

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

---

---

**VOLUME 7**

**NUMBER 12**

**December 2021**

---

<b>Editor's Note: Task Force Guidance</b> Victoria Prussen Spears	391
<b>Safer Federal Workforce Task Force Issues COVID-19 Workplace Safety Guidance for Federal Contractors and Subcontractors</b> Jessica C. Abrahams, Lindsey M. Hogan, Kristin Jones Pierre, Grayson F. Harbour, and Graciela (Grace) Quintana	394
<b>Hunting Telehealth Fraud Under COVID-19 Waivers and Expansion</b> Stephen D. Bittinger, Kim H. Looney, and Nora E. Becerra	400
<b>FAR Conformed to the "New" Limitations on Subcontracting Methodology at 13 C.F.R. § 125.6</b> Amy Laderberg O'Sullivan, Olivia L. Lynch, Michael E. Samuels, and Zachary Schroeder	410
<b>Biden Administration Continues Taking Action to Strengthen U.S. Supply Chains</b> Jamieson L. Greer, Christine E. Savage, Christopher Hyner, and Adam Harper	415
<b>Justice Department Rescinds Brand Memorandum, Reopens the Door to False Claims Act Actions Based on Sub-Regulatory Guidance</b> John P. Elwood and Christian D. Sheehan	419
<b>D.C. Circuit Court of Appeals Revives Medicare Advantage Overpayment Rule</b> Barak A. Bassman, Virginia Bell Flynn, Judith L. O'Grady, Leah Greenberg Katz, and Sara B. Richman	423

**QUESTIONS ABOUT THIS PUBLICATION?**

---

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at ..... 516-771-2169  
Email: ..... heidi.a.litman@lexisnexus.com  
Outside the United States and Canada, please call ..... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844  
Outside the United States and Canada, please call ..... (518) 487-3385  
Fax Number ..... (800) 828-8341  
Customer Service Website ..... <http://www.lexisnexus.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940  
Outside the United States and Canada, please call ..... (937) 247-0293

---

Library of Congress Card Number:  
ISBN: 978-1-6328-2705-0 (print)  
ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[www.lexisnexus.com](http://www.lexisnexus.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

## **EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

## **EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

## **BOARD OF EDITORS**

**MARY BETH BOSCO**

*Partner, Holland & Knight LLP*

**PABLO J. DAVIS**

*Of Counsel, Dinsmore & Shohl LLP*

**MERLE M. DELANCEY JR.**

*Partner, Blank Rome LLP*

**J. ANDREW HOWARD**

*Partner, Alston & Bird LLP*

**KYLE R. JEFcoat**

*Counsel, Latham & Watkins LLP*

**JOHN E. JENSEN**

*Partner, Pillsbury Winthrop Shaw Pittman LLP*

**DISMAS LOCARIA**

*Partner, Venable LLP*

**MARCIA G. MADSEN**

*Partner, Mayer Brown LLP*

**KEVIN P. MULLEN**

*Partner, Morrison & Foerster LLP*

**VINCENT J. NAPOLEON**

*Partner, Nixon Peabody LLP*

**STUART W. TURNER**

*Counsel, Arnold & Porter*

**ERIC WHYTSELL**

*Partner, Stinson Leonard Street LLP*

**WALTER A.I. WILSON**

*Partner Of Counsel, Dinsmore & Shohl LLP*

*Pratt's Government Contracting Law Report* is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

## D.C. Circuit Court of Appeals Revives Medicare Advantage Overpayment Rule

*By Barak A. Bassman, Virginia Bell Flynn, Judith L. O'Grady,  
Leah Greenberg Katz, and Sara B. Richman\**

*The authors of this article discuss a decision by the U.S. Court of Appeals for the D.C. Circuit that could have broad implications for Medicare Advantage insurers.*

The U.S. Court of Appeals for the District of Columbia Circuit revived the Centers for Medicare & Medicaid Services (“CMS”) 2014 Medicare Advantage Overpayment Rule in deciding *UnitedHealthcare Ins. Co. v. Becerra*, a ruling that could have broad implications for Medicare Advantage (“MA”) insurers.<sup>1</sup>

