

Anatomy of An Overpayment Analysis
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AGENDA

- The "60 Day Rule"
- Initial Steps If Concern Identified
 - Is it a **Credible** Allegation of a **Potential** Overpayment?
 - If not credible, Documentation Required
- If **Potential** Overpayment
 - Internal or External Experts?
 - Privilege considerations
 - Statistics
 - Start and End Date
 - Refund Explanation

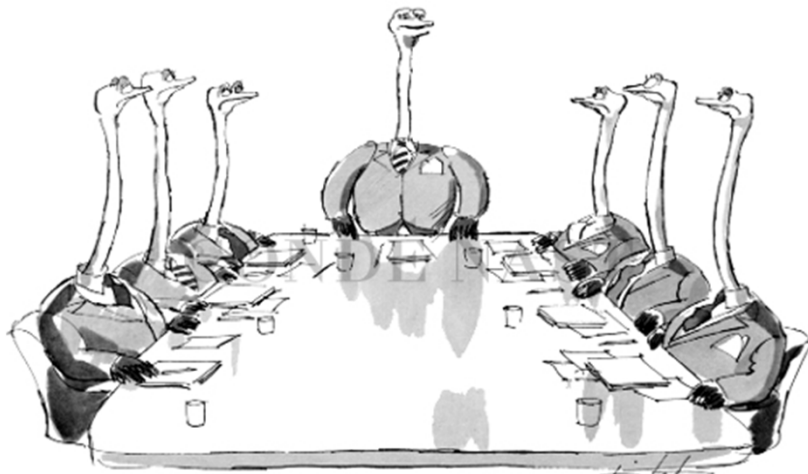
Potential Overpayment Analysis

The 60 Day Rule

Medicare Parts A and B Health Care providers and suppliers are to report and return overpayments within 60 days after the date the overpayment was identified

- Legal DUTY to investigate CREDIBLE allegations of **potential** overpayments
- Six-year lookback period
- Failure to comply could result in improper retention of an overpayment and violation of the False Claims Act

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"The motion has been made and seconded that we stick our heads in the sand."

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- CAVEAT:
 - Different perspective in **POTENTIAL** overpayments being identified than for False Claims Act Investigations
 - Assumptions: 60 Day Rule applied prospectively, without all legal defenses
 - **A "Practical" Review of the Issues – NOT LEGAL ADVICE**

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- **Possible** "Problems":
 - Audit Findings By Government
 - OIG Report
 - Results of Private Payor Audit
 - Call to Hotline/Compliance
 - Trade Press? Local Papers?

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Potential Overpayment Analysis

*The **Potential** "Problem"*

Legal **DUTY TO INVESTIGATE**

Document your investigation of credible allegations

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- **Government Audit Findings**
 - 60 Day Rule: Credible Allegation of an Overpayment is a Government Audit Finding
 - Legally, **DUTY TO INVESTIGATE**

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- **Government Audit Findings**

- Prior Audits with Fully Favorable Outcomes
- Prior Appeal with Fully Favorable Outcome
- CMS Manual Guidance
- *Coverage Issue Changes over time?*
 - Local Coverage Determination (LCD)
 - See, Caring Hearts v. Burwell, No. 14-3243 (10th Circuit)(May 2016)

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- **Government Audit Findings**

- Good Faith Basis for Dispute
 - Prior Appeal *without* Fully Favorable Outcome
 - Later identified records
 - Changing Clinical Information
 - Improvements in EMRs
 - Coding guidelines/ standards

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- **Private Payer Audit Findings**

- Different Coverage Requirements?
 - Supervision standards for "incident to" billing
 - Generally, is Medicare a "stricter" standard?

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- **Private Payer Audit Findings**

- Prior Audits with Fully Favorable Outcomes
- Prior Appeal with Fully Favorable Outcome
- CMS Manual Guidance
- *Coverage Issue Changes over time?*
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 - See, Caring Hearts v. Burwell, No. 14-3243 (10th Circuit)(May 2016)

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- Call to Hotline
 - Credible?

