PUBLICATION

CMS's Use of Contractors to Determine "Sustained or High Level of Payment Errors" Upheld [Ober|Kaler]

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In a decision handed down on July 23, 2013, the United States Court of Appeals for the D.C. Circuit upheld the use by CMS of outside contractors to determine whether a home health agency's reimbursement claims had exhibited a "sustained or high level of payment error." *Gentiva Healthcare Corporation d/b/a Heritage Home Health v. Sebelius*, No. 12-5179 [PDF].

As part of the Medicare Prescription Drug, Improvement, and Modernization Act, Congress authorized the Secretary to use outside contractors to determine whether the Medicare program had overpaid for services furnished by providers and other entities. Congress further stated, however, that a "Medicare contractor" may not use extrapolation to determine overpayment amounts unless "the Secretary determines" that there is a "sustained or high level of payment error." 42 U.S.C. § 1395ddd(f)(3). The question before the court was whether the Secretary could delegate this "sustained or high level" determination to her Medicare contractors.

Specifically at issue was a determination made by Cahaba Safeguard Contractors (Cahaba) that a significant number of Gentiva Healthcare's home health claims failed to meet Medicare coverage requirements. Cahaba had concluded both that 58% of the claims had failed to comply with the coverage requirements and that the payments Gentiva received per beneficiary were high compared to the average payment received by providers in the region. Based on these findings, Cahaba then determined that Gentiva's claims exhibited a "sustained or high level of payment error." Following this determination, Cahaba drew a sample of claims, determined an error rate related to the sample, and extrapolated the error rate across all relevant claims to reach an overpayment determination.

Gentiva challenged the Cahaba determination, arguing that the Medicare statute barred Cahaba or any outside contractor from making the "sustained or high level of payment error" finding that is a prerequisite to using statistical extrapolation. Gentiva argued that, because Congress used the term "Medicare contractor" and "the Secretary" in the same sentence, it intended that the Secretary herself make a determination of a sustained or high level of payment error and that the Secretary could not assign or delegate that function to a contractor. The court, however, rejected this argument.

Applying the time-honored analytical framework of *Chevron U.S.A., Inc. v. Nat'l Resources Def. Council, Inc.*, 467 U.S. 847 (1984), the D.C. Circuit stated that, although it believed that Gentiva may have the better reading of the statute, it must defer to the Secretary. The court acknowledged that Gentiva was correct in stating that delegations to non-governmental entities may be "assumed to be improper absent an affirmative showing of Congressional authorization." But it then stated that Congress had provided such an affirmative showing in 42 U.S.C. § 1395kk(a), which expressly authorizes the Secretary to "perform any of [her] functions under this subchapter directly, or by contract… , as the Secretary may deem necessary." Given the breadth of this authorization, the court said, it could not find the Secretary's construction unreasonable. The court acknowledged that Gentiva may "well be right that reserving the screening function to agency personnel would better effectuate Congress' apparent desire to give the Secretary more oversight over contractors' use of extrapolation," but it then said that "even a desirable statutory interpretation cannot trump an agency's reasonable interpretation under *Chevron*."

Ober|Kaler's Comments

The *Gentiva* decision reflects how the *Chevron* decision makes challenging a CMS determination an uphill battle. The Medicare statute is complex, and it contains many provisions that the agency may identify to suggest that the statute is not clear on its face. If a court accepts this argument and concludes that the statute is ambiguous, the only question remaining is whether the Secretary can assert some plausible basis to support her interpretation, which she often can. Therefore, the best tactic for providers often is to show that the statute is unambiguous in its support of the meaning that the provider is giving it or to show that the Secretary's position is otherwise defective due to some procedural flaw.