

Federal Appeals Court Upholds Fraud Verdict Against Cornell University Medical School For Misuse Of NIH Aids Funding

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PHILADELPHIA, Sept. 6, 2012 /PRNewswire/ -- The 2nd Circuit Court of Appeals today upheld a federal court's judgment, based on a jury finding, that Cornell University's Weill Medical College and a former faculty member submitted false claims to the National Institutes of Health on three separate occasions from 1999-2001.

The grant was awarded by the NIH from funds specifically allocated by Congress for HIV/AIDS research. A clinical neuropsychologist then at Cornell, Wilfred van Gorp, applied for a training grant from NIH, promising to train post-doctoral fellows committed to a career in research in the neuropsychology of HIV/AIDS. With the judgment affirmed, Cornell and van Gorp face a total judgment of up to \$1.75 million.

Dr. Daniel Feldman, one of the fellows hired by van Gorp, brought suit in 2003 under a federal whistleblower statute, known as the False Claims Act, alleging that van Gorp and Cornell used the funds for inappropriate purposes, including requiring the fellows to see an excess of private fee-for-service patients with other medical conditions, and that the defendants failed to disclose their inappropriate use of the taxpayer money and the material changes in the program from what it promised to NIH when it applied for the funds, which Congress had particularly targeted for AIDS research.

At trial in July, 2010 before U.S. District Judge William Pauley, Dr. Feldman showed that of 165 clinical patients seen by the fellows over five years on the NIH-grant, only three patients were HIV- positive. Instead of seeing HIV- patients, the fellows engaged in more lucrative activities, often evaluating individuals referred by insurance companies or attorneys who were in litigation over disability or



worker's compensation claims, or criminal defendants. Indeed, Dr. van Gorp was well-known for his expert witness testimonies for the defense of several high-profile criminal defendants in New York during that period, including mob boss Vincente Gigante and Andrew Goldstein, the "subway pusher."

Feldman was elated by the news of the affirmance. "I am very gratified that the Court of Appeals has affirmed the jury's and Judge Pauley's findings of fraud. I was excited to join the fellowship, anticipating that I would be engaged in meaningful AIDS research. I was shocked that the reality was very different, and especially by the misuse of taxpayer funds which had been specifically targeted for HIV."

THE FEDERAL JURY TRIAL VERDICT

The case was heard before a jury and Judge William Pauley in federal district court in New York over two weeks in July, 2010. Following a verdict of three counts of fraud, the defendants requested a new jury trial from Pauley, which was promptly refused. Pauley wrote in December 2010, "There was ample evidence to support the jury's findings. In addition, this Court observed the demeanor of the trial witnesses. Feldman was as credible and honest a witness as this Court has seen. His testimony was compelling. In contrast, van Gorp's presentation bore indicia of a well-rehearsed performance. It was within the jury's discretion to discount his stagecraft."

The jury specifically found that, over the course of the five-year grant, Dr. van Gorp and Cornell knowingly submitted three progress reports containing false or fraudulent statements to NIH in order to continue the funding of the grant. The original grant application had described a rich program of faculty and research resources, along with a detailed core curriculum, including courses in HIV/AIDS. Dr. Feldman and his counsel, Michael J. Salmanson, of Salmanson Goldshaw, P.C. of Philadelphia, argued during the course of the 8- day trial that the original grant application and the subsequent progress reports contained numerous false statements designed to convince NIH to originally award and then continue the funding.

Dr. Feldman argued that the fellows were engaged primarily in activities related to medicolegal cases instead of HIV research. Indeed, Dr. van Gorp had represented in his initial grant application to the NIH that clinical work is a "springboard" for developing research activities, and considering the disproportionate number of medicolegal cases that the fellows evaluated, the focus of the fellows' research was unrelated to HIV. Dr. Feldman contended that Defendants misrepresented that the fellows would be exposed to formal HIV-courses that were never taught, key faculty on the grant who were never introduced to the fellows, and a breadth of HIV-research in which the fellows were never involved. Feldman argued that the defendants fraudulently failed to disclose the changes to NIH in each

of its annual progress reports to NIH, despite the fact that Cornell was legally obligated to disclose them in those reports, and that the deliberate non-disclosures would have been material to NIH's decision to continue to fund the grant. The jury agreed that Cornell had committed fraud in failing to disclose the changes – and affirmatively representing that no changes had occurred – in each of three successive progress reports.

Based upon the jury's findings of fraud, Judge Pauley had entered an award of \$855,714, representing three times the amount the government paid to Cornell subsequent to its submission of the first fraudulent progress report, plus \$32,000 in statutory penalties and more than \$625,000 in attorneys' fees and costs to Dr. Feldman.

THE AFFIRMANCE BY THE COURT OF APPEALS

The Court of Appeals rejected three separate arguments raised by Cornell and van Gorp. Defendants argued that the Court had miscalculated the amount of damages suffered by the Government; that the evidence was insufficient to prove that the fraudulent misrepresentations were material; and that the lower court improperly excluded evidence.

In its 48-page opinion, a panel of the Court of Appeals unanimously rejected all of Defendants' arguments.

