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Contacts:
Christopher R. Hall
Chair
Nicholas J. Nastasi
Vice Chair
Matthew J. Smith
Newsletter Editor
Brett S. Covington
Contributor
Patrick M. Hromisin
Contributor
Christine M. Pickel
Contributor

White Collar Watch
An eye on whistleblowers, false claims and compliance

Saul Ewing LLP
White Collar and Government Enforcement Practice

Contents

Court of Appeals asked to clarify scope of Dodd-Frank Act whistleblower protections

By Christopher R. Hall and Brett S. Covington

Summary

A federal court of appeals has been asked to clarify the scope of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010's ("Dodd-Frank" or "Act") whistleblower protections. Specifically, the court has been asked to clarify whether the Act protects whistleblowers who do not complain directly to the U.S. Securities and Exchange Commission ("SEC") about potential fraud relating to securities laws. The court's decision will have a significant impact on how employers respond to employees who disclose internally what they believe are violations of securities laws.

Background

The Dodd-Frank Act, which was enacted in the wake of the 2008 financial crisis, encourages individuals to provide information relating to a violation of U.S. securities laws to the SEC. Notably, the Act created a private cause of action for employees against whom employers retaliate after the employee takes certain "protected" actions, including an expression of concern about possible violations of securities laws. 15 U.S.C. 78u-6.

In 2012, a former executive of COR Clearing LLC ("Clearing" or the "Company") filed a retaliation lawsuit under the Dodd-Frank Act against the Company and four individuals. The plaintiff alleged Clearing terminated her after she had cooperated with the Financial Industry Regulatory Authority ("FINRA") in an investigation of the Company. The plaintiff also alleged the Company terminated her after she had provided FINRA with a report that she authored, and which alleged that the Company potentially violated the Bank Secrecy Act and FINRA's anti-money laundering rules. This report, which was authored by the plaintiff, was also provided to the Company's top executives.

The defendants moved to dismiss the Dodd-Frank retaliation claim, arguing that the plaintiff did not qualify as a whistleblower under the Act (and therefore could not bring a claim) because she had not complained directly to the SEC about the potential fraud. The district court rejected the defendants' argument, reasoning that the Act also protected whistleblowers who do not complain directly to the SEC.

On July 28, 2014, the defendants filed an interlocutory appeal with the Eighth Circuit Court of Appeals, asking the court to clarify whether the Act shields whistleblowers who do not complain directly to the SEC. The Eighth Circuit has not yet decided whether to address the issue.

Only one other court of appeals has ruled on this question. In 2013, the Fifth Circuit Court of Appeals held that the Act's whistleblower protections only extend to tipsters who complain directly to the SEC. The Fifth Circuit reasoned that plaintiffs are not "whistleblowers" under the statutory definition of Dodd-Frank unless they report to the SEC.

Going forward

Saul Ewing will continue to follow this case because of the potential for significant corporate liability under the Dodd-Frank Act. If the Eighth Circuit affirms the lower court in *COR Clearing*, all employees who report concerns to regulated employers could invoke the Act's protections if they later experience an adverse employment action regardless of whether they report their concerns to the SEC. This may have the unintended consequence of inducing troubled employees to fabricate concerns to report to their ombudsmen to inoculate themselves from termination. We will keep you posted.

Supreme Court to address circuit splits on wartime tolling and first-to-file bar

By Nicholas J. Nastasi and Patrick M. Hromisin

IN BRIEF

- **The Supreme Court has agreed to hear an appeal which will likely reconcile an appellate split as to whether the Wartime Suspension of Limitations Act applies in False Claims Act cases and the first-to-file bar.**
- **The Court's holding with regard to the application of each of these doctrines will significantly impact the viability of a number of potential False Claims Act claims.**

On July 1, 2014, the U.S. Supreme Court agreed to hear an appeal from a Fourth Circuit Court of Appeals case that implicates current circuit splits on two critical issues under the False Claims Act ("FCA"). The case, *Kellogg Brown & Root Services, Inc., et al. v. United States ex. rel. Carter*, raises the issues of "wartime tolling" and the applicability of the FCA's first-to-file bar. The Fourth Circuit decided that case on March 18, 2013.

