PUBLICATION

Challenge to DSH Adjustment Estimates Barred by Statute [Ober|Kaler]

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In a decision issued on March 31, the United States District Court for the District of Columbia dismissed a challenge by Florida Health Sciences Center, Inc., also known as Tampa General Hospital, to the calculation of its uncompensated care costs for fiscal year 2014, ruling that the statute barred such challenges. *Florida Health Sciences Center v. H.H.S.,* Medicare & Medicaid Guide (CCH) ¶ 305,257 (D.D.C. March 31, 2015).

By way of background, the Affordable Care Act (ACA) revised the Medicare disproportionate share hospital (DSH) adjustment as of fiscal year 2014, with the calculation now being based on a combination of the traditional DSH adjustment and a prospective estimate of each hospital's amount of uncompensated care. CMS published a final rule that used the March 2013 update of each hospital's 2010/2011 cost report as a source for the data that made up the DSH adjustment for fiscal year 2014. Although the hospital asked that CMS, when calculating the uncompensated care payment, use more recently available Medicaid days data contained in the hospital's amended cost reports submitted April 2014, CMS declined to do so. The hospital then sued, challenging the calculation and the rule containing that calculation and contending that CMS's failure to use more recently available data was inappropriate.

The court did not address the merits of the hospital's claims. Instead, the court reviewed the language of the statute, which expressly limits administrative and judicial review of any “estimate of the Secretary” for purposes of calculating the factors, or of any “period selected by the Secretary for such purposes.” This language was added to the DSH provisions as part of the ACA, and the court took its language to heart in dismissing the hospital's challenge. In so ruling, the court recognized that there is a strong presumption that Congress intends judicial review of administrative action. Nevertheless, the court said, that presumption may be overcome if there are persuasive reasons to believe that such was the intent of Congress. In the case of the estimates used by CMS in calculating the DSH adjustment, the court concluded that the language of the statute contains specific language expressing Congress's intent to preclude judicial review of the hospital's claims.

Ober|Kaler's Comments

Over the past decades, Congress has increasingly placed “preclusion” language in the statute, barring administrative and judicial review of certain methodological and other challenges. These preclusion provisions leave providers with limited options when a particular course of action that falls within the preclusion's ambit is proposed by CMS. First, the hospital may attempt to persuade CMS that its proposal is misguided and should be modified. Second, the hospitals may seek to persuade Congress to intervene. Absent success with one of these options, the hospitals are typically left with no further remedy.