BEFORE THE UNITED STATES

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Under Secretary

In the Matter of:

The Inspector General

v.

Frank P. Silver, M.D.,
Respondent.

DATE: April 27, 1987

Department Grant Appeals Board Docket No. C-19

ORDER DECISION CR 11

For the reasons set forth in attached Opinion of this date, IT IS HEREBY ORDERED

THAT the Decision of the Administrative Law Judge of July 11, 1986, is REVERSED;

THAT the Order of the Administrative Law Judge entered July 11, 1986, is VACATED;

THAT the case is remanded to the Administrative Law Judge for proceedings not inconsistent with the attached Opinion. The remand is limited to a single issue: Is there evidence to support a finding that the Respondent had reason to know that his bookkeeper was submitting improper claims to the fiscal intermediary;

THAT the Administrative Law Judge shall issue his Decision and Order Upon Remand within sixty (60) days of the date of this Order and may undertake such additional proceedings as he deems appropriate; and

THAT I shall retain continuing jurisdiction over this matter.

/s/

Robert L. Raclin
Deputy Under Secretary

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On July 11, 1986, an administrative law judge ("ALJ") issued a Decision and Order finding Frank P. Silver, M.D. ("Respondent") liable under the Civil Monetary Penalty Law (CMPL), 42 U.S.C. §§ 1320a-7a(a)(1), 1320a-7(c), for filing 418 Medicaid claims for laboratory tests that were not provided as claimed. The Decision and Order imposed penalties of $232,000.00 and assessments of $9,237.59, and suspended Respondent from participating in the Medicaid and Medicare programs for a period of ten years. In so ruling, the ALJ concluded that although the Respondent did not intend to defraud or otherwise cheat the Medicaid program, he nevertheless was grossly negligent in not more carefully supervising the activities of his billing clerk and thus, he "should have known" that the billings being submitted to Medicaid by his billing clerk were erroneous. I granted Respondent's petition to review the Decision and Order of the ALJ in order to

consider a number of significant issues directly bearing on the propriety of the ALJ's decision and the administration of the CMPL program, namely: (1) May an individual be held absolutely liable under the CMPL for the actions of an employee acting within the scope of employment; and (2) May an individual be subject to liability under the CMPL for his own negligent conduct.[1]

For the reasons outlined below, I conclude (1) that an individual may not be subject to vicarious liability under the CMPL, but (2) that an individual may be subject to liability under the CMPL even though his conduct is merely negligent. However, I also conclude that the ALJ applied the incorrect standard in judging whether the Respondent's actions were negligent,[2] and that judged against the correct standard, the evidence adduced at the hearing falls short of sustaining the Inspector General's burden of proof. Accordingly, the Decision of the ALJ is reversed, the Order vacated and the case is remanded for further proceedings consistent with this Opinion and

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1/ The parties in their briefs also addressed a third issue, namely: May an individual be subject to the maximum penalties under the CMPL if that individual's conduct is merely negligent, as opposed to intentional or reckless. In light of the decision reached below, that issue is no longer ripe.

2/ The Inspector General concedes that the ALJ used the incorrect standard in judging the Respondent's culpability under the CMPL. <u>See</u> <u>Inspector General's Brief Regarding Scope of Liability</u> 5 (filed February 6, 1987). However, the Inspector General maintains that the evidence introduced at the hearing is sufficient to establish liability under the correct standard.

the attached Order.

I.

The Respondent is a licensed physician specializing in the practice of obstetrics and gynecology in Las Vegas, Nevada. Dr. Silver has practiced medicine in the Las Vegas area since 1973 and apparently is one of the few physicians who accepts Medicaid patients in the area.

This case arose under Section 1128A of the Social Security Act, (42 U.S.C. 1320a-7a), commonly referred to as the Civil Monetary Penalty Law (CMPL). The ALJ found that during the period August 13, 1981 through April 11, 1983, Respondent submitted 418 false or improper Medicaid claims for laboratory services in violation of the CMPL. It is therefore appropriate to discuss briefly the Medicaid program in the State of Nevada, the Respondent's office procedures and billing practices as they relate to laboratory tests and the history of the proceedings against the Respondent.

A.

Title XIX of the Social Security Act, as amended (42 U.S.C. § 1396 et. seq.) established a system known as Medicaid under which the federal government provides financial assistance to participating states to aid them in furnishing medical care to

needy persons. When a state chooses to participate in the Medicaid program, it must submit a State Plan to the Secretary of the Department of Health and Human Services ("DHHS") which meets federal statutory and regulatory requirements. The State Plan must provide for the designation of a single state agency to administer the Medicaid program.

Nevada's State Plan, which was approved by the Secretary, designated the Nevada Department of Human Resources (NDHR) to be the agency responsible for administering the Nevada Medicaid program. This program is referred to as "State Assistance for the Medically Indigent" or SAMI.

NDHR is responsible for determining eligibility for services, establishing standards for the services provided, establishing standards for submission of claims for reimbursements, setting payment levels for providers of services, and paying claims. To assist it in carrying out its responsibilities, NDHR contracted with Blue Shield of Nevada (BSN) to serve as fiscal intermediary for SAMI. In that capacity, BSN processed and paid claims submitted by Nevada providers for items or services which providers stated were rendered to Medicaid beneficiaries.

B.

Since 1973 and at all time relevant herein, Mrs. Kathleen J. Eby was employed as Respondent's bookkeeper. Respondent delegated to Mrs. Eby the responsibility of preparing Medicaid claims to be submitted to the SAMI program, signing the SAMI

claims on behalf of Respondent, and filing those claims without Respondent's review. When SAMI forwarded payments to Respondent's office, Mrs. Eby would note on each patient's billing ledger the amount paid for each service claimed. TR I/40. [3/] In instances where SAMI or BSN did not pay, Mrs. Eby would contact the BSN provider service department and request an explanation. TR I/41. Respondent, used commercial laboratories to perform the analysis of specimens obtained from his patients (e.g. pap smears, vaginal and urine cultures, urinalysis and blood test). TR I/49,64, 74, III/519. Respondent's nurse would review a patient's medical chart and complete a test requisition form indicating the laboratory tests to be ordered from an outside laboratory. TR IV/524

The selected laboratory then sent a courier to Respondent's office to pick up the specimens and requisition forms. Test results were returned to Respondent's office, and if normal, placed on the patient's chart without review by Respondent. If the tests were abnormal, they would be shown to Respondent. Whenever Respondent was not shown a patient's test results, he assumed that the results were normal. TR III/524.

