‘Fired’ law firm goes after clients for cut in $3B deal

Took whistleblower case on contingency-fee basis

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By David E. Frank

It started out as the kind of whistleblower case plaintiffs’ lawyers dream about.

Two pharmaceutical salesmen who were about to blow the lid off widespread corruption at British-based GlaxoSmithKline hired a small Colorado law firm to represent them on a contingency-fee basis. The firm devoted seven years and countless hours to the complex False Claims Act suit, which eventually wound up in U.S. District Court in Boston.

By all measures, it should have been time well-spent for the two-lawyer firm of Cross & Bennett. The suit ultimately resulted in a record $3 billion criminal and civil settlement, with $75 million going to each of the whistleblowers in the qui tam action. The firm’s take: an estimated $30 million in legal fees.

But the dream case unexpectedly turned into an ugly nightmare.

According to a suit pending before U.S. District Court Judge Rya W. Zobel, the two whistleblowers fired the firm in 2009 “without cause.” Cross & Bennett’s Boston attorney, Thomas M. Greene, says the bulk of the work in the case had been done by that point, the firm had been informed that a “handshake deal” to settle was near, and U.S. Attorney Carmen M. Ortiz’s office had indicated it would intervene. The issue was not whether the whistleblowers would recover; it was simply how much money they would get.

Then the whistleblowers started bullying the firm into reducing its fee, Greene says. When the lawyers refused, they were fired.

The whistleblowers ultimately retained Kenney & McCafferty, which agreed to conclude the litigation at a far lower contingency rate than Cross & Bennett’s.

Greene, who represented a whistleblower in an FCA case against Parke-Davis and Pfizer that resulted in a $430 million criminal and civil settlement in 2004, says a ruling against the Colorado law firm would send a dangerous message to lawyers who take on risky whistleblower, or relator, cases.

“If a law firm works for seven years and brings the case close to the goal line and then gets fired and cannot recover, that would certainly have a chilling effect on lawyers wanting to work on these cases,” he says. “There are a group of attorneys across the country that do this kind of work. They’re concerned that something like this could happen and that a law firm could be left without being compensated.”

Navigating potential minefields

With an estimated $30 million of the award set aside in an attorney’s lien, Zobel will decide how much money to award the firm. Or she could agree with the whistleblowers’ contention that Cross & Bennett engaged in legal malpractice and award the firm nothing.

While a client has an absolute right to change counsel at any time, Greene says, the law must protect attorneys by ensuring that they are fairly compensated.

“When the termination is pretextual and is done just because the attorney won’t agree to reduce his fee, and there are threats made by the client that he will file ethics complaints or malpractice complaints that will ruin the attorney unless he agrees to the reduced terms, which is what happened here, the attorney has to stand up to that,” Greene says. “That is what [Cross & Bennett] did.”

Matthew J. Fogelman of Newton, co-counsel to the whistleblowers, downplays any chilling effect a decision against the firm might have on the bar.

“A ruling in our favor would simply indicate that the lawyers didn’t handle the case properly,” he says. “In complex, nuanced matters it is extremely important that counsel is as knowledgeable and experienced as possible and have the ability to foresee and to navigate through all potential minefields.”

Fogelman declines to elaborate on Cross & Bennett’s alleged mishandling of the case. But in an August 2012 filing, Fogelman and his co-counsel from Philadelphia’s Obermayer, Rebumann, Maxwell & Hippel wrote that law-firm partners Keith Cross and Joseph Bennett engaged in a pattern of gross malpractice marked by dishonesty, cover-ups and conflicts of interest.

“Other lawyers for the Government and other relators, ultimately obtained a favorable result from which the [whistleblowers] will benefit,” the filing stated. “Because of the defendants’ malpractice and misconduct, the plaintiffs suffered substantial losses equal to at least half the value of the case.”

‘Worst-case situation’

Rory H. Delaney of Boston, one of the lead lawyers in a FCA suit that settled for $780 million in U.S. District Court, says the whistleblowers’ argument in the Cross & Bennett case is perplexing.

“[The firm] must have done a decent job to have achieved, more or less, a record-setting deal,” he says. “What chance would you have of recovering in a negligence suit alleging that your lawyers had been negligent in achieving the largest settlement in history? It’s not going to even get off the ground.”

Delaney predicts that Zobel will decide the fee dispute by applying quantum meruit principles, under which lawyers are paid commensurate to the amount of work and risk associated with a case.

“This is a worst-case situation for anyone that does this work,” he says. “The idea that a lawyer could put all that work in, with all the risk involved, and get nothing out of a case that resulted in a record settlement is something we all should be worried about.”

Because qui tam litigation is so risky, he adds, legal fees should not be calculated simply by looking at the number of hours spent on a case. For every suit a lawyer files, the government intervenes in only one in four, Delaney approximates. Those rejected by the Department of Justice often end up fizzling out because the whistleblowers are unable to take on the bigger, better-funded companies.

“In virtually all those cases, the client pulls out because now they have to spend years and tons of money in litigation against a giant who can afford to crush them,” Delaney says. “If you think about the amount of work that goes into finding that one case that has legs, you ought to be rewarded when you have one that goes the distance. It can’t be that a firm [like Cross & Bennett] does all that work and gets nothing. ”

According to Joseph M. Makalusky of Boston, most qui tam lawyers — himself included — take FCA cases on a contingent-fee basis. The Ellis & Rapacki lawyer sees trouble ahead if the whistleblowers prevail in the Cross & Bennett suit.

“If a firm doesn’t get paid what it was expecting to get paid when it signed on and began doing all the work that goes into these cases, what you’re going to start to see is an ugly scramble of attorneys who are trying to undercut each other after the fact,” he says. “That would be a complete mess.”

Much of the work in FCA suits occurs at the beginning of the attorney-client relationship, when counsel is investigating the allegations and attempting to persuade the DOJ to intervene, according to Makalusky.

“These cases, unlike most others, have tons of upfront work, which is really the driving force in terms of making them successful,” he says. “So if you put in all this upfront work and somebody steps in at the end when everything is done and undercuts you, it would be a disaster.”

Michael B. Bogdanow, a trial lawyer at Boston’s Meehan, Boyle, Black & Bogdanow, notes that every state has a different provision regarding what happens when a client fires a lawyer in a contingency-fee case. While Colorado statutes may control because the fee agreement was signed there, the law in Massachusetts was recently amended, he says.

If an attorney-client relationship ends for any reason before the conclusion of a case, Massachusetts Rule of Professional Conduct 1.5 states that “the attorney may seek payment for the work done and expenses advanced before the termination.”

Under the rule, the amount of the payment to the lawyer depends on the benefit of the services rendered to the client, as well as the timing and circumstances of the termination.

The rule takes into account the “fair value” of the legal services supplied and the amount of money the lawyer would have been entitled to upon the occurrence of the contingency. And while there is no one way to calculate fair value, Bogdanow says, courts factor in the risk that a lawyer on a contingency-fee matter might not get paid at all.

“The lode star method is the standard rule of hours times hourly rate, but there are plenty of cases that say the courts should take into account several other factors, such as the quality of work and the value brought to the client,” Bogdanow says. “So it’s completely appropriate for a judge to look at a case and determine the worth of those services without limiting it to a very strict analysis that simply says, ‘Well, they worked 40 hours and charge $400 [an hour], so here’s what they get.”