

False Claims Act Qui Tam Defense: Employment Releases Not Presumptively Void for Public Policy under the False Claims Act

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For False Claims Act actions, the Fourth Circuit has followed the Ninth Circuit and adopted a public policy balancing test to hold that employment releases are not presumptively void for public policy, when challenged to bar declined qui tam suits by relators who executed employment releases with employers. *United States ex rel. Radcliffe v. Purdue Pharma et al.*, No. 09-1202, F.3d (4th Cir. 2010).¹ Although the holding is limited to those instances where the government had knowledge of the allegations prior to the time the relator filed the qui tam suit, the Fourth Circuit affirmatively recognized the enforceability of such an agreement.

The issue of enforceability of employment releases in False Claims Act actions has been the subject of evolving judicial thinking since the 1986 False Claims Act amendments that enhanced the opportunities for private citizen suits, under its qui tam provisions, to bring a broad array of fraud allegations against employers. The Fourth Circuit joins a growing number of courts inclined to reject a prophylactic rule barring the enforceability of employment releases in situations where the Department of Justice has declined to intervene in the qui tam suit and the former employee elects to proceed with the case.

The Fourth Circuit's position originates from the tangled legal proceedings of the *Purdue Pharma* criminal prosecution in 2007 for alleged misbranding of OxyContin. The Department of Justice had already begun an investigation of alleged unlawful marketing practices for OxyContin when an employee whistleblower suit under the False Claims Act qui tam provisions was filed that also alleged unlawful marketing activities related to OxyContin.

The employee was a former sales representative of Purdue Pharma LP. During his employment, the relator contacted the United States Attorney's office anonymously to raise concerns regarding Purdue Pharma's marketing practices. He subsequently negotiated a departure from Purdue Pharma, with a generous severance package, pursuant to which he executed a comprehensive release, forever discharging his employer from all liability of any kind whatsoever and prohibiting the acceptance of any relief or award in any charge or action against his employer before any federal court, among other terms. After his departure from Purdue Pharma, the relator had fleeting communications with the United States

¹ Available online at <http://www.morganlewis.com/pubs/U.S.VPurduePharma.pdf>.

Attorney's Office and eventually filed a qui tam suit under seal in 2005. At the time that the Department of Justice announced the criminal resolution involving Purdue Pharma in 2007, it also noticed a **declination** of the qui tam action.

The declined qui tam suit proceeded in the United States District Court for the Western District of Virginia under the qui tam provisions of Section 3730(b) of the False Claims Act, which authorizes private citizens to proceed with the action after a government declination as an assignee of the government's potential claims. Purdue Pharma sought to enforce the pre-suit release executed by the relator and said the relator had no right to bring the suit because of it. An Assistant United States Attorney supported Purdue Pharma's position in an affidavit that confirmed that the criminal investigation commenced in 2004 before the qui tam suit was filed, and that the government pursued the allegations against Purdue Pharma independent of any information provided to the government by the relator.

In ruling that the pre-suit employment release barred the relator from pursuing a qui tam action, the Fourth Circuit looked to the standard developed by the Ninth Circuit in *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997). In that case, the Ninth Circuit **applied** a balancing test in evaluating the enforceability of employment releases in False Claims Act qui tam suits where the government has knowledge of the allegations prior to the time the qui tam suit is filed. The Fourth Circuit adopted the Ninth Circuit's balancing test to evaluate the public policy interest, explaining that when the government is unaware of potential false claims, public interest favors the use of qui tam suits to supplement federal enforcement and public policy favors nonenforcement of the employment release.

However, where the government is aware of the claims or allegations prior to the qui tam suit having been filed, the suit is not important to the public interest, and thus public policy supports the enforcement of private settlement of employment suits and releases. Upholding enforceability of pre-suit releases where the government already knows of the allegations promotes a broader public interest that includes avoiding parasitic and opportunistic qui tam suits.

Notably, the Department of Justice filed an amicus brief supporting the enforcement of the release and taking the position that the proper focus of the government knowledge inquiry is whether the allegations of fraud were sufficiently exposed to the government, not on whether the government's investigation was completed. The Fourth Circuit agreed with this position.

Judicial recognition of a public policy balancing test on the enforceability of employment releases in the context of declined qui tam suits is a significant evolution from established law that such release agreements are generally unenforceable for False Claims Act actions. Given the large percentage of parasitic and opportunistic qui tam suits that neither supplement nor substantially assist the government's enforcement mission, the existence of an employment release must be explored in False Claims Act litigation at the outset of the action for jurisdictional defects in the relator's right to proceed with a declined qui tam action. It is, therefore, incumbent on the defense, in qui tam cases involving former employees who have executed employment releases, to pursue pre-answer discovery on both the relator and the government to determine whether an existing employment release should be enforced, based upon the competing public policy considerations judicially recognized by the Fourth Circuit in *Purdue Pharma*.

Because the relator is an assignee of the government's interest in allegations that may comprise False Claims Act liability, employment releases do not waive the government's interest in the action, nor can a release prevent a government investigation of allegations brought under seal in qui tam suits. The government has a mandatory duty to investigate allegations brought in every suit. The existence of an employment release in False Claims Act litigation may prove fatal to the viability of the action in instances where the relator's suit does not advance the specific public interest goals of the statute.

Finally, it is also important to recognize that the enforceability of employment releases in False Claims Act qui tam litigation reflects an important but narrow legal issue to the generally recognized enforceability of employment releases for non-False Claims Act actions. The legal issue of enforceability of releases in the False Claims Act context does not impact the enforceability of releases for all other civil or commercial actions. Moreover, many state whistleblower claims and claims under Sarbanes-Oxley may be released by agreement. In appropriate circumstances, guided by legal counsel, employers should continue to seek employment releases to manage employee departures and bring closure to any potential private litigation.

If you would like more information or have any questions on any of the issues discussed in this LawFlash, please contact the authors, **Kathleen McDermott** and **Meredith S. Auten** (listed below) or any of the following Morgan Lewis attorneys:

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