An ALM Publication

THE AMERICAN LAWYER

THE AM LAW LITIGATION DAILY

Litigators of the Week: Covington Team Beats Multi-Billion FCA Claim

'We hope this case will be a useful touchpoint for companies who face similar FCA allegations premised on non-compliance with informal agency guidance.'

By Jenna Greene
November 8, 2019

Our Litigators of the Week are Covington & Burling's Chris Denig, Matthew Dunn and Ethan Posner. The trio scored a complete defense win for UnitedHealth Group subsidiary Executive Health Resources in U.S. District Court for the Eastern District of Pennsylvania.

In 2012, the company was hit with a multi-billion dollar False Claims Act suit for allegedly bilking Medicare and Medicaid by wrongly classifying hospital patients.

Five years ago, the Justice Department declined to intervene, and the plaintiff continued on alone. But as summary judgment approached, the Justice Department in an unusual move, forced dismissal of the suit, arguing that further litigation "would result in imposing significant costs and burdens on the government and waste precious judicial and governmental resources."

On Tuesday, Senior U.S. District Judge Michael Baylson approved the government's motion to dismiss and granted summary judgment to Covington's client to boot.

Denig, Dunn and Posner discussed the case with Lit Daily.

Lit Daily: Who is your client and what was at stake?

Chris Denig: Our client is Executive Health Resources ("EHR"), a subsidiary of the UnitedHealth Group, which provides recommendations to hospitals concerning admission status decisions for patients (i.e., inpatient or outpatient).

The relator, Dr. Polansky, claimed that EHR made inappropriate "inpatient" recommendations for Medicare patients, leading to the submission of false claims by hospitals. He claimed billions of dollars in damages because so many hospitals were EHR clients. So, needless to say, the stakes were very high.

Photo: Courtesy Photo

(L to R) Ethan Posner, Matthew Dunn and Christopher Denig Covington Burling

Tell us about the origins of the case. Who is Jesse Polansky and what did he allege?

Ethan Posner: Believe it or not, I was already familiar with Dr. Polansky from a previous qui tam I had handled years ago that was dismissed. For purposes of this case, Dr. Polansky was a former, long-time employee of the Centers for Medicare and Medicaid Services ("CMS").

After he left CMS, he worked at our client for a bit less than two months. Not long after departing our client, he filed his qui tam lawsuit—which he claimed was worth billions of dollars—alleging that EHR made inappropriate "inpatient" recommendations to hospitals, leading to the submission of false Medicare claims by hospitals. So, Dr. Polansky has now filed and lost two qui tams defended by Covington.

The United States declined to intervene in the action on June 27, 2014. What did that signify and what happened next?

Posner: It's always a positive development when the government declines to intervene, particularly when

there was an extensive investigation leading up to that decision, as there was here.

After the Justice Department declined to intervene, Dr. Polansky decided to move forward on his own, without the government. In my experience, more "declined" cases are being pursued by relators than was the case 5-10 years ago.

When and how did you get involved?

Matthew Dunn: We got involved in late 2016, after the motion to dismiss.

You faced a huge line-up of opposing counsel—the docket report shows an unlikely alliance of firms including Cohen Milstein; Winston & Strawn; Fish & Richardson and Susman Godfrey. What did you make of this? Did it complicate the litigation?

Denig: Opposing counsel evolved over time, and it didn't just involve your typical relator-side qui tam firms. When we first got involved in the case, Dr. Polansky was represented by Cohen Milstein. Winston and Fish took over the case in May 2017. Then, Susman joined the fray earlier this year.

Given the numbers involved, we assumed they must have thought it was a pretty good case. Needless to say, we disagreed. But, it was certainly a formidable group of lawyers, and we knew we would have our work cut out for us.

Posner: Another trend we see is more elite law firms pursuing these cases on behalf of relators. This case was a perfect illustration. We were really outnumbered! In a recent filing they said they had expended over $20 million in fees and costs on the case.

What was the primary theme of your defense?

Denig: Not to sound flip, but our primary theme comported with reality—there was no factual or legal support for the allegations. Our client, and the good people who worked for it, did nothing wrong. Quite the opposite. They were an innovative company that worked very hard to get it right.

Who were the members of your team and what individual strengths did they bring to the litigation?

Dunn: Covington has deep healthcare expertise and vast experience in litigating False Claims Act cases. We drew on all of that to assemble our team. We don't just throw bodies at these cases. We want the right people, with the right skill sets, who are fully invested in the case, from the most senior partner to the most junior associate.

In addition to the partners, as the litigation progressed, the core team included two senior, experienced litigators, Mike Maya and Ron Dove. Mike led the charge on some of the government discovery issues, to great effect. He's an incredible written and oral advocate. Ron brought his litigation skills to bear in defending depositions and working on expert issues.

