

NEWS: Health Care Fraud
Qui Tam, Whistleblower
False Claims Act Settlement

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Re: Medco Health Solutions
Final \$137.5 Million Settlement

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One Of The Most Actively Litigated And Longest-Running Actions In
Federal False Claims Act History Settled Today, Demonstrating Unprecedented
Coordination And Cooperation Among The Government And Private Counsel

Two Veteran Pharmacists' *Qui Tam* Action Initiated The Case And
Helped Government Recover \$84 Million Of \$137.5 Million In Today's
Mediated Final Settlement Reached Among Whistleblowers, Federal Government
And Medco Health Solutions, Formerly Merck-Medco Managed Care, L.L.C.

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NOTEWORTHY IN THIS CASE

This case is noteworthy in several areas, due to its over seven year length, complexity and industry-changing results:

For The Eastern District of Pennsylvania: Five Senior-Status Judges And One Magistrate Judge Played Significant Roles

The procedural posture of the case was unique in that the length of the litigation resulted in the active involvement of numerous Senior Eastern District of Pennsylvania Federal District Court Judges and one Magistrate Judge, all of whom contributed to the ultimate resolution of this action.

While the case remained under seal, during the early years of its field investigation, it was assigned to former Federal Court District Senior Judge Louis C. Bechtle. Thereafter, it was transferred to Senior Judge Thomas N. O'Neill, Jr., who presided over several pre-sealing matters and the unsealing of the case. Shortly thereafter, the matter was ultimately transferred to the late Senior Judge Clarence C. Newcomer who presided over the case for several years, along with United States Magistrate Judge Peter B. Scuderi. Judge Newcomer decided the initial merits of the action, as well as many complex issues regarding case management, discovery, depositions, attorney-client privilege, HIPPA confidentiality issues and electronic data production.

Judge Newcomer still was executing Medco case-related Orders days before his unfortunate and unexpected death in August 2005. Subsequently, the matter was transferred to Senior Judge Norma L. Shapiro. Judge Shapiro, through active and spirited case management, presided over a number of motions and hearings on this matter and was preparing the case for a lengthy and complex jury trial to begin in June 2006.

Unprecedented Mediation, Instead Of Long Trial

While the matter was proceeding for a jury trial before Judge Shapiro, with the active encouragement and assistance of the Court, the parties mutually agreed to have the matter mediated before Senior Judge J. William Ditter, Jr.

In an unprecedented mediation over several months, with detailed submissions and presentations by the parties, an agreement in principle was reached in the evening of March 22, 2006, through the exhaustive efforts of Judge Ditter.¹ Over the last seven months, the parties worked through complex

¹ During the course of the mediation, two (2) additional matters involving Medco were disclosed to Medco. Through the impetus of the publicly disclosed *qui tam* litigation, these two additional matters were also resolved during the mediation. As a result, the Government will receive a total settlement of \$155 million, which was announced by the Government today.

issues regarding the release language, a comprehensive corporate integrity agreement and other related issues, as well as legal fees, expenses and costs. A final settlement was reached this morning in a very brief, non-acrimonious, and collegial hearing before Judge Ditter. The case was dismissed by Judge Ditter, but the Court has retained jurisdiction until the terms of the Settlement Agreement have been fulfilled.

One Of The Most Actively Litigated Cases In The History Of The Federal False Claims Act

Today's settlement followed one of the most actively litigated actions in the history of the False Claims Act, requiring unprecedented coordination and cooperation between the federal Government and private counsel for the relators. For example:

- Before reaching a mediated settlement, more than nine million pages of documents were exchanged among the parties, as well as complex and extensive computer data;
- Thousands of pages of motions, replies and sur-replies were exchanged;
- The depositions of more than 20 experts and more than 100 fact witnesses were taken throughout the United States, including numerous depositions taken in Tampa, Florida near one of Medco's former facilities;
- The contentious, litigious and highly protracted nature of this case is reflected in the enormous court docket, which includes hundreds of docket entries and detailed written opinions by Senior Judge Clarence C. Newcomer, as well as numerous opinions authored by Magistrate Judge Peter B. Scuderi on myriad discovery disputes which erupted between the parties during the heated litigation.

Extensive Public and Private Resources Returned \$137.5 Million To The Government

The matter had been scheduled for an at least two-month jury trial before the successful mediation rendered the trial moot. To ultimately reach an amicable resolution, the novelty, complexity and magnitude of this multi-faceted litigation demanded a vast expenditure of both public and private resources in order to reach a settlement that, not only benefits the public, but will change, and to some degree has already changed, the course of how all Pharmacy Benefit Managers (PBMs) contract and deal with both the federal Government and state governments in the future.

BACKGROUND

PHILADELPHIA -- The full and final settlement reached today by the United States Attorney's Office for the Eastern District of Pennsylvania and the Department of Justice is the conclusion of an over seven-year, extensively litigated whistleblower, or "*qui tam*," lawsuit filed against the corporate predecessor to the nation's second largest pharmacy benefit manager ("PBM"), Medco Health Solutions ("Medco"), formerly Merck-Medco Managed Care, L.L.C. ("Merck-Medco"), and its subsidiaries.

