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CLIENT ALERT

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Non-contracted Providers Must Exhaust Administrative Remedies for Medicare Advantage Claims

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Health plans routinely assert that contracted providers must appeal underpayments or claim denials according to the health plans' internal dispute process. The payer/provider agreement itself, or provider manuals that health plans contend are incorporated by reference, are the basis for the appeal requirement. Health plans oftentimes analogize this process to the legal principle of exhaustion of administrative remedies. A health plan's appeal requirement generally does not apply in instances where the provider does not have a contract with the health plan (*i.e.*, a non-contracted provider).

In *Global Rescue Jets, LLC dba Jet Rescue v. Kaiser Foundation Health Plan, Inc.*, 30 F.4th 905 (9th Cir. 2022), the Ninth Circuit for the first time established an important exception to this appeal requirement in the context of emergency services rendered to Medicare Advantage members covered by a Medicare Advantage plan. In these circumstances, exhaustion of pre-litigation administrative appeals may be a prerequisite to a provider seeking recovery in court.

In *Global Rescue Jets, LLC*, Jet Rescue, an air ambulance service provider, transported two patients who became seriously ill in Mexico to a Kaiser hospital in San Diego. Both patients were Kaiser Medicare Advantage enrollees who assigned their benefits to Jet Rescue. A dispute arose regarding the amount that Kaiser was required to pay to Jet Rescue for the services. Kaiser asserted that it was required to pay the same amount that would be due under the Medicare program at the Medicare rate set by CMS, which the provider must accept as full payment. 42 U.S.C. § 1395w-22(k)(1); 42 C.F.R. § 422.214(a)(1). On the other hand, Jet Rescue claimed that the international air ambulance services were outside the scope of original Medicare and payable under a supplemental benefit that Kaiser enrollees purchased separately, not Medicare Advantage. Thus, Jet Rescue argued that Kaiser was obligated to pay Jet Rescue's usual and customary rate because the Medicare rate did not apply.

Jet Rescue sued Kaiser in state court, alleging various state law causes of action. Kaiser removed to federal court and moved to dismiss the action based on Jet Rescue's failure to exhaust its administrative remedies under the Medicare Act. The district court granted Kaiser's motion and Jet Rescue appealed.

The key issue for the Ninth Circuit was whether the administrative review process mandated for provider disputes of traditional Medicare claims under Part A and Part B applied to disputes between a provider and a Medicare Advantage plan under Part C. For Parts A and B, the Medicare Act establishes five levels of administrative review:

> (1) an initial determination by the Medicare administrative contractor, 42 C.F.R. § 405.920; (2) a redetermination by the medicare administrative contractor, § 405.940; (3) reconsideration by a qualified independent contractor, § 405.960; (4) a hearing before an administrative law judge (ALJ) if the amount in controversy is $100 or more (adjusted for inflation), §§ 405.1000, 405.1006(b); and (5) review by the Medicare Appeals Council, § 405.1100.

Global Rescue Jets, LLC, 30 F.4th at 911-12. Under Part A and B, if a provider remains dissatisfied, the provider may seek review from the Secretary of Health and Human Services pursuant to 42 U.S.C. § 405(b). *See id.* at 912 (citing *Heckler v. Ringer*, 466 U.S. 602 (1984)). Under 42 U.S.C. § 405(g), if the provider remains unsatisfied, they may seek judicial review "after any final decision of the [Secretary] made after a hearing to which he was a party" by filing a civil action in the appropriate federal district court. *Id.* If a claimant does not exhaust the foregoing process and files suit in court prematurely, the court lacks subject matter jurisdiction to review the denial. *Id.*

The Ninth Circuit concluded that this same administrative exhaustion requirement applied to disputes with Medicare Advantage plans under Part C, holding that when Congress enacted Part C of the Medicare Act, "it imported the same administrative review scheme . . . to resolve disputes between Medicare Advantage organizations and their enrollees over entitlement to benefits . . . with slight modifications." *Id.* at 913. As a result, the Ninth Circuit found the same administrative exhaustion requirements apply to claims covered under Part C. *Id.* at 914.

In doing so, the Ninth Circuit concluded that a Medicare Advantage plan was necessarily acting as an "officer or employee" of the United States. *See* 42 U.S.C. § 405(h) ("The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided [*i.e.*, following the administrative review process].").

Jet Rescue argued that it was not required to exhaust administrative remedies because the services were covered by Kaiser's supplemental benefit plan and not Medicare. Rejecting Jet Rescue's contention, the Ninth Circuit held that even if Jet Rescue was right, "supplemental benefits offered under a Medicare Advantage plan constitute benefits that are offered under Part C of the Medicare Act . . . because the authority to offer supplemental benefits as part of the Medicare Advantage plan is derived entirely from Part C of the Act." *Id.* at 918. Thus, Jet

Rescue's claims were "inextricably intertwined" with claims for Medicare benefits under Part C. *Id.* at 919.

Because Jet Rescue did not complete all five levels of appeals, and did not submit the dispute to the Secretary, the Ninth Circuit concluded that Jet Rescue had not exhausted its administrative remedies, and granted the motion to dismiss for lack of jurisdiction.

Based on the Ninth Circuit's decision, providers should ensure that they comply with the administrative process when disputing denials or underpayments from non-contracted Medicare Managed Care plans.

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