From about 1973 to 1983, the Respondent submitted Medicaid claims for laboratory services in three separate ways. TR I/71, 78. From 1973 to 1978, the Respondent performed all routine laboratory tests in his own office using a certified lab

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3/ Citation to the official transcript of the proceedings before the ALJ will be identified as "TR [Volume Number]/[Page]."

technician. I.G. Ex 425/1. The Respondent's laboratory, however, was not certified, as required by Nevada law. During this period Mrs. Eby would indicate on the Medicaid claim (item 22) that laboratory work was not performed outside the office.

In 1978 Respondent discontinued his office laboratory and instead paid an outside laboratory to perform the appropriate tests. This method was used by the Respondent until August 1981. The Respondent's claim orms submitted during this period indicated that an outside laboratory had performed the test, that Respondent had paid the laboratory for such services and that Respondent was seeking reimbursement from SAMI for those payments. Sometime during this period, Mrs. Eby began submitting claims to SAMI for handling fees. Despite the fact that BSN had advised Mrs. Eby of the appropriate procedures to be used in submitting such claims, Mrs. Eby claimed handling fees for services which were not reimbursable under the State Plan (i.e., urine cultures, urinalysis, pap smears and vaginal cultures when there was an office visit). Claims for these handling fees were consequently denied by BSN. TR 1/40-41, 90-91.

During the third period, August 13, 1981 through April 11, 1983, the period at issue in this case, the Respondent stopped reimbursing outside laboratories and instead, let the laboratory bill the SAMI program directly. TR I/61, TR III/544. The claims submitted during this period appeared in many respects to be identical to the claims submitted by Mrs. Eby during that period when the Respondent had been paying the outside laboratories.

However, the claims did differ in one respect, namely that the claims submitted during this period did not explicitly request reimbursement for a specified amount certain, while the claims submitted during the prior period did. The record contains evidence that notwithstanding that difference the claims submitted during this period conveyed the impression to SAMI that the Respondent was seeking reimbursement for laboratory fees which he had paid on behalf of the program, when in fact no such payments had been made.

In all the claims at issue here, Mrs. Eby listed the 1974 CRVS procedure codes for the tests themselves and identified an outside laboratory as the facility performing the tests. As a result of Mrs. Eby's practices during this period, BSN paid Respondent $9,204.38 for the costs of the tests, based on the erroneous belief that the outside lab was being reimbursed by Respondent.

C.

In the course of discharging its contractual obligations, BSN discovered that Respondent was submitting claims for laboratory services that were in fact performed by outside laboratories and billed by those laboratories directly to SAMI. In October 1982, BSN referred the matter to NDHR which then commenced an investigation into Respondent's billing practices. TR I/126. NDHR did not communicate with Respondent until May 2, 1983, when it requested that Respondent make available to its investigators certain medical and billing records. TR I/131.

Commencing on July 8, 1983, NDHR investigators conducted a series of site visits to Respondent's office. During the course of those visits the investigators reviewed records and interviewed members of Respondent's staff, including Mrs. Eby, Respondent's bookkeeper.

As a result of its investigation, NDHR recommended that the State exclude Respondent from participation in the Medicaid program and referred the matter to the Inspector General of DHHS for further action.

The Inspector General instituted an investigation of the Respondent and as a result of that investigation determined that Respondent had caused to be filed 420 claims which included 1244 line items for services which had not been provided as claimed. The Inspector General advised Respondent that each of the line items or services represented charges to the Medicaid or Medicare Programs for laboratory services which were either never performed by Respondent as claimed or had been separately billed by the particular laboratory performing the service. On August 2, 1985, Respondent was formally notified by the Inspector General of his intent to impose civil money penalties and assessments against him in the amount of $250,000 (penalties of $232,000 and assessments of $18,000), and to suspend him from participating in the Medicaid and Medicare programs for a period of ten years.

Respondent, following receipt of the Inspector General's Notice of Determination, requested a hearing before an ALJ, under

45 CFR § 101.109(b)(2). A prehearing conference was held in Reno, Nevada on October 25, 1985, and a full evidentiary hearing was conducted in Las Vegas, Nevada commencing January 13, 1986, and ending on January 16, 1986. At the hearing, evidence was presented by the Inspector General that Respondent had authorized his bookkeeper, Mrs. Kathleen Eby, to not only compile the billings in general, but also to sign them on his behalf. No evidence was presented which would indicate that the Respondent knew of Mrs. Eby's improper billing practices; no evidence was presented which would indicate that Respondent and Mrs. Eby had conspired to submit improper claims; and no evidence was presented which would indicate that Respondent had intentionally developed office procedures designed to insulate himself from the improper practices of his staff.

On July 11, 1986, the ALJ issued his Decision and Order. In that Decision, the ALJ applied the "should have known" standard and determined, based on that standard, that Respondent was liable under the CMPL for causing to be filed 418 false claims that contained at least 1244 incorrect or false line items. The ALJ further found that there was insufficient evidence to establish fraud or conspiracy on the part of the Respondent. Respondent, nevertheless, was found liable for the actions of Mrs. Eby, since he "should have known" that his billing clerk was submitting false claims for a period of over two years. See Decision and Order, p. 36. The ALJ concluded:

> [t]hat the Respondent was motivated during the time in issue by his desire to practice medicine as he saw it and

> not to be bothered by paperwork, clerical duties or to be involved with matters that he considered to be beneath him ... He intentionally chose to ignore those important rules and regulations because he is not fond of governmental intrusion or regulation (with regard to the practice of medicine) and does not like the burdens placed upon him by Medicare and Medicaid. Decision and Order, pp. 25-26.

Again at page 27 of his Decision and Order the ALJ noted:

> I found Respondent did have a reckless disregard for the Medicaid program's ground rules and regulations <u>and chose to leave the important function of billing to Mrs. Eby without supervision</u>. (emphasis supplied)

Following the issuance of the ALJ's Decision and Order, Respondent, pursuant to 45 CFR § 101.125, requested administrative review by the Secretary. The discretionary review authority set forth in 45 CFR § 101.125 has been delegated to the Under Secretary and redelegated to the Deputy Under Secretary. By letter of December 8, 1986, I granted Respondent's request for review.

II.

Liability under the CMPL attaches only where it has been established that the respondent "knows or has reason to know" that medical services were not provided as claimed. In the case <u>sub judice</u> the ALJ consistently used the incorrect standard in judging the Respondent's liability. Rather than ascertaining whether the Respondent had "reason to know" that the claims were improper, as required by the statute, the ALJ applied a different, and clearly erroneous standard, namely: Whether the

Respondent should have known that the claims were improper. The Inspector General concedes that the ALJ used the incorrect standard in judging the propriety of the Respondent's conduct. However, he urges that that error of law was harmless and that the Decision of ALJ should be affirmed for three independent reasons. First, the Inspector General argues that the CMPL imposes vicarious liability on an employer for the conduct of its employees acting within the course and scope of their employment. Second, the evidence adduced at the hearing is sufficient to support a finding that the Respondent actually "knew" that the claims submitted to the intermediary were improper. And third, the evidence is sufficient to support a finding that the Respondent had "reason to know" that the claims were improper.

