

UnitedHealth Beats DOJ's Medicare Advantage FCA Suit

By **Jeff Overley**

Law360, New York (October 5, 2017, 11:08 PM EDT) -- A California federal judge late Thursday axed a False Claims Act suit accusing UnitedHealth Group Inc. of ignoring questionable diagnoses to boost its Medicare Advantage profits, dealing a blow to an important test case brought by the U.S. Department of Justice.

The order by U.S. District Judge John F. Walter left open the door for the DOJ to strengthen its allegations, but only after identifying major shortcomings in a milestone complaint that the DOJ filed in May. According to Judge Walter, the suit is too vague, doesn't show intentional wrongdoing, and doesn't show that the government would have withheld payment if it had been aware of the alleged violations.

The complaint marked the first time that the DOJ joined a whistleblower suit alleging Medicare Advantage fraud. At issue are Medicare Advantage's "risk adjustment" payments, which increase if insurers cover sicker patients. The DOJ accused UnitedHealth of turning a blind eye to shoddy chart reviews by a company called Healthcare Partners LLC, thereby billing the government for unsubstantiated diagnoses.

But Thursday's ruling found that the complaint is also shoddy. For one, it said the suit failed to identify "material" FCA violations under a test described by the U.S. Supreme Court's landmark decision last year in *Universal Health Services v. Escobar*.

The complaint "includes only conclusory allegations that [UnitedHealth's] conduct was material, and fails to allege that [Medicare] would have refused to make risk adjustment payments to [UnitedHealth] if it had known the facts about [UnitedHealth's] alleged involvement with the Healthcare Partners' chart review process," Judge Walter wrote. "However, such conclusory allegations are insufficient to allege materiality under the False Claims Act in light of *Universal Health Services*."

Judge Walter also deemed the complaint too vague, saying it contains "classic shotgun pleading that wholly fails" to precisely allege how UnitedHealth entities committed wrongdoing.

In addition, Judge Walter said the DOJ failed to show that UnitedHealth knowingly submitted bogus data to the government, as required to prove FCA liability. According to Judge Walter, the complaint "failed to identify anyone" at UnitedHealth who knew that submitted data was faulty.

Judge Walter said the DOJ can file an amended complaint with beefed-up allegations if it desires.

The DOJ is still pursuing a separate suit with similar allegations in California federal court against UnitedHealth. In addition, UnitedHealth has launched a counterattack in D.C. federal court that accuses the federal government of unfairly holding it to a higher anti-fraud standard than traditional Medicare.

Judge Walter on Thursday tossed other allegations with prejudice. They include allegations from before May 1, 2007, which Judge Walter said are barred by a 10-year statute of repose. They also include alleged “reverse false claims” involving attempts to avoid returning overpayments. Judge Walter said that whistleblower James Swoben failed to appeal the dismissal of that theory when it was originally thrown out in 2013, making revival inappropriate.

Judge Walter on Thursday also tossed certain allegations brought solely by Swoben against Healthcare Partners. He did so based on the statute of repose and Swoben’s failure to appeal the dismissal of the reverse false claims theory.

None of the parties were available for comment Thursday night.

The U.S. is represented by Chad A. Readler, Sandra R. Brown, Dorothy A. Schouten, David K. Barrett, Linda A. Kontos, Michael D. Granston, Daniel R. Anderson, Carol L. Wallack, Jessica Krieg, Justin Draycott, Paul Perkins, James P. Kennedy Jr., John E. Lee and Kathleen Ann Lynch of the DOJ. Swoben is represented by William Kioki Hanagami and Abram Zinberg.

UnitedHealth is represented by David J. Schindler, Daniel Meron and Abid R. Qureshi of Latham & Watkins LLP.

Healthcare Partners is represented by Paul B. Salvaty, David W. Skaar, Michael C. Theis and Emily M. Lyons of Hogan Lovells.

The case is U.S. ex rel. Swoben v. Scan Health Plan et al., case number 2:09-cv-05013, in the U.S. District Court for the Central District of California.

--Editing by Breda Lund.