Federal Appeals Court Holds Employee Release Agreement Bars False Claims Act Action

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Last month, the Fourth Circuit Court of Appeals affirmed the dismissal of a federal False Claims Act (“FCA”),1 action brought by a former sales representative of Purdue Pharma, L.P., alleging that the company falsely represented to physicians that OxyContin was twice as potent as, and cheaper than, a predecessor version, MS Contin.2 More interestingly, the Fourth Circuit joined a small league of other federal courts holding that a general release signed by a whistleblower upon accepting a severance package barred his yet-to-be-filed *qui tam* action.3 In essence, the employee signed away his right to bring suit. The decision has important implications for companies seeking to use similar language to cover such suits in employment releases.

False Claims Act Overview

The False Claims Act (“FCA”) is a federal law imposing liability on any person who submits a claim to the federal government for payment that he or she knows, or should know, is false.4 Liability may be imposed when a person “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government…,”5 and when a person conspires with others to defraud the Government.6 For example, FCA actions might arise if a physician submits a bill to Medicare for medical services that were not provided or if a health care provider submits claims that are improperly coded.7 Penalties can be severe, ranging from fines between $5,000 to $10,000 plus three times the amount of damages the government sustains because of the improper conduct.8 More punishing for a health care practitioner or a provider convicted of the fraud is the possibility that the provider may be excluded from participating in the Federal health care reimbursement programs, including Medicare. Section 1128 of the Social Security Act imposes mandatory exclusion from the program for four areas of wrongdoing including felony conviction relating to health care fraud.9

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3 Id.
Commencing an action can be done in one of two ways. First, the federal government may bring suit against the false claimant directly.\textsuperscript{10} Alternatively, a private individual, often a “whistleblower” at a company, may bring a \textit{qui tam} action.\textsuperscript{11} If the case against the false claimant appears to be good, the federal government may intervene, but it is not required to do so. The whistleblower, referred to as a “relator,” may receive a portion of the proceeds recovered from a successful action—depending on whether or not the government takes part in the case.\textsuperscript{12}

When defending any lawsuit, a good attorney will use a variety of legal tactics in an effort to be successful. Such was the case in a recent FCA action.

**Background: U.S. \textit{ex rel.} Mark Radcliffe v. Purdue Pharma, L.P.**

From 1996 to 2005, Mark Radcliffe marketed the pain-relief drug, OxyContin, to health care providers as a district sales manager for Purdue Pharma, L.P. In early 2005, using the alias “John FEMALEDEER,” Radcliffe sent an email to a Purdue executive as well as its General Counsel offering to settle a yet-to-be filed fraud suit against the company based on “deceptive pharmacology,” to the tune of $40 million. More specifically, Radcliffe would later allege in the lawsuit that Purdue marketed OxyContin to individual physicians as a cheaper alternative to its predecessor drug, MS Contin, because the “2:1 equianalgesic ratio between OxyContin and MS Contin…made OxyContin twice as potent and, as a result, cheaper per dose than MS Contin.”\textsuperscript{13} Purdue executives subsequently rejected Radcliffe’s offer.

Around the same time, Radcliffe sent an anonymous email to an Assistant United States Attorney (“AUSA”) to gauge whether the government was interested in pursuing an FCA action against the company without offering any specific examples of wrongdoing. Unbeknownst to Radcliffe, federal government officials had been investigating Purdue’s OxyContin marketing activities since 2002.

According to a declaration executed by an AUSA, “one area of investigation concern[ed] whether Purdue falsely marketed OxyContin as being twice as potent as morphine and, accordingly, less expensive than MS Contin.”\textsuperscript{14} In that same declaration, it was noted that “beginning in 2002 and continuing for the next several years, the government sought millions of documents from Purdue and conducted hundreds of interviews, some of which pertained to the relative potency and cost of OxyContin and MS Contin.”\textsuperscript{15} Over the next several months, the U.S. Justice Department continued its investigation which included convening a grand jury to hear testimony from a number of Purdue employees, including Radcliffe.

