AKIN GUMP STRAUSS HAUER & FELD LLP
Attorneys at Law

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HEALTH INDUSTRY ALERT

ANOTHER MEDICARE DSH ADJUSTMENT VICTORY FOR HOSPITALS

In the latest in a growing line of cases, the U.S. Court of Appeals for the 9th Circuit recently ruled that the secretary of Health and Human Services' interpretation of the Medicare Act's disproportionate share hospital (DSH) adjustment provisions once again ran contrary to congressional intent. Since the case may have significant implications for your institution, this *Health Industry Alert* provides a summary and analysis of the highlights of this decision.

In *Portland Adventist Medical Center v. Thompson*, 399 F.3d 1091 (9th Cir. 2005), the court considered whether to count in the Medicaid Proxy of the DSH adjustment calculation days of hospital care reimbursed by the Oregon Medicaid Program for expanded eligibility populations under a Section 1115 waiver. In short, the court held that low-income individuals who receive medical assistance under a Section 1115 waiver are "persons eligible for medical assistance under a state Medicaid plan" and, therefore, such days must be included in hospitals' DSH adjustment calculations.

Until regulatory amendments effective January 20, 2000, *see* 65 Fed. Reg. 3136 (Jan. 20, 2000), the secretary maintained that the DSH adjustment calculation's Medicaid Proxy did not include days that were paid for by Medicaid under a Section 1115 waiver, unless they qualified for the "hold harmless" treatment under Program Memorandum A-99-62. The secretary's argument was that these patients are not eligible for Medicaid under the Title XIX eligibility standards, but only under the Title XI demonstration authority. Therefore, the secretary contended that their care is not medical assistance under Title XIX and the corresponding days are not properly counted for Medicare DSH purposes until after January 20, 2000.

However, on March 2, 2005, the court ruled that this policy violated the plain meaning of the Medicare Act, which requires that the DSH adjustment calculation include all days where patients were "eligible for medical assistance under a State plan approved under Title XIX, but who were not entitled to benefits under [Medicare] Part A." 42 U.S.C. §1395ww(d)(5)(F)(vi)(II). The court found that the Medicare Act was not

ambiguous, and, therefore, deference to the secretary's interpretation of the Medicare Act's DSH provisions was not required. The court held that the "text of the statute, the intent of Congress, and the decisions of this and other courts make it plain that the entire low-income population actually served by the hospitals – including §1115 expansion populations – must be accounted for in the DSH Medicaid fraction."

If your institution has Section 1115 days that were not included in DSH adjustment calculations prior to FY 2000, you should strongly consider adding this issue to any open Provider Reimbursement Review Board appeals for such years and submitting reopening requests to your intermediary. Moreover, for fiscal periods both before and after January 2000, the court's analysis should be equally applicable to other types of Title XIX days (e.g., *Medicaid* DSH days).

The court in *Portland Adventist* found that payments for days of care furnished to low-income patients under a Section 1115 waiver were expenditures made under the state's Title XIX plan eligible for federal matching funds. In so holding, the court concluded that it was irrelevant whether the patients covered or the benefits paid are not part of the Title XIX provisions defining the standard Medicaid eligibility criteria and benefits. If the reimbursements paid out by the state are funded as Title XIX payments, they are medical assistance under Title XIX and, therefore, the associated days should be included in the Medicare DSH adjustment calculation.

This same analysis applied to other types of Title XIX days, such as Medicaid DSH days, should make such days countable in the Medicare DSH adjustment calculation. Medicaid DSH expenditures are part of states' approved Title XIX plans and are eligible for federal matching payments as medical assistance benefits. If these Medicaid DSH payments provide reimbursement for the specific hospital care received by eligible low-income patients, there are good arguments that these types of days should also be included in hospitals' Medicare DSH adjustment calculations.

This is a significant development because it is the first U.S. Court of Appeals ruling on the secretary's arguments that only days associated with medical assistance that is provided under the standards generally defining who is eligible for traditional Medicaid benefits are countable for Medicare DSH purposes. Although the government did not ask the 9th Circuit for a rehearing of this case, it is to be seen whether it will petition the U.S. Supreme Court for review of this decision. We will keep you apprised of any developments in this and other significant DSH cases.

CONTACT INFORMATION

If you have any questions about the *Portland Adventist* case, need assistance with general Medicare DSH adjustment payment questions, or require counsel regarding associated Medicare appeals, please contact:

John R. Jacob ..... 202.887.4582 ..... jjacob@akingump.com ..... Washington
Elizabeth H. Goldman ..... 202.887.4423 ..... egoldman@akingump.com ..... Washington

Austin Brussels Dallas Houston London Los Angeles Moscow
New York Philadelphia Riyadh (Affiliate) San Antonio San Francisco Washington, D.C.