If credible, then duty to investigate ...

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- **Trade Reports/ Publications**
 - Medicaid calculations of crossover payments

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- Compliance Conclusion:

Your research shows **MAYBE**

- Failure to satisfy a coverage "requirement"

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- Compliance Conclusion: **MAYBE**

- Privileged Review?

If you have been copying in-house counsel on emails about every investigation you do....

- Possibility that your discussions are **not** privileged

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Potential Overpayment Analysis

*The **Potential** "Problem"*

- Compliance Conclusion: **MAYBE**
 - HYPOTHETICAL
 - National Coverage Determination (NCD)
 - Legal Requirements for payment, with one not satisfied
- ... legal considerations post Escobar

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Potential Overpayment Analysis

The Legal Issues

- Universal Health Services, Inc. v. United States ex rel Escobar, 136 U.S. 1989 (2016)
 - When defendant submits claims for payment to Medicare, there is "implied certification" that conditions for payment satisfied
 - To be liable under False Claims Act, the "error" or false representation must be **material** to payment

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Potential Overpayment Analysis

The Legal Issues

Escobar: Materiality standard

Not all violations of standards are "False Claims"

Example: Government knew of issue and paid regardless

D'Agostino v. ev3, Inc., 845 F.3d 1 (1st Cir. 2016)

Note: Evolving Case Law!

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Potential Overpayment Analysis

The Legal Issues

Escobar: Materiality standard

National Coverage Determination

Local Coverage Determination

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Potential Overpayment Analysis

The Legal Issues

Escobar: Materiality standard

Condition of Participation, not payment?

Related to Quality of Service, not whether service performed/medically necessary?

Medical Necessity

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Potential Overpayment Analysis

Preliminary Conclusion

Escobar: Materiality standard

Hypothetically, you reach preliminary conclusion:

There may have been an overpayment....

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Potential Overpayment Analysis

Preliminary Conclusion

Possible Overpayment

Start and Stop Date?

- Fact finding
 - Government audit/ internal audit?
 - Adoption of new workflow/ EMR?
 - Change in NCD/LCD?
 - Change in staff?

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Potential Overpayment Analysis

Preliminary Conclusion

Possible Overpayment

Start and Stop Date: Probe Review

- Claims pulled at random by reviewer
 - internal or external?
- No "magic" number – 40-50?
- Methodic time periods

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Potential Overpayment Analysis

Conclusion

Probe Audit Finds No Errors

Document investigation and Conclusion

Satisfy legal duty to investigate under 60-Day Rule!

** Consider focused education on potential issue, inclusion in future audits

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Potential Overpayment Analysis

SVRS Sampling

- Define Precision to Set Sample Size
- Defined Range of Payments

Not the same as OIG Hospital Compliance Audits!

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Potential Overpayment Analysis

Government Methods

"The applicability of inferential statistics have [sic] long been recognized by the courts." ... **Indeed, as even the public is well aware during election cycles, surveys of a small number of voters can predict the electoral winner.**

See United States v. Ukwu,
546 Fed. Appx. 305, 308 (4th Cir. 2013)

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“[I]n many elections, a sample of 1,000 Americans can show, with enough certainty to satisfy the preponderance of the evidence standard, what is likely to happen in an election involving over 100 million voters.”

Excerpt from DOJ brief filed in Florida, in 2013

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Potential Overpayment Analysis *SVRS Sampling*

- Define Precision to Set Sample Size
- Defined Range of Payments
- Requires **more** than merely random sampling

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Potential Overpayment Analysis *Acceptable Error Rate?*

What is error rate?

– 1 out of 20?

– **\$5 out of \$10,000**

Government threshold – 5% in the past?

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Potential Overpayment Analysis *Refund*

Letter to MAC: Refund in Aubundance of Caution of **POTENTIAL** overpayment

- Give yourself "credit"
- Explain indentification of Issue
- Explain corrective measures taken
- Explain the "math"
- Conclusion: Refund addresses all issues, **if otherwise inform us!**

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Discussion of Hypotheticals

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