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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Calif. FCA Ruling Could Impact Federal FCA Cases

Law360, New York (March 18, 2013, 11:49 AM ET) -- Although California ethics rules generally prohibit ex parte communications between plaintiffs and the employees of defendants, a recent California appellate court decision held that this prohibition does not apply to communications in California state False Claims Act matters between a qui tam plaintiff and a defendant's employees. San Francisco United School District ex. rel. Contreras v. First Student Inc., --- Cal. Rptr. 3d --- (Cal. App. Feb. 19, 2013). If extended to its logical conclusion, this decision would mean that qui tam plaintiffs and their attorneys could routinely contact the employees of defendants in state or federal False Claims Act matters, without the defendants' consent or knowledge.

The California Appellate Decision

The California False Claims Act, California Government Code Section 12650 et seq., establishes a cause of action for false claims for payment submitted to the state of California. Like the federal False Claims Act, the California FCA provides specific remedies for any employee who is "discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against … because of lawful acts done by the employee … in furtherance of a [California FCA action] or to stop a [California FCA] violation." Cal. Gov't Code § 12653(a).

In San Francisco United School District ex. rel. Contreras v. First Student Inc., --- Cal. Rptr. 3d --- (Cal. App. Feb. 19, 2013), a California appellate court held that the policies underlying the California FCA, and more specifically, the above protections the California FCA affords employees, override State Bar Rule of Professional Conflict 2-100, which prohibits ex parte communications between counsel and a represented party without the consent of the party's attorney. The appellate court held that Rule 2-100 does not bar qui tam plaintiffs and their counsel alleging California FCA violations from contacting and speaking with a defendant's current employees. It noted that the defendant employer may not interfere with its employees' ability to speak to or otherwise cooperate with plaintiffs and their counsel.

Contreras involves allegations that the defendant bus company, First Student Inc. (FSI), violated the California FCA when it submitted allegedly false claims for payment to the San Francisco Unified School District that impliedly certified that the company had complied with the material terms of its contracts with the district. The lawsuit was brought by William Padilla and Manuel Contreras, former employees of FSI's predecessor in interest and Environmental Law Foundation (ELF). (The district declined to intervene.)

After FSI accused the plaintiffs of violating Rule 2-100 by contacting current FSI employees, the trial court issued an order instructing the parties not to talk about the lawsuit with employees. FSI then learned that Contreras had contacted another FSI employee and that plaintiffs' counsel had spoken directly to that employee, at the employee's request, about his deposition.

FSI again moved for injunctive relief, and the trial court issued an order: (1) prohibiting plaintiff's counsel and its agents from ex parte communications with current FSI employees unless the employee initiates contact with plaintiff's counsel, in which event, plaintiffs' counsel must notify FSI's counsel that the ex parte contact occurred before discussing any substantive matters with the employee; (2) prohibiting Contreras and Padilla from discussing the case with current FSI employees, and requiring them to tell any current FSI employee who voluntarily initiates contact with them that they cannot discuss the case and to direct the employee to plaintiffs' counsel; and (3) prohibiting ELF from communicating with current FSI employees unless the employee initiates contact with ELF, in which event, ELF may tell the employee that he or she may contact plaintiff's counsel. Plaintiffs challenged the order only as it applied to the individual plaintiffs, on several grounds, including that it violated the policies underlying the California FCA.

The appellate court vacated the injunction as it applied to the individual plaintiffs. First, the appellate court found that plaintiffs had not violated Rule 2-100, because the rule did not bar their communications with FSI employees and there was no evidence that plaintiffs' counsel had improperly directed the plaintiffs' contact with current FSI employees.

Second and more significant, the court stated that the policies underlying the California FCA also required reversal. The appellate court noted that Rule 2-100 applies "unless a statutory scheme or case law will override the rule" and found that the California FCA is such a law that overrides the rule. According to the court, at the time the injunction was entered, the act prohibited employers from adopting any policy that prevents an employee from acting in furtherance of a false claims action. Effective January 1, 2013, the act sets forth specific remedies for any employee suffering retaliation for acting in furtherance of a false claims action or in an effort to stop violations of the law.

Accordingly, the court found that FSI "could not directly interfere with its employees' ability to speak to, or otherwise cooperate with, plaintiffs' counsel, and we do not see how it could indirectly do so by advising its attorney to withhold consent for interviews with willing employees." The appellate court further noted that the trial court's order had acknowledged this issue and thus required "prior notification of FSI counsel when FSI employees initiated contact with plaintiff's counsel" but did not require "FSI's counsel's consent to or presence at meetings between those employees and plaintiffs' counsel."

Potential Ramifications

Under the rule articulated by the California appellate court, qui tam plaintiffs and their counsel who have filed an action under the California FCA are free to approach the defendant's employees to derive information about the action. It would appear, under the court's reasoning, that qui tam plaintiffs and counsel could also make such communications before any suit is filed. Further, it appears that they could also make such communications after the government has intervened in the suit (even though a government attorney would be prohibited by Rule 2-100 from making such communications with a represented party).

Perhaps of greatest significance, the reasoning of the court would apply not only to qui tam matters asserted under the California FCA, but potentially to qui tam matters asserted under the federal FCA, which has identical provisions prohibiting employers from preventing employees acting in furtherance of false claims actions. Thus, if the reasoning of the court were adopted more broadly, the rule articulated here could ultimately apply to all federal and state qui tam actions.

Fortunately, there is reason to doubt widespread adoption of this rule. It is not clear that the anti-retaliation provisions of the California or federal FCA were intended to override the long-standing prohibition on ex parte contacts with a represented party. Other courts to confront the issue will likely disagree with the Contreras decision. In the meantime, though, there is reason to expect that qui tam counsel throughout the country will look to Contreras as justification for contacting defendants' employees.

--By Shawn Hanson, Maria Ellinikos and Peter B. Hutt II, Akin Gump Strauss Hauer & Feld LLP

Shawn Hanson is a partner and Maria Ellinikos is counsel in Akin Gump's San Francisco office. Peter Hutt is a partner in the firm's Washington, D.C., office.