A.

The common law doctrine of vicarious (or imputed) liability holds that under certain well-delineated circumstances an individual is to be held responsible for the acts of others even though that individual behaved in a totally acceptable manner. The doctrine is most commonly encountered under the rubric of respondeat superior, where the actions of an employee are imputed for purposes of tort liability to the employer. See Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167 (2d Cir. 1968).

The basic doctrine enjoys unquestioned acceptance in all

common law jurisdictions. An unbroken line of decisions has held an employer responsible in tort for the employee's negligence even where the employer had expressly, indeed emphatically, forbade the very conduct that constituted the negligence of the employee. See Limpus v. London General Omnibus Co., 1 H.& C. 526, 158 Eng. Rep. 993 (Ex. 1862). Although the doctrine appears to foster numerous distinct, but often competing, societal goals,[4] two have stood out: loss spreading and profit. While the concept of loss spreading is not relevant to our inquiry, the notion of profit deserves attention. That rationale holds that just as the employer gets the benefits from the gains for his worker's activities, so too, should he be required to bear the losses from those activities. The profit rationale has been used by courts to extend the doctrine of respondeat superior to cover instances involving intentional torts and indeed, even criminal breaches. In New York Central & H. R. R. Co. v. United States, 212 U.S. 481, 493 (1909), for instance, the Court noted that

> liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the

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[4] One academic writer identified nine traditional rationales for vicarious liability: control; profit; revenge; carefulness and choice; identification; evidence; indulgence; danger; and satisfaction. He then concluded that none of the nine could fully account for the doctrine: "If one turns to the opinions of judge or books upon the subject seeking a justification, disappointment is almost inevitable. True it is that many reason have been given, but none of them are [sic] satisfying." Y.B. Smith, Frolic and Detour, 23 Colum. L. Rev. 444, 454 (1923).

> agent is acting with the scope of his employment in the business of the principal . . .

More recently, the Court in upholding the power of Congress to "personify a company" for purposes of criminal liability, spelled out that it was "through the doctrine of respondeat superior [that] corporations and other . . . impersonal entities can be guilty of 'knowing' or 'willful' violations of regulatory statutes . . ." United States v. A. & P. Trucking Co., 358 U.S. 121, 125, (1958). The Court's rationale was couched in familiar phraseology borrowed from civil tort law, namely: "The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment." United States v. A. & P. Trucking Co., 358 U.S. at 126.

In light of the doctrine's universal acceptance, it is somewhat surprising to note that there is substantial disagreement over whether the doctrine should extend to include punitive damages.[5] Although a majority of courts have held that vicarious liability extends to punitive damages, even in the absence of approval or ratification by the principal, a substantial minority have held to the contrary. In fact there

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[5] It should be noted that from a theoretical perspective the issue of whether the doctrine of respondeat superior supports the imposition of liability in the event of an intentional tort is distinct from the issue of whether the doctrine supports the imposition of punitive damages. An employer may be liable for compensatory damages caused by an intentional act of his employee and yet, at the same time, escape liability with respect to a punitive damage claim.

appears to be a recent trend in favor of the so-called minority position. [6] The Restatement (Second) of Torts § 909 (1979), which is intended to be a barometer of judicial behavior, limits a principal's responsibility for punitive damages to those cases in which high echelon officials of the principal are actually involved in the tortious conduct.[7] The Restatement appears to have adopted the holding of the Supreme Court in Lake Shore & M.S.R. Co. v. Prentice, 147 U.S. 101 (1893), where the issue was whether in the absence of statutory authority a corporation could be liable in punitive damages for the tort of its employee. The Court, reasoning largely from general principles of respondeat

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[6] In Kline v. Multi-Media Cablevision, Inc, 233 Kan. 988, 666 P.2d 711 (1983), the court specifically adopted the minority position as set forth in the Restatement (Second) of Torts. Similarly, the Wyoming Supreme Court in Campen v. Stone, 635 P.2d 1121 (1981), specifically rejected the majority position and adhered to the dictates of the Restatement (Second) of Torts.

[7] The Restatement (Second) of Torts § 909 provides as follows:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
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> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

superior, held that such vicarious liability could exist only when the employer had authorized and ratified the tort. Notwithstanding the recent expansion of the punitive damage doctrine, though, the Supreme Court has not revisited the issue of whether the common law permits the vicarious imposition of punitive damages.[8]

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[8] The Supreme Court's failure to re-address the issue of whether vicarious liability should encompass punitive damages may reflect little more than the Court's unwillingness to enter an area that has been traditionally governed by state law. Common law remedies, after all, tend to be a function of state rather than federal law. However, it is noteworthy that the Court has on a number of occasions declined to review this issue even when it has arisen in the context of a federal statute. In Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S.299, 314 n.25 (1985), for example, the Court declined to decide whether the in pari delicto defense would extend to bar recovery against a stock brokerage firm whose only role has been that of a "controlling person", as defined in 15 U.S.C. § 78t(a), of the defrauding employee and whose liability is therefore vicarious. See, Mitchell v. General Motors, 725 F.2d 385 (9th Cir. 1984), cert. denied, sub nom. General Motors v. Mitchell, 53 U.S.L.W. 3895 (1985)(punitive damages imposed on employer under the Civil Rights Act of 1866 for actions of employee). However, in City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), the Court held that punitive damages could not be awarded against a municipality under 42 U.S.C. § 1983. Although one could argue that Newport implies that vicarious liability for punitive damages is suspect, the Court's opinion rested on a narrower ground, namely that the Civil Rights Act of 1871 did not contemplate imposing punitive damages on municipalities under any set of circumstances. In General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982), the Court was asked to address the issue of whether the doctrine of respondeat superior applied to actions arising under 42 U.S.C. § 1981. The Court, in ruling that the facts of the case were insufficient to warrant application of the doctrine, found it unnecessary to address the basic issue. Most recently, in Meritor Savings Bank, FSB v. Vinson, ___U.S.___, 106 S.Ct. 2399, 2408 (1986), the Court specifically "decline[d] the parties' invitation to issue a definitive rule on employer liability [under Title VII of the Civil Rights Act of 1964]. . ." However, the Court did note that employers are not "always automatically liable for sexual harassment by their supervisors." Id.