There was also an outstanding associate team led by Krysten Rosen Moller. Krysten is a remarkably talented lawyer who was involved in virtually every aspect of the case, from brief writing, to depositions, to strategic decisions. I'm glad she's on our side! Many other associates did great work on the case, including Dan Eagles, Dan Grant, Nick Griepsma, Noam Kutler, and Bradley Markano, among others. I couldn't be more proud to be part of this team.

Tell us about the allegedly stolen DVD that came to light during discovery and the ensuing sanctions.

Dunn: To be fair, Dr. Polansky claims that he did not steal it.

In the fall of 2018, after the discovery deadline had already passed, we were still engaged in ongoing discovery disputes with both Dr. Polansky and the government. We continued to press hard on these discovery issues, and ultimately—and surprisingly—learned that Dr. Polansky had a DVD of about 14,000 documents from his time at CMS.

After this discovery, there was extensive briefing and an evidentiary hearing. Ultimately, the court ordered the production of the DVD and sanctions against Dr. Polansky. It contained highly relevant documents that were important to EHR's defense.

There was another unusual incident, when Polansky sat at counsel table during a hearing, and the judge called him to the witness stand *sua sponte*. What happened?

Posner: I had never seen this happen before. We were at a scheduled hearing on several pending issues. At the time, we had only recently learned about the DVD, and we had informed the court about the looming issue. Dr. Polansky was at counsel table, and Judge Baylson called him up to answer questions about the contents of the DVD and how he acquired it under oath.

Then the court asked me if I had any questions for Dr. Polansky. "As a matter of fact, I do," I said, and proceeded to question him at length under oath in front

of the court. After that hearing, the case developed in an even more favorable way for us.

Even though the government declined to intervene in Polansky's case, it retains the power under the False Claims Act to dismiss any qui tam suit "notwithstanding the objections of the person initiating the action." How often does this actually happen?

Dunn: Traditionally, it has been quite rare. What has been called the Granston Memo was issued in early 2018, and it contained guidance for DOJ to consider in exercising its dismissal authority. While it's still uncommon, there has definitely been an uptick since that time.

What led to the government's decision to kill this case? And why did it come at such a late stage in the litigation?

Denig: I wouldn't presume to speak for the government or its timing. While it certainly came at a late stage—less than two weeks before our summary judgment was due—the government had continued to monitor the case and maintains its authority to dismiss throughout the litigation.

The Justice Department laid out its rationale in its motion and at oral argument, noting that it was based on a holistic view of the case. For example, the government identified significant concerns regarding shortcomings in the evidence amassed by Dr. Polansky, including his deposition testimony.

The government also cited a drain on government resources caused by the need to monitor the case and comply with discovery obligations. Additionally, the government expressed concerns with an order to produce documents it deemed protected by the deliberative process privilege and with maintaining its prerogative to choose the posture in which key open questions relating to Escobar and Allina would be litigated.

Was the government's decision simply a fortuitous event? Or was it part of your strategy?

Posner: The facts and the law were very good for us, so part of our strategy was always to persuade the government to dismiss this case. We made numerous substantive presentations to the DOJ and HHS lawyers about the weaknesses of Dr. Polansky's case.

At the same time, we of course had to prepare the case on the assumption that DOJ wouldn't move to dismiss. We developed a very strong factual record, buttressed by Dr. Polansky's deposition in August, demonstrating the weaknesses in his claims. We were also very aggressive seeking document discovery and depositions against HHS and CMS. This type of discovery is essential to the defense on key issues like materiality and scienter.

We obtained favorable rulings requiring the government to produce documents it claimed were privileged and sensitive, and DOJ filed an affidavit indicating that government lawyers had already spent thousands of hours on the case.

Finally, we advanced several legal arguments that were important to DOJ because of their broader applicability to other FCA cases. Those were teed up for summary judgment. So, as DOJ stated in its motion, the combination of those things persuaded the government to move to dismiss just before our summary judgment motion was due.

When the court granted the government's motion to dismiss, it also interpreted a new Supreme Court ruling (Allina) in a favorable manner and granted your client summary judgment too. What might this decision mean for False Claims Act defendants moving forward?

Denig: We're pleased that Judge Baylson granted our summary judgment motion related to Allina. Healthcare clients are frequently frustrated when someone tries to convert alleged non-compliance with one of the so-called "10,000 Commandments" in sub-regulatory guidance into a False Claims Act case, even though the requirement doesn't exist in statute or regulation.

We hope this case will be a useful touchpoint for companies who face similar FCA allegations premised on non-compliance with informal agency guidance.

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