *See* 18 U.S.C. § 1512 (2018) (stating it is a crime to tamper with a witness or an informant); *see also* Cell Therapeutics, Inc. v. Lash Grp., Inc., 586 F.3d 1204, 1206 (9th Cir. 2009) (The purpose of the anti-retaliation provision is to prevent companies from using the threat of retaliation to silence whistleblowers and thereby "make employees feel more secure in reporting fraud to the United States.") (quoting Neal v. Honeywell Inc., 33 F.3d 860, 863 (7th Cir. 1994)).

[4] *E.g.*, Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 233 (9th Cir. 1997).

[5] *Id*.

[6] If the Department of Justice decides to intervene, a relator is entitled to fifteen to twenty-five percent of the recovery "depending upon the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730(d)(1) (2018).

[7] 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be

The FCA also contains additional provisions authorizing whistleblowing employees to pursue *qui tam* cases unilaterally if the government elects to decline to take over the case.[8] In other words, even after the government concludes its investigation and notifies the court that it declines to take over the *qui tam* case, the FCA authorizes the relator to proceed with the case on the government's behalf. This FCA provision stands directly counter to courts allowing a general release to dismiss a relator's *qui tam* suit based on the stage of the government's investigation or knowledge of the fraud. The FCA invites and incentivizes whistleblowers to proceed alone once the government's investigation is over and the government declines to intervene. This right is not conditioned upon the level of information known to the government. Indeed, it specifically allows the relator to proceed alone after the government concludes its investigation. The public policy behind allowing whistleblowers to pursue *qui tam* suits unilaterally is very important because it allows the government to preserve resources while still recovering funds lost due to fraud.[9] This entire declination section of the FCA would be displaced if courts inject a government knowledge test to uphold general releases. Thus, the public policy interest in relators pursuing declined *qui tam* cases is stronger than the interest of the company in enforcing a general release based upon any purported government knowledge test.

Those courts that have adopted a government knowledge test also failed to fully consider the chilling effect that a case-by-case analysis with a vague government knowledge standard would have upon all potential whistleblowers in all cases, not just those where a government investigation is completed at the time a particular employee signs a general release. Indeed, in 1986, Congress specifically repealed the "government knowledge bar" from the FCA because it led to whistleblowers refraining from filing *qui tam* cases.[10] Because employees that are being terminated

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brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.").

[8] *Id.* § 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.").

[9] *E.g.*, United States *ex rel.* Ubl v. IIF Data Solutions, 650 F.3d 445, 457 (4th Cir. 2011) ("Given its limited time and resources, the government cannot intervene in every FCA action, nor can the government pursue every meritorious FCA claim.").

[10] 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.

and asked to sign a general release cannot predict, with any certainty, what information the government has or at what stage of any investigation the government might be, these employees are likely to simply forgo filing a *qui tam* suit. Thus, even when there is no government investigation, because the employee does not know one way or the other, she may choose to forgo filing. That is precisely what happened in 1943 when Congress enacted the government knowledge bar, and fewer than six *qui tam* cases were filed each year.[11] Adoption of a government knowledge test would similarly lead to fewer opportunities for the government to recover public funds lost due to fraud and defeat the purpose of the FCA.

Finally, in 2014, Congress passed another law that informs and creates a strong public policy interest in not enforcing general releases against *qui tam* suits; this statute bars the government from even doing business with any entity that seeks to restrict employees from reporting fraud against the government.[12] This new law has not yet been evaluated by the courts, but it strengthens the public policy such that courts should adopt a bright line rule that all general releases that bar filing or participating in *qui tam* complaints are unenforceable.

For all of these reasons, there is a strong public interest in whistleblowers participating in the entirety of a *qui tam* suit. Therefore, public policy prohibits a general release to act as a bar to the filing of or the participation in an ongoing suit that has yet to be filed or is under seal at the time of the release. Moreover, a case-by-case analysis using a government knowledge test for allowing general releases to bar the participation in *qui tam* suits or the receiving of government rewards is directly at odds with the statutory scheme implemented by Congress to combat fraud. Congress chose to create a statutory scheme that incentivizes insiders to act as private attorney generals to recoup ill-gotten gains from employers by filing and fully participating in *qui tam* suits; further, these insiders are incentivized to proceed alone in declined *qui tam* suits. Because courts have not adopted a proper or uniform standard, this

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COOLEY L. REV. 217, 232 (2012) [hereinafter Hesch, *Breaking the Siege*] (quoting Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1769 (2007)) ("[F]rom 1943 to 1986, 'there were fewer than six FCA suits brought per year . . . .'"); *see also id.* at 231 n.76 ("*Qui tam* actions under the FCA had gone in forty years from unrestrained profiteering to a flaccid enforcement tool.").

[11] Hesch, *Breaking the Siege*, *supra* note 10, at 232.

[12] Consolidated & Further Continuing Appropriations Act, Pub. L. No. 113-235, § 743(a), 128 Stat. 2130, 2391 (2014).

Article argues for a bright-line rule that public policy prohibits interpreting a general release to require an employee to either (1) refrain from filing a *qui tam* complaint under the FCA, or (2) forfeit any reward from a pending *qui tam* complaint that is still under seal and unknown to the company at the time the release was entered into.[13]

In this Article, Section I explains the history of the False Claims Act. Section II explains the purposes and provisions of the False Claims Act. Section III reviews the current unsettled case law, and it shows the need for courts to engage in a correct interpretation of public policy and enact a proper standard regarding the enforceability of general releases as applied to *qui tam* actions. Section IV provides a framework for courts to follow and proposes a bright-line rule finding releases entered into prior to filing or while a *qui tam* action is under seal are void on grounds of public policy.

I. History of the FCA

The FCA was enacted by President Abraham Lincoln during the Civil War in 1863.[14] Before the FCA, the amount of fraud being committed against the military in wartime was staggering.[15] For example, "[f]or sugar [the government] often got sand."[16] To combat rampant military-contractor fraud,[17] Congress enacted the FCA as a *qui tam* statute that

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[13] This Article, however, does not argue that the parties cannot negotiate a specific settlement and release of an actual *qui tam* complaint. Indeed, most *qui tam* cases settle. The difference is that only once the case is known to the defendant can a true negotiation take place. In fact, the FCA does not allow the whistleblower to settle a *qui tam* case without the consent of the government. Thus, the defendant would have to include the government in the negotiation and settlement process, which does not take place when the suit is under seal and unknown to the defendant. Furthermore, courts should not allow a general release to do what a company could not directly do with a specific release of a *qui tam* case.

[14] S. REP. No. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273; Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (1994) ("The False Claims Act of 1863 was adopted during the Civil War in order to combat fraud and price-gouging in war procurement contracts.") (citation omitted).

[15] *See* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2:6 (2020).

[16] *Id.*

[17] *See* United States v. Gen. Electric, 808 F. Supp. 580, 581 (S.D. Ohio 1992) ("There is historical evidence that [at the Battle of Gettysburg] a critical position

enabled private citizens to bring lawsuits against fraudulent contractors on behalf of the government.[18] Overnight, the *qui tam* provisions of the FCA became the government's best weapon for combating fraud against itself.[19]

Congress began to fear that relators would bring "parasitic suits" based on publicly available information.[20] As a result, in 1943, Congress amended the FCA to include a jurisdictional bar that changed the eligibility aspect by prohibiting suits "based on information in the possession of the Government."[21] This became known as the "government knowledge bar." However, these amendments reduced the number of actions under the FCA to fewer than six FCA cases brought each year.[22] Fraud soon became rampant again during the 1980s, and Congress realized the 1943 amendments to the FCA "killed the goose that laid the golden egg."[23] For example, companies were bilking the military by charging "$600 for toilet seats and $748 for pliers."[24]

To entice whistleblowers to once again report fraud committed against the government, in 1986, Congress amended the FCA to eliminate the government knowledge bar and provide greater incentives for and protections of whistleblowers.[25] This opened the floodgates,[26] and the *qui tam* provisions once again became the federal government's primary tool to recover public funds lost to fraud.[27] Of the $62 billion recovered

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known as Little Roundtop was almost overrun by Confederate troops because of a lack of Union rifles and ammunition. Armament which had been purchased from private suppliers arrived in boxes that contained only sawdust.").

