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Free Speech, Due Process and Trial by Jury

Judge Awards $339M in Home Healthcare Fraud Qui Tam Action

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A federal judge in Dallas on Wednesday ordered four healthcare professionals to pay the federal government $339.4 million in a qui tam action tied to one of the largest home healthcare fraud cases in U.S. history.

The order, entered by Chief U.S. District Judge Barbara Lynn of the Northern District of Texas, directed formerly licensed doctors Noble Ezukanma of Fort Worth and Ransome Etindi of Waxahachie — whose license was suspended by the Texas Medical Board in 2011 for allegedly having sex with a patient — to pay approximately $102 million and $55 million, respectively.

Judge Lynn also ordered Merna Parcon and Ben Gaines III, who owned and operated the web of healthcare agencies involved, to pay approximately $155 million and $28 million, respectively. Judge Lynn entered final judgment on the damages on the same day.

Dallas attorney Rusty Tucker, who represents the whistleblower in the case, said his client is expected to receive around $80 million of the judgment at minimum as part of the 25 to 30% cut qui tam whistleblowers receive for bringing an action on behalf of the government — if the government ever recovers the full amount awarded by Judge Lynn, that is.

Recovery efforts have been generally unsuccessful so far, Tucker said, although the government has seized a little over $1 million in assets from Ezukanma, including hundreds of thousands of dollars in cash the feds found in a safe when they raided his Fort Worth home, a 2006 Mercedes Benz, and assets tied to his 401(k) and other bank accounts.

Further developments in this area will be wait-and-see, Tucker said, since the government is still actively looking into asset recovery.

The whistleblower, Grant Bachman, was an employee of U.S. Physician Home Visits (USPHV), one of the healthcare agencies that the defendants mutually owned and operated to carry out the fraud. Tucker said Bachman's essential role at the company was as an assistant for Parcon, the primary owner of USPHV. Part of his duties included accompanying the doctors to the home visits that determined whether patients qualified as "homebound" under Medicare's standards.

Under the agency's heightened standards, Tucker said, many of the patients were not even close to being eligible, as they were often out playing golf or at another doctor's office when Bachman and the physicians would show up at their doors.

Bachman alleged that the doctors would still bill Medicare and Texas Medicaid for such patients they didn't even see. When they did see a patient, they would often bill for 90 minutes even if they only saw the patient for 15 minutes so that the cost of the visit would bump up a level to a different billing code.

Bachman retained Tucker to file a sealed civil action in early 2013, which led to a grand jury indictment in June 2015. Bachman's lawsuit was unsealed shortly thereafter.

Tucker said his client felt "almost physically ill" having to go to work and "watch what they (the physicians) were doing every day."

"They would certify a patient as being homebound without ever even seeing the patient to make that determination," Tucker said.

What's more, according to court records, the group billed for more hours there were in a day 21 different times.

"This fraudulent scheme astoundingly resulted in Ezukanma or Etindi billing over 100 hours per day on several occasions to Medicare for physician home visits," Tucker said. "On 12 different occasions, Ezukanma billed Medicare hours ranging from 102.7 hours per day to 205.9 hours per day."

Lawyers who defended Ezukanma, Etindi, Parcon and Gaines did not immediately return messages left Thursday seeking comment on Judge Lynn's ruling.

Prosecutors said the defendants carried out their fraud by operating under a trio of companies. While USPHV and the other two companies, A Good Homehealth and Essence Home Health, appeared to be set up as three separate entities, the companies worked as one. The same employees often worked for and

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were paid by all three companies.

The fraud unraveled after officials with the FBI, U.S. Attorney's Office and other government agencies caught wind of Bachman's complaint. Tucker said two weeks after Bachman met with investigators and drew diagrams on where various files were located, the FBI simultaneously raided the offices of USPHV and the other affiliated companies scattered around North Texas. Tucker said Bachman was at work the day the feds showed up.

Parcon, Gaines, Etindi and other defendants reached plea deals with the government, while Ezukanma stood trial in March 2017. A federal jury in U.S. District Judge Jane Boyle's court found him guilty of one count of conspiracy to commit healthcare fraud and six counts of healthcare fraud. Judge Boyle sentenced him to 16 years in prison and ordered him to pay $34 million in restitution. Ezukanma appealed but the U.S. Court of Appeals for the Fifth Circuit affirmed his conviction.

Judge Boyle sentenced both Parcon and Etindi on Aug. 17, 2017. She sentenced Parcon to 10 years in prison and ordered her to pay $51.5 million in restitution. She sentenced Etindi to 30 months in prison and ordered him to pay $18 million in restitution. She later sentenced Gaines to five years in prison and ordered him to pay $9 million in restitution.

