

SDNY ruling in Anthem sends a signal to Medicare Advantage litigants

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In a decision issued on September 30, Judge Andrew Carter of the U.S. District Court for the Southern District of New York denied Anthem Inc.'s motion to dismiss a government lawsuit filed in March 2020 claiming Anthem submitted inaccurate diagnosis data in conjunction with its Medicare Part C plans that resulted in alleged overpayments in violation of the False Claims Act (FCA).

Judge Carter held that, at bottom, the materiality inquiry concerns “whether the decisionmaker would attach importance to [the alleged misrepresentation] when making a decision.”

Anthem had urged the court to dismiss the government’s complaint for failure to meet the FCA’s materiality requirement. But the court, evaluating the motion under the framework set out in the Supreme Court’s 2016 decision in *Universal Health Services, Inc. v. U.S. ex rel. Escobar*, found the overpayments to be “substantial and not merely administrative” where they totaled over \$100 million.¹ We have previously covered the FCA’s materiality requirement as part of our False Claims Act Fundamentals series.²

Judge Carter’s interpretation of *Escobar* offers compelling considerations for other pending Medicare Advantage cases. Anthem argued that to satisfy the materiality requirement, the government was required to show that CMS would have refused payment had it known of the alleged misrepresentations.

But Judge Carter disagreed, reasoning that this interpretation described “materiality’s ceiling, not its floor” and that although the gap between materiality’s ceiling and floor may be small, “there is a gap.”

Instead, Judge Carter found that while an absolute refusal from CMS to pay had it known of the alleged misrepresentation would

certainly constitute materiality, something less than that could also satisfy the materiality standard. Judge Carter held that, at bottom, the materiality inquiry concerns “whether the decisionmaker would attach importance to [the alleged misrepresentation] when making a decision.”

Judge Carter found materiality adequately pleaded based on the following *Escobar* factors:

- Plaintiff pointed to no express condition in the contract that violations of CMS regulations would result in nonpayment (but stated this factor was not dispositive).
- The complaint contained no allegations that the government had knowledge of noncompliance with CMS guidelines, meaning that Anthem could not contend that failure to respond equated to acquiescence.
- The financial costs to the government, which total over \$100 million, are substantial, not merely administrative costs.

Cases pending in other jurisdictions will likely consider the *Anthem* opinion in their deliberation. One such example is a set of cases pending against Kaiser Permanente in the Northern District of California.

Relevant to *Anthem*, Kaiser argues in its motion to dismiss briefing that the government cannot rely on an alleged failure to comply with International Classification of Diseases coding guidelines as material to CMS’s decisions to pay claims where that guidance is subregulatory, non-binding and not an express part of the contract between the parties.³

It is too soon to tell if Judge Carter’s decision in *Anthem* is the canary in the coal mine for cases like *Kaiser* in other jurisdictions, but it is certain to be a consideration.

Notes

¹ *United States v. Anthem Inc.*, 2022 WL 4815978, at *4 (S.D.N.Y. Sept. 30, 2022).

² <https://bit.ly/3s73XGM>

³ Read more about the *Kaiser* cases: <https://bit.ly/3ERdFV7>

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