[18] *See* United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 963 (9th Cir. 1995); S. REP. No. 99-345, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5277.

[19] Hesch, *Breaking the Siege*, *supra* note 10, at 232.

[20] *Id.* at 230 (citing United States *ex rel.* S. Prawer & Co. v. Fleet Bank of Me., 24 F.3d 320, 324-25 (1st Cir. 1994)).

[21] S. REP. No. 99-345, at 12.

[22] *See* Hesch, *Breaking the Siege*, *supra* note 10, at 232.

[23] *Id.* at 231 (quoting United States *ex rel.* Findley v. FPC-Boron Empls. Club, 105 F.3d 675, 680 (D.C. Cir. 1997)).

[24] *Id.*

[25] *Id.* at 232.

[26] *Id.*

[27] *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

from fraud cases by the Department of Justice (DOJ) between 1986 and 2019, $44.7 billion was the result of *qui tam* actions.[28] This means that whistleblowers, by initiating actions under the *qui tam* provisions, were responsible for seventy-two percent of the DOJ's recovery in fraud cases from 1986 to 2019.[29] Thus, whistleblowers are a vital aspect of the DOJ's success in recovering public funds lost due to fraud.

II. The Purposes and Provisions of the FCA

The FCA's *qui tam* provisions permit a private individual to bring an action on behalf of the federal government.[30] A whistleblower may not receive a reward for simply calling a hotline or informally reporting fraud against the government. Rather, she must file a *qui tam* complaint under seal and serve it only upon the government.[31] The FCA requires a person or company that knowingly submits false statements or claims under any federal contract or program to repay three times the amount of funds wrongfully obtained, plus civil penalties of up to $10,000 for each false claim.[32] The *qui tam* action can only be dismissed if both the Attorney

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

[28] The government keeps track of all FCA cases and recoveries, including the amount paid to whistleblowers. Civil Div., *Fraud Statistics—Overview, October 1, 1986—Sept. 30, 2019*, U.S. DEP'T OF JUSTICE (2019), https://www.justice.gov/opa/press-release/file/1233201/download (providing statistics).

[29] *Id.* ($44,749,960,020 divided by $62,102,439,394 is 72%).

[30] 31 U.S.C. § 3730(b)(1) (2018).

[31] *Id.* § 3730(b)(2).

[32] 31 U.S.C. § 3729(a)(1)(A)-(G) (2018). If there is a violation, the FCA provides that such person

> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 . . . , plus [three] times the amount of damages which the Government sustains because of the act of that person.

Id. When the FCA was amended in 2009, the liability sections were renumbered from (a)(1)-(7) to (a)(1)(A)-(G).

General and the court approve the action's dismissal.[33] Furthermore, once the *qui tam* complaint is filed, the complaint must remain under seal for at least sixty days; this allows the government time to decide whether or not it will "intervene and proceed with the action."[34] The government may move for an extension of the period that the complaint remains under seal for "good cause."[35] *Qui tam* cases typically remain under seal for three to six years while the government investigates the allegations and makes a determination regarding intervention.[36]

If the government decides to intervene in an action, the relator will receive a share of the recovery in an amount between fifteen percent and twenty-five percent of the proceeds of the action; the percentage earned "depend[s] upon the extent to which the person substantially contributed to the prosecution of the action."[37] If the government declines to intervene, the relator is authorized by law to proceed alone and will receive between twenty-five percent and thirty percent of the proceeds of the action.[38] Again, the percentage earned correlates with the extent the relator contributes to the action.[39] Accordingly, the FCA encourages whistleblowers to not only inform the government of allegations of fraud, but also to participate in *qui tam* actions and even pursue the entire case alone if the government elects to decline.[40]

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[33] 31 U.S.C. § 3730(b)(1).

[34] *Id.* § 3730(b)(2).

[35] *Id.* § 3730(b)(3); *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 (2015) [hereinafter Hesch, *It Takes Time*] (discussing the need for the court to apply "good cause" liberally in granting government requests for an extension of the mandated seal period).

[36] Hesch, *It Takes Time*, *supra* note 35, at 931.

[37] 31 U.S.C. § 3730(d)(1).

[38] *Id.* § 3730(d)(2).

[39] *See generally* Hesch, *Breaking the Siege*, *supra* note 10, at 268.

[40] *See generally id.* at 230 n.66. Congress vested the relator with the right to pursue the action if the government declines. 31 U.S.C. § 3730(b)(4) ("Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—(A) proceed with the action, in which case the action shall be conducted by the Government; or (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action."); *id.* § 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.").

III. Review of Case Law

The case law is unsettled with respect to whether the court will enforce a general release against *qui tam* complaints. The courts have created an artificial division based on whether the release was entered into before or after the *qui tam* complaint was filed. Five circuit courts of appeals have addressed the signing of a release prior to the filing of a *qui tam* complaint;[41] unfortunately, some of these circuit courts have implemented a government knowledge standard that undermines the public policy interests supported by the FCA.[42] Two circuit courts of appeals have addressed whether to enforce releases signed after a *qui tam* complaint has been filed.[43] In both cases, the courts held the releases were not enforceable because a relator can only dismiss a *qui tam* action with the consent of the attorney general.[44] Although all of these courts have recognized some of the public policy considerations, none have fully considered each of the public interests behind the FCA. As such, after examining the status of the law, this Article presents a comprehensive framework for courts to find that all general releases are not enforceable against *qui tam* actions on the grounds of public policy.

Although both pre-filing and post-filing releases must be found unenforceable against *qui tam* suits based upon the same public policy considerations, because courts have incorrectly created a distinction, the case law will be analyzed first for pre-filing releases and then for post-filing releases. However, the framework section at the end of this Article suggests a single approach to evaluating the enforceability of general releases without this artificial distinction. It also proposes a bright-line test consistent with the important policy considerations flowing from federal statutes.

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[41] *See* United States *ex rel.* Ladas v. Exelis, Inc., 824 F.3d 16, 19 (2d Cir. 2016); United States *ex rel.* Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 321 (4th Cir. 2010); United States *ex rel.* Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1165 (10th Cir. 2009); United States *ex rel.* Gebert v. Transport Admin. Servs., 260 F.3d 909, 911 (8th Cir. 2001); United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 956 (9th Cir. 1995).

[42] *See* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 231 (9th Cir. 1997).

[43] United States *ex rel.* Longhi v. United States, 575 F.3d 458, 474 (5th Cir. 2009); United States *ex rel.* Doyle v. Health Possibilities, P.S.C., 207 F.3d 335, 338 (6th Cir. 2000).

[44] *Longhi*, 575 F.3d at 474; *Doyle*, 207 F.3d at 338.

A. Pre-Filing Releases

With respect to releases entered into before a *qui tam* complaint is filed, known as *pre-filing* releases, the law is unsettled. So far, four circuit courts of appeals[45] have addressed the issue of whether a general release contained in an employment contract is enforceable when the company seeks to dismiss a whistleblower from a *qui tam* suit under the FCA—the mechanism Congress chose under its whistleblower reward program to incentivize employees to report fraud against the government.

