

Year in Review 2016: Recent Trends and Updates in Managed Care

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Tweeting about this conference?

#ACIManagedCare

AmericanConference.com

Year in Review 2016: Hospital Consolidation

Hospital Consolidation – Litigation Update

- **FTC Cases (mergers)**
 - Advocate / NorthShore 
 - Cabell Huntington / St. Mary's
 - Penn State Hershey / PinnacleHealth 
- **DOJ Cases (non-mergers / adjacent issues)**
 - Carolinas HealthCare System
 - Allegiance Health
- **Private Cases (non-mergers / adjacent issues)**
 - Methodist Health / OSF (St. Francis)

Year in Review 2016: Hospital Consolidation

Hospital Consolidation – MCO Front-End Measures

- **Is there any realistic way - from the strategic business and contracting perspectives - to deter hospitals and other providers from seeking increased market power, and/or minimize the impact if obtained?**
 - *Specific contract terms*
 - Favorable escalators
 - Longer term agreements
 - Restructure benefits / provider networks to move away from facility-based services
 - *Shift from FFS models to value / risk models*
 - Some correlation between market power and resistance to change
 - Importance of CMS pressure and Original Medicare shift
 - *Blur the lines between “payers” and “providers”*
 - Acquisitions, joint ventures, etc.
 - More aggressively invest in care delivery and coordination

Year in Review 2016: Hospital Consolidation

Hospital Consolidation – MCO Back-End Responses





Year in Review 2016: Pharmacy Clawback Litigation

Clawbacks Work Like This:

1. Customer is prescribed 40 milligrams of the stomach medicine pantoprazole.



2. The pharmacy benefit manager has helped negotiate a \$15 co-payment for generic pantoprazole. The medicine costs the pharmacist \$2.05.



\$15

3. The pharmacist is reimbursed \$7.22, giving him a profit of \$5.17.



\$7.22

-\$2.05

\$5.17

4. The benefit manager “claws back” \$7.78 from the pharmacy.



\$7.78

Update, Feb. 27: Corrects dosage
Source: Bloomberg research

Bloomberg

Year in Review 2016: Pharmacy Clawback Litigation

Examples

<u>Drug</u>	<u>Copayment</u>	<u>Pharmacist Payment</u>
Melacoxam	\$6.99	\$2.03
Azithromycin	\$10.00	\$4.29
Amlodipine Besylate	\$20.00	\$1.75

Year in Review 2016: Pharmacy Clawback Litigation

Class Actions

- *In re Humana Inc., PBM Litigation* – W.D. Ky.
- *In re UnitedHealth Group PBM Litigation* – D. Minn.
- *In re Cigna Corporation PBM Litigation* – D. Conn.
- *In re Express Scripts/Anthem ERISA Litigation* – S.D.N.Y.

Year in Review 2016: Pharmacy Clawback Litigation

Claims

- Civil RICO (including conspiracy)
- ERISA violations
- Fraud/negligent misrepresentation
- Breach of contract
- Quasi-contract
- ACA anti-discrimination violations
- Consumer protection statute violations

Year in Review 2016: Pharmacy Clawback Litigation

Procedural Status

- Transfer and consolidation activity
- Motion to dismiss briefing underway
- No discovery yet



Year in Review 2016: Provider Fraud Schemes

Case 4:12-cv-01206 Document 320 Filed in TXSD on 02/03/17 Page 1 of 1

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS
Lynn Hughes District Court
Southern District of Texas

Aetna Life Insurance Company, §
Plaintiff, §
February 03, 2017
David J. Bradley, Clerk

versus §
Civil Action H-12-1206

Humble Surgical Hospital, LLC, §
Defendant. §

Final Judgment

1. The default of Humble Surgical Hospital, LLC, is entered. Assuming Humble's answer and counterclaims had not been struck, Aetna Life Insurance Company would have prevailed on its state law claims.

2. Aetna takes from Humble:

- A. \$41,411,890.98;
- B. \$938,796.24 in prejudgment interest at the rate of 5% per annum from the date suit was filed - April 18, 2012 - through the date of this judgment - February 3, 2017;
- C. Post-judgment interest at the rate of 0.87% per annum until paid; and
- D. Costs of court.

3. Attorneys' fees will be a post-judgment matter.

Signed on February 3, 2017, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Case 4:13-cv-00102-ALM Document 36 Filed 08/22/14 Page 1 of 3 PageID #: 337

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

AETNA LIFE INSURANCE CO. §
V. § CASE NO. 4:13-CV-102
4:13-CV-191 (consolidated)
Judge Mazzant
WARREN MEDICAL IMAGING, LLC §

MEMORANDUM OPINION

Pending before the Court is Aetna Life Insurance Company's Motion for Summary Judgment on Money Had and Received (Dkt. #33). The Court, having considered the relevant pleadings, finds that the motion should be granted.

