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# 'First-to-File' Rule Dooms Cardinal Health Executive's Qui Tam Action Against 5 Physician Practices

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"By having the guts to fight meritless lawsuits, like this one, and win, Health First is able to preserve its resources to put them to their highest use—serving the needs of its members, versus lining the pockets of parasitic whistleblowers and their lawyers. Suffice it to say, Health First believes that Judge Gorton got it exactly right and is grateful for the vindication it earned," said Bob Rhoad, a partner at Nichols Liu, who served as counsel for one of the named defendants, Health First Medical Group.

September 13, 2023 at 01:56 PM

Whistleblower Laws



Allison Dunn

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A federal judge in Massachusetts dismissed a former Cardinal Health executive's qui tam action accusing five physician practices of accepting kickbacks because the allegations closely mirrored those laid out in a then-pending complaint against Cardinal by Omni Healthcare.

U.S. District Judge Nathaniel M. Gorton for the District of Massachusetts concluded Sept. 7 that an amended complaint filed by Michael Mullen, former senior vice president and general manager of the Cardinal Health Specialty Solutions Group, against five physician practices, Birmingham Hematology and Oncology Associates, Oncology Specialties, Dayton Physicians, Northwest Medical Specialties, and Health First Medical Group, was barred by the “first-to-file rule” of the False Claims Act.

The first-to-file rule “prevents any ‘person other than the government’ from ‘bring[ing] a related action based on the facts underlying the pending action,’” according to [Gorton’s order](#). The U.S. Court of Appeals for the First Circuit interpreted Section 3730 (b)(5) to bar “a later-filed related action, that alleges ‘all the essential facts’ or ‘the same elements of a fraud described’ in an earlier-filed complaint while that complaint is still pending,” Gorton cited.

Mullen oversaw the operations of Cardinal Health’s Specialty Pharmaceutical Distribution and VitalSource GPO, through with Cardinal sold and distributed specialty pharmaceuticals. Cardinal Health sold and distributed those specialty pharmaceuticals to the practice defendants.

Based on his first-hand knowledge, Mullen alleged that Cardinal Health offered, and the practice defendants accepted, kickbacks or upfront payments in advance of any drug purchases to sweeten the deal for the practices to enter into distribution agreements with Cardinal Health. Mullen claims that the defendants accepted \$1 million in illegal kickbacks and billed more than \$1 billion in “kickback-tainted claims” to government healthcare programs, according to the allegations.

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Cardinal Health increased its sales of specialty pharmaceuticals from less than \$400 million to nearly \$4 billion between 2012 and 2018, according to Mullen.

In October 2018, Omni Healthcare filed a qui tam lawsuit in the District of Massachusetts against Cardinal Health, alleging it was offered an upfront payment to enter into an exclusive supply agreement in violation of the Anti-Kickback Statute and the FCA. Omni accepted the payment and contracted with Cardinal Health.

In December 2019, Mullen and two unnamed co-realtors filed a qui tam complaint alleging the same fraudulent scheme. In January 2022, the United States elected to intervene in both actions for settlement purposes as to Cardinal Health, and settled the upfront payment claims for over \$13 million. In addition to Massachusetts, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Washington, and Wisconsin were listed as plaintiff states.

Omni Healthcare received \$2.46 million and agreed to pay an undisclosed amount to Mullen and his two co-relators, the order said.

Mullen subsequently filed the present action against the five practices in July 2022. They moved to dismiss the complaint, arguing in part, that it violates the first-to-file and government action prohibitions on qui tam suits.

Mullen argued that the Omni complaint did not contain “all the ‘essential facts’ of the alleged fraudulent scheme,” as the specific physician practices were not named in the first complaint, according to the order.

“Here, the Omni complaint provided the government with the necessary information to investigate Cardinal Health’s upfront payment scheme,” Gorton wrote, noting that 31 U.S.C. Section 3730 (b) does not allow “later-filing relators [to] sue merely because they offer additional information that might also help the government carry out its investigation.” Although the Omni complaint did not name the specific practice defendants in the Settlement, the government listed 38 physician practices that had contracts with Cardinal Health. All five of the practice defendants at issue here were listed in that Settlement. Thus, the Omni complaint contained ‘genuinely valuable information of sufficiently notice-supplying quality’ to enable the government’s investigation,”

Gorton said Mullen’s complaint only offered “‘additional facts and details about the same scheme’” in Omni Healthcare’s case, granting the defendants’ motion to dismiss.

David W.S. Lieberman, a member of the Whistleblower Law Collaborative in Boston, declined to comment.

Bob Rhoad, a partner at Nichols Liu in Washington, D.C., successfully represented Health First Medical Group in the present matter and others. In this instance, a settlement may have seemed like the easy way to avoid potentially costly litigation, he said.

“I have proudly represented Health First for years and have had the good fortune of helping it achieve superlative success in numerous False Claims Act cases like this one. Indeed, all of the FCA matters I have handled over the years have resulted in dismissal/judgment for Health First, including the last three in a row in just the past few years.” Rhoad told Law.com. “There are some notable aspects of the *Mullen* case, which distinguish it, including the fact that the majority of defendants settled whereas Health First refused and fought the good fight on the basis of principle. Health First prides itself on being a good corporate citizen with the non-profit mission of serving the health care needs of its

Oncology Specialties was represented by Maynard Nexsen shareholders Anthony A. Joseph and Thomas W.H. Buck Jr., based in Birmingham, Alabama, as well as Giselle J. Joffre, a partner, and Jonathan Bard, and associate, at Foley Hoag’s Boston office.

“The realtor’s claims against our client were meritless, and we are pleased that they have been dismissed,” Buck told Law.com. “Clearview remains committed to providing its patients with superior service and the best patient care available.”

Birmingham Hematology and Oncology Associates was represented by Dana C. Lumsden and Jonathan H. Ferry, both partners at Bradley Arant Boult Cummings in Charlotte, North Carolina.

Matthew J. Modafferi, a New-York based partner at Frier & Levitt, represented Northwest Medical Specialties.

Barnes & Thornburg partners Michael H. Gottschlich and Anthony J. Burba, as well as associate Alison C. Casey, were counsel for Dayton Physicians.

Messages seeking comment from the other defendants’ counsel were not immediately returned.

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