HALL RENDER
KILLIAN HEATH & LYMAN

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PROVIDERS VICTORIOUS IN DSH MEDICARE ADVANTAGE DAYS CASE

On July 25, 2017, the Court of Appeals for the District of Columbia issued a provider-friendly decision in *Allina Health Services v. Price,* Case No. 16-5255 (more commonly known as *Allina II*), reversing the negative decision the hospitals received at the district court level. The court's reversal stems from its reasoning that the "pre-2004 standard of excluding Part C days from Medicare fractions remains the baseline practice" until the 2014 effective date of CMS's properly promulgated rule pertaining to the location of Medicare Advantage ("MA") days in the Medicare Disproportionate Share Hospital ("DSH") calculation. Additionally, the court seemingly limited the reach of *Perez v. Mortgage Bankers Ass'n*, a Supreme Court case that limited stakeholders' protection under the Administrative Procedures Act for interpretive rules, by stating that the Medicare Act does not exempt interpretive rules from notice-and-comment rulemaking. The *Allina II* decision bodes very well for hospitals that have appealed the MA/Part C days issue. Action items for hospitals that have appealed or wish to appeal this issue are discussed below.

DISCUSSION

Nature of the Issue

At issue is whether days associated with the care of MA patients should be included in the Medicare or Medicaid fraction of the DSH calculation. Hall Render's appeal asserts that MA days should not be included in the Medicare fraction because they are not Part A days, and days associated with patients dually eligible for MA and Medicaid belong in the numerator of the Medicaid fraction.

In *Northeast Hospital Association v. Sebelius*, the D.C. Court of Appeals held that CMS's regulation requiring MA days in the Medicare fraction could not be imposed retroactively but also held the HHS Secretary's ("the Secretary's") approach was a permissible interpretation of the statute. In *Allina v. Sebelius*, the D.C. Court of Appeals declared the 2004 regulation void for failure to provide notice of the proposed rule ("*Allina I*"). However, *Allina I* was a bit of a mixed decision as the Court of Appeals remanded the matter to CMS, suggesting the Secretary was still free to adjudicate whether his interpretation could be applied without reliance on the voided regulation (i.e., on the statute independently).

Still, the situation looked bleak for the Secretary. At the time of the *Allina I* decision, the rule from *Paralyzed Veterans v. D.C. Arena* was clear: changes from prior interpretations required notice and comment even if they were not originally created by notice and comment. In *Northeast,* the court found that the Secretary's prior practice was to put the MA days in the Medicaid Fraction. The Secretary had also indicated that was CMS's policy in the 2004 proposed rule. Further, the Secretary did not publish requirements for data reporting necessary to include the MA days in the Medicare Fraction until 2007. Thus, it seemed clear the Secretary had an informal interpretation to include these days in the Medicaid Fraction, which, under the *Paralyzed Veterans* rule of law, would require formal notice-and-comment rulemaking to change.

However, that rule of law seemingly changed in 2015 when the Supreme Court issued *Perez v. Mortgage Bankers Ass'n*, holding that an agency does not need to use notice and comment to change interpretive guidelines never promulgated by notice and comment. This unexpected Supreme Court decision, in the completely unrelated area of labor law, blew life into the Secretary's nearly dead case. The change in administrative law wrought by the Supreme Court in *Perez* cut from underneath the *Allina II* plaintiffs' strongest argument, that the Secretary had changed an interpretation without notice and comment. The court addressed this, noting that the plaintiffs had withdrawn that argument.

This new *Allina II* decision seemingly prohibits the extension of *Perez's* holding to Medicare cases because the court specifically states "the text of the Medicare Act does not exempt interpretive rules from notice-and-comment rulemaking." The court states the 2012 publication of the SSI Ratios on the CMS website required notice-and-comment rulemaking. The court noted that its holding is contrary to other Courts of Appeal (specifically, the First, Sixth, Eighth and Tenth Circuits), which leaves open the possibility that CMS will seek to have the Supreme Court review the *Allina II* decision.

What Does This Mean for Hospitals Appealing the DSH Medicare Advantage Days Issue?

Allina II seems to extend the decision of *Allina I* beyond the scope of the hospitals in that litigation. The court specifically notes the "pre-2004 standard of excluding Part C days from Medicare fractions remains the baseline practice." How that "baseline practice" will be extended to other hospitals that appealed this policy remains to be seen. The court remanded the case back to the District Court for proceedings consistent with its opinion. Sometimes, that means the case will be settled with CMS. However, any resolution for other hospitals appealing this issue remains unclear. Hall Render, though, will be pursuing all avenues, including potential settlement, to resolve its Medicare Advantage Days Appeals as quickly as possible. Hospitals should continue to preserve appeal rights by protesting the MA days issue in their pre-2014 cost reports.

PRACTICAL TAKEAWAYS

1. The court's position is that for years prior to 2014, Medicare Advantage days should be counted in the Medicaid Fraction where those days are eligible for inclusion there.
2. In the D.C. Circuit, the Medicare Act does not exempt interpretive rules from notice-and-comment rulemaking, and the APA exception does not apply.
3. This case seemingly opens up the possibility that, at a minimum, all hospitals that have properly appealed this issue might see relief.
4. Hospitals receiving DSH should consider preserving appeal rights on this issue by protesting it in their pre-2014 cost reports and appealing any Notices of Program Reimbursement still within the 180-day appeal window.
5. Hospitals in Hall Render MA days appeals or who have appealed or wish to appeal this issue should contact us for more information.

If you have any questions, please contact:

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