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Two More Courts Invalidate CMS's Regulations for Calculating Hospice Cap

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Two United States district courts recently struck down CMS's regulations for calculating hospice caps, joining nearly a dozen other federal courts that found the regulations to be contrary to the Medicare statute. *Autumn Light Hospice v. Sebelius* [PDF], No. CIV-09-178-M (W.D. Okla. Jan. 12, 2011), *Harris Hospice, Inc. v Sebelius* [PDF], Nos. 4:10cv252, 4:10cv275 (E.D. Tex. Jan. 6, 2011).

Medicare pays a hospice provider a predetermined fee for each day that an eligible patient receives hospice services. The hospice benefit includes an annual per-beneficiary cap, applied retrospectively and in the aggregate, to limit the total amount that can be paid to a hospice each year. According to the Medicare statute (42 U.S.C. § 1395f(i)(2)(c)), the cap is calculated by multiplying the number of beneficiaries who received hospice services during the accounting year (November 1 – October 31) by the per-beneficiary cap amount. The statute also provides that the number of beneficiaries for a given account year must be reduced to reflect the proportion of services a beneficiary received in an earlier or subsequent accounting year.

Under CMS's regulation (42 C.F.R. § 418.309(b)(1)), however, a beneficiary is included in a hospice provider's cap only in the year the beneficiary elected the hospice benefit, regardless of whether that individual received hospice care in an earlier or subsequent accounting year, rather than apportioning the beneficiary among the years in which hospice services were provided as required under the statute. For example, under Medicare regulations a beneficiary who elected hospice benefits in August 2010, would only be counted in the 2010 accounting year under the regulation, even if that beneficiary continued to received hospice services into 2011 and beyond. This results in years where the CMS payment cap is calculated at less than the provider's costs of providing services in a given year. Many hospices are therefore confronted with substantial repayment demands from CMS.

In *Autumn Light Hospice* and *Harris Hospice*, hospice providers challenged CMS's payment cap regulation after CMS issued cap repayment demands based on calculations that found the hospices annual revenues from Medicare exceeded the caps. The hospices successfully argued that the demands calculated under CMS's payment cap regulation were overstated. The courts held that CMS's regulation impermissibly conflicts with the plain reading of this statute because it did not account for the proration of beneficiaries among accounting periods, and therefore is arbitrary and capricious and exceeded CMS's statutory authority.

Ober|Kaler's Comments

Although every district court that has addressed this issue has found that CMS's regulation governing the calculation of hospice cap is invalid, CMS has not suspended the use of this regulation. Thus, hospice providers receiving cap repayment demands calculated under CMS's payment cap regulation should file an appeal to challenge the validity of the regulation.