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Why UnitedHealthcare's Litigation Against CMS Is Unique

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My mother always told me that if I wanted something done my way, then I ought to do it myself. These wise words are exemplified by the recent litigation efforts of UnitedHealthcare ("UHC") in its quest to rectify a Centers for Medicare and Medicaid Services overpayment rule, described here, that it alleges results in significant underpayments to Medicare Advantage organizations. As the nation's largest Medicare Advantage insurer, UHC has initiated affirmative litigation under the Administrative Procedures Act (the "APA") seeking to set aside CMS' 2014 overpayment rule on the grounds that the rule violates the requirement of "actuarial equivalence" under the Medicare Act and imposes an improper negligence standard that lacks statutory authority. UnitedHealthcare Insurance Company v. Price, No. 16-cv-157 (D.D.C.). UHC's claims have industry-wide implications, and a positive ruling would equally benefit other Medicare Advantage organizations. Yet, those that may be hoping to ride on UHC's coattails and benefit from a swift and clean victory under the APA would be well served to understand UHC's unique litigation position, including the fact that UHC is a defendant in multiple unsealed whistleblower lawsuits alleging that UHC violated the False Claims Act in connection with its Medicare Advantage payments and processes.

UHC's interests with respect to its potential FCA liability are already revealing themselves as complicating factors for the APA case. Most notably, UHC is seeking to have a FCA lawsuit against it, U.S. ex rel. Benjamin Poehling v. UnitedHealth Group Inc. et. al., No. 16-cv-8697 (C.D. Cal.) (the "Poehling action"), transferred and then at least "coordinated with" its ligation challenge to the CMS overpayment rule. UHC filed a motion to transfer the FCA case to the District of Columbia, arguing that the FCA case pending against it in California "should be coordinated with the APA case however possible." Dkt. No. 134 at 13, United States ex rel. Poehling v. UnitedHealth Group Inc., 2:16-cv-08697-MWF-SS (C.D. Cal. July 17, 2017). Although UHC does not describe how the FCA litigation would be coordinated with the APA lawsuit, UHC previously indicated that a transfer of the Poehling action to Washington D.C. would allow for consolidation with the APA lawsuit pending there. See Dkt. No. 288-1 at 8-9, Proposed Statement of Decision, U.S. ex rel. Swoben v. Scan Health Plan et al., 2:09-cv-05013-JFW-JEM (C.D. Cal.).

Consolidation of the APA claims with the FCA claims would not be in the best interests of other Medicare Advantage organizations for several reasons. First, consolidation with the FCA litigation would significantly delay resolution of the APA claims, likely by multiple years, by injecting lengthy discovery and fact questions concerning UHC's intentions, or materiality, into a litigation that would otherwise be

resolved expeditiously based on motion practice following the compilation of an "administrative record." In addition, facts unique to UHC in the FCA case, such as its national chart review process and its error rates, would present a source of distraction and overly complicate the issues in a litigation that is set to resolve the validity of an industry-wide rule under the standards of the APA. Finally, facts concerning UHC's conduct may serve to bolster the government's theory of its case that the APA litigation is simply a means for UHC to avoid FCA liability.

Indeed, the government has taken action to include facts unique to UHC within the APA litigation. The government recently submitted the "administrative record" upon which UHC's APA claims will be decided. See Dkt. No. 40-2, UnitedHealthcare Insurance Company v. Price, No. 16-cv-157 (D.D.C. July 14, 2017). The administrative record is compiled by the government pursuant to the statutory requirement that a court, if presented with a challenge to agency action under the APA, "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Government agencies exercise great latitude in compiling the administrative record since the scope of the record is defined only by jurisprudence indicating that judicial review is to be based on the full administrative record that was before the agency official at the time he or she made the decision to promulgate the final rule at issue. The recently submitted administrative record in the APA case includes the results from the 2007 Risk Adjustment Data Validation ("RADV") process for two UHC entities, PacifiCare of Texas and PacifiCare of California, showing error rates of 43 to 45 percent. See Dkt. No. 40-2 at 9; see also OIG, Risk Adjustment Data Validation of Payment Made to PacifiCare of Texas for Calendar Year 2007, available here, and OIG, Risk Adjustment Data Validation of Payments Made to PacifiCare of California, available here.

The RADV results for individual Medicare Advantage organizations are arguably not relevant to a challenge to the overpayment rule under the APA. Yet, UHC's 2007 RADV results were likely included in the administrative record in order to bolster the government's theory of the case that UHC's APA complaint is simply an effort to unfairly retain payments to which it is not entitled and/or should have known it was not entitled. See Dkt. No. 12-1 at 8-9, UnitedHealthcare Insurance Company v. Price, No. 16-cv-157 (D.D.C.). In any event, the inclusion of the 2007 RADV results for UHC entities within the administrative record is not advantageous to other Medicare Advantage organizations hoping for a clean proceeding limited to the question of whether CMS' 2014 overpayment rule passes muster under the APA.

In sum, UHC is presently prosecuting claims that uniformly affect all Medicare Advantage organizations. Yet, UHC is simultaneously juggling the risks and liability presented by major federal FCA litigation concerning its own Medicare Advantage payments and processes. Thus, as with its motion to transfer venue, UHC is incentivized to continue to make strategic decisions that best serve its unique positions across all of its litigations. As for the other Medicare Advantage organizations that are impacted by CMS' overpayment rule, those entities must be happy with what they can get out of UHC's efforts or heed my mother's advice and do things themselves.

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