There is little question that if the government in this case were pursuing a common law remedy against the Respondent in a jurisdiction following the majority rule, the evidence would be more than adequate to support an award of punitive damages. The record amply reflects the fact that Mrs. Eby, the Respondent's bookkeeper, acted recklessly at best and with a "touch of larceny", at worst. However, the case sub judice does not involve a common law tort action. Nor does it involve a generic civil penalty statute, which is broad enough to encompass common law remedies. Instead, here the government relies solely on a highly specialized, carefully crafted statute aimed at deterring fraud and abuse in the Medicare and Medicaid programs. The statute specifies the types of penalties that are appropriate and the circumstances under which they may be imposed. Since the CMPL is a creature of statute, the starting point for determining whether vicarious liability is appropriate is the words of the statute itself. Department of Transportation v. Paralyzed Veterans of America, ___U.S.___, 106 S.Ct. 2705, 2710 (1986); Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975)(Powell, J., concurring). The CMPL provides in pertinent part as follows:

Any person . . . that--

> (1) presents or causes to be presented to an officer, employee, or agent of the United States, . . . a claim . . . that the Secretary determines is for a medical or other item or service
>
> > (A) that the person knows or has reason to know was not provided as claimed . .
>
> (2) shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $2,000 for each item or service. . .

Here, unlike other civil money penalty statutes, the CMPL explicitly recognizes the distinction between the actions of the principal and those of the agent. Specifically, by juxtaposing the terms "presents" or "or causes to be presented" the statute contemplates situations, such as the one at bar, where the individual who actually submits the improper claim is not the principal, but an employee who merely submitted the claim in the course of the employment. However, in such instances, the statute expressly limits the liability of the principal to only those situations where the principal either knows or has reason to know that the claims were improper. In short, the clear of language CMPL expressly precludes the application of the doctrine of vicarious liability, and instead requires the Inspector General to establish <u>actual</u> malfeasance or misfeasance on the part of the principal.

Common law principles notwithstanding, the courts have been understandably reluctant to impose vicarious liability where the language of a civil penalty statute indicates to the contrary.

For example, in United States v. Turner, 601 F.Supp. 757 (E.D.WI. 1985), a case involving a statute semantically similar to the CMPL, the government, in seeking to impose liability on one partner on account of the activities of the other partners, argued that vicarious liability would be appropriate because the statute in question closely parallels the law of torts.[9] The court, in refusing to impose vicarious liability under the abusive tax shelter provisions of TEFRA, looked to the wording of the statute and held that "only the person who actually made or furnished the fraudulent statement is liable. . ." Id. at 759. The holding in Turner is particularly instructive, because there, unlike here, the so-called innocent partner actually knew what his partners were doing and was present at meetings where they

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[9] Turner involved certain tax shelter provisions of TEFRA which imposed criminal and civil liability on any person who in the course of promoting an abusive tax shelter:

> (2) makes or furnishes (in connection with such organization or sale)--
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> > (A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or
> >
> > (B) a gross valuation overstatement as to any material matter . . .

26 U.S.C. § 6700(a)(2) [emphasis supplied].

had furnished fraudulent information.[10/]

The Inspector General in urging the incorporation of the doctrine of vicarious liability sidesteps the language of CMPL and instead focuses on the use of that doctrine in the common law and in other civil penalty schemes.[11/] Clearly, analogizing to

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[10/] See Larimore v. Comtroller of the Currency, 789 F.2d 1244 (7th Cir. 1986)(en banc) (holding that the federal banking laws did not authorize the Comptroller to administratively impose civil penalties on a bank director who did not know or have reason to know that the bank's lending limits had been exceeded); Amoco Oil Co. v. Environmental Protection Agency, 543 F.2d 270 (D.C.Cir. 1976)(invalidating, as beyond the scope of the enabling legislation, agency regulations which imposed vicarious liability on refiners on account of the actions of their retail dealers); Rochez Brothers, Inc. v. Rhoades, 527 F.2d 880 (3d Cir. 1975), cert. denied, 425 U.S. 993 (1976) (holding that the provisions of Securities Exchange Act do not authorize wholesale incorporation of the doctrine of respondeat superior); United States v. Ottati & Goss, Inc., 630 F.Supp. 1361 (D.N.H. 1985); but see Sharp v. Coopers & Lybrand, 649 F.2d 175 (3d Cir. 1981)(recognizing that in certain circumstances imposition of vicarious liability would be consistent with the securities laws).

[11/] Courts have consistently imposed vicarious liability in the context of a civil money penalty statute, where the language of that statute is broad enough to accommodate the use of the doctrine. Thus, in West v. Costen, 558 F.Supp. 564 (W.D. Va. 1983), the court held that under the Fair Debt Collection Practices Act, a collection agency was responsible for the acts of its debt collectors. Also, in Bituminous Coal Operators' Assn., Inc., 547 F.2d 240 (4th Cir. 1977), the court ruled that the Federal Coal Mine Health and Safety Act of 1969 authorized the imposition of penalties on coal mine owners for the wrongful acts of their independent contractors. Similarly, in United States v. Hodges X-Ray, Inc., 759 F.2d 557 (6th Cir. 1985), the court affirmed civil money penalties against the president of the defendant corporation because, in the opinion of the court, the term "manufacturer", as used in the Radiation Control for Health and Safety Act of 1968, was sufficiently broad to include a major shareholder or corporate president. See United States v. Park, 421 U.S. 658 (1975) (holding that a corporate officer could be held criminally liable for violations of the Food, Drug & Cosmetic Act).

common law principles is only appropriate where the statute under scrutiny is either silent or ambiguous. Here, the statute is neither silent nor ambiguous. The CMPL on its face requires the government to establish affirmatively that the principal, i.e., the person under whose control the agent acted, actually knows or has reason to know that the actions of the agent were improper. Thus, the CMPL expressly precludes the normal application of the doctrine of vicarious liability. Consequently, the Inspector General's reliance on common law principles of imputed liability is misplaced.

The Inspector General also argues that courts have adopted the doctrine of vicarious liability in the context of other statutory schemes. Specifically, the Inspector General notes that in United States v. Sweet Briar, Inc., 92 F.Supp. 777 (W.D.S.C. 1950) the court imposed liability on an employer for the acts of its employee. In Sweet Briar the defendant corporation was charged under the Walsh-Healey Public Contracts Act with having hired female employees who were under the age of sixteen (16). However, in Sweet Briar the statute and the implementing regulations specifically imposed liability on the principal for the acts of its agents in knowingly hiring individuals who were under age. In short, under the terms of Walsh-Healey the knowledge of the agent was expressly imputed to the principal. Here, in sharp contrast, the CMPL requires as a condition of imposing liability on the principal that the principal itself possess the requisite knowledge. If nothing

else, Sweet Briar evidences the fact that Congress knows full well how to craft language that would impose vicarious liability, but chose instead to do otherwise. The short answer then to any contention that the CMPL authorizes vicarious liability "is that Congress did not write the statute that way." United States v. Naftalin, 441 U.S. 768, 773 (1979). Reliance on other statutory schemes is therefore misplaced.

