



LHA IMPACT LAW BRIEF

9521 Brookline Avenue, Baton Rouge, LA | Phone (225) 928-0026 | Fax (225) 923-1004 | www.lhaonline.org

Louisiana Hospital Association

Volume 33, No. 2 – April 2018

Connect with LHA: [f](#) [t](#) [YouTube](#)

Headlines:

- **Appeals Court Ruling Allows for Healthcare Providers to Seek Injunctive Relief During Medicare Reimbursement Disputes**

Notices:

ARTICLE SUBMISSION: The LHA Society of Hospital Attorneys encourages its members to submit articles on topics of interest. Writing an article that is published in *Lawbrief* is a great way to promote your name in the healthcare community and advertise your knowledge. If you have written an article and would like to have it considered for publication in *Lawbrief*, please email it in Word format (no PDFs please) to LHA Advocacy Coordinator Meaghan Musso at mmusso@lhaonline.org.

LEGAL & REGULATORY EDUCATION PROGRAMS & WEBINARS:

- May 3 [Ethical Dimensions of Teamwork and Collaboration in Healthcare](#) (Webinar)
- May 8 [Understanding Medicare Advantage Programs for Physicians & Hospitals](#) (Webinar)
- May 10 [The Board's Evolving Role in Quality Oversight](#) (Webinar)
- May 16 [Nursing: CMS CoP Standards for Hospitals and Proposed Changes: 2018 Update](#) (Webinar)
- May 16 [Leading Utilization Review Practices: From Access to Exit](#) (Lafayette)
- May 17 [Leading Utilization Review Practices: From Access to Exit](#) (New Orleans)
- June 5 [Payor Day Series - Commercial Health Plans](#) (Baton Rouge)
- June 19 [Medical Marijuana 101: Everything You Need to Know](#) (Baton Rouge)

Articles:

Appeals Court Ruling Allows for Healthcare Providers to Seek Injunctive Relief During Medicare Reimbursement Disputes

By: Ashley Carver Meredith

According to a critical new decision by the United States Fifth Circuit Court of Appeals, *Family Rehabilitation, Incorporated v. Azar*, 886 F.3d 496 (5th Cir. 2018), healthcare providers involved in Medicare reimbursement disputes may have new legal grounds to retain amounts allegedly overbilled to Medicare while awaiting review of disputes.

Background

The Centers for Medicare and Medicaid Services (CMS), which is responsible for overseeing the Medicare program, contracts with private government contractors (Medicare Administrative Contractors, or MACs), to process Medicare claims and issue reimbursements to Medicare providers. Zone Program Integrity Contractors (ZPICs) audit these payments to ensure the accuracy of the providers' billings and reimbursements. If the ZPIC determines that there has been an overpayment of Medicare reimbursements to the healthcare provider, it notifies the relevant MAC, who then issues a demand letter to the provider for repayment of the excess reimbursements.

As it stands, when a provider receives a demand letter from its MAC for repayment of Medicare reimbursements, its only option for challenging the MAC's demand letter is entering into what the *Azar* court aptly refers to as the "harrowing labyrinth" of Medicare administrative appeals. This appeals process has four levels of review. First, the provider may submit a claim to the MAC for redetermination of the overpayment. Thereafter, the provider may ask for reconsideration by a Qualified Independent Contractor ("QIC") hired by CMS. However, if the QIC affirms the MAC's determination, the MAC may begin the recoupment process by garnishing future reimbursements otherwise due to the provider.

At the third level of administrative appeals, the provider may request a hearing before an administrative law judge (ALJ) within the Office of Medicare Hearings and Appeals (OMHA). The regulations provide that the hearing, if timely requested, shall be held and concluded no later than 90 days after the provider's request. After review by the ALJ, the provider may appeal once more, this time to the Medicare Appeals Council, an organization independent of both CMS and OMHA. The Council reviews the ALJ decision *de novo* and is likewise required to issue a ruling within 90 days of a timely appeal. Moreover, if the ALJ fails to issue a decision within 90 days, the provider may "escalate" the appeal to the Council, which will review the QIC's reconsideration.