### BACKGROUND

The Affordable Care Act requires MA insurers to report and return any overpayments identified by the insurer to CMS within 60 days. Failure to do so can trigger liability under the False Claims Act (“FCA”). In 2014, CMS promulgated the Overpayment Rule to implement these statutory requirements and further specified that a “diagnosis that has been submitted [by a Medicare Advantage insurer] for payment but is found to be invalid because it does not have supporting medical record documentation would result in an overpayment.”<sup>2</sup> For purposes of the rule, overpayments are “identified” when actually identified or when they should have been identified by the insurer “through the exercise of reasonable diligence.” “Reasonable diligence” is defined as “proactive compliance activities conducted in good faith by qualified individuals to monitor for the receipt of overpayments.”<sup>3</sup>

Documentation of a reported medical diagnosis is relevant here because of the way CMS pays MA insurers. Unlike traditional fee-for-service (“FFS”) Medicare payments, MA insurers receive pre-established monthly lump sum payments for each beneficiary they insure. The monthly payment amounts are intended to reflect the relative risk and cost of insuring any particular member.

To that end, the Medicare statute requires a monthly payment adjustment to reflect “such risk factors as age, disability status, gender, institutional status, and

---

\* Barak A. Bassman (barak.bassman@troutman.com), Virginia Bell Flynn (virginia.flynn@troutman.com), Judith L. O’Grady (judith.ograde@troutman.com), Leah Greenberg Katz (leah.katz@troutman.com), and Sara B. Richman (sara.richman@troutman.com) are partners at Troutman Pepper Hamilton Sanders LLP.

<sup>1</sup> See *UnitedHealthcare Ins. Co. v. Becerra*, No. 18-5326 (D.C. Cir. Aug. 13, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> 42 C.F.R. § 422.326 at 29,921.

. . . health status . . . , so as to ensure actuarial equivalence” between traditional Medicare and Medicare Advantage. MA insurers are then paid larger amounts for covering higher risk, costlier individuals.<sup>4</sup>

CMS uses the Hierarchical Condition Category risk adjustment model to convert diagnosis data into expected costs for MA beneficiaries. The model uses data from individuals covered under the traditional Medicare program to determine medical costs associated with certain diagnosis and demographic information. CMS then uses this data to predict the cost of care for MA beneficiaries based on their demographics and diagnoses.

Since errors may occur in reporting diagnosis codes, CMS has implemented mechanisms, including the Overpayment Rule, to validate reported diagnoses. Another validation mechanism is the Risk Adjustment Data Validation (“RADV”) audit through which CMS audits a sample of medical records for any unsupported diagnoses that may have resulted in an overpayment. CMS then extrapolates this sample’s error rate across all beneficiaries. At one point, CMS considered adding, but ultimately did not, an FFS adjuster to achieve actuarial equivalence in the RADV program. The FFS adjuster would be applied to any overpayment amounts to ensure that MA insurers were only liable for repayments that exceeded any payment errors under the traditional Medicare program. The FFS adjuster was at issue in the challenge to the Overpayment Rule before the D.C. Circuit.

#### **D.C. DISTRICT COURT VACATES OVERPAYMENT RULE IN 2018**

A group of MA insurers sued to challenge the Overpayment Rule in 2016. The MA insurers argued, among other things, that the Overpayment Rule:

- (1) Ran afoul of the Medicare statute’s actuarial equivalence requirement;
- (2) Is inconsistent with CMS’s earlier announcement that an FFS adjuster would be applied to RADV audits; and
- (3) Applies a negligence standard to False Claims Act liability, which contradicts the FCA’s standards.

