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# Pharmacy Qui Tam Based On U&C Price Billing Survives Motion to Dismiss


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Once again, a pharmacy employee has filed a ***qui tam*** involving a ***drug discount program***, alleging that the failure of the pharmacy to use the discounted pricing as the "usual and customary" price in Medicaid and Medicare Part D billings resulted in falsely inflated claims to those programs. And once again, the *qui tam* case has survived a Motion to Dismiss.

In September of 2013, I blogged about *qui tams* based on usual and customary billings. That blog post was prompted by a ruling in ***U.S. ex rel. Garbe v. K-Mart,*** that a *qui tam* Complaint alleging the chain pharmacy's failure to use discounted pricing as the "*usual and customary*" price for medications in government program claims, was sufficient to pass muster under ***Rules 9(b) and 12(b)(6)***.

Pharmacy claim forms contain a required field for the pharmacy to submit its "usual and customary" price for the billed medication. That price is often factored into the reimbursement formula for government-funded health care programs. However, government programs each define how "usual and customary" price is determined, and when it comes to Medicaid, each state is free to define the term differently. In some instances the term may be defined as inclusive of any discount offered (akin to a most-favored-nation clause), in other instances the term may be defined as an average charged to or paid by any payor, or in still other instances the term may be defined as the amount charged to or paid by any cash-paying customer.

In March 2014, the State of Texas entered into a $12 million state-specific false claims settlement with a pharmacy chain based on allegedly inflated usual and customary billings to the Texas Medicaid Program. The government referenced specific Texas regulations governing inclusion of discounts in calculating and submitting usual and customary prices for medication.

So on January 9, 2015, I was not surprised to see another *qui tam* based on usual and customary billing allegations survive a Motion to Dismiss in the Southern District of Indiana. In *U.S. ex rel. Doe et al. v. Houchens Industries, Inc.,* a pharmacy program was set up to charge cash-paying customers a small ($5.00) fee to participate in a rewards program offering flat discounted fees for hundreds of generic medications — but the pharmacy did not use those flat discounted prices as its usual and customary price in billings to ***Medicare Part D*** or the ***Illinois Medicaid program***. The Court was persuaded that both the Illinois Medicaid Program and Medicare Part D define "usual and customary" in terms of the amount charged cash-paying, general public customers.

In the *Houchens* case, the pharmacy tried to distinguish its program based on the fact that participants had to enroll in the rewards programs, asserting that the enrollment process attenuated the participants from the "general public." However, the employee-whistleblower alleged that the fee was essentially a pretext based on the following: (i) enrollment was open to anyone; (ii) enrollees who actually paid the $5.00 enrollment fee received a gift card in that amount to offset the payment; (iii) the computer system did not even track receipt of the enrollment fee; and (iv) eventually staff was instructed not to assess the enrollment fee. The Court, citing to *Garbe*, found that the enrollment was not a barrier to finding that the pharmacy's failure to bill the flat, discounted price as its "usual and customary" price was actionable under the state and federal false claims act.

I continue to believe that "usual and customary" billing for drug products will be fodder for *qui tam* filings. But as I said in September 2013, "usual and customary" price allegations present challenges in the false claims arena. Practitioners need to keep in mind that:

- Not all government programs or program contractors use "usual and customary" prices as a factor in processing and paying pharmacy claims in the same way.

- The definition of what actually constitutes a "usual and customary" price may vary significantly from government program to government program, or from government program contractor to government

program contractor.

- When it comes to Medicaid, the applicable definition of what actually constitutes the usual and customary price may vary significantly from state to state.

It may also be of interest to false claims practitioners that both the state and federal governments declined to intervene in the *Houchens* case, continuing another trend we are seeing in the false claims arena: relators proceeding to litigate false claims cases despite declination by the government.