Let's Be Reasonable: Controlling Self-Help Discovery in False Claims Act Suits

Stephen M. Payne†

INTRODUCTION

The modern employee is surrounded by information. In a given day, an employee might read or write a report, receive dozens of e-mails, review business plans or records, or look over sales invoices. When the employee is done reviewing these documents, he likely saves them on a company server where they can be accessed anytime. On this server, the employee can access thousands of other documents that have been prepared, submitted, and saved by fellow employees. For the most part, these documents reveal nothing more than the day-to-day operations of the company. But what if somewhere in this vast trove of information lurks evidence that the company is steadily defrauding the US government? And what if the employee could receive a substantial sum of money for bringing those documents to light? Should the law allow the employee to take the documents without permission?

This Comment addresses the legal problems that arise when employees choose to take confidential corporate documents that might reveal fraud against the government and then use those documents to file suit under the False Claims Act[1] (FCA). The FCA is a federal statute that creates a civil cause of action against any person who defrauds the federal government.[2] Actions under the FCA may be brought by either the US attorney general or by private parties suing on behalf of the United States.[3] FCA suits brought by private parties are described using a set of special legal terms. The actions themselves are referred to as "qui tam" suits, and the private plaintiffs are termed "relators."[4]

---

† BA 2012, University of Notre Dame; JD Candidate 2015, The University of Chicago Law School.

1 31 USC § 3729 et seq.

2 31 USC § 3729(a).

3 31 USC § 3730(a)–(b).

4 *Graham County Soil and Water Conservation District v United States*, 559 US 280, 283 (2010).

In 1986, Congress significantly strengthened the qui tam provisions of the FCA to further incentivize whistleblowers to come forward and expose fraud against the government.[5] The centerpiece of the reform was an increase in the monetary reward for relators who bring successful qui tam suits.[6] The result was an explosion in the number of qui tam suits, which continues unabated today.[7] However, the 1986 amendments had a second, and possibly unintended, effect. By increasing the financial rewards available for relators but tying those rewards to the success of the suit, the FCA amendments encouraged relators to take any and all possible measures to ensure a favorable verdict. Perhaps in response to the financial rewards that attach to a successful suit—and only a successful suit—relators in FCA suits have occasionally engaged in a process called self-help discovery. Self-help discovery occurs when evidence is gathered unilaterally by the relator, outside the context of civil discovery and in anticipation of litigation.[8]

Self-help discovery presents its own set of unique legal problems. In particular, if the relator is a current or former employee suing his or her employer, seizure of documents may violate a confidentiality agreement signed by the employee.[9] When this occurs, employers are entitled to bring contractual counterclaims against the relator for breaching the agreement.[10] In this context, courts must effectively decide whether to enforce the contract and remedy the breach or to allow the documents to be used and the qui tam suit to proceed. Courts are currently split on the issue, using one of three distinct approaches. The first and largest group of courts holds that public policy voids confidentiality agreements in the context of the FCA.[11] A second, smaller group takes the opposite approach, holding that confidentiality agree-

---

5 False Claims Amendments Act of 1986, HR 4827, 99th Cong (May 15, 1986), 2d Sess, in 132 Cong Rec 22330, 22335 (Sept 9, 1986).

6 See id at 22339 (statement of Mr. Berman) (arguing that the increased monetary reward "is a critical incentive and reward for persons who come forward with information, putting themselves at risk on behalf of the Federal Treasury and American Taxpayers").

7 See US Department of Justice, Civil Division, *Fraud Statistics – Overview* *1–2 (Sept 30, 2013), online at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf (visited Aug 12, 2014).

8 See Jennifer Purcell, *Self Help Discovery: Are You Protecting Your Client and Yourself?*, 24 DCBA Brief 18, 18 (Dec 2011).

9 See, for example, *Cafasso v General Dynamics C4 Systems, Inc*, 2009 WL 1457036, *7–8 (D Ariz).

10 See id at *8.

11 See, for example, *Ruhe v Masimo Corp*, 929 F Supp 2d 1033, 1039 (CD Cal 2012).

ments are enforceable.[12] The Ninth Circuit has adopted a third approach, holding that the admissibility of documents obtained through self-help discovery turns on the reasonableness of the relator's conduct in relation to the need for the documents.[13] Making matters more confusing, this third approach does not appear to have been faithfully followed by the district courts within the Ninth Circuit. Instead, these courts have adopted the public policy approach, voiding the confidentiality agreements of relators.[14]

In sum, the law concerning self-help discovery in FCA cases is both contradictory and confusing. Even worse, the most common approaches to the issue—the public policy exception and the contractual rule—are diametrically opposed. The use of two opposing bright-line rules produces outcomes that are not cost minimizing, because one of the two rules must produce higher costs than the other.[15] In addition, the existence of two contrary approaches undermines the legislative policies underlying the FCA.[16]

Though the treatment of self-help discovery in FCA cases has become incoherent, it need not remain so. This Comment recommends abandoning the two opposing bright-line rules currently applied by most courts and instead proposes a more developed version of the reasonableness test suggested by the Ninth Circuit. Naturally, some will be skeptical of abandoning easy-to-apply, bright-line rules in favor of a potentially murky reasonableness analysis. Such criticism misses the point. This is not the classic case of rules versus standards, nor is it an area in which a standard offers significant uncertainty. To that end, this Comment argues that there are three specific reasons to prefer a reasonableness analysis in the FCA context.

First, this Comment argues that the rules-versus-standards argument holds little weight when, as here, courts are currently applying two opposing bright-line rules. The choice is not between a single rule and an alternative standard. Rather, it is between the continued use of two irreconcilable rules and the unifying alternative of a reasonableness standard.

---

12 See, for example, *Zahodnick v International Business Machines Corp*, 135 F3d 911, 915 (4th Cir 1997).

13 See *Cafasso v General Dynamics C4 Systems, Inc*, 637 F3d 1047, 1062 (9th Cir 2011).

14 See, for example, *Ruhe*, 929 F Supp 2d at 1038–39; *Siebert v Gene Security Network, Inc*, 2013 WL 5645309, *8 (ND Cal).

15 See Part III.A.1.

16 See Part III.A.3.

Second, this Comment argues that a reasonableness test makes sense in the context of the FCA because it is a tried-and-true method of dealing with self-help discovery. To support that claim, this Comment discusses the treatment of self-help discovery in employment-discrimination litigation. Courts addressing the issue in the context of employment-discrimination suits employ a balancing approach[17] that, when boiled down to its central components, is similar to the reasonableness test proposed by the Ninth Circuit.

Lastly, this Comment argues that a reasonableness test offers substantial benefits over the use of bright-line rules. A reasonableness analysis allows courts to carefully consider the policy goals of the legislature and the applicable costs in each case. In doing so, courts should be able to find the solution that is both faithful to the statute and cost minimizing in each case.

In order to clearly present each of these arguments, this Comment proceeds as follows: First, Part I outlines the procedures related to a qui tam suit generally, discusses the modern explosion of qui tam litigation, and defines the problem of self-help discovery in more detail. Part II reviews the approaches that courts take to self-help discovery in FCA claims, discusses the current bright-line rules, and notes some problems with the existing regime. Part III argues that a reasonableness approach is superior to the current regime—especially because it is likely to be cost minimizing. Then, with an eye toward FCA cases, it examines the treatment of self-help discovery in the employment-discrimination context. Part III concludes by proposing a model reasonableness test for use in FCA cases, discussing how such a test would work in practice and analyzing the question of remedy.

I. QUI TAM SUITS AND THE PROBLEM OF SELF-HELP DISCOVERY

This Part discusses the history and process of FCA qui tam litigation and introduces the problem of self-help discovery. Section A outlines the development of the current qui tam regime and the modern explosion of qui tam litigation. Section B then explains the process for bringing a qui tam suit, outlines the problem of self-help discovery, and discusses why relators might be tempted to use it instead of civil discovery.

---

[17] See, for example, *Niswander v Cincinnati Insurance Co*, 529 F3d 714, 725–26 (6th Cir 2008).

A. The Modern Explosion of FCA Qui Tam Litigation

Initially enacted during the Civil War, the FCA stood mostly unaltered for over 120 years.[18] In the 1980s, however, members of Congress became concerned about an increase in procurement abuses accompanying that decade's military buildup.[19] These concerns led to a set of amendments designed to strengthen the FCA, particularly its qui tam provisions.

The amendments strengthened private individuals' incentives to bring qui tam suits in two ways. First, the amended FCA created a new antiretaliation cause of action for relators.[20] Relators could use this new cause of action to sue if they were retaliated against for any lawful act in furtherance of their FCA claim, even if the FCA claim itself was unsuccessful.[21] This change significantly mitigated some of the risks previously associated with whistleblowing[22]—most notably the likelihood that an employee would be fired simply for filing an FCA suit.

In addition, the amended FCA increased awards for qui tam plaintiffs who brought successful suits. Previously, in suits in which the government chose to intervene, the qui tam plaintiff was entitled to receive up to 10 percent of any recovery.[23] The amendments increased this percentage significantly, to between 15 and 25 percent of the recovery depending on the relator's contribution to the action.[24] The amount recoverable by qui tam plaintiffs pursuing a suit on their own also increased from a *cap* of 25 percent to a payout of between 25 and 30 percent of any damages award.[25] By providing specified award ranges and increasing the maximum percentages available, the 1986

---

18 False Claims Amendments Act of 1986, 132 Cong Rec at 22335 (cited in note 5) (statement of Mr. Glickman) (noting that the FCA had been amended only twice in 123 years).

19 See id.

20 See Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation under the Civil False Claims Act*, 41 Pub Contract L J 813, 819 (2012). These antiretaliation protections are codified at 31 USC § 3730(h).

21 False Claims Amendments Act of 1986, Pub L No 99-562, 100 Stat 3153, 3157–58, codified at 31 USC § 3730(h)(1).

22 See Elameto, 41 Pub Contract L J at 817–18 (cited in note 20).

23 Act of Sept 13, 1982, Pub L No 97-258, 96 Stat 877, 978–79, codified as amended at 31 USC § 3730.

24 False Claims Amendments Act, 100 Stat at 3156, codified at 31 USC § 3730(d)(1).

25 Compare Act of Sept 13, 1982, 96 Stat at 979, with False Claims Amendments Act, 100 Stat at 3156–57, codified at 31 USC § 3730(d)(2).

amendments reduced the ability of courts to minimize payouts to relators.[26]

At the same time, the increase in reward percentages provided a stronger financial incentive for relators to bring qui tam actions. The new antiretaliation provisions concurrently limited the downside risk to failed relators, removing some of the fear that whistleblowers might have felt about coming forward. Whistleblowing thus became safer and far more lucrative.

