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: May 2, 1988

Department Grant Appeals Board Docket No. C-19

MEMORANDUM OPINION AND ORDER

DECISION CR 10

On March 8, 1988, I issued a Decision holding that the Inspector General had failed to prove by a preponderance of the evidence that the Respondent in the above-captioned matter had "reason to know" that his billing clerk was submitting Medicaid claims for services that were not rendered as claimed. That Decision also concluded that while the Civil Money Penalty Law (CMPL) does permit the vicarious imposition of assessments, it does not envision the vicarious imposition of penalties. In short, the Decision held that the CMPL, as amended, must be read in light of its unequivocal legislative history which requires that the law be applied in a manner consistent with the common law and further, that the common law does not recognize the vicarious imposition of punitive damages.

On April 21, 1988, some forty-four (44) days after I had

filed my Decision and Order, the Inspector General filed a motion for reconsideration of that March 8 Order and Decision. In his motion for reconsideration, the Inspector General argues that my analyses were incorrect. Specifically, the Inspector General first argues that inasmuch as the CMPL on its face mandates the imposition of penalties upon a finding of liability, it was improper for me to consider the legislative history in analyzing the statute and thus, I erred by bifurcating the remedies. The Inspector General also argues that notwithstanding the manner in which the statute is interpreted, the record as a whole supports the finding of the Administrative Law Judge (ALJ) that the Respondent "had reason to know" that his billing clerk was submitting improper Medicaid claims. For the reasons discussed below, each of these contentions must be rejected and the motion for reconsideration must be denied.

I.

As a preliminary matter, one needs to address whether, as a matter of law, the Secretary retains the discretion to entertain a motion for reconsideration. Although the regulation implementing the CMPL makes no explicit reference to such motions, as a practical matter such motions make imminent sense, provided that they are filed in a timely manner and raise critical issues not previously discussed by the parties. Indeed, "[t]he power to reconsider is inherent in the power to

decide." Civil Aeronautics Board v. Delta Air Lines, 367 U.S. 316, 339 (1961) (Whittaker, J., dissenting) (citations omitted). 1/ Moreover, the Administrative Procedure Act, itself, in outlining the contours of acceptable agency practice, explicitly notes the potential availability of motions for reconsideration. See, 5 U.S.C. § 704. Here, the Secretary's decision does not become effective until sixty (60) days following receipt of that decision by the Respondent. Thus, it would appear that during that sixty (60) day window the Secretary retains jurisdiction over the case and may, in appropriate instances, entertain a motion for reconsideration. 2/

This is not to say that motions for reconsideration ought to

1/ Agencies have customarily entertained motions for reconsideration. However, it has usually been done pursuant to specific regulatory authority. See, for instance, 49 CFR §1.101 (1949) (Interstate Commerce Commission); 16 CFR § 3.27 (Supp. 1956)(Federal Trade Commission); 18 CFR § 1.34 (Supp. 1956)(Federal Power Commission); 47 CFR § 1.891 (1949)(Federal Communications Commission); and 14 CFR 302.37 (1956)(Civil Aeronautics Board).

2/ One cannot help but note that a 44 day delay in seeking reconsideration stretches the bounds of reasonableness. Generally, motions for reconsideration must be filed on the heals of the adverse order. For instance, Rule 59(e), Federal Rules of Civil Procedure, requires that such motions be filed within 10 days of the entry of the judgment and the local rules of the various district courts adopt a similar limitation with respect to non-dispositive rulings. Inasmuch as the CMPL regulation does not impose a time limit within which such motions are to be filed, I believe that it would be improper to curtail a party's ability to file such a motion without prior notice. Nevertheless, parties are cautioned that such motions are discretionary with the Secretary and therefore, it would not be improper for the Secretary at the outset to consider the length of delay as one factor in deciding whether to entertain that motion.

be routinely filed or automatically entertained.[3] "[C]onstant re-examination and endless vacillation may become ludicrous, self-defeating, and even oppressive." Civil Aeronautics Board v. Delta Air Lines, 367 U.S. at 321 n.5, quoting Tobias, Administrative Reconsideration: Some Recent Developments in New York, 28 N.Y.U.L.Rev. 1262. In the case sub judice, the Inspector General has had more than an ample opportunity to present his case fully--both factually and legally. Following the issuance of the initial ALJ decision on July 11, 1986, the Inspector General has submitted a total of fourteen (14) documents, not counting the extant motion. Of those fourteen documents, eight (8) were briefs addressing substantive legal or factual issues and six (6) were "informational" letters (e.g., calling our attention to new case law or legislation). Indeed, two of those six letters actually discussed the legislative history which is the subject of the current motion for reconsideration. In addition, on remand, the Inspector General was afforded an opportunity to introduce additional evidence bearing on the issue of whether the Respondent had reason to know that his billing clerk was submitting improper Medicaid claims. However, rather than attempting to proffer such evidence, the Inspector General chose instead merely to introduce the reverse

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[3] The Supreme Court has held that petitions for rehearing or reconsideration are not essential to due process. Pittsburg, C.,C. & St. Louis Ry. v. Backus, 154 U.S. 421, 426 (1894).

side of a Medicaid claim form.[4/] There comes a time in every proceeding where basic notions of fairness and administrative finality dictate that the matter must come to an orderly conclusion. In the instant case, that time has been reached. Tenacious adherence to a principle of law that has been soundly rejected on numerous occasions does not serve the ends of justice. This is especially true in a case such as this where the error of law that required the reversal of the ALJ's initial decision, was not only plain on its face, but also interjected at the urging of the Inspector General.

II.

The Inspector General contends that the Under Secretary lacks the authority to bifurcate the remedies and instead, is obligated to impose a penalty under the CMPL even where liability is purely vicarious. In so arguing, the Inspector General asks that I ignore the clear legislative history underlying recent congressional action and instead, urges that I reconsider the case in light of the so-called plain language of the CMPL. The language at issue reads as follows:

(a) Any person (including an organization, agency or other

4/ The Inspector General's failure to introduce additional evidence on remand is perplexing, especially given the fact that we indicated in our initial opinion that the record in its then current state was simply not sufficient to sustain a finding that the Respondent had reason to know that his billing clerk was submitting improper claims.

entity) that -

> (1) presents or causes to be presented to an officer, employee or agent of the United States, or of any department or agency thereof, or of any State agency . . . 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, . . .
>
> 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.

