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INSIGHT: Health-Care Providers Are Pushing Back on Medicare Clawbacks

By Kent Hofmann

Introduction

In a series of recent opinions and orders, including as recently as Sept. 27, Medicare providers have succeeded in obtaining injunctive relief to prevent recoupment of their Medicare revenues while prosecuting appeals of overpayment demands by the Centers for Medicare & Medicaid Services. Providers facing overpayment demands should consider takeaways from these recent developments in deciding whether to pursue injunctive relief.

The Process

When a provider wishes to challenge a Medicare overpayment demand, it must navigate a four-stage administrative appeals process before it can seek judicial relief. Assuming the provider timely meets deadlines for the first two stages of appeal, recoupment of the overpayment demand from the provider's Medicare revenue is barred. However, beginning with the third stage—a hearing before an administrative law judge—CMS begins recoupment. Because the wait time for an ALJ hearing is now three to five years, recoupment can present enormous financial difficulties for many providers.

Typically, attempts to seek judicial relief before the completion of all four stages of the administrative appeals process—i.e., exhausting administrative remedies—have been dismissed by the courts for lack of subject matter jurisdiction. But, under a March 2018 opinion by the Fifth Circuit, providers now have a blueprint for obtaining injunctive relief to stop recoupment while prosecuting the third and fourth stages of the administrative appeals process.

The Fifth Circuit opinion: What to plead

In *Family Rehabilitation, Inc. v. Azar*, 886 F.3d 496 2018 BL 105426 (2018), the Fifth Circuit held that the trial court had subject matter jurisdiction to hear the provider's application to obtain injunctive relief against recoupment at the third stage of the administrative appeals process. The provider alleged a claim for failure to provide procedural due process, and an *ultra vires* claim. These claims were based on the three-to-five year wait time for an ALJ hearing, which runs afoul of the statutory directive that ALJs are to conduct and conclude hearings, and render their decisions, not later than 90 days after a timely request for a hearing. On appeal after the trial court dismissed for lack of jurisdiction, the Fifth Circuit applied the ''collateral-claim exception'' and found that the trial court had jurisdiction over the provider's claims. The court applied the exception because (1) the claims were entirely collateral to the substantive agency decision, and (2) full relief could not be obtained by the provider in a post-deprivation hearing.

To avail itself of the collateral-claim exception, a provider should request only that recoupment be suspended while the administrative appeals process continues. A provider should not ask the trial court to decide anything regarding the substance of the overpayment demand, or to determine facts regarding the application of Medicare laws and regulations. Similarly, the provider should not request a determination that recoupments are wrongful. By narrowly tailoring the relief sought to an injunction against recoupment,

providers have an opportunity to make a case for injunctive relief.

Providers have obtained injunctive relief in Texas and South Carolina

Following the Fifth Circuit's opinion in *Family Rehabilitation*, the U.S. District Court for the Northern District of Texas heard on remand—and, in June granted—the provider's motion for a preliminary injunction. (No. 3:17-cv-03008-K, 2018 BL 196462) The court found that the provider demonstrated a likelihood of success on the merits on its procedural due process claim and that it had established irreparable harm. Less than a month later, in *Adams EMS, Inc. v. Azar*, No. 4:18-cv-01443, 2018 BL 246177, the U.S. District Court for the Southern District of Texas granted a temporary restraining order to the provider to suspend recoupment of an alleged overpayment. The court heard the provider's application for a preliminary injunction on Aug. 27, but there has not yet been a ruling on the motion.

More recently—on Sept. 27—the U.S. District Court for the District of South Carolina in *Accident, Injury & Rehabilitation, PC v. Azar*, Case No. 4:18-cv-02173-DCC, 2018 BL 351493, converted a previously granted temporary restraining order into a preliminary injunction and enjoined recoupment of alleged overpayments from the provider's Medicare revenues. In requesting injunctive relief, the provider asserted the same claims as those alleged by Family Rehabilitation in the case decided by the Fifth Circuit: denial of procedural due process and ultra vires. The court also applied the collateral-claim exception in determining that it had subject matter jurisdiction over the provider's application.

These rulings, particularly the Fifth Circuit's opinion in *Family Rehabilitation*, give providers in the federal Fifth Circuit—those located in Texas, Louisiana, and Mississippi—a reasonable chance to obtain injunctive relief against recoupment. Similarly, given the district court's order in *Accident, Injury and Rehabilitation*, providers in the Fourth Circuit states of Maryland, North Carolina, South Carolina, Virginia, and West Virginia can avail themselves of precedent to support applications for injunctive relief.

Irreparable harm appears to be the key factor for injunctive relief, and the courts are applying a high bar

Generally speaking, and depending on the jurisdiction, a provider seeking a preliminary injunction to enjoin recoupment will need to satisfy four factors: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) a showing that the threatened injury to the provider outweighs the threatened harm to CMS; and (4) a demonstration that injunctive relief will not disserve the public interest. In these recent cases, the pivotal factor has been whether the evidence has shown a substantial threat of irreparable harm. To date, the courts have required a relatively high showing from providers—including that continued recoupment would force the provider to file for bankruptcy or close.

In *Family Rehabilitation*, the provider showed that it had laid off about 89% of its staff since recoupment began, had limited its services to only 8 of its previous 289 patients, and would go out of business should recoupment continue. In *Adams EMS*, the provider presented evidence that it had sold an ambulance and reduced its staff from 12 to 2 employees, and that it would face bankruptcy and closure. And, in *Accident, Injury and Rehabilitation*, the provider showed that it had lost about $6 million in revenue during recoupment and had terminated 24 employees because of its diminishing revenues. Again, the provider presented evidence that should recoupment continue, it would be forced to close and fe for protection under federal bankruptcy law.

The importance of the irreparable injury factor is highlighted by another very recent decision in which the court found that the provider failed to establish that factor in denying a motion for a temporary restraining order. In an order issued Sept, 27 in *Alpha Home Health Solutions, LLC v. Secretary of the U.S. Department of Health and Human Services*, No. 6:18-cv-1577-PGB-TBS, 2018 BL 352990, the U.S. District Court for the Middle District of Florida found that the provider's motion failed to establish irreparable harm because the allegations were too speculative. According to the court's order, it appears that recoupment has not yet begun because the provider is waiting to learn whether its application for a payment plan will be accepted. The court left open the possibility, however, that the provider could obtain injunctive relief on its motion for a preliminary injunction, including in the event that the payment plan application is rejected and recoupment begins.

Conclusion

As shown in these recent opinions and orders, a provider has a reasonable opportunity to obtain injunctive relief against recoupment, particularly in the federal Fourth and Fifth Circuits, while it prosecutes its administrative appeal of an overpayment demand, if it pleads the claims addressed by the Fifth Circuit in *Family Rehabilitation* and makes a strong showing of irreparable and imminent harm as a result of the ongoing recoupment.

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