As might be expected, the 1986 amendments to the FCA unleashed a flood of qui tam litigation.[27] From 1943 to 1986, the number of FCA qui tam suits was minimal, averaging approximately six per year.[28] Furthermore, in 1987, non–qui tam suits under the FCA outnumbered qui tam suits nearly eleven to one.[29] In the two decades following the amendments, the situation has reversed. From 1987 to 2013, the total number of qui tam suits outnumbered non–qui tam actions by a ratio of just over two to one.[30] The numbers are even more striking in absolute terms. Over 9,200 qui tam cases have been opened since 1987. These actions have produced $27 billion in settlements and judgments, including $4.2 billion in payments to relators.[31] In 2013 alone, qui tam suits produced a combined $2.9 billion in settlements and judgments.[32] Roughly $387 million of that, or about 13 percent, was paid out to relators.[33] Though the number of qui tam suits varies from year to year, the explosion of such litigation shows no signs of abating. The number of qui tam suits filed increased from an average of 393 per year in the period from 2004 through 2008 to an average of 609 per year in the period from 2009 through 2013.[34] Given the consistent upward trend, it is no surprise that 2013 had the highest number of qui tam suits on record.[35]

---

26 See Elameto, 41 Pub Contract L J at 818–19 (cited in note 20).

27 See id at 815.

28 Id at 818, citing Steve France, *The Private War on Pentagon Fraud*, 76 ABA J 46, 48 (Mar 1990).

29 Elameto, 41 Pub Contract L J at 825 n 96 (cited in note 20).

30 US Department of Justice, Civil Division, *Fraud Statistics* at *2 (cited in note 7). See also Elameto, 41 Pub Contract L J at 825 n 96 (cited in note 20).

31 US Department of Justice, Civil Division, *Fraud Statistics* at *2 (cited in note 7).

32 Id.

33 Id.

34 Id at *1–2.

35 US Department of Justice, Civil Division, *Fraud Statistics* at *2 (cited in note 7) (reporting 753 qui tam suits in 2013).

B. FCA Lawsuits and Self-Help Discovery

1. FCA qui tam suits and common relators.

The FCA spells out the procedure for bringing a qui tam action in some detail.[36] When a relator files a qui tam FCA action, he is required to provide the DOJ with a copy of the complaint and written disclosure of all material evidence and information that he possesses.[37] These copies are kept under seal.[38] The DOJ then has sixty days to decide whether to intervene in the suit.[39] If it intervenes, the government assumes primary responsibility for prosecuting the action.[40] Currently, the DOJ chooses to intervene in about 22 percent of cases.[41] In the remaining cases, the relator has the right to continue the action on his own.[42]

Relators are current or former employees of corporations that do business with the government.[43] This is not surprising, given that employees have informational advantages over other potential relators. Employees are likely familiar enough with their employers' business to recognize when something seems awry, and they have access to internal information that may expose fraudulent behavior.[44] The importance of employees to the FCA whistleblowing scheme is further illustrated by the inclusion of the previously discussed antiretaliation provisions in the FCA, which apply only if the relator is an employee, contractor, or agent of the entity accused of fraud.[45]

2. Self-help discovery.

A separate set of legal issues is implicated when an employee appropriates confidential documents from his or her employer in anticipation of a qui tam suit. Impermissible evidence gathering done in this context—outside the civil-discovery process and in

---

36 See 31 USC § 3730.

37 31 USC § 3730(b)(2).

38 31 USC § 3730(b)(2).

39 31 USC § 3730(b)(2).

40 31 USC § 3730(c)(1) ("If the government proceeds with the action, it shall have primary responsibility for prosecuting the action").

41 See Elameto, 41 Pub Contract L J at 826 (cited in note 20).

42 31 USC § 3730(b)(4)(B).

43 See Marc S. Raspanti and David M. Laigaie, *Qui Tam Litigation* § VII.B (American Health Lawyers Association seminar materials, Oct 2, 1996), available on Westlaw at AHLA-PAPERS P10029631; Jeffrey A. Lovitky, *Qui Tam Litigation: A Practical Primer*, 35 Trial 68, 69 (Jan 1999).

44 See Raspanti and Laigaie, *Qui Tam Litigation* at § VII.B (cited in note 43).

45 See 31 USC § 3730(h)(1).

anticipation of litigation—is termed "self-help discovery."[46] As used here, the term has a specific and limited meaning. It does not encompass every unilateral investigation done by a party, even if that investigation is not fully regulated or authorized by a federal rule of procedure.[47] For example, a party involved in a car accident might wish to get a head start on proving what happened and therefore hire a private investigator to photograph the accident site. If this investigator is hired without prior judicial approval, the accident participant might colloquially be said to be engaging in self-help discovery because his act is outside the judicially sanctioned discovery process. However, just because the investigation is unilateral does not mean it is impermissible. The investigation does not contravene any rule, law, or contractual obligation, nor does it invade the rights of other parties. It simply involves a private party investigating his own claim.[48]

This Comment defines self-help discovery differently, limiting it to cases in which the plaintiff's unilateral investigation violates a substantive law,[49] an employer's general information restrictions,[50] or a specific contractual obligation of the relator.[51] The specific focus will be on the latter two scenarios, both of which entail violation of a contract between the plaintiff and the entity accused of fraud. Consequently, ensuing uses of the term "self-help" can be assumed to refer to actions that violate contractual rights, though the specific rights at issue may be contained in a variety of contractual forms.[52]

---

46 Purcell, 24 DCBA Brief at 18 (cited in note 8).

47 See *Allendale Mutual Insurance Company v Bull Data Systems, Inc*, 32 F3d 1175, 1178 (7th Cir 1994) (explaining that a party's "right to investigate" is not always explicitly encompassed by a federal rule).

48 See, for example, *Simington v Menard, Inc*, 2012 WL 3288745, *3–4 (ND Ind) (noting that the rules of civil procedure do not prevent parties from legally investigating their own claims).

49 In severe instances, self-help discovery may be considered theft by the employee. See, for example, *Jackson v Microsoft Corp*, 211 FRD 423, 431–32 (WD Wash 2002) (determining that the plaintiff's appropriation of compact discs from Microsoft constituted theft, and that the plaintiff's subsequent use of the stolen compact discs in preparing his lawsuit merited dismissal). Likewise, self-help discovery is not generally considered a protected activity. See, for example, *Ashman v Solectron Corp*, 2008 WL 5071101, *3 (ND Cal).

50 See, for example, *Rector v Bon Secours Richmond Health Corp*, 2014 WL 66714, *6 (ED Va).

51 See, for example, *Glynn v EDO Corp*, 2010 WL 3294347, *1–2 (D Md).

52 For example, an employer may include confidentiality obligations as part of an employment agreement, in a separate confidentiality agreement, or as a condition of a separation or termination agreement. See *Saini v International Game Technology*, 434 F Supp 2d 913, 925 (D Nev 2006).

Because the existence of a contract necessarily requires some sort of prior relationship between the parties, self-help counterclaims based on contractual violations are most likely to arise in cases in which the plaintiff is or was employed by the defendant corporation. This means that self-help discovery commonly occurs in FCA qui tam cases and Title VII employment-discrimination cases, both of which frequently pit employees against employers. While self-help discovery can of course occur in other legal contexts,[53] this Comment focuses on the problem as it relates to the FCA, drawing on the treatment of self-help discovery in the Title VII context to further inform the discussion.[54]

3. Why engage in self-help?

When an employee appropriates evidence for a qui tam action in violation of a confidentiality agreement, the employer can sue the employee for breach of contract.[55] The employer might also bring claims for breach of fiduciary duty or conversion.[56] Lastly, and perhaps most importantly, it is possible that the employee will be fired for his conduct. On the other hand, an employee can avoid such unattractive consequences by forgoing self-help and pursuing normal civil discovery. Assuming that a relator's case makes it past a motion to dismiss, the relator will have access to all the traditional discovery tools. This includes the ability to furnish interrogatories and request documents.[57] Employers may occasionally be able to obtain protective orders for confidential, privileged, or sensitive documents, but they likely cannot protect the documents that will be relevant to proving the alleged fraud.[58] Thus, if there is proof to be had, the relator can likely get it through discovery.

---

[53] See, for example, *Mitchell Co v Campus*, 2009 WL 3110367, *2–3 (SD Ala) (addressing self-help discovery that occurred in a lawsuit over soured real estate dealings).

[54] See Part III.B.

[55] See Michael R. Grimm, et al, *Courageous Whistleblowers Are Not "Left Out in the Cold": Legitimate Justifications Exist for Collecting Evidence of False Claims Act Violations*, 39 False Claims Act & Qui Tam Q Rev 127, 130 (2005).

[56] See id.

[57] See 78 Am Jur 3d Proof of Facts §§ 33–38 (2014).

[58] See Stephen S. Cowen, Christopher C. Burris, and Jessica J-M Hagen, *Transmission of Corporate Documents between the Government and Relators during False Claims Act Investigations and Litigation: Are There Any Limits on "Self Help" Discovery and Government Disclosure of Subpoenaed Materials?*, Civil False Claims and Qui Tam Enforcement *C-11, *C-19 to -24 (ABA-CLE 2010), online at http://www.kslaw.com/Library/publication/6-10CLECowenBurrisHagen.pdf (visited Aug 12, 2014).

Despite the potentially severe consequences of engaging in self-help discovery and the alternative of civil discovery, employees clearly remain tempted to appropriate documents outside of the normal discovery process. There must be some reason why relators regard civil discovery as a dissatisfying alternative. Though motives to use self-help discovery vary,[59] the temptation for most relators is likely twofold.

First, by providing evidence justifying government involvement, self-help discovery may increase the chance that the government will take over the qui tam suit.[60] As discussed in the previous Section, upon filing a qui tam suit a relator is required to provide the DOJ with any material evidence or information that the relator possesses.[61] Because this obligation is triggered prior to civil discovery, the relator faces pressure to provide convincing evidence at the complaint stage. If the evidence is not persuasive, the government may decline to intervene. While this might seem insignificant given that the relator remains free to continue the case on his own, government intervention is actually quite important to relators. Government involvement can dramatically impact the relator's chance of recovery and the size of that recovery. Cases pursued by relators alone are remarkably unsuccessful, suffering from a dismissal rate of 86 percent.[62] That dismissal rate drops to a mere 5 percent in cases in which the government steps in, meaning that government intervention may often make or break a relator's case.[63]

The impact of government intervention on the size of recovery is just as staggering. In 2013, cases in which the government intervened produced over $2.8 billion in settlements and judgments.[64] In contrast, cases pursued by the relators alone realized less than $110 million.[65] In other words, cases in which the government chose to intervene realized about 96 percent of all

---

59 See, for example, Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 Colum Hum Rts L Rev 529, 530 (2003) (discussing self-help discovery motivated by subtle discrimination); Laura W. Morgan, *Marital Cybertorts: The Limits of Privacy in the Family Computer*, 20 J Am Acad Matrim Lawyer 231, 231 (2007) (addressing self-help discovery that seeks to avoid liability for the actions of private investigators).

60 See, for example, *Cafasso*, 2009 WL 1457036 at *5 (discussing a government investigator's desire to review documents that might indicate the alleged fraud).

61 31 USC § 3730(b)(2).

62 Elameto, 41 Pub Contract L J at 825–26 (cited in note 20).

63 See id.

64 US Department of Justice, Civil Division, *Fraud Statistics* at *2 (cited in note 7).

65 Id.

qui tam recoveries.[66] Though these discrepancies are probably due to the fact that the government selects the most promising and high-profile cases for intervention,[67] the fact remains that the relator has an incentive to make the case appear promising at the outset. Even if the case turns out to be a dud, the government might still be able to obtain a more favorable settlement than the relator could have alone.

