

## *Fraud and Abuse*

### **Progressive to Pay \$2.4M in Medicare Secondary Payer Case**

Two Progressive Corp. insurance units must pay \$2.4 million to settle a whistleblower case alleging that they illegally shunted responsibility for automobile-accident medical claims to Medicare and Medicaid.

The settlement, announced by the Justice Department Nov. 14, resolves a False Claims Act case brought in the U.S. District Court for the District of New Jersey against the Progressive companies by a Medicare beneficiary in 2014 and later joined by the U.S. and New Jersey (*United States ex rel. Negron v. Progressive Casualty Ins. Co.*, D.N.J., No. 1:14-cv-00577, settlement 11/14/17).

The case, by alleging FCA violations, helped open a new front in litigation under the Medicare Secondary Payer law, which under 2006 guidance from the Health and Human Services Department gives auto insurance carriers primary responsibility for paying medical claims from car crashes. Medicaid is similarly deemed the payer of last resort under federal rules.

A 1990 New Jersey “health first” law allows auto insurance policyholders to choose their health insurance as the primary payer for medical claims from car crashes, but specifically forbids designating Medicare or Medicaid.

“This was the first case to establish that an auto insurer can be held liable under the False Claims Act for causing Medicare or Medicaid to pay medical bills that were previously denied by an auto insurer in bad faith,” Jeremy E. Abay of Sacks Weston Diamond LLC in Philadelphia, who represented the whistleblower, told Bloomberg Law in a Nov. 15 email.

A federal district judge in March 2016 rejected a defense bid for dismissal of the case, finding that whistleblower Elizabeth Negron had a valid FCA claim.

**Class Action Pending** The settlement, Abay said, “sends a clear message to insurers that they will be held accountable for palming off bills onto taxpayers.” He

added that Negron still has a consumer fraud class action pending against Progressive in New Jersey Superior Court.

Progressive, which did not admit to any liability in settling, did not immediately respond to a request for comment.

The state Superior Court Appellate Division in March allowed the class action to go forward, overturning a lower court decision and remanding it for further proceedings. The U.S. and the state aren't parties to the class action.

The cases in federal and state court allege that Progressive permitted Medicare and Medicaid beneficiaries to elect a “health first” policy, even though designating the public programs as primary payers wasn't lawful. That caused Medicare and Medicaid to pay for claims the company should have paid, with the illegal conduct tainting the claims as false, the plaintiffs said.

**Relator's Share Nearly \$1M** The settlement called for Negron, as the whistleblower, to collect a \$600,000 relator's share, or 30 percent of the total settlement, plus \$392,700 in attorneys' fees and costs.

Negron was represented by Abay and John Weston of Sacks Weston Diamond LLC in Philadelphia in the federal case, joined by co-counsel Jerry R. DeSiderato and Thomas D. Biemer of Dilworth Paxson LLP in Cherry Hill, N.J., in the state class action.

Progressive was represented by Michael K. Loucks of Skadden Arps Slate Meagher & Flom in Boston and Carl D. Poplar of Cherry Hill, N.J.

The U.S. was represented by Assistant U.S. Attorney Bernard J. Cooney.

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*The settlement is at <http://src.bna.com/ueZ>. The complaint is at <http://src.bna.com/ueX>. A searchable database of health-care FCA settlements is available on Bloomberg Law.*

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