In addition, the Inspector General notes that certain courts in applying the False Claims Act, a law closely analogous to the CMPL, have implied that vicarious liability may in fact be appropriate. Specifically, in Miller v.United States, 550 F.2d 17 (Ct.Cl. 1977), the court held a contractor liable under the False Claims Act for ineptitude evidenced by among other things, slipshod supervision of his workmen. However, in Miller the contractor steadfastly maintained that he always checked his men's work personally, that he actually knew that the quantities of materials billed by his workmen were only estimates of what had actually been used, and further, that he made no effort to correct these estimates. Thus, in Miller the court was not required to address, and in fact, did not address the issue of vicarious liability. Liability there rested on unrefuted evidence that the contractor had actual knowledge that his billings were in fact erroneous. Here, in sharp contrast, there is no evidence that the Respondent had such knowledge.

In conclusion, I have not been apprised of any case or legislative gloss that would in anyway undercut the plain meaning

of the CMPL.

B.

The Inspector General maintains that the Decision below ought to be affirmed because the evidence adduced at the hearing demonstrates that the Respondent actually "knew" that improper billings were being submitted by his billing clerk. At the outset it should be noted that there is no evidence, credible or otherwise, to support the proposition that the Respondent had actual knowledge of the improper billings at issue. The Inspector General tacitly concedes this point. Moreover, the ALJ found the record insufficient to support a claim of actual knowledge. The ALJ did find, however, that the Respondent acted with reckless disregard in failing to properly supervise the activities of his billing clerk, and as a result thereof, the Respondent should have known that improper billings were being submitted on his behalf. In light of these findings of fact, the Inspector General forcefully argues that the word "knows," as used in the CMPL, encompasses knowledge that the Respondent would have had had he acted reasonably. In short, the propriety of the ALJ's legal analysis hinges on the meaning of the word "knows."

The word "knows" though is a classic "weasel" word, with a slippery meaning that is highly dependent upon the context in which it is used. In certain settings courts have held for instance, that whether an actor has knowledge is to be judged

subjectively, by examining what knowledge the actor actually possessed. See United States v. Harvey, No. 86-5025 (4th Cir. 3/6/87) (holding that under the Comprehensive Forfeiture Act, an attorney's knowledge of the source of his fees must be judged against a subjective standard). In other settings, though, courts have held that the existence of knowledge is to be judged objectively and in terms of what the actor should have known, as opposed to what he actually knows. While context appears to account for much of the term's definitional variance, traditional notions of pragmatics and presupposition, however, cannot fully explain its extreme fluidity. Much of this variance undoubtedly derives from the uncertainty and ambiguity that have surrounded other referents of scienter (e.g., "malice", "wantonness", "reckless disregard", to name a few). It is not surprising then that courts, as illustrated below, have had difficulty agreeing on a common meaning even within the context of the same statute.

The judiciary's experience with the term "knowing" as it appears in the False Claims Act is particularly instructive for a variety reasons. First, it emphasizes the degree to which courts have differed on the meaning of the word even within a single statute. Second, since the CMPL parallels in certain respects the False Claims Act, cases interpreting that act may be helpful in fleshing out the contours of the CMPL. And third, the Inspector General has relied heavily on court decisions concerning the False Claims Act in interpreting the CMPL. The

False Claims Act provides in pertinent part as follows:

> Any person . . . [1] who shall make or cause to be made, or present or cause to be presented for payment . . . any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious, or fraudulent . . . shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United State may have sustained . . .

The Inspector General correctly observes that under the False Claims Act there is a substantial body of case law equating "reckless disregard" with actual knowledge. In United States v. Cooperative Grain and Supply Co., 476 F.2d 47 (8th Cir. 1973), the court held that extreme carelessness of the defendants in not ascertaining whether purchased grain was eligible for commodity price support was "knowing" within the False Claims Act. In so holding the court reasoned that since the False Claims Act is civil in nature,

> the definition of "knowing" should be the definition as applied in the civil action of misrepresentation. Prosser classifies misrepresentation into "the three familiar tort classifications of intent, negligence, and strict responsibility." . . . Since we have decided that a false claim, not only a fraudulent claim, is actionable under the Act, a negligent misrepresentation can constitute the necessary "knowledge".

Cooperative Grain and Supply Co., 476 F.2d at 60.

The United States Court of Claims in Miller v. United States, 550 F.2d 17, 23 (Ct.Cl. 1977) echoed the sentiments of the Eight Circuit in Cooperative Grain and Supply Co. in holding that negligent misrepresentation is sufficient to satisfy the "knowledge" requirement of the False Claims Act. However, as the Inspector General candidly notes, other courts have read the

False Claims Act far less liberally than either the Eight Circuit or the Court of Claims. For instance, the Sixth and Seventh Circuits have held that proof of actual knowledge is required in order to sustain liability under the False Claims Act. See United States v. Hughes, 585 F.2d 284 (7th Cir. 1978); United States v. Ekelman & Assoc., 532 F.2d 545 (6th Cir. 1976). The rule in the Fifth and Ninth Circuits is even stricter, requiring proof that the defendant not only had actual knowledge but also a specific intent to defraud the government. See United States v. Thomas, 709 F.2d 968 (5th Cir. 1983); United States v. Mead, 426 F.2d 118 (9th Cir. 1970).

Had I been asked to judge the Respondent's conduct in light of the False Claims Act and had I been writing on a clean slate, I would have been inclined to follow the soundly reasoned opinion of the court in Cooperative Grain and Supply Co. and to have adopted the well articulated position of the Inspector General. However, the Respondent's conduct must be judged in light of the language of the CMPL and the language of that statute differs from the language of the False Claims Act in certain critical respects that cannot ignored. Liability under the False Claims Act hinges on a finding that the defendant "knowingly" submitted false claims. In contrast, liability under the CMPL hinges on a finding that the respondent "knows" or had "reason to know" that the claims were improper. Had the Congress not added the phrase "has reason to know" then one would be justified in adopting the interpretation given the word "knowing" by the court in

Cooperative Grain and Supply Co. There the court in essence held that a person has actual knowledge of a false claim if that person should have known that the claim was false. The phrase "has reason to know" though severely restricts the meaning of the word "knows," and effectively precludes one from adopting the broader interpretation urged by the Inspector General.