The fear that the government will ignore a whistleblower who fails to present substantial evidence of wrongdoing is far from unrealistic. The infamous Bernie Madoff case presents a compelling example. As is now common knowledge, Madoff ran a prominent investment firm that was exposed in 2008 as a massive Ponzi scheme.[68] Losses totaled up to $65 billion.[69] Madoff ultimately pled guilty to running the scheme and was sentenced to 150 years in prison.[70] After the case was resolved, reports surfaced that investment analyst Harry Markopolos had repeatedly tipped off the SEC about Madoff's investment activities, beginning as early as 2000.[71] Markopolos lacked direct evidence of the fraud but provided the SEC with calculations showing that Madoff's returns were mathematically impossible based on financial statements and the market.[72] The SEC, however, ignored Markopolos.[73] Though Markopolos did not report any FCA violations, the point remains that the SEC failed to act even when repeatedly presented with compelling logic and potentially massive losses. Markopolos was not a Madoff employee with the chance to appropriate inside documents showing fraudulent practices, but had he been in such a position, it is hard to imagine him resisting the temptation to do so. In light of Markopolos's experience, FCA relators are justified in their fear that, without appropriated documents proving fraud, they simply will not be believed.

---

66 Elameto, 41 Pub Contract L J at 826 (cited in note 20).

67 See text accompanying notes 75–77.

68 Diana B. Henriques and Zachery Kouwe, *U.S. Arrests a Top Trader in Vast Fraud*, NY Times A1, A1 (Dec 12, 2008).

69 Diana B. Henriques and Jack Healy, *Madoff Jailed after Pleading Guilty to Fraud*, NY Times A1, A17 (Mar 13, 2009).

70 Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, NY Times A1, A1 (June 29, 2009).

71 Daniel M. Gold, *The High Human Cost of Following the Money in the Madoff Fraud Case*, NY Times C12, C12 (Aug 26, 2011).

72 Id.

73 Id. For a comprehensive account of Markopolos's whistleblowing, see generally Harry Markopolos, *No One Would Listen: A True Financial Thriller* (Wiley 2010).

Second, engaging in self-help discovery may allow a relator to survive a motion to dismiss, especially given the heightened pleading standard for fraud actions.[74] Motions to dismiss occur before discovery, meaning that whatever evidence might be discoverable later is of no help to a relator. Though there is no direct evidence that engaging in self-help discovery improves one's chances of surviving a motion to dismiss, the 86 percent dismissal rate for qui tam cases in which the government does not intervene suggests that dismissal is a legitimate fear.[75] Indeed, the dismissal rate for individually pursued qui tam actions is about 10 percent higher than the average dismissal rate for civil actions.[76] Of course, these statistics may be somewhat misleading. The particularly high rate of dismissal for individually pursued qui tam suits is doubtless a partial product of the intervention process, which removes promising suits from the pool. Even so, at least one case has suggested that access to insider information is the easiest way to plead an FCA claim with particularity.[77] Relators with access to this information consequently have an incentive to take it. Relators may fear that if they do not, their cases will suffer a one-two punch—refusal to intervene followed by dismissal.

4. The legal posture of FCA self-help-discovery cases.

The fact pattern in the typical FCA self-help-discovery case usually looks something like the situation in *Cafasso v General Dynamics C4 System, Inc*.[78] In *Cafasso*, the relator appropriated documents from her employer, General Dynamics, after learning that she was about to be discharged.[79] Once her discharge became official, the relator filed a qui tam suit for improper retaliation under the FCA.[80] The relator claimed that she was in-

---

74 See FRCP 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").

75 See Elameto, 41 Pub Contract L J at 826 (cited in note 20).

76 See Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 Judicature 127, 132 (Nov–Dec 2012) (finding a dismissal rate of about 77 percent for all civil suits).

77 See *Clausen v Laboratory Corporation of America*, 290 F3d 1301, 1314–15 (11th Cir 2002) (dismissing the relator's suit for pleading merely conclusory allegations but noting that, as a corporate outsider, the relator was in a poor position to obtain the inside information about billing practices that might be required).

78 2009 WL 1457036 (D Ariz).

79 Id at *5–6.

80 Id at *8.

vestigating fraud, a protected activity under the FCA.[81] In the process, she turned the documents over to her attorney.[82] General Dynamics pled six counterclaims, including breach of contract, conversion, and breach of fiduciary duty.[83] The two sides then filed cross motions for summary judgment.[84]

The court therefore faced two distinct but interrelated legal questions. First, it had to decide whether the relator's qui tam suit had a chance of victory on the merits. Second, it had to determine whether the confidentiality agreement had been breached. Though each claim is technically distinct, in practice the resolution of the first claim relies heavily on the resolution of the second. Finding for the employer on the contractual claim would require the court to award a remedy, which would typically involve clawback of the documents by the employer or some sort of monetary damages.[85] Clawback would typically make it impossible for the employee to win at trial, and damages awards would presumably negate or reduce the incentive to bring a qui tam suit in the first place.[86] Clawback might also lead to dismissal of the suit if the plaintiff cannot satisfy the particularity requirement for pleading fraud without the documents.[87] In short, the remedy awarded for the contractual claim would almost certainly negate—or at least make less remunerative—the qui tam suit even if it survived summary judgment.

Because the answer to the contractual question significantly affects the odds that the qui tam suit will succeed or even be initiated, it is helpful to focus primarily on the contractual counterclaim. The court's ruling on that claim—especially the remedy that it chooses to award—will almost always dictate the outcome

---

81 Id at *11.

82 *Cafasso*, 2009 WL 1457036 at *13.

83 Id at *8.

84 Id.

85 See, for example, *Saini*, 434 F Supp 2d at 925 (ordering an employee, in the context of a discrimination suit, to return "confidential and proprietary" documents).

86 See, for example, *Glynn v Impact Science & Technology, Inc*, 807 F Supp 2d 391, 431 (D Md 2011) (ordering the relator to pay nearly $90,000 in damages). Though contract damages are likely to be less than the financial reward for a successful qui tam suit, they may be greater in terms of expected value. Dismissal rates for FCA qui tam suits are high and win rates are low, as discussed in the previous Section. If the probability of being forced to pay damages for self-help discovery is high, then the expected value of an FCA suit based on self-help discovery might run into the negative. Put another way: (contract damages × chance of being ordered to pay damages) might be greater than (relator award × chance of a successful suit).

87 See FRCP 9(b). For an analysis of the requirements of Rule 9(b) in an FCA case, see *Ruhe*, 929 F Supp 2d at 1037–38.

of the qui tam suit. The general rule applied to the contractual counterclaim also has an impact on the ex ante incentives to engage in self-help discovery. If the employee knows that he will never be able to use the documents and may face damages, he will be much less likely to appropriate them in the first place. Relators also may not come forward at all, especially if they think that the government will not believe their claims without supporting documentation.

II. AN INCOHERENT APPROACH: THE CURRENT TREATMENT OF SELF-HELP DISCOVERY IN FCA CASES

Courts are currently divided over how to treat contractual counterclaims when an FCA relator has engaged in self-help discovery. Courts' interpretations can be placed into three groups: First, the Ninth Circuit has adopted a reasonableness test, holding that the admissibility of documents obtained via self-help discovery turns on the reasonableness of the relator's conduct in relation to his need for the documents.[88] A second set of courts has held that confidentiality agreements are void in the face of an FCA suit, explaining that the public policy interest in combating fraud outweighs the employer's interest in confidentiality.[89] Lastly, a third group of courts has taken the opposite position, holding that confidentiality agreements are enforceable even in the face of qui tam suits.[90]

This Part outlines these three different approaches. It also addresses the remedies that courts award when they conclude that confidentiality agreements are enforceable.

A. The Ninth Circuit Reasonableness Test

The Ninth Circuit's decision in *Cafasso v General Dynamics C4 Systems, Inc*[91] offers a unique approach to the problem of self-help discovery. In that case, the relator seized thousands of documents in violation of a confidentiality agreement with her employer.[92] The employer then sued to recover the documents, and the relator filed an FCA suit in district court two days later.[93]

---

88 See *Cafasso*, 637 F3d at 1062.

89 See, for example, *Ruhe v Masimo Corp*, 929 F Supp 2d 1033, 1039 (CD Cal 2012).

90 See, for example, *Glynn v Impact Science & Technology, Inc*, 807 F Supp 2d 391, 424–25 (D Md 2011).

91 637 F3d 1047 (9th Cir 2011).

92 Id at 1052.

93 Id.

The Ninth Circuit declined to adopt a broad public policy exception based on the factual circumstances of the case, instead leaving the issue open.[94] The court stated that, in order to qualify for such an exception, an aspiring relator would need to explain "why removal of the documents was reasonably necessary to pursue an FCA claim."[95] The court then applied this test to the relator's conduct, determining that her seizure was "overbroad and unreasonable."[96] Central to this conclusion was the fact that the relator indiscriminately copied tens of thousands of documents, sweeping up not only those related to the alleged fraud, but also documents that contained confidential attorney-client communications, trade secrets, internal research, sensitive government information, and at least one sealed patent application.[97] The court worried that if a public policy exception were applied in these extreme circumstances, all confidentiality agreements would be unenforceable so long as the employee later filed a qui tam action.[98] Based on this concern, the Ninth Circuit affirmed the grant of summary judgment for the employer.[99]

What merits attention in the Ninth Circuit's opinion is not its resolution of the case, but rather its reasoning regarding self-help discovery. In particular, the Ninth Circuit's decision suggests that courts should employ a reasonableness analysis in FCA self-help-discovery cases.[100] The court thoroughly explained that this was not a holding, expressly stating that it reserved deciding on the existence of a public policy exception "for another day."[101] The Ninth Circuit did, however, establish a framework for evaluating the potential application of a public policy exception. Specifically, the Ninth Circuit focused on the reasonableness of the relator's conduct *in relation to* the need for the appropriated documents.[102] The court explained that future relators would need to justify why the removal of documents was "reasonably necessary to pursue an FCA claim" and suggested that lower courts consider "in particular instances for particular

---

94 Id at 1062 ("Although we see some merit in the public policy exception that Cafasso proposes, we need not decide whether to adopt it here.").

95 *Cafasso*, 637 F3d at 1062.

96 Id.

97 Id.

98 Id.

99 *Cafasso*, 637 F3d at 1062.

100 See id.

101 Id.

102 See id.

documents whether confidentiality policies must give way to the needs of FCA litigation for the public's interest."[103]

Two features of the *Cafasso* test are particularly important. First, the test is amenable to two alternative readings. The Ninth Circuit did not focus on reasonableness in the abstract, but rather on "why removal of the documents was reasonably necessary to pursue an FCA claim."[104] While this might seem like a straightforward requirement, the precise meaning of "reasonably necessary" is unclear. One possible reading is that the appropriated documents must simply be necessary to prove the fraud allegation—meaning that they must be highly probative. A second, stronger reading is that the actual taking of the documents via self-help discovery must be necessary. The documents would still need to be relevant to proving the claim, but simple relevance would not excuse the self-help discovery.

A close reading of the opinion yields two clues that suggest that the Ninth Circuit meant to adopt the second, stronger meaning of "reasonably necessary." The first clue comes from the court's conclusion that the relator's actions were not reasonably necessary: the court tersely explained that the need to pursue a valid claim "does not justify the wholesale stripping of a company's confidential documents."[105] This language suggests that self-help discovery is not excused simply because it targets evidence relevant to the qui tam claim. The relator must have some special justification that goes beyond a desire to prove her case. The court's determination that the relator's appropriation of documents was "overbroad and unreasonable" contains a second clue.[106] Specifically, the use of the word "and" implies that the relator's conduct was problematic for two independent reasons. The self-help discovery was overbroad because it involved the seizure of thousands of irrelevant documents, and it was unreasonable because it lacked a justification beyond the need for proof.

