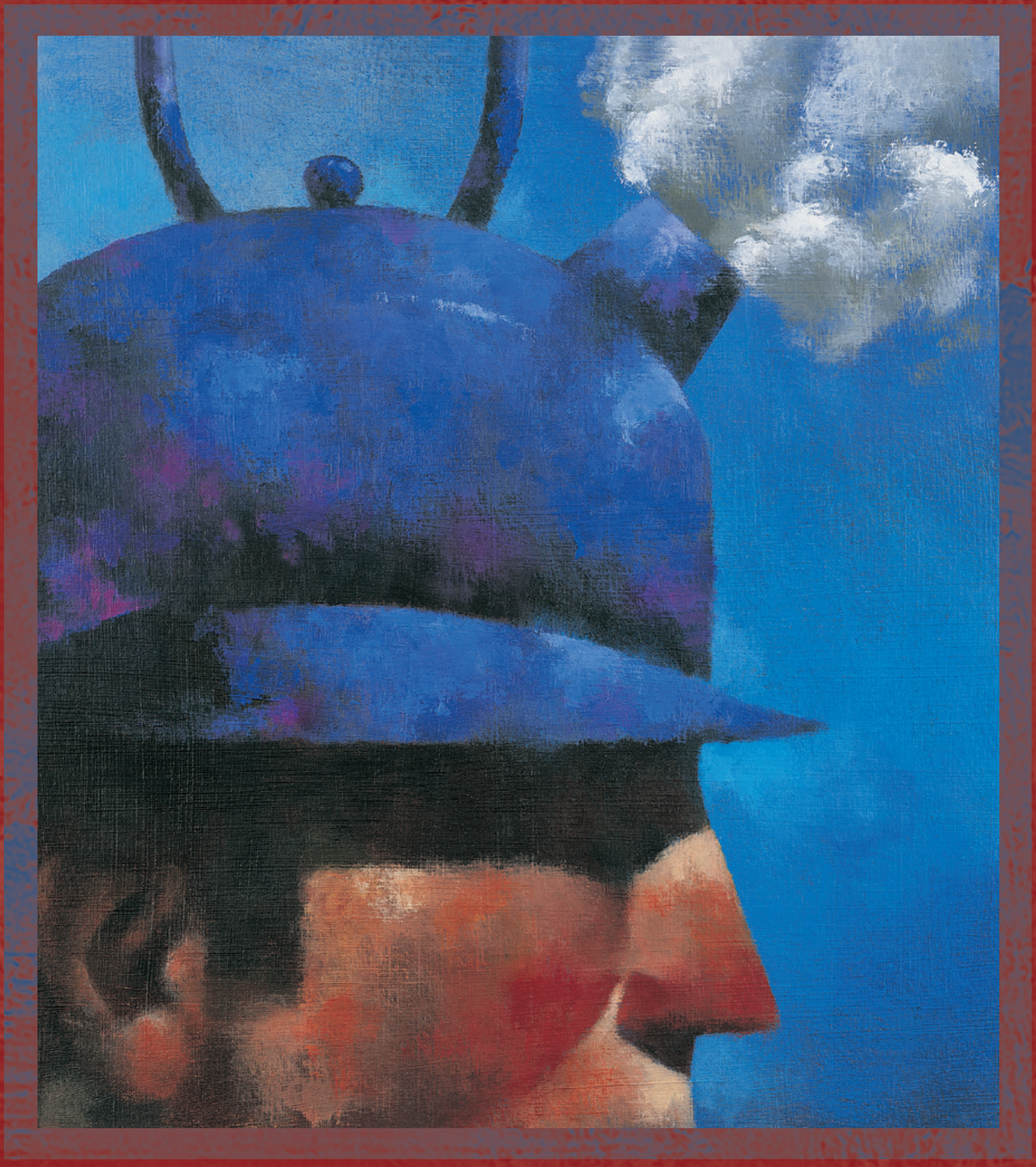
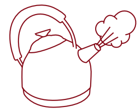


“Headlines from recent articles



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each one announcing an even larger
WHISTLEBLOWER
award against a competing company.”

