

Takeaways From Doc Dispute In Armstrong FCA Litigation

Law360, New York (August 6, 2015, 10:24 AM ET) -- In the ongoing Lance Armstrong doping allegations saga, the U.S. District Court for the District of Columbia recently issued an order upholding the applicability of the attorney-client privilege to relator Floyd Landis' quest for documents in his False Claims Act case. The court found that Armstrong's former racing teammate had not met his burden in proving the inapplicability of the attorney-client privilege and, therefore, Landis cannot obtain privileged documents from nonparty [Williams & Connolly LLP](#), which formerly represented Armstrong.

Background

In June 2010, Lance Armstrong's former cycling teammate Landis filed a FCA suit against Armstrong; Armstrong's agents, Capital Sports and Entertainment Holdings Inc. (CSE); and Armstrong's former employer, Tailwind, to help the government recover some of the \$40 million that the [United States Postal Service](#) paid in sponsoring the cycling team of which Landis and Armstrong were members. Landis alleged that Armstrong and the other defendants defrauded the USPS by breaching the contract between the Postal Service and the cycling team, which allegedly prohibited team members from using performance-enhancing drugs.



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On Feb. 22, 2013, the [U.S. Department of Justice](#) joined Landis' FCA suit against Armstrong and Tailwind, but declined to intervene with respect to the CSE defendants.[1] CSE and Landis reached a settlement agreement but, on April 9, 2015, the district court refused to accept the settlement because the DOJ did not approve of the agreement.[2]

Most recently, Landis subpoenaed communications among Armstrong, CSE and Armstrong's former attorneys, Williams & Connolly, and on June 9, 2015, Landis filed a motion compelling Williams & Connolly to comply with the subpoena.[3] (Williams & Connolly does not currently represent Armstrong in this FCA suit.) Landis asserted three reasons why the attorney-client privilege should not apply to Williams & Connolly's communications with Armstrong and CSE: (1) the applicability of the crime-fraud exception to the attorney-client privilege; (2) the inapplicability of the privilege to communications between Williams & Connolly and CSE, which was neither a client of Williams & Connolly nor acting as Armstrong's intermediary; and (3) the inapplicability of the privilege to communications that did not constitute legal advice.[4] Landis also asked the court to review in camera the documents that Armstrong claimed to be privileged.[5]

In asserting that the crime-fraud exception applies, Landis alleged that Armstrong used Williams & Connolly to make false statements on his behalf in warding off missed drug-test sanctions, in successfully arbitrating a \$7.5 million bonus that [SCA Promotions Inc.](#) previously withheld from Armstrong after he won the 2004 Tour de France, and in formulating the Vrijman Report.[6] (This report established that the laboratory where Armstrong tested positive for performance enhancing substances had used improper testing methods and, therefore, these results "could not form the basis for any action by Union Cycliste Internationale against Armstrong.") [7] Landis also claimed that the need to

obtain the documents from nonparty Williams & Connolly arose because, in January 2005, CSE destroyed potentially relevant documents.[8]

On June 16, 2015, Armstrong filed his opposition to Landis' motion,[9] arguing that Landis' subpoena was harassment and a "fishing expedition." Because Armstrong already admitted to using performance enhancing substances and doping, he maintained that the documents would not provide any probative information. Furthermore, he argued that the crime-fraud exception did not apply because Landis failed to allege any specific crime or fraud and that CSE is protected by the attorney-client privilege because CSE was acting as Armstrong's agent. Finally, Armstrong asserted that [Howry Breen & Herman LLP](#), not Williams & Connolly, represented Armstrong in the SCA arbitration regarding his \$7.5 million bonus, with Williams & Connolly only assisting in the cross-examination of an anti-doping expert.

In its response, Williams & Connolly outlined the "'Production Procedure' that [the firm] intend[ed] to follow in responding to the Subpoena." [10] The procedure, which is "recommended by the District of Columbia Rules of Professional Conduct in scenarios like this one," recommends that Williams & Connolly send all potentially relevant documents to Armstrong's current counsel, who will determine which documents are privileged. Williams & Connolly maintained that this procedure is necessary in order to comply with its ethical obligations to Armstrong, its former client, and that the procedure appropriately limits its burden and expense.

The District Court's Decision

Although Landis' arguments were unique, Judge Christopher Cooper denied Landis' motion on July 13, 2015, upholding the applicability of the attorney-client privilege and finding that Landis "failed to provide sufficient facts to meet his burden to overcome" the application of the privilege.[11]

First, the court addressed the crime-fraud exception by stating that Landis did not provide "sufficient evidence to allow a reasonable inference that [Williams & Connolly's] 'representation and advice' helped further a crime or fraud." Judge Cooper discussed the elements of fraud, and found that Landis' allegations do not comprise a prima facie showing of crime or fraud. In discussing the Vrijman report, Judge Cooper stated that "vigorously advocating on behalf of a client under investigation — even if that client later admits wrongdoing — is a core attorney function; much more is needed to constitute evidence that an attorney's actions constituted or furthered a crime or fraud." [12]

The court then rejected Landis' argument that the privilege did not apply to communications between Williams & Connolly and CSE because CSE was neither a client of Williams & Connolly nor an intermediary of Armstrong. Judge Cooper reasoned that, because CSE has served as Armstrong's agents for many years, the intermediary doctrine is satisfied. He noted that courts focus on "whether the communications were made in confidence for the purpose of obtaining legal advice from the lawyer." [13] The court further explained that the fact that CSE also acted as agents of Tailwind does not preclude the use of the intermediary doctrine because CSE could act as agents for both Armstrong and Tailwind.

