

If you have questions regarding the information in this alert or would like to receive further information regarding our Health Care Department, please contact:

Jennifer L. Benedict
313.465.7326
jbenedict@honigman.com

Scott D. Geromette
313.465.7398
sgeromette@honigman.com

Ann T. Hollenbeck
313.465.7680
ahollenbeck@honigman.com

Matthew R. Keuten
313.465.7510
mkeuten@honigman.com

Kenneth R. Marcus
313.465.7470
kmarcus@honigman.com

Erica D. Partee
313.465.7528
epartee@honigman.com

Linda S. Ross
313.465.7526
lross@honigman.com

**Angela Epolito
Sprecher**
313.465.7540
asprecher@honigman.com

D.C. Circuit Holds That Provider Reimbursement Review Board Jurisdiction Is Subject To Equitable Tolling

On June 24, 2011, the United States Court of Appeals for the District of Columbia (D.C. Circuit) issued its decision in *Auburn Regional Medical Center, et al. v. Sebelius*, No. 10-5115 (D.C. Cir. June 24, 2011). The *Auburn* decision is very significant to hospitals because: (1) it holds that the dismissal of an appeal by the Provider Reimbursement Review Board (PRRB) for lack of jurisdiction is subject to judicial review, and (2) it establishes that the statutory 180-day deadline for filing an appeal with the PRRB, as provided by 42 U.S.C. § 1395oo(a), is subject to equitable tolling. [Click here](#) for a copy of the decision. Moreover, this decision potentially enables hospitals to seek relief regarding the computation of the SSI% fraction (also referred to as the Medicare Fraction) of the disproportionate share hospital adjustment (DSH Adjustment) in light of the D.C. district court's prior decision in *Baystate Med. Ctr. v. Leavitt*, 545 F. Supp. 2d 20 (D.D.C. 2008). In *Baystate*, the district court affirmed the PRRB's decision that errors in the Center for Medicare and Medicaid Services' (CMS) calculation of the SSI % fraction required a recalculation. After exhausting administrative remedies before the PRRB and the Administrator of CMS, all hospitals have the right to file appeals in the jurisdiction of the D.C. Circuit. Therefore, *Auburn* has a broad, national impact.

The PRRB And District Court Decisions

The hospitals in *Auburn* belatedly filed an appeal with the PRRB for the fiscal years of 1987 through 1994, arguing, in light of the *Baystate* decision, that their DSH payment adjustments were understated because the SSI% was calculated with inaccurate data. Although the hospitals acknowledged that they did not satisfy the 180-day appeal requirement, they argued that equitable tolling of that deadline applied to their appeals since they did not discover the miscalculated DSH adjustments until 2006 (after the PRRB's findings in the *Baystate* decision). Thus, the hospitals in *Auburn* argued that the 180-day deadline for the appeals of their DSH payments should have begun to run after the PRRB's decision in *Baystate*. The PRRB held that it did not have authority to toll the limitations period for filing Medicare appeals and, accordingly, held that the hospitals' appeals were untimely and that the PRRB lacked jurisdiction. The hospitals then appealed the PRRB's decision to the district court. The district court found that it lacked jurisdiction to review the PRRB's decision because the decision was not final, for purposes of 42 U.S.C. § 1395oo(f)(1), and also held that the Medicare statute does not permit equitable tolling.

The D.C. Circuit Decision

The D.C. Circuit reversed the district court's decision on the jurisdiction and equitable tolling issues.

In reversing the district court on the jurisdiction issue, the D.C. Circuit relied on its findings in *Athens Community Hospital, Inc. v. Schweiker*, 686 F.2d 989 (D.C. Cir. 1982) in reasoning that "courts have jurisdiction to review a decision by the PRRB declining to hear a case on the basis of lack of PRRB jurisdiction" because such a decision is final and binding on the parties. Accordingly, the D.C. Circuit held that the PRRB's denial of the hospitals' appeals for lack of jurisdiction was subject to the district court's review.

The D.C. Circuit also found that there is a "rebuttable presumption" in favor of the equitable tolling of limitations periods in statutes unless such tolling conflicts with the text of the applicable statute. The Court then stated that the rebuttable presumption also applies to the limitations periods set forth in the Medicare statute. In support of its position favoring equitable tolling of the Medicare statute, the D.C. Circuit reasoned that, in contrast to certain sections of the Federal Tax statute which contain explicit exceptions to the limitations periods that may rebut a presumption of equitable tolling under that statute, the limitations periods provided under the Medicare statute contain "fairly simple language" indicating that Congress intended to allow equitable tolling of the Medicare statute. Thus, because Congress did not enact "a complex set of exceptions" to the limitations periods for provider appeals under the Medicare statute, the D.C. Circuit held that such requirements were subject to equitable tolling.

Action Steps

In light of *Auburn*, hospitals may have the opportunity to belatedly appeal the SSI% computation of their DSH Adjustment for cost reporting periods prior to the issuance of the *Baystate* decision. While a hospital's appeal rights are subject to certain specific facts and circumstances, such as whether the hospital previously filed an appeal regarding the SSI%, we recommend that hospitals review their prior cost reporting periods to determine whether an opportunity to file a beneficial appeal under the equitable tolling principle is available. We would be happy to discuss with hospitals the implications of this decision to their specific circumstances, and whether there may be an appeal opportunity.

For more information regarding the *Auburn* decision or for assistance with any Medicare appeals, please contact Kenneth R. Marcus or any other member of the Honigman Health Care Department.