The first *qui tam* lawsuit in today's consolidated settlement was filed on May 6, 1999, in the Eastern District of Pennsylvania, on behalf of the United States under both the federal and several states' False Claims Acts by two concerned, former Medco pharmacists with more than 30 years of combined professional experience, Walter W. Gauger and George Bradford Hunt.² Licensed pharmacists, Gauger and Hunt were employed by Medco for nearly two decades and worked at its largest automated mail order facility in Las Vegas, Nevada. In their *qui tam* suit, Hunt and Gauger, called "relators" under the False Claims Act, alleged that, since 1993, Medco defrauded the federal Government, as well as state governments, of hundreds of millions of dollars using a variety of false and fraudulent schemes.

Gauger and Hunt have been represented for the last seven-and-a-half years by Alison M. Duncan, Esquire of the Washington, D.C. and Ohio law firm of Porter, Wright, Morris & Arthur LLP and Marc S. Raspanti, Esquire of the Philadelphia law firm of Miller, Alfano & Raspanti, P.C. Both law firms have extensive experience investigating, defending and prosecuting complex health care fraud actions throughout the United States.

The federal Government has been represented by Patrick L. Meehan, Esquire, United States Attorney, Michael L. Levy, Esquire, Chief, Computer Crimes, James G. Sheehan, Esquire, Associate United States Attorney for Civil Programs, Mary Catherine Frye, Esquire, Assistant United States Attorney and Sonya Fair Lawrence, Esquire, Assistant United States Attorney from the United States Attorney's Office for the Eastern District of Pennsylvania, as well as Joyce R. Branda, Esquire, Deputy Director, Michal L. Tingle, Esquire, Trial Attorney and David T. Shapiro, Esquire, Trial Attorney, from the United States Department of Justice.

Additionally, the *qui tam* suit was brought on behalf of the states of Florida, California, Illinois, Tennessee, Texas, Michigan, Louisiana, Nevada, Massachusetts, Virginia, and the District of Columbia, all of which have strong state False Claims Act statutes that closely mirror the federal law.

²A subsequent *qui tam* suit was also filed against Medco by a non-employee, Joseph Piacentile. That lawsuit was consolidated with the action brought by Mr. Gauger and Mr. Hunt and is also part of today's overall consolidated settlement.

On June 20, 2003, the United States Attorney's Office for the Eastern District of Pennsylvania and the Department of Justice formally intervened in the *qui tam* lawsuit, after completing an extensive, multi-year field investigation. The federal Government filed its own Amended Complaint in December 2003. Medco moved to dismiss both the *qui tam* Complaint and the federal Government's Complaint. Those motions were denied by the late Judge Newcomer on September 23, 2004, in a comprehensive opinion that, for the first time, recognized potentially expansive liability under the federal False Claims Act for prescription drug services. United States ex rel. Hunt v. Merck-Medco Managed Care, L.L.C., 336 F. Supp. 2d 430 (E.D. Pa. 2004).

In April 2004, Medco agreed to pay 20 states a total of almost \$30 million to settle numerous claims, including those raised in the *qui tam* Complaint. As a result of their efforts and substantial assistance, Gauger and Hunt received recognition and credit for that portion of Medco's settlement that was allocated to the states of Tennessee and Nevada, as well as the Commonwealth of Massachusetts, including legal fees, expenses and costs. At that time of its settlement with the states, Medco also agreed with the federal Government to a Consent Order requiring permanent, wide-sweeping changes to its business practices. The enterprise-wide change required by the Consent Order instilled transparency into Medco's business practices, and the Consent Order has served as a model for change throughout the entire PBM industry.

ALLEGATIONS IN THE COMPLAINTS

In their Complaints, Gauger and Hunt alleged improper conduct in Medco's pharmacies, including its most critical component -- the accurate and timely dispensing of mail order prescriptions. The Complaints alleged that, since at least 1993, Medco defrauded the federal Government, as well as state governments, out of hundreds of millions of dollars by utilizing a variety of false or fraudulent schemes that emphasized corporate profits over the health, safety and well-being of consumer-patients.

Improper practices alleged in the Complaints and covered in the Settlement Agreement include:

- Cancelling, destroying or re-entering prescriptions into its prescription database system to report a later and inaccurate prescription "receive date" for the purpose of showing that Medco had met contractual turnaround performance standards, or for avoiding contractual penalties;
- Cancelling prescriptions in doctor call, drug utilization review ("DUR") and other pharmacy areas without attempting to clarify the prescription with the physician or patient;
- Dispensing prescriptions without properly performing DUR, without screening, and without appropriately contacting prescribers after screening;
- Failing to interpret or evaluate prescriptions and resolve any errors or ambiguities in accordance with state laws, regulations and standards of practice;