Judge Cooper also found that any nonlegal communications between Armstrong and Williams & Connolly remain protected by the attorney-client privilege because these communications relate closely enough to the legal proceedings in which Armstrong was involved. He stated that "[c]ommunications may still be protected even if they are not themselves legal advice but are nonetheless closely intertwined with litigation and legal strategies." [14]

Finally, the court denied Landis's request for in camera review, finding that Landis failed to show how "in camera review would reveal evidence sufficient to establish the claim that the crime-fraud exception applies." [15]

Implications

The district court's opinion provides support for nonparties seeking to avoid burdensome document requests in False Claims Act lawsuits. This decision illustrates that although relators may go to great lengths to obtain documents in False Claims Act litigation, the court may be reluctant to burden nonparties with discovery demands in qui tam cases absent a legitimate justification.

The decision also is a strong endorsement of the attorney-client privilege. Landis' argument that the attorney-client privilege does not apply to the communications between Armstrong and Williams & Connolly because they were made for lobbying or other nonprivileged purposes appeared to be novel. The court previously had stated that communications are not protected by the privilege merely because they involve a lawyer. [16] However, the same court has also found that "[a] lawyer who occasionally acts as a lobbyist is not precluded from acting as a lawyer and having privileged communications with a client who is seeking legal advice." [17] Landis also attempted to assert the inapplicability of the intermediary doctrine in order to preclude the attorney-client privilege from applying to communications among CSE and Williams & Connolly. The D.C. Circuit Court of Appeals discussed the intermediary doctrine in *In re Lindsey*, stating that it may be true that "the use of an agent for communication between the attorney and the client must be reasonably necessary in order for that agent to fall within the attorney-client privilege," but that the "critical factor is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." [18] Therefore, while Armstrong may not have been able to prove that it was necessary to use CSE to communicate with Williams & Connolly, Armstrong's reliance on CSE to communicate with his lawyers about his legal interests and the fact that the CSE defendants provided his attorneys with information concerning his legal representation were sufficient for the applicability of the attorney-client privilege. Judge Cooper's opinion emphasized the importance of this privilege, which he described as "central ... to the proper functioning of the judicial system." [19]

Despite Judge Cooper's opinion, Landis is likely to proceed with his suit, as he may have other evidence regarding Armstrong's alleged defrauding of the USPS. If successful, Landis stands to receive a significant portion of the damages and penalties that may be levied against the defendants. However, Landis may not be able to recover his full share due to the fact that he was also a member of the cycling team. The FCA states that "if the court finds that the action was brought by a person who planned and initiated" the violation of the FCA, then the court may reduce the share of the proceeds which the relator may recover. [20] Moreover, if Landis is convicted of a crime associated with his alleged doping, the act would preclude his recovery entirely. [21] It therefore remains to be seen whether Judge Cooper's decision is a minor setback or a significant roadblock in Landis' attempt to recover based on Armstrong's alleged fraud against the U.S. government.

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[1] See United States' Notice of Election to Intervene in Part, United States ex rel. Landis v. Tailwind Sports Corp., No. 10-cv-0976 (D.D.C. Feb. 22, 2013), ECF No. 41.

[2] United States ex rel. Landis v. Tailwind Sports Corp., No. 10-cv-0976 , 2015 WL 1623282, at *2 (D.D.C. Apr. 9, 2015).

[3] Relator's Motion to Compel Non-Party Williams & Connolly, LLP to Comply with Subpoena, United States ex rel. Landis v. Tailwind Sports Corp., No. 10-cv-0976 (D.D.C. June 9, 2015).

[4] Id.

[5] Id.

[6] Relator's Motion to Compel Non-Party Williams & Connolly, LLP to Comply with Subpoena, United States ex rel. Landis v. Tailwind Sports Corp., No. 10-cv-0976 (D.D.C. June 9, 2015).

[7] Lance Armstrong's Opposition to Relator's Motion to Compel Non-Party Williams & Connolly LLP to Comply with Subpoena, United States ex rel. Landis v. Tailwind Sports Corp., No. 10-cv-0976 (D.D.C. June 16, 2015).

[8] Relator's Motion to Compel Non-Party Williams & Connolly, LLP to Comply with Subpoena, United States ex rel. Landis v. Tailwind Sports Corp., No. 10-cv-0976 (D.D.C. June 9, 2015).

[9] Lance Armstrong's Opposition to Relator's Motion to Compel Non-Party Williams & Connolly LLP to Comply with Subpoena, United States ex rel. Landis v. Tailwind Sports Corp., No. 1:10-CV-00976 (CRC) (D.D.C. June 16, 2015).

[10] Williams & Connolly's Response to Relator's Motion to compel, United States ex rel. Landis v. Tailwind Sports Corp., No. 10-cv-0976 (D.D.C. June 16, 2015).

[11] Order, United States ex rel. Landis v. Tailwind Sports Corp., No. 10-cv-0976 (D.D.C. July 13, 2015).

[12] Id. at *4.

[13] Id. at *5 (internal quotations omitted).

[14] Id. at *6 (internal quotations omitted).

[15] Id.

[16] See United States ex rel. Barko v. [Halliburton Co.](#), No. 05-cv-1276, 2014 WL 7212881, at *5 (D.D.C. Dec. 17, 2014) ("While the witness interviews qualify for the attorney-client privilege, the investigator's factual summaries do not receive attorney-client protection simply because they were later sent to a lawyer.").

[17] Black v. Sw. Water Conservation Dist., 74 P.3d 462, 468 (Colo. App. 2003).

[18] In re Lindsey, 158 F.3d 1263, 1280 (D.C. Cir. 1998) (internal quotations omitted).

[19] Order, Landis v. Tailwind Sports Corp., No. 10-cv-0976 (D.D.C. July 13, 2015).

[20] 31 U.S.C.A. § 3730(d)(3) (West).

[21] See id. (“If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of [S]ection 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action.”).