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Boeing exposes securities plaintiffs for misuse of confidential source

Perkins Coie LLP

Steve Koh, Kathleen (Katie) M. O'Sullivan and
Jeremy L Ross

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On March 7, 2011, Judge Suzanne Conlon of the U.S. District Court for the Northern District of Illinois dismissed with prejudice a securities fraud class action against Boeing and its executives relating to the delay of first flight of the 787, a new airplane development program, which has been beset by well-publicized delays. Plaintiffs, represented by Robbins, Geller, Rudman & Dowd LLP, contended that Boeing executives fraudulently concealed information concerning the delay, and they claimed damages relating to the drop in stock price that followed the eventual announcement of the delay in June 2009. Boeing; its CEO, W. James McNerney Jr.; and former Boeing Commercial Airplanes CEO Scott E. Carson were represented by Perkins Coie LLP and Sullivan & Cromwell LLP.



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After plaintiffs' initial complaint was dismissed without prejudice for failure to plead particularized facts of scienter, as required by the Private Securities Litigation Reform Act (PSLRA), they filed an amended complaint containing specific allegations of fraudulent intent from a confidential source who purportedly possessed high-level knowledge. The court denied Boeing's motion to dismiss that amended complaint, concluding that "it appears that the confidential source . . . had personal knowledge of the documents that point to the knowledge by officials of the company, including the two named individual defendants."

The identity of the confidential source - Bishnujee Singh - was not revealed by plaintiffs until after an August 2010 hearing, at which the court reaffirmed her denial of the motion to dismiss the complaint and directed discovery to commence. Boeing's in-house counsel immediately sought to uncover facts surrounding Singh's role with the company, and discovered that Singh was not the person plaintiffs had represented to the court. Rather, Boeing found that Singh -- an outside engineering contractor -- was not working at Boeing at the time of the events in question, did not work on the relevant section of the airplane, and had no way of accessing the sort of high-level information that plaintiffs claimed he possessed.

The series of events that followed was later deemed by Judge Conlon to be "worthy of a contemporary novel." On November 1, 2010, Singh appeared at the Seattle offices of Perkins Coie to deliver documents in response to a subpoena served upon him by Boeing. Singh said that plaintiffs' investigator had been "aggressive" and told him that he had to "admit" that he

had seen documents implicating Messrs. McNerney and Carson in wrongdoing, even though he knew nothing on the subject.

Shortly thereafter, at his deposition, Singh again denied that he was the source of the allegations that plaintiffs had made to avoid dismissal of their lawsuit. Singh revealed that incredibly, the deposition was the first time that plaintiffs' counsel had ever met Singh. They had not previously spoken to him, obtained a statement from him, or even shown him the allegations attributed to him in the complaint. Instead, plaintiffs' counsel had relied exclusively on the notes of their investigator from her purported interview of Singh. Boeing returned to court, seeking reconsideration of Judge Conlon's orders denying its motions to dismiss. Boeing observed that plaintiffs' counsel appeared to have engaged in similar practices in other cases - - relying exclusively on the word of their investigator and, when the confidential source later denies having made the statements attributed to him or her, arguing that the investigator has told the truth and that the source is now lying or "recanting", thereby creating a supposed issue of fact for trial.

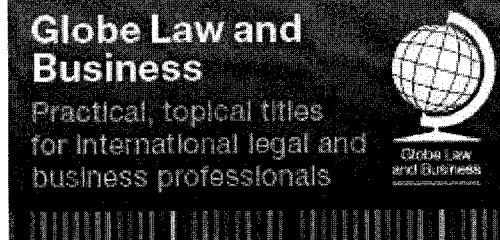
While the motion was pending, Boeing was put to massive document production expense by plaintiffs. On the eve of depositions of Boeing employees, Judge Conlon granted Boeing's motion and dismissed the case with prejudice, concluding that "[m]aterial facts concerning the confidential source's position and personal knowledge were misrepresented by plaintiffs" and that the "information attributed to the confidential source . . . should not only have been steeply discounted, it should not have been considered at all." The court ruled that "The reality is that the informational basis for [the allegations about the confidential source added after the First Amended Complaint was dismissed] is at best unreliable and at worst fraudulent, whether it is [the confidential source] or plaintiffs' investigators who are lying." Judge Conlon reasoned that the "unseemly conflict between plaintiffs' confidential source and plaintiffs' investigators could have been avoided by reasonable inquiry on the part of plaintiffs' counsel before filing the second amended complaint[.]" and not later "making flawed representations directly to the court about the confidential source's position and firsthand knowledge of Boeing's internal testing documents."

The decision reaffirms the importance of the heightened pleading standards required by the PSLRA, enacted by Congress to prevent abusive "stock drop" securities class action lawsuits. Judge Conlon's ruling enforces important minimum standards of diligence that plaintiffs' counsel must follow in attempting to meet those pleading requirements, particularly in their use of confidential sources.

Tags USA, Aviation, Capital Markets, Litigation, White Collar Crime, Perkins Coie LLP

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**Edward M. "Ted" McClure, M.B.A.,
M.A., J.D., M.S.L.S.
Public Services Librarian
Phoenix School of Law**