Aetna Life Insurance Company ("Aetna") filed suit against Warren Medical Imaging, LLC ("Warren") based upon an alleged fraudulent medical billing. Aetna asserts the following claims: (1) fraud; (2) negligent misrepresentation; (3) money had and received; (4) unjust enrichment; (5) injunctive relief; (6) declaratory relief; and (7) equitable relief under ERISA.

On June 27, 2014, Aetna filed a motion for summary judgment (Dkt. #33). No response was filed, and it appears that Warren is no longer participating in this litigation.¹

LEGAL STANDARD

The purpose of summary judgment is to isolate and dispose of factually unsupported claims

VERDICT FORM

FRAUD (MISREPRESENTATION OR CONCEALMENT)

1. Did the following defendants engage in fraud against Aetna and the employer plan sponsors by either affirmative misrepresentation, or concealing, certain information, or both?

- Bay Area Surgical Management, LLC: Yes No
- Bay Area Surgical Group, Inc.: Yes No
- Forest Ambulatory Surgical Associates, LP: Yes No
- SOAR Surgery Center LLC: Yes No
- Knowles Surgery Center, LLC: Yes No
- National Ambulatory Surgery Center, LLC: Yes No
- Los Altos Surgery Center, LP: Yes No
- Julia Hashemlehi: Yes No
- Robert Sarnevesht: Yes No
- Javad Zolfaghari: Yes No

If the answer to any part of question 1 is "yes," proceed to the following question. If the answer to all parts of question 1 is "no," proceed to question 10.

2. Did any of the following defendants conspire to engage in fraud against Aetna and the employer plan sponsors?

- Bay Area Surgical Management, LLC: Yes No
- Bay Area Surgical Group, Inc.: Yes No
- Forest Ambulatory Surgical Associates, LP: Yes No
- SOAR Surgery Center LLC: Yes No
- Knowles Surgery Center, LLC: Yes No
- National Ambulatory Surgery Center, LLC: Yes No
- Los Altos Surgery Center, LP: Yes No
- Julia Hashemlehi: Yes No
- Robert Sarnevesht: Yes No
- Javad Zolfaghari: Yes No

If the answer to any part of questions 1 or 2 is "yes," proceed to the following question. If the answer to all parts of questions 1 and 2 is "no," proceed to question 10.

3. Was Aetna or the employer plan sponsors damaged?
Yes No

Case 4:12-cv-02451 Document 160 Filed in TXSD on 08/20/14 Page 1 of 1

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

Aetna Life Insurance Co., §
Plaintiff, §
versus §
Civil Action H-12-2451

Cleveland Imaging and Surgical Hospital LLC, et al., §
Defendants. §

Partial Judgment

Aetna Life Insurance Co. takes \$8,412,116.01 from Cleveland Imaging and Surgical Hospital, LLC, Trinity Healthcare Network, ERDOC 24/7 PLLC, and Premier Emergency Room @ Imaging (41, 56, 105, 106, 110, 136)

Signed on August 20, 2014, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Year in Review 2016: ACA Section 1557

Section 1557

“Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under

- title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.),
- title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.),
- the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or
- section 794 of title 29,
- be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.”

Year in Review 2016: ACA Section 1557

Section 1557 In Plain English

- Section 1557 is a nondiscrimination provision under the ACA and provides that an individual cannot, on the grounds of race, color, national origin, sex, age, or disability, be excluded from participation in, denied benefits, or be subject to discrimination under any health program or activity that is receiving federal financial assistance. Includes meaningful access to individuals with limited English proficiency.
- Your company is subject to the new regulations if it is a “covered entity.” A covered entity is an entity that is a “health program or activity” and that receives federal financial assistance from HHS. Examples of health programs or activities include group health plans, hospitals, health clinics, health insurance issuers, and physicians’ practices. Examples of federal financial assistance from HHS include funds, services of federal personnel, and real and personal property (e.g., research grants, Medicare payments, Medicare Part D subsidies).

Year in Review 2016: ACA Section 1557

Relief

- Private right of action
- Compensatory damages
- Office of Civil Rights has authority to refer cases to DOJ
- Corrective action

Year in Review 2016: ACA Section 1557

The Road Ahead

- Appellate courts beginning to hear cases
- Repeal and replace?
- HHS's OCR now headed by Roger Severino
- Executive Orders limiting it
- Injunctions limiting it
- Decisions addressing scope including gender identity, HIV/AIDS, sexual orientation, religious exemptions
- Private right of action, elements/standard of proof, intent requirement, administrative exhaustion, "direct liability, "health program or activity"

Year in Review 2016: Federal Health Reform

From one big bite to bite-sized?

The failure of the American Health Care Act suggests that the Trump Administration and 115th Congress are most likely to pursue health policy priorities through incremental legislative and administrative actions



Year in Review 2016: Federal Health Reform

Phase 2 is the new Phase 1

The AHCA was billed as the first of a three-phase integrated approach to the GOP health care agenda—but its apparent collapse moves regulatory action to the fore



AHCA



**Regulatory
Action**



**Further
Legislation**