

HEALTH INDUSTRY ALERT

A MEDICARE BAD DEBTS REIMBURSEMENT VICTORY FOR HOSPITALS



In a case involving an issue of first impression for the U.S. District Court for the District of Columbia, the court recently ruled that CMS' interpretation of certain Medicare bad debt reimbursement provisions ran contrary to congressional intent. (*See Foothill Hospital – Morris L. Johnston Memorial v. Leavitt*, Case No. 1:07-cv-00701-ESH (D.D.C. 2008)). Because the case may have significant implications for your institution, this alert provides a summary analysis of this decision.

SUMMARY

The hospital brought the case to reverse CMS' decision denying certain Medicare bad debt claims filed by the hospital. CMS' denial was based on its position that hospital accounts necessarily do not qualify as bad debt if they have been referred to an outside collection agency. The court disagreed and held that the hospital was entitled to reimbursement for these bad debts. Akin Gump Strauss Hauer & Feld LLP served as co-counsel for the hospital on this case.

CMS BAD DEBT POLICY

The Medicare statute prohibits cost-shifting, which means that costs for treating Medicare beneficiaries should not be borne by those who are not Medicare beneficiaries, and costs for treating non-Medicare patients should not be borne by the Medicare program.¹ Consequently, when a provider is unable to collect coinsurance and deductible amounts from Medicare beneficiaries, the Medicare program reimburses the provider for these amounts so that the costs will not be passed on to non-Medicare patients.² Under federal regulation 42 C.F.R. § 413.89(e), to receive reimbursement for these Medicare "bad debts," providers must demonstrate that the debts satisfy four criteria:

1. The debt must be related to covered services and derived from deductible and coinsurance amounts.
2. The provider must be able to establish that reasonable collection efforts were made.

¹ 42 U.S.C. § 1395x(v)(1)(A)(i).

² 42 C.F.R. § 413.89(e).

3. The debt was actually uncollectible when claimed as worthless.
4. Sound business judgment may be established that there was no likelihood of recovery at any time in the future.

In determining a provider's Medicare bad debts, a key question is when a delinquent account can be considered and therefore claimed as uncollectible. This question was the subject of increased focus during the late 1980s, when the Office of Inspector General (OIG) sought ways to radically restructure the system for handling bad debts. In response to the OIG's efforts, Congress enacted the "Bad Debt Moratorium," which, among other things, prohibits CMS from requiring a hospital to change its bad debt collection policies in effect August 1, 1987.³ In addition, however, and as recognized in the *Foothill* decision, the Bad Debt Moratorium also prohibits CMS from changing its own policy toward bad debts as in effect on that date.

APPLICATION TO *FOOTHILL HOSPITAL*

In *Foothill Hospital*, the court considered whether a hospital can write off and claim bad debts as uncollectible prior to sending the bad debts to an outside collection agency. The hospital sought reimbursement for unpaid Medicare deductibles and coinsurance for the fiscal year ending September 30, 1995. The hospital's fiscal intermediary disallowed certain bad debt claims because the hospital wrote them off and then referred them to an outside collection agency. When the hospital appealed this decision to the Provider Reimbursement Review Board (PRRB), the PRRB decided in favor of the hospital, citing the hospital's extensive in-house collection efforts, noting that the average bill had been outstanding for more than 300 days. However, the CMS Administrator overruled the PRRB and held that "[i]f a provider continues to attempt collection of a debt...it is reasonable to conclude that the provider still considers that debt to have value and that it is not worthless." (*Foothill Presbyterian Hosp. v. BCBSA*, PRRB Dec. No. 2007-D11, Medicare & Medicaid Guide (CCH) ¶ 81,678 (Dec. 19, 2006), *rev'd*, CMS Adm'r Dec., Medicare & Medicaid Guide (CCH) ¶ 81,681 (Feb. 14, 2007)).

The court ruled on two main issues: whether or not the Bad Debt Moratorium limits CMS' ability to change its own bad debt policies, and, if so, whether or not CMS' decision in this case constituted a change in policy.