In sum, *Cafasso* implies that, in order to fall within a public policy exception for self-help discovery, a relator would need to show two things: (1) that the appropriation of documents was reasonable, meaning that it was narrowly tailored to documents related to the suit; and (2) that it was necessary to use self-help

---

[103] *Cafasso*, 637 F3d at 1062.

[104] Id.

[105] Id.

[106] Id.

discovery to obtain the documents. Though the Ninth Circuit did not suggest what level of necessity is required, or whether the existence of any alternative options (like civil discovery) defeats a necessity claim, this Comment argues that the treatment of self-help discovery in employment-discrimination litigation offers a few possibilities.[107]

The second important feature of the Ninth Circuit's framework is its indication that courts should consider the balance of interests in "particular instances."[108] The use of this phrasing, as opposed to a call for a weighing of interests in all cases, implies that the Ninth Circuit envisioned district courts approaching self-help discovery on a case-by-case basis. Had the court intended to adopt a bright-line rule, it would have used different language.

Altogether, the Ninth Circuit's decision in *Cafasso* is best read to suggest that a case-by-case reasonableness test should be applied to self-help discovery in FCA cases. This test would take into account both the reasonableness and necessity of the relator's conduct. However, regardless of the Ninth Circuit's intentions, it does not appear that district courts within the Ninth Circuit have since applied such a test. Rather than balancing the interests or considering reasonableness, these courts have sketched out bright-line public policy rules. The following sections outline those decisions.

B. Courts Permitting Self-Help Discovery on Public Policy Grounds

Authority for an FCA public policy exception[109] to confidentiality agreements appears mostly in district court decisions.

---

[107] See Part III.B.1.

[108] *Cafasso*, 637 F3d at 1062.

[109] A public policy exception is possible in this instance because of Supreme Court precedent permitting federal courts to void a contract when it restricts the use of a federal cause of action. Otherwise, state contract law would govern. The governing case is *Town of Newton v Rumery*, 480 US 386 (1987), which considered the validity of a contractual waiver that would have effectively barred the plaintiff in the case from bringing a § 1983 suit. Id at 390–91. The Court held that, when an agreement purports to waive a right to sue conferred by a federal statute, whether the policies underlying the law may render the waiver unenforceable is a question of federal law. Id at 392. The Court instructed that such questions are to be answered "by reference to traditional common-law principles." Id. The justices described the operative principle as follows: "[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." Id.

This Section outlines each of those decisions, focusing primarily on their common framework.

Two particularly strong applications of the public policy doctrine can be found in district courts within the Ninth Circuit following *Cafasso*. These two courts ignored the Ninth Circuit's call for reasonableness, instead interpreting *Cafasso* to permit an FCA public policy exception to confidentiality agreements.

Ruhe v Masimo Corp,[110] decided just one year after *Cafasso*, was the first lower court decision to ignore the Ninth Circuit's suggested approach. In *Ruhe*, two relators copied documents from their work hard drives in violation of confidentiality agreements.[111] They then used those documents to support an FCA qui tam suit against their former employer, claiming that the employer had encouraged fraudulent billing of the government.[112] The employer tried to exclude the documents, arguing that allowing their use would be "scandalous and impertinent" because the documents were seized in violation of a confidentiality agreement.[113] The district court disagreed, holding that the taking was not wrongful given the "strong public policy in favor of protecting whistleblowers who report fraud against the government."[114] The court cited *Cafasso* to support this position, claiming that the Ninth Circuit had "stated that public policy merits finding individuals such as Relators to be exempt from liability for violation of their nondisclosure agreement."[115] As discussed in the previous Section, the Ninth Circuit said no such thing. Rather, the Ninth Circuit explained that, while it saw "some merit in the public policy exception . . . [the court] need not decide whether to adopt it here."[116] The Ninth Circuit then went on to delineate its reasonableness analysis.[117] The district court ignored this too. It neither mentioned nor applied the Ninth Circuit's instruction to consider whether the relator's conduct was reasonable.[118]

---

110 929 F Supp 2d 1033 (CD Cal 2012).

111 Id at 1038.

112 Id at 1035.

113 Id at 1038.

114 *Ruhe*, 929 F Supp 2d at 1039, quoting *United States v Cancer Treatment Centers of America*, 350 F Supp 2d 765, 773 (ND Ill 2004).

115 *Ruhe*, 929 F Supp at 1039.

116 *Cafasso*, 637 F3d at 1062.

117 Id.

118 See *Ruhe*, 929 F Supp 2d at 1039.

The outcome of *Ruhe* was reproduced in *Siebert v Gene Security Network, Inc.*[119] In *Siebert*, the district court considered the now-familiar situation of a relator who took documents from his former employer in violation of a confidentiality agreement.[120] The court concluded that any antidisclosure obligation was unenforceable as a matter of public policy.[121] It reasoned that enforcing the agreement might frustrate the congressional policy embodied in the FCA—the encouragement of whistleblowing.[122]

Several district courts outside of the Ninth Circuit have also held that there is an FCA public policy exception to confidentiality agreements. The first such decision came in *Doe v X Corp*,[123] in which the relator—an in-house attorney—took documents from his client for use in a qui tam suit.[124] Though it ultimately concluded that the relator had failed to follow proper qui tam procedures, the district court noted that public policy favored permitting relators to disclose fraud against the government.[125] Going further, the court stated that, once a relator has disclosed documents to the government, the documents may also be disclosed to the public unless the defendant corporation can show "some significant interest that outweighs the presumption of public access."[126] In other words, the FCA public policy exception to confidentiality not only permits disclosure to the government, it also creates a presumption in favor of disclosure to the *public*.[127]

---

119 2013 WL 5645309 (ND Cal).

120 Id at *2.

121 Id at *8. Interestingly, the court did caution that the agreement might have been violated if the documents taken "bore no relation" to the FCA claim. Id. This might be a nod to reasonableness, but in context it is more sensibly read to suggest that there is simply no public policy interest in documents irrelevant to an FCA claim. No other court adopting the public policy exception has suggested this limitation, however, which might give credence to fears about abuse of such an exception. Specifically, employers might claim that an unlimited exception allows employees to steal documents and then get away with it by filing a frivolous FCA claim.

122 Id. See also False Claims Amendments Act of 1986, 132 Cong Rec at 22330 (cited in note 5).

123 862 F Supp 1502 (ED Va 1994).

124 Id at 1503.

125 Id at 1508.

126 Id at 1510–11 (quotation marks omitted).

127 Even if any documents were kept permanently under seal (unless the relator prevailed), corporations would still worry about the potential for additional unauthorized disclosures. Some risk of disclosure remains so long as the relator or his attorney has access to the documents, even if the court has ordered them sealed. See, for example, *Grove Fresh Distributors, Inc v John Labatt Ltd*, 888 F Supp 1427, 1452 (ND Ill 1995)

The Northern District of Illinois echoed this decision, articulating a similarly broad rule in *United States v Cancer Treatment Centers of America*.[128]

Most recently, in *Head v Kane Co*,[129] the District Court for the District of Columbia considered an FCA relator who took documents from his employer in violation of a separation agreement.[130] The court opted to dismiss the employer's counterclaims under the agreement, holding that enforcement of the agreement would frustrate the statutory requirement that FCA relators turn over all evidence in their possession to the government.[131] The district court explained that any confidentiality agreement that prevented the disclosure of evidence of fraud against the government would be void under public policy.[132]

Altogether, the cases discussed in this Section stand in favor of a strong FCA public policy exception to confidentiality agreements. The decisions expressly permit an FCA relator to disclose confidential documents to the government under almost any circumstances. Some courts also imply that the documents may ultimately be disclosed to the public. Consequently, these cases render the employer's confidentiality contracts null and void when the FCA is involved.

C. Courts Restricting Self-Help Discovery on Contractual Grounds

1. The contractual rule and its rationale.

Not all courts agree that confidentiality agreements between employers and employees are void in the face of an FCA suit. This Section outlines decisions that take the opposite tack and hold that confidentiality agreements are enforceable in the face of FCA claims.

The Fourth Circuit's decision in *Zahodnick v International Business Machines Corp*[133] is representative. In *Zahodnick*, the

(imposing sanctions on an attorney for disclosing confidential documents in violation of a court order).

128 350 F Supp 2d 765, 773 (ND Ill 2004) (holding that a "confidentiality agreement cannot trump the FCA's strong policy of protecting whistleblowers who report fraud against the government").

129 668 F Supp 2d 146 (DDC 2009).

130 Id at 149–50.

131 Id at 152.

132 Id.

133 135 F3d 911 (4th Cir 1997).

relator was an IBM and Lockheed employee who came across what he believed were improper billing practices.[134] The relator claimed that, after reporting the activities to management, he faced retaliatory action that ultimately led him to resign.[135] After his resignation, the relator brought suit under the whistleblower-protection provisions of the FCA.[136] The relator supported his claim with documents taken from Lockheed in violation of two separate confidentiality agreements, and Lockheed counter-claimed for breach of contract.[137]

The Fourth Circuit found against the relator on all claims, affirming the district court's grant of summary judgment in favor of the employer.[138] Addressing the issue of confidentiality, the court explained that "the district court did not err either in enjoining [the relator] from disclosing Lockheed's confidential materials to third parties or in ordering [the relator] to return all confidential materials to Lockheed."[139] The court did not even discuss the possibility of an FCA public policy exception.[140]

At least two district courts have followed the contractual approach of *Zahodnick*. In *Glynn v Impact Science & Technology, Inc*,[141] the District Court for the District of Maryland evaluated another suit under the antiretaliation provisions of the FCA.[142] The court concluded that the plaintiff had breached the confidentiality obligations imposed by his employment agreement

---

134 Id at 913.

135 Id.

136 Id.

137 *Zahodnick*, 135 F3d at 915.

138 Id at 914–15.

139 Id at 915.

140 In contrast to many of the cases discussed in Part II.B, *Zahodnick* dealt with the antiretaliation provisions of the FCA rather than the fraud provisions. See id at 914. However, this is not a satisfactory ground on which to distinguish or explain away the *Zahodnick* case. Adequate protection is essential to any public policy that seeks to incentivize whistleblowing. Consequently, it would not make sense to interpret the FCA as allowing whistleblowers to share confidential documents while simultaneously exposing them to retaliation for doing so. Such a reading would put the various statutory provisions at cross purposes and dampen the larger aims that the public policy courts claim that the FCA serves. For this reason, *Zahodnick* is thematically akin to a bright-line contractual rule. See, for example, *Ruhe*, 929 F Supp 2d at 1039 (explaining that the FCA embodies a strong public policy in favor of whistleblowing). See also Eletta Sangrey Callahan and Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 Am Bus L J 99, 100–04 (2000) (discussing both incentive-based and antiretaliation means of encouraging whistleblowing).

141 807 F Supp 2d 391 (D Md 2011).