\textsuperscript{10} 31 U.S.C. § 3730(a) (2009).
\textsuperscript{11} 31 U.S.C. § 3730(b) (2009).
\textsuperscript{12} See 31 U.S.C. §§ 3730(d)(1)-(2); Typically, a relator may receive a 15 to 25 percent share of proceeds recovered if the Government intervenes and as much as 25 to 30 percent if the Government does not.
\textsuperscript{13} United States \textit{ex rel.} Radcliffe \textit{v.} Purdue Pharma, L.P., 582 F.Supp.2d 766 (W.D. Va. 2008); United States, \textit{et al.}, \textit{ex rel.} Mark Radcliffe, 2010 WL 1068229 (4th Cir. 2010).
\textsuperscript{14} United States \textit{ex rel.} Radcliffe, 582 F.Supp.2d at 775.
\textsuperscript{15} Id.
In June 2005, Radcliffe left Purdue as part of a workforce reduction and agreed to a severance package. As part of that package, Radcliffe signed a broad release of claims. Pertinent provisions contained in the release stated:

4. (a) Employee . . . knowingly and voluntarily releases and forever discharges [Purdue] of and from any and all liability to Employee for actions or causes of action, suits, claims, charges, complaints, contracts (whether oral or written, express or implied from any source), and promises, whatsoever, in law or equity, which, Employee . . . ever had, may now have or hereafter can, shall or may have against [Purdue] as of the date of the execution of this Agreement, including all unknown, undisclosed and unanticipated losses, wrongs, injuries, debts, claim or damages to [Radcliffe] for, upon, or by reason of any matter, cause or thing whatsoever.

5. To the maximum extent permitted by law, Employee agrees that Employee will not seek and waives any right to accept any relief or award from any charge or action against [Purdue] before any federal, state, or local administrative agency or federal state or local court whether filed by Employee or on Employee's behalf with respect to any claim or right covered by paragraph 4.16

Despite having signed the release and having been subpoenaed by the government to provide testimony before a grand jury on the subject, Radcliffe filed his qui tam action on September 27, 2005. Approximately two months later, the government filed a motion to stay the Radcliffe suit, arguing, that allowing the suit to move forward would publicly reveal a portion of the grand jury’s investigation. The federal district court granted the stay and the government’s investigation continued.17

After a number of amended complaints filed by Radcliffe, his suit entered the hearing phase on the court’s docket. Additionally, on May 7, 2007, the government filed a notice that it would not intervene in the qui tam suit filed by Radcliffe.

District Court Proceedings

In response to Radcliffe’s Third Amended Complaint, Purdue moved to dismiss the action, arguing in part, that the release signed by Radcliffe was a complete bar to his suit. The district court disagreed. Utilizing a legal framework articulated by the Ninth Circuit Court of Appeals18 to analyze the enforceability of the release, the district court determined that even though “the government was aware of the substance of Radcliffe’s

16 United States, et al., ex rel. Mark Radcliffe, 2010 WL 1068229, pp. 9-10 (4th Cir. 2010).
17 Id. at p. 8, n. 4.
18 The district court relied upon the framework in United States ex rel. Green v. Northrop Corp., 59 F.3d 953 (9th Cir.1995) and United States ex rel. Hall v. Teledyne Wah Chang Albany, 104 F.3d 230 (9th Cir.1997).
allegations and had begun, but not completed, its investigation of these allegations as of the date of the Release,”19 Radcliffe’s ability “to supplement federal enforcement of the FCA by prosecuting these allegations on behalf of the government remains.”20 Consequently, the district court determined that:

…the circumstances here fall within the general rule articulated in Green that pre-filing releases are unenforceable to bar subsequent qui tam actions…Further the public policy concerns raised by Purdue do not alter the relative balance of public interests…The general release executed by Radcliffe does not bar this action.21

Despite this rationale from the district court, Radcliffe’s suit was still dismissed on other grounds, namely, that his complaint was not specific enough to meet the requirements of Federal Rule of Civil Procedure 9(b).22

Fourth Circuit Holding

After reviewing the fairly broad language contained in the release signed by Radcliffe, the Fourth Circuit Court of Appeals narrowed down the issue at hand:

…[t]he FCA clearly provides that once a qui tam action is filed, the relator and the defendant may not settle (or at least may not voluntarily dismiss) the action. The statute does not, however, address whether the relator’s release of qui tam claims, executed before the filing of a complaint, is enforceable.23

The Fourth Circuit rejected the lower court’s analysis and its use of the framework outlined by the Ninth Circuit Court of Appeals and, instead, ultimately fashioned three general conclusions which, taken together, uphold the use of general releases to bar qui tam lawsuits.24

