

# False Claims Act Whistleblower Prevails in First Circuit Appeal

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In an appeal to the First Circuit, a False Claims Act (FCA) whistleblower prevailed and established favorable precedent about protections for whistleblowers alleging violations of the Anti-Kickback Statute (AKS). The opinion in [Guilfoile v. Shields](#) underscores the broad scope of [FCA protected whistleblowing](#).

## Thomas Guilfoile's Whistleblowing

Thomas Guilfoile was a seasoned management professional employed by John Shields, the CEO of a collection of health care LLCs, joint ventures, and holding companies operating as a single integrated entity ("Integrated Entity"). The Integrated Entity partnered with hospitals to provide specialty pharmacy services for chronically ill patients, including patients whose care was reimbursed by Medicare or Medicaid, by either operating a pharmacy directly in the hospital or by filling specialty prescriptions through an off-site location. Under Guilfoile's leadership as President, the Integrated Entity grew from a start-up to a successful operation generating millions of dollars in profit.

In the fall of 2015, Guilfoile learned that Shields entered into a contract on behalf of the Integrated Entity with a third party consulting firm, the Ayrault Group. Under the contract, Shields paid the consulting firm, led by Michael Greene, \$35,000 per quarter for each hospital contract that the firm referred to the Integrated Entity. Guilfoile suspected that the payments to Greene and the Ayrault Group unlawfully induced Greene to steer contracts to the Integrated Entity, thereby running afoul of the AKS.

Guilfoile reported to Shields that the contract with Greenes' consulting firm violated the AKS. Shields took some corrective action to halt further payments to Greene, but Greene refused to return the money that the Integrated Entity had already paid for a referral. Guilfoile urged Shields to reveal the matter to the Integrated Entity's Board, but Shields refused.

Shortly thereafter, Guilfoile raised concerns to Shields about potentially fraudulent representations by the Integrated Entity to hospitals about a call-center. Shields refused to take remedial action, so Guilfoile tried to address the issue with Human Resources and the Director of Operations. About one week later, Shields fired Guilfoile.

Guilfoile brought suit under the FCA's whistleblower protection provision. The district court dismissed Guilfoile's claim for failure to adequately plead that his disclosure about the payments to Greene and the Ayrault Group reasonably could have led to a qui tam action. In particular, Guilfoile failed to connect any AKS violation to a potential false claim.

## False Claims Act Whistleblower Protection

The U.S. Court of Appeals for the First Circuit vacated and remanded, holding that Guilfoile's complaint sufficiently alleged that he engaged in [FCA protected conduct](#). Relying on the Supreme Court's decision in *Graham Cty. v. United States ex rel. Wilson*, the First Circuit held that Guilfoile need not prove an FCA violation to prevail in an FCA retaliation claim and that FCA protected conduct should be construed broadly. "Put colloquially, rather than plausibly pleading the existence of a fire — the actual submission of a false claim — a plaintiff alleging FCA retaliation need only plausibly plead a reasonable amount of smoke — conduct that could reasonably lead to an FCA action based on the submission of a false claim."

The court then thoroughly analyzed Guilfoile's disclosures and found that the concerns he raised implicated the AKS because the statute bars a claim for Medicare reimbursement where the claim includes items or services stemming from a kickback. In addition, the court held that Guilfoile need not plead that compliance with the AKS was material to the government's decision to pay any specific claim because any claim resulting from a violation of the AKS is presumably a false or fraudulent claim. In other words, a whistleblower opposing an AKS violation is protected from retaliation regardless of whether the provider expressly certified their compliance with the AKS.

Guilfoile sufficiently alleged protected conduct because he opposed Shields paying the Ayrault Group to induce Greene to use his influence with hospitals to persuade them to select the Integrated Entity for contracts to perform services that would be billed to Medicare.

## Implications for Whistleblowers

*Guilfoile* clarifies that internal disclosures about potential violations of the AKS are protected under the False Claims Act's anti-retaliation provision. Kudos to Guilfoile's attorneys at Outten & Golden for this important win.

Law clerk Diana Alsabe contributed to this post.

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