

# PUBLICATION

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## Court Rejects CMS's "Predicate Facts" Position

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In a decision with implications that could go back 35 years, the United States Court of Appeals for the District of Columbia Circuit rejected a CMS interpretation of its reopening rules as that interpretation affects current cost year appeals. CMS prospective payment rates typically involve certain "base year" determinations that are trended forward to calculate, in part, current year payments. Hospitals may challenge these determinations when made, but the true impact of those determinations may not be felt until later years, after the "base year" appeal period and time for reopenings have closed. Although hospitals have sought to bring later year challenges, CMS has asserted that the reopening regulations bar review after the three-year limitation period, thereby preventing hospitals from challenging, in any form, the predicate facts that were contained in the "base year" determinations more than three years earlier.

CMS's arguments have encountered rough sledding. In 2013's *Kaiser Foundation Hospitals v. Sebelius*, 708 F.3d 226 (D.C. Cir., 2013), the court rejected CMS's "predicate facts" position under the terms of the reopening regulation in effect at the time. The court held that the reopening regulation allows for modification of predicate facts in closed years provided that the change will affect only the total reimbursement determination in the open years. Not deterred, CMS then revised its reopening regulation to state expressly that a predicate fact must be challenged within three years of when it was first determined. 42 C.F.R. § 405.1885(b)(2). The D.C. Circuit, however, has now effectively struck down that position, ruling that the reopening regulation – and thus its predicate facts position – does not apply to appeals made to the PRRB. *St. Francis Medical Center v. Azar*, Case No. 17-5098 (June 29, 2018).

*St. Francis* involved some 277 hospitals that challenged various payment decisions that took place over the last two decades. The hospitals contended that the 1981 cost reporting data used to calculate the standardized amounts in 1983 erroneously characterized transfers of patients from one hospital to another as "patient discharges," thereby overstating the number of discharges and understating the allowable operating costs per discharge. These determinations were applied by CMS in setting the standardized amounts in 1983 and, accordingly, have affected inpatient prospective payment system (IPPS) payment decisions ever since.

The hospitals challenged their Medicare IPPS payments in appeals filed with the PRRB as early as 2005, maintaining that CMS had incorrectly calculated their allowable operating costs per discharge in 1983, which lowered their reimbursement for the open cost reporting periods under appeal. The PRRB, however, dismissed those appeals in light of CMS's 2013 amendment to the reopening regulations. When plaintiffs sought to challenge that position further, the U.S. District Court for the District of Columbia rejected their position. *St. Francis Med. Ctr. v. Price*, 239 F. Supp. 3d 237 (D.D.C. 2017).

The D.C. Circuit has now reversed that earlier ruling, holding that the reopening regulation applies only to reconsiderations made by the entity that made the original decision and does not apply to administrative appeals to the PRRB. The court ruled that the reopening regulation, including its limitation provisions, repeatedly distinguishes reopenings from appeals. Similarly, the statutes and regulations governing appeals do not incorporate the rules for reopenings. See 42 U.S.C. § 1395oo(a) and 42 C.F.R. §§ 405.1835 and 405.1837. And while the PRRB review statute at 42 U.S.C. § 1395oo does make findings under certain sections non-reviewable, those sections do not address predicate facts. Based on all of these factors, the court concluded

that there is no basis for extending to PRRB appeals the regulatory limitation provisions that govern reopenings.

### **Implications for Providers**

The D.C. Circuit's decision is noteworthy, effectively reinstating the court's earlier *Kaiser* ruling to PRRB appeals by providers of earlier base-year determinations that have a current year impact.

What CMS might do in response to this latest ruling is unclear. The *St. Francis* court unanimously concluded that the 2013 amendments to the reopening regulation do not apply to appeals to the PRRB. Two of the three judges ended their analysis there, concluding that they did not need to address a separate challenge raised by the hospitals that the 2013 amendments to the reopening regulation were arbitrary, capricious, and improperly retroactive. Judge and Supreme Court nominee Kavanaugh, however, not only concurred with that decision but ruled separately that CMS's 2013 regulation should be struck down as arbitrary and capricious. Judge Kavanaugh stated that in *Regions Hospital v. Shalala*, 522 U.S. 488 (1998), the Supreme Court ruled that it is not reasonable for HHS to "cement misclassified" costs into "future reimbursements, thus perpetuating literally million-dollar mistakes." Judge Kavanaugh observed that "it would seem to be the very definition of arbitrary and capricious for HHS to knowingly use false facts when calculating hospitals' reimbursements."

Particularly in light of Judge Kavanaugh's concurring opinion, CMS might well exhibit caution before addressing the court's latest ruling by somehow attempting to reinstate its predicate facts position in other regulations. Not only might such an effort be ultimately ruled as contrary to the appeals provision of the statute, it would also likely be ruled, at least by some judges, as arbitrary and capricious.