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HHS ENJOINED FROM ENFORCING SELF-DISALLOWANCE REGULATION

August 2014

On August 6th, the U.S. District Court for the District of Columbia enjoined HHS (along with the PRRB and CMS's Medicare contractors) from applying HHS's "self-disallowance" regulation to any appeals filed on the basis of an untimely NPR.

The court's injunction unlocks the door for certain provider appeals that the self-disallowance regulation had facially barred. The injunction was entered in three related Medicare reimbursement appeals. The appeals were filed on behalf of a group of more than 40 hospitals, each seeking reversal of PRRB dismissals for lack of jurisdiction for asserted non-compliance with the self-disallowance regulation. The hospitals may now pursue their underlying reimbursement claims involving challenges to Medicare's outlier supplemental payment program (approximately US$90 million) and the rural floor budget neutrality adjustments (approximately US$20 million.)

The court's injunction goes hand in glove with HHS's "technical correction" to the self-disallowance regulation, as scheduled to be published on August 22, in the 2015 final IPPS regulations, such that the regulation is inapplicable to appeals filed on the basis of untimely NPRs. Hospitals that have had their appeals dismissed by the PRRB (or the CMS Administrator) – for failure to self-disallow – may be able to seek reopening.

Background

42 U.S.C. § 1395oo gives providers two timing options for appealing Medicare underpayments:

1. within 180 days after receiving an NPR; or
2. within 180 days after the NPR deadline, where none is timely issued (the NPR deadline is one year after the hospital's cost report is filed).

Since 2008, however, the Secretary has enforced a self-disallowance regulation (42 C.F.R. § 405.1835(a)(1)) which requires hospitals to "pre-appeal" any challenges to CMS regulations, manual provisions, or rulings. Under this regulation, such pre-appeals must be reflected on cost reports, by following requirements for filing a cost report "under protest," as set forth in CMS's PRM, Part II, § 115. According to HHS, this pre-appeal is necessary to "preserve" a hospital's right to express "dissatisfaction" with its reimbursement at such later time (recently 2 – 5 years) as an appeal is filed with the PRRB. Absent the pre-appeal, according to the self-disallowance regulation, the PRRB lacks jurisdiction.

Anticipating the need to address the self-disallowance regulation, the hospitals involved in the presently described cases pursued option 2 appeals (i.e., in the absence of timely NPRs). The PRRB predictably ruled that it lacked jurisdiction.

On appeal to the district court, the hospitals challenged HHS's self-disallowance regulation as invalid for several reasons, including that it seeks to impose a dissatisfaction requirement where the statute does not. HHS conceded that the appeals were jurisdictionally proper under the statute and moved to have them reinstated. Following a cross-motion by the hospitals, the district court issued a series of Show Cause orders, requiring HHS to explain why it should not be enjoined from further enforcement of the self-disallowance regulation with respect to option 2 appeals. HHS's subsequent concessions (and stipulation to the injunction) led to the court's orders.

Significance of Injunction

Hospitals that wish to appeal issues – especially those involving challenges to HHS regulations, manual provisions, or rulings – but which did not follow HHS's self-disallowance regulation when filing their cost reports – may file their appeals in the absence of a timely NPR (i.e., within 180 days of the first anniversary of filing their cost reports). This situation most often occurs when the appealable issue (or key information that supports it) is discovered after the cost report has been filed. For those appeals, the self-disallowance regulation is no longer a barrier to PRRB jurisdiction.

Given the frequency with which NPRs are not issued timely, the late NPR appeals present viable and valuable appeal rights with respect to issues that were not self-disallowed on a hospital's cost report.

Final 2015 IPPS Regulation

In its May 15 proposed 2015 IPPS rulemaking, HHS proposed to move the self-disallowance requirements to another section of the regulations, with potentially even more demanding requirements, this time styled as a prerequisite for a "complete" cost report. Commenters opposed these changes (including for reasons based on HHS's concessions in the above-described court cases) and HHS is now expected to decline to make them at this time. However, the preamble to the final 2015 IPPS regulations makes a "technical correction" to the self-disallowance regulation stating that it reflects an "inadvertent error" and does not apply to any appeals taken in the absence of a timely NPR. This correction is retroactive to October 1, 2008, and HHS states that providers may seek reopening of any adverse decisions, issued in the 3 years before October 1, 2014, that were based on prior application of the self-disallowance regulation.

Squire Patton Boggs LLP attorneys Steve Nash, Mimi Hu, Sven Collins, Michi Tsuda and Mel Gates represent the hospitals in the three cases:

- *Lee Memorial Hospital v. Burwell*, Civ. Action No. 13-643 (RMC) (D.D.C.)
- *Denver Health Medical Center v. Burwell*, Civ. Action No. 14-553 (RMC) (D.D.C.)
- *Charleston Area Medical Center v. Burwell*, Civ. Action No. 13-766 (RMC) (D.D.C.)

Contact

Stephen Nash
T +1 303 894 6173
E stephen.nash@squirepb.com

Mimi Hu
T +1 303 894 6157
E mimi.hu@squirepb.com

Sven Collins
T +1 303 894 6370
E sven.collins@squirepb.com

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