

THOUGHT LEADERSHIP

LEGAL UPDATES

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"Fiscal Cliff" Deal Extends Collection Time for Medicare Overpayments

President Barack Obama signed the American Taxpayer Relief Act of 2012, often called the “fiscal cliff” agreement, on January 2, 2013. Buried in the 59 pages of the act is a seven-line amendment to Section 1870 of the Social Security Act. This section bars recovery of overpayments from providers who are “without fault” and automatically deems a provider to be without fault three years from the year in which the original payment was made (unless there is evidence of fault). The three-year “without fault” limitation provision was enacted in 1972. Without much notice, the fiscal cliff deal extended this to five years.

The push for extension of the limitation began when the Department of Health and Human Service’s Office of Inspector General (OIG) issued a report recommending to the Centers for Medicare & Medicaid Services (CMS) that it pursue legislation to extend the statute of limitations. (See OIG, *Obstacles to Collection of Millions in Medicare Overpayments*.) This report blamed the time limitations on reopening and recovery of payments (four years and three years, respectively) as the reason why approximately \$330 million in overpayments could not be recovered by CMS. The OIG also concluded that CMS’ inadequate guidance and monitoring of contractors was to blame. The Congressional Budget Office (CBO) has issued a report estimating that \$500 million would be added to the federal treasury by 2022 as a result of the statute of limitation change. (See CBO, *Detail on Estimated Budgetary Effects of Title VI*.)

The biggest question for providers is how to deal with this change going forward. The following illustration demonstrates how the three-year limitation period applied: Provider was notified on February 22, 2009, that it had been paid for services provided to beneficiary. On January 2, 2013, the contractor determined that provider was overpaid for these services. If there was no

evidence that provider acted fraudulently, this overpayment could not be recovered because under the statute of limitations the right to do so expired on December 31, 2012. Had the contractor determined that the provider was overpaid on any date prior to December 31, 2012, it would have been recoverable. (See *Medicare Financial Management Manual*, Chapter 3, Section 80.1.) Accordingly, any payments made in 2009 or before were not recoverable as of January 1, 2013.

If the amendment, effective on January 2, 2013, is applied retroactively, all payments made after 2007 are recoverable. However, courts presume a law to operate prospectively from its date of enactment unless Congress expressly states that it is to be applied retroactively. Nothing in the fiscal cliff deal indicates an intent that this particular amendment apply retroactively. Moreover, it could be argued that retrospective application of the five-year limitation period is a violation of due process. The success of this argument depends on whether the expiration of the limitation results in a vested right. For further guidance, see *William Danzer & Co. v. Gulf & Ship Island R. Co.*, 268 U.S. 633 (1925), with *Campbell v. Holt*, 115 U.S. 620 (1885). Where federal law is involved, this depends on whether the statute creating the liability also places a time limit on the liability itself. See *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 312 n.8 (1945); *Danzer*, 268 U.S. at 637.

Section 1870 limits recovery from a provider unless the overpayment determination is made within a specified period of time, which is analogous to the argument in *Danzer*. On the other hand, it could be argued that the time limit goes to the remedy and not the liability of the provider. It is uncertain how courts would rule. However, the U.S. Supreme Court has also signaled that special hardships or oppressive effects of retroactive application of a statute of limitations should also be considered. See *Chase Securities*.

What This Means to You

If not applied retroactively, CMS and its contractors would be unable to recover any payments immediately prior to the amendment (i.e., any payments received before January 1, 2010). In other words, payments received in 2009 would not be recoverable despite the new five-year limitation. But, any payments received in 2010 and beyond would be recoverable for the next five years.

Contact Info

If you find yourself in a situation involving a Medicare overpayment, consult your Husch Blackwell attorney or David Pursell at 816.983.8190.

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