

NEWS RELEASES

PUBLISHED: FEBRUARY 1, 2023

Services

False Claims Act

Hospice & Palliative Care

Hospice Medicare & Medicaid Audits

Industry

Healthcare

Professionals

BRYAN K. NOWICKI

MADISON:

608.234.6012

BRYAN.NOWICKI@

HUSCHBLACKWELL.COM

JONATHAN A. PORTER

WASHINGTON:

202.378.2300

JONATHAN.PORTER@

HUSCHBLACKWELL.COM

Husch Blackwell Guides Clients through Surge in Hospice Audits

Husch Blackwell’s Hospice practice team handled a record number of hospice audits during 2022, part of a surge in audits witnessed by the industry. Attorneys at Husch Blackwell worked on over 200 audit matters for hospices throughout 2022, a number the group anticipates will remain steady or potentially increase in the coming year.

“The factors that have driven this surge in audit activity—the billions of Medicare and Medicaid dollars paid to hospices, the post-Covid increase in enforcement activity, and the various ambiguities in clinical and documentation standards that pose ‘traps’ for unwary hospices—remain in play,” said Husch Blackwell partner Bryan Nowicki. “Without a significant change in policy direction or government resources, it’s difficult to see these risks decreasing in 2023.”

Audit activity increased in frequency and intensity across numerous program initiatives, including audits by Medicare Uniform Program Integrity Contractors (UPIC), Medicaid UPIC, the CMS Center for Program Integrity (CPI), Targeted Probe and Educate (TPE) reviews by Medicare Administrative Contractors (MACs), federal Office of Inspector General (OIG) audits, and state-sponsored Medicaid audits.

“As clients turned to us more frequently throughout the year, our team expanded, and we were able to leverage our strong bench to manage the spike in volume,” said Meg Pekarske, head of Husch Blackwell’s Hospice practice. Nowicki added that “we are also continually enhancing audit appeal efforts. With an increasing number of audit appeal decisions appearing to ignore critical clinical data and applicable law, we plan to commence a number of actions in federal court to reverse those flawed decisions and shape the way audit appeal decisions are made in the future.”

In addition to the spike in audit volume, the team has had to address the increased use of certain audit methodologies that impose significant consequences on hospices, notably the use of extrapolation, which involves the review of a handful of claims, then using statistical principles to extend the conclusions of that review to all of the hospice's claims. UPIC audits involving extrapolation increased in 2022, and the Husch Blackwell team resumed its efforts to rein in its use and successfully eliminate the financial impact such practices have on hospices.

“Our team has developed approaches to deal with what we believe to be obvious flaws in the use of extrapolation by healthcare regulators,” said Nowicki. “We have achieved some significant victories for clients in this struggle, including last year, where we extended our streak of successfully eliminating extrapolated overpayments by reducing one client's extrapolated overpayment of over \$2 million to zero at an Administrative Law Judge hearing.”

In 2022, Husch Blackwell's Hospice team also represented a client in potential U.S. Supreme Court litigation. At the trial court, our team had obtained the dismissal of a False Claims Act (FCA) whistleblower lawsuit against a hospice. The whistleblower appealed to the Court of Appeals (and lost) and, ultimately, to the Supreme Court. The case raised cutting-edge issues concerning the level of detail a whistleblower must allege to avoid dismissal. The Supreme Court refused to grant the whistleblower's cert request, preserving our team's trial court victory.

“As attempts at dispute resolution work their way through the system, we found it imperative to maintain a strong bench of lawyers,” said Pekarske. “That includes adding talent whenever possible. We did that recently with the arrival of Jonathan Porter, a former Assistant U.S. Attorney in the Southern District of Georgia, who has deep experience as a prosecutor in the area of healthcare fraud and False Claims Act cases.”

Porter joined Husch Blackwell in January 2023.