Having Your Cake and Eating It, Too — *The (Un)Enforceability of Releases on Pre-Filing Qui Tam Claims*. After weeks of skillful negotiation with a disgruntled employee's attorney, you are putting the final touches on a release to avoid what would have been a messy age discrimination lawsuit. During those negotiations you have discovered that your disgruntled employee was a pro — he had won a substantial verdict against his prior employer for similar claims. In hindsight, it was clear that the employee had spent the past six months setting up his next severance package. Just as you are congratulating yourself for drafting an iron-clad release, your email icon begins to blink.

You click open the email from the disgruntled employee and read, “I want to remind you that I still have concerns about several compliance issues that I brought to the company's attention over the last several months. I hope my replacement will have better luck than I did getting the company to take these concerns seriously.” You shrink back into your chair wondering: *What concerns? What was he talking about?* Headlines from recent articles flash before your eyes, each one announcing an even larger whistleblower award against a competing company. You then look back at the release. Only moments ago, the document was a symbol of a crisis averted. Now, it looks weak and flimsy. Will the release cover this claim? If not, are there any actions you can take to guard against future *qui tam* claims brought by a released employee?

I. The False Claims Act Dilemma

The *qui tam* provision of the False Claims Act (FCA) encourages private citizens to bring a civil action on behalf of the United States against persons who defraud the government.[1] The term *qui tam* is an abbreviation for a Latin phrase which means, “he who sues on behalf of the king as well as for himself.” The whistleblowing employee, called a “relator” in a *qui tam* action, must first file his or her complaint under seal, allowing the government time to decide if it wishes to intercede in the action before the complaint is served on the defendant.[2] During this initial period of review by the government, the *qui tam* action may only be settled and dismissed with written consent by both the court and the Attorney General.[3] To encourage insiders to come forward, the successful whistleblower may recover attorneys' fees and costs as well as a share of the recovery, usually up to 30% of the award.[4] If the government decides not to intervene following this initial review period, the whistleblower has the right to settle the claim.[5]

The FCA is silent, however, regarding the whistleblower's right to settle a potential *qui tam* claim *prior* to filing the claim in court. Doing so arguably prevents the government from ever becoming aware of the fraud and results in all of the settlement proceeds going to the whistleblower, not to the government. After all, the government is the party harmed by the fraud. The whistleblower just happened to be in the “wrong spot, at the right time” to take advantage of the claim. On the other hand, employers have an interest in finality when negotiating potential liability with their current and former employees, and the payout to the employee would certainly act as a deterrent to future misconduct. While relatively few jurisdictions have addressed this issue, most courts that have done so have found that releases for yet-to-be-filed *qui tam* claims are void as against public policy.

II. The Current State of the Law

The prevailing case, *U.S. ex rel. Green v. Northrop Corp.*, arises from the Ninth Circuit.[6] The whistleblower in this case, Michael Green, had previously been employed as an investigator by Northrop Corporation's Advanced Systems Division. After being terminated, Green filed a wrongful discharge claim in state court alleging he had been fired for raising issues about Northrop's billing practices. To settle the discharge claim, Northrop paid Green $190,000 in exchange for Green's release of "any and all claims […] under the law."[7] Nine months later, Green filed a *qui tam* action against Northrop in federal court under the FCA, *raising the same billing issues* he had asserted in the settled state law suit. After the United States declined to intervene, the district court granted summary judgement, finding Green's settlement agreement in the prior suit barred his right to recovery.

The Ninth Circuit reversed and found that releases of *qui tam* claims prior to filing suit would undermine the central purpose of the FCA's *qui tam* provisions — incentivizing insiders to blow the whistle on fraud against the government. The Ninth Circuit was concerned that employers would settle with whistleblowers for an amount less than they would have to pay as a result of a successful *qui tam* claim. Under the FCA, whistleblowers only keep up to 30% of the recovery. The court reasoned that if pre-filing releases were allowed, a rational employee would be willing to accept a settlement for less than the total liability because the whistleblower would not have to share the settlement with the government. Moreover, the government, who was the wronged party in the first place, would recover nothing.

After the Ninth Circuit's ruling in *Green*, most district courts faced with a similar fact pattern have agreed that releases of *qui tam* claims prior to filing suit are unenforceable because they violate the public policy underpinnings of the False Claim Act.[8] This result makes final settlement with an outgoing employee virtually impossible. Even if the employee agrees to release any and every possible claim, that employee could literally deposit the settlement proceeds at the bank on the way to the courthouse to file a *qui tam* claim.

