

Anti-Kickback Statute

Dismissed *Qui Tam* Case Has Much to Teach, Health Care Fraud Attorney Says

A health care fraud case that barely saw the inside of a courtroom has much to teach attorneys representing potential defendants, according to an attorney who was drawn into the case by the federal government.

The case, *United States ex rel. Mitchell v. United Medical Systems Inc. et al.*, teaches the importance of attorneys helping their clients to be proactive, according to **Thomas Zeno** of **Squire Sanders** in Washington.

"Potential defendants can have control over the outcome of a *qui tam* case," Zeno said.

The case, originally filed under seal in the U.S. District Court for the Northern District of Illinois in January 2011, was transferred by the government to the Eastern District of Michigan. The government unsealed the complaint and granted the relator's request to dismiss the complaint against all defendants Aug. 23. All other case documents remain under seal.

Zeno said the 131-page *qui tam* complaint, naming dozens of defendants, alleged that the physician defendants violated the Anti-Kickback Statute by creating joint ventures that referred people for lithotripsy, a noninvasive surgical procedure to remove and treat kidney stones.

The *qui tam* provision of the False Claims Act allows private citizens to file suit on behalf of the government in cases involving federal funds fraud and to share in any consequent settlement or court award.

Zeno explained that the physician-owned joint ventures operated vans containing lithotripsy machines driven around to hospitals to provide mobile lithotripsy services.

The joint ventures were not in themselves illegal, Zeno said. But the complaint alleged that the doctors who owned the joint ventures profited illegally by referring patients to their own machines.

Zeno represents Greater Michigan Lithotripsy and American Kidney Stone Management, two defendants named in the lawsuit. He said he did not know anything about the complaint when he received a civil investigative demand from the federal government in October 2011.



Zeno explained that the civil investigative demand is essentially a subpoena. The government can issue the CID even when there is no case, he said. So, when he received the demand, he said, he did not know if it was for a pre-litigation investigation or whether there was a sealed case. If there were a case, he said, he did not know the name of the case, where it was filed or whether his client was a defendant.

Even now, he does not know which, if any, of the other defendants also were served with civil investigation demands or otherwise scrutinized, and he does not know the circumstances of the dismissal.

Zeno said that what he did know when he received the CID was the potential risks to his clients, because he knew that a year earlier, in July 2010, the Office of Inspector General, which investigates allegations of health care fraud, announced a settlement involving another lithotripsy provider. Under the settlement, the defendant had to pay a civil monetary penalty of \$7.3 million and enter into a five-year corporate integrity agreement.

Zeno said he did not know any of the details behind the demand he received until he saw the complaint this March.

At that point, Squire Saunders went to the government, which allowed the firm to make a presentation on behalf of its clients. Zeno said that long before he had received the civil investigation demand, he had worked with his clients to be sure that they complied with the law.

"We did not wait for the CID. We were proactive. We were able to show how this case was different from the case involved in the earlier settlement and how our clients were in compliance with the law," Zeno said.

The lesson, he said, is that the importance of potential health care fraud defendants working with experienced counsel before they become involved in potentially costly litigation.

"We were able to help our clients position themselves to be compliant, so that if they are investigated, they can present themselves to the government in the best possible light," Zeno said.



Thomas Zeno of **Squire Sanders** in Washington, represented two defendants named in the suit.

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