False Claims Act Development

2010-04-02

United States of America, et al. ex rel. Mark Radcliffe v. Purdue Pharma L.P.; Purdue Pharma, Inc.[1]

In a decision issued on March 24, 2010, the United States Court of Appeals for the Fourth Circuit concluded that a general release may bar a subsequent *qui tam* action if the allegations of fraud had been sufficiently disclosed to the government prior to the filing of the *qui tam* lawsuit. The decision has important implications for companies that seek to use release language broad enough to cover *qui tam* claims.

Factual Background

This case involves the allegations of Mark Radcliffe, who marketed OxyContin for Purdue Pharma from 1996 to 2005 and eventually claimed that Purdue was misleading physicians about the potency and cost-savings of OxyContin. In early 2005, Radcliffe contacted an Assistant United States Attorney for the Western District of Virginia to determine whether there was interest in a claim against Purdue, but he did not reveal specifics. In fact, the government had been investigating Purdue's marketing of OxyContin since 2002, and indeed had sought documents and conducted interviews pertaining to the relative potency and cost of OxyContin.

In June 2005, Radcliffe opted to leave Purdue in exchange for a severance package; in order to obtain an enhanced benefits package, Radcliffe was required to sign a release. The release included the following provisions:

> 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.
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> 16. THE PARTIES HAVE READ AND FULLY CONSIDERED THE AGREEMENT AND ARE MUTUALLY DESIROUS OF ENTERING INTO SUCH AGREEMENT. THE TERMS OF THIS AGREEMENT ARE THE PRODUCT OF MUTUAL NEGOTIATION AND COMPROMISE BETWEEN EMPLOYEE AND COMPANY. EMPLOYEE ACKNOWLEDGES THAT EMPLOYEE (i) HAS HAD AT LEAST FORTY-FIVE (45) DAYS TO CONSIDER THIS AGREEMENT; . . . (ii) HAS CAREFULLY READ THE AGREEMENT AND THE DISCLOSURE STATEMENT IN THEIR ENTIRETY; (iii) HAS BEEN ADVISED IN WRITING TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTION OF THIS AGREEMENT; . . . (v) HAS DISCUSSED IT WITH INDEPENDENT LEGAL COUNSEL, OR HAS HAD A REASONABLE OPPORTUNITY TO DO SO . . . HAVING ELECTED TO EXECUTE THIS AGREEMENT, TO FULFILL THE PROMISES SET FORTH HEREIN, EMPLOYEE FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION, ENTERS INTO THIS AGREEMENT INTENDING TO WAIVE, SETTLE AND RELEASE ALL LIABILITY FOR AND RECOVERY FROM CLAIMS EMPLOYEE EVER HAD, NOW HAS OR MIGHT HAVE AGAINST THE COMPANY AS OF THE DATE OF THIS AGREEMENT.

Despite having signed the release, Radcliffe filed a *qui tam* action on September 27, 2005, alleging that Purdue misled physicians about the potency and cost-savings of OxyContin.

Analysis

After highlighting the broad language contained in the pre-filing release, the Fourth Circuit drew three general conclusions, which taken together allow broadly drafted pre-filing releases to bar subsequent *qui tam* lawsuits.

- **An unfiled FCA claim can be released.** Radcliffe 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*." Radcliffe argued that his "claim" was essentially a partial assignment of the government's damages, and thus that he technically had no claim until he filed his lawsuit following execution of the pre-filing release. The Fourth Circuit concluded, however, that a pre-filing release could encompass FCA claims even if the *qui tam* lawsuit had not yet been filed.

- **Government consent is not necessary for a pre-filing release to bar an FCA claim.** Even though 31 U.S.C. § 3730(b)(1) prohibits relators from unilaterally settling FCA claims absent the government's consent once the suit has been filed, no such consent is

necessary for pre-filing releases. Thus, the Fourth Circuit held that "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."

- **When the government is already aware of the facts underlying the allegations prior to the filing of the *qui tam* lawsuit, a pre-filing release may bar an FCA claim.** The Court looked to the Tenth Circuit's recent decision in *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1168 (10th Cir. 2009).[2] There, the Tenth Circuit held that "[b]ecause the federal interests served by enforcing releases signed after disclosure to the federal government outweigh the interest served by not enforcing them, ... the releases [were] enforceable." *Ritchie*, 558 F.3d at 1163. The *Ritchie* decision relied on a similar decision from the Ninth Circuit, *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997). However, both *Ritchie* and *Hall* involved circumstances where the defendant had self-reported the fraud allegations underlying the suit to the federal government prior to release. The Fourth Circuit extended this reasoning to the circumstances surrounding Radcliffe's release—specifically, that although there had been no explicit disclosure of his allegations to the government, the government was already investigating the substance of those allegations. The Court concluded that "when, as in this case, the government was aware, prior to the filing of the *qui tam* action, of the fraudulent conduct represented by the relator's allegations, the public interest has been served and the Release should be enforced."

Implications

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. The Fourth Circuit specifically cited the broad language in the Radcliffe release in its analysis. Specifically, the Court found important that Radcliffe had agreed to "forever discharge [] [Purdue] of and from any and all liability *to Employee* for actions or causes of action, suits, [or] claims." Op. at __ (emphasis in original). The Court also noted that Radcliffe explicitly "enter[ed] into this agreement intending to waive, settle and release all liability for and recovery from claims [he] ever had, now has, or might have against the company as of the date of this agreement." Op. at __. Finally, the Court pointed out that Radcliffe "waive[d] any right to accept any relief or award from any charge or action against [Purdue] before any ... federal, state or local court...." Op. at __.

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. In *Ritchie*, for example, the defendant self-reported the relator's allegations to the government; because the government already possessed knowledge of the alleged fraud prior to Ritchie's *qui tam* lawsuit, the Tenth Circuit held that the release barred the claims. *Purdue*, in turn, held that the government's

pre-complaint knowledge of "the [alleged] fraudulent conduct represented by the relator's allegations" was sufficient to enforce a release, without the defendants having made an express disclosure.

For more information, please contact a member of our WilmerHale False Claims Act Working Group: Karen F. Green, Jennifer M. O'Connor, David W. Ogden, Jonathan E. Paikin, Kimberly A. Parker or Howard M. Shapiro.

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[1] WilmerHale represents Purdue Pharma in this matter.

[2] More generally, the Fourth Circuit (and the Tenth Circuit in *Ritchie*) analyzed the question under a framework established by the Ninth Circuit 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). In *Green*, the Ninth Circuit concluded "that enforcing the release .. would impair a substantial public interest" and declined to enforce the release, but it deemed it "critical ... that the government only learned of the allegations of fraud and conducted its investigation *because of the filing of the qui tam complaint*." *Green* at 966. Two years later, the Ninth Circuit upheld a pre-filing release in *Hall* because "the government had full knowledge of the ... charges and had investigated them before" execution of the release.

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