PUBLICATION

Provider Taxes: The Battle over Medicare's Treatment Continues

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For the better part of a decade, hospitals and CMS have fought over the extent to which hospitals may claim as reasonable costs the provider tax assessments levied on them by the individual states in which they operate. In 2011, CMS issued a clarification in the Provider Reimbursement Manual (PRM) stating that, while such taxes may be generally allowable, the provider may treat only the "net tax expense" as reasonable costs. PRM § 2122.7. CMS then said that the tax costs must be reduced by payments that the provider receives from the state that are "associated with the assessed tax." *Id*. In implementing this "clarification," CMS has maintained in litigation that, when taxes are placed by the state into a fund and the monies in that fund are used, at least in part, to reimburse the hospital through state hospital payments (such as Medicaid payments), those state payments operate, in essence, as a refund of the taxes and reduce the amount that is appropriately reimbursable.

Hospitals have challenged this position with limited success. In the lead case, *Abraham Lincoln Mem'l Hosp. v. Sebelius*, 698 F. 3d 536 (7th Cir. 2012), the court upheld the government's position, as did the Eighth Circuit in another case involving somewhat different facts, *Kindred Hospitals East, LLC v. Sebelius*, 694 F. 3d 924 (8th Cir. 2012). Then, in October of 2016, the United States District Court for the District of Columbia in *Dana-Farber Cancer Institute v. Burwell*, C.A. No. 14-1269, took a contrary position, at least as applied to the Massachusetts provider tax situation. Although the government argued that the *Abraham Lincoln* decision achieved the correct result, the *Dana-Farber* court found that the Seventh Circuit's reasoning in *Abraham Lincoln* to be unpersuasive, and it ruled for the provider. In December of 2016, the government appealed that decision, and the case is currently pending before the United States Court of Appeals for the District of Columbia Circuit.

Now, yet another court of appeals has weighed in. In the middle of last month, the United States Court of Appeals for the Sixth Circuit ruled in the government's favor in *Breckinridge Health, Inc. v. Price*, Case No. 16-6269 (June 14, 2017). In *Breckinridge Health*, the Sixth Circuit adopted the *Abraham Lincoln* rationale when addressing the Kentucky provider tax arrangement. The court said that, while there were factual distinctions between *Abraham Lincoln* and *Breckinridge Health*, "the Seventh Circuit's sound reasoning and similarities to the core structure to the scheme at issue here naturally leads us to conclude that HHS's decision to uphold the offset was not arbitrary, capricious or manifestly contrary to the legislative scheme."

With the *Breckinridge Health* decision having been handed down, there are now decisions out of three different United States Courts of Appeals against the providers' arguments. One can be certain that the government will rely heavily on these three decisions when arguing the *Dana-Farber* case. How the D.C. Circuit might weigh these decisions, however, is uncertain.