- Improperly using pharmacy technicians and other non-pharmacist personnel to perform functions which must, by law, be performed by pharmacists, or under a pharmacist's direct supervision;
- Submitting claims for prescriptions where Medco dispensed less than (i.e., "shorted") the quantity prescribed by the physician and billed by Medco;
- Establishing managerial structures and practices which had the foreseeable effect of causing inadequate supervision of pharmacy personnel and interfering with professional pharmacists' ability to exercise independent professional judgment;
- Imposing production quotas on professional and support personnel within mail order pharmacies, which had the foreseeable effect of interfering with the professional obligation of pharmacists to adequately ensure clarification of prescription drug orders with prescribers prior to dispensing;
- Fabricating records of calls to physicians in connection with doctor call, DUR, managed care, and other required physician contacts, and otherwise creating false records of contact with physicians;
- Shipping and billing the Government for drugs without ensuring that the correct number, strength, dosage, and type of drugs were dispensed;
- Failing to provide accurate, complete, timely and reliable information to patients and physicians concerning the reasons for, costs relating to, and effect of drug switches, in order to induce them to approve the switch, or withdraw their objection to the switch; and
- Switching or changing patients' prescriptions to different, more expensive or less effective drugs by providing false, misleading, or incomplete information or without the knowledge or consent of the patient or physician, or without approval of the relevant plan.

TODAY'S SETTLEMENT

The federal Government, including the United States Department of Justice along with the Office of Inspector General of the Department of Health and Human Services, the Office of Personnel Management and the Department of Defense TRICARE Management Activity, Medco, the relators and their legal counsel reached a final settlement of the monetary claims resulting from the conduct alleged in the *qui tam* and federal Government Complaints. As a result of Gauger and Hunt's efforts and their legal counsel in the substantial assistance in the investigation and prosecution of the case, \$84 million of the Government's recovery has been allocated to these two relators.

In successful *qui tam* whistleblower cases in which the Government intervenes in private actions, relators are entitled to receive awards representing 15-to-25 percent of *qui tam* recoveries. These relators were awarded a 24% relator share of that portion of the settlement allocated to their claims.³ Under today's settlement, Gauger and Hunt also have resolved all claims for their counsel's legal fees, expenses and costs from Medco for the federal Government's action, as well as Medco's settlement with the states of Nevada and Tennessee and the Commonwealth of Massachusetts.

The Settlement Agreement states that the agreement is neither an admission of liability, wrongdoing, or improper conduct by Medco, nor a concession by the United States that its claims are not well founded.

ABOUT MEDCO

Medco is the nation's second largest PBM and manages the prescription drug benefits of more than 60 million Americans, including millions of Medicare beneficiaries. In 2005, Medco reported net revenue of \$37.9 billion, managing more than 87.3 million prescriptions through its mail order facilities alone. Medco also manages pharmacy benefits nationwide for Fortune 500 corporations, unions, health maintenance organizations, Blue Cross/Blue Shield plans, insurance carriers, local and state employees programs, and federal employees programs. Medco previously was a wholly-owned subsidiary of the pharmaceutical giant Merck & Co.

Medco operates a nationwide chain of prescription drug mail order facilities. These facilities are or were located across the country, including in Pennsylvania, Florida, Nevada, New Jersey, Ohio, Texas, Virginia and Washington.

During the course of this litigation, Medco was represented by Williams & Connolly LLP in Washington, D.C., as well as the firms of Morgan Lewis & Bockius LLP and Drinker Biddle & Reath LLP in Philadelphia. Defendant Diane Collins was represented by Zuckerman Spaeder LLP.

³ The False Claims Act ("FCA"), also known as the *Qui Tam* statute, allows private citizens with knowledge to help the Government recover for false and fraudulent claims, as well as seek civil penalties. "*Qui tam*" is a term derived from English Common Law meaning "he who sues on behalf of the king as well as himself." In general, the FCA allows the Government to collect up to three times the amount it was defrauded, in addition to civil penalties between \$5,500 to \$11,000 per false claim.

ATTORNEYS' COMMENTS

"For Americans who must rely on a drug delivery system administered by pharmaceutical benefit managers, their health and safety must remain paramount," commented Marc S. Raspanti, Esquire, on behalf of his two clients. "Over nearly eight years, two concerned pharmacists took significant personal and professional risk to do what they thought was right. As a result of their False Claims Act case, the quality and cost of pharmacy services for millions of Americans using PBMs has improved," added Raspanti, who concentrates his practice in white-collar criminal matters and litigation under federal and state *qui tam* statutes.

Alison M. Duncan, Esquire, in commenting on behalf of her two clients, stated that: "The Medco case represented the most comprehensive, blueprint litigation for the pharmacy benefit management industry. Settlement of this case established new ground rules for a critical component of the United States healthcare system. In growing numbers across the country, patients continue to depend upon the safety and accuracy of the mail order delivery system for life-saving and life-improving drugs. Thanks to the Medco case, systems are now in place to help ensure that patients will receive the right drug, at the right quantity, at the right time."

ATTORNEYS OF RECORD AND CONTACT INFORMATION

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