The district court granted the insurers’ motion for summary judgment and vacated the Overpayment Rule, holding that it violated the Medicare statute’s actuarial equivalence requirement. The court held that because “payments for care under traditional Medicare and Medicare Advantage are both set annually based on costs from unaudited traditional Medicare records,” but the Overpayment Rule measures overpayments on audited records, there was an actuarial

---

<sup>4</sup> 42 U.S.C. § 1395w-23(a)(1)(C)(i).

distinction.<sup>5</sup> The court found there could be no actuarial equivalence between payments under traditional Medicare and Medicare Advantage when CMS pays for “all diagnostic codes, erroneous or not, submitted to traditional Medicare,” but would require repayment for erroneous diagnoses submitted by MA insurers.<sup>6</sup>

The court further held that CMS’s prior statements regarding the inclusion of an FFS adjuster in its RADV audits for purposes of actuarial equivalence constituted an agency decision or policy from which CMS unlawfully departed in enacting the Overpayment Rule.<sup>7</sup>

Finally, the court held that the Overpayment Rule’s “reasonable diligence” requirement went “far beyond the False Claims Act,” and “CMS has no legislative authority to apply more stringent standards to impose FCA consequences through regulation.”<sup>8</sup>

#### **D.C. CIRCUIT COURT REVIVES OVERPAYMENT RULE**

CMS appealed the district court’s order in late 2018 and prevailed in August. In reversing the district court’s order, the D.C. Circuit primarily focused on whether the Medicare statute’s actuarial equivalence requirement even applied to the Overpayment Rule.

The court answered that question in the negative: “[A]ctuarial equivalence does not apply to the Overpayment Rule or the statutory overpayment-refund obligation under which it was promulgated. Reference to actuarial equivalence appears in a different statutory subchapter . . . and neither provision cross-references the other.”<sup>9</sup> It further explained that “[a]ctuarial equivalence is a directive to CMS. It describes the goal of the risk-adjustment model Congress directed CMS to develop. It does not separately apply to the requirement that Medicare Advantage insurers avoid known error in their payment requests.”<sup>10</sup>

Because the court held that the actuarial equivalence requirement does not even apply to the Overpayment Rule, it ruled that the agency had no obligation to consider an FFS adjuster as it did in the context of RADV audits.

Notably, CMS did not appeal the district court’s holding on the Overpayment Rule’s reasonable diligence requirement as it pertains to False Claims Act

---

<sup>5</sup> *Becerra*, *supra* note 1.

<sup>6</sup> *UnitedHealthcare Ins. Co. v. Azar*, 330 F. Supp. 3d 173, 187 (D.D.C. 2018).

<sup>7</sup> *Id.* at 189–90.

<sup>8</sup> *Id.* at 191.

<sup>9</sup> *Becerra*, *supra* note 1.

<sup>10</sup> *Id.*

liability. Accordingly, the district court's holding that the reasonable diligence requirement was overreaching remains intact. Although the D.C. Circuit was not charged with reviewing the reasonable diligence requirement, it did, in the context of evaluating the actuarial equivalence requirement, reject the insurers' argument that the Overpayment Rule "creates a sweeping obligation that effectively requires Medicare Advantage insurers to self-audit all their data."<sup>11</sup> The court explained that "nothing in the Overpayment Rule obligates insurers to audit their reported data . . . the Rule only requires" refunds for any known overpayments, i.e., "payments [insurers] *are aware* lack support in a beneficiary's medical records."

### IMPLICATIONS

With this opinion, the D.C. Circuit disfavored arguments advanced by Medicare Advantage insurers and the district court, largely reinstating the Overpayment Rule and shoring up CMS' authority to implement fraud prevention and cost containment measures in a variety of forms.

Importantly though, this opinion did not disturb the significant victory Medicare Advantage insurers enjoyed at the district court concerning the reasonable diligence requirement, which the court ruled could not be applied to lower the standard for False Claims Act liability.

Even so, Medicare Advantage insurers must remain diligent in their compliance procedures. As the D.C. Circuit made clear, CMS has several tools in its arsenal—including certification obligations, RADV audits, and the Overpayment Rule—to identify and recoup overpayments and to potentially impose substantial liability for erroneous coding submissions.

---

<sup>11</sup> *Id.*