Arnall Golden Gregory LLP

Client Alert

Contact Attorney Regarding This Matter:

Tracy M. Field
404.873.8648 - direct
404.873.8649- fax
tracy.field@agg.com

Update: South Carolina Lawsuit Challenges Recoupment of Funds while Medicare Appeal is Pending

On September 5, 2008, the United States moved to dismiss the lawsuit brought by South Carolina providers who sought to enjoin the Medicare program for recouping alleged Medicare Part A overpayments while appeals were pending. (See, Case No. 8:08-2453-HFF, U.S. District Court, District of S.C., Anderson Division). The providers contended that any recoupment of funds while the appeals process is pending violates the Medicare Prescription Drug Improvement and Modernization Act of 2003 (MMA).

Now, the government has moved to dismiss the lawsuit, asserting that because the providers have not completed the appeals process, the court does not have the authority to decide the issue. The government argues that the administrative appeals process is so intertwined with the overpayment demands that the process must be completed, or final, before a court can consider the issues raised.

On September 23, 2008, the providers responded to the governments' position, asserting that the MMA made clear Congress' position that any alleged overpayment cannot be recouped until the provider has had the opportunity to challenge the determinations through the administrative appeals process. The providers assert that their lawsuit relates to the issue of when a recoupment is proper, and that forcing them to wait until all administrative reviews are complete will make the issue moot. In their briefs, the providers report the alleged overpayments were recouped either at or before the notices were sent. Therefore, the providers had no time to file appeals to stay the recoupments as contemplated under the MMA. The impact of over $30 million in recoupments for the providers' cash flow was substantial. Ultimately, the providers asserted that the court had authority to decide the case now, without waiting for the appeals process to be completed.

As reported previously, the outcome of this case could have far-ranging implications for all Medicare-participating providers who had adverse determinations as a result of post-payment review. CMS's current policy is to begin recoupment 40 days after an adverse decision is issued, despite the fact that providers have 120 days or 180 days, respectively, to file appeals in the first

Arnall Golden Gregory LLP
Attorneys at Law
171 17th Street NW
Suite 2100
Atlanta, GA 30363-1031
404.873.8500
www.agg.com

and second stages of the appeals process. Although it is possible to file notice of an appeal early to meet CMS's aggressive deadline and reserve the right to supplement the filing, there are administrative burdens for providers in doing so. In addition, rushing to file an appeal may result in an incomplete record, which reduces the provider's chances of success.