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Medtronic Kickback Case Moving Forward in Pennsylvania

Jun. 07, 2018, 2:06PM

- *Judge declines Medtronic's motion for summary judgment*
- *Rules that whistleblower provided additional, materially significant information to what's already publicly disclosed*

Medtronic Inc. will have to answer questions about alleged kickbacks it gave to health-care providers to induce them to prescribe its devices.

A federal trial court in Pennsylvania ruled against the medical device company's summary judgment motion, which argued the case shouldn't continue because the allegations were already publicly known. Judge Edward Smith of the U.S. District Court for the Eastern District of Pennsylvania ruled that the whistleblower provided enough additional information to what was already known for the case to proceed.

The court's June 4 decision provides hope to whistleblowers bringing cases against companies already facing false claims litigation because it shows a willingness by courts to allow a case to proceed if a relator can add new information.

"It could make it tougher to get the cases dismissed under the public disclosure bar. Up until now, if you could demonstrate information had been publicly disclosed, the courts would dismiss the case," Sanford Teplitzky, a partner at Baker Donelson in Baltimore who works on fraud and abuse issues for health-care clients, told Bloomberg Law.

Public Disclosure Bar

Lawyers who spoke to Bloomberg Law said that Smith's opinion was the most detailed breakdown they'd seen of the FCA's public disclosure bar.

The FCA's public disclosure bar states that a court should dismiss a relator's action in which the government hasn't intervened if the relator alleges actions that were already publicly known. Publicly known information can be learned through news stories, trials, reports, public hearings, audits, or investigations.

A relator who is an "original source" of the information is exempted from the public disclosure bar's restrictions. Original sources are defined as people who voluntarily disclose information the allegations are based on to the government or who have independent knowledge that materially adds to the publicly disclosed information.

A defendant who moves for a case to end based on the public disclosure bar must show a valid disclosure exists, that the prior public disclosure is over "substantially the same allegations or transactions" of fraud, and the relator is not an original source. According to Teplitzky, attorneys defending against FCA actions had a high level of success using the public disclosure bar as a defense.

Original Info

Cathleen Forney, a former employee of Medtronic who rose to become a district service manager before being fired in 2012, brought the case alleging the company paid kickbacks to doctors and hospitals for using its products by providing free surgical staffing services so that hospitals and providers didn't have to pay their own employees to do that work. Some of the work Forney cited included Medtronic staff checking devices after they'd been implanted, providing free consulting on practice management, and providing staff to handle administrative tasks usually handled by hospitals, including data entry.

Medtronic argued that Forney's case should be thrown out because most of the allegations she made were already publicly disclosed in five other lawsuits against the company. The court found that two of the five lawsuits satisfied the public disclosure requirements because the U.S. intervened in the cases while declining to recognize Medtronic's assertion that a whistleblower is an agent of the government, writing that if the government doesn't intervene it can't control the whistleblower's actions.

"In my view, taking the position a relator isn't an agent in this context doesn't support one of the intentions behind the public disclosure bar," George Breen, an attorney at Epstein Becker Green in Washington who defends clients in health-care fraud litigation, told Bloomberg Law. He said that the idea behind the bar was so the government didn't have to share a recovery if substantially the same allegations have already been disclosed and that this issue may be litigated further.

"I thought one of the most surprising and interesting holdings was the initial holding early in the analysis that prior FCA cases did not constitute public disclosures simply because the government hadn't intervened in the case," Taylor Chenery, an attorney at Bass, Berry, Sims in Nashville, Tenn., who defends clients in false claims cases, told Bloomberg Law. Chenery found the decision to be a very narrow reading of the public disclosure bar that would allow subsequent relators to file similar allegations.

"The court just assumes in a non-intervened case that the government is not a party just because it didn't intervene. Other courts have found the government is the real party in interest in an FCA case," Chenery said.

Material Additions

The court found the allegations concerning device checks, providing reimbursement advice, and providing administrative assistance were all disclosed publicly in two previous cases. Smith

ruled Forney overcame this by being an original source who materially added to the publicly disclosed fraud allegations.

Smith pointed to the documents she provided that include more specific information on the allegations against Medtronic than was previously available. Their submission also shows Smith is an original source.

While allowing the case to move forward, Smith admitted that some of the allegations against Medtronic appeared "benign" and may not constitute fraud.

"The sense I got from reading the decision is that the court really struggled in the way they came down on this," Laura Angelini, a partner in Hinckley Allen's Government Enforcement & White Collar Defense practice group in Boston, told Bloomberg Law. "A whistleblower's claims can survive if they add significant detail, even if that additional detail appears to be benign and ultimately may not prove to be actionable."

Still, Angelini thought the court sent a message that it has concerns with the underlying merits of the case, a sentiment that was echoed by Teplitzky and Chenery. Brian Markovitz, a principal attorney at Joseph, Greenwald & Laake in Greenbelt, Md., who represents whistleblowers in false claims cases, told Bloomberg Law that the judge seemed to signal that he may still grant summary judgment later in the case.

But Markovitz thought the court made the right decision on this summary judgment motion. Forney "was able to show she was an original source because she got policies, dates, and names," Markovitz said, noting that if she is bringing 2,000 pages of documents, then she can add to what is known. "When you've got a fact-intensive inquiry, that shouldn't go to summary judgment."

Moving Forward

The decision could have implications for both whistleblowers and defendants in false claims cases.

"Whistleblowers will have to be creative to show they're bringing something new, different, and meaningful that builds on what might have been in the public realm until then," Teplitzky told Bloomberg Law. He said the decision creates an obligation on both sides with defendants having to show the new information is not meaningful.

"I don't know if this court's decision would change strategy in connection with pursuing a motion to dismiss or summary judgment with respect to public disclosure," Breen told Bloomberg Law.

Markovitz said the decision is "definitely a win" for relators because the court is saying that a defendant facing broad allegations can't just use the public disclosure bar to get additional allegations by new relators dismissed. "If the court follows this, cases are going to move forward," Markovitz said. "That means a lot more money being returned for the taxpayers."

This case is United States v. Medtronic, Inc. , 2018 BL 197826, E.D. Pa., No. 15-6264, summary judgment denied 6/4/18 .