

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Outlier Fraud: Recent Spate of Settlements and Government Interventions Shows Issue is High Priority

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In December 2007, the U.S. Department of Justice (the "DOJ") agreed to a \$7.5 million settlement of claims that a New Jersey hospital inflated its patient charges to obtain artificially high Medicare outlier payments.¹ In addition, in January 2008, the DOJ announced that it had intervened in whistleblower suits against three other New Jersey hospitals alleging fraudulent outlier payments.² One of these three New Jersey hospitals has just agreed to a \$2.5 million settlement of the whistleblower suit against it in which the DOJ intervened.³

Outlier Payments

Medicare outlier payments compensate hospitals for cases in which a hospital's costs substantially exceed Medicare reimbursement. Each Medicare inpatient is categorized into a diagnosis related group or DRG, and the hospital treating such patient is paid a predetermined, specific amount for each discharge based on the DRG, regardless of the hospital's cost of treating the particular patient. To be eligible for an outlier payment, the hospital's cost for a particular discharge must exceed the total Medicare payment for the discharge by an amount called the "outlier threshold." For federal fiscal year 2008, the outlier threshold is \$22,650.⁴ Medicare will pay 80% of a hospital's costs that exceed the sum of the DRG payment plus the outlier threshold. In order to calculate the hospital's cost of a particular case, Medicare multiplies the hospital's charge for the case by the hospital's cost-to-charge ratio according to the hospital's most recent cost report.

¹ *Warren Hospital Agrees to Pay \$7.5 Million to Government for Medicare Over Billing*, U.S. Department of Justice, U.S. Attorney Christopher J. Christie, District of New Jersey, press release, Dec. 10, 2007, accessed at: <http://www.usdoj.gov/usao/nj/press/index.html>

² *United States Joins False Claims Act Cases Against Three New Jersey Hospitals*, U.S. Department of Justice, press release, Jan. 24, 2008, accessed at: http://www.usdoj.gov/03press/03_1_1.html.

³ See Settlement Agreement among U.S., Bayonne Medical Center, and relator Monahan, among others, accessed at <http://pubs.bna.com/NWSSTND/IP/BNA/HCE.NSF/SearchAllView/B4FD9786F7490CFE852573E60008139C?Open&highlight=BAYONNE,MEDICAL> *New Jersey Hospital to Pay \$2.5 Million to Resolve Allegations of Medicare Fraud*, BNA Health Care Daily, Vol. 13, No. 23 (Feb. 5, 2008).

⁴ 72 Fed. Reg. 47130, 47186 (Aug. 22, 2007).

Warren Hospital Settlement

The \$7.5 million settlement with Warren Hospital in Phillipsburg, New Jersey ended a lawsuit filed in 2002 in which whistleblowers alleged that Warren Hospital took advantage of a delay in Medicare's calculation of hospitals' cost-to-charge ratio in order to obtain inflated outlier payments.⁵ Prior to October 2003, Medicare calculated a hospital's cost-to-charge ratio using the hospital's most recent settled cost report. It can take several years before a cost report is settled, and the suit alleged that Warren took advantage of this lag by substantially inflating its charges. The increased charges did not lower the hospital's cost-to-charge ratio for several years, and in the meantime, according to the suit, many more of the hospital's cases qualified for outlier payments. The complaint alleged that Warren Hospital's outlier payments increased over 12 fold between 1998 and 2001.⁶ In October 2003, Medicare reduced the lag time for calculating a hospital's cost-to-charge ratio by announcing that it would use data from "either the most recent settled cost report or the most recent tentative settled cost report, whichever is from the latest cost reporting period."⁷

The whistleblower suit against Warren Hospital and one of the two suits against the other three New Jersey hospitals also name Tenet Healthcare Corporation as a defendant. Tenet settled these outlier claims and other claims in 2006 by agreeing to pay \$900 million.⁸

Government Interventions and Bayonne Medical Center Settlement -- OIG Remains Interested in Outliers

Certain state Medicaid programs make outlier payments using methodologies similar to Medicare, and in its 2008 Work Plan, the OIG announced that it would review Medicaid outlier payments.⁹ In addition, in January 2008, the U.S. Department of Justice announced that it had intervened in two whistleblower suits against other New Jersey hospitals alleging fraudulent Medicare outlier payments.¹⁰ The suits allege that Robert Wood Johnson University Hospital, Barnert Hospital, and Bayonne Medical Center fraudulently inflated their charges in order to receive increased outlier payments. Bayonne Medical Center just settled this suit with respect to itself earlier this month for \$2.5 million.¹¹

⁵ Settlement Agreement among U.S., Warren Hospital, and relators Salvatori, Iveson and Kite, accessed at <http://pubs.bna.com/NWSSTND/IP/BNA/HCE.NSF/SearchAllView/B466087D320254D5852573AE0003B08C?Open&highlight=WARREN,HOSPITAL> *New Jersey Hospital to Pay \$7.5 Million to Resolve Allegations of Medicare Fraud*, BNA Health Care Daily, Vol. 12, No. 237 (Dec. 11, 2007). The settlement also covers allegations that Warren Hospital violated the Stark Law.

⁶ *U.S. ex rel Salvatori v. Tenet Healthcare Corp et al.*, Complaint, (E.D. Pa. 2002) p.33.

⁷ 42 CFR § 412.84(i)(2).

⁸ It appears that suit against Warren and Tenet may also include the three other New Jersey hospitals mentioned above, although the names of certain of the plaintiffs have been redacted from the currently available unsealed complaint.

⁹ *Office of Inspector General Work Plan Fiscal Year 2008*, U.S. Dept. of Health and Human Services, Office of Inspector General, pp. 36-37.

¹⁰ *United States Joins False Claims Act Cases Against Three New Jersey Hospitals*, U.S. Department of Justice, press release, Jan. 24, 2008, accessed at: http://www.usdoj.gov/03press/03_1_1.html.

¹¹ Settlement Agreement among U.S., Bayonne Medical Center, and relator Monahan, among others, accessed at <http://pubs.bna.com/NWSSTND/IP/BNA/HCE.NSF/SearchAllView/B4FD9786F7490CFE852573E60008139C?Open&highlight=BAYONNE,MEDICAL> *New Jersey Hospital to Pay \$2.5 Million to Resolve Allegations of Medicare Fraud*, BNA Health Care Daily, Vol. 13, No. 23 (Feb. 5, 2008).

If you have any questions about these whistleblower suits or about the calculation of outlier payments or other questions related to Medicare reimbursement, please call any of the healthcare attorneys listed below.

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