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Health Care Qui Tam Update: August 2017

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In this month's issue of our *Qui Tam Update*, we review **a**n unusual cluster of five cases alleging that common defendants — a health care provider and its subsidiaries — provided medically unnecessary services to hospice, skilled nursing, and rehabilitation facilities. In addition, we feature a case in which a whistleblower claimed that an electronic records system's deficiencies resulted in the submission of false claims for federal incentive payments. Both law suits resulted in substantial settlements.

Overview of *Qui Tam* Activity

- We identified 23 health care?related *qui tam* cases that were unsealed in June 2017.
- Of those cases, the government intervened, in whole or in part, in eight cases and declined to intervene in 13. There were two cases in which the intervention status could not be determined from the case docket.
- The 23 unsealed cases were filed in 18 different districts. Four cases were filed in the active Middle District of Florida, while two apiece were filed in the Eastern District of Virginia and the Western District of Missouri. All remaining districts had one case apiece.
- The entities named in the *qui tam* actions included outpatient medical providers, laboratory testing companies, inpatient hospitals, and medical supply companies.
- All but three cases were brought by current and former employees of the defendants. Four of those 20 employee relators alleged they were victims of retaliation. One case was brought by a resident of a skilled nursing facility.
- Once again, there were long delays in unsealing these cases, with an average time under seal of just over two years and four months. One case had been under seal for almost nine years, another for over six, and only three cases were sealed for less than one year. No case was unsealed within the statutory 60 day period.

Featured Cases

A cluster of five cases against common defendants was settled in June 2017, concurrent with the unsealing of the two that had remained sealed until then.

United States, ex rel. Cretney-Tsosie v. Creekside Hospice II, LLC, No. 2:13-cv-167-HDM (D. Nev.); *United States ex rel. Deaton v. Skilled Healthcare Group, Inc.*, No. 4:14-cv-00219 (W.D. Mo.); *United States ex rel. McAree v. SunDance Rehabilitation Corp.*, No. 1:12-CV-4244 (N.D. Ga.); *United States, ex rel. West v. Skilled Healthcare Group Inc.,* No. 11-02658-ED (N.D. Cal.); and *United States ex rel. Wilson v. Skilled Healthcare Group, Inc.*, No. 14-cv-860 (W.D. Mo.)

Complaints Filed: *Cretney-Tsosie*: April 9, 2012; *Deaton*: March 7, 2014; *McAree*: December 7, 2012; *West*: March 2, 2011; *Wilson:* October 1, 2014

Complaints Unsealed: *Cretney-Tsosie*: December 30, 2015; *Deaton*: June 13, 2017; *McAree*: March 14, 2016; *West*: June 14, 2017; *Wilson:* June 14, 2017. Although the *Cretney-Tsosie* and *McAree* complaints were unsealed some time before the federal government intervened and the parties settled, there was no substantive litigation during the period between unsealing and settlement.

Intervention Status: *Cretney-Tsosie*: intervention-in-part by the United States and State of Nevada; *Deaton*: intervention-in-part by the United States; *McAree*: intervention by the United States; *West*: intervention-in-part by the United States; *Wilson:* intervention-in-part by the United States

Claims:

Cretney-Tsosie

False Claims Act (“FCA”), 31 U.S.C. § 3729(a)(1)(A), (a)(1)(B), and (a)(1)(G); Nevada False Claims Act, NRS 357.010 *et seq.*

Deaton

FCA, 31 U.S.C. § 3729(a)(1)(A) (False or Fraudulent Claims); FCA, 31 U.S.C. § 3729(a)(1)(B) (False Statements); California False Claims Act; Iowa False Claims Act: New Mexico Medicaid False Claims Act and New Mexico Fraud Against Taxpayers Act; Nevada Submission of False Claims to State or Local Government; Texas Medicaid Fraud Prevention Act

McAree

FCA, 31 U.S.C. § 3729(a)(1) (Presentation of False Claims); FCA, 31 U.S.C. § 3729(a)(2) (Presentation of False Statements); Payment by Mistake of Fact; Retaliatory Constructive Discharge

West

FCA, 31 U.S.C. § 3729 *et seq.*; California False Claims Act, Cal. Gov. Code § 12651 *et seq.*

Wilson

FCA, 31 U.S.C. § 3729(a)(1)(A) (False or Fraudulent Claims); FCA, 31 U.S.C. § 3729(a)(1)(B) (False Statements); California False Claims Act; Iowa False Claims Act: New Mexico Medicaid False Claims Act and New Mexico Fraud Against Taxpayers Act; Nevada Submission of False Claims to State or Local Government; Texas Medicaid Fraud Prevention Act

Defendants' Business: The defendants provide rehabilitation therapy, hospice, and nursing services.

Relators: Joanne Cretney-Tsosie, Jennipher Deaton, Kimberley Green, Camaren Hampton, Teresa McAree, Terri West, and Brian Wilson.

