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White Collar Watch

The Newsletter of the White Collar and Government Enforcement Practice

Saul Ewing LLP

White Collar and Government Enforcement Practice

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Third Circuit Panel Liberalizes "Protected Activity" Immunity for Employees Claiming Whistleblower Status

By Michael A. Finio and Keith R. Lorenze

IN BRIEF

- A recent panel decision from the U.S. Court of Appeals for the Third Circuit, *Wiest v. Lynch, et al.*, lowers the federal pleading standards pertaining to claims brought by employees claiming whistleblower status under section 806 of the Sarbanes-Oxley Act.
- Public companies, especially those that may be subject to the jurisdiction of the federal courts in the Third Circuit, ought to be mindful of this decision when taking adverse employment actions. Corporate conduct that seemingly bears no relationship to fraud and has no bearing on shareholder interests may nevertheless, under the panel majority's opinion, qualify the employee for whistleblower status, and its accompanying protections, under section 806.

The popular image of the American corporate whistleblower, as depicted in Hollywood box-office smashes such as *The Insider* and *Michael Clayton,* is a courageous hero who reports corporate wrongdoing, often at the risk of retaliation by the whistleblower's employer or fellow employees. Such retaliation may take the form of threats to the whistleblower's reputation, career or personal safety.

For good reason, U.S. law contains protections for employees who report corporate misconduct. Most federal laws governing industry operations contain a provision that allows employees to sue their employer for monetary and/or injunctive relief if they believe they have observed serious wrongdoing by their company and suffered an employment-retaliation as a result of reporting it. Unfortunately, these laws do not provide much guidance to employers concerning whom and what to believe. Even a disgruntled employee motivated by nefarious purposes may use whistleblower laws to try to pry attention away from his own less-than-acceptable workplace conduct.

These legal protections afforded to whistleblowers have been liberalized further by a recent panel decision from the U.S. Court of Appeals for the Third Circuit. The ruling in *Wiest v. Lynch, et al.*, No. 11-4257 (March 19, 2013), lowered the federal pleading standards for lawsuits brought by employees claiming whistleblower status under section 806 of the Sarbanes-Oxley Act ("SOX 806"). Arguably, if this decision stands, nearly every complaint made by an employee of a public company may be cloaked with SOX 806's "protected activity" immunity. This would allow such complaints to survive a motion for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, regardless of whether the employee had a reasonable belief that illegal activity occurred (or was about to occur). A petition for rehearing *en banc* has been filed and remains pending before the Third Circuit.

Background

Jeffrey Wiest was employed in the accounting department of Tyco Electronics Corporation ("Tyco") for over 30 years, some of them with what was then Tyco International during the infamous "Kozlowski years" of corporate financial excesses. In mid-2008, Wiest raised several concerns regarding proposed business expenses and Tyco's internal process for approval of those expenses, including the treatment of three corporate meetings and events under federal tax law. Wiest claimed he had been concerned about the potential impact that such events may have on employee morale, in light of recent corporate downsizing. Ultimately, upon further review by Tyco's tax department, two of the events were approved as corporate expenses, while the third was properly treated as an award, the value of which would be imputed to the attendees as income.

Following Wiest's voicing his concerns about the corporate events, Tyco conducted standard assessments of Wiest's performance and awarded him a bonus of nearly $10,000 for that year. In mid-September 2009, however, Tyco representatives informed Wiest that they were investigating allegations that he had made inappropriate comments to female employees, had an improper sexual relationship with another employee, and failed to report a gift of baseball tickets from a vendor. Approximately two weeks later, on September 30, 2009, Wiest, who was fearful of the investigation into his alleged misconduct, left work sick and did not return.

Proceedings Before the U.S. Department of Labor and U.S. District Court

Wiest blamed the termination of his employment on Tyco and filed a SOX 806 complaint against his former employer with the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA"), claiming that he was constructively discharged. A significant premise of his claims rested on references to the "Kozlowski years." Those references, however, were not made in his complaint to his employer about the expenses, but rather were set forth only in his complaint to OSHA and, ultimately, in his federal court complaint.

SOX 806 allows an employee to maintain an action against an employer if the employee reasonably believes that he has suffered an adverse employment action because of his "blowing the whistle" on a fraud implicating corporate shareholder interests. OSHA conducted its investigation into Wiest's allegations and found them to be without merit, concluding that Wiest's reporting of his concerns about the corporate events was not a contributing factor in the termination of his employment. Before OSHA reached this conclusion, however, Wiest initiated a separate action in federal District Court pursuant to a "kick out" provision in SOX. This provision authorizes a SOX claimant to re-file a complaint in federal district court if OSHA has not issued its findings on the initial complaint within 180 days.