Carter arose as a *qui tam* action by Benjamin Carter, a former employee of the massive defense contractor Kellogg Brown & Root ("KBR"), who alleged that KBR overbilled the government for services it provided in Iraq in 2005. Carter's original complaint was dismissed for procedural defects and he filed an amended complaint in 2011. The district court dismissed the 2011 complaint on the grounds that it was barred by the FCA's six-year statute of limitations and that it was barred by the FCA's first-to-file requirement because it overlapped with a previously-filed case that was dismissed after Carter filed the 2011 complaint.

Wartime tolling

However, the Fourth Circuit, in *Carter*, reversed the district court and ruled that the Wartime Suspension of Limitations Act ("WSLA") applies to FCA claims to toll the statute of limitations. The WSLA's impact on a statute of limitations is known as "wartime tolling." The WSLA, 18 U.S.C. § 3287, applies "[w]hen the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces." In that instance, the WSLA tolls the statute of limitations for any offense "involving fraud or attempted fraud against the United States or any agency thereof in any manner . . . ."

In June 2014, the Court of Appeals for the Federal Circuit ruled that the WSLA **does not** apply to the FCA. That ruling came in *United States ex rel. Floyd Landis v. Tailwind Sports Corporation, et al.*, which concerned the fraud claims that *qui tam* relator and former professional cyclist Floyd Landis raised against his former teammate Lance Armstrong. The D.C. Circuit ruled that the WSLA only applies to claims that require proof of specific intent to defraud the government (which the FCA does not). The *Landis* court noted that although Landis cited to the Fourth Circuit's *Carter* ruling in invoking the WSLA, the issue of "specific intent to defraud" was not briefed on appeal there.

In addition to ruling that the WSLA applies to FCA claims, the Fourth Circuit also determined the WSLA does not require a formal declaration of war. As such, the U.S.' long-running war in Afghanistan was sufficient to trigger the WSLA's tolling provisions. The resolution of this question is critical, given the nature of the U.S.' modern military engagements, which over the past several years have included sophisticated military attacks against targets in Pakistan, Libya, Yemen, and Iraq, all without formal declarations of war. If such engagements are sufficient to establish the existence of a state of war for WSLA purposes, there is a risk that the FCA's statute of limitations may apply in increasingly rare instances.

First-to-file

The FCA's first-to-file bar, found at 31 U.S.C. § 3730(b)(5), provides that "when a person brings an action under [the Act], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." Courts have split as to whether this section bars claims that arise from the same facts only while one suit is "pending," or whether it continues to bar future actions after the first case has been resolved.

In *Carter*, the Fourth Circuit ruled that the section only bars duplicative suits while one action remains pending, joining the Seventh and Tenth Circuit Courts of Appeals on that side of the issue. The First, Fifth, Ninth, and Federal Circuit Courts of Appeals have all ruled to the contrary, finding that the first-to-file bar prohibits any duplicative action arising under the same facts because the earlier case already served the statutory purpose of alerting the government to the existence of the alleged fraud.

The Supreme Court's decision on this issue will determine whether the disposition of a *qui tam* suit re-opens the door to potential suits arising from the same facts, or whether the existence of one suit completely forecloses the filing of another.

Conclusion

The *Carter* case presents the Supreme Court an opportunity to significantly impact the number of future suits under the FCA, because its treatment of the wartime tolling issue and the first-to-file bar may potentially broaden the number of such suits. We will keep you apprised of future developments in this pivotal case.

IRS amends whistleblower regulations to expand eligible whistleblowers and potentially increase award amounts

By Christine M. Pickel

Whistleblower incentives and awards are not unique to the False Claims Act or Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. On August 12, 2014, the Internal Revenue Service ("IRS")issued long-awaited guidance for its own whistleblower program. As in the past, the IRS will continue to pay at least 15 and not more than 30 percent of the "collected proceeds" resulting from information provided by a whistleblower. The new regulations define several key terms and facilitate awards.

FYI

First Circuit says False Claims Act defendant may deduct portion of civil settlement payment

The First Circuit has upheld a district court decision which allowed Fresenius Medical Care Holdings, Inc. to deduct $50 million in taxes related to a $385 million civil settlement regarding False Claims Act ("FCA") allegations. In its August 13, 2014 ruling, the court parted ways with the Ninth Circuit, and held as a matter of first impression that, in determining the tax treatment of an FCA civil settlement, a court may consider factors beyond the mere presence or absence of a tax characterization agreement between the government and the settling party. The case is *Fresenius Medical Care Holdings, Inc. v. United States*, Case No. 13-2144 (August 13, 2014), and the opinion can be found at http://tinyurl.com/k6ejnqu.

