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False Claims Act

View From Mayer Brown: False Claims Act – Counterclaims for Stolen Documents

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Relators who file cases under the False Claims Act, 31 U.S.C. §§ 3729-33 (''FCA''), are often employees or former employees of the defendant. Moreover, such relators have often signed confidentiality agreements with the defendant stating that they will not remove or disclose the defendant's confidential information, but then use at least some of the information in connection with their FCA cases. In response, defendants have filed counterclaims alleging breach of the confidentiality agreements.

A recent decision from the District Court for the Eastern District of Pennsylvania involves this situation and summarizes related precedent. In *Walsh v. Amerisource Bergen Corp.*, a defendant in a FCA action asserted a counterclaim claiming the relator, who was an employee of one of the defendants, breached the confidentiality agreement he signed as a condition of his employment by disclosing confidential company information to his counsel and attaching it to his complaint. No. 11-7584, 2014 WL 2738215 (E.D. Pa. June 16, 2014). As discussed further below, the court in *Walsh* addressed the relator's motion to dismiss the counterclaim. As more and more companies are confronted with FCA claims, an increase in counterclaims based on breaches of confidentiality agreements is likely to occur. Further, as discussed below, employee confidentiality agreements have received public scrutiny in recent months, with relators' attorneys, legislators, and other public officials expressing public policy concerns similar to those raised in recent cases.

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The *Walsh* Decision. In *Walsh*, the relator was an auditor who works for one of the defendants, a pharmaceutical services company. *Id.* at *1. Before he filed the FCA complaint, he took and removed a variety of the defendants' confidential, proprietary, and privileged documents. *Id.* at *2. The relator attached the documents to the complaint and the documents became public when the complaint was unsealed. This conduct constituted the basis for the defendants' breach claim.

In resolving the motion to dismiss the counterclaim, the district court focused on the relator's argument that there is a strong public policy against counterclaims in *qui tam* actions. The district court, citing decisions from the Ninth Circuit and other district courts, stated that independent counterclaims that are based on damages are permitted as long as the ultimate effect does not provide for indemnification or contribution. *Id.* at *4 (citing *United States ex rel. Madden v. Gen. Dynamics Corp.*, 4 F. 3d 827, 831 (9th Cir. 1993); *United States v. Campbell*, No. 08–1951, 2011 WL 43013, at *10 (D.N.J.

Jan.4, 2011); *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 505 F. Supp.2d 20, 26 (D.D.C. 2007)). Courts disfavor counterclaims that allow a defendant to obtain recovery from a relator to pay a portion of the FCA damages because it conflicts with the deterrence and punitive value of FCA damages. In contrast, damages based on an independent claim do not present the same problem. *Id.* at *6-7. The court further noted that because a counterclaim is often compulsory under the Federal Rules of Civil Procedure, a defendant may waive the right to assert a claim later if it does not raise a counterclaim in response to the FCA action.

The *Walsh* Court denied the motion to dismiss, finding that the defendants were not seeking indemnification and did not allege that the injuries sustained were due to the disclosure. *Id.* at *7. Instead, the defendants were seeking damages based on the breach of the confidentiality agreement, and that breach was wholly independent from the FCA action. The court stated:

> The Amended Counterclaim does not allege that Relator participated in the purported fraud. Nor does it suggest that the injuries sustained by Defendants were a result of Relator's disclosure of the alleged fraud. Furthermore, unlike *Battiata*, Defendants' requested damages are not based upon any potential revenues, earnings, profits, compensation, or benefits awarded to Relator as a result of this qui tam action. Rather, the damages sought by Defendant are alleged to be the result of Relator's breach of a validly executed confidentiality agreement.

Id. at *7. Moreover, the court reasoned it was too early to dismiss the counterclaim because it was unclear whether the information was required to prove the relator's claim, and the defendants may not be found liable for violating the FCA. In sum, because the court determined that the counterclaim was independent of the FCA claim, it denied the motion to dismiss.