The Ninth Circuit was the first to address the enforceability of pre-filing releases in *United States ex rel. Green v. Northrop Corp.*[46] The court held that "prefiling releases of *qui tam* claims, when entered into without the United States' knowledge or consent, cannot be enforced to bar a subsequent *qui tam* claim."[47] Two years later, the same court addressed whether it must enforce a pre-filing release when the government has knowledge of fraud prior to the filing of a *qui tam* complaint in *United States ex rel. Hall v. Teledyne Wah Chang Albany*.[48] This time, the Ninth Circuit ruled that a general release would prohibit a whistleblower from filing a *qui tam* complaint when the government had already

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[45] In addition, the Eighth Circuit addressed the issue, but in the limited context of a bankruptcy setting, which the court itself distinguished and limited to the unique context of bankruptcy. United States *ex rel.* Gebert v. Transp. Admin. Servs., 260 F.3d 909 (8th Cir. 2001). In that case, the court distinguished *Green* because the *qui tam* claim was "in the context of a bankruptcy proceeding, not through a general, independent release of a claim for money." *Id.* at 916. Because of this, the policy concerns in *Green* were not present and the release was found to be enforceable. The case is also distinguishable because the relator was judicially estopped because he did not disclose the claim in bankruptcy proceedings. *Id.* at 917-19.

[46] 59 F.3d 953 (9th Cir. 1995). In that case, after being terminated for bringing fraud to the attention of his supervisors and signing a settlement agreement and general release, Green filed a *qui tam* complaint alleging that Northrop violated the FCA. *Green*, 59 F.3d at 956.

[47] *Green*, 59 F.3d at 969.

[48] 104 F.3d 230 (9th Cir. 1997). In that case, Hall was fired after informing his supervisors that Teledyne's tubeshells were not heated correctly to improve corrosion resistance. *Hall*, 104 F.3d at 231-32. After reporting Hall's concerns to the Nuclear Regulatory Commission, and after that agency found that Hall's concerns lacked merit, Teledyne and Hall settled a suit and Hall signed a release. *Id.* Hall then filed a *qui tam* complaint. *Id.* The court held that the pre-filing release was enforceable because the government had knowledge of the allegations of fraud. *Id.* at 233.

completed its investigation.[49] The court ruled this way because the government was already aware of the allegations of fraud at the time the relator filed the *qui tam* complaint.[50] Therefore, the court incorrectly ruled that the public policy incentivizing relators to file *qui tam* complaints no longer applied; the purpose of the *qui tam* provisions of the FCA is only to alert the government of allegations of fraud.[51] Taking these two decisions together, the Ninth Circuit established a case-by-case analysis based on a "government knowledge" standard when determining whether to enforce general releases against *qui tam* claims. In a case like *Green*, where the government did not have prior knowledge of the allegations of fraud, the release will not be enforced. In a case like *Hall*, where the government had prior knowledge of the allegations of fraud, the release will be enforced if the court determines the government had sufficient information to go forward alone. The Ninth Circuit improperly based its decisions upon the incorrect assumption that notifying the government of fraud is the primary public interest at stake. The court fails to give proper deference to other vital components of the FCA; namely the need for whistleblowers to both participate in the case and even pursue the case alone should the government decline intervention.

In 2009, the issue of enforceability of pre-filing releases was next addressed by the Tenth Circuit in *United States ex rel. Ritchie v. Lockheed Martin Corp*.[52] The court adopted the Ninth Circuit's framework established by both *Green* and *Hall*.[53] In *Ritchie*, the whistleblower alerted her supervisors of potential fraud against the government, and Lockheed then alerted the Air Force and Defense Contract Management Agency of these allegations.[54] The Defense Contract Audit Agency conducted its own audit with the whistleblower's assistance, and the whistleblower settled the case and signed a release; after the signing of

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[49] *Hall*, 104 F.3d at 233.

[50] *Id.*

[51] *See id.*

[52] 558 F.3d 1161 (9th Cir. 2009).

[53] *Ritchie*, 558 F.3d at 1169-71 (holding that the release was enforceable because Lockheed disclosed Ritchie's allegations of fraud to the government prior to her *qui tam* complaint, which meant the government had knowledge of the fraud prior to the *qui tam* complaint).

[54] *Id.* at 1164.

this release, the whistleblower filed a *qui tam* action under the FCA.[55] The Tenth Circuit held that the pre-filing release was enforceable against the *qui tam* complaint because the government was already sufficiently aware of the allegations of fraud.[56] This case was factually similar to *Hall* because the defendant disclosed the allegations of fraud to the government; as a result of this similarity, the court mirrored its analysis to the analysis in *Hall*.[57] The court found that the public policy encouraging relators to inform the government of fraud was no longer an interest because the government was already aware of the fraud.[58]

Next, in 2010, the Fourth Circuit enforced a pre-filing release based on the "government knowledge" standard implemented by the Ninth Circuit.[59] In *Radcliffe v. Purdue Pharma L.P.*,[60] the court enforced a pre-filing release because the "allegations of fraud were sufficiently disclosed to the government" already.[61] In that case, the relator threatened to bring a *qui tam* suit against the company, but the relator did not actually file the suit.[62] Purdue settled with the potential whistleblower, and he signed a general release.[63] At the same time, the government had already been conducting its own investigation of Purdue.[64] Because of this, when the relator filed a *qui tam* complaint after he signed the release, the Fourth Circuit held that the release was enforceable because the government was already conducting its own investigation and already had sufficient knowledge of the allegations of fraud.[65] This is slightly different from *Hall*, where the Ninth Circuit enforced the release because the govern-

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[55] *Id.* at 1164-65.

[56] *Id.* at 1170-71.

[57] *Id.* at 1169-71.

[58] *Id.* at 1171.

[59] Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 332-33 (4th Cir. 2010) (holding that because the government knew about the fraud allegations before Radcliffe filed the *qui tam* suit, the court must enforce the release).

[60] 600 F.3d 319 (4th Cir. 2010).

[61] *Radcliffe*, 600 F.3d at 333.

[62] *Id.* at 322.

[63] *Id.* at 323.

[64] *Id.* at 322-23.

[65] *Id.* at 332-33.

ment had already completed its investigation. Again, this logic assumes that the only public interest created by the FCA is to alert the government of allegations of fraud.

Finally, in 2016, the Second Circuit addressed this issue in *United States ex rel. Ladas v. Exelis, Inc.*[66] In that case, the whistleblower tried to alert the government of fraud allegations with respect to equipment supplied under a procurement contract.[67] The whistleblower's employment was later terminated and he signed a general release upon exiting employment; however, it was before he filed a *qui tam* complaint.[68] The Second Circuit applied a similar government knowledge framework as used in *Hall*, and the court found that because the government did not have knowledge of the allegations of fraud prior to the filing of the *qui tam* suit, the public policy considerations from *Green* applied; therefore, the release was unenforceable on the grounds of public policy.[69]

In short, each of the four court of appeals' decisions recognized that pre-filing releases are generally unenforceable based on a strong public policy of enlisting the public's assistance in reporting fraud against the government. However, some of these courts left open the door for enforceability of a pre-filing release if the government already had sufficient knowledge about the allegations.[70] Unfortunately, none of these courts examined all of the public interests contained in the FCA and other federal statutes. These public policy interests render general releases void even if the government was aware of allegations of fraud at the time a relator signed a release.

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[66] 824 F.3d 16 (2d Cir. 2016).

