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SNF Provider Settles FCA Case Involving Waivers; 'Incorrect Reasoning' Raises Questions

By Nina Youngstrom

In what's apparently the first False Claims Act (FCA) settlement over alleged misuse of COVID-19 waivers, ReNew Health Group and ReNew Health Consulting Services, a nursing facility and skilled nursing facility (SNF) company, and two of its executives have agreed to pay $7.084 million, the U.S. Department of Justice (DOJ) said April 26.[1] According to the settlement, ReNew billed Medicare nursing home residents under the Part A SNF benefit based on their exposure to COVID-19 from March 1, 2020, to June 31, 2022, and justified it with waivers—including the waiver of the three-day qualifying inpatient hospital stay—although they allegedly didn't require skilled care.[2] For example, when a kitchen worker at one California nursing facility got COVID-19, nine residents were shifted to the SNF even though they didn't test positive, the whistleblowers alleged in the complaint that set the case in motion.[3]

This appears to be the first false claims settlement for alleged misuse of COVID-19 waivers as opposed to abuse of COVID-19 relief funds more broadly, said attorney Ray Sarola, with Cohen Milstein Sellers & Toll PLLC, which represented Bay Area Whistleblower Partners.

But the settlement has a phrase—"incorrect reasoning"—that's at odds with the basis of an FCA violation, said former federal prosecutor Melissa Jampol. The government alleged that in March 2020, after learning about the waivers, CEO Crystal Solorzano, Chief Operating Officer Chaim Kolodny and other ReNew leaders "incorrectly reasoned" that many nursing home residents required skilled care because they might get COVID-19 and therefore ReNew SNFs could bill Medicare Part A and generate more reimbursement than they would for "standard" nursing home care, which isn't covered by Medicare. "This incorrect reasoning was disseminated within ReNew and the affiliated and formerly affiliated companies" and led some people in its operations to adopt a practice that led to the submission of SNF claims for residents who were near a COVID-19-positive resident or employee on the premise that the residents needed skilled care, the government alleged.

It's unusual to have phrases like "incorrect reasoning" in a false claims settlement, said Jampol, with Epstein Becker and Green, which was not involved in the case. "If you have incorrect reasoning, how does that rise to the level of a false claim?" It doesn't seem consistent with the knowledge requirement for an FCA violation, which is actual knowledge, deliberate indifference or reckless disregard, Jampol noted.

"This company appears to have gotten itself in trouble because it tried to keep people safe from COVID. It looks like they misinterpreted the waiver," Jampol said. "It's problematic for people to second guess what people were doing when we were still wiping down our groceries, thinking there was virus on them." Although there was a lot of fraud in COVID-19 relief programs, expending resources on a case involving "incorrect reasoning when there's more overt fraud is troubling."

The case was set in motion by whistleblowers who formed Bay Area Whistleblower Partners to file the FCA lawsuit. Their identities are unknown and preserving their privacy is apparently one of the reasons for not filing separate cases under their own names. The complaint notes that the "partners of relator have direct knowledge

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of the facts alleged in this complaint." This approach to whistleblower cases is becoming more common, said Jampol, and its lack of transparency raises concerns. No individual relator's name is on the complaint or they don't sign the settlement.

That's the case with the ReNew complaint and settlement. According to the complaint, ReNew Health Group is a California company that operates with ReNew Health Consulting Services as a single enterprise. It owns or owned 27 facilities in California and its nursing homes also qualified as SNFs.

Two Waivers Are at Heart of ReNew Allegations

The allegations in the FCA complaint began with the COVID-19 public health emergency and its waivers for SNFs with patients affected by COVID-19. The SNF waivers, which expired May 11, 2023, at the end of the public health emergency (PHE), were designed to make it easier for people to be admitted to SNFs and free up space in hospitals for COVID-19 patients. According to CMS, one of the waivers provided "temporary emergency coverage of SNF services without a qualifying hospital stay." Another waiver authorized "a onetime renewed SNF coverage without first having to start and complete a 60-day 'wellness period' (that is, the 60-day period of non-inpatient status that is normally required in order to end the current benefit period and renew SNF benefits)."[4]

CMS noted the waivers don't apply if ongoing SNF care is unrelated to the PHE and providers are still required to abide by all other SNF requirements.

According to the complaint, ReNew allegedly responded to the waivers "by treating them as a blank check to bill Medicare for nearly every resident at its facilities." Within a week of CMS announcing the waivers, Renew started its alleged scheme to bill Part A for skilled nursing or therapy services for residents who didn't need them.

