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. 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. 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.

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. If the government decides not to intervene following this initial review period, the whistleblower has the right to settle the claim. 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. 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...
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. 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.

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. 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. If the government decides not to intervene following this initial review period, the whistleblower has the right to settle the claim. 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 held that releases for yet-to-be-filed qui tam claims are void 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. The whistleblowers 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, Green agreed to a pre-filing release of any and all claims against the government. 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.

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. Teleflite Wah Chang Alaska, 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 interven. 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. Prior to filing any suit, in April of 1990, Mr. Hall brought the matter to the attention of management at Teledyne. In response, Teledyne investigated the matter and concluded his concerns were unfounded.

Nevertheless, in January 1991, Teledyne informed the Nuclear Regulatory Commission (NRC) of Hall’s concerns and the company’s investigation. In June of 1990, five months after the NRC was notified of the allegations, Hall filed his own complaint with the NRC alleging Teledyne’s failure to meet specifications. In November 1991, the NRC informed Teledyne that after conducting its own investigation, it determined that the nuclear reactor components met specifications.

Also in 1991, Hall initiated a state court action alleging a variety of employment-related offenses. In December 1993, Hall settled these claims with Teledyne and executed a broadly worded general mutual release. Less than one year after entering into the settlement agreement in federal district court with the same allegations that Teledyne’s manufacturing process did not meet government specifications. The United States investigated, concluded the products met specifications, and declined to intervene in the action.

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. 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. 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-filing release of a qui tam claim in a bankruptcy estate to be enforceable. The Eighth Circuit, however, cautioned that its decision was extremely limited. The husband and wife relatives in U.S. ex rel. Gebert v. Transp. Admin. Servs. were terminated after their employers 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, 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].”

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 underwrite the ability of former employees to pursue a qui tam 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].”

Thus, the proper government authorities itself to come within the Hall exception and protect against later qui tam lawsuits. 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.
would certainly act as a deterrent to future misconduct. While relatively few jurisdictions have addressed this issue, most courts that have done so have allowed 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. 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, 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.

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 Whiting Alloys, 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. 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. Prior to filing any suit, in April of 1992, Mr. Hall brought the matter to the attention of management at Teledyne. In response, Teledyne investigated the matter and concluded his concerns were unfounded. Nevertheless, in January 1991, Teledyne informed the Nuclear Regulatory Commission (NRC) of Hall’s concerns and the company’s investigations. Later that same month, Hall filed his own complaint with the NRC alleging Teledyne’s failure to meet specifications. In November 1991, the NRC informed Teledyne that after conducting its own investigation, it determined that the nuclear reactor components met specifications. Also in 1991, Hall initiated a state court action alleging a variety of employment related offenses. In December 1993, Hall settled these claims with Teledyne and executed a broadly worded general mutual release. Less than one year after entering into the qui tam action in federal district court with the same allegations that Teledyne’s manufacturing process may not meet government specifications. The United States investigated, concluded the products met specifications, and declined to intervene in the action.

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. 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. 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-filing release of a qui tam claim in a bankruptcy estate to be enforceable. The Eighth Circuit, however, cautioned that its decision was extremely limited. The husband and wife relators in U.S. ex rel. Gebert v. Trans-Port 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, 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 scheduled assets of 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 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].”

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 disclaim 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. Thus, while healthcare entities must assume that releases of qui tam claims will be unenforceable, 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.