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Court OKs Counterclaims Against Compliance Officer Turned Whistleblower

By Nina Youngstrom

In a case that turns the tables on a chief compliance officer turned whistleblower, a federal court is allowing her former employer to press counterclaims in connection with her False Claims Act (FCA) lawsuit.^[1] The U.S. District Court for the Northern District of Georgia on Feb. 27 denied a motion filed by Elizabeth Cooley, former chief compliance officer at Ermi LLC, to dismiss its counterclaims against her. Among other things, Ermi alleges that Cooley breached her fiduciary duty by reassuring the durable medical equipment (DME) manufacturer that its renewal with the state Agency for Health Care Administration (AHCA) in Florida was on track.

Cooley was chief compliance officer for Ermi—which manufactures and leases DME that helps orthopedic patients regain range of motion—from November 2018 to October 2019. In her third amended FCA complaint, filed Feb. 2, 2023, she alleged Ermi overbilled through various schemes. DOJ declined to intervene in Cooley’s whistleblower complaint.

Although the decision simply allows the counterclaims against her to move forward, the court in the process has highlighted how the waters can get muddy when compliance officers become whistleblowers, said attorney Jeffrey Fitzgerald, with Polsinelli. Compliance professionals probably “would find it extremely distasteful to be sued for negligence because they failed to stop their organization from engaging in some type of noncompliance, especially technical licensure-type issues,” he said. That being said, the Ermi case suggests that compliance professionals turned whistleblowers may face more roadblocks than seems to be the case in one of the FCA lawsuits pending against Kaiser, Fitzgerald added. A court recently gave a green light to Jeffrey Mazik, former senior practice leader for Kaiser’s national compliance office, to continue with his FCA lawsuit against Kaiser over alleged software tampering and retaliation, although it granted Kaiser’s motion to dismiss risk-adjustment related allegations on first-to-file grounds (i.e., other whistleblowers filed earlier FCA lawsuits based on those of allegations).^[2]

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