

Whistle-blowers' spotlight falls on drug companies

US rules allowing big payouts weigh on life-sciences industry

By Ross Kerber, Globe Staff | April 22, 2005 *(Thomas and Durrell mentions **highlighted** below)*

Former federal prosecutors report a sharply rising rate of private lawsuits filed in Boston by people urging the government to bring fraud charges against their employers, especially drug companies.

The boom in these cases -- up as much as 30 percent since 2002 by one estimate -- comes as law-enforcement pressure grows on the state's fast-growing life-sciences industry.

One reason for the growing number of cases, some specialists say, is federal rules allowing huge payouts to plaintiffs whose suits deliver the goods.

Perhaps the most famous was a former drug salesman who was awarded \$77 million for helping the government strike a record \$875 million settlement with TAP Pharmaceutical Products Inc. That case and others have led to more filings, both in US District Court in Boston and nationally, said Robert M. Thomas, previously an assistant US attorney in Baltimore who prosecuted white-collar cases.

"Success breeds success, and you end up where more people are aware of this avenue," said Thomas, now a Boston attorney who represents plaintiffs who file such cases.

Nearly all these cases are filed under seal and often aren't disclosed by the Justice Department, making their exact number hard to pin down.

Michael J. Sullivan, US attorney for the District of Massachusetts, won't discuss exact figures or the nature of pending investigations. But his office will soon have 10 lawyers handling such cases, double from when he arrived in 2001, he said.

"The ultimate objective here isn't to do ad hoc cases, but to change industry practices," Sullivan said. "That will have a much more significant impact over the long term with regard to protecting the integrity of the healthcare system, especially with prescription drugs," he said.

The False Claims Act gives individuals the power to bring charges of wrongdoing against government contractors, then seek to have the Justice Department join the legal battle as a powerful ally. Those who bring cases can receive up to 30 percent of the total recoveries that targets might eventually agree or be ordered to pay.

The False Claims Act dates to the Civil War era, passed to combat overcharging by military contractors.

The whistle-blowers who bring these suits don't have any special status other than the chance to become key witnesses for prosecutors. But judges usually allow these plaintiffs to keep their cases sealed both to protect them against reprisal by their employers and to give prosecutors more freedom to investigate. Employees can bring such suits against rival companies as well if they suspect wrongdoing.

Often the probes can drag on for years, and only become unsealed once the government strikes a settlement with a company or brings charges, or decides not to pursue an investigation.

Suzanne Durrell, previously chief of the civil division of the Boston US attorney's office, who often works with Thomas, estimates since 2002 as many as 30 complaints have been filed under the False Claims Act in US District Court in Boston. That would be an increase compared with the 100 or so cases filed in the previous 13 years she helped oversee them, Durrell said.

Durrell and Thomas said that between them they represent plaintiffs in seven ongoing healthcare fraud cases, most of which involve pharmaceutical companies. Durrell thinks smaller biotechnology companies will also soon face whistle-

blower actions. "It's reasonable to expect that the biotech industry is prone to the same kind of fraud we've seen with the larger pharmaceutical companies."

Robert Ullmann, who was chief assistant US attorney for Massachusetts in the early 1990s and is now at the Boston firm of Nutter, McClennen & Fish, said Durrell's estimate of up to 30 new cases since 2002 seems correct. "I have to assume whistle-blowers are flocking to Massachusetts in light of the large paydays," Ullmann said.

The system already has led to a few enormous payouts. In addition to Douglas Durand, the former TAP salesman, recipients include David Franklin, who once worked for [Pfizer Inc.'s](#) Warner-Lambert, and who received \$26.6 million last year after bringing a complaint that eventually resulted in \$430 million in fines against the company, in a case handled by Boston prosecutors. Two employees of Columbia/HCA also split \$100 million after a 2000 settlement in which the company pled guilty to unlawful billing charges and agreed to pay more than \$840 million.

Meanwhile, a number of Boston-area life-sciences companies have reported in their securities filings that they face Justice Department investigations. Just last week four former employees of Rockland drug developer Serono Inc. were indicted on bribery and conspiracy charges for allegedly trying to influence doctors to prescribe an AIDS treatment with free trips to France.

The individuals deny wrongdoing. Mark A. Berman, a Newark, N.J., attorney representing one of the defendants, said, "We have reason to believe it is a whistle-blower case motivated by a former employee's desire to get revenge against the company."

A spokeswoman for Sullivan's office declined to discuss the case's origins. The company says it is cooperating with investigators but wouldn't discuss the charges against the individuals.

Prosecutors' interest in health-care companies generally stems from the huge taxpayer sums invested in programs that buy nearly every type of medicine and medical device on the market.

During the 1990s, recoveries from healthcare cases began to outstrip recoveries from defense contractors, the second-largest area. For the fiscal year ended Sept. 30, 2004, for instance, settlements and judgments stemming from fraud in the Department of Health and Human Services totaled \$502 million, compared with \$27 million for Pentagon work, according to Justice Department figures.

The department, which handles the cases for the other agencies, doesn't publish the number of sealed claims it investigates. But at a conference in October in Washington, assistant attorney general Peter Keisler said, "We have 100 or more cases involving many different pharmaceutical manufacturers and other entities such as pharmacy benefit managers, doctors and hospitals. In all, the cases name over 225 defendants. They involve a myriad of different drugs; at present count over 500 drugs."

Patrick Burns, spokesman for a Washington advocacy group Taxpayers Against Fraud said the group has been told by Justice officials that the bulk of these cases are pending in Boston and Philadelphia.

While the big caseload might seem to indicate a trove of wrongdoing, Burns' group and some politicians say the numbers also show how the Justice Department has allowed a backlog of work to linger.

Burns says the agency simply hasn't put enough attorneys on the job. In its 2006 budget request, for instance, the agency seeks \$2 million to hire 17 attorneys "to handle more than 125 separate healthcare fraud matters involving numerous pharmaceutical manufacturers and other related entities." It also seeks \$3 million to hire 13 more attorneys for similar work.

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