[67] *Ladas*, 824 F.3d at 19-21.

[68] *Id.* at 21.

[69] *Id.* at 23-24.

[70] *Id*. at 25; *see also Radcliffe*, 600 F.3d at 332 ("But when the government is aware of the claims, prior to the suit having been filed, public policies supporting the private settlement of suits heavily favor enforcement of a prefiling release."); United States *ex rel.* Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1170 (9th Cir. 2009) ("The disclosures to the government in this case were sufficient to satisfy the public interest in uncovering fraud."); United States *ex rel.* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 233 (9th Cir. 1997) (stating the federal government had sufficient prior knowledge of the plaintiff's allegations).

1. The Government Knowledge Rule Is at Odds with the FCA

The government knowledge rule is misplaced and fails to account for all of the public policy interests contained in multiple federal statutes. Indeed, the False Claims Act contains not one, but three separate strong public policy considerations that render general releases unenforceable. Unfortunately, *Hall*, and later cases relying upon it, only focused upon one aspect of the FCA, which invites whistleblowers to alert the government of allegations of fraud through the filing of a *qui tam* action.[71] Thus, these courts incorrectly developed the government knowledge standard when evaluating the enforceability of pre-filing releases. However, Congress not only wanted whistleblowers to notify the government of fraud through the filing of a *qui tam* case, but it sought to enlist whistleblowers to *participate* in *qui tam* cases as well.[72] In fact, a whistleblower is not entitled to a reward simply by notifying the government of fraud; if this were the case, Congress would have only needed to provide a hotline. Rather, whistleblowers must both file and participate in a *qui tam* case in order to receive a percentage of the proceeds.[73] Because of the nature of fraud, the government normally needs the continued assistance of insiders to help pursue a *qui tam* case.[74] Furthermore, the FCA requires an element of scienter.[75] This element is the most difficult to prove,[76] and the government can only prove this element with the

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[71] *Hall*, 104 F.3d at 231-33.

[72] *See id.* at 233; 31 U.S.C. § 3730(b)(1), (d)(1) (2018).

[73] 31 U.S.C. § 3730(b)(1), (d)(1).

[74] Joel D. Hesch, *Allowing Whistleblowers to Copy Company Documents to File Qui Tam Complaints Under the False Claims Act When Reporting Medicare Fraud*, 13 LIBERTY U.L. REV. 265, 278 (2019) [hereinafter Hesch, *Allowing Whistleblowers to Copy Company Documents*] ("[T]he 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.").

[75] *See* 31 U.S.C. § 3729(b)(1) (2018). The FCA requires "knowing" violation, which means the defendant "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information;" and the "knowing" standard requires "no proof of specific intent to defraud." *Id.*

[76] 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.

assistance of insiders.[77] Equally important, the level of the reward, known as a relator share, is based upon the level of *participation* in the *qui tam* case. This reward structure is at odds with the government knowledge defense, which enforces a release if the government knew of the allegations at the time the *qui tam* complaint was filed and could pursue the case on its own. Thus, barring a relator from continuing with a case merely because the government already has knowledge of the fraud prevents the whistleblower's participation in the case, and Congress sought to incentivize whistleblowers to assist the government throughout the entire case through higher reward rates.

Next, the FCA contains a key provision creating a strong public policy interest which was not addressed by *Hall* or other courts when deciding to adopt a government knowledge rule. Congress included a statutory provision within the FCA to give whistleblowers the right to proceed alone on behalf of the government when the government declines to take over a *qui tam* case.[78] Under the FCA, the government may choose to either take over the *qui tam* case or decline and leave it for the whistleblower to pursue unilaterally.[79] By law, the relator is authorized under the FCA to proceed in a declined *qui tam* case alone and on behalf of the government.[80] Thus, if a court follows a government knowledge rule, it

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991, 1024-25 (2017) [hereinafter Hesch, *Public Disclosure Bar*] ("Because FCA cases often turn on the issue of scienter and since the government is never in a good position to have direct evidence of guilty knowledge, courts should presume that adding any inside evidence of scienter materially adds to publicly disclosed information. Even if some details regarding scienter are in a public disclosure, a relator still satisfies the 'materially adds' requirement by bringing forth other knowledge of scienter. For instance, if the public disclosure contained information regarding one internal meeting, but there were other corporate meetings discussing fraud, knowledge of other meetings likely meets this test because of the critical need and crucial role scienter plays in FCA cases. The point is that evidence of scienter that is not already publicly disclosed is highly valued and should be presumed to materially add value.").

[77] 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, 370 (2014) [hereinafter Hesch, *Zone of Protection*] ("[T]he 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.").

[78] *See* 31 U.S.C. § 3730(c)(3).

[79] *Id.*

[80] *Id.*

would defeat the FCA provisions granting whistleblowers the right to proceed alone in a declined case. This is a vital aspect of the FCA because the DOJ declines to intervene in nearly eighty percent of cases.[81] Thus, the role of recovering ill-gotten gains falls upon the relator. Furthermore, this provision allows the government to preserve vital public resources while still pursuing funds lost due to fraud.[82] The government does not have enough resources to pursue every claim; it relies on relators to pursue some of the claims unilaterally.[83] Because of this, Congress intended for relators to be allowed to proceed regardless of government knowledge. Therefore, a government knowledge standard for determining the enforceability of releases runs counter to the public interest in allowing relators to pursue *qui tam* actions unilaterally, and on behalf of the government, when the government elects to decline to intervene.

In addition, applying a case-by-case approach to the enforceability of releases that is dependent upon a sliding scale of government knowledge will have a chilling effect on all potential whistleblowers. Whistleblowers are not in a position to know what information the government might possess at a given time. Therefore, they will choose not to file *qui tam* suits. This is not mere conjecture; a similar "government knowledge" test to the FCA was implemented by Congress and then repealed because of its chilling effect on the FCA. Indeed, in 1986, Congress repealed the *government knowledge bar* from the FCA because it drastically reduced the number of *qui tam* complaints that were filed each year.[84] Courts should not resurrect a government knowledge standard in the face of strong public policy inviting whistleblowers to fully participate throughout the entire life of a suit—not simply providing information to the government. Thus, the approach by the courts has already proven to go against the wishes of Congress and is at odds with the structure and specific provisions of the FCA.

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[81] Hesch, *It Takes Time*, *supra* note 35 at 907.

[82] *See* United States *ex rel.* Ubl v. IIF Data Solutions, 650 F.3d 445, 457 (4th Cir. 2011).

[83] *See id.*

[84] Hesch, *Breaking the Siege*, *supra* note 10, at 231-32.

2. The Government Knowledge Rule is at Odds with other Statutes and Regulations

There are other federal statutes that also inform the public policy landscape that were not considered by *Hall* or other courts when applying a government knowledge rule. In December of 2014, Congress enacted a law that prohibits the federal government from doing business with any company that requires employees to sign confidentiality agreements that prohibit the reporting of fraud against the government. Specifically, the statute reads:

> 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 contactors 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.[85]

This law clearly shows that it is improper to ask an employee to sign a severance agreement that even attempts to require a potential relator to give up a right to report fraud or assist the government in pursuing fraud investigations or *qui tam* cases. There could not be a clearer indication of a strong public policy than a statute by Congress that bars the government from doing business with companies that require employees to sign general releases giving up the right to participate in a *qui tam* complaint alleging fraud against the government. However, to enforce a release barring *qui tam* claims accomplishes this very action—it prevents whistleblowers from reporting fraud.[86] Indeed, Congress chose under the FCA to require whistleblowers to file *qui tam* complaints as the only way of obtaining a reward for reporting fraud.[87] Thus, enforcing general releases that bar filing or participating in a *qui tam* action effectively restricts a whistleblower from reporting fraud under the framework of the FCA.

