

Jury returns \$43 million verdict against Precision Lens

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On February 27, a federal jury in Minnesota returned a verdict finding that Precision Lens and its co-founder, Paul Ehlen (together, Defendants), violated the Anti-Kickback Statute, and in turn the False Claims Act (FCA), by providing kickbacks to doctors to induce them to use Defendants' products, resulting in approximately \$43 million in single damages.

The U.S. Attorney's Office in Minnesota promptly announced that the Department of Justice (DOJ) will seek treble damages and statutory penalties under the FCA, which could potentially hike the \$43 million verdict up to \$485 million.

The government sought to prove at trial that, between 2006 and 2015, Defendants paid kickbacks to ophthalmologists to induce the physicians to utilize products provided by Precision Lens in connection with eye surgeries paid for by federal payors, including Medicare.

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DOJ argued that Precision Lens and Mr. Ehlen treated ophthalmologists to high-end dining and entertainment and private flights, among other things. The alleged kickbacks included upscale hunting, fishing, skiing, and golfing trips, discounted or free travel to and from the same, and discounted (or free) frequent flyer miles for the physicians' private use. DOJ further sought to establish that Defendants often covered these and similar costs outright, but when physicians paid anything in return, it was far below fair market value.

The ten-day trial took place between January 9 and February 13, when DOJ and Defendants submitted motions for judgment as a matter of law. Judge Wilhelmina M. Wright denied both parties' motions the same day and sent the jury to deliberate.

The jury was charged with deciding, among other things, whether DOJ had proven that Defendants had provided kickbacks to 47 individual physicians. As to each of those physicians, the 39-page jury verdict form listed the physician and the alleged kickback(s) received by the physician (for example, "Masters Golf Trip" or

"Private Flight"), and provided spaces for the jury to answer "yes" or "no" to the question "Did the following transaction amount to a kickback that resulted in a violation of the False Claims Act?"

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The jury deliberated for a total of five days (February 13 through February 16, and February 21) before returning its verdict on February 27. It found that Precision Lens and Mr. Ehlen violated the FCA by providing about two-thirds of the total number of kickbacks DOJ presented, and that Defendants had submitted 64,575 claims to the federal government tainted by those kickbacks, which resulted in nearly \$43.7 million in damages.

This case began almost a decade ago. On November 1, 2013, relator Kipp Fesenmaier filed a *qui tam* complaint against Precision Lens and Mr. Ehlen, Dr. Jitendra Swarup, Sightpath Medical (Sightpath), and 17 other defendants, most of whom were ophthalmologists.

In August 2017, DOJ intervened as to Defendants, Sightpath, and Dr. Swarup and declined to intervene as to the remaining defendants. Thereafter, Sightpath agreed to pay more than \$12 million to resolve the claims against it.

The jury found that Precision Lens and Mr. Ehlen violated the FCA by providing about two-thirds of the total number of kickbacks DOJ presented.

In addition to alleging that Defendants and Sightpath provided ophthalmologists with, among other things, high-end trips and private flights, DOJ alleged that Sightpath had entered into sham consulting agreements with physicians and physician practices for services that were never performed or improperly tracked, resulting in payments in excess of fair market value.

To avoid exclusion from Medicare, Sightpath also agreed to enter into a five-year corporate integrity agreement with the Department of Health and Human Services' Office of Inspector General (OIG).

In February 2018, Dr. Swarup agreed to pay \$2.9 million to resolve the government's claims against him, including that he had received kickbacks from Defendants and Sightpath, and had entered into sham consulting agreements with Sightpath.

In the recent jury trial resulting in a verdict against Defendants, the jury determined that four trips taken by Dr. Swarup were kickbacks from Defendants. Like Sightpath, Dr. Swarup also agreed to enter into a three-year integrity agreement with OIG to avoid

exclusion from Medicare. The whistleblower received 19.5% of the government's settlement recoveries from Sightpath and Dr. Swarup.

Under the FCA, the approximately \$43 million in damages found by the jury could be tripled to approximately \$130 million, and each false claim could potentially trigger a penalty between \$5,500 and \$11,000, resulting in total penalties between \$355 million and \$710 million.

In a statement provided by their attorneys after the verdict came down, Defendants asserted that they will "continue to defend [themselves] and [their] wholly appropriate actions as [they] navigate the appeals process." We here at *Qui Notes* will continue to monitor and report on case developments.

About the authors



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