

# PUBLICATION

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## D.C. District Court Applies Prohibition on Administrative and Judicial Review to IRF PPS Rates [Ober|Kaler]

2016

On July 25, 2016, Judge John D. Bates of the United States District Court for the District of Columbia issued a [memorandum opinion](#) broadly construing 42 U.S.C. § 1395ww(j) to prohibit administrative or judicial review of a challenge by an inpatient rehabilitation facility (IRF) to a Medicare contractor's application of the Low-Income Percentage (LIP) adjustment for its fiscal years (FYs) 2002 through 2004.

In *Mercy Hospital, Inc. v. Burwell*, No. 15-1236 (D.D.C. July 25, 2016), the court had to decide whether 42 U.S.C. § 1395ww(j)(8) precludes review of the Medicare contractor's LIP adjustment determination. In short, § 1395ww(j) is the "foundation of the prospective payment system for inpatient rehabilitation facilities" and instructs the Secretary of the Department of Health and Human Services (Secretary) to determine the prospective payment rate applicable to each discharged patient. To do so, the Secretary must estimate costs associated with the average IRF patient and then utilize five factors to adjust an IRF's prospective payment rates. These factors include (1) inflation; (2) "outlier" costs; (3) local labor costs; (4) costs associated with a category of cases – the "case mix group"; and (5) most notably, any "other factors as the Secretary determines are necessary to properly reflect variations in necessary costs of treatment among rehabilitation facilities." This fifth factor includes the LIP adjustment, designed to take into account the percentage of low income patients served by the provider. A Medicare contractor determines a provider's prospective payment rates as the Secretary's agent and issues a notice of total program reimbursement to the provider.

Generally, the Medicare provider receives the Medicare contractor's determination and, if dissatisfied, may appeal the determination to the Provider Reimbursement Review Board (PRRB) pursuant to §1395oo(f)(1). In this case, Mercy Hospital (Hospital) appealed the Medicare contractor's determination to the PRRB, arguing that the contractor improperly applied the LIP adjustment when determining its rates. The PRRB [concluded \[PDF\]](#) it had authority to review the Hospital's challenge and ultimately sided with the Hospital. The CMS Administrator [vacated \[PDF\]](#) the PRRB's decision, concluding the PRRB did not have the authority to review the Hospital's appeal due to § 1395ww(j)(8), which prohibits judicial or administrative review of an IRF's prospective payment rates. The D.C. District Court was faced with determining whether "prospective payment rates" referred to an IRF's pre- or post-adjusted rates.

The Hospital argued the statutory administrative and judicial review prohibition, as applicable to IRFs, referred only to the pre-adjustment (base) rates because: (1) broad construction of the provision would render the entire provision surplusage; (2) the grammatical structure of the provision leads to the conclusion that "prospective payment rates" refers to unadjusted rates; (3) initial prospective payment system regulations indicate the Secretary initially believed that only unadjusted rates were unreviewable; (4) Congress intended the "other factors" to be reviewable; (5) if the provision is broadly construed, IRFs would have nothing to challenge; and (6) the right to collect reimbursement is a property right which the Hospital would be deprived of, without due process of law, if it cannot seek review of the LIP adjustment.

Despite a federal court's "'strong presumption' that judicial review of administrative action is available," the D.C. District Court concluded § 1395ww(j)(8)'s plain language precludes administrative and judicial review of the Medicare contractor's reimbursement determination of the final prospective payment system rates for inpatient rehabilitation facilities. The Court noted that "the LIP adjustment is a component of a prospective payment rate

much as a first baseman is a component of a baseball lineup." Therefore, the D.C. District Court concluded the "prospective payment rate" refers to the final, post-adjusted rate and dismissed the case for lack of subject-matter jurisdiction.

## **Ober|Kaler's Comments**

The *Mercy* decision significantly limits an IRF's potential challenge to its LIP payments. The Hospital has not yet appealed this decision but has until later this month to note such an appeal.