The phrase "has reason to know" has a highly specialized and well established meaning. The term "reason to know" is defined in the Restatement (Second) of Torts § 12 (1965) and Restatement (Second) of Agency § 9 (1957) to mean that an actor actually has information from which a person of reasonable intelligence would infer that the fact in question exists. The term "reason to know" differs in one important respect from the closely related term "should know." The latter term implies that the actor is under a duty to ascertain all pertinent information. The former term, i.e., "reason to know", implies that the actor is under no duty to ascertain that information. Burgess v. Montgomery Ward and Company, 498 F.2d 495, 498 (10th Cir. 1959) (holding that the "phrase 'reason to known' as used in the Restatement does not imply any duty to ascertain an unknown fact"). The duty to investigate further arises only after the actor actually learns of the pertinent information. As here, where the Congress borrows

> terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . In such case, absence of contrary direction may be taken as satisfaction with the widely accepted definitions, not

as a departure from them.

Morrisette v. United States, 342 U.S. 246, 264 (1952). Consequently, I must assume that when the Congress engrafted the phrase "reason to know" onto the CMPL it did so with a clear understanding of its meaning and effect. If Congress had intended the word "knows" to encompass the concept of "should know" then there would have been no need to add the phase "reason to know," since the former subsumes the latter. The phrase "reason to know" would then have been purely superfluous. It is by now axiomatic that a statute must be read to give effect to every word, clause and sentence of that statute. See United States v. Menasche, 348 U.S. 528, 538-39 (1955); Montclair v. Ramsdell, 107 U.S. 147, 152 (1882). It would be ill advised for any court or administrative body to blithely ignore as superfluous the words of any statute,[12/] especially, where as here, the statute imposes significant civil penalties. See Brennan v. Occupational Safety & Health Rev. Com'n., 511 F.2d 1139, 1144 (9th Cir. 1975)(holding that it would be improper to read-out of a civil penalty statute the concept of "knowledge"); Willamette Subscription Television v. Cawood, 580 F.Supp. 1164 (D.Or. 1984). One must therefore assume in the absence of legislative history to the contrary that the Congress intended

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12/ In Tabor v. Ulloa, 323 F.2d 823, 824 (9th Cir. 1963), the court noted that a "legislature is presumed to have used no superfluous words" in a statute. See International Society for Krishna Consciousness v. Lee, 105 FRD 435, 449 (S.D.N.Y. 1984).

to give meaning to the phrase "reason to know" when it used that phrase in the CMPL. As noted above, though, the phrase only has meaning if one interprets the word "knows" to refer only to actual knowledge and not to knowledge that the actor should have had had he acted reasonably. This reading is entirely in accord with cases interpreting other civil penalty statutes. For instance, in United States v. Four Million Two Hundred Fifty-Five Thousand Dollars in U.S. Currency, 762 F.2d 895, 905 (11th Cir. 1985), the government urged that the forfeiture provisions of the Controlled Substances Act, 21 U.S.C. § 881(a)(6), should be applied even where the property owner acted negligently, i.e., had reason to know. Title 21, § 881(a)(6) provides that "no property shall be forfeited . . . to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of the owner." [emphasis supplied]. The court, in rejecting the government's position, held that the propriety of the forfeiture turns on claimant's actual knowledge not constructive knowledge. See United States v. Premises Known As 2639 Meetinghouse, 633 F.Supp. 979, 992-93 (E.D.Pa. 1986).

In conclusion, I find that the word "knows" as used in the CMPL refers only to actual knowledge and not to knowledge that the actor should have had. I further find, as did the ALJ below, that the record in this case is uniquely devoid of any evidence which would indicate that the Respondent had actual knowledge that the claims at issue were in fact improper.

C.

The Parties have devoted considerable attention to an analysis of whether liability may be imposed under the CMPL for conduct which amounts to mere negligence. The Respondent has argued that liability can only be imposed if a person acted intentionally or, at the least, recklessly. The Respondent further argues that his conduct was neither intentional nor reckless. The Inspector General maintains that liability may be imposed even in the absence of reckless conduct, that mere negligence will suffice and further that the Respondent acted negligently. Specifically, the Inspector General maintains that the evidence adduced at the hearing demonstrates that the Respondent had "reason to know" that the claims submitted on his behalf were erroneous.

At the outset it must be reiterated that the form of any action under the CMPL must be governed by the language of the statute and not by common law principles. Civil penalty statutes vary widely in terms of scope and penalty. Some statutes impose significant penalties on a strict liability basis; other statutes impose modest penalties, but only upon a showing of malice. The notion championed by the Respondent, that liability can only attach upon a showing of fraud or other conduct bordering on fraud, is contrary to both the plain meaning of the CMPL and its legislative history.

As noted above, where the resolution of an issue turns on the meaning of a statute, courts look first to the language of the statute and then, if necessary, to its legislative history. Blum v. Stenson, ___U.S.___, 104 S.Ct. 1541, 1548 (1984). The language of the CMPL is clear on its face. Liability attaches upon a showing that a respondent either "knows or has reason to know [that a medical item or service] was not provided as claimed." 42 U.S.C. § 1320-7a(a)(1)(A) (1982). The statute does not require a showing of fraud; it does not require a showing of evil intent; and it does not even require a showing of actual knowledge. The wording of the statute is unambiguous: liability may be imposed if a respondent "has reason to know" that services were not provided as claimed. The Constitution demands no more than that and the statute requires no more. See Mayers v. U.S. Dept. of Health and Human Services, No. 85-3803 (11th Cir. Dec. 22, 1986)(holding that the Congress can impose civil penalties and even criminal sanctions without proof of mens rea) . Thus, Respondent's argument that certain unidentified common law principles require a heightened showing of culpability is entirely without merit.

The legislative history surrounding the adoption of the CMPL, although meager, in no way undermines the plain meaning of the statute. On August 31, 1981, Congress passed the CMPL, as an alternative procedure to existing federal enforcement mechanisms. Congress found that the existing mechanisms, most notably the

criminal fraud provisions of medicare and medicaid , were inadequate to combat the increasing incidence of Medicare and Medicaid fraud and abuse. Griffon v. United States Dept. of Health and Human Services, 802 F.2d 146, 148-49 (5th Cir. 1986). Congress found that due to the large volume of such cases, the Department of Justice was only able to institute criminal proceedings where the amount of money involved was substantial or the conduct was particularly egregious. As a result, "criminal penalties have proved an ineffective deterrent to fraudulent practices under medicare and medicaid." H.R.Rep. No. 97-158, 97 Cong., 1st Sess., vol. III, 327 (1981). The CMPL thus was intended to provide an alternative to criminal proceedings so as to increase the effectiveness of enforcement by providing the Secretary with a non-criminal administrative mechanism for deterring fraud and abuse. While, I am not unmindful of the fact that the legislative history consistently speaks in terms of "fraud", there is nothing in that history that would in any indicate an intent on the part the Congress to restrict the scope of the CMPL to cases involving only actual fraud. Indeed, as Respondent acknowledges, the legislative history does in fact make reference to the "reason to know" standard--a standard that is inextricably linked to negligence. Moreover, the fact that the statute imposed civil, as opposed to criminal, sanctions indicates an intent on the part of Congress to expand the coverage of the then existing deterrent mechanisms. As the court in Griffon aptly noted: "In addition, the CMPL creates new

substantive liability if a claim-filer 'has reason to know' that her claims are false . . ." Griffon v. United States Department of Health and Human Services, 802 F.2d at 150. The "reason to know" standard is unique; it creates what can best be described as a negligence based-tort with a "springing duty."

