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## **Tremendous New Reimbursement Opportunity Available to Providers Resulting from Recent Ruling by U.S. Court of Appeals**

Due to a recent ruling, providers can now appeal predicate facts like the IPPS Standardized Payment Rate; the Sole Community Hospital or Medicare Dependent Hospital Base Rate; the Number of Residents Determined in Base Year Teaching Programs; or the Amount Per Resident to name a few.

### **Background**

Recently, the U.S. Court of Appeals for the District of Columbia Circuit invalidated CMS' longstanding prohibition on certain types of appeals, opening the door for providers to appeal additional issues relating to significant reimbursement opportunities. Toyon Associates, Inc. is in the process of setting up appeals for its clients, as well as any prospective clients, to take advantage of this new ruling.

The case at issue (*Saint Francis Medical Center, et al. v. Azar*, decided 6/29/18) involves the Secretary's interpretation of 42 CFR 405.1885(a)(1), the regulation governing reopening a contractor determination or reviewing entity decision. The regulation sets a three-year limit for requesting "reopenings" of determinations, CMS has long used that regulation as grounds for its position that providers cannot challenge "predicate facts" in either reopenings or appeals.

### **Defining the Issue**

A predicate fact is a "factual underpinning of a specific determination of the amount of reimbursement due to a provider [that] may first arise in, or be determined for, a different fiscal period than the cost reporting period under review." Put another way, this definition, established by 78 FR 74826, 75162 (Dec. 10, 2013), means a factual determination that is relevant to the fiscal year at issue but was actually decided in a year outside of the current year in dispute. Thus, CMS has always argued that 42 CFR 405.1885(a)(1) bars providers from challenging in a reopening or an appeal any predicate facts that involve determinations outside of the three-year limit.

### **Ruling Details**

The D.C. Circuit Court disagreed on June 29, 2018, and held 42 CFR 405.1885(a)(1) does NOT bar providers from appealing predicate facts that are outside of the three year limit even if they may affect reimbursement of closed years. Further, the court determined that appeals are completely different from reopenings and that 42 CFR 405.1885(a)(1) does not apply to appeals at all. One judge even wrote in a concurring opinion that CMS' barring challenges to appeals of predicate facts could lead to absurdity, as "it would seem to be the very definition of arbitrary and capricious for HHS to knowingly use false facts when calculating hospital reimbursements."

In the example of the Saint Francis appeal, the predicate fact being challenged by the provider was a 1983 standardized amount (Federal rate), calculated based on SF's 1981 cost report and then used every year thereafter to determine inpatient payment rates. The Provider began filing appeals with the PRRB in 2005 but its appeals were consolidated and dismissed by the PRRB because they were purportedly appealing a predicate fact, based on a cost report more than three years before the appealed cost report year. While the Court did not consider the merits of Saint Francis' appeal, it did rule unequivocally that the provider has the right to appeal its rate, regardless of when it was established.

If you have questions or would like additional information, please contact Mike Smith, Vice President Appeals Services at 925 685-9312 or [Mike.Smith@toyonassociates.com](mailto:Mike.Smith@toyonassociates.com)

