

# MEDICAID COMPLIANCE NEWS

## Two Providers With Excluded Employees Faced Far Different Medicaid Consequences

In two recent Medicaid recoupment cases, two organizations that committed the same violation had wildly different fates, apparently because of the way they interacted with the government. Both Maryland-based organizations serve people with developmental disabilities and both had an employee who was excluded from Medicare and Medicaid. But one organization self-reported and wound up repaying a modest amount, while the other organization lost all Medicaid reimbursement earned during the time it employed the excluded person.

The juxtaposition of the two cases underscores the risks of trying to sweep the presence of an excluded employee under the carpet at a time of increased government scrutiny and enhanced enforcement powers. "The difference in the recovery is staggering," Pam Owens, assistant inspector general for the Maryland Department of Health and Mental Hygiene, tells *MCN*.

In fact, it's highly unusual for Medicare or Medicaid to disallow all payments to a facility. "I have never seen that done," says San Francisco attorney Judy Waltz, with Foley and Lardner LLP. The more dramatic case involves Bee Homes Inc., which led investigators on a wild goose chase over the excluded employee, according to a report on Bee Homes prepared by the Maryland IG. Last year, the Maryland Department of Health and Mental Hygiene realized that Bee Homes' vice president and chief financial auditor, Hamilton Pollock, was on the Medicare and Medicaid exclusion list. Pollock was excluded in 1995 after pleading guilty to knowingly and willfully bribing a state employee with the purpose of influencing the employee's official duties, according to the state report. "The scheme involved the purchase of sensitive and private information about Medicaid recipients for the purpose of enrolling those recipients in the HMO that employed Mr. Pollock," the report says. Fifteen years later, when the exclusion came to the state Department of Health and Mental Hygiene's attention, Pollock had not been reinstated to Medicare and Medicaid, Owens says.

Medicare and Medicaid can't pay for services or goods ordered, provided or prescribed by excluded individuals or entities. "This ban on payment extends to payment for services not directly related to patient

care that are performed by an excluded administrator, billing agent, accountant, [or] managing employee," the report says. "Any payment made by the state to an entity employing an excluded individual that is claimed for federal financial participation constitutes an overpayment under 42 USC Sec. 1903, and is subject to recoupment," the state Department of Health and Mental Hygiene said in a letter to Bee Homes.

Employers also risk civil monetary penalties for employing excluded people. Penalties could reach \$10,000 for each item or service provided to the beneficiary. Almost every month, the HHS Office of Inspector General announces a new civil monetary penalty (CMP) settlement with a hospital or other organization for employing an excluded person.

### Conviction Disappears After One Year

In other words, Pollock had to go, and "Medicaid funds paid to Bee Homes since June 23, 2009" — when he started working there — "constitute an overpayment of \$567,353.12 that must be returned to the [state]," the letter noted.

The Maryland Department of Health and Mental Hygiene informed Bee Homes of its obligations under federal exclusion provisions. The response was unexpected: Bee Homes claimed that the Hamilton Pollock it employed as vice president and chief financial auditor was a different guy than the excluded Hamilton Pollock. In a letter to the state, Bee Homes said the information provided by HHS OIG and the state IG didn't match Pollock's Social Security number "or any other identifying information" and that Maryland court records showed Pollock was never convicted of fraud.

But Bee Homes declined to provide the state with a Social Security number "for the Mr. Pollock in its employ, or any documentation that Bee had used in making its determination that their employee was not the Mr. Pollock on the LEIE," which is OIG's Medicare sanctions database. (Owens says under the terms of Pollock's guilty plea — the punishment was "probation before judgment" — he was able to legitimately say he was never convicted one year after the deal was

sealed. But that is unrelated to the fact of his exclusion, she explains.)

As the case strayed farther from the norm, it was referred to the state IG's office. The IG nailed down Pollock's identity in various ways, according to the report. It used Maryland wage records to confirm that Bee Homes employed a Hamilton Pollock with a certain Social Security number that was almost identical to the Social Security number of an excluded person (two digits were inverted) who shared a birth date with the Bee Homes' chief financial auditor as well as several addresses. And the booking form for his 1995 arrest contained the same Social Security number used by the Pollock employed at Bee Homes.

### **Investigator Recognized Employee From 1995**

But still Hamilton Pollock insisted it was a case of mistaken identity and was supported in this stance by Bee Homes' senior leadership, Owens says. At the same time, he declined to provide information to help clear up the matter despite offers from the state and HHS OIG, according to the report.

Finally, the investigation got a boost from the institutional memory of Maryland Medicaid fraud control unit investigator Valerie Puig, who had investigated Pollock for the crime that ultimately led to his exclusion. Puig looked at 13 years' worth of Pollock's driver's license photos and confirmed that the Hamilton Pollock employed at Bee Homes was the same Hamilton Pollock who pleaded guilty in 1995 to bribing a state officer (which triggered the exclusion).

As a result of Bee Homes' employment of Pollock, the Maryland IG moved to recoup all Medicaid payments to Bee Homes during his tenure, which began at least as early as June 23, 2009.

