

The False Claims Act is Not a License to Divulge Employer Confidences



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Health care employers concerned that former employees may misappropriate the company's confidential information to support *qui tam* lawsuits under the False Claims Act ("FCA") received guidance from a recent court decision. ***United States ex rel. Wildhirt v. AARS Forever, Inc.***, No. 1:09-cv-01215, 2013 WL 5304092 (N.D. Ill. Sept. 19, 2013). The court denied a motion by the *qui tam* relators – both former employees of the defendants – seeking dismissal of several counterclaims filed against the relators by the defendants, AARS Forever, Inc. and THH Acquisition LLC 1. Defendants' counterclaims alleged that their former employees breached their employee confidentiality agreements by disclosing confidential information in support of their *qui tam* lawsuit. Among other things, the court rejected relators' argument that the agreements were unenforceable on public policy grounds and thus allowed several counterclaims to proceed.

The Agreement and Relators' Lawsuit

The relators' employment agreements stated, among other things, that the relators would:

- not copy or disclose confidential information without permission;
- indemnify defendants for any loss, claim, or damages (including attorneys' fees) for the unauthorized disclosure of confidential information;
- not receive any monetary reimbursement for a *qui tam* lawsuit against defendants (and turn over any *qui tam* award to defendants); and
- notify defendants of any "suspect practices" of which they became aware.

After their employment ended, relators filed a lawsuit alleging that defendants violated the federal FCA and its Illinois state analogue by falsely billing Medicare and Medicaid for patients in the Veterans Administration hospital system.

One of the relators retained company documents after her employment ceased and, in connection with the *qui tam* lawsuit, allegedly disclosed the misappropriated documents to counsel, the government, and to the public. Relators also disclosed the contents of company-related verbal communications.

The Defendants' Counterclaims

As a result of relators' unauthorized disclosure of confidential information, the defendants filed counterclaims alleging, among other things, that relators: (1) breached their agreements with the defendants through unauthorized disclosure of confidential information (counts I and II); and (2) breached their agreements by failing to report suspect practices to the company before filing the *qui tam* lawsuit (count IV). The defendants also sought indemnification under those agreements for damages suffered as a result relators' disclosure of confidential information (count III).

In response, the relators argued that the provisions of the agreements they allegedly violated were contrary to public policy, which relators identified as "the detection and exposure of potential fraud against the United States"

Looking to "well-developed" FCA-related case law addressing relators' "asserted policy interests," the court explained that a *qui tam* defendant may bring counterclaims "for independent damages" that are "not dependent on a finding that the *qui tam* defendant is liable." There are two categories of these independent claims: (1) the conduct at issue in the counterclaim is distinct from the conduct underlying the FCA case; or (2) a defendant's claims, though "bound up in the facts of the FCA case," can succeed if the defendant is not liable in the FCA case (generally where relator's allegations are found to be untrue). The court decided that defendants' counterclaims fit "comfortably in at least one of the two categories" and thus should not be dismissed as contrary to public policy. The court did, however, dismiss counterclaims to the extent that defendants sought damages or indemnification if relators prevailed.

The decision highlights the importance of requiring employees to report potentially unlawful conduct internally and utilizing robust employee confidentiality agreements. Internal reporting is an important part of an effective compliance program. Furthermore, because *qui tam* relators often take and disclose confidential company information in support of their claims, requiring employees to sign confidentiality agreements may both dissuade employees from misappropriating confidential information and give the company recourse if they do.

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