

Report on Medicare Compliance Volume 33, Number 18. May 13, 2024 Baptist Health Settles FCA Case Over Copay Waivers, Benefited From DOJ Cooperation Credit

By Nina Youngstrom

The cooperation credit that Baptist Health System in Florida earned jumps out in its False Claims Act (FCA) settlement with the U.S. Department of Justice (DOJ) over waivers of patient copays, coinsurance and deductibles.^[1] DOJ alleged that Baptist Health subsidiaries offered these discounts to certain groups of patients to coax them to receive or refer services there.

Baptist Health agreed to pay \$1.5 million in the civil settlement, which was announced May 6, after it self-disclosed the discounts to the government.^[2] Although cooperation credit typically evokes images of self-disclosures, cooperation and remediation with respect to corporate crimes resolved with the DOJ criminal division, the same goes for the FCA vis-a-vis the civil division, as set forth in the *Justice Manual*.^[3] Waivers of copays, coinsurance and deductibles may run afoul of the Civil Monetary Penalties Law (CMPL) and Anti-Kickback Statute (AKS) because they're potentially a form of remuneration to reel patients in for services. If the discounts qualify for a safe harbor, however, they would be immune from AKS prosecution.

The specific reference to cooperation credit in the FCA settlement is a flashing light from a DOJ bent on creating a regime focused on effective compliance, said Anthony Burba, a former DOJ health fraud prosecutor. "There's clearly an intentional and concerted effort by DOJ to promote its resolutions arising out of self-disclosures," said Burba, with Barnes & Thornburg LLP in Chicago, which wasn't involved in the case. "They're mentioning it because it's a relatively new policy, and it's a huge point of emphasis for this particular DOJ. They want to identify all the wins they get as much as they can."

According to the settlement, Baptist Health—which is a parent company for affiliated hospitals and medical providers in northeast Florida—self-disclosed in July 2022 that "certain legacy patient discount policies potentially violated" the CMPL and AKS. The health system did an internal compliance review and turned over a detailed supplemental disclosure to the government.

The government alleges Baptist Health and its subsidiaries gave discounts up to 50% or more "on patient cost-sharing obligation balances for certain categories of Medicare beneficiaries, as determined by the health system, without regard to any financial need consideration," from Jan. 1, 2016, to Aug. 15, 2022. As a result, the government contends that Baptist Health caused the submission of false claims to Medicare because its subsidiaries provided the discounts in return for the "beneficiaries' purchase or referral of services from Baptist Health subsidiaries," according to the settlement.

Baptist Health received credit under DOJ's guidelines for taking disclosure, cooperation and remediation into account in FCA cases, the settlement states. The copay and other waivers ended the same day as the voluntary disclosure.

Discounts Were Partly to Thank Clergy, Volunteers

Baptist Health told RMC that while transitioning to a new electronic health record in the summer of 2022, it did a

“prophylactic review of its policies to ensure standardization and optimization. This review uncovered two outdated courtesy discount policies. The purpose of the policies was two-fold: to ease the financial burden for uninsured patients who lacked access to discounted pricing under a health plan and, for some patients, like clergy members and health system volunteers, to acknowledge and thank them for graciously contributing their time and effort to help the health system further its charitable mission. Baptist Health found no evidence that suggested these discount policies were designed to induce patients to receive care at Baptist; rather, these discounts were part of Baptist Health’s community and mission-driven organization.” Even so, Baptist Health compliance and legal believed it was conceivable these policies could possibly be seen as violating the law “in that they could have the unintended potential of inducing patients to seek services through Baptist Health.”

In response, Baptist Health said it immediately ceased the discounts, notified its staff and affected patients of the discontinuation, made a voluntary self-disclosure and did an internal investigation into the impact. Baptist Health, which disclosed to all relevant federal partners, including DOJ and the HHS Office of Inspector General (OIG), said it “knew of no whistleblower or hotline complaint at the time of disclosure; rather, this disclosure was done purely in an effort to be a good steward of federal resources. Baptist Health believes that this incident and its response demonstrate its proactive and effective compliance program. Baptist Health reaffirms its dedication to compliantly delivering high-quality care for patients and for consistently doing the right thing.”

Of the \$1.5 million settlement amount, \$1 million is restitution, which indicates it’s a 1.5 multiplier—typical for self-disclosure-driven settlements.

Routine Waivers Are a Problem

It makes sense to self-disclose to both OIG and DOJ, “particularly if an individual or entity desires a global resolution or believes they have liability under both the CMPL and FCA,” said former OIG Senior Counsel David Traskey, with Garfunkel Wild in Washington, D.C. Assuming successful acceptance into OIG’s self-disclosure protocol, the settlement frees providers only from CMPL liability, while DOJ releases providers from FCA liability, he explained. With its joint self-disclosure, Baptist Health got the benefits of both types of releases.

Copay and deductible waivers are a compliance risk for providers if they’re routine, Traskey said. “No matter how altruistic your motive would be, routinely waiving copays and deductibles is likely going to be a problem in particular if they don’t fit into the safe harbor,” he noted. The operative language in the Baptist Health settlement refers to discounts of 50% or more for certain categories without regard to financial considerations. “That kind of discount won’t be covered under the safe harbor,” Traskey said. “To be eligible under the safe harbor, you need to meet all of its criteria—the waiver is not advertised, the waiver is not done routinely and you’ve used the waiver only after you’ve done some kind of individualized financial needs analysis or you’ve undertaken reasonable efforts to collect the money owed but were not successful.”

Aside from the AKS, routinely waiving copays could run afoul of the beneficiary inducement statute and lead OIG to impose civil monetary penalties on people or entities, Traskey said. In this case, it could impose penalties on “remuneration offered to induce program beneficiaries to use particular providers, practitioners, or suppliers,” OIG said on its website.^[4]

Baptist Health didn’t admit liability in the settlement. “In my years counseling clients, Baptist Health stands out as a health care organization committed to high-quality patient care and first-in-class compliance,” said attorney Jason Mehta with Foley & Lardner LLP, which represented Baptist Health. “Baptist directed us to do the right thing every step of the way. It is a testament to the organization, its compliance department, and its leadership that it disclosed these legacy policies and resolved the matter so expeditiously.”

In its statement, Baptist Health added that after self-disclosing, it “worked closely and cooperatively with the

government to provide additional information about the conduct and agree upon the calculation of the conduct's impact. Because of these efforts, we were able to reach a resolution quickly. Baptist Health believes that this incident and its response demonstrate its proactive and effective compliance program. Baptist Health reaffirms its dedication to compliantly delivering high-quality care for patients and for consistently doing the right thing.”

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1 U.S. Department of Justice, Office of Public Affairs, “Florida Hospital System Agrees to Pay \$1.5 Million to Resolve Liability Relating to Self-Disclosure of Improper Discounts,” news release, May 6, 2024, <https://bit.ly/4dAijwi>.

2 Settlement agreement, United States v. Baptist Health (M.D. Fla. May 3, 2024), <https://bit.ly/4dAv0R2>.

3 U.S. Dep’t of Just., Just. Manual §4-4.112 (2019), <https://bit.ly/3hCUorl>.

4 U.S. Department of Health and Human Services, Office of Inspector General, “Civil Monetary Penalty Authorities,” accessed May 9, 2024, <https://bit.ly/4duGTYX>.

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