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[85] Consolidated & Further Continuing Appropriations Act, Pub. L. No. 113-235, § 743(a), 128 Stat. 2130, 2391 (2014).

[86] *Id.*

[87] 31 U.S.C. § 3730(b)(1) (2018).

The SEC also has had occasion to address the enforceability of general releases that impact whistleblower rewards for reporting SEC violations.[88] The SEC 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.[89]

The SEC has determined that even including a general release in an employment-related agreement, that might be broad enough to waive reward applications for reporting SEC violations, are not only void but subject the company to sanctions. In one instance, a company paid a $265,000 penalty for including in a severance agreement a general release that might operate to waive any whistleblower reward.[90] As part of the case, the company agreed "to amend its severance agreements to make clear that employees may report possible securities law violations to the SEC and other federal agencies without [the company's] prior approval and without having to forfeit any resulting whistleblower award."[91] In another case, a company paid a $340,000 penalty for including in severance agreements a provision requiring "employees to waive their

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[88] *See* 17 C.F.R. § 240.21F-17 (2020). The "[r]egulations promulgated under Dodd-Frank expressly preclude parties, including employers, from interfering with Dodd-Frank's whistleblower program." Erhart v. BofI Holding, Inc., No. 15-cv-02287-BAS-NLS, 2017 WL 588390, at *9-10 (S.D. Cal. Feb. 14, 2017); *see also* Hesch, *Allowing Whistleblowers to Copy Company Documents*, *supra* note 74, at 278 ("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.' 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.").

[89] 17 C.F.R. § 240.21F-17.

[90] THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION, COMPANY PAYING PENALTY FOR VIOLATING KEY WHISTLEBLOWER PROTECTION RULE (Aug. 10, 2016), https://www.sec.gov/news/pressrelease/2016-157.html.

[91] *Id.*

ability to obtain monetary awards from the SEC's whistleblower program."[92]

The SEC got it right. It would violate public policy and the structure of government reward programs if employers were allowed to impede the reporting of fraud by including in severance agreements either general releases or waivers of rewards, because these releases would interfere with the whistleblower reward program.

In sum, there are strong public policies flowing from several provisions within the FCA and other federal statutes or regulations that have not been fully considered by those courts which have adopted a government knowledge exception to the enforceability of releases barring *qui tam* claims. This government knowledge exception incorrectly allows the enforcement of releases when the court concludes that the government was on sufficient notice that it could proceed with a FCA action on its own.[93] However, in 1986, Congress eliminated the "government knowledge" bar to the FCA because it had a chilling effect on *qui tam* actions and thereby expressed that the FCA should not be limited based solely upon knowledge of the government. Rather, it included a public disclosure bar in its place; but also promptly added an original source exception to allow relators to still proceed to assist the government even when the government was on notice of fraud.[94] Thus, courts should not reinvent the government knowledge test, which Congress chose to discontinue.

Further, the structure of the FCA goes well beyond encouraging whistleblowers to simply alert the government regarding fraud committed against it in order to be eligible for a reward. Through an incentive structure, the FCA enlists and encourages whistleblowers to fully *participate* in *qui tam* actions by including a range of rewards available dependent upon the level of participation. Moreover, the FCA contains

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[92] THE UNITED STATES SECURITIES AND EXCHANGE COMMISSION, COMPANY PUNISHED FOR SEVERANCE AGREEMENTS THAT REMOVED FINANCIAL INCENTIVES FOR WHISTLEBLOWING (Aug. 16, 2016), https://www.sec.gov/news/pressrelease/2016-164.html.

[93] *See* Hesch, *Breaking the Siege*, *supra* note 10, at 265-66.

[94] 31 U.S.C. § 3730(e)(4)(A)(i-iii) (2018) (the public disclosure bar); *id*. § 3730(e)(4)(A) (the original source exception). For a detailed analysis of the public disclosure bar and original source exception, see Hesch, *Original Source Exception*, *supra* note 1, at 124-26.

separate provisions granting the relator the ability to proceed alone after the government concludes its investigation and decides to decline to intervene and instead rely upon the relator to proceed alone. These FCA provisions are at odds with a government knowledge test and have not been fully considered by the courts.

Finally, other statutes and regulations show Congress specifically does not want companies to be able to prohibit employees from not only alerting the government of potential fraud, but also from actively assisting the government in the process. For these reasons, courts must find that general releases barring *qui tam* actions still under seal and unknown to the defendant are unenforceable on grounds of public policy.

B. Post-Filing Releases

Some courts have attempted to distinguish general releases that were entered into after the filing of a *qui tam* release, but while the *qui tam* case was still under seal and unknown to the defendant. This category of releases is known as "post-filing releases." The two circuit courts of appeals[95] that have addressed this issue both held that post-filing releases are *per se* unenforceable because the FCA specifically states only the Attorney General (AG), together with court approval, can dismiss a *qui tam* suit that has been filed.[96] When an individual brings a *qui tam* suit under the FCA, the action may be dismissed only if the court and the AG give written consent to the dismissal and their reasoning for consent.[97] The courts both found this provision required the Attorney General to consent to the release if it was to be enforced.[98] Further, the Sixth Circuit found that permitting a private party to settle *qui tam* complaints would allow incentivized private parties to settle all *qui tam* claims in order to avoid losing part of the award to the government.[99] Therefore, both the Fifth Circuit and the Sixth Circuit blanketly found that general releases

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[95] United States *ex rel.* Longhi v. United States, 575 F.3d 458 (5th Cir. 2009); United States *ex rel.* Doyle v. Health Possibilities, P.S.C., 207 F.3d 335 (6th Cir. 2000).

[96] *Longhi*, 575 F.3d at 474; *Doyle*, 207 F.3d at 336.

[97] *See* 31 U.S.C. § 3730(b)(1).

[98] *Longhi*, 575 F.3d at 474; *Doyle*, 207 F.3d at 339.

[99] *Doyle*, 207 F.3d at 340-41.

cannot be used to dismiss a *qui tam* case (or the relator from the case) if signed after the *qui tam* case is filed.[100]

The vast majority of district courts that have addressed this issue have followed this line of logic—post-filing releases are invalid because the FCA allows *qui tam* actions to be dismissed only if both the Attorney General and the court approve of the dismissal because post-filing releases are an attempt by the defendant to dismiss *qui tam* actions without the approval of the Attorney General and the court.[101] Only two lower courts have ruled that post-filing releases are enforceable;[102] however, the logic of neither case can withstand scrutiny. First, the Southern District of Georgia addressed the issue of the enforceability of post-filing releases in *United States ex rel. Whitten v. Triad Hospitals, Inc*.[103] In that case, the whistleblower was terminated from his position at the company and signed a general release as part of his severance package.[104] After this, the whistleblower filed a *qui tam* action alleging the company committed fraud against the government.[105] The court held the release was enforceable because the relator had ample opportunity to include the potential *qui tam* claims as part of the settlement agreement.[106] Also, the court stated that *Green* did not address whether a relator could maintain a *qui tam* action if "the government has declined to intervene" in the action.[107] Therefore, the court improperly determined

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[100] *Longhi*, 575 F.3d at 474; *Doyle*, 207 F.3d at 344.

