KING & SPALDING

Health Headlines

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D.C. Circuit Vacates and Remands 2007 and 2008 Rules for Calculating Rural Floor Budget Neutrality Adjustment – On January 14, 2011, the D.C. Circuit Court of Appeals issued a ruling vacating and remanding the portion of CMS's 2007 and 2008 inpatient PPS rules setting forth the calculation of the rural floor budget neutrality adjustment prescribed under section 4410(b) of the Balanced Budget Act of 1997. *See Cape Cod Hospital v. Sebelius*, No. 09-5447 (D.C. Cir. Jan. 14, 2011). The Court vacated and remanded the 2007 rule because CMS did not address a "significant public comment" by the hospitals' consultant, Theodore Giovanis, that exposed a systemic flaw in the agency's calculation of the annual the rural floor budget neutrality adjustment to the standardized amount. The Court also vacated and remanded the 2008 rule because the agency's rationale for refusing to true up the payment rate by removing the effect of duplicative prior-year adjustments violated the statute's budget neutrality requirement.

King & Spalding Healthcare partners Chris Keough, Dennis Barry and Stephanie Webster represented the hospitals in this lead case. King & Spalding partner Paul Clement argued the case before the Court of Appeals.

Reporter, *Harry Richards*, Washington, DC, +1 202 626 9126, jrichards@kslaw.com.

CT Scan Payments Much Too Low Under Medicare Outpatient PPS – When CMS "cross-walked" from old CPT-4 codes to new CPT-4 codes for CT scans, it "mapped" high cost services to Ambulatory Payment Classifications (APCs) that will pay substantially less than cost. This appears to be an inadvertent error and has been pointed out to CMS by commenters. Specifically, pelvic and abdominal CT scans were formerly grouped into a composite APC when performed together. Under the new rule, the procedures—which are performed together roughly 75% of the time—are assigned to the single procedure APC. This change will reportedly result in a 20% cut in payments. A similar issue exists with regard to a change in CPT codes for ophthalmologic diagnostic testing which will purportedly lead to a 50% reduction from the 2010 rate. These errors could reduce aggregate outpatient PPS payments by 1%. Commenters contend this result is inconsistent with budget neutrality requirements and the premise that the APCs be "resource based."

CMS has not yet responded to the comments on the mapping of CT codes to APCs. At this point, commenters believe that the error was inadvertent, and are optimistic that CMS will make a correction. It will probably take at least a few more weeks before CMS addresses these comments, and if CMS takes corrective action, it may be prospective only from the date of that action.

Reporter, *Martha S. Henley*, Atlanta, +1 404 572 2775, mhenley@kslaw.com.

AHA Files Amicus Brief in Support of Tuomey Healthcare System – On January 10, 2011, the American Hospital Association (AHA) filed an *amicus curiae* brief in the Fourth Circuit Court of Appeals (the Fourth Circuit) in support of Tuomey Healthcare System, Inc. (Tuomey) in its defense against government allegations of False Claims Act (FCA) and

Stark Law violations. The U.S. Department of Justice (DOJ) brought an FCA suit against Tuomey in the U.S. District Court for the District of South Carolina (the District Court). In March 2010, the District Court found that Tuomey had violated the Stark Law and assessed damages of $45 million, but found that Tuomey had not violated the FCA. The District Court granted the DOJ's request for a re-trial in order to hear testimony from witnesses which would show Tuomey's knowledge of its Stark Law violations, a prerequisite for FCA liability. Tuomey appealed the order for re-trial to the Fourth Circuit, but its petition was denied on October 26, 2010. Previous *Health Headlines* discussing the District Court's decision and the Fourth Circuit's denial of Tuomey's appellate petition are available by clicking here and here.

