

Medicare Overpayments Can Go From Bad to Worse  
- G. Christopher Kelly, Esq.

There are many ways in which an ambulance service provider may *not* get paid by Medicare. A claim may be denied from the beginning, for various reasons. Or, your claim may be paid initially, only to be determined later to be an “overpayment”. These overpayments may be determined by an audit or “probe review” which then requires the company to refund the overpayments or have the overpayments recouped from future payments due to the company. These overpayments may also be determined in a lawsuit filed against the company by the government or individual “whistleblowers” suing on the government’s behalf.

In a lawsuit brought by the United States and two former employees of an Illinois ambulance company, a Federal Court has upheld the government’s right to seek recovery of money paid to the ambulance company under several different theories. The Complaint filed against the companies was initially brought by the former employees under the False Claims Act, which allows for private “whistleblowers” to recover money improperly paid by the government due to false claims or statements. The Act also allows these “whistleblowers” to be paid a percentage of what the government recovers, anywhere from 15 to 30%. In this case, the allegations are that the ambulance service billed the Medicare program for services rendered to Medicare patients which were not medically necessary.

In addition to the False Claims violations, the former employees also alleged that the ambulance service entered into agreements with several hospitals to transport in-patients at a reduced rate when the hospitals were responsible for the charges in exchange for getting referrals of other out-patient transports which were paid by Medicare at a higher rate. The Complaint alleges that this reduced rate given to the hospitals in exchange for the referral of Medicare business constitutes an illegal incentive under the federal Anti Kick-Back Act, and therefore, all patients referred from the hospitals and transported by the ambulance company were claims that should not have been made. The Complaint states that these payments should be treated as false claims as well and should be repaid by the ambulance company and the hospitals involved.

In a separate complaint filed against the same ambulance company and hospitals, the government reiterates the former employees’ position regarding the False Claims Act and Anti Kick-Back Act violations. However, the government’s Complaint goes on to include separate allegations of payment by mistake and unjust enrichment. The legal claim of “payment by mistake” would allow the government to recover payments made by Medicare upon a showing that the original payment was based on a mistake of fact. No showing of intentional fraud on the part of the ambulance company would be required for the government to recover under this theory. Similarly, the claim of “unjust enrichment” would allow the government to recover upon a showing that the ambulance company was not entitled to the money they received. Again, no showing of intentional misconduct on the part of the ambulance company would be required for the government to recoup payments under this theory.

Both the complaint filed by the former employees and the complaint filed by the government seek the same amount of actual damages: \$8,971,580.00. This figure comes from the actual payments made by Medicare to the ambulance company for services furnished to patients who allegedly did not qualify under the medical necessity rules, plus the services furnished to patients who were referred by hospitals as part of the alleged illegal kick-back arrangement. The complaints also seek treble damages, or three times the amount of the actual damages, and other statutory penalties available under the False Claims Act. While the government's alternative allegations of payment by mistake and unjust enrichment could result in the ambulance company having to repay the total actual damage amount, only the False Claims Act carries the additional penalties of treble damages and penalties of up to \$11,000 per false claim made. The difference is that in order for the government to qualify for these additional amounts, they must prove either intent to make false or fraudulent claims or reckless disregard for the truth of these claims.

The case is United States *ex rel* John Klaczak and Jeff Sharp v. Consolidated Medical Transport, Inc. Sharp was a former employee and EMT for CoMed. Klaczak was the former general manager for Stat, Inc., an ambulance company acquired by Tower Ambulance Service in 1994. In addition to CoMed, the Complaint filed by Sharp and Klaczak identified Tower Ambulance Service Inc. and Daily's Ambulance Service, Inc. (both of which are connected to CoMed), St. Bernard Hospital, Mount Sinai Medical Center of Chicago, and many other hospitals and individuals who were allegedly involved in the illegal conduct.

With actual damages approaching \$9 million, treble damages and penalties for each false claim made could make the suit worth over \$30 million. Of which the former employees who blew the whistle on the alleged fraud stand to gain as much as \$7.5 million.

Whether your claims are denied up front or are paid and then determined to be overpayments in an audit or court proceeding; or whether the theory for the overpayment is intentional fraud and kick-back violations with a resulting repayment due of \$30 million, or payment by mistake and unjust enrichment with a resulting repayment of \$9 million, it is clear that the government can use one of several legal avenues to recoup overpayments.

There is nothing good about having claims denied, however having the money and then having to pay it back often creates even more of a hardship. That is especially the case where interest has accrued and you owe more than you received. It is even more devastating when the government feels that the overpayments were caused by intentional or reckless misconduct and therefore seeks three times the amount actually received. Then there is the worst case scenario where the government believes that the conduct that caused the overpayment was more than just intentional, it was criminal. Criminal charges can bring additional monetary penalties as well as significant jail time. No question about it, overpayments can go from bad to worse, much worse.

Stories like these are unfortunately much more than urban legends. Be sure that your company bills properly and is in compliance with all federal and state regulations. The best way to insure proper payments and to avoid overpayment issues is to document your services well and to understand the regulations that govern your industry.

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