

THE NATIONAL LAW REVIEW

Fifth Circuit Decision is Rare Victory Permitting District Court to Enjoin Recoupment Before Provider Exhausts Administrative Remedies

Tuesday, April 17, 2018

The all-too-common story of a healthcare company declaring bankruptcy in the face of aggressive Medicare recoupment actions before the company even has a hearing before an Administrative Law Judge (ALJ) may get a new ending – at least in the Fifth Circuit. Although the Fifth Circuit Court of Appeals remanded the case, *Family Rehabilitation, Inc. v. Azar*, back to the district court and thus it is still too soon to tell the ultimate outcome, it reversed the district court and held that there is jurisdiction for a district court to enjoin CMS recoupment during the administrative appeals process. This decision is a big win for companies navigating the difficult and seemingly one-sided process of Medicare recoupment actions. In late March, Family Rehabilitation, Inc. (Family Rehab) successfully challenged a district court decision to dismiss the company’s request for an injunction against recoupment until the company received an ALJ hearing. The U.S. District Court for the Northern District of Texas originally dismissed Family Rehab’s injunction request for lack of subject-matter jurisdiction because Family Rehab had not yet exhausted its remedies under the administrative process mandated by the Medicare Statute before seeking relief in federal court (the so-called “channeling requirements”). [The Fifth Circuit reversed the district court’s decision](#) on the basis that Family Rehab’s due process and *ultra vires* (exceeding statutory authority) claims met the “collateral-claim” exception to the jurisdictional channeling requirements.

Family Rehab is a home healthcare services provider in Texas, with up to 94% of its revenue coming from Medicare. Like all home healthcare providers, Family Rehab must complete an initial home health certification for each patient. In 2016, a Zone Program Integrity Contractor (ZPIC) audited 43 of Family Rehab’s claims and determined that the company had overbilled Medicare on 93% of those claims. The ZPIC based that finding on document-related deficiencies stemming from the initial home health certifications. The ZPIC extrapolated this 93% error rate to all of Family Rehab’s Medicare claims and concluded that the company had received approximately \$7.89 million in excess reimbursements from Medicare.

Family Rehab’s Medicare Administrative Contractor (MAC), Palmetto GBA, LLC, sent Family Rehab a demand letter for this amount. Following the administrative process set forth in the Medicare Statute and regulations, the company first requested that the MAC redetermine the overpayment. Palmetto denied the request for reconsideration, so, still following the statutory appeals process, Family Rehab submitted a request for reconsideration to a Qualified Independent Contractor (which is hired by CMS as part of this process). The QIC denied Family Rehab’s request for reconsideration.

In the event that a QIC affirms the MAC’s overpayment determination, the Medicare Statute permits the MAC to begin recouping overpayments by garnishing future reimbursements otherwise due to the provider. Accordingly, after the QIC denied Family Rehab’s request for reconsideration, Palmetto notified the company that it intended



Article By
[Samantha P. Kingsbury](#)
[Laurence J. Freedman](#)
[Mintz Health Law & Policy Matters Blog](#)
[Health Law & Managed Care Litigation / Trial Practice](#)
[5th Circuit \(incl. bankruptcy\) Texas](#)

to begin recoupment on November 1, 2017.

The third step in the appeals process involves requesting a hearing from an ALJ, which Family Rehab did on October 24, 2017. Family Rehab learned that its ALJ hearing would not be scheduled for at least another **three to five years** (due in part to the backlog of agency appeals and the lack of resources to address the backlog). Like many companies in its position, Family Rehab realized that due to the MAC's recoupment efforts and the long delay before any possible hearing, it would be forced to shut down before it ever had the chance to challenge the recoupment in front of an ALJ. Faced with these circumstances, Family Rehab sought an injunction in federal district court to prevent Palmetto from recouping the alleged overpayment until the administrative appeal had been concluded.

After the district court denied Family Rehab's appeal on the jurisdictional ground that the company had yet to exhaust its administrative remedies — and thus this matter was not a "final decision" over which the court had jurisdiction — Family Rehab appealed to the Fifth Circuit. The Fifth Circuit accepted Family Rehab's argument that the company met the "collateral-claim" exception to the Medicare statute's channeling requirement on the grounds that: (1) its procedural due process and *ultra vires* claims were entirely collateral to the substantive agency decision; and (2) full relief could not be obtained at a post-deprivation hearing.

Under the "collateral-claim" judicial exception, courts can deem the requirement of exhausting administrative review as waived, giving them jurisdiction over the claim at issue. Here, the Fifth Circuit found that Family Rehab's claim met the "collateral" element because it did not require the court to address the substance of the underlying Medicare claim or make a factual determination as to the application of the Medicare statute, did not request the substantive relief Family Rehab was seeking through the agency appeals process (*i.e.*, overturning the overpayment determination), and sought relief that was unavailable through the administrative process. With respect to the requirement that full relief could not be obtained at a post-deprivation hearing, the court found that Family Rehab met this element because the combined threats of going out of business and disruption to Medicare patients were sufficient to allege the required "irreparable injury."

Because Family Rehab succeeded in obtaining a remedy where many similarly situated healthcare companies have failed, we can expect to see more companies subject to recoupment making similar arguments. We also expect the U.S. Department for Health and Human Services to strongly contest this ruling by seeking reconsideration or *en banc* review, and to vigorously defend other suits by providers seeking injunctions of recoupments. We will continue to follow this case and report back on any developments.

© 1994-2019 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. All Rights Reserved.

Source URL: <https://www.natlawreview.com/article/fifth-circuit-decision-rare-victory-permitting-district-court-to-enjoin-recoupment>