[101] *See* United States *ex rel.* Gohil v. Sanofi-Aventis U.S. Inc., 96 F. Supp. 3d 504, 515 (E.D. Pa. 2015); United States *ex rel.* Scott v. Cancio, No. 8:10-cv-50-T-30TGW, 2011 WL 5975782, at *2 (M.D. Fla. Nov. 28, 2011); United States *ex rel.* Davis v. Lockheed Martin Corp., No. 4:09-CV-645-Y, 2010 WL 4607411, at *4 (N.D. Tex. Nov. 15, 2010); United States *ex rel.* El-Amin v. Geo. Wash. Univ., No. 95-2000(JGP), 2007 WL 1302597, at *5 (D.D.C. May 2, 2007); United States *ex rel.* Longhi v. Lithium Power Techs., Inc., 481 F. Supp. 2d 815, 822-23 (S.D. Tex. 2007).

[102] United States *ex rel.* Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C., No. 07-80323-CIV, 2009 U.S. Dist. LEXIS 138468, at *13-14 (S.D. Fla. Mar. 24, 2009); United States *ex rel.* Whitten v. Triad Hosps., Inc., No. Civ.A. CV202-189, 2005 WL 3741538, at *6 (S.D. Ga. Oct. 27, 2005) (holding the post-filing releases were enforceable; however, they both failed to take into account all of the public policy interests behind the FCA).

[103] No. Civ.A. CV202-189, 2005 WL 3741538 (S.D. Ga. Oct. 27, 2005).

[104] *Whitten*, 2005 WL 3741538, at *1-2.

[105] *Id.* at *1.

[106] *Id.* at *4.

[107] *Id.*

that the test for enforceability of post-filing releases was whether the government decided to intervene.[108]

A district court in the Southern District of Florida also held that a post-filing release should be enforceable.[109] In that case, the whistleblower filed a *qui tam* action reporting fraud against his employer.[110] Ten months after the filing of the *qui tam* action, the whistleblower settled a state court case regarding a non-compete clause.[111] The court held that the release was enforceable because ten months was enough time for the government to determine whether or not it wanted to intervene in the case.[112] Furthermore, the court cited *Whitten* and *Hall* in stating that the public interests behind the FCA would not be obstructed by enforcing the release.[113]

Both of these decisions miss the mark for several reasons. First, they fail to take into account that there is not one, but *three* important public policy reasonings within the FCA that render general releases unenforceable, which are discussed above.[114] Second, the rationale fails to comprehend the nature of the FCA's mandatory seal period; specifically, it does not consider the purpose and effect of a mandatory seal period. In *Whitten*, it was unreasonable for the court to expect the relator to discuss the potential *qui tam* claims with the employer when negotiating a severance package. The FCA mandates the *qui tam* complaint be kept under seal in order for the government to fully investigate the claims, so requiring a potential relator to disclose claims under the FCA when negotiating a severance agreement undermines this FCA provision.[115]

Both *Whitten*'s standard of enforceability based on government intervention and *Litwincuk*'s finding that ten months is ample time for

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[108] *Id.* at *5.

[109] United States *ex rel.* Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C., No. 07-80323-CIV, 2009 U.S. Dist. LEXIS 138468, at *14 (S.D. Fla. Mar. 24, 2009).

[110] *Id.* at *2-3.

[111] *Id.* at *4.

[112] *Id.* at *5.

[113] *Id.* at *4-5.

[114] *See* United States *ex rel.* Doyle v. Health Possibilities, P.S.C., 207 F.3d 335, 340-41 (6th Cir. 2000).

[115] For more information explaining why the FCA's provision mandating the *qui tam* complaint be kept under seal is so important, see Hesch, *It Takes Time*, *supra* note 35, at 906-07.

the government to determine whether to intervene are unreasonable. First, the court in those cases granted the government more time to retain the seal, based upon a finding of good cause. Second, the seal is for the benefit of the government, not the relator.[116] This time period is to allow the government to conclude its investigation and determine whether it wants to intervene in the *qui tam* case.[117] Third, on average, it takes the government three years to fully analyze a potential fraud claim.[118] Placing the government on a ten-month timetable, as the court did in *Litwincuk*, is unreasonable and will result in the public losing funds due to fraud. Therefore, the court should not set arbitrary deadlines on the mandatory seal period or place an unreasonable timetable on the government in investigating claims of fraud.

Finally, because the government does not have the resources to pursue every allegation of fraud, the FCA allows whistleblowers to pursue claims unilaterally if the government declines to intervene.[119] Enforcing post-filing releases when the government has the ability to, and in fact frequently does, decline to intervene is completely at odds with the statutory scheme whereby Congress chose to vest relators with the right and responsibility to pursue declined *qui tam* cases. This public interest will be undermined if the court dismisses the relator from the case when she signs a general release after filing her *qui tam* claim and the claim was entered into without the defendant's knowledge of the FCA allegations.

In short, courts should apply the same rationale and public policy considerations in a so-called post-filing release as they do for a pre-filing

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[116] Hesch, *It Takes Time*, *supra* note 35, at 913 ("The seal functions to 'allow[] 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.'") (quoting United States *ex rel.* Howard v. Lockheed Martin Corp., No. 1:99-CV-285, 2007 WL 1513999, at *1 (S.D. Ohio 2007)).

[117] *Id.* at 914-19 (explaining the government's investigation process of *qui tam* cases).

[118] *Id.* at 917 ("[T]he actual investigation period for cases in which the government intervenes can take three years for standard cases and six years for large and complex cases . . . .").

[119] *See* Hesch, *Breaking the Siege*, *supra* note 10, at 233 ("[T]he DOJ has time to make a decision on whether to join the suit and take the lead, or decline and authorize the relator's counsel to independently pursue the litigation.").

release. The only difference is that there may be some additional support for voiding a post-filing release. Thus, the same public policy considerations discussed under the pre-filing release apply equally to post-filing releases. Accordingly, post-filing releases are not enforceable against *qui tam* actions based on public policy. The next Section contains a framework for courts to apply when faced with the issue of whether to enforce a general release against a potential relator's *qui tam* complaint.

IV. Framework

Courts should adopt a bright-line rule finding that general releases—without regard to any so-called distinction between pre-filing and post-filing releases—are void on grounds of public policy. This rule extends to circumstances where a company asks a court to bar a relator from filing or participating in *qui tam* actions when a release was entered into before a *qui tam* complaint was no longer under seal and known to the defendant. Indeed, the company is not asking the employee to release the employer from any harm it may have caused to the employee; rather, it is asking to keep the employee from assisting the government from redressing a harm to the public. In effect, the defendant is simply paying an employee to promise to neither report fraud to the government nor participate in a case helping the government prove the company committed fraud. The reason that general releases applying to sealed *qui tam* cases are void (whether pre- or post-filing) and without regard to the government's knowledge of the fraud is because Congress intentionally structured the FCA with three important goals that are not tied to the government's knowledge of the allegations: to encourage whistleblowers to come forward by filing a *qui tam* action, to encourage whistleblowers to participate fully in *qui tam* actions, and to encourage whistleblowers to proceed alone in declined cases.[120] Other federal statutes and regula-

[120] Another reason why the benchmark for voiding general releases entered into before a *qui tam* is out from under seal is because when a case is filed but remains under seal, the whistleblower is prohibited from mentioning it to the defendant and lacks any leverage in negotiating a carve out of the *qui tam* from the release. Once the case is out from seal, however, the defendant and the whistleblower may engage in true settlement discussions and actually evaluate the cost or worth of the case and settle the case on its merits. At that time, if the defendant refuses to pay a severance to the whistleblower for the cost of filing the *qui tam* suit, it would be viewed as retaliation for filing the suit.

tions apart from the FCA also inform the strength of the public policy interest in support of allowing whistleblowers to help combat fraud against the government.[121]

The following framework guides courts through the analysis of weighing strong public policies stemming from several different statutes, and it finds that a general release entered into at any point prior to a *qui tam* complaint being out from under seal is void against public policy to the extent it is relied upon to bar a whistleblower from either filing a *qui tam* complaint or participating in a *qui tam* suit.