42 U.S.C. § 1320a-7a(a) [emphasis supplied].

The Inspector General maintains that the phrase "shall be subject . . . to a civil money penalty of not more than $2,000 for each item or service" imposes a mandatory duty on the Secretary to impose such a penalty once liability attaches. And further, since the language is plain on its face, the legislative history is irrelevant and therefore, must be ignored. The Inspector General's position is seriously flawed for a variety of reasons. As noted in our initial decision, the plain meaning of the CMPL does not authorize the vicarious imposition of damages--compensatory or exemplary.[5] It is only through the use of the recent legislative history that vicarious liability of any sort can be justified. Consequently, if one were to ignore that

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[5] This issue was extensively briefed by both parties and thoroughly considered in Silver I. Had the Congress intended to impose vicarious liability, "it certainly knew how to achieve such a result." Indeed, the recently enacted anti-dumping provisions impose liability on the "responsible physician," even though that physician may not have participated in the improper conduct. See 42 U.S.C. § 1395dd.

legislative history, as the Inspector General now urges, no liability whatsoever would attach. That legislative history, which in essence forms the very foundation of the Inspector General's case, mandates that I apply the CMPL in accordance with the common law principles of respondeat superior. Those common law principles which the Inspector General now deems irrelevant authorize the vicarious imposition of liability, but do not authorize the vicarious imposition of punitive damages. In short, the Inspector General cannot have it both ways: either the legislative history is relevant in which case vicarious liability for compensatory damages alone may attach or it is not relevant in which case no vicarious liability of any sort may attach. Legislative history, like any other indicia of the law, is not a creature of convenience to be enthusiastically embraced when it is useful but callously discarded when it proves to be a liability. To so argue, not only turns logic on its head, but also seriously erodes the public's confidence in our legal system and its institutions.

Quite aside from the Inspector General's unorthodox treatment of legislative history, the motion for reconsideration is telling in what it fails to say. The Inspector General has devoted considerable time repeating a somewhat polemic discussion of the evils likely to behalf our system if penalties are not imposed in this case. Significantly, however, the Inspector General has made no effort to question the policy considerations

outlined in my recent decision which firmly support the notion that the vicarious imposition of punitive damages not only makes little sense, but may well undermine the Inspector General's overall enforcement effort. This is especially noteworthy given the fact that in my Opinion on Remand at 28, I indicated that the "Inspector General makes no effort to proffer any legitimate rationale for the vicarious imposition of punitive damages." Moreover, the motion for reconsideration does not identify with any specificity the shortcomings of the approach embodied in the Restatement (Second) of Torts § 909. As noted in the Opinion on Remand, Section 909 provides the Inspector General with maximum flexibility in enforcing the CMPL.

The Inspector General's so-called plain meaning argument is tied to the phase "shall be subject to a . . . penalty." However, as the Inspector General recognizes that phrase must be read in the context of the entire statute. When so read that phrase certainly does not require that a penalty be imposed where the Secretary determines that such is unwarranted. Indeed, a somewhat less tentative phrase is used throughout title 18 of the United States Code (i.e., "shall be fined not more than $ . . or imprisoned not more than ... year, or both") and no one can seriously argue that such language requires a judge to either fine or imprison a convicted felon. See 18 U.S.C. § 3561.

III.

As noted above, a motion for reconsideration, when timely made, may be justified to raise new and relevant points or to alert the decision maker to new and significant case law or legislation. In that regard, the Inspector General's motion as it relates to the legislative history surrounding recent amendments to the CMPL is certainly proper. However, the same cannot be said for that aspect of the motion which seeks to reargue for at least the third time the sufficiency of the evidence. That matter has been fully briefed by both sides and was duly considered. The Inspector General's reanalysis of the record raises no new points and presents no new insights.

IV.

For the reasons stated above the Inspector General's motion for reconsideration is DENIED and further pleadings in this case will not be accepted for filing.

It is So Ordered.

/s/

Anabel Smith Bowen
Deputy Under Secretary

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: March 8, 1988

Department Grant Appeals Board Docket No. C-19

FINDINGS AND ORDER ON REMAND

For the reasons set forth in the attached Opinion on Remand of this date, IT IS HEREBY FOUND

THAT the Inspector General has failed to prove by a preponderance of the evidence that the Respondent either knew or had reason to know that improper Medicaid claims were being submitted by his billing clerk and accordingly, the Respondent is not held directly liable under the Civil Money Penalty Law;

THAT the Inspector General has established by a preponderance of the evidence that the Respondent's billing clerk either knew or had reason to know that she had submitted Medicaid claims for services not provided as claimed; and

THAT as a result of the conduct of the Respondent's billing clerk, as noted above, Respondent is held vicariously liable under the Civil Money Penalty Law for assessments in the amount of $9,000., to cover the costs of this action.

ACCORDINGLY, IT IS HEREBY ORDERED

THAT the Decision on Remand of the Administrative Law Judge of July 2, 1987, is REVERSED;

THAT the Order of the Administrative Law Judge entered July 2, 1987, is VACATED; and

THAT the RESPONDENT is ORDERED to pay assessments in the amount of $9,000.