Wiest re-filed his complaint with the U.S. District Court for the Eastern District of Pennsylvania. The District Court evaluated Wiest's complaint in light of settled case law and held that Wiest failed to plead that he had been engaged in a "protected activity." The case law from several different federal circuit courts of appeals requires a SOX 806 claimant to allege that the corporate conduct which is the subject of the employee's report "definitively and specifically" relates to a violation of certain federal fraud statutes (such as those pertaining to mail fraud, wire fraud or securities fraud). This

"definitively and specifically" standard was developed by the Department of Labor's Arbitration Review Board ("ARB") in 2006 and subsequently adopted as federal law in several federal circuit courts of appeals. The District Court found that Wiest's concerns about Tyco's corporate events related to federal tax law and employee morale, rather than any sort of fraud identified in SOX 806. Therefore, the District Court dismissed Wiest's complaint.

Wiest's Appeal

Wiest appealed the dismissal of his claims to the U.S. Court of Appeals for the Third Circuit. He argued that the District Court improperly relied upon the "definitively and specifically" standard because the ARB had since jettisoned it, rendering the subsequent circuit court decisions relying on that standard unpersuasive. Tyco countered that allowing the ARB's recent change of heart to dictate how federal courts must evaluate pleadings sets a dangerous precedent, poses constitutional separation-of-powers concerns, and places the Third Circuit in conflict with every other circuit court that had addressed this issue as of that time. More importantly, however, according to Tyco, was the fact that eliminating the ARB's "definitively and specifically" standard would dramatically lower the pleading threshold for SOX 806 claimants to maintain an action in federal court against their employers.

In a split 2-1 decision, the Third Circuit agreed with Wiest, reversing and remanding the District Court's decision and holding that Wiest had sufficiently pled that he had engaged in "protected activity" under SOX 806. The panel majority stated that it was constrained by the ARB's recent reiteration of the SOX 806 pleading standard and, consistent with the most recent ARB precedent, that Wiest was not required to plead that Tyco's corporate events "definitively and specifically" related to any of the fraud provisions set forth in the statute. In other words, an employee need not plead that his communication about the alleged corporate wrongdoing was somehow connected to any fraud. Further, the employee's report does not have to plead the existence of fraudulent conduct by the employer; it is sufficient merely for the employee to believe that a violation "is likely to happen," according to the panel majority.

Potential Impact on Public Companies

The Third Circuit panel has designated its decision in *Wiest* as precedential, which means it constitutes binding authority upon all lower courts in the circuit. The significance of this decision, however, will likely extend far beyond the boundaries of the Third Circuit. As one of the few circuit court decisions addressing the ARB's recent departure from the "definitively and specifically" standard, and the only one of those few decisions designated as precedential, Wiest may be cited as persuasive authority by other district and circuit courts addressing similar issues arising under SOX 806. The panel majority's expansive interpretation of the whistleblower protections in SOX 806 – again assuming that it is not revisited by the court *en banc* – presents a sea-change in the law and may give rise to an increase in whistleblower litigation in the federal courts.

Public companies, especially those that may be subject to the jurisdiction of the federal courts in the Third Circuit, ought to be mindful of *Wiest* when taking adverse employment actions, such as imposing discipline or demoting or terminating employment. Corporate conduct that seemingly bears no relationship to fraud and has no bearing on shareholder interests may nevertheless qualify the employee for whistleblower status, and its accompanying protections, under SOX 806. If an accountant who is merely performing his job duties in identifying supposedly questionable tax treatment of corporate business expenses for further review can successfully maintain that his reported concerns were "protected activities" under SOX 806, it is difficult to establish any bright-line standards to guide employers dealing with similar reports from their employees in the absence of a connection between the employee's communication and fraud. Unfortunately, the panel majority's opinion in *Wiest* provides little guidance in this regard.

Doing Time: A Requirement for White Collar Crime?

By Christopher R. Hall and Courtney L. Schultz

IN BRIEF

- **A recent Eleventh Circuit ruling underscores the importance of developing § 3553 factors for sentencing early as part of any White Collar defense.**
- **Practitioners must address at sentencing the competing interests of deterrence and rehabilitation when seeking downward departures and variances from the Guidelines.**

A recent decision from the Eleventh Circuit indicates that deterring future white collar crime is a substantial factor in shaping appellate court rulings relating to appropriate sentences for fraud, particularly when a defendant receives no jail time.