Medicare has specific requirements for Part A SNF coverage. Patients must require skilled nursing care or rehabilitation every day to address conditions that were treated in an acute-care hospital during a qualifying stay or at a SNF after treatment for the condition at the hospital. Medicare only covers services that are reasonable and necessary, and the waivers didn't change fundamental medical necessity requirements. As CMS said in a waiver FAQ, "A COVID-19 diagnosis would not in and of itself serve to qualify a Medicare beneficiary for coverage under the Medicare Part A SNF benefit. That's because coverage isn't based on particular diagnoses or medical conditions, but rather on whether the beneficiary meets the statutorily prescribed SNF level of care definition of needing and receiving skilled services on a daily basis which, as a practical matter, can only be provided in a SNF on an inpatient basis."

'I'm Praying the Waiver Ends'

Discussions about the waivers started with ReNew's regional director of operations at the time. He allegedly was told the purpose of the waivers was to ensure Medicare coverage for people who require skilled care but whose treatment is affected by the pandemic. He and others at ReNew were informed by their Medicare billing consultant that the waivers applied "under certain circumstances" and that residents still were required "to meet the qualifications to be skilled under Part A first and foremost. Just having Part A is not an acceptable reason…" But the director of operations allegedly still requested a list of all Medicare-eligible residents at ReNew facilities.

By the end of March, top management had weekly "COVID calls" to talk about the "desire to 'skill' all residents," the complaint alleged. Most ReNew facilities, especially in Southern California, had started billing virtually all residents to Part A.

For example, a utilization review nurse consultant for ReNew said that under the waivers, its Orinda facility

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would expand the Part SNF benefit to include "observation" of 25 residents who might have been exposed to COVID-19, but there's allegedly no provision for observation in the waivers. "By the end of April, all ReNew facilities were engaging in this practice," the complaint alleged.

Apparently, this didn't sit well with everybody. When ReNew's facility in Silicon Valley added 38 residents to the SNF benefit, the senior vice president of revenue management said, "I'm praying the waiver ends," according to the complaint.

The billing consultant again raised concerns about the company's alleged "misuse" of COVID-19 waivers in July. "I am continuing to express my concern about picking up the patients who are not positive nor showing symptoms of covid just because a staff person at one facility is positive," the consultant allegedly wrote. "I am not sure that being potentially 'exposed' to covid is a condition that requires a skilled level of care. Also just because a resident has days available doesn't precipitate the start of a benefit period. I am also concerned that it seems the residents who have days available are receiving 'skilled care' because they have days available."

Jampol noted that ReNew was allowed to settle the FCA lawsuit without an admission of liability. U.S. attorneys' offices are split on this, with some allowing defendants to settle without admissions and others insisting they acknowledge certain facts in the settlement.

"If you settle ordinary litigation, you don't admit liability. That's one of the reasons for entering into a settlement," Jampol said. "There are a million reasons why people choose to settle that have nothing to do with the merits of the case. False Claims Act litigation is incredibly expensive." In settlements like ReNew's, both parties have their say. The government—DOJ and the state of California, which was also a party to the case—asserts that the settlement is not a concession "that their claims are not well-founded."

ReNew's attorney, Benjamin Gluck, said "ReNew is proud of the extraordinary care it provided during a historic pandemic. It's easy to unfairly use 2024 hindsight when gauging COVID-19 risks and to forget just how different things were when we were in the thick of it, especially for people on the front lines like ReNew's caregivers. The settlement recognizes that the emergency enacted rules were at best unclear and ReNew settled without conceding its interpretations were wrong. ReNew prefers to focus on resident care, not litigation." Solorzano and Kolodny are the two executives who were parties to the FCA settlement.

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1 U.S. Department of Justice, Office of Public Affairs, "California-Based Nursing Home Chain and Two Executives to Pay $7M to Settle Alleged False Claims for Nursing Home Residents Who Merely Had Been Near Other People With COVID-19," news release, April 26, 2024, https://bit.ly/3JJ1QBF.
2 Settlement agreement, United States and State of California ex rel. Bay Area Whistleblower Partners v. ReNew Health Group LLC et al., No. 2:20-cv-09472 (C.D. Cal., 2024), https://bit.ly/3Qr6LLk.
3 Amended complaint, United States and State of California ex rel. Bay Area Whistleblower Partners v. ReNew Health Group LLC et al., No. 2:20-cv-09472 (C.D. Cal., 2022), https://bit.ly/4boSGpB.
4 Centers for Medicare & Medicaid Services, "Long Term Care Facilities (Skilled Nursing Facilities and/or Nursing Facilities): CMS Flexibilities to Fight COVID-19," May 10, 2023, https://go.cms.gov/3n9NHFV.

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