The linchpin of modern negligence is the existence of a duty owed by the defendant to the plaintiff. See Green, The Duty Problem in Negligence Cases, 28 Colum. L. Rev. 1014 (1928). "Proof of negligence in the air, so to speak, will not do." Pollock, Torts 468 (13th ed. 1929). Thus, negligence is not actionable unless it involves the invasion of a legally protected interest. Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). The "reason to know" standard which has been engrafted onto the CMPL represents an acknowledgement on the part of the Congress that a duty does not automatically exist to ferret out errors made by others. The duty, however, springs into existence once the actor has sufficient information to place a reasonable man under similar circumstances on notice that improper claims are in fact being filed. Restatement (Second) of Torts § 12. Once the duty attaches, the Respondent is liable for what he "should have known" had he investigated further. The concept of a springing duty is most commonly encountered in cases involving the liability of landowners for injuries sustained by those who enter the land as licensees. At common law, a landowner owes an affirmative duty of care to business invitees. Such invitees are entitled to enjoy the premises in a reasonably

safe condition. In contrast, the landowner owes no such duty either to licensees, e.g., social guests, or to trespassers. In the case of licensees, the possessor is only liable if, among other things, the possessor knows or has reason to know of the dangerous condition that causes the harm and then fails to warn the licensee of that danger. Restatement (Second) of Torts § 342. In such cases, the duty to warn only springs into existence if the possessor is actually aware of information that would have put a reasonable man on notice of the danger or potential danger. The cases cited by the Inspector General in his Brief of February 6, 1987, aptly illustrate that point. In Madison v. Deseret Livestock Co., 574 F.2d 1027 (10th Cir. 1978), the court, in applying Utah law, reversed a district court order granting summary judgment, because there were genuine issues of fact as to whether the defendant had reason to know of the hazardous condition. The Court of Appeals noted, for instance, that the hazard was visible from the road, that it existed for a few days and that defendant's ranch foreman acknowledged driving past the hazard on numerous occasions. In sum, a reasonable jury could have concluded that the foreman either knew or had reason to know of the hazard. Similarly, in Christians v. Homestake Enterprises, Ltd., 25 Wis.2d 25, 303 N.W.2d 608 (1981), the trial court, using a "should know" standard, entered judgment in favor of the plaintiff-trespasser. The Wisconsin Supreme Court, after recounting the difference between the "should know" standard and the "reason to known" standard, adopted the latter, reversed the

trial court judgment in favor of the plaintiff, and held that as to trespassing children, "the possessor is under no duty to inspect, but if the possessor knows of facts from which a reasonable person would infer that the condition in question exists . . . the possessor is charged with knowledge of the condition." Id. at 621. The court went on to conclude that a reversal was necessary because it was impossible to discern whether the jury had based its decision upon a finding that the defendant knew, had "reason to know," or "should have known" of the hazard. In summary, the cases illustrate that there is a discernible difference between the two standards, that use of the improper standard warrants reversal, and further, that to support a finding that a defendant has "reason to know," there must be specific, concrete evidence to indicate that the defendant actually knew enough to put a reasonable man on notice that further inquiry was warranted. [13] See Restatement (Second) of

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[13] For example, suppose that A invites his friend B to dinner. A does not know that his private road has been dangerously undermined at a point where it runs along an embankment and that it is not observable to a person driving along the road. However, A could have discovered the danger had he paid attention to his road. While B is driving along the road it collapses, causing serious harm to B. A is not liable to B. Restatement (Second) of Torts § 342, comment d, illustration 3. Also, in Samuels v. Empres Lineas Maritimas Argentinas, 573 F.2d 884 (5th Cir. 1978), a case noted by the Inspector General, the court, in affirming a jury verdict for the plaintiff under the Longshoremen's and Harbor Workers' Compensation Act, held that the evidence was sufficient of support a finding of negligence under the "reason to know" standard. In Samuels the plaintiff sustained injuries after falling through a hole in the cargo hold of a ship. Among others things, the court noted that the area in question was insufficiently illuminated, that this had been conveyed to ship personnel, but nothing was done to correct the situation. Moreover, the court emphasized that ship personnel

Torts §§ 339, 342. At issue, then, in this case is whether the record, when taken as a whole, contains such specific, concrete evidence.[14]

The Inspector General maintains that the evidence adduced at the hearing is sufficient to support a finding that the Respondent had "reason to know" that one of his employees was submitting claims for laboratory services that either were not performed at all or were performed by an independent laboratory. In support of that proposition, the Inspector General points to a series of independent events that would have placed a reasonable man on notice that something amiss was occurring. First, the ALJ found that in 1977 the Respondent was advised that he was operating an unlicensed laboratory, but he made no effort to investigate or otherwise correct the problem. Second, in 1978, the Respondent was informed by SAMI that he had been overutilizing certain procedures and billing incorrectly for comprehensive examinations and that these abuses would have to cease. And third, in July 1983, the Respondent was advised that

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had actually inspected the area shortly before the accident. In short, there was circumstantial evidence that ship personnel either knew of the hole, as a result of the inspection, or in the alternative, because of the poor illumination had reason to inspect further.

[14] It is by now a well-settled rule "that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial." McCandless v. United States, 298 U.S. 342, 347-48 (1936)(emphasis in the original).

pap smears are considered part of the standard vaginal examination and therefore, may not be billed separately. An examination of the exhibits and supporting testimony concerning each of these three events reveals that these incidents, either when viewed separately or together, are insufficient to demonstrate that the Respondent had "reason to know" that from August 1981 through April 1983 his billing clerk was submitting improper Medicaid claims.