This focus on deterrence in *U.S. v. Kuhlman,* No. 11-15959, 2013 WL 857344 (11th Cir. Mar. 8, 2013) centered on whether a sentence that departed significantly downward from advisory Sentencing Guidelines met the test for "substantive reasonableness." The Court found the sentence did not. Even post-offense rehabilitation, as approved by the Supreme Court in *Gall v. U.S.*, 552 U.S. 38 (2007), did not sway the ruling.

The Eleventh Circuit's Decision in *Kuhlman*

In *Kuhlman*, the defendant pled guilty to a 5-year, $3 million health care fraud scheme. The Guidelines recommended a sentencing range of 57 to 71 months imprisonment. The District Court, however, continued the sentencing hearing *sua sponte* to permit the defendant to make full restitution and to complete 391 hours of community service, upon which the court sentenced Kuhlman to 6 months probation. The Government appealed on the grounds that Kuhlman's sentence was both procedurally and substantively unreasonable.

The Eleventh Circuit determined that the sentence was procedurally correct, but substantively unreasonable on the grounds that the sentencing court had failed to balance the § 3553(a) factors properly. On the sentence of probation, which required a downward variance of 57 months from the bottom of the applicable Guidelines range, the Court ruled that the "sentence fails to achieve an important goal of sentencing in a white-collar crime prosecution: the need for general deterrence. [. . .] We are hard-pressed to see how a non-custodial sentence serves the goals of general deterrence." In rejecting the sentence of probation, the Court repeatedly emphasized the extent of the variance as its grounds.

Gall in Contrast

In *Gall*, the U.S. Supreme Court held that regardless of whether a District Court imposes a sentence inside or outside the Guidelines range, appellate courts must review sentences under an abuse-of-discretion standard for both procedural error and substantive reasonableness. When determining whether the sentence is substantively reasonable, appellate courts may apply a presumption of reasonableness to a sentence within the Guidelines range, but may not apply a presumption of unreasonableness for sentences outside the Guidelines range. Rather, when reviewing a sentence outside the Guidelines range, appellate courts may consider the extent of the deviation, but must give due deference to the District Court's decision that the § 3553(a) factors justify the extent of the variance.

In *Gall*, the defendant was charged with conspiring to sell drugs from 1996 through 2002, but voluntarily withdrew from the conspiracy three years prior to the indictment. During that period, he graduated from college and successfully started a construction company. The Guidelines range recommended 30 to 37 months imprisonment. The District Court varied downward and imposed a sentence of probation based on Gall's relatively young age and post-offense, pre-indictment rehabilitation.

The appellate court reversed and remanded based on its belief that any significant departure from the Guidelines required "extraordinary circumstances," which it deemed absent. On further appeal, the Supreme Court rejected a requirement of extraordinary circumstances, and permitted lower courts to attach great weight to pre-indictment rehabilitation and the relative youth of a defendant as indicators that deterrence need not predominate the court's judgment.

Kuhlman's Teachings

Unlike *Gall*, the defendant in *Kuhlman* did not demonstrate any rehabilitative effort until after the District Court, *sua sponte,* continued the sentencing hearing to permit him to demonstrate remorse. The downward variance that the court subsequently applied, moreover, nearly doubled that of *Gall* — at nearly 60 months. The lesson for White Collar practitioners is clear: assist your clients in charting a course of rehabilitation (restitution and community service) as soon as possible, and hope for facts which require reasonable downward variances — five years now seems out of reach, at least in the Eleventh Circuit. Finally, as the chart below demonstrates, venue will play a part as well. Some circuits tolerate greater downward variances for fraud crimes than others.

Fraud Crimes		
Circuit	Prison Sentence (Number/Percentage)	Non-Prison Sentence (Number/Percentage)
National	479 (36%)	850 (64%)
First Circuit	37 (29.4%)	89 (70.6%)
Second Circuit	23 (20.5%)	89 (79.5%)
Third Circuit	29 (35.8%)	52 (64.2%)
Fourth Circuit	33 (28.4%)	83 (71.6%)
Fifth Circuit	55 (30.9%)	123 (69.1%)
Sixth Circuit	81 (54.7%)	67 (45.3%)
Seventh Circuit	15 (26.8%)	41 (73.2%)
Eighth Circuit	38 (43.2%)	50 (56.8%)
Ninth Circuit	69 (35.6%)	125 (64.4%)
Tenth Circuit	24 (31.6%)	52 (68.4%)
Eleventh Circuit	73 (52.9%)	65 (47.1%)
DC Circuit	2 (12.5%)	14 (87.5%)

Source: U.S. SENT. COMM'N, FEDERAL SENTENCING STATISTICS BY STATE tbl. 6 (2011), available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2011/index.cfm (last accessed Apr. 7, 2013).