While efficient in theory, healthcare providers caught in the mire of Medicare administrative appeals often find that the process is quite the opposite. Because of a massive backlog in Medicare appeals, providers that timely request review by an ALJ have to wait much more than 90 days — sometimes several years — before receiving a hearing date. For providers whose future Medicare reimbursements are in garnishment, the wait for a hearing can have dire effect on their ability to stay afloat and continue providing services. And, to top it all off, federal law provides that a provider cannot seek relief in federal court until it has exhausted its administrative remedies (i.e., completed the four-level appeals process that is causing it to go bankrupt in the first place). See 42 U.S.C. 405(g)-(h) and 42 U.S.C. 1395ff(b)(1)(A). This is where the Fifth Circuit's decision in *Family Rehabilitation, Incorporated v. Azar* comes in.

The Fifth Circuit Court of Appeals Opinion in *Azar*

Family Rehabilitation, Incorporated (Family Rehab) is a home healthcare provider that provides Medicare-reimbursable services in Texas. In 2016, an audit by Family Rehab's ZPIC revealed that Family Rehab had likely overbilled Medicare on 93 percent of its claims and received \$7,855,803.23 in excess reimbursement. Accordingly, Family Rehab's MAC sent a demand for that amount, and Family Rehab began the Medicare appeals process.

Family Rehab challenged the ZPIC's findings on several grounds, and after exhausting the first two stages of the appeals process, Family Rehab timely requested a hearing with the ALJ. Like many others in this situation, Family Rehab soon learned that it would be unable to receive a determination for at least three to five years. Escalation to the Council would likewise be significantly delayed. Despite the pending appeals, the MAC would soon begin garnishing Family Rehab's future Medicare reimbursements for recoupment. Faced with the prospect of going out of business while waiting on a hearing, Family Rehab filed suit in federal court seeking an injunction to prevent recoupment until the conclusion of its administrative appeal. Among other claims, Family Rehab asserted that the recoupment (1) violated procedural due process, and (2) was *ultra vires* (meaning, outside of the MAC's legal authority).

The district court dismissed Family Rehab's suit, finding that the court lacked subject matter jurisdiction over the action since Family Rehab had not exhausted its administrative remedies (i.e., completed the Medicare appeals process). On appeal, however, the Fifth Circuit found that the judicial "collateral-claim exception" provided by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), provides an exception to the exhaustion rule as it relates to Family Rehab's procedural due process and *ultra vires* claims. Under the "collateral claims" exception to the exhaustion requirement, jurisdiction may lie over claims (1) that are "entirely collateral" to a substantive agency decision and (2) for which "full relief cannot be obtained at a postdeprivation hearing." *Azar*, 886 F.3d at 501 (citing *Mathews*, 424 U.S. at 330-32). Thus, without ruling on the merits of the injunction claims, the Fifth Circuit held that, because Family Rehab's procedural due process and *ultra vires* claims meet the *Eldridge* requirements, Family Rehab may pursue its injunction against recoupments in federal district court.

What this Means for Medicare Providers

Whereas Medicare providers have previously been unable to get into federal court to enjoin or suspend Medicare recoupment while waiting for a hearing with an ALJ, under *Azar*, Medicare providers potentially have a new way to combat the heavy financial burden placed upon providers when faced with the backlog of Medicare claims appeals. Though a limited win for Family Rehab, the *Azar* opinion gives other providers a roadmap for how to prevent CMS from recouping funds while they await an administrative hearing on amounts in dispute.

Ashley Carver Meredith is an Associate at Taylor Porter, working with the Firm's litigation, environmental and healthcare practice groups. Ashley can be reached at ashley.meredith@taylorporter.com or 225-381-0220.

DISCLAIMER: Any views or opinions presented in this newsletter are solely those of the author and do not necessarily represent those of the Louisiana Hospital Association. The Louisiana Hospital Association accepts no liability for the content of this newsletter or for the consequences of any actions taken based on the information. Hospitals and physicians seeking specific legal advice should consult a qualified attorney.

If you would like to unsubscribe from LHA's electronic newsletters, email Meaghan Musso at mmusso@lhaonline.org with "unsubscribe from LHA newsletters" in the subject line.

If you did not receive this email directly and would like to be placed on our e-IMPACT mailing list, send your name, title, and hospital or organization name, along with your email address, to Meaghan Musso at mmusso@lhaonline.org with "add me to e-IMPACT mailing list" in the subject line.