/s/

Anabel Bowen
Deputy Under Secretary

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OPINION ON REMAND

This Civil Money Penalty case is on review before the Deputy Under Secretary for the second time. On July 2, 1987, the Administrative Law Judge (ALJ) issued a Decision and Order on Remand in which he found that Frank P. Silver, M.D. ("Respondent") had reason to know that his billing clerk was submitting claims to SAMI, the Nevada State Medicaid agency, for services not provided as claimed. The ALJ ordered the Respondent to pay an assessment of $9,000 and penalties of $73,500. In addition, the ALJ ordered that the Respondent be suspended from the Medicare and Medicaid programs for a period of three years. This case presents two primary issues. First, has the Inspector General established by a preponderance of the evidence that Respondent had reason to know that his billing clerk was submitting improper claims to SAMI. And second, does the Civil Money Penalty Law ("CMPL") authorize the vicarious imposition of compensatory damages, assessments and penalties (including

suspension from the Medicare and Medicaid programs). For the reasons stated below, I conclude (1) that the Inspector General has failed to establish by a preponderance of the evidence that the Respondent had reason to know of the improper billings and (2) that the Respondent may be held vicariously liable for the improprieties of his billing clerk, but as a matter of law such liability must be limited only to compensatory damages and assessments. Consequently, the ALJ's Decision on Remand is reversed and the Order on Remand is accordingly modified.

I.

The facts of this case were amply set out in our initial Opinion and those findings are specifically incorporated by reference. However, inasmuch as there have been numerous filings since the date of our initial Opinion, in order to put this Opinion into proper perspective, I believe it appropriate to summarize the procedural aspects of this case, beginning with the ALJ's initial Decision and Order. On July 11, 1986, an ALJ issued a Decision and Order finding the Respondent liable under the Civil Money 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. That Decision and Order imposed penalties of $232,000 and assessments of $9,237.59 and suspended Respondent from participating in the Medicaid and Medicare programs for a period of ten years. In his 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.

On review, the Inspector General tacitly acknowledged that the ALJ used the incorrect standard in judging the Respondent's culpability. Specifically, rather than judging the Respondent's conduct by using the "have reason to know" standard, as required by the statute, the ALJ used the less rigorous "should have known" standard. Nevertheless, the Inspector General argued that the Decision and Order of the ALJ should be affirmed for three reasons. First, the Inspector General noted that there was sufficient evidence to support a finding that the Respondent had actual knowledge of his billing clerk's improper billing practices. Second, the Inspector General contended that the evidence was sufficient to support a finding that the Respondent had "reason to know" of those improper practices. And third, even if the Respondent did not have reason to know, he was nonetheless vicariously liable for the improper actions of his employee. In our Opinion of April 27, 1987, we held that the ALJ (at the urging of the Inspector General) had in fact employed the incorrect standard in judging the Respondent's culpability under the CMPL. As noted above, rather than judging the

Respondent's conduct by using the "have reason to know" standard, as required by the statute, the ALJ used the less rigorous "should have known" standard. We also held that the record as a whole was devoid of evidence supporting the Inspector General's contention that the Respondent had "actual knowledge" of the improper billing practices and further held that a Respondent may only be penalized for the improper conduct of an employee, if the Inspector General is able to satisfy the requirements of the Restatement (Second) of Torts §909 (1979). In this case, we noted that the record lacked any such evidence.

Instead of dismissing the case, we vacated the ALJ's Order, reversed his Decision and remanded the matter to the ALJ so as to provide him with an opportunity to judge the Respondent's conduct using the "have reason to know" standard. Our Order was sufficiently broad so as to enable the ALJ to reopen the record and to request that the parties present such additional evidence on that point as they deemed appropriate. In accordance with that Order, the ALJ issued an Order on April 30, 1987, in which he stated that "[u]nless further proceedings are requested or otherwise indicated, I will decide the issue on the basis of the briefs and the prior record." ALJ Order at 4 (April 30, 1987). On May 14, 1987, the Inspector General filed a motion requesting that the record be reopened for the limited purpose of introducing into evidence an example of the reverse sides of the 418 claim forms at issue in the case. That motion was granted

and the record was accordingly supplemented. Also, on May 14, 1987, the Inspector General filed his proposed findings of fact and Brief on Remand. On May 27, 1987, the Respondent filed his proposed findings of fact and a brief entitled: Respondent's Answer to Inspector General's Brief on Remand.

On July 2, 1987, the ALJ issued his Decision and Order on Remand. In that Decision, the ALJ found that the Respondent "had reason to know" that his billing clerk was in fact submitting improper Medicaid billings. As a consequence, the ALJ ordered that the Respondent pay an assessment of $9,000 and penalties of $73,500. The ALJ further ordered that the Respondent be suspended from the Medicare and Medicaid programs for a period of three (3) years. On August 7, 1987, the Respondent filed exceptions to the ALJ's Decision and Order on Remand and on August 25, 1987, the Inspector General filed a reply to the Respondent's exceptions. In addition, on August 11, 1987, the Inspector General filed a separate pleading on the issue of vicarious liability, which can best be characterized as a motion to reconsider our earlier holding which had limited the use of that doctrine in cases arising under the CMPL. On August 21, 1987, the Respondent filed a Reply Brief on the Issue of Vicarious Liability. Twenty days later, on September 9, 1987, the Inspector General sought leave to file a brief in Response to Respondent's Reply Brief to the Inspector General's Brief on Vicarious Liability and attached a copy of that brief to the

motion. On September 15, 1987, the Respondent filed pleadings opposing the Inspector General's motion for leave to file a response.[1] Finally, on January 7, 1988, and January 21, 1988, the Inspector General submitted materials indicating that in the final hours of the last session of the Congress, the CMPL was amended in certain respects which could have a bearing on this case. In particular, those materials indicate an intent on the part of the House Committee on the Budget and the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce "to incorporate common law principles of <u>respondeat superior</u> into the civil money penalty authority."

On February 4, 1988, in view the voluminous pleadings filed by the parties, I ordered the matter submitted and now reverse the Decision of the ALJ, vacate his Order and enter a modified Order. For the reasons stated below, I conclude (1) that the Inspector General has failed to prove by a preponderance of the evidence that the Respondent had reason to know of the improper billing practices of his clerk, and (2) that a Respondent may be held vicariously liable under the CMPL, but only to the extent that such liability is consistent with the common law principles of respondeat superior. Applying the doctrine of vicarious liability, the Respondent is ordered to pay an assessment of $9,000. Since punitive measures may not be vicariously imposed

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[1] The Inspector General's motion is file a response on the issue of vicarious liability is hereby granted.

under the common law principles adopted by the majority of our States, I therefore vacate the penalty of $73,500 and the three (3) year suspension from the Medicare and Medicaid programs.