Bee Homes again put up its dukes, and the dispute moved to the state Office of Administrative Hearings, Owens says. "They continued to maintain [the chief financial auditor] was not the same person on the exclusion list, so it was an issue of fact that needed to go to a hearing," she says.

But Bee Homes did not bring an attorney to the hearing as required, which meant sudden death for Bee Homes. The judge issued a default order in favor of the state. And that was that: The recovery was more than half a million dollars, the amount of money Medicaid paid Bee Homes while Hamilton Pollock worked there, Owens says.

Bee Homes is no longer a Medicaid provider. The state found that Bee did not meet Medicaid conditions of participation because of its employment of an excluded individual.

Waltz says "it makes theoretical sense" that Maryland recouped every penny already paid. "If you take that as the framework for the analysis, it makes some sense that no payments would be due.... They suspended future payments unless and until [Bee Homes] provided proof they got rid of the guy." Also, she notes, "From the documents, it looks like the [state] felt there was a lack of cooperation and obfuscation."

Waltz says she had not seen any other case where employment of an excluded provider resulted in a finding that an entity did not meet the conditions of participation. The state's approach in recouping all payments potentially raises larger questions about appropriate remedies for a provider's past failure to meet the conditions of participation.

Switching gears, the Maryland IG took a kinder, gentler approach to another exclusion case that occurred in the same time period because the provider was forthcoming, Owens says. The case came about in the wake of provider outreach and training conducted by the state IG. In community meetings with providers, the IG emphasizes federal audits, the new state False Claims Act and exclusions — "those are three big subject areas, and I have noticed huge turnouts at provider meetings," Owens says.

After one meeting, a manager from another organization serving developmentally disabled people hustled back to work and immediately ran all employees through the exclusion database. The manager got a hit. "She didn't know about the exclusion requirement. She had never heard of the exclusion database," Owens says. It turns out that for seven years, the organization had employed a social worker who was on the LEIE, Owens says.

### **Self-Reporting Is Feared**

The organization self-reported its employment of the excluded social worker, but not without fear and loathing. "Their reaction was, 'I know we have to self-report, but it will cost us a lot of money that we can't afford to pay back,'" Owens recalls. "I told [the manager] that failure to self-report never pays, and that we would figure out an appropriate and legal way to take the least amount back." There are different ways to calculate repayments based on cooperation, "so when providers self-report, we will make sure good providers are not harmed because they did the right thing."

Owens says the state IG is legally allowed to recover just the salary paid by the provider to the excluded individual during the time of employment. Also, the Department of Health and Mental Hygiene can put a provider on a payment plan that protects its solvency and allows it to continue treating Medicaid patients.

Owens says the experience was a first for the IG — a self-disclosure “literally precipitated by a training seminar.”

The differences in how the two organizations fared is striking, and appears to have turned largely on their level of cooperation with the government, Waltz says. “It can definitely change the outlook of the case and how they will treat you,” she says. Bee Homes is no longer in Medicaid, “but it sounds like they said ‘thank you’” to the other provider for the self-disclosure.

Enforcement in the exclusion arena has picked up steam, and there is an emphasis on organizations that have excluded owners and executives, says Washington, D.C., attorney Howard Young, with Morgan Lewis & Bockius. “As part of the enrollment and re-enrollment process, CMS is instructing organizations to look at owners and executives,” says Young, a former top OIG attorney. “I understand states are also becoming more diligent in screening Medicaid providers.”

Screening for excluded employees is a priority of Medicare and Medicaid watchdogs. In a 2009 letter to state Medicaid directors, CMS recommended that Medicaid programs require providers to screen employees for sanctions monthly. “Subsequently, I think a lot of states have developed more robust screening methods and processes,” Young says, which may be one reason propelling increased identification of excluded executives. Some states tell providers to screen employees monthly, but it’s not a statutory or regulatory requirement.

When organizations learn that administrators are on the Medicare sanctions database, it’s not enough to fire them, Young says. “They have to assess whether there is an overpayment as well,” he notes. Sometimes employees don’t even realize they’re still excluded because they assume automatic reinstatement when the exclusion period expires.

But based upon OIG exclusion rules, that’s not the case; people excluded by OIG have to formally reapply and be accepted back into Medicare and Medicaid. This application for reinstatement can also lead to detection by law enforcement of former employers of the excluded person. The application for reinstatement asks where people have been working during their period of exclusion.

“OIG gets a window into where you have been employed,” and if it’s a company that bills Medicare or Medicaid, OIG may be inclined to pursue that employer under its CMP authority for employing an excluded individual. Also, DOJ has recently pursued billings related to excluded people under the civil False Claims Act. So if a provider fails to self-report an excluded person matter and the government subsequently comes knocking, the OIG may view the employer in a much different light, with the potential for larger fines and a harsher view of an overpayment amount, Young notes. “OIG has urged providers to self-disclose in such situations — when they do, they should get a benefit,” he asserts.

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