142 Id at 398.

and that the employer was entitled to damages.[143] The court further determined that the confidentiality obligations in the plaintiff's employment agreement were valid under state contract law.[144] It did not consider whether federal law might void the contract on public policy grounds.[145] The Fourth Circuit affirmed and was also completely silent on the contractual counterclaims.[146]

A similar outcome obtained in the district court decision in *Cafasso*, though its rationale was superseded by the Ninth Circuit's subsequent ruling in the case.[147] The district court's discussion of the issue is still worth noting, however, because it considered and rejected the idea of creating an absolute public policy exception in favor of the relator. Specifically, the district court held that the FCA's incentives for whistleblowers "do not establish a public policy in favor of violating an employer's contractual confidentiality and nondisclosure rights."[148] The court then qualified this statement, adding that confidentiality agreements might be unenforceable if they substantially interfere with the filing of an FCA qui tam action.[149] But even if the district court's decision is best considered as opening the door to a limited public policy exception, it still stands in contrast to the absolute public policy regime adopted by most courts. It also contrasts with the Ninth Circuit's subsequent decision, which was more favorable to the creation of a public policy exception. For these reasons, the lower court decision is best understood as adopting a loose contractual rule.

Because the contractual-rule courts have not substantially engaged with the arguments advanced by the public policy courts, it is hard to tell precisely what motivates the contractual approach. However, the likely answer is that the contractual-rule courts are animated by a concern that permitting self-help discovery in FCA cases would enable unscrupulous employees to

---

143 Id at 424, 431.

144 Id at 423–24.

145 See *Glynn*, 807 F Supp 2d at 423, citing *ACAS Acquisitions (Precitech), Inc v Hobert*, 923 A2d 1076, 1084 (NH 2006).

146 *Glynn v EDO Corporation*, 710 F3d 209, 218 (4th Cir 2013) (failing to reach the contractual issues and affirming the lower court's disposition).

147 *Cafasso*, 2009 WL 1457036 at *14, revd, *Cafasso*, 637 F3d at 1062.

148 *Cafasso*, 2009 WL 1457036 at *14.

149 Id.

steal documents and then avoid the consequences by filing frivolous FCA claims.[150]

2. Remedying self-help.

When a contractual-rule court finds that a confidentiality agreement has been breached, it must then consider whether to award a remedy. The remedy (or remedies) selected is important, both for the outcome of the immediate lawsuit and for its effects on future relator conduct.[151] This Section provides background for that discussion, offering a survey of the remedial blends awarded in contractual-rule cases.

Employers seeking to enforce confidentiality agreements against relators typically seek injunctive relief. When injunctive relief has been granted in FCA suits, it usually includes clawback of the documents by the employer and an order forbidding further disclosure.[152] It is no surprise that corporations typically prefer injunctive relief, as it has the obvious benefit of protecting proprietary information and shielding the company from further litigation based on the documents.

In addition to ordering injunctive relief, contractual-rule courts have sometimes awarded monetary relief in the form of attorney's fees or damages. In *Cafasso*, the Ninth Circuit affirmed both the district court's grant of injunctive relief and its award of attorney's fees to the employer, though only with respect to the employer's successful contractual claim.[153] The court took care to express its concern that a fee award might "chill prospective relators from exposing frauds on the government," but concluded that the misconduct of the relator ultimately outweighed those concerns.[154] Likewise, the district court in *Glynn* determined that the employer was entitled to recover damages equal to the amount that it expended recovering the confidential documents that the relator had appropriated.[155]

---

[150] See, for example, *JDS Uniphase Corp v Jennings*, 473 F Supp 2d 697, 702–03 (ED Va 2007) (discussing the concern that permitting the use of documents obtained via self-help discovery would enable document thieves to protect themselves with frivolous whistleblowing claims).

[151] See Part III.

[152] See *Zahodnick*, 135 F3d at 915; *Cafasso*, 637 F3d at 1062–63; *Saini v International Game Technology*, 434 F Supp 2d 913, 925 (D Nev 2006); *JDS Uniphase*, 473 F Supp 2d at 704–05.

[153] *Cafasso*, 637 F3d at 1061–63.

[154] Id at 1062–63.

[155] *Glynn*, 807 F Supp 2d at 427–32.

III. TOWARD A REASONABLENESS TEST

The above discussion of current law reveals that courts have failed to develop a consistent approach to self-help discovery in FCA qui tam litigation. This Part offers a solution to the current divide. Section A discusses the problems resulting from the current divided approach and the advantages of switching to a reasonableness approach. Section B then proposes that courts adopt a reasonableness test to evaluate self-help discovery by relators. This test, which is based on the Ninth Circuit's test in *Cafasso* and the tests used in employment-discrimination cases, requires courts to weigh the need for the documents against the disruption caused by taking them. This Part then concludes by demonstrating how the proposed test should be applied.

A. The Advantages of Reasonableness

This Section addresses the problems with the current approach to self-help discovery and argues that there are two reasons to prefer a reasonableness test to either of the current bright-line rules. These reasons are: (1) the likelihood that a reasonableness test would minimize the combined costs of fraud and self-help discovery, and (2) that a reasonableness test is more sensitive to the competing policy concerns that arise in FCA self-help-discovery cases.

1. Costs of the current regime.

The existing legal regime is problematic from an economic perspective. Both of the current rules are inflexible, meaning that they can lead to costly outcomes in certain situations. For example, a contractual rule may be costly in a case in which a company defrauds the government of millions of dollars, and any attempt to expose the fraud will prompt the company to destroy all related evidence. Because a contractual rule leaves no room for necessity, the relator will likely be deterred from coming forward, and the fraud will remain unexposed. If the employee comes forward without the documents, he may not be believed[156] and will probably be fired. But if he takes the documents, he will face a lawsuit, injunction, and possible damages. Facing a lose-lose scenario, the relator will probably do nothing. Indeed, this

[156] The risk that a whistleblower who lacks documentary proof will not be believed is far from speculative, as the Bernie Madoff case demonstrates. See Part I.B.3.

is precisely what aspiring relators did prior to the addition of antiretaliation provisions to the FCA in 1986. Before the 1986 amendments, whistleblowing under the FCA was almost always a losing proposition. Relators feared that if they came forward, the government would do nothing, and their employers would then fire them in retaliation.[157] Many relators will likely behave similarly if self-help discovery is not protected in some circumstances.

A bright-line public policy rule can be equally costly. If no fraud is actually occurring, but the employee uncovers documents that he believes show fraudulent behavior, then nothing is gained from permitting the employee to engage in self-help discovery. Allowing the employee to take the documents will expose no fraud, but the employer will suffer the disruptiveness of the employee's actions, the cost of litigation, and potential exposure of trade secrets and business strategies.[158] A bright-line public policy rule ignores all of this and simply admits the documents into evidence despite the costly loss imposed on the employer.

As these examples show, the current rules are quite flawed in certain situations. The bright-line public policy rule may incentivize unnecessary self-help discovery, imposing costs on employers in the form of lost confidentiality and uncertainty. On the other hand, the bright-line contractual rule might deter some whistleblowers from coming forward, allowing fraud against the government to go undetected. Even worse, the contractual rule would not allow self-help discovery even if the relator discovers that the documents are about to be destroyed and the fraud covered up. If the wrong rule is applied, the list of potential costs is long.

The problem, however, is not that rules can produce costly outcomes in certain circumstances. That much is obvious and is part of the endlessly debated issue of rules versus standards.[159] Moreover, bad outcomes from the two rules are uncommon because most situations are not as extreme as the two described

---

[157] See False Claims Amendments Act of 1986, 132 Cong Rec at H 6483 (cited in note 5) (statement of Mr. Berman) (defending the 1986 FCA amendments with evidence showing that relators were too fearful to come forward under the then-current FCA).

[158] See, for example, *Cafasso*, 637 F3d at 1062 (noting that the relator's "unselective taking of documents" swept up privileged communications, trade secrets, internal research, sensitive government information, and at least one patent application).

[159] See, for example, Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L J 557, 596–99 (1992).

above. For proof of this, one need look no further than a few of the actual cases. The application of a contractual rule in *Ruhe* would not have been disastrous, as the appropriated documents were contained in only two exhibits and were relevant but not crucial to the relators' claims.[160] Likewise, applying a public policy rule might not have imposed catastrophic costs on the corporation in *Zahodnick* because there was no indication that the documents taken by the relator contained any particularly sensitive information.[161]

Rather, the real question is whether fraud or excessive self-help discovery is the more costly social problem. Fraud against the government and disruptive breaches of confidentiality agreements both impose social costs. The former increases the cost of government contracts and services, while the latter increases the cost of doing business. But no one, including the courts and the litigants, knows which set of costs is larger.

Consequently, one of the two bright-line rules currently in use must be objectively more costly than the other. A bright-line rule would make sense only if courts could be confident that one rule or the other produced preferable outcomes most of the time.[162] But without empirical data or an explicit legislative finding on the issue, courts lack this confidence. They stand on uncertain ground when they adopt bright-line rules one way or the other. Moreover, courts are remarkably ill suited to pick a rule in the first instance by guessing what the universe of future FCA cases will look like, when all that courts have to go on is the case in front of them. For this reason, a balancing approach that permits courts to weigh the costs based on the facts of each case will likely lead to a more accurate set of decisions.

2. Reasonableness and cost minimization.

Implementing a reasonableness test would likely help solve the problem described above and could prevent at least one group of courts from persisting in error. By affording flexibility, a reasonableness test would allow a court to admit or bar documents based on the facts before it. Courts could admit the

---

[160] *Ruhe*, 929 F Supp 2d at 1038 (discussing the exhibits only after concluding that the complaint could survive a motion to dismiss). See also Part II.B.

[161] See *Zahodnick*, 135 F3d at 913–15. See also Part II.C.1.

[162] For a discussion of the problem of using bright-line rules when the court either does not or cannot understand the background social problem, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L J 943, 953–58 (1987).

documents if the fraud costs were higher than the disruption costs caused by self-help discovery or exclude them if the reverse were true. So long as courts are capable of recognizing whether fraud costs or confidentiality costs are larger in a particular case, the preferable rule would almost always be applied.[163] In fact, courts are sometimes asked to assess these costs in FCA cases. The court must already assess the cost of the fraud if it decides to award damages, and it may be required to evaluate the monetary harm that self-help discovery inflicts on the employer if the employer prevails on its contractual counterclaim.[164]

Balancing inquiries of this sort are thought to be cost minimizing in a number of other legal contexts—such as when courts decide whether to issue a preliminary injunction[165]—and there is no reason why the same would not be true here. A reasonableness approach would not make self-help discovery costless, as the court would still have to impose some fraud costs on the government or some disruption costs on the employer, but this approach would allow the court to impose only the lower of those two costs. By minimizing the sum of fraud and disruption costs in each case, the reasonableness approach would ultimately yield the lowest aggregate cost across all cases.

Two objections might be made to this argument. First, it is possible that courts are not good at applying a reasonableness test and will frequently fail to find the cost-minimizing approach. However, this objection has equal force with respect to either of the bright-line rules currently in use. If courts are not good at identifying the cost-minimizing option, we should have no more confidence in their ability to select a bright-line rule in the first instance than in their ability to apply a reasonableness

---

163 While some might object that evaluating costs entails a partial weighing of the merits at the motion to dismiss stage, it can be analogized to the inquiry into the likelihood of success on the merits that occurs when a court decides to issue a preliminary injunction. See, for example, *BUC International Corp v International Yacht Council Ltd*, 489 F3d 1129, 1137–38 (11th Cir 2007) (assessing the likelihood of prevailing on the merits in a copyright case).

164 If the qui tam suit is successful, 31 USC § 3729(a)(1)(G) requires the court to calculate the amount of harm that the government has suffered from the fraud. And if the employer wins on its contractual counterclaim, it may ask the court for monetary damages. See, for example, *Cafasso*, 637 F3d at 1062–63. So long as courts are trusted to perform these tasks, there is little reason to criticize their ability to make rough estimates of the likely magnitude of these costs at an earlier point in the litigation.