The Government Is Not Required to “Sign Off” on General Releases

First, the Court rejected Radcliffe’s argument that the release was ineffective because the federal government had not “signed off” on it. No such consent by the government is required. The Court cited a host of legal cases as authority for the premise, but

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19 United States ex rel. Radcliffe, 582 F.Supp.2d at 781.
20 Id. at 782.
21 Id. at 783.
22 F.R.C.P. 9(b) states “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.”
principally relied on *United States ex rel. Ritchie v. Lockheed Martin Corporation*,\(^ {25} \) in which the Tenth Circuit Court of Appeals held that the FCA provides:

...that a person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.\(^ {26} \)

Consequently, the Court reasoned that when there is a signed release predating a yet-to-be-filed *qui tam* action, there is neither an action to dismiss nor a judge to consent to the agreement.\(^ {27} \) Thus, the statute only governs the enforceability of settlement agreements made *after* the filing of a claim.

Additionally, the Court pointed out that if Congress intended to preclude a relator from releasing his claims only with the Attorney General’s consent prior to filing suit, it would have done so—but it did not. Therefore, the Court held, “the consent of the government is not a necessary condition precedent to enforcement of an otherwise valid release where such a release is executed prior to filing a *qui tam* action.”\(^ {28} \)

**Radcliffe’s *Qui Tam* Lawsuit Is a “Claim” Which He Released**

Second, the Court rejected Radcliffe’s argument that the plain language of the release did not encompass his *qui tam* claims against Purdue. Specifically, the Court reasoned that since he released Purdue from “all liability to Employee for...claims...which Employee...ever had, may now have or hereafter can, shall or may have... as of the date of the execution of this Agreement [Aug. 1, 2005],” Radcliffe had a statutory claim, and legal standing to file an action, once he became aware that the government had suffered an injury.\(^ {29} \) Thus, the *qui tam* action fell neatly into the category of a “claim” to which Radcliffe was signing away.

**The Government’s Knowledge of Underlying Facts May Bar the FCA Action**

Finally, the Court rejected the argument that overriding public policy considerations should nonetheless prevent enforcement of the release signed by Radcliffe. In *United States ex rel. Green v. Northrop Corporation*,\(^ {30} \) the Ninth Circuit declined to enforce a release signed by an employee settling claims with his former company who allegedly overcharged the U.S. Air Force for B-2 Bomber aircraft. There, the Court concluded that

\(^{25} \) 558 F.3d 1161 (10th Cir. 2009).
\(^{27} \) Id. at p. 16.
\(^{28} \) Id.
\(^{29} \) Id. at pp. 17-18.
\(^{30} \) 59 F.3d 953 (9th Cir. 1995).
enforcing the release would “impair a substantial public interest.” However, critical to the Court’s analysis was the fact that the government “only learned of the allegations of fraud and conducted its investigation because of the filing of the qui tam complaint.”

A few years later, the same Court upheld a release of claims because, unlike the facts in Green, “the government had full knowledge of the charges and had investigated them before” the relator and the defendant settled. Therefore, because the “allegations of fraud were sufficiently disclosed to the government” prior to Radcliffe’s filing of the action, the release was enforceable.

Conclusion

According to attorneys who specialize in False Claims Actions, there are two significant implications for companies seeking to avoid qui tam lawsuits. First, companies should use broad language in releases similar to the language used in the Radcliffe release covering any past, present, or future state or federal claim, etc. Second, if companies are aware of issues or allegations, they should at least consider self-disclosure in order to avoid meritless qui tam lawsuits. The Fourth Circuit’s decision in Purdue continues a trend of courts recognizing that when the government is aware of facts underlying allegations prior to the filing of the qui tam lawsuit, the claim may be barred by a release.

Health Law Perspectives (April 2010)
Health Law & Policy Institute
University of Houston Law Center
http://www.law.uh.edu/healthlaw/perspectives/homepage.asp

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32 Id. at 20 (citing United States ex rel. Green, 59 F.3d at 966).
33 United States, et al., ex rel. Mark Radcliffe, 2010 WL 1068229 at p. 20 (4th Cir. 2010) (citing United States ex rel. Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 231 (9th Cir.1997)).
34 Id. at 25.
35 See Karen F. Green, et al., supra note 24.
36 Id.