

L A C M A Physician

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11845 W OLYMPIC BL #665
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CLIA '88 RULES

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**CLIA '88:
More Red Tape**



HENRY R. FENTON

Medi-Cal Audit Payments May Be Recoverable

In the June 20, 1988 issue of *LACMA Physician*, this author discussed a Superior Court case arising out of a physician Medi-Cal audit. In that case, the California Department of Health Services (DHS) claimed that the physician had been overpaid in excess of \$600,000. The amount was calculated in a fashion typical of such audits. An extrapolation was made based upon a very simple statistical methodology adopted by DHS.

The Superior Court concluded in that case that the claim was invalid, because the statistical methodology utilized was statistically invalid and unenforceable.

The Superior Court stated there was another reason for ruling in favor of the doctor: The extrapolation methodology used by DHS was an unlawful regulation which had never been adopted in compliance with the provisions of the California Administrative Procedure Act. Those provisions require that any government regulation be subjected to public scrutiny and adopted officially as a regulation before it is applied.

Henry R. Fenton, a West Los Angeles attorney, specializes in the representation of physicians.

As expected, DHS appealed the decision. In response to the appeal, the Court of Appeal issued a published decision in the case of *Grier v Kizer* in April 1990, upholding the decision of the Super-

Significantly, the court addressed the issue of what recourse providers who had previously been audited by statistical methodology would have to recover monies previously paid to DHS

rior Court. This author represented the physician in the Court of Appeal, as well as earlier in the Superior Court.

The Court of Appeal upheld the decision of the Superior Court on the basis that DHS's failure to comply with the Administrative Procedure Act rendered its auditing methods invalid and unenforceable. In oral argument, the judges of the Court of Appeal also seemed to agree that the statistical methodology used by

DHS was invalid, but the court held that it was not necessary to officially decide that issue, since DHS's auditing method was an improper and unenforceable underground regulation.

Subsequent to the *Grier* case, the Court of Appeal decided the case of *Union of American Physicians and Dentists v Kizer*. In that case, on the heels of the decision in *Grier*, the Union of American Physicians and Dentists also contended that DHS's use of statistical sampling and extrapolation constituted an invalid underground regulation. Concluding that the issue had already been decided in *Grier*, the Court of Appeal upheld the Superior Court's decision in favor of the Union.

Significantly, the court also addressed the issue of what recourse providers who had previously been audited by means of the statistical methodology — which the court had now determined to be unlawful — would have to recover monies they had previously paid to DHS. The court concluded that providers who did not earlier pursue an administrative appeal were not precluded from now making claims for

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Legal Line

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reimbursement, since it clearly would have been futile to have attempted to challenge the legality of the sampling and the extrapolation methodology before DHS itself.

The court stated further, however, that any individuals who sought reimbursement were still required to file suit in the Superior Court, within the applicable statute of limitations, in order to obtain such reimbursement. The

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question remains: What is that applicable statute of limitations? The Court of Appeals in the *Union of American Physicians and Dentists* decision referred to another case which suggests that the statute of limitations to seek reimbursement is three or four years.

In the view of this author, there is an excellent argument that the statute of limitations is four years. This means that physicians who were previously audited may be able to make claims for reimbursement in court for the amounts that they previously paid to DHS, if they file suit in time.

Any physician who wishes to make a claim for reimbursement must file suit within that three or four year period, or it is likely that the claim will be barred by the applicable statute of limitations. ■

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