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Tricare Fraud Defense Lawyers: Trial was a ‘Lesson’ to Prosecutors

DECEMBER 23, 2019 | NATALIE POSGATE

The lawyers who represented the three defendants who were acquitted in last week’s verdict from the \$100 million Tricare fraud case have mixed feelings about the last two months they spent advocating for their clients in Dallas federal court.

On one hand, they are absolutely elated for their clients, who they say have had their careers destroyed, their reputations damaged and lives overall on hold for the past three years. On a more personal level, they’re proud of their own work product for getting these clients the result they felt they deserved.

On the other hand, they are disturbed that this trial even took place — an outcome they say is reflective of a larger trend of government overreach by prosecutors in an attempt to recover public dollars that were lost because of the system’s own shortcomings.

“[The government] uses the U.S. Attorney’s Office as a debt collector, which is a pretty disturbing pattern that is emerging across the country,” said Houston attorney Sean Buckley, who represented defendant

Jeffrey Cockerell at trial. “It’s what they tried to do here, which is just wrong. I think it was shown by the jury for this case that it was inappropriate.”

“I think the lesson is that the government should take great care in evaluating whether the facts would demonstrate the intent element of fraud, and this case wholly failed to evaluate that issue,” Buckley added.

Nicole Knox defended Cowboys marketing professional Michael Kiselak, a former player for the Dallas Cowboys. She concurs.

“I think all of these cases are about making the government whole again... I just don’t think putting people in prison is the answer to really a debt collection problem,” she said. “There are other avenues [the government] could explore.”

Cockerell and Kiselak were two of three total defendants acquitted last week in a massive case brought by the government in 2016 that alleged a group of doctors, compound pharmacy owners and marketers conspired to run a scheme to defraud Tricare, the U.S. military’s healthcare system, through various kickback payments related to prescriptions for compounded pain and scar creams.

The government alleged the scheme took place between May 2014 and February 2016, defrauding Tricare out of \$100 million.

The other defendant acquitted in last week’s verdict was pharmacist Steven Kuper.

The overreach is apparent in the outcome, lawyers say. The acquittals are believed to be among the first — if not the first — in a case alleging compound pharmacy fraud involving Tricare.

“By any objective measure the significance is that this doesn’t happen very often,” **Jeff Ansley**, who represented Kuper at trial, told *The Texas Lawbook*. “Part of it was good lawyering and the other part was overreach by the government... it was criminalizing capitalism, which is completely inappropriate.”

Arianna Goodman, who also represented Kuper, said she hopes last week’s result causes the government to think harder before prosecuting.

“While this full acquittal [of Kuper] is justice, it is not restorative,” she said. The price paid is the continued damage these false assertions have caused. Hopefully, this sort of setback will ensure that prosecutors reexamine their cases to avoid false accusations.”

Some aspects of the government’s case clearly resonated with jurors. Two days after acquitting Cockerell, Kuper and Kiselak, jurors returned a conviction against drug marketer John Paul Cooper on eight counts, including one count of conspiring to commit healthcare fraud. But the jury also acquitted Cooper on two counts and could not return a verdict on seven other counts against him.

Likewise, jurors deadlocked on charges against two physicians, Walter Neil Simmons of Arizona and William F. Elder-Quintana, and prosecutors say they plan to retry those cases.

“We’re disappointed in the outcome... we felt the government hadn’t proven [its case] but we respect the jury’s verdict and will continue to work to represent Mr. Cooper,” said James Whalen, who represented Cooper.

The U.S. Attorney's Office in the Northern District of Texas, which prosecuted the case, has not made a specific comment on last week's outcome.

The government's case also resonated with some of the defendants. More than half of the original 13 defendants — seven total — struck plea deals with the government instead of standing trial.

Still, plea deals are often a calculation of the risks of going to trial against the federal government — including the cost of representation and the likelihood of a longer sentence.

“Ninety-seven percent of all people who are federally indicted plead guilty because they don't have the power and resources of the federal government,” Knox said. “Not only is it daunting to just be charged with a crime ... it takes a huge amount of courage to stand up to the government knowing what you're facing.”

And it's not just daunting for the defendants; it's equally daunting for criminal defense lawyers — regardless of how talented they are, lawyers say.

“You're fighting the largest, most well-heeled and well-armed organization in the entire world [in my opinion]: the Department of Justice,” said Ansley, a former federal prosecutor who now practices at Bell Nunnally & Martin in Dallas. “You're fighting a war against the largest army in the world. You have to be ready for a long fight... and stay empowered with psychological and physical stamina to engage in that fight.”

‘An unmitigated disaster’

One of the most telling witnesses at trial, defense lawyers said, was the government's star witness: Richard Cesario.

Cesario was one of the seven defendants who took a plea deal with the government and agreed to testify on their behalf at trial. He was also who the government considered as one of the architects of the scheme.

Cesario was on the stand for seven days, but defense lawyers say he did the government no favors.

For example, Ansley said, Cesario said on the stand that certain defendants got involved with the conspiracy many months before he had even met them. Goodman said Cesario also identified people who were not even involved. At other times, he would claim to have seen text messages that were nowhere on the record, Ansley said. Knox said Cesario also admitted that he lied to federal officials.

