PUBLICATION

D.C. District Court Bucks the Trend and Rules for Hospital in Provider Tax Case [Ober|Kaler]

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Many states assess taxes against hospitals and other providers as a means of funding their Medicaid and other healthcare-related programs. The revenue generated by the taxes is used, with CMS's approval, to fund Medicaid payments to providers, with the federal government participating in these payments through Federal Financial Participation.

For many years, providers claimed, and were reimbursed by Medicare on a reasonable cost basis for, their provider tax payments. This was consistent with the general rule that taxes assessed against providers are allowable costs under the Medicare reasonable cost principles. *See* Provider Reimbursement Manual, § 2122. In 2010, however, CMS issued a "clarification of policy" as part of its 2011 Inpatient Prospective Payment System (IPPS) final rule. In that clarification, CMS stated that, while provider taxes are generally allowable, Medicare contractors should review claims for such taxes to determine whether an offset of Medicaid revenues should be made against the tax claims. *See* 75 Fed. Reg. 50362-64 (Aug. 16, 2010).

In recent years Medicare contractors have applied CMS's "clarified" offset policy, and, although hospitals have challenged that policy, those challenges have been rejected. *See Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F.3d 536 (7th Cir. 2012); *Kindred Hospitals East, LLC v. Sebelius*, 694 F.3d 924 (8th Cir. 2012); *Breckinridge Health, Inc. v. Burwell*, C.A. No. 3:15 C.V.-00251-JHM (W.D. Ky. June 15, 2016). That is, until now.

In a decision dated October 24, 2016, the United States District Court for the District of Columbia rejected CMS's reliance on its offset policy as applied to a hospital's Massachusetts provider tax payments. *Dana-Farber Cancer Institute v. Burwell*, C.A. No. 14-1269 (RBW). The court ruled that the tax payments made by Dana-Farber were not subject to offset and, in so doing, expressly disagreed with the reasoning employed by the Seventh Circuit in the *Abraham Lincoln* case. The court ruled that the Massachusetts Trust Fund payments served to reduce the hospital's costs of providing care to under- and uninsured patients and that they were not made to reduce the expense of the hospital tax. The court concluded that the disbursements made to Dana-Farber and the other Massachusetts hospitals were not "associated with" the assessed tax and did not reduce the burden of the hospital tax. Further, the court noted that the record contained evidence that the Secretary's interpretation of the refund regulation did not account for hospitals that received more in trust fund payments than they paid in hospital taxes.

Beyond this, the court addressed the argument made by Dana-Farber that the Medicaid "hold harmless" requirement would be violated by the Secretary's position. The court reserved judgment on that issue because the argument had not been adequately addressed by the Provider Reimbursement Review Board. Therefore, the court held that the most prudent course was to remand the case to the Secretary to provide the agency an opportunity to analyze the hold harmless argument in light of the facts of the case.

Ober|Kaler's Comments

The *Dana Farber* decision is a significant and positive development for providers, especially as it rejects the reasoning of the Seventh Circuit in *Abraham Lincoln*. Moreover, given the decision is from the federal court in the District of Columbia, where all hospitals may file suit, the decision, if upheld, is particularly precedential. The next steps in the case, however, are unclear at the moment. Although one must assume that the government will wish to appeal the decision, it is not apparent that the government will immediately have that opportunity given that the matter was remanded to the Secretary. All providers with the provider tax issue will have to stay tuned.