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BLOG

Sutter Health's $90 Million FCA Settlement Highlights Enforcement Focus on Medicare Advantage Program Fraud

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On August 30, 2021, the U.S. Department of Justice (DOJ) announced that Sutter Health and several affiliates, including the Palo Alto Medical Foundation, agreed to pay $90 million to resolve claims that they violated the False Claims Act (FCA) by knowingly submitting inaccurate and unsupported information about the health status of individuals enrolled in Medicare Advantage (or Medicare "Part C") plans in order to increase payments to Medicare Advantage Organizations with which they contracted, and ultimately themselves.[1]

The settlement resolves claims that stem from a *qui tam* complaint filed by Relator Kathleen Ormsby, a former employee of Palo Alto Medical Foundation, in March 2015.[2] In December 2018, the United States intervened in part and filed its Complaint in Intervention in March 2019.[3] In its Complaint, the government alleged that Sutter Health and Palo Alto Medical Foundation began a "campaign" in roughly 2010 to "increase the number of risk-adjusting diagnosis codes" submitted to Medicare Advantage plans, which resulted in Sutter Health receiving and retaining tens of millions of dollars in overpayments from the Centers for Medicare and Medicaid Services (CMS).[4] More specifically, the United States alleged that, among other things, Sutter Health and Palo Alto Medical Foundation (i) pre-populated Medicare Advantage beneficiaries' medical records with diagnosis codes before physicians saw or diagnosed the beneficiaries; (ii) had nonphysician coders review Medicare Advantage beneficiaries' medical records and retroactively add codes that the physicians allegedly "missed" or change the physicians' codes to ones for more severe conditions; and (iii) submitted unsupported diagnosis codes to CMS and prohibited their internal auditors from deleting unsupported diagnosis codes. The United States further alleged that Sutter Health knowingly ignored red flags raised by auditors and treating physicians who identified false claims, statements, records, and overpayments.

After the United States intervened in part with respect to the claims against Sutter Health and Palo Alto Medical Foundation, the Relator filed a first amended complaint in April 2019.[5] This complaint was broader than the government's Complaint in Intervention, as it alleged that Sutter Health committed similar violations of the FCA through its other affiliates.[6] The Defendants sought to preclude the Relator from pursuing these more expansive FCA claims, arguing that the Relator could not maintain a broader FCA action than the government's FCA action.[7] The Northern District of California, in a lengthy opinion denying the Defendants' motions to dismiss both the government's Complaint in Intervention and the Relator's amended complaint on this and other grounds, rejected

this argument and sided with the vast majority of courts that have found that the government's decision to intervene with respect to certain FCA claims does not preclude a relator from pursuing non-intervened FCA claims.[8]

Under the terms of the settlement, the $90 million owed by Sutter Health will be offset by a $30 million settlement that Sutter Health and several affiliates other than Palo Alto Medical Foundation reached with the DOJ in April 2019 to resolve non-FCA claims stemming from similar allegations involving the submission of inaccurate information about the health status of beneficiaries enrolled in Medicare Advantage plans that resulted in the plans being overpaid.[9] Payment of the remaining amount will release Sutter and its affiliates from the outstanding FCA claims by both the government and the Relator.

In connection with the settlement, Sutter Health and certain affiliates also entered into a five-year Corporate Integrity Agreement with the U.S. Department of Health and Human Services, Office of Inspector General (HHS-OIG).[10] As part of that agreement, Sutter Health is required to implement a risk assessment program and hire an independent organization to audit its Medicare Advantage patient records.

As previously discussed in the FCA Playbook, combatting fraud in the Medicare Advantage Program has become one of the DOJ's main priorities. The Sutter Health settlement—which was the result of a coordinated effort by the DOJ Civil Division, the U.S. Attorney's Office for the Northern District of California, and HHS-OIG—is yet another example of a large recovery obtained from health care providers alleged to have defrauded the Medicare Advantage Program in recent years.

KEY TAKEAWAYS:

- The Sutter Health settlement reaffirms the government's commitment to hold accountable health care providers that exploit Medicare Advantage Programs for their own gain.
- Despite an increase in government-initiated FCA matters in the government's 2020 fiscal year, whistleblower-initiated *qui tam* suits such as this one continue to serve as a substantial driver of FCA recoveries. For example, of the more than $2.2 billion recovered by the government in FCA matters in fiscal year 2020, approximately $1.69 billion—76% of the total recovered—was secured in *qui tam* matters, with awards to whistleblowers of more than $309 million.[11]
- Entities facing FCA claims may be exposed to expanded liability if, after the government intervenes in certain FCA claims in a relator's *qui tam* action, the relator chooses to pursue non-intervened FCA claims, such as in the Sutter Heath case. As the court's motion to dismiss opinion makes clear, the vast majority of district courts have allowed relators to proceed with the non-intervened portions of their case along with the intervened claims that become the primary responsibility of the government to pursue.

If you have additional questions or need further assistance, please reach out to **Suzanne Jaffe Bloom** (Co-Chair, White Collar, Regulatory Defense, and Investigations), **Amandeep Sidhu** (Partner, White Collar, Regulatory Defense, and Investigations), **Benjamin Sokoly** (Of Counsel, White Collar, Regulatory Defense, and Investigations), **Kaitlin Pierce** (Associate, White Collar, Regulatory Defense, and Investigations), or your Winston & Strawn relationship attorney.

