

Health Law Alert

A report
for clients
and friends
of the firm December 2001

Hospitals May Qualify For Additional Disproportionate Share Reimbursement After D.C. Circuit Court Decision

Many Disproportionate Share Hospitals ("DSH") may now qualify for additional adjustments to their PPS payments as a result of a recent decision by the U.S. Court of Appeals for the District of Columbia. In *Monmouth Medical Center v. Thompson*, 257 F.3d 807 (D.C. Cir. 2001), the Court of Appeals held that fiscal intermediaries were required to reopen the settled cost reports of two hospitals to recalculate DSH payments consistent with the method announced in Health Care Financing Administration Ruling 97-2 ("HCFAR 97-2"). The significance of the court's decision is that the Secretary of Health and Human Services ("the Secretary"), who had previously refused to allow hospitals with settled cost reports to take advantage of the HCFAR-97-2 revision, must now reopen settled cost reports for that purpose. This decision could mean a significant increase in reimbursement for many hospitals that previously were denied reopenings under HCFAR-97-2.

Under a 1983 amendment to the Medicare Act authorizing DSH adjustments, the Secretary promulgated a regulation prescribing the methodology to be used to make the DSH calculation. The calculation was based on the number of inpatient days for patients "eligible for medical assistance under a State plan (i.e., Medicaid)." The Secretary also published an informal interpretation of the regulation for intermediaries that defined "eligible" in a restrictive way. Under the interpretation, "eligible for medical assistance under a State plan" meant that Medicaid covered days would include only those days for which benefits were actually payable. Hospitals

might provide care to many patients who were "eligible" for Medicaid benefits but not actually receiving benefits under the State plan on some days. The Secretary's restrictive interpretation had the effect of reducing the number of days for which hospitals were entitled to DSH adjustments.

Prior to 1997, several hospitals challenged the Secretary's restrictive interpretation. The hospitals argued that the Secretary's interpretation was inconsistent with the plain meaning of the 1983 amendment and illegally reduced the number of DSH adjustment days. Four U.S. Circuit Courts agreed with the hospitals and struck down the Secretary's interpretation. As a result, on February 27, 1997, the agency issued HCFAR 97-2, adopting an interpretation more favorable to hospitals that provided DSH adjustments for Medicaid eligible days whether or not the hospital actually received payment under the State plan for those inpatient hospital services. The Secretary announced, however, that the new DSH calculation would apply only to as yet unsettled cost reports and to cases where appeals were pending. Hospitals whose cost reports were settled were barred from requesting a reopening of their cost reports to apply HCFAR 97-2.

Monmouth Medical Center and Staten Island University Hospital originally had not challenged their Notice of Provider Reimbursement ("NPR") for the years 1993 and 1994. However, the hospitals did request to have their DSH payments recalculated after the Secretary issued HCFAR 97-2, and they filed for reopening within the three years required by 42 C.F.R. 405.1885. They also filed appeals with the PRRB within 180 days of its publication, arguing that HCFAR 97-2 mandated a reopening under 42 C.F.R. § 405.1885(b), which requires an intermediary to reopen and revise a cost report if a decision is inconsistent with applicable law. The intermediaries objected that the 180-day time limit for filing appeals ran from the NPR, not from the publication of HCFAR 97-2. The Provider Reimbursement Review Board ("PRRB") rejected the hospitals' argument that issuance of HCFAR 97-2 constituted "good cause" for extending the time limit to file an appeal under 42 C.F.R. § 405.1841(b). Both hospitals then sought

review of that decision in the U.S. District Court for the District of Columbia. The District Court decided that it lacked subject matter jurisdiction because the hospitals failed to follow the statutorily mandated procedure for appealing their payments, and the Medicare Act precluded other review.

The appeal to the U.S. Court of Appeals followed. The Court of Appeals held that it had mandamus jurisdiction under 28 U.S.C. § 1361 to order the Secretary to exercise his clear duty pursuant to 42 C.F.R. § 405.1885(b) to reopen the DSH payment determinations. The court also held that the portion of HCFAR 97-2 that conflicts with that duty — namely, the Secretary's pronouncement that settled cost reports would not be reopened — was inapplicable.

At least one U.S. District court has adopted the basic reasoning of the *Monmouth* decision but disagreed on how to calculate the three-year limitation period for reopening. In an opinion released October 22, 2001, the Federal District Court for the District of Arkansas allowed only those NPRs issued within three years of the date of HCFAR 97-2 to be reopened, whereas the D.C. Court of Appeals allowed any NPR to be reopened if requested within three years of the issuance of the NPR. See *Bartlett Memorial Medical Center, Inc. et al. v. Thompson*, 2001 U.S. Dist. LEXIS 18322.

It remains to be seen whether the Secretary will appeal the *Monmouth Medical Center* decision to the Supreme Court, acquiesce on a national basis, or litigate on a case by case basis. The deadline for filing a petition of certiorari in the Supreme Court to appeal the decision is December 26, 2001 and can be extended for good cause. When contacted regarding the agency's plans, Gerard Keating, lead attorney for the Department of Health and Human Services in the appeal to the D.C. Circuit, declined to give any information about whether the Solicitor General will appeal the decision to the Supreme Court. Several hospitals are already preparing to take advantage of the D.C. Circuit Court precedent by filing lawsuits in federal district court in the District of Columbia to force intermediaries to reopen settled cost reports and to recalculate DSH adjustments.

This firm welcomes inquiries by hospitals interested in determining what steps should be taken to assess the impact that the *Monmouth Medical Center* case may have on their ability to receive additional adjustments to cost reports.

You can also visit our Website at www.proskauer.com

Has your Address Changed?
Please let us know if your mailing address needs to be updated. Contact Deborah Chernoff with the correct information, either via email: dchernoff@proskauer.com, or fax: 212.969.2900.

NEW YORK LOS ANGELES
WASHINGTON BOCA RATON
NEWARK PARIS

Health Law Alert
Proskauer's Health Care Department includes over 30 attorneys with significant and diverse health care experience. The following individuals serve as contact persons and would welcome any questions you might have.

Malcolm J. Harkins, III
202.778.1103 - mharkins@proskauer.com

Edward S. Kornreich
212.969.3395 - ekornreich@proskauer.com

Margaret J. Babb
202.778.1128 - mbabb@proskauer.com

You may also contact any other member of Proskauer's Health Care Department in:

New York 212.969.3000
Washington 202.416.6800

Proskauer is an international law firm with more than 540 attorneys who handle a full spectrum of legal issues worldwide.

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice or render a legal opinion.

© 2001 PROSKAUER ROSE LLP. All rights reserved.