

Anderson Kill & Olick, P.C. HEALTHCARE NEWSLETTER

www.andersonkill.com

Autumn 2004

Pre-Empting Healthcare Whistleblowers

By John M. O'Connor and John H. Doyle, III

ANDERSON KILL & OLICK, P.C.
1251 Avenue of the Americas
New York, NY 10020-1182
(212) 278-1000
Fax: (212) 278-1733

ANDERSON KILL & OLICK, P.C.
1600 Market Street
Philadelphia, PA 19103
(215) 568-4202
Fax: (215) 568-4573

ANDERSON KILL & OLICK, P.C.
One Gateway Center
Suite 901
Newark, NJ 07102
(973) 642-5858
Fax: (973) 621-6361

ANDERSON KILL & OLICK, L.L.P.
2100 M Street, N.W.
Suite 650
Washington, DC 20037
(202) 218-0040
Fax: (202) 218-0055

ANDERSON KILL & OLICK (Illinois), P.C.
1821 Walden Office Square
Suite 400
Schaumburg, IL 60173
(847) 925-5430
Fax: (847) 925-5431

ANDERSON KILL & OLICK, P.C.
Two Sound View Drive
Suite 100
Greenwich, CT 06830
(203) 622-7668
Fax: (203) 622-0321

www.andersonkill.com

Whistleblowing in the healthcare field is a growth area. In the 2003 fiscal year, the government collected \$ 1.48 billion in suits initiated by whistleblowers under the federal False Claims Act. The healthcare industry has accounted for the lion's share of the recoveries. Here are some SAQs (Seldom Asked Questions) on why you should care about whistleblowing and what you can do about it.

What kind of "whistleblowing" are we talking about?

The Federal False Claims Act provides for penalties against those who file false claims with the government and gives a portion of the government's recovery to qualifying individuals who have provided the information on which the government's recovery is based. (These whistleblower suits are also called "*qui tam*" actions, a Latin shorthand for "one who brings the action for himself as well as the king.")

Why should healthcare executives care about this?

Big bucks are involved and healthcare entities are especially vulnerable. Healthcare entities, such as hospitals, laboratories, nursing homes, and physician practice groups submit a high volume of claims to the government. A false claim is punishable by a penalty of \$5,000 to \$10,000 *per claim*, plus *three times* the damages sustained by the government.

What range of damages are we talking about?

For example, \$641 million was recovered from HCA Inc. (formerly Columbia/HCA) to settle claims of over-billing and kickbacks. The whistleblowers' combined take was \$154 million. A California hospital system paid \$51 million to settle allegations that unnecessary cardiac procedures were performed. SmithKline Beecham Clinical Laboratories paid \$325 million based on allegations that lab tests were either not needed or not performed.

But we don't submit false claims.

Are you sure? There are important issues lurking beneath the surface here. First, although the statute exacts penalties only where the false claim is submitted "knowingly," the definition of "knowing" includes "reckless disregard of truth or falsity" and "acts in deliberate ignorance of truth or falsity." In other words, even if a healthcare entity did not intentionally sit down and decide to defraud the government, a court or jury might later decide that it had been reckless or culpably ignorant.

Second, claims can be considered "false" in ways that are not obvious. For example, courts have recognized a "certification theory" of liability under the False Claims Act. Suppose that in order to get paid, a healthcare



who's who

John M. O'Connor is a stockholder in the New York office of Anderson

Kill & Olick, P.C. and Chair of Anderson Kill's Healthcare Group. Mr. O'Connor has over 25 years of experience in litigation and healthcare in both government and private practice. A former Assistant U.S. Attorney in the Southern District of New York, Mr. O'Connor has also been an Adjunct Professor of Law at Cordozo Law School, and has published articles in the fields of litigation and health law. John can be reached at (212) 278-1014 or joconnor@andersonkill.com.



John H. Doyle, III, is a senior stockholder in the New York office of Anderson Kill & Olick, P.C. Mr. Doyle is former Chief of the Criminal Division

of the Southern District of New York. Mr. Doyle has handled internal corporate investigations and a variety of civil litigation matters. Mr. Doyle can be reached at (212) 278-1753 or jdoyle@andersonkill.com

The information appearing in this newsletter does not constitute legal advice or opinion. Such advice and opinion are provided by the Firm only upon engagement with respect to specific factual situations.

© Copyright 2004 Anderson Kill & Olick, P.C.

To subscribe to this or any of the Anderson Kill Newsletters and Alerts, visit:

www.andersonkill.com/subscribe/

To unsubscribe, please email unsubscribe@andersonkill.com

provider must represent that it has complied with certain federal statutes or regulations, or with certain contractual terms. If it is later proven that these provisions were not complied with, then the prior representation may be held false, subjecting the entity to the treble damages and penalties provided in the False Claims Act. Since such false certifications may have occurred over a several year period involving numerous claims, the potential exposure can be daunting. For example, it has been held that items and services must be "reasonable and necessary" in order to obtain payment under Medicare and that the submission of a claim implicitly certifies compliance with this requirement.

In addition to allegations that the items or services provided were unnecessary, false claims can be based upon allegations that the claim overstated the level of service provided, or that the claim billed for services that were not provided.

What can we do?

There are several steps that health care providers can take to prevent a whistleblower suit.

- The most important is to have a *working* internal compliance program for reporting possible or suspected problems. This is probably the most effective prophylactic measure that can be taken.
- Act on information that is received. Conduct an investigation to determine whether there is a potential problem. If the conclusion is that there is no problem, document what was done and the results. If there is a potential problem, take action to correct the situation.
- Keep employees grunted. Since disgruntled employees are the most likely persons to bring whistleblower actions, to the extent that employees (and other potential whistleblowers) feel valued, and that their concerns have been treated with respect—even where there is disagreement—they are less likely to resort to a whistleblower suit. ■

Mark Your Calendar

Modernization and Construction of Healthcare Facilities Seminar: Part I

Date: November 17, 2004
Place: Harvard Club of NYC, 27 West 44th Street, NYC
Time: 4:15 - 6:00 (Cocktails 6:00 - 7:00 pm)
Cost: Free

We cordially invite you to a seminar featuring discussions of the legal and related issues associated with the modernization of existing healthcare facilities and the construction of new ones—including hospitals, nursing homes and related facilities. Healthcare institutions not only face challenges common to any construction project. They also must deal with the many issues that are unique to healthcare. This seminar is the first of a two-part series that will explore many facets of the construction process, from the planning to project completion. Topics to be discussed at the first seminar include: HHS Evaluation of the Project, Land Use Issues, Dealing with Contractors and Architects, and Project Finance.

Part II—January 19, 2005
 [Seminar topics to be announced.]

For more information or to register for either or both of these seminars, please visit our website at www.andersonkill.com or contact Michele Elie at (212) 278-1318.