

Medicare

DOJ Joins One More Whistle-Blower Lawsuit Alleging UnitedHealth Overcharged Medicare

Health insurance giant UnitedHealth Group used misleading and inaccurate information to boost its payments from the Medicare program, the government alleged in a complaint filed under the False Claims Act (*United States ex rel. Swoben v. Secure Horizons*, C.D. Cal., No. 09-cv-5013, complaint 5/1/17).

The Department of Justice alleged United obtained inflated risk adjustment payments based on untruthful and inaccurate information about the health status of beneficiaries enrolled in the company's largest Medicare Advantage (MA) plan, UHC of California. The DOJ May 1 intervened and filed an FCA complaint in the case filed by whistle-blower James Swoben. In a statement, United May 2 said the company is confident that it and its leaders "complied with Medicare Advantage program rules and were transparent with CMS about how we interpreted the government's murky policies."

John Gorman, executive chairman of the Gorman Health Group in Washington, told Bloomberg BNA May 2 that the DOJ's intervention in Swoben's case was a "huge development," and raised the enforcement stakes "not just with UnitedHealth, but for all Medicare Advantage insurers." Gorman also said that the intervention was a signal that President Trump's DOJ wouldn't ease up on scrutiny of MA insurers' risk adjustment practices.

Companion Cases The False Claims Act action follows the DOJ's intervention in another, related case filed by whistle-blower Benjamin Poehling, also against UnitedHealth, earlier this year. Both cases are pending in the U.S. District Court for the Central District of California, though Judge John F. Walter denied the government's request to consolidate the two cases in an April 27 order.

The DOJ and Swoben accused UnitedHealth of conducting "one-way" audits of its diagnosis code data, which are used to calculate payments for each of an MA insurer's beneficiaries. The government said UnitedHealth conducted review audits that would add diagnosis codes to patient charts that increased risk adjustment payments when additional patient diagnoses were found, but wouldn't remove incorrect diagnosis codes found during the review audits that would have reduced payments.

in August 2016, the U.S. Court of Appeals for the Ninth Circuit ruled in Swoben's favor that these types

of biased internal audits could form the basis of FCA claims.

William K. Hanagami, an attorney in Woodland Hills, Calif., who represents Swoben, told Bloomberg BNA May 2 that the government's intervention in both cases is a signal that the DOJ is giving "more scrutiny into fraud in the Medicare Advantage program." Hanagami said he was "pleased that [the DOJ] intervened," and that the government will be taking "a more active role in prosecuting the case."

Walter said in his April 27 order that it would be premature to consolidate the cases because the DOJ had yet to file its complaints in intervention in either of the actions. The DOJ is required to submit its complaint in the Poehling action by May 16 and Hanagami said the government could renew its request to consolidate the two cases at that time.

Counsel for UnitedHealth didn't respond to Bloomberg BNA's request for comment.

Administration Focus on Fraud Gorman said MA insurers were "breathing a sign of relief" after an April 3 MA call letter from the Centers for Medicare & Medicaid Services that eased up on an unpopular requirement that MA insurers use certain data in payment calculations. But the intervention in the Swoben lawsuit showed that MA insurers might be mistaken if they believed the call letter was indicative of a lighter government approach on risk adjustment going forward, Gorman said.

That viewpoint was echoed by Brian J. Markovitz, with Joseph Greenwald & Laake PA in Greenbelt Md., who frequently represents whistle-blowers in FCA cases. Markovitz told Bloomberg BNA May 2 that the DOJ's intervention shows that "there hasn't been much of a change in attitude" toward fraud enforcement in the MA context with the change in presidential administrations.

Importance of Compliance Markovitz also said that the DOJ's interest in the Swoben case showed just how focused the government is on health-care companies' compliance programs. The DOJ said in its complaint that maintaining an effective compliance program was "a prerequisite to an MA Organization's obtaining and retaining" payments, and that UnitedHealth failed in that regard by not correcting patient diagnosis codes it knew to be false after conducting review audits.

Hanagami said UnitedHealth's audits were "designed to game the system and inflate payments." Gorman said MA insurers must exhibit a "much higher degree of diligence and vigilance" in their plans and the audit process.

The Department of Justice represents the government. William K. Hanagami in Woodland Hills, Calif., and Abram J. Zinberg in Huntington Beach, Calif., represent Swoben. Latham and Watkins LLP represents UnitedHealth.

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The government's complaint is at <http://src.bna.com/orc>.

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