

DOJ Drops \$83M FCA Medicare Case Against Fresenius

By **Richard Vanderford**

Law360, New York (December 21, 2012, 12:00 AM ET) -- The U.S. Department of Justice has dropped an \$83 million lawsuit claiming that the kidney dialysis unit of health care company Fresenius Medical Care AG ran a scam to overcharge Medicare, Fresenius said Friday.

The government filed a stipulation dismissing the case Thursday, Germany-based Fresenius Medical Care said in a statement. The company, a division of the Fresenius Group of health care companies, bills itself as the world's largest provider of dialysis products and services.

The DOJ claimed that a dialysis company that Fresenius Medical Care bought in 2005 had split its equipment-providing and treatment arms into separate companies to take advantage of a Medicare loophole that allows equipment providers to bill higher if they do not provide the treatment themselves. The government claimed the arrangement violated the False Claims Act .

A lower court judge found that Fresenius had knowingly run a scam and should pay \$83 million, but the Sixth Circuit reversed that decision and ordered some of the case to go back to the district court. A DOJ spokesman declined to comment, but its dismissal signals that agency lawyers might have felt the case was too weak to go forward.

"We are pleased to have this lengthy litigation successfully concluded," Fresenius Medical Care CEO Ben Lipps said.

Dialysis treatment replicates the functions of kidneys for patients whose kidneys no longer function properly. Renal Care Group Inc., which Fresenius bought in 2005, provided dialysis treatment to patients but sold its machines through a unit called Renal Care Group Supply Co. that it formed in 1998.

A company that provides home dialysis treatment to a patient, like RCG does, is entitled to one level of Medicare reimbursement, but companies that only provide equipment, like RCGSC, can be paid at a higher rate, known as "Method II."

Under the law, a Method II supplier is not allowed to be "under the direct supervision" of the services provider, and is eligible for reimbursements that are about 20 to 30 percent higher than those a Method I provider like RCG could get.

From 1999 to 2005, RCG and RCGSC received about \$84 million in Method II reimbursements.

The government based its case on a whistleblower action former employees brought in 2005. They said that RCGSC, whose employees were managed by RCG employees, was "not a legitimate and independent durable medical equipment supply company" but a "billing

conduit.”

Concerns over the arrangement had been brought up long before — a regional chief thought the method was illegal and said “I don't want to go to jail” in a 1998 e-mail to RCG's director of material management, according to the Sixth Circuit.

When the Sixth Circuit reversed the case, it said the RCG had consulted lawyers to check on the arrangement's validity and that the government had raised no concerns in inspections. The company even asked for clarifications on the legality of the arrangement in a letter to a Health Care Financing Administration official. RCG did not get a response.

Medicare officials also inspected RCGSC in 2000 and did not cite the issue, the Sixth Circuit said.

The defendants “consistently sought clarification on the issue, followed industry practice in trying to sort through ambiguous regulations and were forthright with government officials over RCGSC's structure,” s Sixth Circuit panel said. “To deem such behavior 'reckless disregard' of controlling statutes and regulations imposes a burden on government contractors far higher than what Congress intended.”

The Sixth Circuit said federal Medicare regulations “suggest that an organization can be controlled by another and yet still be considered an 'entity' for purposes” of those reimbursements, so the claims may not even be false.

As long as the defendants believed their ownership structure was legal — and they sought legal advice and made disclosures to the government to ensure that it was — it made business sense for them to create RCGSC to receive the higher reimbursements, the appeals court said.

Fresenius Medical Care was represented by James Bennett and Megan Heinsz of Dowd Bennett LLP.

The case is U.S. ex rel. Julie Williams et al. v. Renal Care Group et al., case number 3:09-cv-00738, in the U.S. District Court for the Middle District of Tennessee.

--Additional reporting by Keith Goldberg. Editing by Sarah Golin.

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