

A 'Game Changing' Ruling For Whistleblowers

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In what is being called a game-changing decision, a federal court has ruled that a drug or device maker remains liable under the False Claims Act even when a pharmacy or hospital was unaware that a kickback was made to a doctor to induce the sale of a product for which reimbursement was sought from Medicare and Medicaid.

The ruling, which was issued earlier this week by US Court of Appeals for the First Circuit, has the potential to alter the outcome of countless whistleblower lawsuits that were filed against drug and device makers defending kickback charges, according to lawyers who have reviewed the decision ([you can read the ruling here](#)).

Other courts, for instance, have previously ruled that the False Claims Act could not have been violated if a pharmacy does not know that a prescription was only written because a drugmaker gave a kickback to a doctor. Whistleblowers have argued, however, that a violation occurs once reimbursement is sought from Medicaid or Medicare.

One recent example involved a whistleblower lawsuit brought by former Pfizer exec Peter Rost, who charged the drugmaker with marketing the Genotropin human growth hormone for unapproved uses. Last fall, a US District Court Judge in Boston ruled against him, in part, because a pharmacist could not have known that a doctor wrote a prescription due to a kickback from a drugmaker ([read here](#)). He plans to appeal.

“This means that you can’t play games and use somebody indirectly to accomplish the dirty work for you and get away with avoiding a false claims,” says Stephen Sheller, an attorney in Philadelphia who represents whistleblowers. “You can’t just simply pay off a doctor to write scrips and then when the pharmacy fills it, Medicaid and Medicare can’t recover.”

Adds Jeb White of Nolan & Auerbach, which has also brought whistleblower, or qui tam, lawsuits against the pharmaceutical industry: “This decision is a game-changer, for it rejects a lot of the judicially-created obstacles for legitimate FCA cases.”