

Whistleblower Reaps \$9.2 Million In Settlement of Qui Tam Lawsuit

BY CLAIRE ZILLMAN

ORTHOFIX International N.V. announced on June 7 that it had agreed to pay \$42 million to settle civil and criminal charges arising from its marketing and sale of devices to Medicare and other federal health plans.

The settlement stems from allegations brought by whistleblower Jeffrey Bierman, a client of Getnick & Getnick, a Manhattan law firm specializing in such qui tam action.

Bierman, a health care consultant, observed Orthofix's billing practices and detected what he believed was fraud: Orthofix was falsifying Medicare claim documents and paying kickbacks to doctors, their staff, patients and sales agents, he alleged. In exchange, the company got orders for non-invasive bone growth stimulators, which cost about \$100 to manufacture, and which Medicare purchased for \$4,000, he claimed.

Getnick & Getnick filed a qui tam suit under the federal False Claims Act in Boston against Orthofix and four other stimulator manufacturers on behalf of the U.S. government, 11 states, and the District of Columbia in March 2005. Neil Getnick, the firm's managing partner, served as co-lead partner with Lesley Ann Skillen.

News of the settlement came hours after Getnick sat on a panel sponsored by the American Bar Association on the Civil False Claims Act and Qui Tam

Enforcement. He touted qui tam as a "powerful statute that taps into the best of the American judicial system by partnering government resources with an active citizenry."

Orthofix, represented by Ropes & Gray, is the first manufacturer to resolve the fraud claims. The Minnesota corporation will pay \$34 million to settle the civil case, but denies all civil charges. According to a plea agreement filed on June 7, Orthofix will also pay a \$7.7 million criminal fine and plead guilty to one felony count of obstructing an audit, which stemmed from the criminal investigation. The DOJ officially filed an information against Orthofix on June 7.

Whistleblower Bierman is set to get 27 percent of the \$34 million civil settlement (\$9.2 million), an uncommonly high percentage that reflects the assistance he gave the government, said Getnick. In the other four cases, Bierman would receive between 15 percent and 30 percent of the civil recovery, Getnick added.

Getnick said his firm would be paid a contingency fee from the settlement and a statutory fee to be paid by Orthofix, but would not reveal the amount of the fees.

Brien O'Connor of Ropes & Gray said the company is "pleased that it has reached formal agreements to resolve all issues associated with

the government's investigation of sales of its bone growth stimulator devices." After a lengthy period of full cooperation with the federal government, the company "now can move forward in pursuit of its mission to serve patients," O'Connor said. He also represented Orthofix in another False Claims Act case related to fraudulent billing and marketing that was dismissed in June 2011.

Litigation continues against the four other device manufacturers named in the 2005 complaint: Biomet Inc., DJO

Incorporated, Orthologic Corp., and Smith & Nephew. Each of the remaining defendants filed motions to dis-

miss in Boston federal district court.

"We believe those decisions are highly favorable to the relator," said Getnick. "This is an industry-wide case." The Orthofix matter "is just the first domino to fall. This is good initial result, in our view."

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