II.

In his Decision on Remand, the ALJ thoughtfully analyzed the "reason to know" standard and concluded that the Respondent had reason to know that his billing clerk, Mrs. Eby, had submitted Medicaid claims for services that were not provided as claimed. Decision on Remand at 38. In our Opinion, we emphasized that the salient difference between the "reason to know" and "should have known" standards is that under the former, an actor is under no affirmative duty to ferret out errors, while under the latter, he is under such a duty. Under the reason to know standard, an actor is obligated to investigate only if he either possesses sufficient information to put a reasonable person[2/] on notice that further investigation is warranted or is

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2/ The Inspector General has correctly noted that the reasonable man standard used to assess whether an actor "has reason to know," is not a purely objective test. Instead, an actor will be held to higher standard, if he has superior intelligence. The Inspector General therefore argues that since the Respondent has superior intelligence, he in fact should be held to a higher standard. IG's Brief on Remand at 5 (May 14, 1987). The Respondent does not disagree with the Inspector General's characterization of the law, only with its application. The Respondent argues that while he may have superior intelligence, that intelligence is limited to certain disciplines and does not encompass the arcane world of Medicaid regulations and billing practices. Respondent's Answer to IG's Brief on Remand at 5 (May 27, 1987). The Inspector General's view, while interesting as a matter of theory, is contrary both to basic

under some pre-existing duty to investigate. The ALJ's finding that the Respondent "had reason to know" of the improper billing practices of his clerk was premised on the legal conclusion that the Respondent was under a pre-existing duty to review the accuracy of each claim. Specifically, the ALJ found that the Respondent was under a pre-existing duty to investigate the truth, accuracy and completeness of the claims before they were submitted, solely because each of the claims contained a certification statement. The certification referred to by the ALJ reads as follows: "NOTICE: This is to certify that the foregoing information is true, accurate and complete." 3/ Decision on Remand at 39. The ALJ stressed the importance of this certification by noting that "[w]hile the Respondent was allowed to use a facsimile stamp for his signature, he was required to initial each claim form after he checked the accuracy of each claim." Decision on Remand at 40. Similarly, the Inspector General in his Brief of August 25, 1987, emphasized that the certification is a representation by the physician or

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principles of tort law and the structure of his own case. The Inspector General called as witnesses numerous individuals who attempted to outline the complexities of the Medicaid billing system. None of these witnesses was a physician. Rather each specialized in a particular area of Medicaid reimbursement. In short, in reviewing the facts of this case, I shall treat the Respondent as I would any other Medicaid physician, and not as an expert in the area of Medicaid reimbursement. Given the high error rate normally associated with Medicaid claims, any other holding would be disingenuous at best.

3/ This notice is required by 42 CFR § 455.18(a)(1).

supplier that <u>he or she has acquired sufficient knowledge</u> to assure that the claim is true, correct and complete. IG Brief at 12 (August 25, 1987). In light of the potential significance of this certification, the Inspector General proceeded to note that a billing clerk's signature is not acceptable. Indeed, the billing manual instruction with respect to the HCFA 1500 signature block states: "<u>Provider's</u> signature or facsimile stamp (initialed) must be on every claim and every page of claim." IG Ex. 426/9. The thrust of the ALJ's Decision and Inspector General's argument was that the certification was no mere formality, that the provider is under a duty to ascertain the truth before certifying and once certification occurs, the provider may be held liable for any inaccuracies on the form. However, even a cursory glance at the exhibits in this case reveals a telling irony: neither the Respondent's signature nor his initials appear on any claim form. Moreover, while a facsimile stamp, when properly initialed by the provider, may be used in lieu of the provider's actual signature, here, not only was no facsimile stamp used, but the Respondent never even inked his initials. Instead, Mrs. Eby using the Respondent's name signed each of the claim forms and then proceeded to initial (i.e., "K.E.") each form. Clearly, even under the most liberal reading of the manual instruction, none of these claims should have been paid by the intermediary.[4/] Indeed, had the

[4/] The ALJ notes that SAMI, the Nevada Medicaid agency, accepted the claims at issue with initials of Mrs. Eby next to the signature stamp of the Respondent. Decision on Remand at 40,

intermediary rejected these claims, the Respondent then would have been required to focus on the claims at issue and he may not have certified them for payment. In short, since under the ALJ's theory the certification formed the basis of the pre-existing duty and since no valid certification was ever introduced into evidence, then no pre-existing duty exists. This is not to say, that a valid certification would be sufficient, as a matter of law, to form the basis of a pre-existing duty to investigate. Rather, under the circumstances of this case, it is unnecessary to address that issue.

The ALJ also reiterated a number of the points that he had made in his original Decision. Many of those points, however, are dependent on the existence of a valid certification. For instance, the ALJ held that the Respondent had "reason to know" because he was negligent in not more carefully supervising Mrs. Eby. The CMPL though does not, in and of itself, impose liability for negligent supervision. Instead, liability is imposed only if a respondent has reason to know that improper claims are being submitted. As we indicated in our original Opinion, a claim for negligent supervision is nothing more than a claim that a respondent "should have known" that improper Medicaid billings were being filed and thus, is not actionable

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n. 20. However, as noted above, no signature stamp was ever used. Hence, even under SAMI's tortured ready of the manual instruction, these claims ought never have been paid.

under the CMPL. Opinion at 39. The ALJ's holding though that negligent supervision is actionable is primarily based on the notion that the "Respondent failed to check the accuracy of the claims, as was required by the certification statements." Decision on Remand at 42. However, as noted above, there were no validly executed certifications filed in this case. Consequently, there is no basis to argue that a duty sprang into existence.