As to damages, Cornell had argued that, since the fellows had received some training, it should have been entitled to argue that the Government received some "benefit of the bargain," and that the jury should have been allowed to reduce the damages by whatever value it believed the government had received. In a case of first impression in the 2nd Circuit, the Court held that, when the government does not pay for a tangible good, the Court had properly concluded that the measure of damages is the full amount of money that flowed from the government to the recipient.

As to materiality, the Court of Appeals rejected Defendants' contention that Feldman should have been required to present testimony from the NIH program officer who reviewed the progress reports, or another NIH official, that NIH would have cut off the funding. The Court noted that the jury had more than enough evidence, based on NIH's own rules and regulations presented at trial, that the defendants' misrepresentations about such items as the number of faculty involved in the program, the failure to teach the proposed curriculum, and an almost complete lack of access to HIV-patients, would naturally have been capable of influencing NIH's funding decisions.

Finally, the Court of Appeals held that Judge Pauley had not abused his discretion in excluding evidence of trial that neither the NIH nor the government had not acted in response to Dr. Feldman's earlier complaints about the fellowship.

THE LONG ROAD TO JUSTICE

The road to this particular verdict and affirmance has been long, especially considering that Dr. Feldman first raised these concerns to Cornell in 1999. After notifying the head of Psychiatry and the NIH, the NIH requested Cornell to complete an internal investigation into the fraud, which they took over two years to complete. Basing their findings on interviews with some of the faculty and four postdoctoral fellows, Cornell concluded they had done nothing inappropriate. The NIH apparently accepted Cornell's own conclusion that it had done nothing wrong. This lack of response from the NIH formed the basis of some of the argument from the defense for the appeal.

In 2003, after being turned down by another law firm, Dr. Feldman employed the counsel of Michael Salmanson, now of Salmanson Goldshaw, PC in Philadelphia, who filed a whistleblower case on his behalf. The government assembled a review team from the FBI, the Office of the Inspector General, and the Department of Health and Human Services. Their investigation took until April 2007, at which point they declined to intervene on behalf of Feldman, an option the government is granted for whistleblower cases.

During the government's investigation, the case was held "under seal," meaning that neither Dr. Feldman nor anyone involved in the case could discuss the matter with anyone outside of the investigation team. For Dr. Feldman, this was a difficult time; Dr. Feldman lost the support and collaboration of many of his colleagues and previous mentors and was professionally ostracized. As a fledgling practitioner who did not have the support of his postdoctoral mentor, and who could not talk about the lawsuit, finding a job or getting referrals was incredibly challenging.

"Before the government investigation, I even went to the American Psychological Association for help and complained about the program challenges and fraud," detailed Dr. Feldman. "When the case was under seal from the government, the APA closed my case without notifying they were doing so and refused to hear anything further, even after we received a jury verdict in my favor in 2010." The APA has told Dr. Feldman that they had cleared Dr. van Gorp of any wrongdoing, based on van Gorp's own account to the APA, and that they would not reopen the case without any new evidence being presented.

"I especially want to thank the other fellows, who truthfully and courageously testified at trial about their lack of focus on HIV research during their time on the fellowship, and confirmed that the defendants had not truthfully represented the progress of the program to NIH." Dr. Feldman says that in the ensuing years of the sealed investigations and trial, he was compelled to abandon his academic career. In 2003, he went into the pharmaceutical industry where he had built a successful second career. In 2008, Dr. Feldman was elected President of the Pharmaceutical Management Science Association, and in 2009, he was awarded the Pharmaceutical Market Researcher of the Year Award from the Pharmaceutical Market Research Group.

With this now finally behind him, Dr. Feldman expects to return to a full-time clinical practice and potentially an academic setting. "Thirteen years is a long time to wait for justice to prevail. But in the end, it feels good knowing that you stood up and did the right thing." From Dr. Feldman's perspective, during much of those 13 years, Dr. van Gorp has been allowed to continue his practice unfettered, being promoted at Columbia University, and providing his expert opinions at universities, in court, and at conferences to lawyers.

As the whistleblower, Dr. Feldman is entitled to up to 30% of the \$855,714 in damages, plus attorneys' fees and costs.

Dr. Feldman was represented by Michael Salmanson and Scott Goldshaw, of the two attorney firm Salmanson Goldshaw, PC in Philadelphia. Said Mr. Salmanson, "We are gratified by the opinion of the Court of Appeals, especially in its adoption of our position on damages. We hope that this is a potent reminder to those entrusted with federal taxpayer dollars that if they don't use the money as intended, they will face serious consequences. We are proud to have represented Dr. Feldman over the past decade, and admire his integrity and courage in standing up to a powerful institution." Salmanson added that he anticipates seeking in excess of \$150,000.00 in additional fees and costs incurred in the appeal.

Cornell was represented by Tracey Tiska, Brian Black and Eva Dietz at Hogan Lovells, LLP in New York. Dr. van Gorp was represented by Nina Beattie of Brune & Richard.

Dr. van Gorp left Cornell for Columbia at the tail end of the grant. He is now in independent practice at The Center for Cognitive Assessment in Chicago and New York.

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