MASSACHUSETTS Lawyers Weekly
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JULY 16, 2020

Thanks to 11th Circuit, Boston attorney's whistleblower client regains $250M verdict

By Kris Olson

The COVID-19 pandemic may have shuttered Florida's theme parks, but Boston whistleblower attorney Royston H. "Rory" Delaney and his qui tam relator client still managed to go on a roller coaster ride in the Sunshine State recently.

In a False Claims Act case brought by registered nurse Angela Ruckh, a U.S. District Court jury initially found the defendants — two skilled nursing facilities, two related entities that provided management services at those and 51 other facilities in the state, and an affiliated company that provided rehabilitation services — liable for submission of 420 fraudulent Medicare claims and 26 fraudulent Medicaid claims.

The verdict: $115 million in damages, which escalated to almost $348 million when statutory trebling and penalties were applied.

However, the trial judge wiped the verdict away, ruling that it was unsupported by the evidence. He granted judgment as a matter of law and, for good measure, conditionally granted the defendants' request for a new trial as well.

But with its June 25 decision, the 11th U.S. Circuit Court of Appeals has reinstated the larger portion of the verdict, related to the Medicare claims.

On remand, the District Court has been directed to enter a judgment of more than $85 million, which with trebling and statutory penalties will total approximately $250 million — up to 30 percent of which will be awarded to Ruckh for pursuing the case on the government's behalf, according to Delaney.

"I can't see how the government can argue she should get less," Delaney says.

For five months, Ruckh had been charged with preparing the required Medicare and Medicaid assessments for two rehabilitation centers, during which she believed she had discovered three different forms of malfeasance.

First, she found that the defendants routinely engaged in "upcoding," artificially inflating the three-letter Resource Utilization Group code, or RUG code, tied to the amount of payments the Centers for Medicare & Medicaid Services makes to skilled nursing facilities.

Ruckh also found evidence of "ramping," in which spikes in treatment provided are deliberately timed to boost reimbursement from CMS.

The third form of alleged fraud pertained specifically to the Medicaid reimbursements the facilities received. Ruckh said those claims had been submitted without creating or maintaining comprehensive care plans for the residents.

The 11th Circuit upheld the lower judge's dismissal of the Medicaid-based claims, saying Ruckh had "failed to connect the absence of care plans to specific representations regarding the services provided."

"The FCA is not a wide-ranging tool to combat failures to comply with even important government regulations," U.S. District Court Judge Ursula Mancusi Ungaro, sitting by designation, wrote on behalf of the panel.

But as to the Medicare claims, the trial judge had drawn a somewhat mystifying series of conclusions about a supposed lack of evidence, at one point referring to the defendants' disputed practices as "a handful of paperwork defects."

"That characterization misses the mark," Ungaro wrote.

Rory Delaney

Instead, there was ample evidence to support the jury's finding that both upcoding and ramping had occurred, the 11th Circuit concluded.

Delaney says the trial judge's finding that there was no evidence of scienter, in particular, was a "curious oversight," given that his client's bosses had locked her in her office to prevent her from speaking with investigators.

As for Ruckh's claims against the management entity, the judge had found insufficient evidence that it had in any way directed the scheme. But at trial, a Florida former investigator relayed a conversation with a different registered nurse, who had been instructed to "have the RUG levels as high as possible so that the revenue, the reimbursement, was high."

Ruckh had also testified that she and other employees had been routinely pressured to "get the RUGs higher" to meet the company's financial targets and were reprimanded for failing to meet RUG budgets. Company management then reinforced those messages in weekly calls.

Ruckh survived a novel challenge to her standing premised on the fact that she had agreed to sell less than 4 percent of her share of the judgment originally entered by the District Court, if the jury verdict were upheld on appeal, to a litigation funder.

The defendants argued that the partial reassignment violated the Constitution and the text and structure of the False Claims Act, disqualifying Ruckh from continuing as a relator.

But the 11th Circuit didn't buy the constitutional argument, in part because the agreement stated explicitly that Ruckh retained sole authority over the litigation, and the litigation funder had no power to control or influence it.

As for the challenge grounded in the text of the FCA, the court rejected the invitation to "engraft" onto the statute a prohibition against relators entering into litigation funding agreements.

Of the defendants' "Hail Mary arguments," that is the one that would have had "massive implications" for a fast-growing litigation funding industry if the 11th Circuit had bought it, Delaney says.

Meanwhile, in terms of collecting on the verdict, Delaney notes that the private equity owners of the defendants have had three years in which to "move pieces on the chessboard." Having initially enjoined the defendants from anything outside of the "ordinary course of business," the trial judge allowed a motion to "modify certain management arrangements."

Any abusive machinations can be unwound, but the battle is "not over," Delaney acknowledges.

Delaney tried the case with lawyers from the Washington, D.C., firm now known as Kellogg, Hansen, Todd, Figel & Frederick, which counts Supreme Court Justice Neil M. Gorsuch among its alumni.