PUBLICATION

Court Rules in Favor of Hospitals in Bad Debt Collection Effort [Ober|Kaler]

2016

On July 25, 2016, the United States District Court for the District of Columbia issued an opinion favoring provider flexibility in the reasonable collection of Medicare bad debt. Winder HMA, LLC, *et al.* v. Sylvia Burwell. The plaintiffs, a group of hospitals (the Hospitals), were denied reimbursement for certain Medicare bad debt because, according to the Fiscal Intermediary and the Provider Reimbursement Review Board (PRRB), they did not expend precisely identical efforts to collect Medicare bad debt as they did to collect non-Medicare debts. The court reversed, finding that the Secretary of the Department of Health and Human Services (DHHS) (the Secretary) maintained an understanding of interpretative guidance regarding collection efforts that was inconsistent with her 1987 interpretation and thus in violation of the so-called Bad Debt Moratorium.

Background – Medicare Bad Debt

When hospitals submit Medicare bad debt for reimbursement, they must demonstrate that the debt satisfies criteria set forth in regulations, including a requirement that *reasonable collection efforts* were made. According to the Provider Reimbursement Manual (PRM) at § 310: "To be considered a reasonable collection effort, a provider's effort to collect Medicare deductible and coinsurance amounts must be similar to the effort the provider puts forth to collect comparable amounts from non-Medicare patients." A reasonable collection effort may, but need not, involve referral of unpaid amounts to a collection agency. The PRM also sets forth a "presumption of noncollectibility," according to which debts are deemed uncollectible if after reasonable and customary attempts to collect a bill, the debt remains unpaid more than 120 days.

In the Omnibus Budget Reconciliation Acts of 1987, 1988, and 1989, Congress effectively froze in place the Secretary's interpretations of the bad debt regulations and guidance as they existed on August 1, 1987, prohibiting the Secretary from taking a contradictory interpretation in the future. This became known as the "Bad Debt Moratorium," imposing a two-pronged restriction on the Secretary. First, the Secretary is prohibited from making any changes to the agency's bad debt policy in effect on August 1, 1987. Second, the Secretary is prohibited from requiring a provider to change bad debt policies it had in place on August 1, 1987.

The Hospitals' Collection Efforts

Against that backdrop, the issue before the Court in *Winder HMA* was the Hospitals' efforts to collect outstanding debts from Medicare patients before writing them off as bad debts for the fiscal years 2004, 2005, and 2006. As part of their collection efforts, the Hospitals first maintained a substantial in-house collection process, contracting with a private corporation to engage in "first party" collections in the name of the Hospitals. If accounts still remained unpaid after these efforts, the corporation would send a final demand letter and then return the accounts to the Hospitals, which would then send all of the unpaid accounts – both Medicare and non-Medicare – to an outside collection agency (OCA). These in-house and outside-agency collection efforts extended for more than 120 days for all accounts. After this time, the OCA would review each account and determine whether it was uncollectible. If so, the OCA would send the account back to the Hospitals, which would then write it off as bad debt. Once the Hospitals had written off the accounts, the Hospitals elected to send only their non-Medicare bad debts to a secondary collection agency (SCA). According to the Hospitals, they had for years been employing this practice of sending only non-Medicare bad

debts to SCAs after writing them off as uncollectible. The Fiscal Intermediary had accepted this practice before, but suddenly told the Hospitals that they were not following identical collection efforts as contemplated by PRM § 310.

The Hospitals argued before the PRRB that they believed, at the time that all the accounts were written off, that their primary collection activities constituted "reasonable collection efforts." They contended that at the time they finished their primary collection efforts, there was no likelihood of collection in the future on the accounts in their "sound business judgment... based upon the determination that if the debtor had not paid by that point, after those collection efforts, he or she was not going to pay." Of note, the SCA's primary activity was credit reporting, not necessarily debt collection, in that their attempts to contact the patient were minimal, and they did not engage in litigation or other efforts to collect the unpaid debt.

The Fiscal Intermediary determined that the Hospitals' Medicare bad debts should be disallowed because they had not been sent to the SCA, as the non-Medicare accounts had. It concluded that the dissimilar use of the SCA for non-Medicare versus Medicare patient accounts violated PRM § 310, making the Hospitals' collection process unreasonable. The PRRB agreed. Turning then to the Bad Debt Moratorium, the PRRB explained that its decision did not violate the first prong of the Moratorium, which prohibits the Secretary from changing its bad-debt policy in effect on August 1, 1987, because Section 310 of the PRM existed in the same form in 1987. Rather, Section 310 made clear that regardless of where the provider sets the bar for its actual collection effort, § 310 specifies that, in order for a collection effort to be considered reasonable, the provider's actual 'collection effort' for Medicare accounts must be similar to that used for non-Medicare accounts, and there must be "consistency in this treatment across" both forms of accounts. The PRRB opted for a rigid approach in evaluating such consistency.

District Court's Reversal

The Court framed the central issue as whether the Bad Debt Moratorium in some circumstances allows providers to treat Medicare and non-Medicare accounts differently, if sound business judgment counsels in favor of such differential treatment, and whether the PRRB's decision in the negative thus violates the Bad Debt Moratorium. Essentially, the question was whether the PRRB's application of the § 310 "similar-collection-efforts" standard in a rigid and inflexible manner violated PRRB policy or interpretation that existed in 1987. The Hospitals pointed to several decisions of the PRRB that pre-date the 1987 Moratorium – one from 1985 and another from 1986 – that support a flexible approach. They insisted that to shift to a rigid approach to the similar-collection-efforts standard now constitutes a change in the policy in effect on August 1, 1987, in contravention of the Moratorium.

The decisions cited by the Hospitals each contemplated a flexible approach to collection based on the providers' business judgment. Thus, the Court agreed with the Hospitals that the PRRB's flexible approach pre-dated the Moratorium, and that a decision to refer only non-Medicare accounts to a secondary collection agency *could be* within the sound business decision of a provider. Notably, the Court here did not accept the Secretary's argument that deference to agency interpretation of its own guidance supported the PRRB's decision against the Hospitals, noting that the Moratorium complicates the deference issue because it requires the Court to follow the agency's 1987 interpretation of its own regulations, rather than the agency's present-day interpretation.

The Court remanded the decision to the PRRB for a determination on the reasonableness of the Hospital's decision to separate the collection efforts after primary collection efforts ended, noting an absence of evidence regarding that business decision on the record. The Court instructed that the PRRB should determine whether the Hospitals' belief that the recovery rates for Medicare accounts would be less than those for similar-value

non-Medicare accounts sent to SCAs was supported by evidence *beyond mere assumptions about Medicare patients as a group*.

Ober|Kaler's Comments

Providers who have made a “sound” business decision to treat Medicare and non-Medicare debt collection efforts somewhat differently, particularly after 120 days, may find support in this case if the business decision can be substantiated. It further strengthens the argument that the Secretary may not use present-day interpretations of pre-1987 guidance in violation of the Bad Debt Moratorium, where the PRRB or the Secretary established a different interpretation prior 1987.