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REPORT

False Claims Act

Whistleblower or qui tam actions under the False Claims Act pose a continuing concern to federal contractors, with many contractors arguing that the act imposes high penalties for innocent mistakes and provides an incentive to litigation by disgruntled employees or former employees. In some cases, contractors say they retain unsatisfactory employees rather than risk meritless but expensive lawsuits.

However, recent developments in federal case law suggest that requiring terminated employees to sign releases of claims at the time of termination can, at least under some circumstances, provide contractors and other employers some protection.

This analysis discusses two district court cases that cast new light on this issue, and makes recommendations concerning steps contractors might take to reduce liability risk when effecting the separation of an employee who may be a whistleblower.

Employee Releases: A Tool Federal Contractors Can Use To Protect Themselves Against False Claims Act Liability

BY CATHERINE KUNZ AND JODY GOODMAN*

**Catherine Kunz is counsel in the Government Contracts Group of Crowell & Moring, Washington, D.C., and Jody Goodman is an associate.*

In this age of frequent and extensive employment litigation, employers that are terminating an employee sometimes offer severance packages that include monetary compensation for the terminated employee in exchange for the employee's agreement to release claims he or she might have against the employer. While this tactic might work well for certain types of claims employees have against employers or former

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employers, it has had only limited effectiveness with respect to *qui tam* actions brought against employers by former employees under the False Claims Act. However, recent decisions indicate a possible shift in the law that may foretell greater success by federal contractors and other employers in using releases to bar False Claims Act *qui tam* actions by former employees.

A number of employers have tried to mitigate their potential exposure to claims by former employees by crafting releases from liability as part of a severance deal. A release might read:

> [Employee] releases [employer] from all actions, causes of actions, suits, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, known or unknown, that [employee] now has or at any time heretofore had or held against [employer] by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this release.

Until recently, courts have generally been reluctant to uphold releases of employees' rights to bring False Claims Act actions. Judges voiced public policy concerns that inhibiting the pursuit of *qui tam* cases would subvert the purpose of the False Claims Act. For example, in *United States ex rel. Green v. Northrop Co.*, the Ninth Circuit held that if a release were enforceable, the government might never learn about the relator's allegations of fraud.[1] *Green* has served as the guidepost for courts that have held releases invalid over the past ten years, including the decisions in *United States ex rel. Pogue v. American Healthcorp, Inc.*,[2] *United States ex rel. DeCarlo v. Kiewit/AFC Enterprises, Inc.*,[3] and *U.S. ex rel. Bahrani v. Conagra, Inc.*[4]

The Ninth Circuit in *Green* did not have occasion to consider the public policy ramifications when the government chooses not to intervene, and therefore clearly had notice of the alleged fraud. Three years later, it did and in *United States ex rel. Hall v. Teledyne Wah Chang Albany*,[5] the Ninth Circuit affirmed a district court's decision to uphold a release and grant a motion to dismiss where the government had ''full knowledge of the plaintiff's charges before he executed the release and the government had found no fraud.'' In distinguishing *Green*, the *Hall* court stated that ''[t]he effect of enforcing releases when the government has no knowledge of the qui tam claims would be to encourage relators to settle privately and release their claims, thus retaining 100 percent of the recovery, instead of providing the government with information and retaining at most the 30 percent recovery available in a *qui tam* action.''[6] The court noted that in *Hall*, ''the concerns that led us to deny enforcement in *Green* are not present. The federal government was aware of Hall's allegations regarding false certifications. Therefore, the public interest in having information brought forward that the government could not otherwise obtain is not implicated.''[7]

New Possibilities for Enforcing Releases. Though *Hall* distinguished itself on its facts from *Green*, without challenging the premise of the *Green* holding, several district courts have recently taken notable steps away from the *Green* holding and dictum, which open up possibilities for enforcing releases, at least under certain circumstances, to prevent former employees from bringing *qui tam* suits. One recent case, *United States ex rel. Whitten v. Triad Hospitals, Inc.*,[8] went a step further than *Hall*, affirmatively stating that where the government has declined to intervene in a False Claims Act action, public policy favors the enforcement of release agreements. Another recent district court case, *United States ex rel. Jimenez v. Health Net Inc.*,[9] held that when an employee signs a release stating that he or she has not filed an FCA claim, and that statement is false, the release may be upheld, since the employee breached the terms of the agreement.