Casting a Smaller Net: Seventh Circuit Requires "Net Trebling" Under FCA – Potentially Impacting Settlement Dynamics for all Industries Subject to Government Enforcement

By Christopher R. Hall and Brian P. Simons

IN BRIEF

- **The Seventh Circuit's "net trebling" ruling in *Anchor Mortgage Co.* may offer practitioners a valuable negotiating tool when attempting to resolve FCA claims in all highly regulated industries, including health care, by blunting the threat of enormous, gross trebling damages.**

The Seventh Circuit recently ruled that under the False Claims Act ("FCA") treble damages should be calculated by the net amount of loss suffered by the government (after appropriate setoffs or credits are deducted) rather than the gross amount.

This ruling lowers the damages ceiling for claims subject to trebling in FCA cases, and undercuts implicit government threats during settlement negotiations to seek *gross* treble damages if the government wins at trial.

In *U.S. v. Anchor Mortgage Co.*, a mortgage brokerage corporation and its former president proceeded to trial and lost on claims under the FCA that they had obtained federal guaranties of mortgage loans based on misrepresentations. As part of the judgment, the District Court trebled the amount of the federal mortgage guarantees, and then subtracted amounts recovered by the government from the sale of the properties which secured the mortgages. This "gross trebling" resulted in $2.7 million in damages.

On appeal, the Seventh Circuit found that the FCA, while not specifying a trebling method, also did not represent a departure from the norm, which was "net trebling." Thus the statute instead requires courts to ascertain the amount which the federal government had paid and then to subtract any amount recovered *before* trebling. This method (determining the net loss before trebling) will always result in a smaller damage award. This is also true for damages doubled under the FCA, rather than tripled, in cases where the person acting fraudulently offers information and cooperation to the government as described by the statute.

Judge Easterbrook, writing for the Court, analogized the FCA's trebling to that of the Clayton Act, which requires net trebling in anti-trust cases. He also noted that damages are normally based on net loss in civil litigation, and pointed to the Second, Sixth, D.C., and Federal Circuits which apply a net trebling approach in FCA cases – though noting a Ninth Circuit opinion that applied gross trebling.

Anchor Mortgage Co. may provide useful precedent during settlement negotiations outside of the context of mortgage lending fraud, including health-care investigations, which represent the largest source of government recoveries. The U.S. Department of Health and Human Services Office of the Inspector General announced a record-breaking $4.2 billion in health-care fraud recoveries in 2012 – $3 billion of which came from FCA actions. (See this link for details: http://www.hhs.gov/news/press/2013pres/02/20130211a.html.) The government wields extraordinary leverage during these negotiations by dint of the "death penalty" exclusion provisions in 42 U.S.C. § 1320a-7. Government attorneys often open settlement negotiations with the twin threat of exclusion and gross treble damages if the defendant loses at trial. The Court of Appeals in *Anchor Mortgage Co.* may have evened that playing field a bit by injecting uncertainty in the government's bargaining position. The decision provides grounds for defense counsel to assert that goods and services actually provided, even if part of a larger fraudulent scheme, should be netted from the loss figure before trebling, and that the net figure places a ceiling on the settlement amount the government can recover.

Highlighting Transparency Through the Federal Sunshine Act Regulations

By Bruce D. Armon

IN BRIEF:

- **With the final regulations implementing the Physician Payments Sunshine Act now in effect, pharmaceutical manufacturers, group purchasing organizations, academic medical centers and physicians need to be ready to ensure compliance with the Act and the final regulations.**

The final regulations implementing the Physician Payments Sunshine Act ("Act") took effect April 9, 2013. The Act, which was part of the Patient Protection and Affordable Care Act, requires manufacturers of drugs, devices, biologics, or medical supplies covered by Medicare, Medicaid or CHIP to collect and report payments and other transfers of value to physicians and teaching hospitals. The Act also requires manufacturers and group purchasing organizations to disclose ownership or investment interests held by individual physicians or the physician's immediate family members.

The proposed regulations were published in December 2011 and, after receiving extensive comments, the Centers for Medicare and Medicaid Services ("CMS") published the final rule on February 8, 2013 (78 FR 9458) ("Final Rule"). The Final Rule is set forth in Title 42, Part 403 of the Code of Federal Regulations.

The Final Rule requires manufacturers to begin collecting data on August 1, 2013 and to report the data to CMS by March 31, 2014 for the period from August 1 through December 31, 2013 and thereafter on a calendar year basis.

