PUBLICATION

D.C. District Court Again Rules That Bad Debt at a Collection Agency is Allowable [Ober|Kaler]

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The United States District Court for the District of Columbia recently ruled, again, that a Medicare contractor is not permitted to disallow Medicare bad debts solely on the ground that the bad debt is still at an outside collection agency and, therefore, not yet worthless. *District Hosp. Partners v. Sebelius*, D.D.C. No. 11-1717 [PDF]. In so ruling, the court relied heavily on the bad debt moratorium laws and its earlier analysis of the same issue in *Foothill Hosp-Morris L. Johnston Mem'l v. Leavitt*, 558 F.Supp.2d 1 (D.D.C. 2008).

The regulations state that Medicare bad debt is allowable if: (1) the debt is "related to covered services and derived from deductible and coinsurance amounts"; (2) the provider establishes that "reasonable collection efforts were made"; (3) the debt was "actually uncollectible when claimed as worthless"; and (4) "sound business judgment" establishes that there in "no likelihood of recovery at any time in the future." 42 C.F.R. § 413.89. Congress established the Bad Debt Moratorium Laws in 1987, which include two restrictions on the Secretary of Health and Human Services (Secretary): (1) The Secretary is prohibited from making any changes to the *agency's* bad debt policy in effect on August 1, 1987; and (2) the Secretary is prohibited from requiring a *provider* to change the bad debt policies the provider had in place on August 1, 1987.

In *District Hosp.*, the hospitals claimed bad debt in their 2003, 2004 and 2005 fiscal years, even though the bad debt had not yet been returned to the hospitals by outside collection agencies. The Medicare Fiscal Intermediary disallowed the claimed bad debt on the grounds that it was not worthless because it was still in the hands of the outside collection agencies. Although the Provider Reimbursement Review Board ruled unanimously in favor of the providers, the CMS Administrator reversed that ruling, concluding that when bad debt is still at the collection agency, a hospital cannot establish that a reasonable collection effort was made, that the debt was actually uncollectible when claimed as worthless and that there is no likelihood of recovery. The Administrator asserted that there was a presumption of collectability where accounts were still with a collection agency. The Administrator further opined that since it has always been Medicare's policy that a provider must demonstrate that its collection efforts are reasonable, the requirement that the bad debt must be returned by the collection agency before it can be allowed is not a change in policy.

The District Court, however, disagreed. It found that the Secretary could not support that its presumption of collectability for accounts still at a collection agency existed prior to August 1, 1988. Accordingly, the court held that the Secretary's policy violated the Bad Debt Moratorium Laws, which prohibit the Secretary from making any changes to the agency's bad debt policy in effect on August 1, 1987. The court found that the first time the Secretary's presumption of collectability appeared in writing was in a Medicare Intermediary Manual transmittal letter, issued in 1989.

Ober|Kaler's Comments

This court had come to the same conclusion in a 2008 decision which addressed the same issue, Foo*thill Hosp*. Although the Secretary had initially filed an appeal of that decision, she withdrew the appeal prior to briefing, thereby making the district court's decision the final decision. It will be interesting to see if the

Secretary appeals the decision in the *District Hosp.* case. Arguably, there would be little reason for the Secretary to have pursued the *District Hosp*. case at the district court level (rather than settling it) unless the Secretary intended to appeal any decision in the providers' favor, in the hopes of getting the decision overturned and thereby removing the precedent established by *Foothill Hosp*. The Secretary has until late May of this year to appeal the court's recent decision in *District Hosp.* Until such time as the district court's decision either becomes final (if the Secretary does not appeal it) or it is appealed and a final decision is rendered on appeal, the issue of whether providers may claim bad debt still at a collection agency remains unresolved.

Providers should consider claiming bad debt that has been disallowed because it is still at a collection agency, in a later year once the bad debt has been returned by the collection agency. Providers also should be sure to identify the bad debt claimed the second time around as bad debt previously claimed but denied, or anticipated to be denied by the contractor, so that the provider is not seen as trying to double dip or have the bad debt allowed in more than one year.