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QUALCOMM Settles Department Of Justice Charges On Its Acquisition Of Flarion

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On April 13, 2006, the Antitrust Division of the Department of Justice announced a settlement with QUALCOMM Incorporated and Flarion Technologies, Inc. of claims that QUALCOMM and Flarion violated the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") in connection with QUALCOMM's acquisition of Flarion in January 2006 for approximately $600 million in cash and QUALCOMM stock. The Antitrust Division alleged that QUALCOMM acquired operational control of Flarion *prior* to the expiration of the HSR Act waiting period (*i.e.,* gun jumping).

Generally, the HSR Act requires that parties to an acquisition file a notification with the Department of Justice and the Federal Trade Commission and wait for the expiration of the waiting period when voting securities or assets having a value in excess of $56.7 million (subject to adjustment) are acquired or are to be held (meaning consolidated with other previous holdings) as a result of an acquisition. Certain size of party tests apply unless the transaction is valued in excess of $226.8 million (subject to adjustment). The HSR Act requires that the parties to a subject transaction must wait for the expiration of the 30-day waiting period before consummating the underlying transaction. During such waiting period, the Antitrust Division and the Federal Trade Commission have an opportunity to investigate the transaction. At the end of such initial 30-day waiting period, the antitrust agencies are permitted to request additional information and materials (generally referred to as a "second request"), which effectively prohibits the parties to the transaction from consummating it until substantial compliance with the second request and the ultimate expiration of the waiting period.

On July 25, 2005 QUALCOMM and Flarion entered into a merger agreement. The parties field their HSR Act notification during August 2005, and a second request was issued in September 2005. The waiting period under the HSR Act expired on December 23, 2005.

According to the Antitrust Division's Complaint, the merger agreement between QUALCOMM and Flarion imposed on Flarion negative covenants that restricted Flarion from taking certain actions without first obtaining QUALCOMM's consent. For example, the Antitrust Division alleged in the Complaint that, *"Flarion could not, without QUALCOMM's consent: enter into agreements to licence its intellectual property to third parties; enter into agreements involving the obligation to pay or receive $75,000 or more in a year or $200,000 or more in the aggregate; enter into agreements relating to the disposition or acquisition of intellectual property rights, except for 'shrinkwrap' software licenses with purchase prices of less than $10,000; or present business proposals to customers or prospective customers."*

In addition to the allegation that QUALCOMM improperly gained certain control over Flarion through the negative contractual covenants, the Antitrust Division also alleged that Flarion permitted QUALCOMM to have significant control over its operations with respect to:

- the hiring of new employees even in the ordinary course of business;
- the marketing of products and services to customers and potential customers, including price quotations and potential discounts to existing customers;
- the pursuit of customer proposals; and
- certain new contracts.

As a result of the negative covenants and operation control provided to QUALCOMM, the Antitrust Division alleged in the Complaint that QUALCOMM and Flarion violated the HSR Act by QUALCOMM effectively taking control of Flarion prior to the expiration of the waiting period under the HSR Act, and that as a result QUALCOMM had acquired Flarion in violation of the HSR Act.

In its press release announcing the settlement, the Antitrust Division warned parties to subject transactions:

"Merging parties must continue to operate independently until the end of the premerger waiting period," said Thomas O. Barnett, Assistant Attorney General in charge of the Department's Antitrust Division. "The Antitrust Division will vigorously enforce this requirement against any company that assumes operational control of a business that it is acquiring."

The Antitrust Division's action against QUALCOMM and Flarion does not seem to be a departure from the antitrust agencies' philosophy with respect to coordination between parties during the waiting period. Rather, it should be viewed as a reminder that, while legitimate reasons may exist for negative covenants in acquisition agreements (*e.g.,* preservation of assets and the business during the pendency of the transaction), coordination with respect to *ongoing business activity* verses coordination with respect to post-closing *integration* must be considered carefully. There exists no bright line test for determining when the violation of the HSR Act has occurred with regard to unlawful coordination, but parties must consider this issue carefully. The failure to comply with the HSR Act carries with it significant potential fines and other penalties ($11,000 per day for each violation), making compliance with it critical.

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Independent Contractors Now Protected By New Jersey's Whistleblower Law

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A recent court decision expands the class of individuals entitled to the protections and remedies of New Jersey's "whistleblower" law, the Conscientious Employee Protection Act ("CEPA") N.J.S.A. 34:19-1 *et seq*. CEPA protects an employee from retaliatory action when she objects to a practice she reasonably believes to be in conflict with a clear mandate of law or public policy concerning the public health, safety, or welfare, or protection of the environment. Recently, the New Jersey Appellate Division ruled that CEPA's definition of employee, which turns on the employer's "control and direction" of the worker, does not foreclose the possibility that a worker who might be classified as an "independent contractor" for other purposes, may qualify as an "employee" under New Jersey's whistleblower statute. Thus, an independent contractor could sue a company for which she has performed services for wrongful termination of the independent contractor relationship under CEPA, even though the statute purports to provide a cause of action only to "employees."

