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The Plaintiffs' HOT LIST

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Qui tam case looked like a winner—and was it ever

Phillips & Cohen's client's share of $1.8 billion in civil and criminal penalties surpassed $51 million.

BY SHANNON GREEN

When Phillips & Cohen's Erika Kelton took over representation of whistleblower John Kopchinski in his 2003 False Claims Act action against Pfizer Inc. and its subsidiary, Pharmacia & Upjohn Inc., she knew she had a good case. The former Pfizer sales representative had significant evidence that improper off-label marketing of the anti-inflammatory drug Bextra was being directed from high up within Pfizer's ranks.

"There were many features that demonstrated that it was a highly important case that the Justice Department should join," Kelton said. "This included the extreme nature of the misrepresentations and off-label marketing, the fact that the company had sought the acute pain approval and been denied by the [U.S. Food and Drug Administration] and then disregarded that denial and marketed for that indication anyway. And, of course, the grave health risks that Bextra posed. It was a complete disregard of the process."

In September 2009, Pharmacia entered a guilty plea to a felony violation of the Food, Drug, and Cosmetic Act for misbranding the drug. Pfizer agreed to pay the government $1.8 billion—$502 million in civil penalties and $1.3 billion in criminal fines and forfeiture. The recovery in the case, *U.S. ex rel. Kopchinski v. Pfizer Inc.*, was part of a $2.3 billion global settlement of qui tam actions stemming from the marketing of Bextra, Geodon, Zyvox, Lyrica and nine other drugs. It represented the largest combined federal and state health care fraud settlement to date, and the criminal fine was the largest yet imposed in a U.S. criminal prosecution.

Phillips & Cohen declined to disclose its fee for handling the case, but Kopchinski's share of the settlement came to more than $51.5 million.

"The settlement amount is eye-popping," Kelton said. But in the beginning, "you don't know if it will be a life-changing amount."

Pfizer and Pharmacia worked in tandem to market Bextra, a COX-2 inhibitor designed to relieve various forms of pain and inflammation. The Food and Drug Administration (FDA) approved the drug in 2001 only for the relief of symptoms associated with osteoarthritis, adult rheumatoid arthritis and primary dysmenorrhea.

Kopchinski had worked for Pfizer for 11 years until he was fired in March 2003. Years earlier, he had initiated a correspondence with then-Chief Executive Officer Edmund Pratt Jr. while serving as an Army platoon leader in Kuwait—he'd read an article about Pratt in *Reader's Digest*. According to Kelton, the CEO, in a way, adopted the platoon. The relationship landed Kopchinski a position as a sales representative in Florida when he left the military. Kelton said the loyalty and integrity her client established in the military led to his whistleblowing.

Pfizer spokesman Christopher Loder said in a written statement that Pfizer has accepted full responsibility for improper promotional practices related to Bextra and had entered into a corporate integrity agreement containing numerous industry-leading measures to ensure that the company's practices to ensure its trustworthiness.

DISPUTE OVER FIRING

"It's important to consider not only Mr. Kopchinski's allegations but also all of the information regarding his own conduct and the nature of time of his complaints against the company," he wrote. According to Loder, Kopchinski was terminated for cause after an internal investigation revealed that he'd participated in the theft of medicines from a doctor's office and had given his supervisor prescription drug samples intended for doctors. Kopchinski had accused his supervisor of stealing the drugs. Kopchinski's claims for retaliatory dismissal were settled to his satisfaction, Kelton said.

Amendments to the False Claims Act in 1986 increased plaintiff incentives and added protections for whistleblowers against retaliation by employers. "What it created was a public/private partnership in false claims enforcement," Kelton said. "The False Claims Act had fallen into disuse. Since, it's become the crucial tool for fraud enforcement."

With offices in San Francisco and Washington, Phillips & Cohen represents whistleblowers in False Claims Act, tax fraud and securities law cases. The firm's attorneys have recovered more than $5.5 billion for the government in civil settlement and criminal fines. During the past year alone, Phillips & Cohen was instrumental in multimillion-dollar settlements in 14 qui tam cases. "Our business is really flourishing," she said. "Fraud doesn't have a downturn"—in fact, she added, it may pick up in a bad economy, as companies support their bottom lines through illegal measures.