Relators' Relationship to Defendants: Relator Cretney-Tsosie was an administrator for Creekside Hospice II LLC; Relator Deaton held positions at Skilled Healthcare SNF Liberty Terrace and Rehabilitation Center including "Medicare Manager for the Express Recovery Unit (ERU)/ Nurse Manager"; Relator Green held positions at Skilled Healthcare Liberty Terrace including "MDS/ PPS Nurse Manager"; Relator Hampton held positions at Skilled Healthcare Liberty Terrace including "MDS, Long-Term Care/ Nurse Manager"; Relator McAree was a physical therapist at SunDance Rehabilitation Corp.; Relator West held positions including "Director of Rehabilitation"; Relator Wilson was "Director of Rehabilitative Therapy Services" at Hallmark Rehabilitation, LLC.

Relator's Counsel: *Cretney-Tsosie*: Hughes Socol Piers Resnick & Dym, Ltd., The Terry Law Firm, Ltd., and Cohen Law Group; *Deaton*: Brous Law LLC and Brous, Horn, LLC; *McAree*: Fields Howell LLP and Wood Smith Hening & Berman, LLP; *West*: The Garcia Law Firm;*Wilson:* Brous Law LLC and Brous, Horn, LLC

Summary of Cases: This cluster of cases, two of which were unsealed in June 2017, resulted in a settlement resolving four main sets of allegations against Genesis Healthcare, Inc. and its subsidiaries (together, "Genesis"). Genesis owns and operates skilled nursing facilities, assisted/ senior living facilities, and a rehabilitation therapy business. In its press release announcing the settlement, the United States Department of Justice described the resolved allegations as follows:

> First, the settlement resolves allegations that from April 1, 2010 through March 31, 2013, Skilled Healthcare Group Inc. (SKG) and its subsidiaries, Skilled Healthcare LLC (Skilled LLC) and Creekside Hospice II LLC, knowingly submitted or caused to be submitted false claims to Medicare for services performed at the Creekside Hospice facility in Las Vegas, Nevada by: (1) billing for hospice services for patients who were not terminally ill and so were not eligible for the Medicare hospice benefit and (2) billing inappropriately for certain physician evaluation management services.
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> Second, this settlement resolves allegations that from Jan. 1, 2005 through Dec. 31, 2013, SKG and its subsidiaries, Skilled LLC and Hallmark Rehabilitation GP LLC, knowingly submitted or caused to be submitted false claims to Medicare, TRICARE, and Medicaid at certain facilities by providing therapy to certain patients longer than medically necessary, and/or billing for more therapy minutes than the patients actually received. The settlement also resolves allegations that those companies fraudulently assigned patients a higher Resource Utilization Group (RUG) level than necessary. Medicare reimburses skilled nursing facilities based on a patient's RUG level, which is supposed to be determined by the amount of skilled therapy required by the patient.

Third, this settlement resolves allegations that from Jan. 1, 2008, through Sept. 27, 2013, Sun Healthcare Group Inc., SunDance Rehabilitation Agency Inc., and SunDance Rehabilitation Corp. knowingly submitted or caused the submission of false claims to Medicare Part B by billing for outpatient therapy services provided in the State of Georgia that were (1) not medically necessary or (2) unskilled in nature.

Finally, this settlement resolves allegations that between Sept. 1, 2003 and Jan. 3, 2010, Skilled LLC submitted false claims to the Medicare and Medi-Cal programs at certain of its nursing homes for services that were grossly substandard and/or worthless and therefore ineligible for payment. More specifically, the settlement resolves allegations that Skilled LLC violated certain essential requirements that nursing homes are required to meet to participate in and receive reimbursements from government healthcare programs and failed to provide sufficient nurse staffing to meet residents' needs.

Current Status: On June 16, 2017, the United States Department of Justice announced that Genesis will pay the federal government $53,639,288.04. The Relators will receive a combined $9.67 million as their share of the recovery. The settlement agreement resolving federal intervention in the cases specified that the settlement did not release Genesis from attorneys' fees and costs, and that, should the parties be unable to reach agreement on fees and costs, the district courts would retain jurisdiction to resolve any disputes. The states of Texas, Missouri, Nevada, Iowa, and California also provided releases to Genesis and were entitled to a portion of the overall settlement amount. New Mexico's claims were dismissed without prejudice.

Reasons to Watch: This cluster of cases is particularly interesting because it involves multiple *qui tam* lawsuits, advancing substantially similar allegations that were filed by different relators in disparate venues against units of a single corporation. What all have in common are allegations of medically unnecessary services involving hospice, skilled nursing and rehabilitation facilities. The growing demand for such services as the population ages has led to an increasing enforcement focus on long-term care directed toward elderly patients. The Department of Justice's press release commenting on the case noted that the matter was handled by the DOJ Civil Division's Commercial Litigation Branch; the U.S. Attorneys' Offices for the Northern District of California, the Northern District of Georgia, the Western District of Missouri, and the District of Nevada, and the U.S. Department of Health and Human Services Office of Inspector General. This is illustrative of the numerous government entities involved in litigating and settling *qui tam* actions in the health care field. It is important for companies choosing defense counsel to select counsel who have experience negotiating with the many levels and branches of the federal government, and sometimes, various state governments. Companies should also heed another important lesson from this group of cases. The DOJ press release describing the settlement noted that SKG and its subsidiaries were acquired by Genesis after the conduct at issue in this settlement, and that Sun Healthcare Group Inc., SunDance Rehabilitation Agency Inc. and SunDance Rehabilitation Corp. were acquired by Genesis in December 2012. Businesses contemplating acquisitions are well-advised to perform due diligence to reduce the risk that they will face possible liability for potentially unlawful conduct undertaken by the acquisition target in the past. Such due diligence may be difficult in fields like the health care industry where allegations of fraud or false claims are commonplace and are often the subject of unexpected or sealed *qui tam* complaints. Nonetheless, acquirers should take the time to ask the right questions and review records that could form the basis for allegations of liability post-acquisition.