165 See William F. Patry, 6 *Patry on Copyright* § 22:62 (Thomson 2013) (discussing cost-minimizing balancing in copyright law); Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 11A *Federal Practice and Procedure* § 2948.3 (Thomson 2d ed 2013) (discussing preliminary injunctions generally).

approach. Moreover, a reasonableness test has the advantage of limiting error to the case at issue, whereas adoption of an erroneous bright-line rule sets a precedent that later courts will likely follow. A reasonableness test therefore limits the damage in the event that the initial decision is incorrect and is likely preferable so long as courts get it right a majority of the time.

Second, one could argue that any cost savings from reasonableness are negated by a potential increase in litigation costs and uncertainty costs. The logic of this argument is that even a bad rule would cabin judicial discretion and provide certainty to the parties, and that these benefits would outweigh the improvement in substantive outcomes offered by a reasonableness test.[166] This argument is correct to an extent, as it is true that a bright-line rule would be easier for courts to apply and would probably reduce the cost of litigation. In the context of self-help discovery, however, these types of savings are probably not substantial enough to justify maintaining a bad rule. Unlike many legal issues, self-help discovery is typically litigated prior to discovery, in conjunction with a motion to dismiss.[167] The additional cost of litigating a prediscovery issue is likely to be small compared to the general cost of litigation, meaning that the potential administrative savings from a bright-line rule are minimal.[168] Given that the costs of fraud or disruption can be astronomical,[169] continuing with a bright-line rule would save a penny on litigation but cost a pound in substantive losses. Moreover, under a reasonableness test, courts would be able to

---

166 For a thorough discussion of this type of pro-rule argument, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1179 (1989) ("There are times when even a bad rule is better than no rule at all.").

167 See, for example, *Cafasso*, 637 F3d at 1051; *Ruhe*, 929 F Supp 2d at 1035–39; *Siebert*, 2013 WL 5645309 at *1–2.

168 A recent study found that discovery costs accounted for nearly one-fourth of all outside legal fees paid by major corporations, supporting the claim that prediscovery litigation is significantly less costly. See Lawyers for Civil Justice, Civil Justice Reform Group, and US Chamber Institute for Legal Reform, *Litigation Cost Survey of Major Companies: Appendix 1* *2 (Civil Litigation Conference, Duke Law School 2010), online at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Litigation%20Cost%20Survey%20of%20Major%20Companies.pdf (visited Aug 12, 2014). See also Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex L Rev 1, 12 (1984) (arguing that the use of standards increases the cost of litigation in antitrust cases, primarily by increasing the cost of discovery). This suggests that, if most cases can be dismissed before discovery, the cost impact of a standard will be less significant.

169 See, for example, *Glynn*, 807 F Supp 2d at 430–31. See also Diana B. Henriques, *The Wizard of Lies: Bernie Madoff and the Death of Trust* 215 (Times 2011) (describing some of the costs of Madoff's fraudulent scheme).

dismiss truly frivolous suits, further limiting litigation and uncertainty costs.

3. Reasonableness and policy.

A reasonableness test also better accommodates the competing policy interests implicated by self-help discovery. As the public policy courts consistently note, the FCA evidences a strong legislative policy of encouraging whistleblowing and combating fraud.[170] A contractual rule pushes in the opposite direction, permitting employers to silence relators via confidentiality agreements.[171] Consequently, public policy courts are rightly concerned that enforcement of a contractual rule undermines the whistleblowing incentives that Congress meant to create.[172]

In contrast, courts taking the contractual approach usually mention the general public policy in favor of protecting confidentiality and honoring contracts.[173] These courts worry that a public policy exception undermines the fundamental precepts of contract law, giving relators a license to breach confidentiality and break contracts.[174] These concerns are just as valid as those of the public policy courts, but simply focus on a different set of legislative values.

The current regime of bright-line rules forces courts to choose between these two sets of legitimate policy values. When courts adopt a bright-line contractual or public policy rule, they are implicitly holding that one set of policy concerns merits full protection and that the other merits none. The bright-line courts consequently ignore the alternative set of legislative policy goals, instead choosing the goals that they each think are more important.

In contrast, a reasonableness test would permit courts to consider both sets of values. By weighing the costs of fraud against the costs of disruption from self-help discovery, courts would effectively be testing the strength of each set of policy concerns in the case before them. The strongest policy interest in each case could then be protected, instead of privileging the

---

170 See, for example, *Ruhe*, 929 F Supp 2d at 1039.

171 See id ("Obviously, the strong public policy would be thwarted if [the defendant corporation] could silence whistleblowers and compel them to be complicit in potentially fraudulent conduct.").

172 See, for example, *Siebert*, 2013 WL 5645309 at *8.

173 See, for example, *JDS Uniphase*, 473 F Supp 2d at 702–03.

174 See, for example, id.

same policy interest in all cases. For this reason, a reasonableness approach is more faithful to the competing legislative policies. Courts would no longer be forced to choose between contractual and antifraud goals.

B. A Reasonable Solution: Adopting the Ninth Circuit's Test

Adopting a reasonableness test solves the problems with the current legal treatment of self-help discovery. The test proposed by the Ninth Circuit in *Cafasso* is a helpful starting point, and it provides the basic inquiry that courts should conduct. The Ninth Circuit suggested that a public policy exception should apply to self-help discovery only if the relator can show "why removal of the documents was reasonably necessary to pursue an FCA claim."[175] Unfortunately, the Ninth Circuit did not explain precisely how to evaluate either the reasonableness or the necessity of the relator's conduct. At best, the court implied that the documents seized should relate to the alleged fraud, and that self-help discovery should be the only feasible way to obtain the documents.[176] Without more, the Ninth Circuit's suggested test offers little more than vague guideposts.

Fortunately, the treatment of self-help discovery in employment-discrimination cases offers a number of possibilities for filling in the Ninth Circuit's proposed reasonableness test. In those cases, courts have developed a series of balancing tests to determine whether the taking of documents is a protected activity. These balancing tests consider a number of interests but typically focus on the reasonableness of the relator's conduct.

This Section draws on the balancing tests used in employment-discrimination cases to propose a model reasonableness test for use in FCA cases. To that end, this Section first discusses the treatment of self-help discovery in employment-discrimination cases. Then, drawing from the Ninth Circuit's test in *Cafasso*, it proposes a model test that focuses on the reasonableness of the relator's conduct as well as the balance of fraud and disruption costs. After articulating the proposed reasonableness test, this Section provides an illustration of how the test should be applied. It concludes with a discussion of the remedies that should be awarded in the event that a court decides to honor the confidentiality agreement.

---

[175] *Cafasso*, 637 F3d at 1062.

[176] For further discussion of the *Cafasso* test, see Part II.A.

1. Self-help discovery in employment-discrimination cases.

a) Why consider employment-discrimination suits? The balancing test used in employment-discrimination cases provides a particularly apt model for an FCA reasonableness test. Both tests share a focus on the reasonableness of the relator's conduct, and each statute considers similar interests. Indeed, employment-discrimination cases address the same basic public policy conflicts as FCA cases. In the employment-discrimination context, courts evaluating self-help discovery must weigh the interest in combating discrimination against the disruptive effect that self-help discovery may have on the employer.[177] Similarly, if a reasonableness test were adopted in the FCA context, courts would balance the public interest in combating fraud and the relator's need for the documents against the harm that the self-help discovery causes the employer.[178] In light of these similar policy interests, courts in employment-discrimination cases have already identified many of the factors that should be considered when evaluating the utility and disruptiveness of self-help discovery.[179] These factors are equally applicable in the FCA context, especially if the inquiry is likewise focused on the reasonableness of the relator's conduct.

Perhaps more importantly, the focus on reasonableness in employment-discrimination cases supports the adoption of a reasonableness approach in FCA cases. The use of similar reasonableness regimes in each statute would harmonize the treatment of self-help discovery in federal law, bringing uniformity to a currently haphazard treatment. Standardization would also create a common pool of precedent for courts and litigants to draw on when evaluating self-help discovery, further clarifying the issue.

b) The Title VII balancing approach. Self-help discovery is a well-considered problem in employment-discrimination litigation under both Title VII of the Civil Rights Act of 1964[180] and state antidiscrimination laws.[181]

---

[177] See, for example, *O'Day v McDonnell Douglas Helicopter Co*, 79 F3d 756, 763 (9th Cir 1996); *Kempcke v Monsanto Co*, 132 F3d 442, 445–46 (8th Cir 1998).

[178] See Part III.B.2.

[179] See, for example, *Niswander v Cincinnati Insurance Co*, 529 F3d 714, 726 (6th Cir 2008).

[180] Pub L No 88-352, 78 Stat 241, 253–66, codified as amended at 42 USC § 2000e et seq.

[181] See Purcell, *Self Help Discovery*, 24 DCBA Brief at 18–20 (cited in note 8) (providing an overview of how this issue plays out in state law).

As with FCA qui tam actions, litigants in employment-discrimination cases sometimes take or disclose confidential documents from their employers and then use those documents to pursue discrimination claims.[182] If the employee is then fired for having taken the documents, the court is usually called on to decide whether disclosure of the documents was a protected activity under the applicable employment-discrimination law.[183] In the event that the court decides that taking the documents was protected, the employer is potentially liable for improper retaliation.[184]

Most federal discrimination suits involving self-help discovery arise under Title VII. Like the FCA, Title VII contains both substantive and antiretaliation provisions. The substantive provisions prohibit discrimination in hiring,[185] and the antiretaliation provisions bar employers from retaliating against employees who have "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" related to an employment-discrimination claim.[186] Consequently, if an employee seizes documents in order to assist with a discrimination claim under the statute, Title VII may protect the employee from retaliatory action.[187]

To determine whether the protections of Title VII apply to employees who engage in self-help discovery, federal courts have developed a series of balancing tests.[188] These tests focus primarily on the reasonableness of the employee's conduct[189] but also weigh the competing policy goals of combating discrimination and maintaining employer control over personnel.[190] However, two of the Title VII self-help-discovery cases go further, carefully articulating criteria that can be used to evaluate the reasonableness and necessity of employee self-help discovery. These

---

[182] See, for example, *Laughlin v Metropolitan Washington Airports Authority*, 149 F3d 253, 256–57 (4th Cir 1998).

[183] See, for example, id at 258.

[184] See, for example, id at 258–59.

[185] 42 USC § 2000e-2(a)(1).

[186] 42 USC § 2000e-3(a).

[187] See, for example, *Niswander*, 529 F3d at 722–29 (explaining when disclosure of confidential documents qualifies as protected activity).

[188] See, for example, *Laughlin*, 149 F3d at 259–60; *O'Day*, 79 F3d at 763; *Kempcke*, 132 F3d at 445–46.

[189] See, for example, *Laughlin*, 149 F3d at 260 (stating that Title VII "was not intended to immunize insubordinate, disruptive, or nonproductive behavior at work").

[190] See, for example, id at 259.

two decisions, outlined below, offer the most useful models for evaluating self-help discovery in the context of the FCA.

