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## Parsons Sheds Federal FCA Claim In LA Subway Overbill Suit

By Daniel Siegal

Law360, Los Angeles (April 15, 2015, 11:07 PM ET) -- A California judge on Wednesday trimmed a nearly two-decade-running \$10 million whistleblower lawsuit alleging a Parsons Corp.-Dillingham Construction joint venture overcharged Los Angeles County's transit agency while building its subway, saying the relator was forum-shopping with his federal False Claims Act claim.

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.

At Wednesday's hearing on Parsons-Dillingham's motion for summary judgment on Gerlinger's federal FCA claim, Los Angeles Superior Court Judge John Shepard Wiley issued a tentative ruling overturning 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 that under the D.C. Circuit's 2014 ruling in *U.S. ex rel. Shea v. Cellco Partnership*, this gamesmanship is barred by the FCA's first-to-file rule.

Cohen urged Judge Wiley to reverse his tentative ruling, arguing that Shea is an outlier and that instead the court is controlled by California Court of Appeals precedent. Cohen argued the state appeals court has held that the first-to-file bar in the California FCA — which is worded identically to the federal law — is meant to prevent relators from "riding the coattails" of other relators. He said that because Gerlinger filed both suits, the claim should survive.

Judge Wiley rebuffed Cohen's assertion that state law precedent applies to the federal law and that the two laws are identical, saying, "They're not the same words, they were written by a different legislative body."

"This is an argument you will deploy with vigor before the Court of Appeal," he added.

Judge Wiley also responded to Cohen's assertion that the first-to-file bar is only meant to prevent "opportunistic" or "parasitic" qui tam suits and that forum-shopping is common in FCA suits.

"Do you think forum-shopping in general is opportunistic?" he said. "I rarely see forum-shopping used as a term of praise."

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.

On Wednesday, Judge Wiley asked the joint venture why it brought a motion for summary judgment separately on the federal FCA claim, noting that the majority of the case remains intact.

"Why was this motion even brought? What was the point, and why did you bother to oppose it?" he asked. "What's in the federal statute that's not in the state statute?"

James Zelenay of Gibson Dunn, representing Parsons-Dillingham, said that if the suit does reach a jury, the ruling will take any damages related to federal funding out of the case. After the hearing, however, Cohen told Law360 the ruling would not affect the damages Gerlinger was seeking.

At the close of the hearing, Judge Wiley made his tentative ruling his final ruling and scheduled the defendants' motion for summary judgment on Gerlinger's remaining claim for May 14. The case is slated to head to a jury trial in August, should that motion be denied.

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 General Counsel Charles Safer.

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

--Editing by Brian Baresch.

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