

Health Group Of The Year: Williams & Connolly

By Jeff Overley

Law360, New York (January 11, 2016, 3:33 PM ET) -- Williams & Connolly LLP knocked out a closely watched whistleblower suit alleging Medicare Part D fraud by pharmacy giant CVS, one of many high-profile defense wins that made the firm a False Claims Act heavyweight and ranked it among Law360's Health Practice Groups of the Year.

The Part D triumph occurred in September in Pennsylvania federal court, where CVS Caremark Corp. stood accused by a private auditor, Anthony R. Spay, of widespread billing misconduct. The case, which is now on appeal at the Third Circuit, has attracted attention because Part D is a young program that hasn't been the subject of many FCA cases or rulings.



"One of the particularly interesting things about the Part D world is it is new," said Holly M. Conley, a Williams & Connolly partner who worked on the case. "This is really one of the first cases out there."

Making matters more notable was the fact that CVS was wrestling with numerous theories of fraud, including alleged dispensing of expired drugs, failure to use unique prescriber identification numbers, failure to check for overutilization and lax screening to ensure prescriptions were appropriate.

Williams & Connolly defeated the suit on summary judgment, and it came away with a 134-page ruling from U.S. District Judge Ronald L. Buckwalter that was full of intricate background on Part D's structure and elaborate discussion of why CVS' billing wasn't illegitimate. Given the opinion's substance and the dearth of FCA case law involving Part D, attorneys and judges elsewhere are likely to look at the ruling for some time to come.

"Judge Buckwalter is extremely thorough in addressing all the arguments that have been raised by either party," said Enu A. Mainigi, another Williams & Connolly partner on the case. "As a result of that, I think he ends up touching on a wide range of issues that may be before other courts around the country."

For the firm's eight-partner team of health fraud attorneys, that was only one highlight from the past year. In Texas federal court, Williams & Connolly beat back a prominent FCA suit accusing nursing home pharmacy Omnicare Inc. of shelling out kickbacks to land patient referrals.

According to the whistleblower in *Ruscher v. Omnicare*, the company had a secret practice of writing down debt for nursing homes that steered more clients its way. Williams & Connolly argued that the case was much ado about nothing, and that Omnicare's debt-collection practices were entirely ordinary.

"The evidence showed that ... Omnicare was doing its best to collect, but it was a very complicated collection environment," Conley said.

U.S. District Judge Keith P. Ellison ultimately agreed, granting summary judgment and writing that "the collection practices of Omnicare ... would not seem exceptional, much less fraudulent."

Elsewhere, Williams & Connolly dispensed with two FCA suits — *Winkelman v. CVS* and *Morgan v. Express Scripts* — by turning to the statute's public disclosure bar. In the *Winkelman* case, the firm showed that media stories and congressional reports had already aired comparable allegations, and in the *Morgan* case, the firm showed that congressional reports and prior lawsuits contained largely the same allegations.

Broadly speaking, Mainigi noted, the sharp rise in FCA litigation in recent years means that defenses based on the public disclosure bar are becoming available more frequently.

"As that area gets more and more saturated with qui tams, there is more of a possibility that a public disclosure defense may be a viable one," she said.

Some of the firm's most important wins came by nipping cases in the bud early on. As one example, a whistleblower in Massachusetts federal court in July dropped a case against durable medical equipment distributor Edgepark Medical Supplies after Williams & Connolly met with government attorneys and persuaded them not to intervene.

Separately, the firm convinced a whistleblower named David Kester to settle an FCA case against CVS without receiving any monetary payment. The value of that dismissal became clear when co-defendants Accredo Health Group Inc. and Novartis Pharmaceuticals Corp. agreed to pay \$60 million and \$390 million, respectively, to settle their roles in the same case.

"We were prepared, certainly, to litigate the case and to continue going forward with the case, because we certainly did not think there was a basis for them to continue going forward against our client," Mainigi said. "Ultimately, what I can surmise is a judgment on their part to perhaps cut their losses with us and keep going with other defendants."

--Editing by John Quinn.
