SEVENTH CIRCUIT REJECTS NOVEL FRAUD THEORY

Relator Thulin was a pharmacist in Idaho working for Shopko, a Wisconsin company. He filed an FCA claim alleging Shopko defrauded Medicaid by failing to pass along private insurance plan prices to Medicaid for dual-eligible patients. The court rejected Shopko's claim, affirming the trial court's grant of a motion to dismiss.

Dual-eligible Medicaid recipients are patients who have private insurance and Medicaid. Such patients are required to assign to the state any rights they have under private insurance plans (42 U.S.C. § 1396k(a)(1)(A)) and Medicaid is the "payer of last resort," meaning the private insurance pays first, and Medicaid pays the remaining amount owed.

Thulin theorized that Shopko was required by the statute to give Medicaid the benefit of private insurer-negotiated fees. The court offered the following example from Thulin's comments in oral argument.

Assume for instance that a dual-eligible has a prescription for Drug A, which has a list price of $50. Her private insurer has an agreement with Shopko pursuant to which Shopko has agreed to accept $25 as payment in full for Drug A: $20 from the private insurer and a $5 co-pay from the dual-eligible. Under Medicaid's less favorable agreement with Shopko, Medicaid has agreed to pay $30 for Drug A. The dual-eligible submits her prescription to Shopko and pays nothing at the point of sale. Shopko fills the prescription and then bills the private insurer $25 using PDX. The private insurer remits payment of $20, the agreed amount of its payment less the dual eligible's unpaid co-pay. Shopko then bills Medicaid, the “payer of last resort,” but not only for the $5 that remains unpaid under its contract with the dual-eligible's private insurer. Instead, Shopko bills Medicaid $10, the difference between the $20 that the private insurer already has paid and the $30 that Medicaid has agreed to pay for the drug.

The court considered the plain language of 42 U.S.C. § 1396k(a)(1)(A) and found that it entitles Medicaid to reimbursement if a recipient receives a settlement or other recovery from third-party tortfeasors rather than Thulin's "novel interpretation." The court also noted that the electronic system Medicaid required pharmacies to use included co-pays as an optional rather than mandatory field, proving that Shopko was not obligated to include co-payment information in its Medicaid claims.

Thulin v. Shopko Store Operating Co., LLC, Case No. 13-3638 (7th Cir. Nov. 12, 2014)

If you have any questions or would like more information on this topic, please contact David B. Honig at (317) 977-1447 or dhonig@hallrender.com or your regular Hall Render attorney.

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