In *Whitten*, the relator worked for an entity that managed two hospitals (''the Authority''). The Authority hired a third party, Quorum Health Resources, to provide management services for its hospitals. Whitten, who alleged that Quorum submitted false claims to the United States, negotiated a severance agreement with the Authority. In exchange for more than $124,000, Whitten released the Authority from ''any and all claims, demands, actions, and causes of action of any kind or nature, known or unknown, arising or existing until the date of this instrument.'' A different clause of the agreement provided:

> The parties hereto acknowledge and agree that Ted. R. Whitten is contemplating initiating an action for damages or other claim or claims against Quorum Health Resources, LLC, or its proper affiliate, regarding matters arising out of his employment by Releasees and nothing herein is intended to or shall be construed to release Quorum, et al, from any such claims or liabilities.[10]

When Whitten filed a *qui tam* action against Quorum, Quorum argued that the court lacked subject matter jurisdiction. The district court agreed, holding that the False Claims Act case ''does not relate to 'matters arising out of [Whitten's] employment.' ''[11] The claim was ''not dependent upon Whitten's employment at the hospitals''; rather, it was ''entirely derivative of the government's right to recover for fraud against [the Authority].''[12] The court concluded that ''[a]t least in cases where the government has declined to intervene, public policy favors the enforcement of agreements like the one entered into by Whitten and the Authority.''[13] . The court went on to state: ''The public policy interest identified in Green, encouraging disclosure of allegations of fraud against the government, is served adequately by a rule that prohibits a litigant who has agreed to release his right to serve as a relator from maintaining a qui

[1] 59 F.3d 953, 962-69 (9th Cir. 1994).

[2] 1995 WL 626514 (M.D. Tenn. Sept. 14, 1995) (''This Court agrees with the Ninth Circuit [in *Green*] that enforcement of release agreements that include claims against an employer under the FCA would subvert the purposes of the Act.'').

[3] 937 F. Supp. 1039 (S.D.N.Y. 1996) (citing *Green* for the proposition that if the release were enforceable, Congress's intent to deter fraudulent activity would be effectively diluted).

[4] 183 F. Supp. 2d 1272 (D. Colo. 2002) (''[E]ven if the release encompasses Bahrani's *qui tam* claims, it is unenforceable for the public policy reasons stated in *Green*.'').

[5] 104 F.3d 230 (9th Cir. 1997).

[6] 104 F.3d at 233.

[7] Id.

[8] 2005 U.S. Dist. LEXIS 26208 (S.D. Ga. Oct. 27, 2005).

[9] 2005 WL 2002435 (D. Col. Aug. 19, 2005).

[10] 2005 U.S. Dist. LEXIS 26208 at *8.

[11] *Id.* at *9.

[12] *Id.*

[13] *Id.* at *15

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tam action if the government declines to intervene in the action.''[14]

United States ex rel. Whitten v. Triad Hospitals Inc. affirmatively stated that where the government has declined to intervene in the False Claims Act action, public policy favors the enforcement of release agreements.

The *Jimenez* case held that relators can not accept severance pay, execute releases from filing future claims, and then seek recovery under the False Claims Act, without at least tendering a return of the severance funds. In this case, the relator executed a release that provided:

> To the extent permitted by law, [Jimenez] agrees that [Jimenez] shall not initiate or cause to be initiated against [defendants] any compliance review, suit, action, investigation or proceeding of any kind, or voluntarily participate in same . . . pertaining to any matter related to [ ] her employment with the Company. *[Jimenez] represents that [ ] she has not to date, initiated (or caused to be initiated) any such review, suit, action, investigation or proceeding.*[15]

The court held that Jimenez had breached the terms of the release by not disclosing that she had filed a False Claims Act suit against her employer prior to signing the release, and ordered Jimenez to return the $125,000 she had received in severance pay.

Considerations for Contractors Using Releases. While releases are still not guaranteed to prevent former employees from bringing *qui tam* actions, employers that wish to use releases should consider the following information when crafting the language of the release:

- A departing employee should be required to represent in writing that he/she is not aware of any violations of the law by the employer, or to specifically state in writing any possible violations of which he/she is aware.
- The language of a release should expressly articulate that it covers False Claims Act actions.
- The release language should also require the employee to state whether he or she has already filed a False Claims Act action against the employer.
- The release should contain a provision that nothing contained therein shall prohibit the employee from reporting misconduct to the appropriate governmental authorities.

If a *qui tam* action is subsequently brought by a former employee who has signed a release, the government will almost certainly argue that any such release is void for public policy reasons. If the government has chosen not to intervene, the employer may respond that the government's decision not to intervene negates the government's argument and constitutes grounds to enforce the release. Releases will be more difficult to enforce in cases where the government has not had the opportunity to investigate the relator's claims.

When confronted with an unhappy employee who may be a *qui tam* relator, employers should bear in mind that most *qui tam* relators are not driven by personal financial interests; they are driven mainly by moral outrage at a perceived wrong. Potential relators are often very loyal to their employer, and will therefore be willing to execute a release if the employer's allegedly fraudulent conduct is cured. Indeed, employers might consider asking an employee to release his or claim to monetary compensation – either directly or indirectly – from a *qui tam* suit, rather than releasing the employer from the claim itself. This would relieve the employer of some financial exposure, though of course the government would still be free to pursue financial recovery from the company.

Though *qui tam* litigation is always a concern for employers, well-written releases and thoughtful handling of employees' complaints should minimize liability risks. Companies should ensure that they have effective compliance programs in place, and should respond in a meaningful way to employees' reported concerns. If an unhappy employee ends up leaving the company, a well-written release should probably be part of the severance picture.

[14] *Id.*
[15] 2005 WL 2002435 at *2 (emphasis in original).