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III. A Glimmer of Hope?

Subsequent to *Green*, the Eighth and Ninth Circuits have found that in very limited situations, a pre-filing release may be enforceable to bar a future *qui tam* claim. Two years after *Green*, in *U.S. ex rel. Hall v. Teledyne Wah Chang Albany*, the Ninth Circuit considered the enforceability of pre-filing releases of *qui tam* claims where the government had already investigated the alleged *qui tam* claims and declined to intervene.[9] In this case, Christopher Hall, an engineer involved in the manufacture of nuclear reactor components for defendant Teledyne, alleged that Teledyne's manufacturing process did not meet government specifications.[10] Prior to filing any suit, in April of 1990, Mr. Hall brought this concern to management at Teledyne.[11] In response, Teledyne investigated the matter and concluded his concerns were unfounded.[12] Nevertheless, in January 1991, Teledyne informed the Nuclear Regulatory Commission (NRC) of Hall's concerns and the company's investigation.[13] Later that same month, Hall filed his own complaint with the NRC alleging Teledyne's failure to meet specifications.[14] In November 1991, the NRC informed Teledyne that after conducting its own investigation, it determined that the nuclear reactor components met specifications.[15]

Also in 1991, Hall initiated a state court action alleging a variety of employment related offenses.[16] In December 1993, Hall settled these claims with Teledyne and executed a broadly worded general mutual release. In 1994, less than one year after entering into the release, Hall filed a *qui tam* action in federal district court with the same allegations that Teledyne's manufacturing process did not meet government specifications.[17] The United States investigated, concluded the products met specifications, and declined to intervene in the action.[18]

The employer in *Hall* successfully argued that the prior release barred the plaintiff from proceeding with the *qui tam* claim. The court distinguished the case from *Green* noting that the federal government was aware of Hall's allegations and had investigated the allegations prior to Hall's settlement with Teledyne. Thus, in Hall, there was no concern that the release would prevent the government from learning about the alleged fraud.[19] Accordingly, under the *Hall* rationale, a release may be upheld if the defendant can prove that (1) the federal government had full knowledge of the plaintiff's charges before the release was executed, and (2) the federal government had already investigated the allegations prior to their release.[20] Thus, the *Hall* court creates an exception to the general rule that pre-filing releases are void as to future *qui tam* claims.

In 2001, the Eighth Circuit found a pre-

UNFORTUNATELY, HEALTHCARE ENTITIES *must assume* THAT PRE-FILING RELEASES OF *QUI TAM* CLAIMS WILL BE *unenforceable*. WHILE COUNSEL *may not* BE ABLE TO PROVIDE AN "*iron-clad guarantee*" THAT A FINAL RELEASE IS *indeed* FINAL, THEY CAN *undercut the ability* OF FORMER EMPLOYEES TO PURSUE A *QUI TAM* CLAIM.

filing release of a *qui tam* claim in a bankruptcy estate to be enforceable.[21] The Eighth Circuit, however, cautioned that its decision was extremely limited. The husband and wife relators in *U.S. ex rel. Gebert v. Transport Admin. Servs*. were terminated after their employer discovered the Geberts may have misappropriated over $500,000 in company assets. The Geberts subsequently filed for bankruptcy. When their former employer filed claims against them for misappropriation, the Geberts countered with a claim for $1.2 million. The bankruptcy trustee, the Geberts, and the former employer then entered into a settlement in which the trustee and the Geberts released the former employer for all claims. At no point, however, did the Geberts list among their schedule of assets a potential FCA claim.