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[1] *See* DOJ Press Release, "Sutter Health and Affiliates to Pay $90 Million to Settle False Claims Act Allegations of Mischarging the Medicare Advantage Program" (Aug. 30, 2021), *available at* https://www.justice.gov/opa/pr/sutter-health-and-affiliates-pay-90-million-settle-false-claims-act-allegations-mischarging (last visited Sept. 20, 2021) [hereinafter "Sutter Health Settlement Press Release"].

[2] *See* Sutter Health Settlement Press Release; *United States ex rel. Ormsby v. Sutter Health, et al.* Complaint, Civ. No. 15-CV-01062-LB (N.D. Cal.), Dkt. 1.

[3] *See* United States' Complaint in Intervention, *United States v. Sutter Health et al.*, Civ. No. 3:15-CV-01062-JD (N.D. Cal. Mar. 4, 2019), *available at* https://www.justice.gov/opa/press-release/file/1428661/download.

[4] *Id.*

[5] *See* Relator's First Amended Complaint, *United States ex rel. Ormsby v. Sutter Health, et al.*, Civ. No. 3:15-CV-01062-LB (N.D. Cal. Apr. 23, 2019), Dkt. 52.

[6] The government previously settled with Sutter Health and its non-Palo Alto Medical Foundation affiliates for $30 million in a non-FCA settlement, which amount was offset against this current settlement as discussed below. *See* DOJ Press Release, "Medicare Advantage Provider to Pay $30 Million to Settle Alleged Overpayment of Medicare Advantage Funds" (Apr. 12, 2019), *available at* https://www.justice.gov/opa/pr/medicare-advantage-provider-pay-30-million-settle-alleged-overpayment-medicare-advantage (last visited Sept. 20, 2021).

[7] *See* Motion to Dismiss Relator's First Amended Complaint, *United States ex rel. Ormsby v. Sutter Health, et al.*, Civ. No. 3:15-CV-01062-LB (N.D. Cal. June 14, 2019), Dkt. 68.

[8] *See* Order Denying Defendants' Motions to Dismiss, *United States ex rel. Ormsby v. Sutter Health, et al.*, Case No. 15-CV-01062-LB (N.D. Cal. Mar. 16, 2020), Dkt. 114 at 85-91.

[9] *See* Settlement Agreement, *available at* https://www.justice.gov/opa/press-release/file/1428656/download; DOJ Press Release, "Medicare Advantage Provider to Pay $30 Million to Settle Alleged Overpayment of Medicare Advantage Funds" (Apr. 12, 2019), *available at* https://www.justice.gov/opa/pr/medicare-advantage-provider-pay-30-million-settle-alleged-overpayment-medicare-advantage (last visited Sept. 20, 2021).

[10] *See* Corporate Integrity Agreement Between the Office of Inspector General of the Department of Health and Human Services and Sutter Health, Sutter Bay Medical Foundation, and Sutter Valley Medical Foundation, *available at* https://oig.hhs.gov/fraud/cia/agreements/Sutter_Health_Sutter_Bay_Medical_Foundation_and_Sutter_Valley_Medical_Foundation_08302021.pdf.

[11] *See* DOJ FY2020 Statistics (Jan. 14, 2021), *available at* https://www.justice.gov/opa/press-release/file/1354316/download (last visited Sept. 20, 2021).

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Suzanne Jaffe Bloom

Amandeep S. Sidhu

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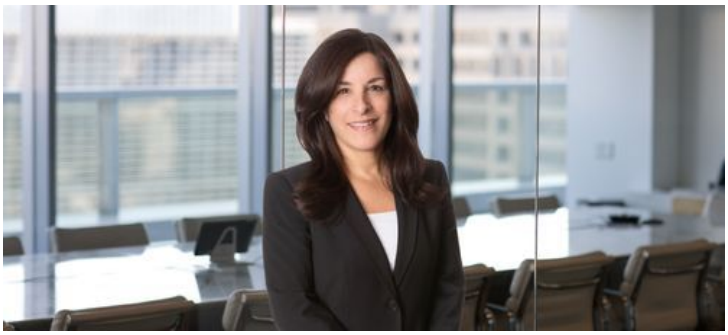

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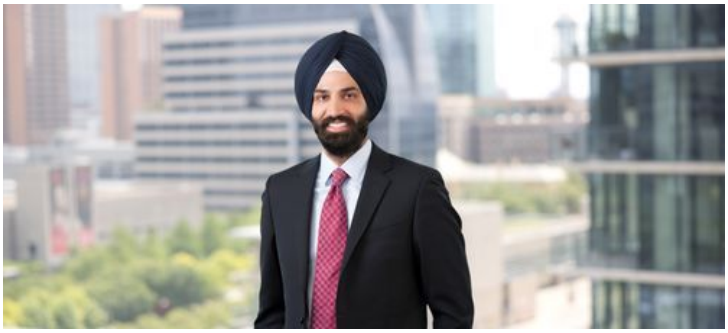

Amandeep S. Sidhu

Benjamin Sokoly

Kaitlin Pierce Marino

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