The indictments of the USPHV officials were part of a bundle of nationwide sweeps announced by the Department of Justice in what was at the time the largest crackdown on Medicare fraud in strike force history, both in terms of the number of defendants charged and the loss amount.

Prosecutors alleged the USPHV group cost Medicare nearly $60 million between Jan. 1, 2009 and June 9, 2013 alone. The nationwide sweep, spread across 17 districts, resulted in charges against 243 individuals for participating in Medicare and Medicaid fraud schemes involving $712 million in false billings.

The $339 million that Judge Lynn awarded on Wednesday included the treble damages that relators are entitled to under the False Claims Act.

Tucker said he hopes Judge Lynn's order "sends a strong message" to those who commit or conspire to commit Medicare fraud.

"Companies and individuals who violate the federal False Claims Act will be held accountable," he said. "Mr. Bachman, who came forward, should be recognized for helping expose this massive home healthcare fraud."

The DOJ attorneys in charge of prosecuting the defendants were Assistant U.S. Attorneys Douglas Brasher and Katherine Pfeifle, one of the lead AUSAs who successfully prosecuted eight defendants in the Forest Park federal bribery and kickback trial this spring. Aptive has run into curfew issues with town authorities as the company has expanded its geographic reach, Fielding said. As that began happening, Aptive called Fielding, who had a track record of successfully negotiating with town authorities on behalf of solicitors. Recently, he obtained a settlement against North Texas' City of Colleyville to lift its 5 p.m. solicitation curfew against another company, Moxie Pest Control, on the eve of a trial.

Fielding did not hesitate to take on Aptive as a client.

"Given the four years I spent selling door-to-door during the summers, representing Aptive felt like I was 'coming home.' I learned so much from my experience selling door-to-door — about resiliency and hard work and the art of persuasion," Fielding said. "This was my chance to give back."

He said another big factor was that he believed in the company's cause.

"The government's commitment to free speech is not tested when the speech in question is popular," he said. "Instead, that commitment is weighed when the speech is unpopular and some folks (who might have the ear of their city council members or legislators) want to prohibit it … this makes it politically easy to pass ordinances restricting the speech.

"The problem is that these ordinances then take the choice away from the many, many other people that DO want to buy Aptive's services."

Fielding said he and law partner Jon Kelley, who both joined Kirkland last fall from Lynn Pinker Hurst & Schwegmann, addressed problematic curfews in "literally hundreds" of city ordinances across the country. Once the lawyers sent letters to the cities identifying the constitutional problems with their ordinances, "99% of these cities agreed to repeal" them, he said.

Castle Rock was the only municipality not to, which led Aptive to sue the city in 2017. After a March 2018 bench trial, a federal court in Denver ruled in Aptive's favor, holding that Castle Rock's 7 p.m. to 9 a.m. curfew was unconstitutional.

At trial and on appeal, which went to oral argument in March 2019, Fielding said his side argued that Aptive "places a high priority on maintaining a strong relationship with the cities in which it sells," which involves appreciating and supporting "narrowly-tailored regulations" that are targeted toward

the residents' safety.

Castle Rock was Exhibit A for having such restrictions, which Aptive embraced. Castle Rock requires all solicitors to register with the town and pass a background check, and it forbids solicitors from knocking on the doors of residents who have opted out by placing "No Soliciting" signs on their property (Mark Curriden, we're looking at you and your "Go Away" doormat).

"We pointed out that these other existing aspects of the solicitation ordinance served to keep residents safe and protect their privacy," Fielding said. "With these existing regulations already protecting resident safety and privacy, we pointed out that the curfew was superfluous and a needless additional restriction."

The 10th Circuit agreed, holding that Castle Rock's curfew "unconstitutionally burdens Aptive's First Amendment Rights" and that Castle Rock failed to "demonstrate that the curfew advances its substantial interests in a direct and material way."

The 10th Circuit pointed out the fact that Castle Rock problematically excluded political and religious solicitors from its ordinance.

"When an ordinance makes these sorts of facial distinctions, e.g., between those soliciting for religious purposes and those soliciting for commercial gain, not only the Supreme Court, but our court, has expressly held that it 'contemplates a distinction based on content,'" the opinion says.

"And so, because the 2014 ordinance creates a content-based distinction which determines which solicitors the curfew applies between commercial and noncommercial speech, we must reject any argument that the curfew is either not subject to First Amendment scrutiny at all or can be analyzed merely as a content-neutral line, place and manner restriction."

While Fielding handled oral argument before the 10th Circuit, he said former Lynn Pinker colleagues David Coale and Paulette Miniter provided significant assistance on the appeal.

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