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FCA Counterclaims – Defendants Can Proceed with Counterclaims Against False Claims Act Whistleblowers

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A recent federal district court ruling allowed a defendant in a federal False Claims Act (FCA) *qui tam* action to maintain counterclaims against the whistleblower, signaling potentially widened avenues for relief for FCA defendants. On February 27, 2024, the U.S. District Court for the Northern District of Georgia allowed Defendant, a medical equipment supplier, to maintain several counterclaims against an FCA *qui tam* relator, previously Defendant's chief compliance officer. *See U.S. ex rel. Cooley v. ERMI, LLC, et al.*, C.A. No. 1:20-CV-4181-TWT, 2024 WL 815514, at *1 (N.D. Ga. Feb. 27, 2024).

In her February 2023 complaint, Relator alleged that Defendant had engaged in unlicensed and fraudulent activity in violation of the federal FCA by providing medical equipment after its previous Florida license expired and before receiving a valid updated license. She also alleged that Defendant had retaliated against her by stopping her from bringing the company into compliance and by subsequently forcing her out when she threatened to bring an FCA suit. Defendant filed counterclaims alleging (1) breach of fiduciary duty, (2) negligence per se, and (3) breach of contract. Defendant sought the return of its property and confidential information, financial damages, and attorney's fees.

On November 2, 2023, the Court granted Relator's motion to dismiss all of Defendant's counterclaims, except for breach of contract, with leave to amend. Defendant filed amended counterclaims on December 4, 2023, where it updated its breach of fiduciary duty claim and reiterated its claims for breach of contract and for litigation expenses under a Georgia statute. With respect to breach of fiduciary duty, Defendant's core allegation was that the relator misled the company into believing that the "renewal process was going smoothly" and that a renewal was expected "in short order," when, in

fact, "a proper renewal application was never submitted." Def. Counterclaims, Dec. 4, 2023, Dkt. 84 ¶¶ 18 & 33. These alleged misrepresentations caused "significant delay and expense" in renewing ERMI's license and exposed the company to "costly litigation brought by one of its competitors." *Id.* ¶ 33. As to breach of contract, Defendant alleged that Relator had breached the confidentiality agreement she had signed upon leaving the company by retaining and disclosing the company's confidential information.

On December 15, 2023, Relator moved to dismiss Defendant's amended counterclaims. Among other contentions, Relator argued that Defendant's breach of fiduciary duty claim was void as against public policy because it was really a veiled claim for contribution and indemnification. As to breach of contract, Relator maintained that the confidential information she allegedly retained and disclosed related to her FCA claim and, as such, was permissible under the confidentiality agreement, which expressly allowed the disclosure of confidential information where it was reasonable to believe that Defendant acted illegally.

In its February 2024 decision upholding the defendant's counterclaims, the Court clarified that counterclaims for causes of action distinct from the FCA could, in fact, proceed even if they arose from the same underlying facts as the FCA action. While both Relator's FCA claim and Defendant's counterclaims involved operating without a valid license, in upholding Defendant's breach of fiduciary duty claims as not violative of public policy, the Court determined that Defendant had "provided enough facts to show that there is [a] 'clear distinction' between the facts supporting liability for each claim." *Cooley*, 2024 WL 815514, at *3. The Court explained that "the conduct at issue can be found to be distinct 'even where there is a close nexus between the facts, so long as there is a clear distinction between the facts supporting liability against relator and the facts supporting liability against the FCA defendant." *Id.* (quoting *U.S. ex rel. Miller v. Bill Harbert Intern. Const. Inc.*, 505 F. Supp. 2d 20, 27 (D.D.C. 2007)). Indeed, the Court held, "that overlap is what makes [Defendant's] counterclaims *compulsory*." *Id.* The court also agreed with Defendant that (i) Relator's role in allowing defendant's Florida license to expire and misleading it into thinking a renewal was forthcoming was "entirely unrelated to the underlying FCA claims"; and (ii) the competitor's lawsuit against Defendant was brought under the Florida Deceptive and Unfair Trade Practices Act, not the FCA, so that claim constituted "independent damages" that did not offset FCA liability. *Id.* at *2–*3.

The Court allowed Defendant's breach of contract counterclaim for the time being, reasoning that it was too early in the litigation to determine whether Relator fell within the confidentiality agreement's safe harbor that allows disclosure of confidential information to a regulator concerning conduct that an employee "reasonably believes is illegal or in material noncompliance" with applicable laws. *Id.* at *8. The Court explained that if the facts later reveal that Relator retained confidential documents *only* to support her FCA claim, then this counterclaim could be dismissed on public policy grounds. *Id.* at *7–*8. Because both the breach of fiduciary duty and breach of contract counterclaims were allowed to proceed, the Court did not dismiss the Georgia state claim for litigation expenses.

The *Cooley* decision provides a roadmap that companies facing FCA claims can follow to pursue distinct remedies against whistleblowers, even when such counterclaims stem from the same underlying facts as the FCA claims. FCA Defendants should evaluate potential injuries imposed by the whistleblower's actions during and after their tenure, as applicable, and determine whether counterclaims may be appropriate even if they arise from the same set of facts as the FCA case.

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