***Delaney v. eClinicalWorks*, 2:15-cv-00095-wks (D. Vt.)**

Complaint Filed: May 1, 2015

Complaint Unsealed: May 30, 2017

Intervention Status: On May 12, 2017 the United States intervened for the purpose of settlement.

Claims: Relator brought a claim under the FCA, 31 U.S.C. § 3729 (a)(1) (A), (a)(1)(B), premised upon a violation of the Anti-Kickback Statute ("AKS").

Defendant's Business: The defendant, eClinical Works ("ECW"), is a privately held software company that develops and supplies electronic health records ("EHR") systems.

Name of Relator: Brendan Delaney

Relator's Relationship to Defendant: Relator Delaney is an EHR system project manager. He previously worked for several institutions that implemented ECW's electronic health records system. Specifically, Relator Delaney was an implementation specialist with the New York City Division of Health Care Access and Improvement, a senior consultant at Arcadia Solutions and a consultant for HSM Consulting. Through these positions, Relator Delaney consulted with numerous health care providers. He is currently a project manager for UnitedHealth Group.

Relator's Counsel: Eric Poehlmann and Tristram Coffin of Downs Rachlin Martin, PLLC, and Colette Matzzie, Larry Zoglin and Ari Yampolsky of Phillips & Cohen LLP.

Summary of Case: This matter concerns the EHR Incentive Program, which was established by the American Recovery and Reinvestment Act of 2009 to encourage health care providers to demonstrate their "meaningful use" of EHR technology. Under the program, the U.S. Department of Health and Human Services ("HHS") offers incentive payments to health care providers who utilize certified EHR technology and meet requirements relating to its use. To obtain certification, companies that develop and market EHR software (like ECW) must attest that their software satisfies the applicable HHS criteria and must also pass testing by an HHS-approved certifying entity.

The government's complaint-in-intervention contends ECW concealed significant flaws in its EHR systems and misrepresented to both the HHS and ECW purchasers that its systems complied with program requirements. Specifically, Relator alleged that ECW reviewed publicly available test scripts in advance of software certification testing and then allegedly modified its software by "hardcoding" only the sixteen drug codes that would be tested, rather than fully programming the software as required.

Further, the government's complaint alleged ECW's software did not accurately record user actions in an audit log and did not always properly record diagnostic imaging orders or perform drug interaction or allergy checks. In addition, the complaint alleged ECW's software failed to satisfy data portability requirements that are necessary to permit health care providers to transfer patient data from ECW to other vendors. The Complaint asserted that, as a result of these and other deficiencies, ECW caused the submission of false claims for federal incentive payments based on the use of ECW's software. The Complaint also charged that ECW paid unlawful remuneration to influential customers to recommend its product to additional prospective customers.

Current Status: On May 31, 2017, the Department of Justice ("DOJ") issued a press release stating ECW and its Chief Executive Officer ("CEO"), Chief Marketing Officer ("CMO"), and Chief Operating Officer ("COO") agreed to pay a total of approximately $155 million to resolve the lawsuit. Notably, ECW and the CEO, CMO, and COO are jointly and severally liable for the payment of the settlement amount under the terms of the settlement agreement. Separately, an ECW developer must pay $50,000 and two project managers must each pay $15,000.

The settlement agreement further required ECW to enter into a Corporate Integrity Agreement with the HHS Office of Inspector General ("OIG"), requiring, among other things, that ECW retain an Independent Software Quality Oversight Organization ("ISQOO") to assess ECW's software quality control systems and provide written semi-annual reports to the OIG and ECW documenting ISQOO's reviews and recommendations. According to the settlement agreement, ECW must also retain an Independent Review Organization to review ECW's arrangements with health care providers to ensure compliance with the AKS. The case was dismissed on July 20, 2017.

Reasons to Watch: This case serves as a reminder that relators may not only be employees, but customers with whom a defendant does business. Companies should establish policies and procedures to encourage customers to communicate their concerns in the course of the business relationship—rather than in a *qui tam* suit.

This case is notable because the settlement agreement held the CEO, CMO, and COO jointly and severally liable for the large majority of the settlement amount. This is perhaps, in part, based on ECW's allegedly deliberate effort to hide its systems' non-compliance with program requirements. Further, the inaccuracy of patient data presents a unique harm to patients. The DOJ specifically noted in its press release that "millions of Americans rely on the accuracy of their electronic health records to record and transmit their vital health information."

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