The AHA's *amicus* brief focused on two issues from the original trial which could arise again as part of the new trial. First, the District Court allowed the DOJ to disavow official guidance promulgated by CMS regarding the provisions and interpretation of the Stark Law. Emphasizing the complexity of the Stark Law prohibitions and the historical pattern of reliance on official CMS commentary, the AHA requested that the Fourth Circuit rule that hospitals were "entitled to rely on official agency guidance." The AHA focused on the need for "clarity and predictability" and predicted that, if the District Court's ruling was allowed to stand, it would lead to a "state of uncertainty" that would be "problematic because of the chilling effect it [has] on hospital efforts to work with physicians to improve the delivery and coordination of health care for patients." Second, the District Court had entered judgment against Tuomey for nearly $45 million without addressing or analyzing the DOJ's proof of those damages. According to the AHA, the sole proof presented by the DOJ was a sum dollar value of claims which identified physicians that the DOJ alleged had made improper referrals to Tuomey. The AHA asked the Fourth Circuit to reverse the District Court's judgment and rule that the DOJ was required to present evidence of amounts billed for "designated health services" provided pursuant to actual prohibited referrals.

A copy of the AHA's brief is available by clicking here.

Reporter, *Adam Laughton*, Houston, +1 713 276 7400, alaughton@kslaw.com.

Medical Residents Working 40+ Hours Per Week are Subject to FICA Tax Says United States Supreme Court – On January 11, 2011, in a unanimous decision in favor of the government, the United States Supreme Court ended a long-running dispute over whether "doctors who serve as medical residents are properly viewed as 'students' whose service Congress has exempted from FICA [Federal Insurance Contributions Act] taxes under 26 U.S.C. § 3121(b)(10)." At issue is a congressional exemption from FICA taxes for "service performed in the employ of . . . a school, college, or university . . . if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university." 26 U.S.C. § 3121(b)(10).

Historically, the Treasury Department applied this student exception when the work performed for the school was "incident to and for the purpose of pursuing a course of study there" and made such decisions on a case-by-case basis. Responding to litigation about the student exception as applied to medical residents specifically, the Treasury Department promulgated a final regulation in 2004 providing that an employee's service is "incident" to studies when "[t]he educational aspect of the relationship between the employer and the employee, as compared to the service aspect of the relationship, [is] predominant." An example in the regulation specifically provides that a medical resident whose "normal work schedule calls for [him] to perform services 40 or more hours per week" is not an exempt student under § 3121(b)(10) because his services "are not incident to and for the purpose of pursuing a course of study." 26 C.F.R. § 31.3121(b)(10) - 2(e) (Example 4).

Giving deference to and upholding the Treasury Department's regulation, the Court stated that "[r]egulation, like legislation, often requires drawing lines." Because the statutory text of 26 U.S.C. § 3121(b)(10) does not address whether medical residents working full-time for an academic medical center, for example, are eligible for the student tax exception, the question becomes whether the Treasury Department's regulation is a reasonable interpretation of the statute. Writing for the Court, Chief Justice Roberts explained that the Treasury Department "reasonably sought a way to distinguish between workers who study and students who work." As such, concluded the Court, "[f]ocusing on the hours an individual works and the hours he spends on studies is a perfectly sensible way of accomplishing that goal."

In conclusion, the Court reasoned that the "Department certainly did not act irrationally in concluding that these doctors—'who work long hours, serve as highly skilled professionals, and typically share some or all of the terms of employment of career employees'—are the kind of workers that Congress intended to both contribute to and benefit from the Social

Security system." The amount of money at issue, according to court papers, is about $700 million a year in tax revenues and $2.1 billion in pending claims for refunds. A copy of the opinion is available by clicking here.

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CMS Publishes Correction to CY 2011 Physician Fee Schedule – On January 11, 2011, CMS published a correction to the calendar year (CY) 2011 physician fee schedule (PFS) final rule published November 29, 2010. In the notice, CMS corrects a number of technical and typographical errors, including errors in the physician work relative value units (RVUs), practice expense RVUs and malpractice RVUs. CMS also corrects the CY 2011 budget neutrality factors, conversion factor and anesthesia conversion factor to reflect updated values due to the corrections to the work, practice expense and malpractice RVUs. The corrections are effective as of January 1, 2011. A copy of the January 11, 2011 correction notice is available by clicking here. A copy of the November 29, 2010 final rule is available by clicking here.

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