



COMPLIANCE

Legal Theory Could Having Sweeping Implications for Nursing Homes' Ability to Claim Medicaid Dollars

By **Shelby Grebbin** | February 7, 2023

SKILLED NURSING NEWS | FEBRUARY 7th, 2023—A Maryland court case could have expansive implications for Medicaid reimbursement policies related to nursing homes.

A law firm specializing in Medicare and Medicaid reimbursement, sb2 Healthcare, has brought a case on behalf of 21 Maryland operators to address the denial or nonpayment of Medicaid claims without affording appeal rights for residents who have been approved for skilled nursing care.

According to sb2 Managing Partner Chad Bogar, the issue at the center of the dispute is whether providers have a protected property interest in their Medicaid claims. If the court interprets Medicaid claims as constituting a property interest, the claims can be protected under the Due Process Clause of the U.S. Constitution, Bogar told Skilled Nursing News.

In the Maryland case, the firm established that providers do have a protected property interest in approved applications for Medicaid. The ruling creates a mechanism for operators to protect their revenue by making it more difficult for state agencies to deny claims with no basis, or not pay approved claims.

In Maryland and other states a Provider Resolution Unit (PRU) reviews previously approved applications for Medicaid related to coverage for skilled nursing care. If the unit concludes that an application should not have been approved, it can rescind the approval without any notice or appeal rights given to the resident or provider.

Providers cannot file appeals to administrative law judges to recoup their claims because there is no jurisdiction, Bogar said.

“Somehow, it gets trapped in PRU,” Bogar said. “There’s no due process. There’s nothing. So if PRU decides that a Medicaid application should not have been approved for whatever reason, there’s nothing you can do.”

Bogar said the firm’s litigation theory has been used to win cases in Illinois and Maryland, and could create a precedent for similar cases across the nation for providers that face similar challenges regarding their Medicaid claims.

“This is a giant step forward in protecting skilled nursing providers’ revenue in Maryland and every other state,” Bogar said. His law firm is now planning to file federal suits in Ohio, Indiana and Illinois, seeking to enforce providers’ constitutionally protected property interests in approved Medicaid applications. These states are among those that failed to comply with CMS regulations, causing significant revenue loss, he said.

And the litigation strategy may be more relevant to providers now than ever before.

In the past, residents and providers could use a legal strategy known as the “Blessing Analysis” to enforce various provisions under the Medicaid Act, Bogar said, adding that only in two instances does the Act explicitly state that providers and residents have the right to enforce the Medicaid Act through legal action.

“We’ve been noticing for years that the right to enforce the Medicaid Act was becoming more and more tenuous,” he said. “The Blessing analysis basically takes the position that if it kind of looks like Congress was once giving [residents and providers] the right or the ability to enforce these various provisions, they’ll let you do it.”

The Supreme Court is currently reviewing a case which may be leveraged to further restrict providers’ right to enforce violations by the state of the Medicaid Act, and the due process clause litigation strategy will be important for providers to be aware of, Bogar said.

The Supreme Court case in question raises the issue of whether Medicaid beneficiaries can seek relief in federal court when they believe their rights are being violated by state officials, or whether the enforcement of state-level compliance of federal Medicaid rules should be left solely to the scrutiny of CMS.

The case, concerning a provider in Indiana, is relevant to providers that receive federal funding on a national level. Among other implications, it would determine whether or not providers can sue the state to address the denial or nonpayment of Medicaid claims.

The Indiana case's litigation began in 2019 when Susie Talevski sued the Health and Hospital Corporation of Marion County (HHC), which owns Valparaiso Care and Rehabilitation, the nursing facility at which Susie Talevski said her late father's rights were violated.

Since Gorgi Talveski was a Medicaid recipient, HHC said that Talevski had no right to sue, and, along with operator American Senior Communities, filed a petition to have the Supreme Court review the case after a lower court allowed it to continue.

A ruling in HHC's favor would mean that both residents and providers who rely on federal assistance programs would lose the right to sue the state, and the Blessing Analysis could be eliminated. Yet for recouping Medicaid claims and enforcing CMS eligibility requirements, Bogar said the due process clause may provide an important loophole.

Bogar expects that the Supreme Court will likely quash the Blessing Analysis. However, providers should take heart that there are other options, one being the method utilizing the due process clause that his law firm has used to win in Maryland.