Both ALJ and the Inspector General devoted substantial attention to the 1977 investigation of the Respondent's unlicensed laboratory. Whatever that incident may reveal about the Respondent's attitude in 1977 toward paper work and federal intrusion into the practice of medicine, one thing is clear: the incident is simply irrelevant with respect to Mrs. Eby's billing practices in the period August 1981 through April 11, 1983. The record reveals that Mr. Norman Siegel visited the Respondent's office and laboratory on September 21, 1977. During the course of that visit he copied a number of patient charts, examined the physical premises and had a conversation with the Respondent. During that conversation Respondent indicated that he "knew nothing about billing SAMI." I.G. Ex. 424. Following Mr. Siegel's site visit, a "Confidential Report of Preliminary Investigation" was completed on February 8, 1978. I.G. Ex. 425. That report focused on a number of areas including Respondent's surgical practice and laboratory billings. The report concluded that there were "clinical finding[s] that could constitute

support for the performance of an anterior/posterior vaginal repair in conjunction with the hysterectomy and indication in the Operative Report that it, in fact, was performed were [sic] found in all instances." The report went on to note that medical necessity was found in all instances for the laboratory procedures billed to SAMI. However, the report did note certain deficiencies, including that in 57% of the sample examined, there was no documentation to support the fact that laboratory procedures which had been billed to SAMI were in fact performed. In addition, the report also found that the Respondent's laboratory was not certified, as required by State law. The report concluded by listing a variety of "suggested action alternatives," including initiating a full-scale fraud investigation, obtaining restitution of all monies paid on account of tests performed at Respondent's laboratory, terminating Respondent's provider agreement and/or discontinuing payments to Respondent for laboratory procedures. Notwithstanding this rather impressive report, it is surprising to find that none of the suggested alternatives was pursued, that the contents of the report were never shared with Respondent and that he was never even informed of the deficiencies noted in the report. In short, the entire incident provides no evidence that the Respondent had "reason to know" that the laboratory billing practices of Mrs. Eby were amiss.

The second event alluded to by the Inspector General is even less probative than the laboratory incident noted above.

Specifically, on May 26, 1978, Respondent was advised via certified mail that in one instance he had billed for six comprehensive re-examinations in a six month period. The letter went on to note that only rarely do patients require such an intense level of care and that future use of the comprehensive re-examination must be restricted. There is simply no relationship between this event, which occurred in 1978 and involved medical judgment about the level of care to be accorded a single patient, and Mrs. Eby's billing practices, which occurred three years later and involved ministerial laboratory billing procedures. Moreover, there is nothing in the record that would even indicate that the Respondent's extensive use of the comprehensive re-examination for the one patient was in fact improper. That patient, may have been the rare case referred to in the SAMI letter.

The final event pointed to by the Inspector General as indicating that the Respondent had "reason to know" that Mrs. Eby's billing practices were improper occurred in July 1983 when SAMI investigators signed a note on Respondent's stationery acknowledging that a physician could not charge separately for a Pap smear. Clearly, a "warning" provided a full three months after the improper billings had ceased and which related to a billing practice not even at issue in this case cannot as matter of a law form the basis for a "reason to know" finding. Indeed, if nothing else, this final event provides circumstantial evidence that Respondent did not fully comprehend SAMI billing

regulations and insisted upon an official note to confirm the correct procedure.

In summary, the events alluded to by the Inspector General do not support the contention that the Respondent had "reason to know" that Mrs. Eby was filing incorrect claims with the fiscal intermediary. This is not to say, that Respondent's conduct was either proper or above reproach. It is clear that the Respondent was careless in not more carefully supervising the billing activities of his staff. However, it is equally clear that such carelessness, as long as it does not affect the quality of care afforded Medicaid patients[15/] and as long as the Respondent did not have reason to know of it, is not actionable under CMPL.

In situations such as this, where an appellate tribunal discerns that the factfinder "has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the

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15/ Where the actions of a provider adversely affect the quality of medical care the constraints imposed by the "reason to know" standard no longer pertain. As noted above, the "reason to know" standard assumes that there is no pre-existing duty on the part of the provider to ferret out information. However, a provider always owes a duty of due care to each of his patients. Consequently, prosecutions under the CMPL which implicate the quality of care do not require independent proof to cause the duty to spring into existence. The duty to provide quality care always exists. In this case, the ALJ found that the Respondent did in fact practice quality medicine and there was nothing in the record to indicate that his carelessness in supervising his billing clerk had any adverse effect on the quality of care that he afforded his patients. The urinalyses that were billed to SAMI by Mrs. Eby, but never performed, were, based on the medical evidence adduced at the hearing, largely redundant. The urine cultures and other tests that were performed would have detected any abnormalities.

[factfinder] to make the missing findings." Pullman-Standard v. Swint, 456 U.S. 273, 291 (1982). As the Court in DeMarco v. United States, 415 U.S. 449, 450 (1974) observed:

> [F]actfinding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved this factual dispute which had not been considered by the District Court.

Accordingly, since the ALJ did not review the record in light of the "reason to know" standard, the preferred course is to remand this matter to the ALJ to provide him with an opportunity to consider the evidence in light of that standard. It should be noted that the remand is limited to a single issue, namely whether there is evidence to support a finding that the Respondent "had reason to know" that improper claims were being submitted on his behalf.

III.

The decision reached today is not intended to limit or otherwise thwart the superb enforcement efforts of the Inspector General, which are vital to the Medicare and Medicaid programs and which remain above reproach in all respects. The actions of the Inspector General are not at issue in this case; his investigation and prosecution were both thorough and fair. This case, however, was, and remains, highly unusual and my decision must be read accordingly. It is the only case to my knowledge in which an ALJ found no evidence of fraudulent intent, found no evidence of actual knowledge, found no evidence of conspiracy or

complicity on the part of a respondent, and found no evidence that the Respondent had intentionally implemented office procedures designed to insulate himself from the improper practices of his staff. In short, this case tested the outer limits of the CMPL. Under normal circumstances, subtle legal distinctions are not infrequently ignored by courts with little risk to justice. In Mayers v. U.S. Dept. of Health and Human Services, No. 85-3803 (11th Cir. Dec. 22, 1986), for instance, the court confused the "should know" standard and the "reason to know" standard treating the two as if they were equivalent. Mayers, though, involved a mundane case of clear fraud under the CMPL and the court's "error," such as it was, had no affect on its holding. Here, given the unique facts of this case, the subtle distinction between the two standards did have meaning, and the ALJ's failure to recognize that distinction by consistently using the incorrect legal standard, constituted prejudicial error mandating reversal. When venturing on the outer limits of a statute it is easy to misstep and ignore those subtle legal distinctions which under normal circumstances would have little import. As Roger Traynor noted: "To err is human, as a judge well knows, but to err is not always harmless." Traynor, The Riddle of Harmless Error 3 (1970).

Accordingly, for the reasons discussed above, the Decision of the ALJ is reversed, the Order vacated and the case is remanded to the ALJ for proceedings consistent with this Opinion and with the attached Order.

/s/

Robert L. Raclin
Deputy Under Secretary