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LA Transit's FCA Suit Against Parsons Grinds To Halt

By **Daniel Siegal**

Law360, Los Angeles (May 14, 2015, 10:02 PM ET) -- A California judge on Thursday dismissed a two-decade-old whistleblower suit alleging a Parson Corp.-Dillingham Construction joint venture fleeced Los Angeles County's transit agency while building its subway, ruling the purported overcharge didn't violate the state's False Claims Act.

Relator J. Martin Gerlinger's suit had alleged that the Parsons-Dillingham Metro Rail Construction Joint Venture violated both the federal False Claims Act and the California False Claims Act by overbilling the Los Angeles County Metropolitan Transportation Authority, and sought at least \$10 million in single damages, according to Gerlinger attorney Louis Cohen.

After tossing the federal FCA claim last month, Los Angeles Superior Court Judge John Shepard Wiley on Thursday granted the joint venture's motion for summary judgment and brought an end to Gerlinger's long-fought battle before the case made it to a scheduled August jury trial. Judge Wiley said the joint venture's practice of charging a provisional overhead rate to the MTA, and not substituting its actual overhead rates — which were lower — and later refunding the difference is a contractual failure, one addressed in a \$92 million judgment the judge issued against the joint venture last year.

But Judge Wiley said the actual invoices submitted to the MTA were not false, because they listed to contractually delineated provisional rate, and thus can't support a False Claims Act claim.

Thomas Long of Nossaman LLP, representing the MTA, disagreed, arguing the joint venture's behavior was a textbook example of a reverse false claim — which is barred by the statute — in which its invoices using the provisional rate were false records used to conceal or avoid their obligation to give money back to the government.

But Judge Wiley refused to hear this argument, saying it hadn't been properly argued in the pleadings or in the MTA's opposition to the joint venture's motion.

"You can't come out with a new theory on the day of oral argument; that's simply not fair," he said.

Gerlinger's case made a long and convoluted journey to Wednesday's hearing, starting in 1994 when the former finance manager for a subway construction consulting firm filed suit in California federal court, alleging the joint venture severely overbilled the MTA while building the Metro Red Line subway that runs from downtown Los Angeles through Hollywood into the San Fernando Valley. Its first stations opened in 1993, but litigation stemming from its construction has dragged on since the mid-1990s.

On May 20, 1996, Gerlinger filed an amended complaint in his federal suit and filed an identical action in state court. After the MTA intervened in the state suit, Gerlinger dismissed the federal complaint, according to Judge Wiley's ruling.

A previous judge on the case held in 1999 that the state court gained jurisdiction over the federal FCA claim when Gerlinger dismissed the federal suit and filed a second amended complaint in the state action.

The MTA also filed a contract suit against the joint venture that was consolidated into Gerlinger's suit. Judge Wiley in February 2014 entered a \$92.3 million **judgment against Parsons-Dillingham**, which it has appealed. Oral arguments have not been scheduled in that appeal.

In April, Judge Wiley overturned a 1999 finding that Gerlinger was not barred from bringing the federal FCA claim in state court two years after filing an identical claim in federal court. Judge Wiley **wrote in his tentative ruling** that under the D.C. Circuit's 2014 ruling in U.S. ex rel. Shea v. Celco Partnership, this gamesmanship is barred by the FCA's first-to-file rule.

On Thursday, Louis J. Cohen of Louis J. Cohen PC, Gerlinger's attorney, told Law360 after the hearing that he felt Judge Wiley was acting unfairly in refusing to allow further briefing on the reverse false claim argument, and that the plaintiffs would be appealing.

"Our sense is Judge Wiley felt long ago that this was not a viable False Claims Act case and that he had meted out sufficient justice in applying a \$93 million judgment on breach of contract and this ruling today was an inevitable conclusion from that position," he said.

Gerlinger is represented by Louis J. Cohen of Louis J. Cohen PC. The MTA is represented by Thomas D. Long and Eric Brin of Nossaman LLP and its own Associate General Counsel Charles Safer.

The defendants are represented by Marcellus McRae, James Zelenay, Abbey Hudson and Chelsea Norell of Gibson Dunn and Phyllis Kupferstein of Kupferstein Manuel & Quinto LLP.

The case is Los Angeles County Metropolitan Transportation Authority et al. v. Parsons-Dillingham Metro Rail Construction Manager Joint Venture et al., case number BC150298.

--Editing by Chris Yates.

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