

Third Circuit Reinstates Kickback Claim Against Medicare Managed Care Plans

A federal appeals court June 30 reinstated whistleblower claims alleging that two Medicare Advantage plans violated a condition of payment under the Medicare Act by giving kickbacks to providers (*United States ex rel. Wilkins v. United Health Group Inc.*, 3d Cir., No. 10-2747, 6/30/11).

In so ruling, the U.S. Court of Appeals for the Third Circuit reversed and remanded, in part, a ruling that dismissed a lawsuit against United Health Care Inc. and its subsidiaries, AmeriChoice and AmeriChoice-New Jersey, collectively UHC. AmeriChoice and AmeriChoice-New Jersey are MA plans.

The ruling reinstated whistleblower qui tam claims brought by Charles Wilkins and Daryl Willis that the MA plans violated the False Claims Act by falsely certifying compliance with the anti-kickback statute (AKS). Both qui tam relators worked for UHC and alleged they were fired because they complained about UHC's marketing practices.

The court affirmed the district court's dismissal of claims against UHC and its subsidiaries, however, based on allegations that the companies violated FCA marketing regulations (14 HFRA 452, 6/2/10).

The appeals court ruled that the qui tam relators had not met the requirements of Federal Rule of Civil Procedure 12(b)(6) and 9(b) in that they failed to state claims upon which relief could be granted and failed to plead their claims with particularity, respectively.

Additionally, the appeals court said, the district court did not abuse its discretion in dismissing the marketing-based claims with prejudice, thus precluding the possibility that relators could cure defects in their pleadings. The relators failed to explain how they would cure the deficiencies, the Third Circuit said.

Importance of Case

The appeals court, however, said it disagreed with the U.S. District Court for the District of New Jersey "to the extent that it held that compliance with the AKS was not a condition for payment from the Government under the federal health insurance program."

The court said, "Compliance with the AKS is clearly a condition of payment under Parts C and D of Medicare [managed care and outpatient drug benefits, respectively] and appellees do not refer us to any judicial precedent holding otherwise."

Judicial precedent and the United States in its amicus brief agree with the relator's argument that certification of compliance with the FCA is a condition of payment by Medicare, the Third Circuit said.

Commenting on the ruling, Joseph E.B. White of Nolan & Auerbach P.A., Philadelphia, said, "This decision is important because it correctly focuses on the underlying culpability of the defendant, as opposed to myopically scrutinizing the individual false claims submitted by a wayward health care provider. When government health care programs pay for medical care, they require providers to 'turn square corners' with the government by not pocketing kickbacks."

The appeals court's opinion quoted Justice Oliver Wendell Holmes: "Men must turn square corners when they deal with the Government," from *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 56 (1920).

White added, "This decision places a judicial spotlight on the underbelly of health care kickbacks."

AKS Claim Properly Pleaded

The appeals court also disagreed with the district court on whether the relators properly pleaded their AKS claims. The whistleblowers properly summarized the applicable Medicare regulation and pleaded that an MA organization may not provide incentives that might induce enrollees to use a particular

provider, practitioner, or supplier, the court said.

Further, the whistleblower appellants alleged that UHC subsidiary AmeriChoice paid \$27,000 to the Reliance Medical Group to induce the clinic owners to change dual eligible beneficiaries from Horizon Blue and move them to AmeriChoice, the appeals court said. The relators also pleaded that AmeriChoice agents enticed doctors into receiving additional income if they provided agents with names of physicians' patients.

"Arguably, these allegations state a claim for relief under an express false certification theory inasmuch as appellants allege that appellees falsely certified compliance with the AKS in order to receive monthly payments from the Government," the court said.

Additionally, the appeals court expressly adopted the implied false certification theory of liability, joining U.S. appeals courts for the Second, Sixth, Ninth, Tenth, Eleventh, and District of Columbia circuits. But the Third Circuit added that the implied certification theory is not necessary to its decision to reinstate the claims by Wilkins and Willis, as UHC expressly certified compliance with the AKS.

The court said the theory is consistent with Congress's intent to "reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services."

The Third Circuit remanded the AKS portion of the case to the district court for proceedings in line with its decision.

Ross Begelman of Begelman, Orlow & Melletz, Cherry Hill, N.J., argued for the relators. Michael C. Theis of Hogan Lovells LLP, Denver, argued for UHC and its subsidiaries. Assistant Attorney General Tony West argued for the United States.

The opinion is at <http://op.bna.com/hl.nsf/r?Open=droy-8jcs5e>.