A Second Judge Gives United Health A Partial FCA Victory Based On Materiality

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On February 12, 2018, a second judge in the Central District of California, Judge Michael W. Fitzgerald, dismissed, with leave to amend by February 26, 2018, counts in a False Claims Act (FCA) case alleging that UnitedHealth had fraudulently inflated patient risk scores to obtain higher reimbursements from Medicare Advantage ("MA"). *United States ex rel. Poehling v. United Health Group, Inc.* (CV 16-08697-MWF (SSx)) ("*Poehling*").[1] One of the many recent cases applying the rigorous and demanding materiality standard established by the Supreme Court in *Universal Health Servs., Inc. v. United States ex rel. Escobar,* 136 S.Ct. 1989 (2016) ("*Escobar*"), the case is intertwined with the previous decision in a related case by a different judge in the same district, Judge John F. Walter. *United States of America ex rel. Swoben v. Scan Health Plan, et al.* (CV 09-5013-JFW (JEMx)) ("*Swoben*").

Poehling originally filed his *qui tam* lawsuit in the Western District of New York in March 2011. Five and a half years later, in November 2016, the Government moved to transfer the sealed action to the Central District of California, seeking to have it consolidated with *Swoben*, which had been filed there in 2009. Judge Walter declined to accept *Poehling* as a related case, however, and the case was assigned to Judge Fitzgerald, instead.

Medicare Advantage organizations must submit risk adjustment data to CMS, and each submission is a claim for payment. CMS's Risk Adjustment Processing System ("RAPS") allows MA organizations to delete previously submitted codes, so they can retract unsupported, invalid diagnoses. Each MA organization must certify that the diagnosis codes submitted for risk adjustment payments are accurate and truthful, based on best knowledge, information and belief. 42 C.F.R. § 422.504(1)(2). Both Poehling and Swoben alleged that United Health had submitted false Risk Adjustment Attestations.

On May 1, 2017, following a decision by the United States Court of Appeals for the Ninth Circuit that had permitted Swoben to file a Fourth Amended Complaint, the Government filed a "Complaint-in-Partial-Intervention" in his case against United Health. On May 16, 2017, the Government also filed a "Complaint-in-Partial-Intervention" against United Health in Poehling's case.

On September 28, 2017, Judge Fitzgerald denied United Health's motion to transfer the *Poehling* case to the District of Columbia, and ordered United Health to respond to the Complaint within twenty days.

In the interval, however, on October 5, 2017, Judge Walter dismissed the Government's Complaint in *Swoben*, with leave to amend in part by October 13, 2017. While Judge Walter found that the government's Complaint failed to identify the *corporate officers* who had signed the Attestations at issue, or that they knew or should have known that the Attestations were false, that it included only conclusory allegations that the conduct was *material* and failed to allege that CMS would have refused to make the payments if it had known of the conduct, and that the government's "classic 'shotgun pleading'" failed to "state clearly how each and every defendant is alleged to have violated" the statute, the Court also provided clear guidelines for amending the Complaint. Instead of amending the Complaint, however, on October 12, 2017, the Government moved to dismiss *Swoben* without prejudice.

1 https://www.agg.com/files/uploads/US-PoehlingvUnitedHealthcare.pdf

In light of the dismissal in *Swoben*, the parties in *Poehling* agreed that the Government would file an Amended Complaint in that case. Accordingly, on November 17, 2017, the Government filed its First Amended Complaint-in-Partial-Intervention, which included an additional FCA claim that was not at issue in Swoben.

United Health moved to dismiss in part on the ground that the Government had failed to adequately allege that the Risk Adjustment Attestations were material. Judge Fitzgerald found that, "with respect to the Attestations, as in Swoben, the Government has failed to allege that CMS would have refused to make risk adjustment payments if it had known the Attestations were false."

The *Poehling* Complaint also alleged, however, a claim based, not on the Attestations, themselves, but on the alleged submission of invalid diagnostic data. This claim alleged that, because United Health failed to delete invalid diagnoses in RAPS, they failed to return the Medicare overpayments they received based on the invalid diagnosis codes they submitted (reverse false claims). The Court upheld the claim for relief on this basis, as well as the common law claim of Unjust Enrichment and Payment By Mistake.

In dismissing the Attestation-based claims with leave to amend, the Court noted pointedly that, "*While there may be a Second Amended Complaint, there will be no Third. Any future successful motion to dismiss shall be granted without leave to amend."* (emphasis added).

Poehling and *Swoben*, like a growing number of cases, suggest that courts are becoming concerned with certain characteristics of FCA qui tam cases as they have evolved in recent years. First, it is noteworthy that *Swoben*, which was filed in 2009, lingered until late 2017 before being dismissed by the Government, while *Poehling*, which was filed in early 2011 is still alive. While not explicitly addressed by either judge, both cases involved lengthy periods of investigations under seal, with the concomitant effects of increasing the periods of time under scrutiny, as well as the costs and burdens of being under and defending a *qui tam* lawsuit.

Second, it has become increasingly clear that the courts are following the Supreme Court's characterization of materiality as "demanding" and "rigorous" closely. As a result, *qui tam* litigants are facing stricter scrutiny of their allegations and a higher standard of pleading than before.

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