Health Law Bulletin

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UNDERSTANDING CMS' LATEST CHANGES TO THE ANTI-MARKUP/PURCHASED TEST RULE

For years, Medicare has required that if a provider purchases a diagnostic test from another provider, then the first provider could bill Medicare no more than what the first provider paid the second provider for the test. In other words, the first provider couldn't "mark up" the price of the test and make a profit. This rule was also commonly known as the "purchased test" rule. Medicare also has a manual provision that relates to the purchase of professional components—the so-called "purchased interpretation" rule. The purchased interpretation test rule dealt more with who could perform the interpretation rather than with how much the provider could bill Medicare for it.

In recent years, CMS has expressed concern on several occasions that providers were using these rules to "game" the system. It was possible for a provider to utilize the purchased test rule, the Medicare reassignment rules, and the Stark in-office ancillary services exception to create an arrangement that arguably circumvented the purchased test/anti-markup rule. After a couple failed attempts, CMS has settled on a new approach to "fix" the problem of purchased tests.

The new rule, effective January 1, 2009, focuses on whether the physician performing or supervising the test "shares a practice" with the billing provider. If the performing provider shares a practice with the billing provider, then there is no payment limitation. If the performing provider does not share a practice with the billing provider, then the anti-markup limitation applies.

The question, of course, is: What does it mean to "share a practice" with another provider? CMS has developed two tests for making this determination. The first test makes a decision based on the performing provider's practice. The second test reviews transactions on a case-by-case basis. To make the examples easier, we will refer to two hypothetical doctors. Dr. B is the billing provider. Dr. P is the performing provider.

(1) The "Substantially All" test. If Dr. P furnishes at least 75 per cent of his professional services through Dr. B's practice, then Dr. P is considered to "share a practice" with Dr. B. It does not matter where Dr. P works, whether he is an owner or employee, or what he does for the other 25 per cent of his services. As long as 75% of Dr. P's professional services are performed for Dr. B., then all diagnostic tests performed or supervised by Dr. P for Dr. B are not subject to the payment limitation. With respect to

the technical component, the provider to look at is the physician that supervises the technical component. If that physician meets the test, the anti-markup rule does not apply.

In analyzing a situation, always consider the "Substantially All" test first because it is broader-based and can cover, in some cases, all of the tests provided for the practice. However, if your situation is not covered by the "Substantially All" test, there is another option to consider.

(2) The "Site of Service" Test. The "Site of Service" test, as the name suggests, is based on where the purchased service is performed. For a given test, there are two requirements. First, Dr. P must be an owner, employee, or independent contractor of Dr. B's practice. The second requirement is that a technical component must be conducted and supervised in Dr. B's office or a professional component must be performed in Dr. B's office.

For purposes of the "Site of Service" test, the "office of the billing provider" is any medical office space in which the ordering provider regularly furnishes patient care.

Finally, the real point of the rule is this: If Dr. P is determined to "share a practice" with Dr. B under either of these rules, then Dr. B can charge the cost to Medicare as he would if he performed the test himself. On the other hand, if Dr. P is determined not to "share a practice" with Dr. B, Dr. B must bill Medicare the *lower* of what Dr. P charged Dr. B, what Dr. B normally charges for the test, or the Medicare fee schedule amount. As you can see, in the second instance, the payment will normally be limited to what the performing physician charged the billing physician.

This rule is still relatively new, and providers as well as health care lawyers are still discovering the nuances of the rule. You should review any arrangements that you have where you purchase test from other physicians. If you have questions about whether those arrangements are compliant with the new rule, you may want to seek advice from your lawyer.