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D.C. District Court Rules in Favor of Baystate in DSH/SSI Decision

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On March 31, 2008, the United States District Court for the District of Columbia issued a sharp rebuke to CMS, holding that the agency's failure to use readily available data when calculating a hospital's disproportionate share hospital ("DSH") payments was arbitrary and capricious, and entitled the hospital to a recalculation of its DSH payments using more reliable information. See *Baystate Medical Center v. Leavitt*, D.D.C. No. 1:06-cv-90263-JDB, 3/31/08.

Baystate Medical Center challenged the calculation of its DSH add-on adjustments to its prospective payment rates, claiming that CMS had used outdated, inaccurate and/or incomplete information to derive the Supplementary Security Income ("SSI") fraction component of the hospital's DSH payments. Importantly, CMS did not dispute that the agency was obligated to compute a hospital's DSH payments with some degree of accuracy and that it could not merely rely on estimates in its various calculations of the components of the DSH payment. CMS, however, maintained that what it had done was sufficient, a position that the Court did not accept. The Court ruled that in order for calculations to be sufficiently accurate to be upheld, CMS must have used "the most reliable data available," and ruled further that, in this case, CMS did not meet that burden.

The Court held that "the accuracy of any particular index, payment, or in this case, the SSI fraction, cannot be weighed in a vacuum, but instead must be evaluated by reference to the data that was available to the agency at the relevant time." The Court characterized CMS' arguments for rejecting updated data as arbitrarily putting "the issue of accuracy — here, the impact on the SSI fraction — before data quality." Significantly for providers, the Court held that "rejection of data based on a finding that the percentage change is 'small' is particularly problematic in light of this Circuit's recognition that even a modest percentage difference can be 'substantial' given the enormity of the Medicare program." In this case, the Court ruled against CMS "because the standard for accuracy...is intertwined with whether the best available data has been used."

The *Baystate* decision is important not only on the issue of CMS' obligation to use the best available data in making reimbursement calculations, but also on the issue of whether providers are entitled to retrospective relief from arbitrary and capricious DSH/SSI calculations performed by CMS. On this issue of

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recalculating DSH/SSI payments, which are entirely retrospective and not a component of the PPS payment itself, the Court held that "the public[had a] substantial interest in the Secretary's following the law" that outweighed whatever burden CMS theorized would be involved in recalculating hospital DSH payments that had been computed using inaccurate data. Moreover, "the court rejected the proposition that payment of extraordinary sums of money — more than \$1 billion — in hundreds of cases constituted an impermissible burden [on CMS], for '[h]aving to pay a sum one owes can hardly amount to an equitable reason for not requiring payment."

Finally, the Court reiterated its position that, in cases such as the Baystate challenge to the accuracy of the data used by CMS in calculating its DSH payments, "the burden of bringing forward evidence generally shifts when the defendant has greater access to information on a particular issue." In this case, the Court found that "CMS and the Social Security Administration were in sole possession of the SSI data necessary to determine the scope of the impact [on the DSH payment of the incomplete and/or inaccurate data] with any greater precision," and therefore Baystate could not be denied retrospective relief based on its inability to prove the impact of CMS' errors with any more particularity. The Court, however, found that it had no authority to order CMS to make DSH payments in specified amounts to Baystate, and remanded the case back to CMS with orders to take "further action consistent with" the opinion.

Ober|Kaler's Comments: It is unclear whether the Secretary will try to take an interlocutory appeal of the decision or what the Secretary will do on remand. In the meantime, many hospitals have appeals of the DSH/SSI issue pending and being held in abeyance at the Provider Reimbursement Review Board ("PRRB"). In most instances, the PRRB has instructed providers that the cases need not be addressed until there is a *final* court decision. The *Baystate* decision is not now a final decision. Providers who receive or believe they should receive a DSH adjustment should continue to protect their cost reporting years by continuing to include this issue in their appeals.

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