“I believe he was one of the worst witnesses I'd ever seen on a witness stand,” Ansley said. “Cesario in my view was an unmitigated disaster.”

“He couldn't keep straight what the lies were and what the truth was,” said Knox, who has her own criminal defense law firm in Dallas.

The defense lawyers said it was abundantly clear at trial that Cesario was lying in hopes of earning a lighter sentence.

“I think I beat him over the head with a club for the better part of a day,” Buckley said. “I'm proud of my work; I exposed him as a liar on a number of occasions. I hope and believe part of my work was helpful to the other defendants, as was their work helpful to us.”

Cesario co-owned and co-operated CMGRX, a company that primarily marketed compounded pain and scar cream to military patients insured through Tricare. The only aspect of Cesario's testimony that was credible was the backstory for why he got into the compound pharmaceutical business, Knox said.

He said he decided to get into the business after his wife, who was addicted to pain pills, died from an overdose. He said he wanted to provide an alternative solution to pain management in the midst of the opioid crisis.

"Cesario testified that his intentions were good and pure when he started... but greed got the best of him and his intentions changed," Knox said. "What was never clear was that he made those intentions known to everyone else — everyone else was still operating under [the good intentions he presented] while he took advantage of them."

Exhibit A was Kiselak, Knox said. He was the only of the six defendants to testify at trial.

A former starting center for the Dallas Cowboys, Kiselak got into sales after an injury ended his football career, Knox said. She said his career change suited him well because he was a "natural networker" and had a strong ability "to connect with people."

Knox said a business acquaintance introduced Kiselak to Cesario, who recruited him to join CMGRX to help market its compounded creams. Once there, Kiselak and another co-defendant led marketing groups that recruited military members and their families and offered them compensation in exchange for obtaining compounded drugs with their Tricare prescription benefits as part of a study, the indictment said. That study supposedly evaluated the safety and efficacy of compounded drugs.

But the government alleged at trial that it was a bogus study, and that the real reason for it was to compile a list of Tricare beneficiaries who would be paid for agreeing to receive the unnecessary compounded drugs.

Knox said a large part of her defense of Kiselak was presenting evidence — including emails and his testimony — that supported his state of mind at the time.

"Obviously when you're preparing your client to be cross-examined by people who are professional cross-examiners, it's a little intimidating," she said.

But, she added, "It's a beautiful thing when the truth is your defense. "He was trying to do everything the right way. Every time there was a concern he reported it up the chain of command."

A speed-bump that could have occurred during his testimony but didn't was a previous case Kiselak faced against the federal government. In 2009, Kiselak agreed to disgorge more than \$19 million in a civil suit brought by the U.S. Securities and Exchange Commission that alleged he and the investment firm he owned defrauded investors by misrepresenting how their money would be invested.

Knox said the prosecutors did not bring up the former case during Kiselak's testimony, nor did they ask the court for permission to bring up the subject at trial during pre-trial proceedings. Asked if she thought the SEC case played a role in Kiselak's indictment, she said she wasn't sure.

The logic behind who the government chose to indict seemed to have no pattern, she said. Knox said out of 16 other marketers involved who made more money than Kiselak did, only four were indicted. And five

marketers who made around the same amount of money as Kiselak did but were not indicted either, she said.

The only pattern Knox said she could think of is the federal government's track record with successfully prosecuting other professional athletes for their involvement in alleged Tricare fraud schemes.

One to have been prosecuted recently is former Jacksonville Jaguars linebacker Monty Ray Grow, who was sentenced last year to 22 years in prison after a jury convicted him of 18 charges, including kickbacks and conspiracy to commit healthcare fraud.

"I think it brings a noteworthy element to a case when you have an NFL player indicted," Knox said. "And because they were successful in making an example of the Jacksonville Jaguars player, they assumed they'd be able to do the same in Dallas."

But instead, the opposite happened. After seeing the jury form, Knox said she learned that Kiselak was the first defendant jurors decided to acquit during their deliberations, because they wrote that they had reached that decision on Dec. 5. The jury did not deliver that finding until Dec. 17, when it announced it had acquitted Kiselak, Kuper and Cockerell. Then jurors announced the fate of the three remaining defendants — Cooper, Simmons and Quintana — two days later.

The prosecutors on the case included Assistant U.S. Attorneys Douglas Brasher, Ryan Raybould and Renee Hunter.

In addition to Buckley, who practices at Buckley & Assoc., Cockerell's trial team also included Houston attorney Jim Lavine of Zimmermann Lavine & Zimmermann.

In addition to Whalen, who practices at the Whalen Law Office in Frisco, Cooper's legal team also included Whalen Law associate Ryne Sandel and Dallas solo practitioner Christopher Knox.

Simmons' lawyers were Shirley Baccus-Lobel and Cheryl Wattlely, who both run their own criminal defense law firms in the Dallas area and both were involved in the John Wiley Price public corruption trial.

Elder's lawyers were El Paso attorneys Mary Stillinger and Katherine Godinez.

U.S. District Judge Barbara Lynn of the Northern District of Texas presided over the trial. The case number is 3:16-cr-00060-M.

Editor's Note: Litigation writer Natalie Posgate is married to an attorney at Bell Nunnally who is not involved in this case.

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