First, in *Jefferies v Harris County Community Action Association*,[191] the Fifth Circuit expanded the general balancing approach by identifying three specific situations in which breaching a confidentiality agreement might be necessary.[192] By highlighting that the plaintiff had not established that (1) the employer might have destroyed the documents had the employee not acted, (2) the employee reasonably believed that he needed to act as he did, or (3) existing grievance procedures were inadequate, the court seemed to imply that these factors would render a breach of confidentiality acceptable.[193] These three factors helpfully illustrate circumstances in which seizing documents might be necessary to a relator's case.

Building on the Fifth Circuit's approach, the Sixth Circuit developed a sophisticated balancing test that can be used to judge the reasonableness of self-help discovery. This approach was outlined in *Niswander v Cincinnati Insurance Co*,[194] in which the plaintiff was fired for disclosing confidential corporate documents to her attorneys in the course of pursuing a class action sex discrimination claim.[195] The plaintiff then filed an individual suit claiming retaliatory discharge under Title VII, and the employer counterclaimed for conversion of the documents.[196] The district court granted summary judgment for the employer on the Title VII claim but found for the plaintiff on the conversion claim.[197] The plaintiff then appealed dismissal of the Title VII claim.[198]

The Sixth Circuit seized on the appeal as an opportunity to clarify the appropriate test for determining whether self-help discovery is protected under Title VII.[199] Rejecting the Fourth

---

191 615 F2d 1025 (5th Cir 1980).

192 Id at 1036.

193 See id.

194 529 F3d 714 (6th Cir 2008).

195 Id at 717–18.

196 Id.

197 Id at 719.

198 *Niswander*, 529 F3d at 719.

199 See id at 726 ("Based on the analysis applied by the courts in the cases discussed above, we believe that the following factors are relevant in determining whether Niswander's delivery of the confidential documents was reasonable."). It is worth noting that the Sixth Circuit declined to adopt the Fourth Circuit's two-step approach, holding instead that in cases involving self-help discovery, a balancing test applies regardless of whether the employee's conduct is categorized as participatory or oppositional. See id at 725.

Circuit's limited approach in *Zahodnick*, the court created its own multifactor balancing test. The Sixth Circuit began by explaining that "[t]he ultimate question under the balancing test is whether the employee's dissemination of confidential documents was reasonable under the circumstances."[200] To provide further guidance to district courts, the Sixth Circuit then articulated six factors that are relevant to the reasonableness determination. Specifically, the court recommended that district judges consider:

> (1) [H]ow the documents were obtained, (2) to whom the documents were produced, (3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct, (4) why the documents were produced, including whether the production was in direct response to a discovery request, (5) the scope of the employer's privacy policy, and (6) the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy.[201]

The court explained that its test is designed to account for the employer's interest in keeping its employment and agency documents confidential while still protecting the employee's potential need to copy and disseminate the documents.[202] Applying the test to the facts of the case, the Sixth Circuit held that the plaintiff's activity was not reasonable under Title VII.[203] In so ruling, the court noted that the plaintiff might have obtained the information by other means and explained that it was reluctant to give employees an incentive to intentionally rifle through confidential documents in hopes of finding support for future litigation.[204]

The evolution of the Title VII balancing approach to self-help discovery offers a useful roadmap for courts adjudicating future FCA claims. The *Niswander* case in particular provides helpful color to key concepts, exploring in detail what it means for a relator's conduct to be reasonable or for self-help discovery

---

200 Id.

201 Id at 726. The New Jersey Supreme Court adopted a similar test in the context of a sex discrimination suit brought under the New Jersey Law against Discrimination, NJ Stat Ann § 10:5-1 to -42. See *Quinlan v Curtiss-Wright Corp*, 8 A3d 209, 227–29 (NJ 2010).

202 *Niswander*, 529 F3d at 726, citing *Jefferies*, 615 F2d at 1036.

203 *Niswander*, 529 F3d at 727.

204 Id.

to be necessary.[205] Furthermore, the workability of balancing in Title VII cases shows that a reasonableness regime is a feasible way to address self-help discovery in FCA cases.[206] The following Section builds on these ideas and uses the Title VII balancing approach to fill in a reasonableness test for self-help discovery in FCA cases.

2. Refining reasonableness: a model test.

The move toward a reasonableness test in FCA cases should begin with the test developed by the Ninth Circuit in *Cafasso*. Courts currently applying one of the two bright-line rules should simply adopt the facial holding of *Cafasso*, permitting the use of documents obtained via self-help discovery only when the relator's conduct is "reasonably necessary" to the pursuit of his FCA claim.[207] In doing so, courts should consider whether the confidentiality policies of the employer "must give way to the needs of FCA litigation for the public's interest."[208]

Shifting to the *Cafasso* reasonableness regime would be easy from a legal standpoint, because it would at most require reversing a handful of district court decisions. Only district courts have applied a public policy exception,[209] meaning that the circuit courts could easily overrule them and implement a reasonableness approach. This is also mostly true for courts applying the contractual rule, with the obvious exception of the Fourth Circuit's ruling in *Zahodnick*.[210] However, because *Zahodnick* did not explicitly consider the possibility of applying a public policy exception,[211] the Fourth Circuit could implement a reasonableness test without upsetting explicitly established precedent. In short, the field is wide open for a reasonableness approach.

---

[205] For an example of a case finding in favor of the employee, see *Kempcke*, 132 F3d at 446–47.

[206] For criticism of the Title VII balancing approach, see generally Brianne J. Gorod, *Rejecting "Reasonableness": A New Look at Title VII's Anti-retaliation Provision*, 56 Am U L Rev 1469 (2007); Nicholas M. Strohmayer, Note, *Drawing the Line:* Niswander*'s Balance between Employer Confidentiality Interests and Employee Title VII Anti-retaliation Rights*, 95 Iowa L Rev 1037 (2010); Eric Ledger, Note, *Relevance Is Irrelevant: A Plain Meaning Approach to Title VII Retaliation Claims*, 44 Akron L Rev 583 (2011).

[207] *Cafasso*, 637 F3d at 1062.

[208] Id.

[209] See Part II.B.

[210] See *Zahodnick*, 135 F3d at 915.

[211] See Part II.C.1.

The practical obstacles to a reasonableness approach are more substantial but would also be easy to overcome. Because the Ninth Circuit's reasonableness test has never been applied by a lower court, valid questions remain about what precisely makes relator conduct reasonable or necessary. Courts adopting the Ninth Circuit's test should simply ask the same basic questions that are used in the employment-discrimination context. Indeed, courts need look no further than the Sixth Circuit's *Niswander* test and the three potential factors identified by the Fifth Circuit in *Jefferies*.[212] By slightly reworking the six-factor test from *Niswander*, it is possible to identify four basic questions that courts reviewing self-help discovery in the FCA context should ask. Each question gets at the reasonableness of the relator's conduct in relation to the need for the documents and then frames the ultimate inquiry in terms of the balance of public and private interests at stake. No single question is dispositive, but each tilts the balance toward or away from reasonableness.

First, courts should ask how the employee came into possession of the documents. After ascertaining the relevant facts, courts should consider whether the methods used by the employee were either disruptive to the employer's business or illegal. If so, then this factor points toward enforcing the confidentiality agreement. But if not, then this factor counsels in favor of exempting the employee from the agreement on public policy grounds.[213]

Second, courts should ask why the employee chose to appropriate the documents and then assess the strength of those reasons. This factor favors permitting self-help discovery only if it was necessary—that is, it was the only feasible way to obtain the documents. To evaluate necessity, courts should consider the three specific situations identified by the Fifth Circuit: (1) whether the employer might have destroyed the documents, (2) whether the employee reasonably believed that he needed to act as he did, and (3) whether existing grievance procedures were inadequate.[214] The court should inquire whether the discovery was motivated by a desire to expose fraud or by unrelated reasons.[215]

---

[212] See *Niswander*, 529 F3d at 726; *Jefferies*, 615 F2d at 1036.

[213] The focus on disruption is adopted from the general balancing cases discussed in Part III.B.1. See *Laughlin*, 149 F3d at 260; *Jefferies*, 615 F2d at 1036; *O'Day*, 79 F3d at 763; *Kempcke*, 132 F3d at 446.

[214] See *Jefferies*, 615 F2d at 1036.

[215] See, for example, *Glynn*, 807 F Supp 2d at 400 (describing facts suggesting that the relator may have engaged in self-help discovery to obtain proprietary information

The court should also consider whether there were reasonable alternative means to obtain the documents, namely civil discovery.[216] When the relator is not motivated by a desire to expose fraud or could have easily obtained the documents through civil discovery, this factor counsels enforcement of the confidentiality agreement. Lastly, this step entails asking whether the documents were related to the alleged fraud. If they were not, then taking them cannot have been necessary.

Third, the court should examine what the relator did with the documents. If the relator gave the documents only to his counsel or the government in pursuance of the FCA suit, this indicates reasonableness and favors allowing self-help discovery. In contrast, if the relator shared the documents with coworkers, the press, third parties, the public, or others unrelated to the litigation, this factor recommends enforcing the confidentiality agreement.[217]

Fourth, the court should consider the impact of the disclosure on the employer. This requires examining the documents and assessing whether disclosure would disrupt or harm the employer's business. Documents that contain trade secrets, business strategies, or confidential financial information should generally remain protected, while documents that expose fraud but do little else to harm the employer should generally be allowed in the suit.[218]

Once the court has considered each factor individually, it should balance all of the factors in light of the competing policies embodied in the FCA. The primary goal of this step is to determine whether the interest in exposing fraud outweighs the employer's confidentiality interest in the specific case. As a secondary matter, the court should consider the broader ramifications of its decision—namely, how its decision would affect the report-

---

that he then used to form a start-up to compete with his former employer); *Saini v International Game Technology*, 434 F Supp 2d 913, 917–18 (D Nev 2006) (noting that the plaintiff seized documents to support his paid testimony as an expert witness in a case against his former employer).

[216] For an example of a case in which destruction of documents was suggested as a possibility, see *Cafasso*, 2009 WL 1457036 at *6. If such a situation arises, the court will have to consider whether the risk of destruction is real, perhaps by ordering limited discovery to see if the company actually did attempt to cover its tracks.

[217] For an example of the type of disclosure this factor would seek to discourage, see *E.A. Renfroe & Co v Moran*, 249 Fed Appx 88, 89 (11th Cir 2007).

[218] See, for example, *Quinlan*, 8 A3d at 229 (weighing the impact that disclosure would have on the employer and finding it to be negligible).

ing of fraud and the incentives for relators to come forward.[219] That said, most cases will not have a broad systemic impact. The court should typically keep the inquiry focused on whether the four factors indicate that the fraud costs or confidentiality costs are greater in the given case. The idea is not for the court to simply tally up the factors on each side but rather to focus on the facts that are most important for weighing these two potential costs. This means that factors directly indicating necessity or reasonableness—such as the scope of the self-help discovery or the contents of the documents—should be most important. Peripheral considerations such as the relator's motives should matter less, and concerns about the effect of the decision on future relators should matter least.

3. Applying the test.

To further illustrate the benefits of the reasonableness approach, it is helpful to examine how the test would affect the outcome in a case decided under one of the bright-line rules. In *Siebert*, the district court applied a bright-line public policy exception and found the relator's seizure and use of confidential documents permissible.[220] If the proposed reasonableness test had been applied instead, the court would likely have reached the opposite result.