Facts Of The Case

In *D'Annunzio v. Prudential Insurance Company of America,* No. A-2544-)4T1 (App. Div. February 23, 2006), the plaintiff, a licensed chiropractor, contracted with Prudential Property and Casualty Insurance ("Prudential") to serve as a chiropractic medical director. The contract between the parties stated that it was not to be construed as creating an agency, partnership, joint venture or employer-employee relationship, and required the plaintiff to pay all applicable taxes.

Among the plaintiff's primary duties was to review requests for pre-approval of chiropractic treatment plans to determine whether proposed treatments were "medically necessary" for purposes of compliance with the Automobile Insurance Cost Reduction Act ("AICRA"). Pursuant to AICRA, only a licensed medical doctor can deny coverage on the basis that the treatment requested was not medically necessary. While many insurance companies contract with outside vendors for this type of work, Prudential retained "in-house" independent contractors for this service.

Prudential terminated the plaintiff's contract after six months on the grounds that the plaintiff acted unprofessionally and failed to follow instructions. Specifically, Prudential alleged that the plaintiff (1) refused to limit his review and recommendations to chiropractic issues (for which he was licensed, qualified and hired to advise); (2) failed to conform his written recommendations to the format prescribed by company policy; (3) repeatedly and improperly accused physicians of fraud; (4) continually offended the staff with whom he worked; and (5) refused to grant approval for appropriate medical procedures.

After receiving several oral warnings, the plaintiff attended an "official counseling session" with a Prudential employee who was responsible for overseeing his work, following which he refused to appropriately conform his behavior and work product. Accordingly, Prudential terminated the contract; the plaintiff was escorted to his cubicle where he gathered his belongings and then was escorted out of the building.

The Trial Court Decision

The plaintiff brought an action against Prudential alleging, among other claims, that he was wrongfully discharged in violation of CEPA in retaliation for his complaints that Prudential took part in unethical and illegal practices. In determining whether the plaintiff was Prudential's "employee" and, therefore, entitled to maintain a claim under CEPA, the trial court applied the test first adopted by New Jersey courts in *Pukowsky v. Caruso,* 312 N.J. Super. 171 (App. Div. 1998). Under the *Pukowsky* test, 12 factors are weighed to determine a worker's status as employee or independent contractor. The trial court dismissed the plaintiff's CEPA claim on the grounds that he was not an "employee." The plaintiff appealed.

The Appellate Court's Decision

The appellate court rejected the approach used by the trial court, finding many of the factors articulated in *Pukowsky* to be irrelevant to whether a worker should be classified as an "employee" under CEPA. The appellate court held that the following four factors are determinative of whether the plaintiff is an independent contractor or an "employee" for purposes of a whistleblower claim:

1. the employer's right to control the means and manner of the worker's performance;
2. whether the work was supervised;
3. the furnishing of equipment and a workplace; and
4. manner of termination.

In concluding that evidence supplied to the trial judge precluded dismissal of the plaintiff's CEPA claim, the appellate court highlighted the following facts as pertinent to whether Prudential exercised "direction and control" over the plaintiff for purposes of CEPA:

- Upon commencing work, the plaintiff was given a "sign-in" sheet by which he was to account for his time.
- The plaintiff was given various computer training, assigned to his own cubicle, and provided with all necessary supplies, including a computer, a private telephone line, fling cabinets, an e-mail address, a mailbox, and supplies.
- Prudential required the plaintiff to report to work at certain designated times and prohibited the plaintiff from performing his duties at his home or elsewhere.
- Prudential directed and required the plaintiff to adhere to certain company protocols and "chain of command" directives in the discharge of his duties.
- The plaintiff was instructed as to Prudential's "expected approval rate" for treatment requests, and the required format and scope of the plaintiff's recommendations.
- The contract allowed Prudential to terminate the plaintiff for any or no reason on 60 days' notice, and when Prudential terminated the plaintiff's contract, he was escorted from the building in the same manner in which Prudential would sever its relationship with an employee.

What Does This Mean For Employers?

Given the growing marketplace trend toward classifying workers as "independent contractors," it is important for employers to recognize that certain independent contractors with whom they work may be entitled to the same protections and benefits as employees under CEPA if the company exercises significant control over the worker in question.

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