

# PUBLICATION

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## Medicare Bad Debts and CMS's "At a Collection Agency Policy" - New Uncertainty [Ober|Kaler]

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**As reported in previous *Payment Matters* articles (6/11/08, 4/4/13 and 6/27/13), the United States District Court for the District of Columbia has ruled in two separate opinions that a Medicare contractor is not permitted to disallow Medicare bad debt solely on the grounds that the bad debt was still at a collection agency. CMS elected not to appeal those decisions to the Court of Appeals for the District of Columbia Circuit.**

All providers that wish to do so may appeal adverse PRRB or CMS Administrator decisions involving this issue to the United States District Court for the District of Columbia. Therefore, one might have fairly assumed that CMS's decision not to appeal the two district court decisions to the appeals court essentially meant that all providers now had a clear route by which they could obtain recovery of bad debts even though those bad debts were at the collection agency. A recent decision out of the same court, however, has now placed that assumption in question.

In a Memorandum Opinion issued July 19, 2013, another judge of the D.C. district court upheld CMS's "at a collection agency" policy. *Lakeland Regional Health Sys. v. Sebelius, Civ. Case No. 12-600 (RJL)* The court concluded that the policy is supported by substantial evidence, by the language of the regulation at 42 C.F.R. 413.89(a), by the Secretary's interpretive guidance, and by past administrative practice. The court stated that, where an outside collection agency continues collection efforts on behalf of a provider, it cannot be said that a bad debt is "actually uncollectible when claimed as worthless" or that "sound business judgment" establishes that "there was no likelihood of recovery at any time in the future," as the regulation requires. Moreover, the court said, the fact that CMS's policy was not explicitly set forth in writing prior to the bad debt moratorium is not fatal. The Interpretive Guidance in place prior to August 1, 1987, the court ruled, "did not purport to be a comprehensive review of all conditions that might be placed on reimbursement" of Medicare bad debts. The court thus concluded that it cannot logically be inferred that the agency lacked a policy to disallow reimbursement of accounts pending at a collection agency or had a contrary policy.

### Ober|Kaler's Comments

This most recent decision again places in doubt providers' claims for bad debt reimbursement when those claims are still pending at a collection agency. Providers can only hope that Lakeland will appeal this decision and that the United States Court of Appeals for the District of Columbia Circuit will finally provide clarity to the picture.