

HEALTH CARE  
& HUMAN  
SERVICES

David P. Glasel, *Chair*  
518.429.4250  
dglasel@hblaw.com

Linda J. Clark

Sheila A. Gaddis

James S. Grossman

Holly J. Hoehner

Rashondra M. Jackson

Tara N. Kamble

Eugene M. Laks

Henry J. Nahal

Gabriel M. Nugent

Margaret Surowka Rossi

Robert Tengeler

Melissa M. Zambri

## Statutory Changes and Proposed Regulations Give OMIG Greater Ability to Penalize Medicaid Providers

Recent statutory changes have increased the amount of the penalty that the Office of the Medicaid Inspector General (OMIG) may impose on providers who violate Medicaid standards or generally accepted medical practice.

The revised statute and its corresponding proposed regulations increase the maximum amount of the penalty that can be assessed from \$2,000 to \$10,000, if the provider has not had a penalty assessed against it during the last five years, for each item of care, service or supply that is determined to warrant a penalty under the provisions. If the provider has been penalized during the previous five years, the maximum penalty increases to \$30,000 for each item of care, service or supply subject to the penalty.

OMIG may require the payment of a monetary penalty as restitution to the Medicaid program where a provider fails to comply with Medicaid or generally accepted medical practice standards in a substantial number of cases or where a provider grossly or flagrantly violates Medicaid or generally accepted medical standards, where a Medicaid payment was paid, and the person knew or had reason to know that: (i) the care was medically improper, unnecessary or in excess of the documented medical needs of the patient; or (ii) the care, services or supplies were not provided as claimed; or (iii) the person who ordered or prescribed the care, services or supplies was suspended or excluded from the Medicaid program when the care, services or supplies were furnished; or (iv) the care, services or supplies for which payment was received were not, in fact, provided.

Under prior regulations, these penalties could be taken in lieu of recoupment of the Medicaid payments for these services. Under the proposed regulations, if twenty-five percent or more of the claims that were the subject of an audit conducted by OMIG are considered overpayments, unauthorized payments or "otherwise inappropriate payments," a monetary penalty and recoupment may be sought. If less than twenty-five percent of identified claims come into question, then OMIG may recoup the payments or impose a monetary penalty, but not both. Multiple responsible persons may be required to pay a penalty based upon the same improper act or claim.

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These new provisions will give OMIG yet another tool to use in its aggressive auditing and investigating of providers. They also further the importance of handling any Medicaid audit carefully from the outset. For more information regarding the audit process, please see our Firm's December 2007 Legal Alert. The failure to respond appropriately to an audit from the outset may lead to results where more than twenty-five percent of the claims are found to be inappropriate, leading OMIG to seek substantial penalties and recoupment.

These new provisions also underscore the need for an effective Compliance Program to assist providers in establishing systems designed to maintain statutory and regulatory compliance and identify and then correct non-compliance as soon as practicable. A Compliance Program also demonstrates to government enforcement agencies a provider's good faith compliance efforts. ■

*Hiscock & Barclay's Health Care and Human Services Practice Area has substantial experience in helping providers respond to investigations, audits and other reviews and implementing compliance programs. Members of our team have extensive experience in attending entrance and exit conferences, preparing responses to audit reports, attending to hearing issues, drafting and revising compliance plans, and training Boards of Directors, executive team members and staff of providers regarding compliance issues. Should you have any questions regarding this Legal Alert, feel free to contact Melissa Zambri or any member of the Health Care and Human Services Practice Area.*

Melissa M. Zambri  
Partner, Albany  
mzambri@hblaw.com  
(518) 429-4229

