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Whistleblowers Rewarded Again by SEC and the Judiciary

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On August 29, 2014, two whistleblower developments of particular interest to health care and life science entities emerged from the Securities and Exchange Commission ("SEC") and the Eighth Circuit Court of Appeals, respectively. The SEC, through its whistleblower program, awarded more than $300,000 to a compliance professional who acted as a whistleblower for providing information that led to an enforcement action against the staffer's employer. This award represents the first time that the agency has used the so-called "whistleblower bounty" to reward a compliance professional.

In a separate action, the Eighth Circuit, in *Thayer v. Planned Parenthood*, ruled that, in certain cases, health care whistleblowers alleging a violation of the False Claims Act ("FCA") need not provide specific examples of allegedly fraudulent billing in order to satisfy the heightened pleading standard required in complaints for allegations of fraud. This decision further intensifies the circuit split in this area that already is the subject of particular concern to health care providers and government contractors.

Both of these matters highlight the fact that inducements to whistleblowing are being vigorously encouraged and liberally rewarded by agencies and courts alike.

SEC Awards Bounty to Compliance Professional Acting As Whistleblower

The SEC's whistleblower program was established through regulations mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. The program allows a whistleblower to recover between 10 and 30 percent of the money collected in SEC enforcement actions exceeding $1 million.[1] Awards are made at the SEC's discretion, but may be available to those tipsters who voluntarily provide original information that leads to successful enforcement actions.[2] Employees whose principal duties involve compliance or internal audit functions are not eligible for such an award *unless* they first report the misconduct internally and provide the employer with at least 120 days to

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (2010); Implementation of the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934, 17 C.F.R. § 240.21F (2011).

[2] Implementation of the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934, 17 C.F.R. § 240.21F-3 (2011).

respond.[3] The 120-day waiting period may be circumvented if the whistleblower believes that the alleged misconduct is likely to result in significant harm to the company or to its investors.[4] When determining an award, the SEC takes into account the role, if any, that the whistleblower played in the misconduct, in addition to a variety of other factors, such as the significance of the information provided. The SEC's final bounty regulation ignored the arguments of businesses that individuals whose very job duties were to prevent fraud and abuse should not be eligible for whistleblower bounty awards as this could incentivize their dereliction of duty and undercut good faith compliance efforts by businesses.

To date, the SEC has granted only nine awards under the program, but the most recent award is significant as it is the first made to a compliance professional who acted as a whistleblower. The individual is reported to have filed a complaint with the SEC allegedly after an internal complaint went unanswered within the required 120-day window.

The 120-day waiting period provides some protection for companies that learn of potential problems from the very people who are responsible for monitoring compliance. Considering, however, that compliance staff will necessarily possess a great deal of internal information and that whistleblowers have the ability to circumvent the waiting period, this latest award requires careful consideration by those businesses that are subject to securities regulation.

Eighth Circuit Decision in *Thayer v. Planned Parenthood*

In *Thayer v. Planned Parenthood*,[5] the Eighth Circuit, departing from earlier precedent, held that an FCA whistleblower with first-hand knowledge of a company's billing or claims process need not provide specific examples of alleged fraudulent claims in order to survive the requirement that a fraud claim be pleaded with particularity. Federal Rule of Civil Procedure 9(b) establishes this heightened standard for alleging fraud claims and, while all circuits require facial fidelity to the 9(b) standard in FCA claims, the specific application has resulted in a circuit split.[6] The Fourth, Sixth, and Eleventh Circuits follow a stricter application of the standard, requiring not only the general details of the alleged fraud but also representative examples of the alleged fraudulent claims.[7] The First, Third, Fifth, and Ninth, and now the Eighth, Circuits allow a relaxed application of Rule 9(b), requiring only "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."[8] Notably, however, the "reliable indicia" can be satisfied without provision of actual or representative examples of the alleged false claims.

