

## Prosecutor Turf War Overshadows \$150M Maxim Deal

By **Hilary Russ**

Law360, New York (September 14, 2011, 4:43 PM ET) -- Maxim Healthcare Services Inc.'s Monday settlement of billing fraud allegations may be remembered for something other than its \$150 million price tag, after a rare public turf war erupted following accusations by federal prosecutors that state prosecutors had lied about their role in the case.

"It is extraordinary," said Daniel C. Richman, a professor at Columbia Law School. "The normal way a turf war plays out is through dueling leak programs. It is rare for an office to go on the record."

Maxim's settlement calls for the home health service provider to pay a \$20 million criminal penalty and \$130 million to settle a whistleblower suit accusing the company of engaging in a decadelong, nationwide billing scheme that allegedly defrauded Medicaid and U.S. Department of Veterans Affairs programs. Of that amount, the federal government will get about \$70 million and 42 states will split the remaining \$60 million.

But while divvying up the money isn't a problem, assigning credit appears to be a different story, with New Jersey Attorney General Paula Dow and U.S. Attorney for New Jersey Paul Fishman unleashing a war of words Monday few legal observers have ever seen.

Despite a five-year federal criminal probe sparked by a 2004 qui tam suit, prosecutors had largely been able to keep the Maxim investigation and case under wraps. All that was due to change Monday at a noon press conference when Tony West, assistant attorney general for the U.S. Department of Justice's Civil Division, was set to reveal the massive global settlement, the nine guilty pleas prosecutors netted from executives and others, and extensive compliance concessions by the company.

But before West and other federal officials could broadcast the news, a few major news outlets had already published stories on the Web based on Dow's press release hours earlier.

The release said that New Jersey had led more than 40 states to participate in reaching a settlement with Maxim and that Dow's office had "spearheaded" the "multistate investigation." It mentioned the U.S. Attorney's office and several others as coordinating agencies, prompting an angry response from the former outfit.

First Assistant U.S. Attorney J. Gilmore Childers fired off a statement that afternoon, saying that the state played "a limited administrative role in this case."

"It is troubling and disappointing that they would take credit for years of tireless work done by federal agents and prosecutors, particularly concerning an issue so important to the people of New Jersey," he said.

Dow shot back to say that it was unfortunate Childers would downplay her office's role.

"To call New Jersey's role 'administrative' is a mischaracterization of our significant efforts over several years in developing and analyzing evidence, and negotiating on behalf of the states with the company," she said.

Yet rather than bury the hatchet, Dow's reply garnered another angry statement from the feds, who accused Dow's office of lying.

"While pretending to be disinterested in who gets credit, the AG's office has continued to make claims about its role that are not true. The state did not develop evidence. In fact, because of grand jury secrecy, the AG's office did not even have access to more than 100 witness interviews and millions of documents uncovered by the federal investigation," said Rebekah Carmichael, a spokeswoman for the U.S. Attorney's office. "The federal government negotiated the more than \$150 million settlement directly with the company. The money returned to the states, including New Jersey's share, was automatically determined by a formula."

Asked for a response, AG spokesman Leland Moore said that the office stood by Dow's previous statement but declined to provide further details on the process that led to its press release.

"We are proud of the efforts of this office in this joint investigation, and the favorable resolution," he said. "We remain committed to working cooperatively with all of our state and federal law enforcement partners in the future."

It's still unclear exactly how or why the rift occurred, and a defense attorney for the company declined to discuss the turf war.

The two offices did communicate before the press releases were issued, but federal prosecutors did not know what the content of the state's comments would be, Carmichael said.

The feds took the unusual step of issuing the public statement in order to "correct the record," and the dispute was not about trying to deny anyone credit for their roles in the case, she said.

"It's a dispute over truth," Carmichael said, adding that the AG's office did not directly negotiate with the company or have an investigative role.

While turf wars themselves aren't uncommon, they're usually worked out before the resolution of a case is announced and they are almost never aired so publicly, experts say.

Considering that the general public doesn't always distinguish between exactly which agency is handling which aspect of the case, "either there's something else going on or there are personality differences that are unfortunately being aired through the media," said Lisa M. Noller, a partner at Foley & Lardner LLP in Chicago.

"There's really nothing to be gained by one side taking credit where credit isn't due," Noller said. "There's everything to be gained by putting forward a coordinated face of law enforcement."

This battle was all the more unusual because chief prosecutors in both offices have decades of experience and have almost undoubtedly encountered similar problems before without resorting to such measures — and because of significant overlap between the offices, experts said.

In particular, Childers is a long-time federal prosecutor well-known for going after terrorists and organized crime rings when he worked in Manhattan. He also spent more than a decade as in-house counsel for Goldman Sachs Group Inc.

Dow also has extensive prosecutorial experience. She formerly ran the Essex County Prosecutor's office, and she spent eight years in the U.S. Attorney's office in New Jersey — two of them as counsel to now-Gov. Chris Christie when he was the U.S. Attorney there.

Two of her chief prosecutors — First Assistant AG Phillip H. Kwan and Executive Assistant AG Marc Ferzan — each spent many years at the U.S. Attorney's office. Ferzan had worked on the Maxim case while he was a federal prosecutor.

Some experts said, however, that the way the dispute unfolded indicated that Childers in particular may have been deeply offended.

"If the feds did do most of the work I can understand why they'd be teed off," said Solomon Wisenberg, co-chair of Barnes & Thornburg LLP's white collar practice. He was not involved in the case.

Others questioned why the state would spend significant resources on settlement negotiations if in the end New Jersey will only get about \$2.7 million of the \$150 million pot. The whistleblower himself stands to receive more than five times the amount that New Jersey will take home.

"In the grand scheme of things that's beer money," said Day Pitney LLP partner Dennis T. Kearney, who is a former state prosecutor in New Jersey. "Everybody knows how qui tam cases play. And that's why I can say with much confidence that what the feds are telling you ... is exactly what went down."

--Editing by Anne Urda and Andrew Park.