As the *Walsh* Court acknowledged, other courts have reached differing conclusions when presented with similar motions to dismiss. For example, in *United States ex rel. Grandeau v. Cancer Treatment Centers of America*, the defendant asserted counterclaims for breach of fiduciary duty, breach of a confidentiality agreement, and conversion, and the court dismissed the claim for breach of a confidentiality agreement. 350 F. Supp.2d 765, 773 (N.D. Ill. 2004). In that case, the court held that the defendant failed to adequately allege a breach of a confidentiality agreement because ''the confidentiality agreement cannot trump the FCA's strong policy of protecting whistleblowers who report fraud against the government.'' *Id.* Other courts have declined to establish a *per se* rule that public policy prevents the enforceability of confidentiality agreements in FCA cases. In *Caffaso v. General Dynamics C4 Systems*, the Ninth Circuit affirmed the district court's decision entering summary judgment in favor of the defendant on its counterclaim for breach of a confidentiality agreement. 637 F.3d 1047, 1061 (9th Cir. 2011). There, the relator copied 11 gigabytes of data before filing an FCA action and urged the Court of Appeals to adopt an exception to the enforcement of confidentiality agreements that would allow relators to disclose information to bring an FCA action. The court rejected this proposal, stating:

> Although we see some merit in the public policy exception that Cafasso proposes, we need not decide whether to adopt it here. Even were we to adopt such an exception, it would not cover Cafasso's conduct given her vast and indiscriminate appropriation of GDC4S files. Cafasso copied nearly eleven gigabytes of data. . . An exception broad enough to protect the scope of Cafasso's massive document gather in this case would make all confidentiality agreements unenforceable as long as the employee later files a qui ta[m] action.
>
> Were we to adopt a public policy exception to confidentiality agreements to protect relators — a matter we reserve for another day — those asserting its protection would need to justify why removal of the documents was reasonably necessary to pursue an FCA claim.

Id. at 1062.

Decisions from the District Court for the District of Columbia demonstrate that these types of cases turn on the specific facts involved. In 2002, the court denied a motion to dismiss a counterclaim when the defendant argued that the relator violated Virginia's Uniform Trade Secrets Act and breached a related contract that prohibited the disclosure and retention of confidential information when the relator pursued his FCA claim. *United States ex rel. Mossey v. Pal-Tech, Inc.*, 231 F. Supp. 2d 94, 99 (D.D.C. 2002). The court did not address any FCA-related policy considerations. Rather, the court held that if the defendant's assertions were true, the defendant's counterclaim sufficiently alleged facts that could entitle it to relief under the nature of the contract. *Id* However, seven years later, the district court dismissed a defendant's counterclaim for failure to return company documents in violation of the relator's separation agreement, because enforcing the agreement would conflict with public policy of encouraging those with knowledge of fraud to come forward. *United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 151-52 (D.D.C. 2009). The court declined to dismiss a counterclaim for failure to refrain from disparagement, which was also based on the separation agreement, because the relator made the disparaging comments to third parties outside the scope of the litigation. This reasoning suggests that the court's focus was on whether enforcing the agreement would affect the relator's ability to bring the suit. *See id.* at 152 (''Enforcing the Agreement under [the disparagement counterclaim] would not implicate Head's ability to bring this suit, and so does not involve the same public policy concerns as [the breach of contract counterclaim].'').

Scrutiny of Confidentiality Agreements. Members of Congress and federal agencies have expressed concerns similar to those raised by courts about the role of confidentiality agreements in FCA cases. Earlier this year, KBR came under scrutiny for provisions in confidentiality agreements it requires employees to sign that prohibit employees from speaking to anyone about fraud allegations. *See* Scott Highman, *KBR is asked to release internal corporate files, signaling a widening fraud investigation*, Washington Post, Apr. 1, 2014; Scott Highman, *SEC has opened investigation into KBR, whistleblower's lawyer says*, Washington Post, Mar. 10, 2014. Information about KBR's policy was revealed in a case pending in the District Court for the District of Columbia, *United States ex rel. Barko v. Halliburton Co*. Allegedly, under KBR's confidentially agreement, an employee who discloses information about an allegation can be terminated and sued by KBR. Scott Highman, *SEC has opened investigation into KBR, whistleblower's lawyer says*, Mar. 10, 2014. The revelation of KBR's policy drew attention from Congress, the Securities and Exchange Commission, and the Department of Justice because the FCA and the Securities and Exchange Act prohibit companies from preventing employees from reporting possible fraud. However, KBR has asserted that the confidentiality statement is intended to preserve the confidentiality of ongoing investigations, and it has never been used to prevent an employee from testifying, working with the DOJ, or otherwise cooperating with the government in a fraud investigation.

Conclusion. For good reasons, many companies, including government contractors, require employees to sign confidentially agreements. As *qui tam* cases continue to proliferate, the collision of these agreements and *qui tam* complaints will continue to generate counterclaims. Contractors should be familiar with the relevant case law, both for purposes of structuring their confidentiality agreements and to prepare for possible *qui tam* actions by current or former employees. In many instances the documents may reveal trade secrets or be used by competitors or others who could not otherwise obtain the documents. Agreements should consider return of documents to assure that even if used in a *qui tam*, they are not provided to a competitor or used for other purposes that do not implicate any developing fraud reporting policy issues.