Finally, it must be noted that in our original Opinion we held that "the evidence adduced at the hearing [when judged against the correct standard] falls short of sustaining the Inspector General's burden of proof." Opinion at 2. Inasmuch as no new evidence, other than the reverse side of one certification form, was introduced on remand, there is no basis in the record to reverse our original conclusion. Consequently, I find that the Inspector General has failed to establish by a preponderance of the evidence that the Respondent had reason to know that his billing clerk was submitting false Medicaid claims.

III.

The Inspector General has devoted considerable effort urging that I reconsider our original Opinion in which we held that an individual may not be held vicariously liable under the CMPL. The Inspector General vigorously avers that an actor should be

subject to vicarious liability under the CMPL for the following reasons. First, he argues that the doctrine of respondeat superior is woven so thoroughly into the fabric of our legal tradition, it is likely that Congress intended to incorporate the doctrine into the CMPL. Second, he opines that the CMPL would be eviscerated if an actor were not held vicariously liable for the actions of his employee and further that the compensatory goal of the statute would be effectively thwarted. Third, the Inspector General contends that CMPL should be interpreted in light of American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982), a case in which the Supreme Court applied common law agency principles to hold a principal liable for treble damages for the antitrust violation perpetrated by an agent. And finally, the Inspector General has brought to our attention recent action by the Congress which indicates an intent on the part of the Congress to incorporate common law notions of vicarious liability into the CMPL.

At the outset, it must be emphasized that in analyzing the scope of vicarious liability one must be mindful of a critical distinction which we voiced in our original Opinion:

> 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.

Opinion at 13 n.5.

Thus, the scope of the doctrine with respect to the CMPL is

necessarily a function of a two-step analysis. First, should an individual be held vicariously liable for compensatory damages (including costs in the form of an assessment) under the CMPL. And second, should an individual be held vicariously liable for penalties under the CMPL. For the reasons set out below, I conclude that while a principal may be held vicariously liable for both compensatory damages and assessments under the CMPL, a principal may not be held vicariously liable for penalties (including suspension).

A.

During the waning hours of the first session of this Congress, the House of Representatives, without debate, amended the language of the CMPL to provide that liability could attach if a provider either knows or should have known that false claims were submitted. In short, the House substituted the "should have known" standard for the "reason to know" standard. According to the House Report, this change was made in response to our original Opinion in the <u>Silver</u> case. Specifically, the House Report stated:

> The Under Secretary [sic] first held that an employer may not be subject to civil penalties or assessments for the actions taken by his employee within the scope of his or her employment. The Under Secretary [sic] also interpreted the "reason to know" standard as imposing a duty on a physician or other person to investigate the truth of his claims for payment only if he has previously learned of some information that puts him on notice that this or her claims are improper.
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> * * *
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> The Committee amendment would therefore provide for the imposition of civil money penalties and assessments in

> instances where a person (or entity) "knows or should know" that claims submitted were false. The purpose of this amendment is to nullify the interpretation set forth in Silver, and to incorporate common law principles of respondeat superior into the civil money penalty authority.

H.R. Rep. No. 100-391, 100th Cong., 1st. Sess., vol. I, 534 (1987).

The Report went on to observe that providers "have an affirmative duty to ensure that the claims for payment which they submit, or which are submitted on their behalf by billing clerks or other employees, are true and accurate representations of the items of services actually provided." Id.

In essence, the Committee arguably found fault with two aspects of our initial Opinion. First, the Committee apparently disagreed with our holding that penalties and assessments may not be vicariously imposed. And second, the Committee disagreed with our interpretation of the phrase "reason to know."

The effect on this case of the amendment and of the accompanying Committee statements is less than clear. It is by now well settled that "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974). Courts are understandably reluctant to seriously consider post-enactment statements of intent, because of the hazards usually associated with such after-the-fact pronouncements. See, Public Citizen v.

Young, No. 86-1548, slip op. at 19 (D.C. Cir. October 23, 1987). Whatever those hazards may normally be, in this setting they are particularly apparent. Here, the amendment and Committee statement were made amidst the documented chaos of the budget reconciliation process--a process whereby thousands of pages of legislation were at the eleventh hour hurriedly enacted and presented to the President for his signature in order to prevent the government from unceremoniously closing. The legislation was adopted with such speed that most legislators were unaware of many controversial provisions contained in the final bill. In fact, the current amendment itself, which is less than a model of clarity, evidences the problems frequently associated with hastily drafted omnibus legislation. For example, the Committee begins by noting two problems that it intends to address: vicarious liability and the use of the "reason to know" standard. However, the amendment itself only addresses our interpretation of the reason to know standard. No language was offered, considered or adopted which in any way would have imposed vicarious liability on providers. Consequently, one could argue that Congress' failure to specifically incorporate language to impose vicarious liability is evidence that vicarious liability ought not be imposed. Further, and more troubling, is the assertion in the House Report that our interpretation of the "reason to know" standard is not consistent with congressional intent. Not only does the Inspector General fully concur with our interpretation of that phrase, but also, as we indicated in

our original opinion, our interpretation of that phrase is fully consistent with the manner that it has been interpreted by the courts and commentators for more than a generation. Thus, the statement in the House Report that "the 'knows or should know' language clarifies but does not alter the intent underlying the current 'knows or has reasons to know' language," only creates uncertainty and confusion. The uncertainty generated by the amendment is further exacerbated by the fact that that amendment is to be applied retroactively. While the retroactive application of the amendment may in the future raise significant constitutional issues, we need not address those here because the Inspector General "does not contend that the Respondent's conduct should be otherwise judged by the 'should know' standard, since we did not file exceptions on this issue." IG Letter at 1 (January 7, 1988).

Although it is well established that the language in a House Report is not binding on a federal agency, out of deference to the Congress and a need to foster comity, I believe it advisable to give the Report language appropriate effect. Consequently, since the House Report does indicate a belief that the CMPL ought be implemented in a manner consistent with the common law doctrine of respondeat superior, I conclude that the Respondent is liable for compensatory damages, including those aspects of a compensatory damage award that would normally be classified as taxable costs. In the setting of the CMPL, taxable costs are

analogous to assessments, and hence, the Respondent is vicariously liable for the $9,000 assessment imposed by the ALJ. As discussed below, however, the vicarious imposition of punitive damages would not be consistent with the common law doctrine of respondeat superior and thus, that portion of the ALJ Order on Remand imposing punishment is vacated.

