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Doctor vs. Doctor: Is All Fair in Love and Whistleblowing?

Florida dermatologist Ted Schiff signed off last month on his second multimillion-dollar false claims settlement in two years—not as the defendant but as the whistleblower against other dermatology practices that are potential competitors.

The news highlights a practice that health-care attorneys say is somewhat rare but potentially concerning—doctors, hospitals, or other medical providers acting as False Claims Act whistleblowers.

The cases, which are called qui tam suits in legal parlance, almost always lead to a government investigation into the defendants' billing and business practices and sometimes result in multimillion-dollar settlements. Qui tams are more often filed by an employee or former employee against a medical practice or hospital.

And whoever blows the whistle is due for a share of the settlement amount, if any. Schiff is due to receive more than $2 million from the settlements resulting from his two whistleblowing lawsuits.

Having a competitor as the whistleblower ''certainly raises flags for their credibility when the government determines whether to intervene,'' Will Chang, a partner at Crowell & Moring in Washington, told Bloomberg Law Aug. 31. Chang represents health-care companies and executives against fraud and abuse allegations, after previously prosecuting cases as a Justice Department attorney.

Partial 'Discounting' by Federal Prosecutors Jason Mehta, another former Justice Department prosecutor who's now in private practice, agreed U.S. attorneys' offices might ''discount'' a false claims allegation somewhat based on the source having conflicting interests. But that's not the same as ruling them out.

''When I was a prosecutor, I looked at every qui tam that was filed,'' said Mehta, who practices in the Tampa office of Bradley Arant Boult Cummings LLP. He looked at about 100 cases during his five years with the department. ''I would look at the allegations independent of the source of the allegations.''

Competitors aren't the only whistleblowers with a potential conflict of interest, of course. Mehta and others noted that most qui tam lawsuits come from employees or former employees, who also could have an ax to grind.

''Most defense lawyers, myself included, are going to pound the table'' criticizing a whistleblower's ulterior motives, Scott Grubman, a health-care attorney with Chilivis Cochran Larkins & Bever LLP in Atlanta, said.

But in Grubman's previous role as an assistant U.S. attorney, he told qui tam defendants not to worry about the source of the allegations.

''Once the qui tam is filed, it's the government's investigation,'' he told Bloomberg Law Sept. 5.

Still, Grubman said the False Claims Act wasn't meant to encourage potentially abusive lawsuits by competitors or ''serial relators,'' and it's due for reforms either in Congress or by federal regulation. Whistleblowers are also known as relators.

One high-profile example of a competitor-whistleblower case, *United States ex rel. Amphastar Pharmaceuticals v. Aventis Pharma* (now part of Sanofi SA), stumbled over one of the most common hurdles for whistleblowers: the need for original, nonpublic information. In May 2017, the U.S. Court of Appeals for the Ninth Circuit upheld the dismissal of Amphastar's complaint accusing Aventis of misrepresenting a patent and causing the federal government to be overbilled for its blood-thinner drug, enoxaparin. The court said Amphastar's claims were based on information disclosed publicly in an earlier lawsuit.

Need for Insider Information ''Whistleblower cases are only really effective if you're getting inside information,'' Tom Barnard, a health-care attorney at Baker Donelson in Baltimore, and a former assistant U.S. attorney, said.

In the recent Florida dermatology case, Schiff, who owns a chain of practices across the state under the name Water's Edge Dermatology, accused a Tampa practice, Dermatology Healthcare, of falsely inflating its claims to Medicare and Medicaid. The Tampa practice agreed to a $4 million settlement announced by the Justice Department Aug. 28.

Schiff said in his complaint that he'd talked with two of the defendants' employees to confirm his suspicions. He also said a photo on the company's website showed a radiation machine that performs simple skin cancer treatments, while the practice was billing for more complex, expensive treatments.

''The reason this case was able to survive was that the guy had interviewed those two employees,'' T. Mills Fleming, a health-care attorney at HunterMaclean in Savannah, Ga., said.

It's not uncommon for cases like this one to get dismissed, because the whistleblower lacks the nonpublic, inside information that the False Claims Act requires, he added.

''The other dermatologist was not technically the original source'' of information on the improper billing allegations, Fleming said.

 ISSN

Complaint Dismissed but Then Settled In fact, a federal judge in the U.S. District Court for the Middle District of Florida did dismiss Schiff's complaint against Dermatology Healthcare and the husband and wife who run it. The judge found Schiff's complaint lacked ''specific and well-pleaded'' facts about his allegations and said the relator ''admittedly gleaned most of the information in the complaint through public databases, anonymous calls, and stakeouts.''

Schiff's attorney was due to file an amended complaint when the government filed its initial notice of a settlement agreement in March.

Schiff previously filed a qui tam lawsuit against a south Florida dermatologist, Gary Marder, claiming Marder faked skin cancer diagnoses of patients who later came to Schiff for a second opinion. That case resulted in an $18 million civil settlement in February 2017—with the government lowering the required payment to $5.2 million in exchange for Marder paying promptly. Marder later pleaded guilty in a related criminal case.

Schiff and his attorney, Lawrence Klitzman of Klitzman Law Group in Sunrise, Fla., didn't respond to Bloomberg Law's request for comment.

Broader Universe of Possible Whistleblowers Joel Androphy, an attorney who represents whistleblowers at Berg & Androphy in Houston, said he's seen a lot of cases of competitors looking to blow the whistle, but agreed they often struggle to obtain the necessary inside information.

''It's legitimate like anything else,'' Androphy told Bloomberg Law. ''The problem with a competitor is they're not going to know as much as insiders.''

With competitors in the mix, the universe of possible whistleblowers is broader than many health-care providers might think, Mehta said. This means providers must be vigilant about proper billing practices, he said.

''An ounce of prevention in terms of compliance is worth more than a pound of cure,'' he said.

The same is true for avoiding financial arrangements that might be considered illegal kickbacks, Fleming said.

''A simple slip could lead to a violation,'' he said. ''It's a very technical statute and one that's very difficult to comply with in spite of your best efforts.''

Allegations don't have to lead to a big-dollar recovery to cause big headaches for the defendant.

''The real danger of a competitive qui tam is this: there really doesn't have to be merit to it to have a negative impact on the target,'' Barnard said. ''Chances are if a competitor files the action, the government will put the target through some kind of investigation, which can result in costs and reputational damage regardless of the outcome.''

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