



Aetna vs. BASM: Pigs Get Fat and Hogs Get Slaughtered

By: **Carol K. Lucas**

On April 13, 2016, a jury in Santa Clara, California awarded Aetna, Inc. \$37.4 million from Bay Area Surgical Management, LLC ("BASM"), six of its affiliated surgery centers and its three principals. Aetna had accused the surgery center company of a massive conspiracy to defraud Aetna and other carriers who offer out-of-network benefits by paying off doctors, lying to patients and lying to carriers and employers, the result of which was overpayment by Aetna for surgeries to the extent of tens of millions of dollars. Aetna asserted causes of action for fraud, intentional interference with contractual relations and unjust enrichment. The BASM defendants have announced that they will appeal.

Aetna's specific complaints were several: first, Aetna contended, BASM paid off doctors by selling them ownership interests at a price far below fair market value. Because physicians paid only a nominal price for their ownership interests, BASM was able to pay annual rates of return of several hundred percent. In return, Aetna claimed, the owner physicians shifted their cases to BASM centers, and especially their high-price procedures with good coverage. BASM also reallocated ownership to reward high producing physicians and punish those who were less profitable.

BASM also concealed from patients how much the surgery centers were charging for procedures by not collecting the patients' co-payment or, Aetna, claimed, telling the patient that the charge was substantially lower than the amount the surgery centers billed to Aetna. Aetna presented testimony that the waiver of coinsurance skews the healthcare system by encouraging patients to get procedures at more costly facilities. Aetna also presented evidence that BASM's charges were significantly higher than other area facilities, both in and out of network.

Aetna further presented evidence that the BASM surgery centers actively sought patients with good out-of-network benefits. BASM surgical schedulers were instructed not to schedule patients whose plans had a daily max for out-of-network benefits and emails and text messages from BASM principals to owner physicians emphasized the kinds of cases they were to bring in order to maximize profit.

The result of these practices, Aetna argued, was an insidious conspiracy to bilk the insurance company out of multiple millions of dollars.

BASM had argued that it was the insurance company's responsibility to protect itself. Further, per BASM, everyone in the health care industry knows that billed charges are arbitrary. Only payers can determine what to pay for a particular procedure at a particular facility and "no one ever pays the sticker price."

The jury unanimously sided with Aetna and awarded all of the damages Aetna claimed. Still pending in California state court is a similar case by United Healthcare Services, Inc. set for trial later this year and a case in California federal court by BASM against Aetna, United and some in-network surgery centers alleging an anti-competitive conspiracy to destroy BASM's business.

Reports of this case cannot help but chill other out-of-network surgery centers in California. However, it is important to remember that it is not illegal or fraudulent to be out of network. Nor is it illegal or fraudulent to charge high fees. Aetna did not go after BASM merely because BASM charged a lot. Rather, it was the combination of practices described above, all allegedly intended to achieve the effect described, that prompted the lawsuit. If BASM had charged physicians the real value of their interests, Aetna could not have alleged a kickback conspiracy. Similarly, if BASM had not reallocated ownership based on profitability, Aetna could not have argued that the "ownership" was a sham to disguise payment for referrals. If BASM had told patients what their procedures really cost, or collected patient coinsurance, Aetna could not have alleged fraudulent concealment or billing fraud.

The case should not be read to outlaw the out-of-network model. However, the specific practices called out in the case should make other surgery centers consider their own practices, lest they too cross the line.



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