

## Pa. Hospital Network Bests Medicare Fraud Suit In 3rd Circ.

By **Matt Fair**

*Law360, New York (August 01, 2012, 8:58 PM ET)* -- The Third Circuit on Wednesday tossed a False Claims Act suit accusing Pennsylvania hospital network Guthrie Healthcare Systems Inc. of Medicare and Medicaid fraud, affirming that the whistleblower case brought by a former Guthrie employee was based on previously known information.

Former Guthrie general counsel Rodney Repko filed the qui tam suit in 2004, alleging the company illegally paid a subsidiary millions of dollars to generate referrals that were later reimbursed by the federal government.

A district court tossed the case in September, ruling the suit could not move forward because Repko's claims had been made public as part of a plea bargain Repko negotiated after he was charged for allegedly stealing \$2 million by forging the names of Guthrie officials on a loan document. On Wednesday, a three-judge panel for the Third Circuit upheld that decision.

"He gave this information only after he pleaded guilty to bank fraud, faced a substantial sentence and bargained for a lower sentence," the panel said. "We agree with the district court in this case that the plea agreement compelled Repko's disclosures."

Repko had argued that any information he provided as part of the plea bargain did not constitute public disclosure, as no one outside of the government was made aware of the allegations.

"The plea agreement's only reference to wrongdoing, other than to the charges against Repko himself, is the single sentence: 'The defendant has agreed to cooperate with the United States by providing information concerning the unlawful activities of others,'" Repko said in a December brief.

According to the Third Circuit's decision, the government investigated the information that Repko provided to them as part of the plea bargain and found it insufficient to warrant any criminal charges against Guthrie. The government, likewise, declined to intervene in Repko's qui tam suit, leading to the case being unsealed in 2006.

Repko leaned on the Third Circuit's decision in another FCA case, *Dunleavy v. County of Delaware*, which established a so-called X+Y=Z in determining whether fraud against the government had been committed. Since the totality of the disclosures did not point to fraudulent activity on the part of Guthrie, Repko said, his case should be allowed to move forward.

“The purported 'disclosures' are incomplete and deficient, containing little of X, none of Y and the affirmative representation of 'Not Z,’” Repko's brief said.

Repko alleged that Guthrie and at least one of its subsidiaries had financial relationships with one another, resulting in medical referrals that violated the Stark and Anti-Kickback acts. He also alleged that Guthrie employed a doctor who was excluded from the New York Medicaid program, resulting in false reimbursement claims.

Guthrie claimed that the relationships between its subsidiaries and doctors was made public on Internal Revenue Service forms and bond statements and information on its website, an argument that both the district court and the Third Circuit agreed with.

“The websites and prior litigation it referenced constitute public disclosure of information on both the issues of financial assistance between Guthrie entities, and associated referral relationships,” the Third Circuit said. “Repko's view that some of the disclosed information is vague or misleading — preventing the discovery of fraud — is unavailing.”

Attorneys for Repko could not immediately be reached for comment Wednesday.

Judges Anthony J. Scirica, Joseph A. Greenaway Jr. and Richard Nygaard sat on the panel for the Third Circuit.

Repko is represented by Mark B. Schoeller of Offit Kurman PA and Ronald V. Santora and Louis J. Sinatra of Bresset & Santora LLC.

Guthrie is represented by Eric W. Sitarchuk and David W. Marston Jr. of Morgan Lewis & Bockius LLP.

The case is U.S. ex rel. Repko v. Guthrie Clinic PC et al., case number 11-3682, in the U.S. Court of Appeals for the Third Circuit.

--Editing by Andrew Park.