[3] *Id.* at § 240.21F-4(b)(4)(iii)-(v).
[4] *Id.* at § 240.21F-4(b)(4)(v).
[5] U.S. *ex rel.* Thayer v. Planned Parenthood, 2014 U.S. App. LEXIS 16701 (8th Cir. 2014).
[6] FED. R. CIV. P. 9(b).
[7] *See, e.g.*, U.S. *ex rel.* Clausen v. Lab. Corp. of Am., Inc., 290 F.3d 1301 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003); U.S. *ex rel.* Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493 (6th Cir. 2007).
[8] *See, e.g.*, U.S. *ex rel.* Grubbs v. Kanneganti, 565 F.3d 180 (5th Cir. 2009); U.S. *ex rel.* Duxbury v. Ortho Biotech Prods., *L.P.*, 579 F.3d 13 (1st Cir. 2009).

In the instant case, Thayer was employed as a clinic manager for two different Planned Parenthood clinics in Iowa. In her complaint, she alleged that Planned Parenthood fraudulently obtained Medicaid reimbursements for prescriptions and services provided at the clinics she managed. The district court granted Planned Parenthood's motion to dismiss the complaint on the grounds that Thayer had failed to meet the heightened pleading requirements of Rule 9(b) because she did not provide specific or representative examples of fraudulent claims to support her allegations. On appeal, the Eighth Circuit agreed with Thayer that 9(b) does not require specific or representative examples to be provided by whistleblowers for every FCA claim. Rather, if the whistleblower is otherwise able to provide "reliable indicia" such as "personal knowledge of the defendant's submission of false clams," then specific examples would not be necessary.[9] Here, because Thayer, in her role as clinic manager, oversaw the billing and claims system for the Planned Parenthood clinic, the court was persuaded that such first-hand, personal knowledge allowed Thayer to satisfy the particularity requirement of 9(b).

Earlier this year, the Supreme Court declined to hear a case, *United States ex rel. Nathan v. Takeda Pharmaceuticals North America*, that could have resolved the circuit split related to the application of the 9(b) pleading requirement to FCA complaints. Solicitor General Verrilli, in response to a request from the Court to weigh in, opined that the *Takeda* case was "not a suitable vehicle for resolving" the split.[10] To support this position, the Solicitor cited movement by the lower courts towards a common approach to 9(b)—a position that is consistent with the Eighth Circuit's holding in *Thayer*, which brings the split favoring a more "flexible," i.e., lower threshold, standard to 5-3.[11]

The lower pleading threshold for FCA whistleblower complaints would ultimately make it easier for whistleblowers to successfully file an FCA claim with less information, which risks an uptick in frivolous suits and allegations made by disgruntled employees with suspect motives. It remains to be seen how the circuits will work through the split in this area, either moving towards the unified position of a more flexible Rule 9(b) standard or maintaining the current divide between the so-called flexible and stricter approaches, with the latter approach appearing more consistent with Rule 9(b) standards.

What Health Care and Life Sciences Entities Should Do Now

With decidedly whistleblower-friendly actions coming from both the regulatory agencies and some federal courts, employers, particularly those in the health care and life sciences industry, and those doing business with the government, must be alert to what these trends mean for business. To minimize the likelihood of whistleblower actions filed against businesses, businesses should:

1) take a very proactive approach to compliance and provide ample training on appropriate government billing procedures;

[9] *Thayer*, 2014 U.S. App. LEXIS 16701 at 10.
[10] Brief for United States as Amicus Curiae at 11, U.S. *ex rel.* Nathan v. Takeda Pharms. et al., No. 12-1349 (2014).
[11] *Id.*

2) require annual certification by compliance personnel that they are not aware of any practices that they believe are inappropriate and, if that is not the case, ask for immediate disclosure of facts supporting any belief of inappropriate activities;

3) employ a robust system for promptly identifying and responding to any whistleblower or compliance complaints or concerns; and

4) train all managers to recognize potential whistleblower complaints and that they should immediately bring them to the attention of the chief compliance officer or the general counsel.

If you have any questions about this Advisory or other questions regarding the FCA, Dodd Frank, or whistleblower matters, please contact:

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