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A New Remedy for an Old Problem: Fifth Circuit Rules That Providers May Seek Injunctive Relief While Waiting For a Delayed Medicare Hearing

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The long-running saga of the Medicare appeals backlog added a new chapter that may give frustrated stakeholders a new remedy.[1] On March 27, 2018, the United States Court of Appeals for the Fifth Circuit ruled that a home health agency may pursue a claim against the Secretary of HHS for failing to provide a hearing before an Administrative Law Judge within a reasonable time. *Family Rehabilitation, Incorporated v. Azar,* No. 17-11337 (5th Cir., Mar. 27, 2018).

In this case, Family Rehabilitation ("Family") received a notice from a Medicare Zone Integrity Program Contractor ("ZPIC") in 2016 alleging that it had been overpaid $7.88 million based on an extrapolation from a sample of 43 claims. It pursued its administrative appeal rights, and after the second level of review the overpayment was reduced to $7.62 million. At that point, its Medicare Administrative Contractor began recouping the alleged overpayment; at the same time, Family requested a hearing before an Administrative Law Judge. However, due to the backlog of Medicare Part B appeals, the Secretary conceded that it would take between three and five years to schedule a hearing even though the Social Security Act requires that an ALJ issue a decision within 90 days of a timely hearing request.[2]

Family was caught in a bind: if it waited for a hearing, it would likely have gone out of business without any Medicare reimbursement while over seven million dollars was being recouped. It took the drastic step of seeking an injunction to prevent CMS from recouping the alleged overpayments until its appeal had been decided. It alleged that because the recoupment would force it to go out of business before it had any chance to have its appeal heard, this amounted to irreparable harm and authorized the injunctive relief to prevent the Secretary from acting beyond the scope of his authority. Although the District Court dismissed the case on jurisdictional grounds, but the Court of Appeals reversed the judgment and concluded that Family could state a cause of action based on the Secretary's alleged failure to comply with the statute.

The Court of Appeals explained that although there is a presumption that all Medicare appeals will follow the established four levels of administrative appeals before a federal court will review the Secretary's actions, there are exceptions. One well-established caselaw exception allows for direct judicial review of matters that are "entirely collateral" to a claim for benefits, and where the full relief requested cannot be obtained in an after-the-fact hearing. The Court agreed that both elements were

met, and that Family could argue that this provided a separate cause of action for relief. It agreed that the relief sought for alleged due process and equal protection violations could not be obtained through the administrative hearing process, and did not require a court to "wade into the Medicare Act and regulations" governing home health coverage and reimbursement; as a result, since the claims made by Family were unrelated to the merits of the alleged overpayment and recoupment because Family was not challenging the authority of CMS to recoup overpayments, they were entirely collateral. The Fifth Circuit then sent the case back to the district court for a ruling on Family's request for an injunction.

Although the Fifth Circuit did not rule on Family's requests for an injunction, the decision is significant for stakeholders because it may give them an avenue for interim relief when CMS acts first, offers after-the-fact appeals, but then forces them to wait for years before deciding an appeal or even scheduling a hearing. The decision is narrow, but would be useful in circumstances where CMS is moving forward with recoupment of disputed Medicare funds that may ruin a provider or supplier because it would be out of business before it could even get a hearing. It may offer providers and suppliers a targeted remedy to forestall a recovery of disputed Medicare funds before a provider or supplier can have a hearing. This is different from an action that seeks to block CMS from taking any action before the administrative appeals process has been exhausted, because it does not challenge the merits of an alleged overpayment or the Secretary's authority to recover overpayments. In its decision, the court expressly rejected the Secretary's arguments that Family was really seeking to prevent the recoupment of an overpayment, and was not persuaded that Family's motivation was to short-circuit the appeals process. It noted that the relief sought was limited to suspending the recoupment before a hearing, which is different from a request to prohibit the recoupment altogether.

The slow pace of any executive or legislative remedy for the Medicare auditing and administrative appeals process may mean that more federal courts inclined to be less deferential to agencies, and are open to finding that agency non-compliance may rise to the level of a constitutional violation.

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[1] The ongoing history of the Medicare appeals backlog and attempts to remedy the situation are discussed in *American Hospital Association v. Burwell,* 209 F. Supp. 2d 221 (D.D.C. 2016).

[2] 42 U.S.C. § 1395ff(d)(1)(A).

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