

# PUBLICATION

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## CMS's "At a Collection Agency" Bad Debt Policy - Confusion Continues [Ober|Kaler]

August 20, 2015

**As we reported in previous *Payment Matters* articles (6/11/08, 4/4/13, 6/27/13, and 8/7/13) the United States District Court for the District of Columbia has issued inconsistent opinions regarding Medicare's policy not to allow bad debt when that bad debt is still at a collection agency.**

In two decisions, *District Hosp. Partners L.P. v. Sebelius*, 932 F.Supp.2d 194 (D.D.C. 2013) and *Foothill Hosp. v. Leavitt*, 558 F.Supp.2d 1 (D.D.C. 2008), the court ruled in favor of the providers, concluding that CMS's policy was inconsistent with the Medicare bad debt moratorium. In *Lakeland Reg'l Health Sys. v. Sebelius*, 958 F.Supp.2d 1 (D.D.C. 2013), however, the same court disagreed with the earlier decision and upheld the CMS policy. None of those decisions advanced to the United States Court of Appeals for the District of Columbia Circuit for a definitive ruling, thus leaving the status of the issue unsettled in D.C. Now, however, the issue may be moving towards resolution.

In a decision dated July 7, 2015, the United States District Court for the District of Columbia issued yet another "at a collection agency" decision in *Community Health Sys. v. Burwell*, C.A. No. 14-1432 (D.D.C. 2015) [PDF]. The court concluded that the agency's interpretation of the bad debt regulation, 42 C.F.R. § 413.89(e), and the "at a collection agency" position are both reasonable. The court ruled that, under the regulation, a debt is not "worthless" with "no likelihood of recovery at any time in the future" until all collection efforts have ceased. Thus, simply looking at the regulation, the court found that the "at a collection agency" policy is consistent with both the third and fourth prong of the regulation.

The court further found that the Secretary's interpretation does not violate the bad debt moratorium. The court found that there was substantial evidence in the record to support the conclusion that the CMS policy predated the moratorium. Thus the court concluded, as did the court in *Lakeland*, that the reimbursement policy at issue was not a "change" from the Secretary's practices as of August 1, 1987, and did not violate the moratorium.

In late July, the hospitals appealed the court's ruling to the United States Court of Appeals for the District of Columbia.

### Ober|Kaler's Comments

The *Community Health Systems* decision reflects the continuing uncertainty regarding Medicare's "at a collection agency" policy and its validity. Providers can only hope that the United States Court of Appeals for the District of Columbia Circuit will soon provide much needed clarity.