B.

The Inspector General, relying almost exclusively on the Supreme Court opinion in American Society, urges that penalties may be vicariously imposed under the doctrine of respondeat superior. In American Society the Court, partially relying on common law principles of agency, upheld the imposition of treble damages for antitrust violations. In that case, the defendant, a professional association of 90,000 mechanical engineers, was charged with having violated the antitrust laws, because industry standards adopted by one of its committees were primarily promulgated to prevent the plaintiff from successfully marketing its product. In particular, the vice chairman of the subcommittee was also the vice president of the plaintiff's principal competitor, and it appeared from the evidence, that he was responsible for instigating certain subcommittee and committee action that seriously injured the plaintiff's ability to compete with his employer. The Court affirmed the liability of the defendant under the antitrust laws for the actions of an agent that were undertaken with apparent authority. The Inspector General argues that the Court's decision in American

Society supports the common law imposition of punitive damages under the doctrine of respondeat superior and thus, supports the ALJ's imposition of penalties under the CMPL.

The Inspector General's reliance on American Society as a basis for supporting the vicarious imposition of punitive damages is clearly misplaced. At issue in this case is whether the common law recognizes the vicarious imposition of punitive damages. With respect to that issue, the Court's opinion in American Society is not apposite, for four independent reasons. First, the antitrust laws at issue in American Society are conceptually distinct from common law principles of tort liability and therefore, the Court's analysis logically cannot be used as a basis for synthesizing common law precepts. Second, treble damages under the antitrust laws simply are not analogous to traditional punitive damages; they serve different purposes and foster different societal goals. Third, the facts of the case sub judice do not support the application of the doctrine of apparent authority which was central to the Court's decision in American Society. And fourth, to the extent that American Society may be compared with this case, the holding there is entirely consistent with our Opinion in this case. In addition, notwithstanding the Court's opinion in American Society, the common law does not countenance the vicarious imposition of punitive damages primarily because the rationale underlying its application makes little sense in this context.

Under the antitrust laws, compensatory and exemplary damages are inextricably intertwined: one form of damages cannot exist without the other. Once civil liability attaches, the trial court is obligated to impose treble damages. Unlike a court adjudicating a typical common law tort, a court in an antitrust case lacks the authority to parse damages between compensatory and exemplary and to independently determine the legal and factual propriety of each component. This dependency places a court in a conceptual dilemma and effectively forces it to analyze the entire damage request in light of the policy considerations underlying the vicarious imposition of compensatory damages, considerations that normally would be entirely inappropriate if the only issue before the Court were the vicarious imposition of punitive damages. In American Society, for instance, had the Court determined that treble damages could not be vicariously imposed, it would necessarily also have been forced to deny the plaintiff compensatory relief. Yet, the doctrine of respondeat superior, at least with respect to compensatory damages, is so well ingrained in our common law tradition, that such a holding would have been untenable. Thus, given the choice facing the Court (i.e., compensating an innocent victim for injuries suffered at the hands of the defendant's agent or denying such compensation on the grounds that the defendant would be forced pay treble the amount of the actual damages), its holding is entirely consistent with both

commonsense and the common law doctrine of respondeat superior. In contrast, however, the CMPL provides the decision maker with same discretion with respect to the imposition of penalties, as the common provides with respect to the imposition of punitive damages. In neither case is the decision maker required to impose exemplary damages upon a finding of liability. In both cases, each damage element can and must be individually scrutinized. Thus, while the Court may have been justified in partially relying on certain common law principles to support its position that treble damages could be vicariously imposed under the antitrust laws, the converse clearly does not follow. That is to say, common law principles of vicarious liability cannot be derived from the Supreme Court's antitrust holding in American Society. That holding, is simply not conceptually relevant to the issues posed by this case.

As noted above, treble damages under the antitrust laws are not akin to traditional punitive damages. Specifically, the primary purposes of punitive damages are to punish and to deter. In contrast, the primary purpose of treble damages under the antitrust laws is to provide a powerful incentive for the private enforcement of the antitrust laws.[5] See, Areeda, Antitrust

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[5] It is interesting to note, that one of the primary differences between the analysis of the majority and that of the dissent in American Society hinges on the manner in which each characterized the purpose under treble damages. The majority opinion downplayed the punitive aspects of treble damages and extolled their compensatory purpose. In contrast, the dissent argued that "treble damages primarily punish and are intended to

Analysis 69 (1969). As the Court in Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) stated:

> Congress created the treble-damages remedy ... precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations. [emphasis in original].

While treble damages do serve as a deterrent, the deterrent is indirect and derives from the expectation that treble damages provide an incentive for vigorous private enforcement, thereby increasing the likelihood that anticompetitive activities will be detected and remedied. The direct deterrent effect of the treble damage remedy is limited, for two reasons. First, such damages are generally a deductible business expense for federal income tax purposes. Rev. Rul. 64-224, 1964-2 Cum. Bull. 52. 6/ Second, treble damages, unlike punitive damages, result in an award that is not related to the wealth of the defendant, but only to the damages suffered by the plaintiff, and thus in many instances they do not serve to punish as much as they do to compensate. In short, treble damages authorized by the antitrust laws are not closely akin to either the penalties imposed under the CMPL or to traditional punitive damages.

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do so." American Society, 456 U.S. at 583 (Powell, J., dissenting).

6/ Such damages are not fully deductible if the defendant has been previously convicted in a related criminal action. See, Section 162-22, Internal Revenue Code.