Qui tam plaintiffs are entitled to 15% to 25% of any money recovered by the government if the Department of Justice intervenes in the case and 30% if the government declines to participate. "The strategy is always to get the government to collabo-

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rate and adopt your allegations," Kelton said. "You want the government in there. Throughout a whistleblower litigation, and particularly when the case is first presented to the Justice Department, it is essential to present the evidence and the law in a compelling manner. This often means culling through voluminous amounts of material and emphasizing those facts and documents that tell the most compelling narrative."

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>
> —ERIKA KELTON

After all, "this is the government's investigation, ultimately," Kelton said. "We provide evidence that the scheme is being directed from high up. You're not looking at a smoking gun. In this case, there was an accretion of evidence supporting the story of an improper scheme that was carried out nationwide."

Assistant U.S. Attorney Sara Miron Bloom, who led the government's prosecution of Pfizer, said the simultaneous criminal investigation caused the probe take longer than usual. The flow of information between the Department of Justice and the relator's counsel is very much a one-way street, she said—the whistleblower might go for months with no news from the government's end. That makes the process all the more difficult for the plaintiff, who "may be suffering the blows of being a whistleblower."

"Some of the biggest issues involve the stress that the clients are undergoing," said Ann Lugbill, who works in the Cincinnati and Washington offices of Murphy Anderson and who represented fellow whistleblower Glenn DeMott, a former Pfizer sales representative who received $7.4 million as his share of the settlement.

Since qui tam cases are filed under seal, the client can't go to his or her normal support networks, Lugbill said. Attorneys often are ill-equipped to handle the resulting strain. "We don't have the right doctorate after our name," she said.

In Lugbill's experience, most whistleblowers say at the end of the ordeal that, if they'd known what they would go through, they would not have done it. "Within reason, you need to make yourself available," she said. The problem is that their attorneys often have precious little information to relay to them.

Shannon Green is a reporter for NLJ affiliate Corporate Counsel. *She prepared this report for the NLJ.*

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THE PLAINTIFFS' HOT LIST

PHILLIPS & COHEN

Phillips & Cohen's representation of whistleblowers in qui tam, tax and securities law cases has resulted in governments recovering more than $5.5 billion in civil settlements and related criminal fines. During the past year, qui tam cases brought by the firm have resulted in $1.97 billion in recoveries. Phillips & Cohen has achieved 14 multimillion-dollar settlements of qui tam cases during the past year alone.

NOTEWORTHY CASES

• *U.S. ex rel. John Kopchinski v. Pfizer Inc.*, No. 1:05-12115 (D. Mass.). Lead attorney Erika Kelton. Pfizer's alleged illegal and potentially dangerous off-label marketing of the painkiller Bextra got Phillips & Cohen on the case. The pharmaceutical company paid $1.8 billion to settle the qui tam action, $1.3 billion of which represented the largest criminal fine the government has ever imposed. It also settled five other qui tam cases. In addition, Pfizer was forced to submit to unprecedented corporate reforms.

• *U.S. ex rel. Spivack v. Johnson & Johnson*, No. 04-11886 (D. Mass.). Lead attorneys Erika Kelton, Larry Zoglin. Phillips & Cohen's case against Johnson & Johnson subsidiary Ortho-McNeil for alleged off-label marketing of its epilepsy drug Topamax culminated in an aggregate of $84.5 million (civil, criminal and interest) paid to the federal government and several states to settle the matter along with a separate qui tam case.

• *City of Banning v. James Jones Co. LLC.*, No. BC 321513 (Los Angeles Co., Calif., Super. Ct.). Lead attorneys Eric Havian, Mary Inman, Stephen Hasegawa, Harry Litman. Four companies allegedly provided substandard parts for water supply systems that contained levels of lead that exceeded industry standards. The firm recovered $89 million for 54 California municipalities and water districts, representing the second-largest settlement obtained under the California False Claims Act.

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