

# PUBLICATION

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## AHA Challenges to the Two-Midnight Rule - Preserve Your Hospital's Right to Challenge [Ober|Kaler]

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**The American Hospital Association (AHA), along with several state and regional hospital associations and several hospitals, recently filed two lawsuits challenging CMS's two-midnight rule and related policies.**

In the first case, the plaintiffs challenge three recently promulgated rules: the two-midnight rule, the one-year Part B filing rule and the rule requiring a physician order for all inpatient admissions. *Am. Hosp. Ass'n et al. v. Sebelius*, D.D.C., No. 1:14-cv-00609.

They are seeking: (1) a declaratory judgment that the three rules are arbitrary and capricious, (2) a declaratory judgment that the physician order rule violates the Administrative Procedure Act and the Medicare statute, (3) an order vacating and setting aside all three rules, and (4) an order to reimburse the hospitals for the reasonable and necessary care they provided.

In the second case, the plaintiffs challenge both the substantive and procedural validity of the 0.2 percent payment reduction implemented by CMS to cover what CMS asserted would be the additional cost to the Medicare program as a result of the implementation of the two-midnight rule. *Am. Hosp. Ass'n et al. v. Sebelius*, D.D.C., No. 1:14-cv-00607. 00609.

The plaintiffs assert that the 0.2 percent reduction is invalid and should be set aside because CMS: (1) acted arbitrarily and capriciously in relying on indefensible assumptions and failing to explain its assumptions, (2) failed to comply with the notice and comment procedural requirements of the Administrative Procedure Act, and (3) failed to properly promulgate the reduction in the federal regulations, as required by the Administrative Procedure Act and the Medicare statute. The plaintiffs seek reimbursement for the monetary harm caused by the allegedly unlawful promulgation of the 0.2 percent payment cut.

### Ober|Kaler's Comments

To offset the effects of the two-midnight rule, CMS finalized a 0.2 percent reduction to the operating IPPS standardized amount, the hospital-specific rate, and the national capital Federal rate. See CMS's discussion in the [FY 2014 IPPS Final Rule \[PDF\]](#), 78 Fed.Reg. 50496, 50746-47, 50952-53.

In order to preserve the right to challenge these reductions by an appeal of a Notice of Program Reimbursement (NPR) to the Provider Reimbursement Review Board (PRRB), hospitals must include the reduction amounts as protested items on their cost reports. Since the rule went into effect for admissions beginning October 1, 2013, hospitals should include this as a protested item for all cost reports with admissions beginning October 1, 2013. This would include cost reports with a December 31, 2013 year end, which are due next month.

The challenge to this estimate of the effect of the rule through the cost report/PRRB process would be in addition to any appeals of individual claims that are denied for failure to comply with the rule.

