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Qui tam suit against Medline settled for \$85 million

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An Illinois-based supplier of medical and surgical products has agreed to pay \$85 million to the federal government to resolve a former employee's claims that the company engaged in an illegal kickback scheme targeting health-care providers that purchase products paid for by federal programs, the whistleblower's attorneys said.

The settlement, approved last week by U.S. District Judge Suzanne B. Conlon, resolves a lawsuit brought by Sean Mason, a former employee of Medline Industries Inc., headquartered in Mundelein.

Mason, who worked at the nationwide medical supply firm from 1998 to 2005, alleged that the company unlawfully paid tens of millions of dollars in kickbacks and bribes to hundreds of health-care providers and their purchasing officials in exchange for new or continued business.

In one of Mason's positions at Medline he oversaw and administered rebates paid to hospitals, skilled nursing facilities, hospices and other health-care providers that entered into annual requirements contracts for the company's medical and surgical products, according to the complaint.

The former Medline employee was awarded 27.5 percent of the settlement proceeds for his whistleblower role in the case, his attorneys said.

"The thing that was remarkable about him is that he had a mental recall that was stunningly accurate," Robert A. Clifford of Clifford Law Offices said Wednesday. "He's one of these people that was just in a position to sit down at a table and start reciting a factual history that, when tested, was incredibly accurate. No question that it was a game winner for everyone involved — and it's what brought Medline to the table."

Along with Clifford, attorneys serving as co-counsel for the plaintiff included C. Barry Montgomery of Williams, Montgomery & John Ltd. For years, the two veteran Chicago trial lawyers have typically faced off on opposite sides of lawsuits — with Clifford on the plaintiff's side and Montgomery on the defense side.

"We brought some strengths of our respective firms together that really benefited our client and the government, and it was pretty exciting to work on a case of this magnitude," Clifford said.

Montgomery, who said it was the magnitude of the case he was brought on to that sent him to Clifford for "additional fire power," said the otherwise adversaries worked well together.

"Having been against him the number of times I have, I knew exactly how he operates. It worked out very well," Montgomery said.

Also serving as co-counsel for the plaintiff were Williams, Montgomery partner Edward R. Moor; Clifford Law Offices associate Courtney A. Boho Marincsin; Sherman P. Marek of Marek Law Office P.C.; and several attorneys from Milberg LLP in New York.

Attorneys representing Medline and its charitable arm, The Medline Foundation, included Jenner & Block LLP partner Anton R. Valukas, who declined to comment on the settlement Wednesday.

Although a party to the settlement, the U.S. Department of Justice elected not to intervene in the lawsuit. Mason pursued it as a qui tam action, bringing the suit on the federal government's behalf.

A spokeswoman for the U.S. attorney's office in Chicago declined to comment Wednesday on why the Justice Department elected not to intervene in the lawsuit, which was originally filed in October 2007.

Following the government's investigation into Mason's initial allegations, the plaintiff in March 2009 filed an amended complaint, which Conlon dismissed. But she granted Mason's motion for leave to file a second amended complaint and in February 2010, the court denied Medline's motion to dismiss the action in its entirety.

"In the early go, they [the Justice Department] weren't persuaded that this was a meritorious case, and indeed Judge Conlon's ruling endorsed that view," Clifford said. "It wasn't until we successfully reexamined what we had that we were able to put forward enough of a factual presentation that had fit into the judge's requirements on a pleading that could withstand a motion to dismiss."

The kickbacks outlined in the complaint took on various forms, including a common one involving rebate offers, the plaintiff's attorneys said.

"There was a tiered rebate. In other words, the more you bought from Medline the more rebate you got. It's a kickback, essentially," Moor said.

"The difference with that is the hospital or provider didn't report the rebate to the federal

government, and the law is that if health care is paid for with federal dollars, then this kind of payment from a supplier like Medline to a customer has to be recorded and reported so that the government gets the credit," Moor said. "We alleged that it was done in such a way that it couldn't be reported, or wasn't reported, and this was basically by design."

Clifford argued that since the medical products were being paid for through federal programs like Medicaid and Medicare, "the government lost out on the benefit of that bargain."

The plaintiff's attorneys filed suit solely against Medline and its charitable arm, not against a single hospital or provider, Moor pointed out.

"A seller like Medline can still be liable even if a misrepresentation is made by another, because it caused or facilitated the misrepresentation," Moor said.

Of the qui tam action, Clifford said: "It's a significant case because in these tough economic times for our government, it's essential to empower a citizenry with the opportunity to safeguard things that they see taking place in the private sector that are wrong."

Montgomery said he was pleased with the outcome of a case that involved an extensive discovery process and "literally millions of documents."

"It's very unusual to get a settlement this large without the U.S. intervening," he said.

Medline said in a statement that the company denies the allegations.

The company also said the case was related to how Medline previously handled customer rebates, discounts and charitable contributions. It stressed that there were no allegations that the company caused financial harm to its customers or that any government programs paid more for their products.

"We had strong defenses to the questions raised and we are proud of our high ethical business standards and practices," Medline said. "However, despite our strong position, we have resolved this matter to avoid the costs and burden of prolonged civil litigation for our company, our customers and our employees. It's why practically all of these types of cases are settled out of court, which is why we chose to do the same."

The case, which was dismissed March 11, is *Sean Mason v. Medline Industries Inc, et al.*, No. 1:07-cv-05615.