

We have secured a victory in a case that will have broad implications for US hospitals that have been stymied by, and wish to object to the legitimacy of, the US Department of Health and Human Services' (HHS) so-called "self-disallowance" regulation and its application to certain administrative payment appeals made by providers.

As explained by Steve Nash, co-chair of the firm's international Healthcare Practice Group, on May 23, 2008, the Centers for Medicare and Medicaid Services (CMS) issued omnibus revisions to its regulations governing practice before the Provider Reimbursement Review Board (PRRB), 73 Fed. Reg. 30190 (May 23, 2008).

One such revision reintroduced, in regulatory form, a policy that had been struck down by the Supreme Court, in 1988, in *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399 (1988).

That policy required a provider to note "purely legal challenges" — e.g., to an HHS regulation — at the time of filing its cost report. If a provider failed to do so, HHS took the position that the PRRB did not have jurisdiction to hear that challenge. This requirement came to be known as the "self-disallowance rule."

On Friday, August 19, 2016, District Judge Amit P. Mehta of the US District Court for the District of Columbia ruled in favor of a group of 11 hospitals in *Banner Heart Hospital v. Burwell*, a case challenging the validity of the HHS's 2008 self-disallowance regulation as applied to legal challenges to the validity of one or more of the agency's payment regulations. We presented oral arguments before Judge Mehta on behalf of the hospitals on July 21, 2016.

Steve's team also represents two other groups of hospitals whose cases were stayed before Judge Mehta pending the outcome in *Banner Heart*. Substantively, all three cases involve challenges to the HHS's Medicare Outlier Regulations and allege that the hospitals have been underpaid for a range of FYs from 2007 – 2013.

Two years ago, a group of hospitals represented by Steve's team was successful in challenging the application of the self-disallowance rule to PRRB appeals filed in the absence of a timely Notice of Program Reimbursement (NPR). See, e.g., *Charleston Area Med. Ctr. v. Sibelius*, 2014 BL 227626, D.D.C., No. 13-766, 8/6/14. The *Charleston* case opened the door for a US\$32.5 million settlement from the HHS on behalf of approximately 15 hospitals nationwide.

The present case has successfully challenged application of the same rule, but this time as applied to PRRB appeals filed after receipt of an NPR. As the court stated:

Accordingly, the court holds that, under Bethesda — and at Chevron Step One — the Secretary's self-disallowance regulation, as applied to Plaintiffs' specific regulatory challenge, conflicts with the plain text of section 1395oo.... The court's ... decision is limited only to the regulation's application to providers who, like Plaintiffs, seek to assert a legal challenge to a regulation or policy that cannot be addressed by a fiscal intermediary.

Steve notes that, as with the *Charleston* case, the court's decision in *Banner Heart* has broad application and should benefit all hospitals that have had PRRB appeals advancing purely legal challenges dismissed by the PRRB for lack of jurisdiction due to failure to comply with HHS's self-disallowance rule. This with respect to any cost report filed before January 1, 2016.

Appeals in respect of cost reports filed on or after January 1, 2016 will encounter a new set of requirements, largely mimicking those invalidated by the *Charleston* and *Banner Heart* cases, newly established by CMS in the fall of 2015 but now tied to the agency's requirements for the filing of a complete cost report. Steve expects the new requirements to be challenged as well.

Judge Mehta's order remands the case to the PRRB to rule on the hospital's expedited judicial review (EJR) request, unencumbered by the HHS's self-disallowance regulation.

If you would like to discuss any of the details or implications of this matter for your business, please speak to one of the individuals listed in this publication or your usual contact the firm.

Contacts

Stephen P. Nash

T +1 303 894 6173

E stephen.nash@squirepb.com

Sven C. Collins

T +1 303 894 6370

E sven.collins@squirepb.com

Mimi H. Brouillette

T +1 303 894 6157

E mimi.brouillette@squirepb.com

Michi M. Tsuda

T +1 303 894 6158

E michi.tsuda@squirepb.com

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations nor should they be considered a substitute for taking legal advice.

© Squire Patton Boggs.

All Rights Reserved 2016