Update: Second Circuit rules on question of whether Dodd-Frank protects whistleblowers outside U.S.

Saul Ewing's White Collar and Government Enforcement attorneys have been following *Meng-Lin Liu v. Siemens, A.G* since a district court judge ruled that the Anti-Retaliation Provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act did not apply extraterritorially. The plaintiff appealed to the Second Circuit, and the Securities and Exchange Commission filed an amicus brief on February 20, 2014 to address another issue in the case concerning whether Dodd-Frank and SEC regulations protect whistleblowers even if they report their concerns only to their employers, and not also to the SEC (see http://tinyurl.com/mk9u8po).

The Second Circuit issued its opinion on August 14, 2014, but did not address the SEC amicus issue. Instead, the court focused on the district court's holding and affirmed: Dodd-Frank whistleblower protection provisions do not apply extraterritorially. (Meng-Lin Liu worked for a Chinese subsidiary of Siemens and reported to Siemens allegedly corrupt activity that took place in China, North Korea, and Hong Kong.) The ruling leaves open the question of whether employees must report concerns directly to the SEC to qualify under Dodd-Frank for protection from retaliation. The full decision can be found here (see http://tinyurl.com/kp5szes).

The new definitions expand the scope of persons eligible to seek awards by removing a provision which excluded state and local employees (unless federal law prohibits those employees from acting as whistleblowers). The regulations also expand the potential base against which the IRS applies the percentage award. The definition of "collected proceeds" will now include reductions in net operating losses and carryovers, with the likely result of increasing award amounts. The regulations also adopt fixed award percentages of 15, 18, 22, 26 and 30 percent. All awards will start at 15 percent. The Whistleblower Office will then consider enumerated factors to determine whether to increase the award to either 22 or 30 percent before then considering additional, qualifying factors that may warrant decreases to 18, 22, or 26 percent. This approach adopts methods the Department of Justtice, Securities and Exchange Commission, and Commodity Futures Trading Commission use to make awards under the False Claims Act and Dodd-Frank. The IRS hopes to make consistent awards by this process.

The regulations also clarify how whistleblowers can participate in the award process. Whistleblowers will have 30 days to respond to a preliminary award determination, preliminary denial letter or preliminary award recommendation letter.
The Whistleblower Office will provide a detailed report to the whistleblower, and whistleblowers may review information in the administrative claim file after signing a confidentiality agreement. Whistleblowers may also appeal awards to the Tax Court.

The new regulations took effect August 12, 2014. Please see http://tinyurl.com/p5wwv2b to view the regulations in their entirety.

The Saul Ewing White Collar and Government Enforcement Practice

Christopher R. Hall, Chair
215.972.7180
chall@saul.com

Nicholas J. Nastasi,
Vice Chair
215.972.8445
nnastasi@saul.com

Jennifer L. Beidel
215.972.7850
jbeidel@saul.com

Andrea P. Brockway
215.972.7114
abrockway@saul.com

Brett S. Covington
202.295.6689
bcovington@saul.com

Marisa R. De Feo
215.972.1976
mdefeo@saul.com

Jennifer A. DeRose
410.332.8930
jderose@saul.com

Justin B. Ettelson
215.972.7106
jettelson@saul.com

Patrick M. Hromisin
215.972.8396
phromisin@saul.com

Aaron Kornblith
202.295.6619
akornblith@saul.com

Keith R. Lorenze
215.972.1888
klorenze@saul.com

Brittany E. McCabe
215.972.7125
bmccabe@saul.com

David R. Moffitt
610.251.5758
dmoffitt@saul.com

Joseph F. O'Dea, Jr.
215.972.7109
jodea@saul.com

Christine M. Pickel
215.972.7785
cpickel@saul.com

Courtney L. Schultz
215.972.7717
cschultz@saul.com

Gregory G. Schwab
215.972.7534
gschwab@saul.com

Brian P. Simons
215.972.7194
bsimons@saul.com

Matthew J. Smith
215.972.7535
mjsmith@saul.com

Nicholas C. Stewart
202.295.6629
nstewart@saul.com

Meghan J. Talbot
215.972.1970
mtalbot@saul.com

Chad T. Williams
302.421.6899
cwilliams@saul.com