



## Early Victory: Judge Dismisses *Qui Tam* Suit Against UnitedHealthcare

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On October 5, 2017, in *United States of America ex rel. Swoben v. Scan Health Plan, et al.* (“Swoben”),<sup>1</sup> Judge John F. Walter of the United States District Court for the Central District of California granted United Health Group, Inc.’s (“UnitedHealth”) Motion to Dismiss the government’s False Claims Act (“FCA”) Complaint alleging that UnitedHealth fraudulently inflated patient risk scores to obtain higher reimbursements from Medicare Advantage (“MA”). The court dismissed the Complaint with leave to amend by October 13, 2017. But, on October 12, 2017, in a surprise turn of events, the government instead filed a Notice of Dismissal Without Prejudice.

The relator’s lawsuit, originally filed in 2009, alleged that UnitedHealth and other defendants had violated the FCA by artificially inflating beneficiary risk scores and overlooking questionable diagnoses to boost their profits from MA plans. On May 1, 2017, following a decision by the Ninth Circuit Court of Appeals permitting the relator to file a Fourth Amended Complaint, the Department of Justice (“DOJ”) filed a “Complaint-in-Partial-Intervention” against the UnitedHealth defendants only.

UnitedHealth moved to dismiss on five separate grounds: (1) that the government’s Complaint failed to allege that the individuals who signed the relevant attestations knew that the attestations were false; (2) that the Complaint failed to allege that the attestations were material to the government’s decision to pay the claims; (3) that the Complaint failed to identify with particularity the acts of each of the seven distinct corporate entities comprised by UnitedHealth; (4) that the Complaint attempted to revive a reverse false claims theory that had been waived; and (5) that claims from before 2007 were untimely under the statute of repose.

Although the court dismissed the government’s Complaint-in-Partial-Intervention on all five grounds raised by the defendants, it granted leave to amend on all but the reverse false claims count and the pre-2007 claims, which he deemed barred by the statute of repose. In issuing this ruling, the court provided clear guidelines for amending the remaining counts of the Complaint.

Specifically, the court identified that the government failed to allege that anyone at UnitedHealth “undertook any action to shield the signatories of the attestations from gaining the necessary knowledge that would have demonstrated that they were false.” And, although the government argued that it is sufficient for someone other than the signatories to have known the attestations were false, the government “failed to identify anyone at the United Defendants who possessed the requisite knowledge.” Moreover, the government’s Complaint failed to “identify the role of each defendant in the alleged fraudulent scheme,” thus falling short of the Rule 9(b) pleading standard and the corresponding materiality requirements.

The government’s apparent decision not to file an amended complaint is interesting in several respects. First, while the Court’s guidance for an amended complaint is clear, it also is fairly stringent, requiring a level of specificity regarding the alleged conduct that is not always evident in FCA complaints. The Court’s emphasis on identifying the corporate officers, clarifying the state of their knowledge, specifying why and how the conduct was material, and stating clearly “how each and every defendant is alleged to have violated” the statute raises the pleading standard above the level of inference or argument.

<sup>1</sup> 2:09-cv-05013-JFW-JEM.

Second, prior to its partial intervention in *Swoben*, the government had already intervened in a lawsuit that had been transferred as a related case to the Central District of California from the Western District of New York, *United States ex rel Poehling v. UnitedHealth Group, Inc.*, (CV 16-08697-MWF) ("*Poehling*").<sup>2</sup> However, because Judge Walter had declined to accept the transfer as a related case, the *Poehling* case is assigned to another judge. It is unclear, at this point, whether the government elected not to file an amended complaint in *Swoben* because it has decided to proceed on the basis of *Poehling*'s case or because it requires more time to file a complaint that meets Judge Walter's terms.

Third, the similarities between the two complaints may include the same flaws that led to the dismissal in *Swoben*. If UnitedHealth moves to dismiss the *Poehling* complaint, it will be interesting to see whether a different judge holds the government to the same pleading standards for a false claims case that the government failed to meet in *Swoben*.

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<sup>2</sup> <https://www.justice.gov/opa/pr/united-states-intervenes-second-false-claims-act-lawsuit-alleging-unitedhealth-group-inc>

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