A. Contracts that Violate Public Policy Are Unenforceable

The United States Supreme Court has long recognized that "a federal court has a duty to determine whether a contract violates federal law before enforcing it."[122] According to the Court,

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes . . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.[123]

Applying this principle, the Court, in the leading case of *Town of Newton v. Rumery*,[124] held that "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."[125] This requires courts to conduct a balancing test in order to determine if the interests in the

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[121] *See* 31 U.S.C. § 3730(d)(1) (2018) ("If the Government proceeds with an action brought by a person under subsection (b), such person shall . . . receive at least 15 percent . . . of the proceeds of the action . . . depending upon the extent [of the person's contribution].").

[122] Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83 (1982).

[123] Hurd v. Hodge, 334 U.S. 24, 34-35 (1948); *accord Kaiser Steele Corp.*, 455 U.S. at 83-84 (quoting *Hurd*, 334 U.S. at 34-35).

[124] 480 U.S. 386 (1987).

[125] *Rumery*, 480 U.S. at 392.

enforcement of a promise outweigh the public policy interests that will be harmed by enforcing the agreement.

B. The Application of the Balancing Test From *Rumery*

When faced with the issue of whether the court should enforce a general release barring *qui tam* actions, the court must first determine the strength of the public policy in support of not enforcing general releases against *qui tam* actions. Federal 'public policy' is typically found in the Constitution, treaties, federal statutes and regulations, and court cases.[126] The starting point is to identify public policy found in federal statutes.

Here, there are several strong public policies flowing from two different federal statutes. The first statute is the False Claims Act,[127] which contains three strong public policies that operate to bar the enforcement of a general release from keeping an employee from either filing or participating in a *qui tam* complaint when the release is entered into before such *qui tam* suit is unsealed and known to the company. The second federal statute bars the government from doing business with companies that seek to restrict employees from reporting fraud against the government.[128] Both of these statutes (separately or combined) create a strong public policy that outweighs a company's interest in having general releases bar the filing of or participation in *qui tam* cases that have yet to be unsealed.

1. The False Claims Act

In 1863, Congress enacted *qui tam* provisions within the FCA to incentivize "'whistleblowers' to act as 'private attorneys-general' . . . in pursuit of an important public policy" of combatting fraud against the

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[126] Stamford Bd. of Educ. v. Stamford Educ. Ass'n, 697 F.2d 70, 73 (2d Cir. 1982) (first citing *Hurd*, 334 U.S. at 35; then citing Muschany v. United States, 324 U.S. 49, 66 (1945)); *see also Stamford Bd. of Educ.*, 697 F.2d at 73 ("The term public policy is obviously a broad one; it embraces a multitude of virtues and sins.").

[127] 31 U.S.C. §§ 3729-3733 (2018).

[128] Consolidated & Further Continuing Appropriations Act, Pub. L. No. 113-235, § 743(a), 128 Stat. 2130, 2391 (2014).

government.[129] "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.'"[130] "Because it is estimated that as much as 10 percent of all federal government spending is lost due to fraud, it is vital that the *qui tam* provisions be given their full effect of enlisting and protecting whistle-blowers who report suspected fraud against the government."[131] "The right to recovery clearly exists primarily to give relators incentives to bring claims."[132] The False Claims Act is the government's primary tool in combatting fraud.[133] Between 1986 and 2019, the government recovered $44.7 billion in *qui tam* actions.[134] Today, seventy-two percent of the recovery by the government in FCA cases is the result of relators filing *qui tam* cases.[135]

"The importance of the Act's incentive effect is evidenced clearly in the revised Act's structure. A relator who properly brings a claim will generally receive a share of the recovery as well as eligibility for

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[129] Hesch, *Zone of Protection, supra* note 77, at 368; *see also* Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (1994).

[130] United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 963 (9th Cir. 1995) (citations omitted). That court also stated:

> Congress expressed its judgment that 'sophisticated and widespread fraud' that threatens significantly both the federal treasury and our nation's national security only could successfully be combatted by 'a coordinated effort of both the Government and the citizenry.' S. REP. No. 345, 99th Cong., 2d Sess. 2-3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267-68. Emphasizing both difficulties in detecting fraud that stem largely from the unwillingness of insiders with relevant knowledge of fraud to come forward, *see id.* at 4, *reprinted in* 1986 U.S.C.C.A.N. at 5269, and 'the lack of resources on the part of Federal enforcement agencies' that often leaves unaddressed '[a]llegations that perhaps could develop into very significant cases,' *id.* at 7, reprinted in 1986 U.S.C.C.A.N. at 5272, Congress sought to 'increase incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government,' *id.* at 2, reprinted in 1986 U.S.C.C.A.N. at 5267.

Id. at 963.

[131] Hesch, *Zone of Protection*, *supra* note 77, at 368-69.

[132] *Green*, 59 F.3d at 963-64.

[133] *See* United States *ex rel.* Steury v. Cardinal Health, Inc., 625 F.3d 262, 267 (5th Cir. 2010); Avco Corp. v. U.S. Dep't of Justice, 884 F.2d 621, 622 (D.C. Cir. 1989).

[134] *See Fraud Statistics—Overview*, *supra* note 28.

[135] *See id.*

attorneys' fees and costs."[136] Three distinctive provisions within the FCA each create strong public policies operating to void general releases entered into before a *qui tam* case is unsealed.

First, Congress purposely decided that no rewards are available simply for *notifying* the government of potential fraud. Congress mandated that the relator do more than merely inform the government of fraud; she must file a detailed *qui tam* complaint meeting the heightened standards of Rule 9(b).[137] In addition, the relator must provide the government with a separate statement of material evidence or disclosure statement, which the FCA defines as a "written disclosure of substantially all material evidence and information the person possesses."[138] The strong policy behind paying rewards for filing a *qui tam* case, instead of merely providing information to the government, is borne out by the fact that today, seventy-two percent of the recovery by the government in FCA cases is the result of relators filing *qui tam* cases.[139]

Second, Congress structured the FCA to incentivize the relator to fully *participate* in the *qui tam* case by tying the relator's share of recovery to his participation during the entirety of the case.[140] "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."[141] The level of a reward varies between fifteen and twenty-five percent, "depending upon the extent to which the person substantially contributed to the prosecution of the action."[142] Specifically, Congress is seeking help from the relator during the prosecution of the entire case—not merely being informed of the existence of fraud.

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[136] *Green*, 59 F.3d at 963.

[137] 31 U.S.C. § 3730(b)(1) (2018); *see also* Hesch, *Zone of Protection*, *supra* note 77, at 371 ("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.' . . . 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.'") (citations omitted).

[138] 31 U.S.C. § 3730(b)(2).

[139] *See Fraud Statistics—Overview*, *supra* note 29.

[140] 31 U.S.C. § 3730(d)(1).

[141] Hesch, *Zone of Protection*, *supra* note 77, at 377.

[142] *See* 31 U.S.C. § 3730(d)(1).