In American Society, the Court heavily relied upon the agency principle of apparent authority to form the basis of vicarious liability. The doctrine of apparent authority basically holds a principal liable for the actions of his agent, if a person reasonably believes from the actions of the principal that the agent is authorized to undertake the problematic activities. "Apparent authority" is defined in the Restatement (Second) of Agency § 8 as follows:

> Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

However, apparent authority exists only to the extent that it is reasonable for the third person dealing with the agent to believe that the agent is authorized. Further, the third person must actually believe that the agent is authorized. Restatement (Second) of Agency § 8, comment c. See, Foerstel v. Houston, 101 F.2d 742, 747 (6th Cir. 1939); Cox v. Pabst Brewing Co., 128 F.2d 468, 472 (10th Cir. 1942). Under SAMI's own rules, a Medicaid claim form can only be processed if that form contains an appropriate certification from the principal. Those rules describe the contours of reasonable behavior. Here, as noted above, no valid certification was ever submitted by the Respondent or his agent, and hence, there is no basis whatsoever for SAMI to believe that the agent had apparent authority to act. SAMI's own rules establish that absent some expression by the

principal (e.g., principal signing his initials to the form) there is simply no authority.

Finally, the Court's holding in American Society is entirely in accord with both the position adopted in the Restatement (Second) of Torts § 909 and this Opinion. Under the Restatement, as discussed below, a principal may be held liable for punitive damages if the agent that caused the injury was in a management position. In American Society, the actual tortfeasor was the vice chairman of the defendant's subcommittee and thus, was serving the defendant in a management capacity. In sharp contrast, the Respondent's bookkeeper had no management role. She was not authorized to supervise employees, she was not authorized to make deposits, she was not authorized to make withdrawals and she was not authorized to enter into contracts. And consistent with that lack of authority, she undertook none of those responsibilities. Indeed, the Inspector General has never attempted to portray Mrs. Eby has anything other than a nonsupervisory employee. Thus, even if we were to apply the holding in American Society to the fact of this case, the result would be the same.

The Inspector General also attempts to argue that under the common law punitive damages may be vicariously imposed. This argument is based exclusively on a footnote in the Court's opinion in American Society recounting a statement made by Dean

Prosser. However, not only is Dean Prosser's assertion that a majority of the states vicariously impose punitive damages simply not correct, but the common law specifically rejects the notion that punitive damages may be vicariously imposed. Notwithstanding Dean Prosser's statements to the contrary,[7] the majority of jurisdictions follow the rule that a principal cannot be held vicariously liable for punitive damages assessed against an agent unless the principal's conduct, in relation to the agent's, was itself somehow wrongful.[8] This rule, frequently

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[7] Dean Prosser has stated that the majority of states have imposed punitive damages vicariously even in the absence of approval or ratification. Prosser, Law of Torts 12 (4th ed. 1971). This statement appears to have misled some scholars and courts, including the Supreme Court in American Society. See, Owen, Punitive Damages in Products Liability Litigation 74 Mich. L. Rev. 1257, 1300-01 (1976). As discussed below, 24 States currently reject the vicarious imposition of punitive damages, while 18 others permit their imposition.

[8] Twenty-four (24) jurisdictions have refused to apply the doctrine of respondeat superior in situations involving punitive damages and instead, have adopted the rules set forth in the Restatement (Second) of Torts. Those jurisdictions are as follows:

California	Agarwal v. Johnson, 25 Cal.3d 932 (1979)
Colorado	Frick v. Abell, 602 P.2d 852 (Colo. 1979)
Connecticut	Maisenbacker v. Society Concordia of Danbury, 71 Conn. 369 (1899).
District of Columbia	Dart Drug, Inc. v. Linthicum, 300 A.2d 442 (D.C. App. 1973)
Florida	Mercury Motors Exp., Inc. v. Smith, 393 So.2d 545 (Fla. 1981)
Hawaii	Lauer v. Young Men's Christian Ass'n of Honolulu, 57 Haw. 390 (1976)
Idaho	Openshaw v. Oregon Auto Ins. Co., 94 Idaho 335 (1971)
Illinois	Pendowski v. Patent Scaffolding Co., 89 Ill. App.3d 484 (1980)
Iowa	Briner v. Hyslop, 337 N.W.2d 858 (Iowa 1983).

Kansas	Kline v. Multi-Media Cabelvision, Inc., 233 Kan. 988 (1983).
Minnesota	Minn. Stat. Ann. sec. 549.20(2).
Nevada	Summa Corp. v. Greenspan, 96 Nev. 247 (1980).
New Jersey	Security Aluminum Window Mfg. Corp. v. Lehman Assoc. Inc., 108 N.J. Super. 137 (1970).
New Mexico	Samedan Oil Corp. v. Neeld, 91 N.M. 599 (1978).
New York	Craven v. Bloomingdale, 171 N.Y. 439 (1902).
North Dakota	John Deere Co. v. Nygard Equipment Inc., 225 N.W.2d 80 (N.D. 1974).
Ohio	Tracy v. Athens & Pomeroy Coal & Land Co., 115 Ohio St. 298 (1926).
Rhode Island	Conti v. Winters, 86 R.I. 1456 (1957).
Texas	Fisher v. Carrousel Motor Hotel, Inc., 44 S.W.2d 627 (Tex. 1967).
Vermont	Snortle v. Central Vermont Pub. Service Corp., 137 Vt. 32 (1979).
Virginia	Freeman v. Sproles, 204 Va. 353 (1963).
West Virginia	Addair v. Huffmann, 156 W. Va. 592 (1973).
Wisconsin	Garcia v. Sampson's Inc., 10 Wis.2d 515 (1960).
Wyoming	Condict v. Condict, 664 P.2d 131 (Wyo. 1983).

