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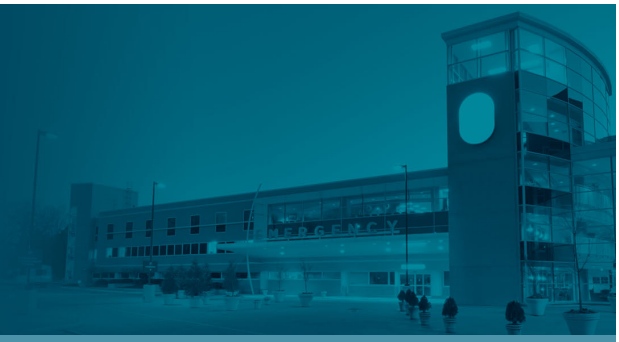

Seventh Circuit Appeal in Case Against Medical Center Could Impact the Ability to Bring Suits Under the False Claims Act

The decision in a case pending before the Seventh Circuit could affect the ability of plaintiffs to bring suit under the False Claims Act (FCA) in cases where the government already possesses information concerning the alleged fraud.

The FCA allows private citizens to bring lawsuits alleging that health care providers have submitted false claims for reimbursement under Medicare or other federal programs. In FCA claims brought by private plaintiffs, known as qui tam actions, the plaintiff receives a share of the recovery, often in the range of 20 percent. A qui tam action is thus a close cousin to the more common class action, in that both encourage private citizens to bring contingent litigation on behalf of absent parties, but in a qui tam case the absent party is the federal government.

The FCA includes provisions to discourage or prohibit suits that are redundant or without merit, including the "public disclosure bar," which prohibits a private plaintiff from bringing a qui tam suit based on facts that are already known, i.e., have been "disclosed," to the federal government through existing reports, investigations or other sources. The Seventh Circuit, which is now at the forefront in developing the public disclosure bar doctrine, has recently issued a series of decisions refining the definition of what constitutes a public disclosure sufficient to prohibit a private plaintiff from bringing a qui tam action based on circumstances already known to the government.

In a qui tam case being defended by the firm, the plaintiffs acknowledge that the government already had some knowledge of the alleged fraud before the plaintiffs filed suit, but they argue that their case is not precluded by the public disclosure bar because plaintiffs have offered factual detail beyond what the government had known before. The FCA, however, precludes qui tam actions in cases where the government already has enough information to be on the trail of the potential fraud, and in that circumstance, even if additional factual detail is provided that is insufficient for the plaintiffs to avoid the public disclosure bar. The result in this case will likely further define the meaning of the public disclosure bar, and the use of the FCA in the Midwest and nationwide.

Putative Class Action Seeks Ruling That Illinois Health Care Providers Must Accept Insurance Payments in Lieu of Asserting a Lien Against a Patient's Tort Recovery

A hospital or other health care provider is generally entitled to place a lien against the proceeds recovered in the patient's tort suit against the party responsible for the injuries, as a source of payment for the cost of the medical services. In a putative class action currently pending in an Illinois court, however, plaintiffs allege that the provider must seek payment only from the patient's insurer and that placing a lien against the proceeds of a patient's tort suit violates the contract with the insurer (which is silent on the issue) as well as the Illinois Consumer Fraud Act.

Recent appellate court opinions on the issue have been construed by some as conflicting, but the better reasoned opinion supports a provider's right to choose between accepting certain payment from the insurance company, at a discounted rate, or taking its chances on recovering in full from the proceeds of plaintiff's tort recovery. After all, if the tort suit is unsuccessful, a hospital that has opted to forego payment from the insurance company receives nothing.

Under the model advanced by plaintiff in the current class action, the hospital would be required to accept a discounted payment from the insurance company even though the plaintiff can use the full cost of the hospital's services in its proof of damages in the plaintiff's tort suit.

The decision in the case may clarify providers' rights in this area, either by upholding the right to place the lien or by expressly limiting the provider's lien rights and requiring a provider to seek payment only at the discounted rate from the insurer.

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Illinois Appellate Court Relies on the Rule of Non-Review to Uphold the Dismissal of Tort Claims by Physicians Whose Preliminary Applications for Privileges Were Rejected

The Illinois Appellate Court for the First District recently affirmed a trial court's dismissal of a multi-count complaint asserting claims for tortious interference and antitrust violations based on a hospital system's rejection of preliminary applications for privileges submitted by two surgeons, under the rule of non-review.

The rule of non-review generally precludes courts from reviewing a private hospital's decision to deny a physician's initial application for privileges. In an attempt to circumvent the rule, plaintiffs alleged that the decision to reject their preliminary applications was not made by the hospital's formal credentialing body, but instead by two staff physicians whose practices competed with those of the plaintiffs. The court rejected this argument based on undisputed evidence that the initial decision to deny the preliminary applications was later reaffirmed by the hospital administration. This ruling suggests that the claim might have survived if the evidence had shown that the decision to reject the preliminary applications was made by the two staff physicians without hospital oversight.

As for the antitrust claims, the court noted that the decision of the Illinois Supreme Court in the seminal case of *Barrows v. Northwestern Memorial Hospital*, decided 20 years ago, left open the question of whether the rule of non-review would bar antitrust claims. Without much analysis, the court held that in the absence of contrary authority from the Illinois high court, the rule of non-review will continue to bar not only traditional tort claims, but also antitrust claims based on a decision to reject preliminary applications for medical staff privileges.

The decision is important for two principal reasons. First it reaffirms that the rule of non-review precludes court review of a private hospital's decision to deny an initial application for staff privileges. Second, it provides a warning that the rule of non-review may not be applied if the decision to deny an initial application is made by staff physicians without the participation of the hospital credentialing committee or other administrators involved in the credentialing process. Hospitals should therefore ensure that denials of initial applications are reviewed by the hospital's credentialing body, to avoid claims for tortious interference and other torts based on allegations that the physicians denying the initial application had ulterior motives.

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