In *Siebert*, the relator left his employer amicably pursuant to a separation agreement in which he promised to return all files belonging to the company and to maintain confidentiality.[221] Less than a month after leaving, the relator filed a claim under the FCA.[222] He alleged that his employer had engaged in fraud to obtain National Institutes of Health grants from the government.[223] He supported the suit with confidential documents that he had obtained via unauthorized access to his employer's computer system and that were not related to his employment duties.[224]

---

[219] Though some relators may be unaware of the background legal rules and consequently unaffected by rule changes, it is safe to assume that at least some will be affected by legal incentives. And even if future relators are completely nonplussed by the legal regime, this does not prevent the court from weighing the costs in the case before it.

[220] *Siebert*, 2013 WL 5645309 at *8.

[221] Id at *2.

[222] Id.

[223] Id at *1.

[224] *Siebert*, 2013 WL 5645309 at *2.

Examining the reasonableness of this relator's conduct using the above four-prong test suggests that the confidentiality agreement should have been enforced. The first factor counsels slightly in favor of enforcing confidentiality. Though the relator did not obtain the documents disruptively, he accessed them by entering a computer system without authorization and outside the scope of his employment. Factor two cuts the same way, suggesting disapproval of the self-help discovery. It appears from the facts that the relator could have easily obtained the documents in civil discovery and that obtaining the documents via self-help was not necessary to secure government intervention or avoid dismissal.[225] The relator had sufficient knowledge to allege or relate the contents of the documents and there was no reason to believe that the documents would have been destroyed. There was also a chance that the relator took documents unrelated to the alleged fraud.[226]

In the relator's defense, it does appear that he acted only for the purpose of exposing fraud. However, good motives should not excuse what is otherwise objectively unreasonable conduct. Permitting a motive to be used as a trump card would create an easy out for relators as it would be difficult for businesses to prove that the relator's thoughts were otherwise. Likewise, a focus on motives would reduce the incentive for relators who believed that they were acting in good faith to take care with their disclosures. Put simply, reasonableness would be discouraged.

Continuing through the test, factor three suggests that the relator's conduct should be protected. No evidence indicated that the relator used the documents for anything other than pursuing his FCA suit.[227] Factor four is neutral, as it does not appear that the employer had a strong confidentiality interest in the exposed documents. The documents did not contain trade secrets or other information that might assist competitors. Finally, it is unlikely that a decision against the relator would have adverse systemic effects. While the relator brought a valid claim, a decision against him would not deter additional relators from coming forward. It appears from the facts that the relator chose to breach his severance agreement and retain the confidential documents after he had already decided to bring suit.[228] Fu-

---

[225] See Part I.B.3.

[226] See *Siebert*, 2013 WL 5645309 at *8.

[227] See id at *6.

[228] See id.

ture relators in the same situation would simply come forward with their complaint and then obtain the documents legally in civil discovery.

Considering all the questions together, the proposed balancing test favors honoring the confidentiality agreement and granting the employer's counterclaims. The employee's conduct was not reasonable because it was unnecessary and overbroad. Civil discovery would have been a perfectly acceptable alternative, and exposing the alleged fraud did not require taking the documents. The overbroad scope of and lack of justification for the self-help discovery outweigh the opposing factors, making it clear that the relator's conduct was neither reasonable nor necessary. The result here demonstrates that a reasonableness test successfully provides more protection for employers than exists under the current bright-line public policy rule.

The suggested reasonableness test would also change the result in contractual-rule cases. The facts of *JDS Uniphase Corp v Jennings*[229] serve as a good example of the sort of circumstances which might suggest reasonable relator conduct. In that case, the whistleblower took documents that were related to the alleged misconduct, claimed that the documents might have been shredded had he waited for discovery, and filed his claim before his employer took any adverse action.[230] While the actual whistleblower was unable to prove his claim of necessity,[231] proof that the employer might destroy the documents would likely have been enough to support a finding of reasonableness. The necessary seizure of relevant documents is the sort of behavior that courts should facilitate. A reasonableness test would therefore achieve its aim of moderating the decisions of the bright-line courts, finding the appropriate outcome in each individual case.

4. Remedies under a reasonableness approach.

The individual tailoring enabled by a reasonableness test should also extend to the contractual remedies available to employers. A sophisticated treatment of remedies is a useful complement to the test proposed by this Comment, as it can reinforce the moderating incentives of a reasonableness approach.

---

229 473 F Supp 2d 697 (ED Va 2007).

230 Id at 698–701.

231 Id at 704.

Contractual-rule courts have previously granted three types of remedies in FCA self-help-discovery cases: injunctive relief, monetary relief, and attorney's fees.[232] Adoption of a reasonableness test does not compel any changes to the current remedy scheme, though it is important to note how each remedy protects the interests at stake and affects the incentives of relators to come forward in the first place.

Injunctive relief is the presumptive remedy in self-help-discovery cases and, as a matter of practice, appears to be universally awarded by contractual-rule courts and balancing courts that side with the employer.[233] This would remain the same under a reasonableness approach. Injunctions against further disclosure provide the bare minimum of relief necessary to vindicate the contractual interests of the employer and to limit further damage. Under a reasonableness approach, if the court determines that there are potentially significant confidentiality costs to exposure, ordering clawback of the documents will be necessary to remove the risk of additional harm. However, injunctive relief may not affect relator incentives or deter improvident self-help discovery. If a relator must return the documents taken but is then allowed to proceed to discovery and re-obtain them, honoring the contract produces little value for the employer and does little to deter future self-help discovery.

Despite these concerns, injunctive relief will normally be enough to deter improper self-help discovery. If unreasonable self-help discovery is restricted by the courts, relators will presumably come to understand that self-help discovery can harm their substantive FCA suits. Documents that must be returned are of no use in getting to discovery or encouraging the government to pick up the case. In short, relators will change their thinking when considering self-help discovery. Routine injunctive relief will undermine the belief that self-help discovery is beneficial and will teach aspiring relators that taking documents unnecessarily is not worth the extra hassle and cost of litigating the issue—especially given the easy alternative of civil discovery and the risk of getting fired for the self-help discovery.[234]

---

[232] See Part II.C.2.

[233] See Part II.C.2.

[234] These issues are discussed at length in Part I, which lays out the risks of engaging in self-help discovery and the link between the contractual and substantive FCA claims.

However, in particularly egregious cases, courts may wish to consider monetary relief in the form of either damages[235] or a fee award. In cases in which self-help discovery threatens the revelation of important secrets or is extremely disruptive to the employer, simple injunctive relief may not sufficiently deter this problematic relator conduct. Monetary relief may also be preferable if the relator acted in bad faith, took documents unrelated to the alleged fraud, or bypassed legitimate avenues of dispute resolution. Lastly, monetary relief may be necessary in the rare case in which a relator engages in egregious self-help discovery but nonetheless survives dismissal or summary judgment based on other evidence. Failure to award damages in such a case would allow relators who have secured legitimate sources of evidence to then engage in self-help discovery without suffering a meaningful penalty.

Awarding damages in extreme cases fits with the overall goal of the reasonableness scheme. Damage awards would deter the most expensive types of confidentiality breaches and encourage moderation of relator behavior. Some reporting of fraud might be lost, but only in the extreme cases in which courts can be relatively sure that confidentiality costs outweigh fraud costs in any event. Adjusting the remedy based on the egregiousness of the relator's conduct has the additional benefit of compensating the employer for harms unrelated to the disclosure of confidential documents.[236]

However, these positive benefits attach only if monetary damages are strictly limited to instances of egregious conduct. To extend them to every case would risk deterring potential relators because they would fear owing substantial sums of money if they turned out to be wrong.[237] So long as the use of monetary

---

[235] For a model of how such damages might be calculated, see *Glynn*, 807 F Supp at 427–31.

[236] For an example of these types of harms, see id at 431 (noting that the employer incurred nearly $90,000 in recovery costs).

[237] The incentive effects of awarding damages against failed relators are similar to the effects of fee-shifting and Rule 11 sanctions, which can reduce the number of suits filed. See Lucian Arye Bebchuk and Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J Legal Stud 371, 377–81 (1996) (finding that fee-shifting and Rule 11 sanctions may not lead to optimal decisions regarding when to sue); Steven C. Salop and Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Georgetown L J 1001, 1016–30 (1986) (addressing the effects of fee-shifting on filing and settlement); Thomas D. Rowe Jr, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L J 651, 660–61 (discussing fee-shifting as a punishment for undesirable behavior).

damages remains limited, however, relators with good claims should not be substantially deterred from coming forward. Rather, they would be incentivized to act reasonably. Put another way, courts evaluating relator self-help should think of monetary relief as similar to punitive damages. Monetary damages should not be given simply to compensate the primary harm, but rather to punish particularly egregious conduct and to deter future instances of that conduct.[238]

To see how this scheme might work, it is helpful to consider a few of the cases discussed above. Monetary damages would be ideal in a situation like that presented in *Saini v International Game Technology*,[239] in which the plaintiff, a recently terminated employee, took documents primarily so that he could obtain new employment as an expert witness in a lawsuit against his former employer.[240] Though the court enjoined further use of the documents,[241] the former employee did not suffer any additional harm and would presumably have taken the documents again if given the chance. Monetary damages would deter this sort of conduct by making the employee worse off than if he had never taken the documents. Aware of this possible outcome, aspiring relators would avoid behaving badly so as not to risk financial harm to themselves.

In most cases, however, monetary damages would not be necessary and would actually deter some valid whistleblowing. For instance, in *Zahodnick* the relator began collecting evidence of what he suspected was fraud while still employed with the company and then kept that evidence after his resignation.[242] He later used the documents to file an FCA retaliation claim.[243] The court ultimately applied a contractual rule, barring the relator's use of the documents.[244] Had the court awarded monetary damages to the employer, it would have risked deterring future relators. Any relator who, like Zahodnick, investigated in good faith but was simply wrong would be subject to a penalty. Fearing this financial penalty for being wrong, some relators might not come

---

238 See *Exxon Shipping Co v Baker*, 554 US 471, 492–93 (2008) ("[T]he consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.").

239 434 F Supp 2d 913 (D Nev 2006).

240 Id at 917–18.

241 Id at 925.

242 *Zahodnick*, 135 F3d at 913.

243 Id.

244 Id at 915.

forward at all, even if fraud were actually occurring. Avoiding monetary damages in such cases limits the downside risk to failed relators and encourages them to act reasonably. Fraud will still be reported, but with minimum damage to honest employees.

CONCLUSION

A reasonableness test offers a solution to the current circuit split over the handling of self-help discovery in FCA qui tam cases. The current regime of two competing bright-line rules is inconsistent, problematic, and probably inefficient. Without a legislative or empirical judgment regarding the comparative harms of fraud against the government and self-help discovery, no court can be confident that it has adopted the preferable bright-line rule, and one of the two rules must be wrong.

Adopting a reasonableness test modeled on the one proposed by the Ninth Circuit in *Cafasso* solves these problems. Such a test would allow judges to use their discretion to reach the preferable outcome in each case. If the court decided not to permit the self-help discovery, it could then apply a sliding scale of remedies, awarding only injunctive relief in all but the most extreme cases, in which damages would also be warranted. This would incentivize reasonable relator conduct without deterring good faith reporting of fraud. A reasonableness approach would also produce uniform treatment of self-help discovery across federal statutory schemes and would be more sensitive to the competing policy concerns embodied in the FCA. In sum, a reasonableness test would unify the currently divided law and produce less costly outcomes. It would also create the proper ex ante incentives, encouraging valid whistleblowing but discouraging excessively disruptive conduct by relators. It would, in short, make FCA suits a bit more reasonable.