The following eighteen (18) jursidictions do not follow the Restatement view and instead employ the doctrine of respondeat superior with respect to punitive damages:

Alabama	Avondale Mills v. Bryant, 10 Ala. App. 507 (1913).
Arizona	Western Coach Corp. v. Vaughn, 9 Ariz. App. 336 (1969).
Arkansas	Ray Dodge, Inc. v. Moore, 251 Ark. 1036 (1972).
Georgia	Piedmont Cotton Mills, Inc. v. General Warehouse No. 2, 222 Ga. 164 (1966).
Indiana	Hibschman Pontiac, Inc. v. Batchelor, 226 Ind. 310 (1977).
Kentucky	Kiser v. Neumann Co. Contractors, Inc., 426 S.W.2d 935 (Ky. 1968).
Maine	Goddard v. Grand Trunk Ry. of Canada, 57 Me. 202 (1869).
Maryland	Safeway Stores v. Barrack, 210 Md. 168 (1956).
Michigan	Lucas v. Michigan Cent. R. Co., 98 Mich. 1 (1893).
Mississippi	Sanifer Oil Co. v. Drew, 220 Miss. 609 (1954).
Missouri	Johnson v. Allen, 448 S.W.2d 265 (Mo. App.

referred to as the so-called complicity rule,[9] has been aptly synthesized in the Restatement (Second) of Torts § 909 (1979):[10]

> Punitive damages can properly be awarded against a master or other principal because of an act of an agent if, but only if,
>
> (a) the principal or managerial agent authorized the doing and the manner of the act, or
> (b) the agent was unfit and the principal or 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.

The complicity rule was adopted by the American Law Institute in the Restatement largely out of a recognition that there is little

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	1969).
Montana	Rickman v. Safeway Stores, 124 Mont. 572 (1951).
North Carolina	Hairston v. Atlantic Greyhound Corp.,220 N.C. 642 (1942).
Oklahoma	Kurn v. Radencic, 193 Okla.1126 (1943).
Oregon	Stroud v. Denny's Restaurant, Inc., 271 Ore. 430 (1975).
Pennyslvania	Philadelphia Traction Co. v. Orbann, 119 Pa. 37 (1888).
South Carolina	Hopper v. Hulto, 160 S.C. 404 (1931).
Tennessee	Odum v. Gray, 508 S.W.2d (Tenn. 1974).

9/ The complicity rule limits the imposition of vicarious liability for punitive damages to situations in which a managerial agent of the employer either commits the egregious act, specifically authorizes the act, or ratifies the act or when an unfit employee recklessly hired by the employer commits the act. Under the complicity rule, the employer's liability is not truly vicarious, but rather hinges on some discrete act of the employer.

10/ This Restatement section is identical to Restatement (Second) of Agency § 217C (1958).

justification to support vicarious punitive damage liability. Although vicarious liability for compensatory damages has existed for centuries, it remains a rule in search of a rationale. A variety of justifications have been offered, but each has proven less than fully adequate. The most influential factor underlying vicarious liability for compensatory damages would appear to be the desire to ensure that innocent victims can reach a defendant with sufficient resources to provide full relief. Courts have long assumed that employers generally have deeper pockets than their employees and thus, the likelihood of compensation increases as liability is shifted to the employers. Vicarious liability for compensatory damages has also been justified on the grounds that it spreads the loss and that it internalizes the costs of injuries associated with the activities of an enterprise.

Each of these justifications has been subject to criticism in the context of compensatory damages. Yet, whatever their merit, they offer no support for vicarious punitive damage liability. Clearly, justifications that are grounded on a desire to ensure that a victim is fully compensated do not apply. Punitive damages are not intended to compensate innocent victims, but rather to punish malfeasors. The loss-spreading rationale contradicts the theory underlying punitive damages. By definition, it would spread punishment among large numbers of nonwrongdoers who do not deserve punishment and thus, may well

weaken the deterrent effect of punitive damages. The cost internalization argument is equally unsatisfying. Indeed, if one assumes that vicarious liability for compensatory damages provides an adequate incentive for an employer to take cost-justified precautions, then the vicarious imposition of punitive damages introduces an untoward inefficiency. Namely, if punitive damages are vicariously imposed the employer may be induced to take precautions beyond the necessary level of efficiency. In the healthcare services market such inefficiencies may only serve to further contribute to spiraling costs. In such a setting, it makes more sense, both economically and morally, to impose lower punitive damages on the actual malfeasor--the employee. Indeed, if such were done, the deterrent effect would be greater since the employee generally lacks the ability of the employer to spread those loses. Clearly, the vicarious imposition of punitive damages raises the moral hazard issue associated with policies that ensure against punitive damage awards. In essence, the employer, with his greater ability to spread the lose, in effect is transformed into the employee's underwriter.

Not surprisingly, the Inspector General makes no effort to proffer any legitimate rationale for the vicarious imposition of punitive damages. Instead, he opines that without the vicarious imposition of punitive damages the CMPL would be eviscerated, hospitals and other providers would be able to evade the CMPL's provisions by delegating responsibilities to non-management

personnel and as a result, fraud would blossom. The Inspector General's parade of horrors is largely illusory. Of the many CMPL cases instituted by the Inspector General, this is only one in which the issue of vicarious liability has ever been raised. It is most unlikely that the unique fact pattern that gave rise to this case would ever be replicated. Moreover, the provisions of the Restatement provide more than ample protection against those entities that attempt to avoid responsibility by "passing the buck." In addition, the Inspector General's concerns are premised on a questionable assumption: the target of an enforcement action should be limited to the principal. If, as we are told, the purpose of the CMPL is to compensate the government, punish the wrongdoer and deter future improprieties, then restricting the enforcement to only principals makes little sense. Indeed, in this case, the Inspector General would have been able to vindicate each and every purpose underlying the CMPL had he instituted an action against both the Respondent and Mrs. Eby. Under such a strategy, the Inspector General would look to the principal to pay the compensatory component of the damage award and to the actual wrongdoer to pay the penalties. While the economic resources of an agent may not justify the full measure of punitive damages that would normally be imposed on an economically viable principal, the purpose of punitive damages is not to compensate but to punish. Consequently, a small penalty imposed on a wrongdoer of limited means may have a greater penal effect than a larger penalty imposed on a wealthy individual.

Further, broadbased enforcement of the CMPL may well deter others in similar circumstances from undertaking improper billing practices. In short, we anticipate that the Opinion in this case will assist rather than impede the Inspector General's excellent enforcement efforts.

/s/

Anabel Bowen
Deputy Under Secretary