

## Hot Topics In Risk Management



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## Litigation Funding Companies Courting Whistleblowers

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With the COVID-19 pandemic has come an increase in federal funding, from the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") and the Paycheck Protection Program and Health Care Enhancement Act through the Provider Relief Fund. With an increase in funding, the United States Department of Justice ("DOJ") is also expected to increase fraud detection and enforcement measures. One method of recovering money from health care professionals who allegedly defraud the government are whistleblower, or *qui tam*, lawsuits. In these types of lawsuits, a whistleblower alerts the government of potential fraud. If the government itself declines to prosecute the case, the whistleblower may file a lawsuit on the government's behalf against the health care professional, alleging violation of the False Claims Act ("FCA").<sup>[1]</sup> If successful, the whistleblower is entitled to 25-30% of any verdict or settlement plus reasonable expenses, attorney's fees, and costs.

A recent 11<sup>th</sup> Circuit Court of Appeals case regarding *qui tam* lawsuits has raised some concern with health care professionals. In *Ruckh v. Salus Rehab*, a registered nurse at a skilled nursing facility filed a *qui tam* lawsuit against her employer for upcoding Medicaid bills. Since *qui tam* lawsuits can be costly and last for years, the nurse obtained funding from a third-party company, and in exchange offered a percentage of her recovery to the litigation funding company. The skilled nursing facility argued the arrangement violated the Constitution and the FCA. The 11<sup>th</sup> Circuit Court of Appeals disagreed, meaning that until Congress decides otherwise, third-party litigation funding companies can continue to fund and support *qui tam* lawsuits.

This should raise concerns for health care professionals who accept any Federal funding, including Medicare, Medicaid, or CARES Act money. With a likely proliferation of third-party litigation funding companies offering support, whistleblowers potentially will pursue more and more cases. Whistleblowers may now have less fear in bringing a lawsuit and may be less motivated to drop a case. This can be problematic even for health care professionals who think they follow all rules and regulations, as disgruntled former employees may now have the funding to push these cases forward when they might otherwise be dropped.<sup>[2]</sup>

Health care professionals who accept or have accepted Federal funding can do several things now to protect against the possibility of future *qui tam* lawsuits. First, and most obviously, is to carefully comply with all relevant laws and regulations. Second, health care professionals should create an environment of openness and trust with employees. Employers should encourage employees to engage in open and frank discourse with leadership as one way to limit the number of disgruntled employees who could become whistleblowers. Third, in the event an employee discovers any type of discrepancy or deviation, a health care professional should keep meticulous records and work with legal counsel to correct errors. Until Congress takes further action, or until other courts decide differently on similar cases, health care professionals should prepare now for an increase in this type of litigation.

<sup>[1]</sup> Health care professionals and their practices that *knowingly* submit a false or fraudulent claim to the Federal Government for payment or approval are subject to steep penalties under the provisions of the FCA.

<sup>[2]</sup> The DOJ has asked courts to dismiss some of the cases the DOJ perceives as meritless, taking seriously its responsibility to act as a gatekeeper. But some courts have disagreed with the DOJ and allowed these cases to move forward. The DOJ's actions should be comforting to health care professionals, while courts' refusals to dismiss these cases should be worrisome. Professionals involved in lawsuits in which the DOJ is willing to ask for a dismissal should work closely with the DOJ to ensure that courts can see that the DOJ conducted a thorough investigation which merits dismissal.

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