STRATEGIC MANAGEMENT SERVICES

Federal Court Finds That CMS Overpayment Rule Does Not Violate Medicare Requirements

Richard P. Kusserow | August 26, 2021

Key Points:

- **Expect CMS to move against backlog held up by litigation.**
- **Expect an increase in DOJ investigative and enforcement actions.**

The D.C. Circuit Court of Appeals has reversed a lower court opinion that vacated the Center for Medicare and Medicaid Services (CMS) Overpayment Rule for Medicare Advantage Organizations (MAOs). As a result, CMS may again require MAOs to return payments that were based upon diagnoses that were unsupported by medical records.

The Overpayment Rule, which was established by the Affordable Care Act (ACA), requires that an overpayment be reported and returned within 60 days after the date on which the overpayment was identified (or, if applicable, by the cost report due date). Health care providers and suppliers may otherwise face liability under the False Claims Act (FCA) and the Civil Monetary Penalties Law (CMPL). They may also be subject to exclusion from federal health care programs.

In its opinion, the Court states that "[t]he Overpayment Rule is part of the government's ongoing effort to trim unnecessary costs from the Medicare Advantage program" and "[n]either Congress nor CMS has ever treated an unsupported diagnosis for a beneficiary as valid grounds for payment to a Medicare Advantage insurer. Consistent with that approach, the Overpayment Rule requires that, if an insurer learns a diagnosis it submitted to CMS for payment lacks support in the beneficiary's medical record, the insurer must refund that payment within sixty days. The Rule couldn't be simpler."

This ruling means CMS could move against the backlog of risk adjustment-related recoupments that it put on hold while it awaited the outcome of the litigation. This may have a significant financial impact on payors; according to the Government Accountability Office (GAO), overpayments amounted to about 10 percent of all Medicare Advantage payments in fiscal year 2016. This ruling is also likely to lead to an increase in investigative and enforcement actions. The significance of the ruling extends to the Department of Justice (DOJ), which has intervened in many *qui tam* actions that have accused MAOs of gaming the system by applying unsupported diagnostic codes to patient records in order to receive higher reimbursements from CMS.

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