With respect to the first issue, the court examined the language of the Bad Debt Moratorium and the legislative history of the statute and found that the language of the law was unambiguous and the intent of Congress was clear. It held that CMS is prohibited from making any changes to CMS' bad debt policy as it existed as of August 1, 1987, the effective date of the Bad Debt Moratorium. The court also held that even if the statute were ambiguous, CMS' currently alleged interpretation of the law was not entitled to deference because it was inconsistent with prior CMS interpretations, which allowed bad debt claims even though outside collection agencies were still managing the delinquent accounts. Holding that CMS was not permitted to change the agency's bad debt policies as they existed on August 1, 1987, the court then turned to the second issue-whether CMS' decision to deny reimbursement in this case constituted a change in policy.

To determine whether CMS' determination that reimbursement is improper as long as the provider continues to pursue collection activities, the court reviewed a number of sources, including CMS manuals, regulations and case law interpreting such regulations. The court held that, given what it deemed to be the agency's policy as it existed prior to the Bad Debt Moratorium, which did not include a per se disqualification for debts held by a collection agency, CMS'

³ Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1220, § 4008 (reprinted in 42 U.S.C. § 1395f note), as amended by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, § 802 (reprinted in 42 U.S.C. § 1395f note), as amended by the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106, § 6023 (reprinted in 42 U.S.C. § 1395f note).

decision to deny the hospital's bad debt claims constituted a prohibited change in CMS' bad debt policy. The court rejected CMS' argument that its collection agency policy was mandated by the requirements of 42 C.F.R. § 413.89(e), i.e., that the debt be uncollectible and that sound business judgment establish that there is no likelihood of recovery, finding that CMS confused its interpretation of the regulation with the regulation itself. "While § 413.89(e) certainly predates the Moratorium, [the agency's] interpretation of § 413.89(e), which prohibits all bad debts held by collection agencies, does not." Consequently, the court concluded that CMS' determination constituted a change in policy in violation of the Bad Debt Moratorium and granted the hospital's motion for summary judgment.

Notably, apparently on the same day the *Foothill Hospital* case was decided, and perhaps in response to it, CMS issued a Medicare Learning Network (MLN) transmittal that purported to clarify its Medicare Bad Debt Policy in relation to collection agency accounts. (See MLN SE0824, Clarification of Medicare Bad Debt Policy Related to Accounts at a Collection Agency). CMS stated that it had a "longstanding policy that when an account is in collection, a provider cannot have determined the debt to be uncollectible and cannot have established that there is no likelihood of recovery" under the regulations and the Provider Reimbursement Manual. Despite the court's ruling in *Foothill Hospital*, CMS reiterated that "in accordance with the regulation/policy in effect prior to the moratorium, effective August 1, 1987, until a provider's reasonable collection efforts have been completed, including both in-house efforts and the use of a collection agency, unpaid deductible and coinsurance amounts cannot be recognized as a Medicare bad debt." *Id.*

Therefore, it appears that, regardless of the District Court's decision in favor of the hospital in *Foothill Hospital*, CMS will continue its policy of denying reimbursement for bad debts written off prior to being sent to collection agencies. The government has appealed the *Foothill Hospital* decision to the United States Court of Appeals for the District of Columbia Circuit. Hospitals who are negatively affected by CMS' policy should consider preserving their appeal rights regarding this issue.

CONTACT INFORMATION

If you have questions about the *Foothill Hospital* case or CMS' recent MLN transmittal, need assistance with general Medicare bad debt reimbursement questions or require counsel regarding associated Medicare appeals, please contact:

Eugene E. Elder	gelder@akingump.com	202.887.4149	Washington, D.C.
John R. Jacob	jjacob@akingump.com	202.887.4582	Washington, D.C.
Elizabeth H. Goldman	egoldman@akingump.com	202.887.4423	Washington, D.C.
Taylor L. Jones	tjones@akingump.com	202.887.4578	Washington, D.C.