Generally, manufacturers must report all forms of remuneration to physicians and teaching hospitals above the de minimis amount of $10 per payment or $100 in the aggregate for a calendar year. The $10/$100 thresholds will be adjusted in subsequent years based upon the change in CPI, and CMS is required to publish the values for the next reporting year 90 days before the beginning of the reporting year.

The information that is required to be reported to CMS includes:

- the name of the covered recipient;
- address of the covered recipient;
- specific identifiers for physician covered recipients;
- the amount of payment or other transfer of value;
- date of payment or transfer of value;
- the form of payment or transfer of value; and
- the nature of payment.

As part of the Final Rule, CMS created 17 categories for "nature" of payment, and the manufacturer has the responsibility to select the category it deems most accurate to describe the nature of the payment. These categories are: consulting fees; compensation for services other than consulting; honoraria; gift; entertainment; food and beverage; travel and lodging; education; research; charitable contribution; royalty or license; current or prospective ownership or investment interest; compensation for serving as a speaker at an unaccredited continuing medical education course ("CME"); compensation for serving as a speaker at an accredited CME; grants; or, for teaching hospitals only, space rental or facility fees. In addition, there are additional provisions in the Final Rule governing research payments made by manufacturers, and manufacturers should start analyzing their relationships in preparation for the August 1, 2013 data collection start date.

CMS requires that each report filed must include an attestation by the reporting entity's CEO, CFO, Chief Compliance Officer or other officer that the information reported is timely, accurate and complete to the best of his or her knowledge and belief. The Final Rule requires CMS to give manufacturers, GPOs, covered recipients, and physician owners and investors not less than 45 days to review and correct the compiled information prior to the CMS disclosure date.

Pharmaceutical manufacturers are well aware of the importance of ensuring federal and state compliance. The Act and the Final Rule impose another broad responsibility upon manufacturers and add significant penalties for failure to comply. The Final Rule provides that a manufacturer or GPO that fails to timely, accurately or completely report the information required is subject to civil monetary penalties of not less than $1,000 but not more than $10,000 for each payment or transfer of value or ownership or investment interest not reported timely, accurately or completely, not to exceed $150,000 for each annual submission. Knowingly failing to report information can result in civil monetary penalties of not less than $10,000 but not more than $100,000 for each instance, not to exceed $1 million for each annual submission.

An intensive effort of staff and resources will be required by manufacturers and GPOs to ensure compliance, which should include a review of existing policies and procedures, creating a list of assumptions for the data submission process, internal auditing and monitoring activities to ensure compliance, and the communications and exchange of information with teaching hospitals and physicians, particularly those who were the beneficiaries of legal (but in excess of de minimis) payments from the company.

Teaching hospitals and physicians are also very familiar with the importance of sound compliance efforts. The CMS reports generated as part of the Act and the Final Rule could result in investigations against teaching hospitals and physicians related to alleged federal anti-kickback statute, False Claims Act or Stark law violations. Teaching hospitals should review their existing conflict of interest, disclosure, CME and non-CME speaker fee policies for their employed and affiliated physicians, and update them as needed to ensure compliance with

the Act and to be prepared for the public comment and scrutiny that may result from CMS disclosures. Physician groups and individual physicians should also review their protocols with regard to interactions with pharmaceutical manufacturers and be prepared to deal with the questions or issues that may result depending upon the depth and extent of these professional relationships.

CMS believes approximately 50 percent of physicians are involved in transactions with manufacturers and GPOs covered by the Act, and that "the vast majority of teaching hospitals would have at least one financial relationship with an applicable manufacturer." CMS estimates the total cost in Year One of compliance for physicians and teaching hospitals to be over $63 million, and the ongoing annual costs for physicians and teaching hospitals to be approximately $34 million. The total Year One costs for manufacturers and GPOs is approximately $205 million, and the ongoing annual costs for manufacturers and GPOs is estimated to be approximately $146 million. It is important to note, however, that these are only cost estimates, obviously, and it will be very important for physicians, teaching hospitals, manufacturers and GPOs to dedicate sufficient staff and resources to ensure full compliance with the Act.

The Act and the Final Rule will inevitably highlight the legal relationships between pharmaceutical manufacturers and GPOs on the one hand, and teaching hospitals and physicians, on the other, with regard to their financial interdependence. Transparency can have many benefits and consequences. Everyone who could be affected should review the Act and the final regulations, update relevant policies and procedures, and be prepared for the questions that may arise once CMS starts its annual disclosures.

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