Third, Congress granted relators with private attorney general powers to *pursue on behalf of the government qui tam* cases that the government elects to decline to intervene.[143] Thus, a critical component of the FCA is to allow the relator to pursue declined *qui tam* cases. The role of relators in declined *qui tam* cases is so important to the structure of the FCA that Congress increased the incentive from the normal range of fifteen-to-twenty-percent when the government intervenes, to twenty-five-to-thirty-percent when the relator pursues a declined *qui tam* action.[144] The government declines eighty percent of *qui tam* cases,[145] and therefore relies on relators to proceed with the action. Indeed, the intent of Congress was for relators to participate in *qui tam* actions.[146] This is also important because it allows the government to preserve its resources while still pursuing funds lost due to fraud.[147]

Together, these three FCA provisions create a very strong public policy that outweighs any interest the company has in barring an employee from filing or participating in a *qui tam* action alleging fraud against the government. The policy exception should not be limited to cases where the government was not aware of the fraud at the time of the release, as a few courts have suggested.[148] As demonstrated, the FCA contains a tiered reward structure to induce relators to fully *participate* in the entirety of the FCA case. Moreover, an entire segment of the FCA itself pertaining to relators pursing declined *qui tam* cases would be lost if the public policy exception to general releases was based upon the level of government knowledge at the time the release was entered.

Finally, Congress has already spoken about how a government knowledge test hinders the FCA. Indeed, the FCA once included in the

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[143] *See id.* § 3730(d)(2).

[144] *Id.* § 3730(d)(1)-(2).

[145] Hesch, *It Takes Time*, *supra* note 35, at 907.

[146] *See* United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 963 (9th Cir. 1995).

[147] *See* United States *ex rel.* Ubl v. IIF Data Solutions, 650 F.3d 445, 457 (4th Cir. 2011).

[148] United States *ex rel.* Ladas v. Exelis, Inc., 824 F.3d 16, 23 (2d Cir. 2016); Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 332 (4th Cir. 2010); United States *ex rel.* Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1176 (10th Cir. 2009); United States *ex rel.* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 233 (9th Cir. 1997).

qui tam framework a government knowledge bar that restricted relators from pursuing *qui tam* actions if the government already knew about the allegations of fraud.[149] Congress removed that bar in 1986 because barring relators when the government already possessed information sufficient that it could pursue the case on its own ruined FCA enforcement—whistleblowers remained on the sidelines and fraud escalated.[150] Thus, any purported government knowledge test would also have an improper chilling effect upon the FCA and otherwise is contrary to at least two provisions within the current FCA structure.[151] Thus, a government knowledge-based test[152] has no place in assessing the public policy reasons for whether general releases are void, and there is no true need for a pre- or post-filing distinction.[153]

2. Other Federal Statutes

Another federal statute also informs the courts regarding the strength of the need to void the use of general releases to restrict seeking rewards for reporting fraud. Congress enacted a law that specifically prohibits the federal government from doing business with any company that requires employees to sign confidentiality agreements that prohibit reporting fraud against the government.[154] This law that makes it clear

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[149] *See* S. REP. No. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5272.

[150] *See* Hesch, *Breaking the Siege*, *supra* note 10, at 231-32.

[151] *See id.*

[152] *See id.* at 265-66.

[153] Courts should apply the same rationale and public policy considerations in a so-called post-filing release as they do for a pre-filing release. The only difference is that there may be some additional support for voiding a post-filing release because the action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting. *See* 31 U.S.C. § 3730(b)(1) (2018).

[154] Consolidated & Further Continuing Appropriations Act, Pub. L. No. 113-235, § 743(a), 128 Stat. 2130, 2391 (2014) ("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 contactors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law

that it is improper to ask an employee to sign a severance agreement that even attempts to require a potential relator to give up a right to report fraud or assist the government in pursuing fraud investigations or cases.[155]

Although Congress has clearly indicated through this statute that companies cannot prohibit employees from alerting the government of fraud and assisting the government in actions relating to fraud, some courts allow companies to do just that by enforcing releases barring *qui tam* actions.[156] Indeed, whistleblowers must file *qui tam* complaints in order to obtain a reward from the fraud allegations.[157] However, enforcing general releases that bar the filing of or participation in a *qui tam* suit restricts a whistleblower from reporting fraud under Congress's chosen method through the FCA.[158]

In sum, based on these main public interests behind the FCA and other statutes, the courts must find that general releases barring *qui tam* actions are unenforceable regardless of the level of knowledge the government possessed at the time the *qui tam* complaint was filed. These releases undermine the incentive structure of the FCA that encourages whistleblowers to report fraud. Furthermore, relators will be discouraged from participating in the *qui tam* actions throughout the entire duration of the case; if the government declines to intervene, relators will also be discouraged from proceeding with the case unilaterally. Finally, a government knowledge standard would have a chilling effect on relators; indeed, this very chilling effect occurred in 1943 when Congress implemented

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enforcement representative of a Federal department or agency authorized to receive such information.").

[155] *Id.*

[156] *See* United States *ex rel.* Ladas v. Exelis, Inc., 824 F.3d 16, 19 (2d Cir. 2016); United States *ex rel.* Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 321 (4th Cir. 2010); United States *ex rel.* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 233 (9th Cir. 1997); United States *ex rel.* Litwinczuk v. Palm Beach Cardiovascular Clinic, L.C., No. 07-80323-CIV, 2009 U.S. Dist. LEXIS 138468, at *13-14 (S.D. Fla. Mar. 24, 2009); United States *ex rel.* Whitten v. Triad Hosps., Inc., No. Civ.A. CV202-189, 2005 WL 3741538, at *6 (S.D. Ga. Oct. 27, 2005).

[157] *See* 31 U.S.C. § 3730(d)(1).

[158] In addition, the SEC has issued penalties to companies simply for including general releases or waivers of rewards in severance agreements without carving out whistleblower reward programs. *See* 31 U.S.C. § 3730(b)(1); Consolidated & Further Continuing Appropriations Act, Pub. L. No. 113-235, § 743(a), 128 Stat. 2130, 2391 (2014); United States *ex rel.* Ubl v. IIF Data Solutions, 650 F.3d 445, 457 (4th Cir. 2011).

the government knowledge bar to the FCA. The nullification of these public interests through a government knowledge standard would have a substantially negative impact on the government's recovery of public funds lost due to fraud.

Accordingly, general releases—without regard to any so-called distinction between pre-filing and post-filing—are void on grounds of public policy to the extent a company asks a court to bar a relator from filing or participating in *qui tam* actions when the release was entered into before a *qui tam* complaint is out from under seal and known to the defendant. In addition, a general release is void regardless of the level of information known to the government at the time the release was entered.

Conclusion

This Article has analyzed whether a general release that bars all future lawsuits operates to waive an employee's right to receive a reward for reporting fraud against the government simply because the government reward program requires filing a *qui tam* suit under the False Claims Act on behalf of the government to be eligible for a reward. In doing so, this Article has discussed each of the circuit courts of appeals that have addressed this unsettled area of law. After analyzing the cases and all of the public policy considerations, this Article has offered a proper and uniform framework for courts to follow. In doing so, this Article has explained why the so-called "government knowledge test," followed by a handful of courts, is not only unworkable, but also rejected by Congress in 1986 as a means to curtail *qui tam* actions. Rather, a general release is void regardless of the level of information known to the government at the time the release was entered based upon the structure of the FCA, which both enlists whistleblowers to fully participate in *qui tam* suits intervened by the government and specifically charges whistleblowers with private attorney general authority to pursue *qui tam* actions when the government declines to intervene. Finally, this Article has suggested courts adopt a bright-line rule finding that general releases are void on grounds of public policy to the extent a company asks a court to bar an employee from filing or participating in a *qui tam* action when the release was entered into before a *qui tam* complaint is out from under seal and known to the defendant.