The Geberts subsequently filed a *qui tam* lawsuit against their former employer. The Eighth Circuit, however, ruled the Geberts were barred from bringing the *qui tam* claim because of the release entered into during the bankruptcy proceedings. Moreover, the court found the Geberts to be judicially estopped from bringing the claim because the Geberts had failed to list their FCA claim in the schedule of assets before the bankruptcy court. The Eighth Circuit distinguished the Ninth Circuit's decision in *Green*, finding that the interest in enforcing the parties' release outweighed other policy concerns because the release was entered in the context of a bankruptcy proceeding rather than a general, independent release of a claim for money. Essentially, the court found that the public policy concerns addressed by *Green* were not present because the claim belonged to the bankruptcy estate, not to the former employees, and the proceeds of the release would flow to the estate instead of to the employee. The court noted, "the unique context of this case will have an exceedingly narrow application and, accordingly, will void nearly all of the public-interest harms discussed in [*Green*]."[22]

IV. Strategies for Uncertain Times

Unfortunately, healthcare entities must assume that pre-filing releases of *qui tam* claims will be unenforceable. While counsel may not be able to provide an "iron-clad guarantee" that a final release is indeed final, they can undercut the ability of former employees to pursue a *qui tam* claim. For instance, the release agreement should contain a representation and warranty section requiring that the employee affirmatively disclose any and all compliance issues with specificity, describe how the employee has firsthand knowledge of the issue, identify to whom and when the issue was reported, and indicate why they feel these claims have not been cured. This provision should contain the affirmation that the disclosure is true and correct to the best of the declarant's knowledge.

Doing so forces the employee to disclose all known concerns and helps narrow the universe of possible claims. Although a release may not be effective, counsel will at least know what possible claims may exist, placing settlement negotiations on a more level field. Also, if the former employee later asserts a *qui tam* claim on an undisclosed issue, counsel has ammunition to attack the credibility of the relator. Finally, if your company has investigated the compliance issue and found the allegations to be meritless, the company may consider informing the proper government authorities itself to come within the *Hall* exception and protect against later *qui tam* lawsuits. Thus, while you may not be able to keep your disgruntled employee out of the courtroom, you may be able to make him think twice before filing suit.

1 31 U.S.C. §3729, 3730(b).

2 *Id.* at §3730(b).

3 *Id.*

4 *Id.* at §3730(d).

5 *Id.*

6 *U.S. ex rel. Green v. Northrop Corp.*, 59 F.3d 953 (9th Cir. 1995)(*Green*).

7 *Id.*

8 *See, e.g., U.S. ex rel. El Amin v. George Washington University,* 2007 WL 1302597 *3-8 (D.D.C. 2007) (finding the public policy objectives of the False Claim Act outweigh the Defendant's undisputed interest in enforcing the release); *U.S. ex rel. Longhi v. Lithium Power Technologies*, 481 F.Supp.2d 815, 818 (S. D. Tex. 2007) (finding that enforcement of such a release would run counter to public policy and serve to potentially shield those who allegedly commit fraud against the United States); *U.S. ex rel. Bahrani v. ConAgra, Inc.*, 1983 F. Supp. 2d 1272 (D. Colo. 2002) (denying defendant's motion to dismiss and finding a pre-filing release invalid), *rev'd on other grounds* 465 F.3d 1189 (10th Cor. 2006); *U.S. ex rel. Pogue v. American Healthcorp, Inc.*, 1995 WL 626514 (M.D. Tenn. Sep. 14, 1995), *vacated on other grounds*, 914 F. Supp. 1507 (M.D. Tenn. 1996); *U.S. ex rel. DeCarlo v. Kiewit/AFC Enters., Inc.*, 937 F. Supp. 1039 (S.D.N.Y. 1996); *but see U.S. ex rel. Whitten v. Triad Hosps., Inc.*, 2005 WL 3741538 (S.D. Ga. Oct. 27, 2005) (holding that a pre-filing release of qui tam claims *was enforceable and did not violate public policy*) *rev'd on other grounds, U.S. ex rel. Whitten v. Triad Hosps., Inc.*, 2006 WL 3626992 (11th Cir. Dec. 13, 2006).

9 104 F.3d 230 (9th Cir. 1997).

10 *Hall*, 104 F. 3d. at 231.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 231-32.

16 *Id.* at 232.

17 *Id.*

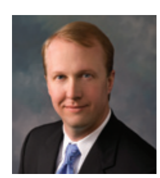
18 *Id.*

19 *Id.* at 233.

20 *Id.*

21 *U.S. ex rel. Gebert v. Transport Admin. Servs.*, 260 F.3d 909 (8th Cir. 2001).

22 *Id.*



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