

## TERMINATION OF MEDICARE/MEDICAID PARTICIPATION AND PROVIDER CHALLENGES

### In This Issue:

- Medicare Termination
- Medicaid Termination
- Termination "For Cause"
- Temporary Restraining Order

[www.HealyLawDC.com](http://www.HealyLawDC.com)

*A health law firm in  
the nation's capital*

For most providers, termination from participation in the Medicare and Medicaid programs would have a profound impact on the provider's ability to remain financially viable. This is particularly true for long-term acute care hospitals ("LTACHs"), due to the medically complex patient population they treat, the high level of resources expended, and the inability of LTACHs to re-enroll in Medicare during the moratorium. CMS issued new guidance this year to clarify the circumstances when a State must terminate a provider's participation in that State's Medicaid program after the provider's participation in Medicare or another State Medicaid program has been terminated. Providers have a number of options to challenge a termination of program participation if they act quickly. A recent decision from the United States District Court for the Southern District of Alabama granted a temporary restraining order to a Skilled Nursing Facility ("SNF") less than 24 hours before the termination was to take effect.<sup>1</sup> Although such reprieves are rare, providers have other administrative options to successfully avoid termination and reach a favorable result. Because time is of the essence, it is important to alert your in-house legal department as soon as program termination is threatened. Outside counsel can help with the administrative appeals and judicial challenges to a termination action.

Please feel free to reach us at the phone number or email address to the left if you have questions about how to prepare for a program termination or need assistance in challenging one.

### CMS Informational Bulletin and Terminations "For Cause."

Section 6501 of the Patient Protection and Affordable Care Act ("PPACA"), which amended Section 1902(a)(39) of the Social Security Act ("SSA"), requires a State to terminate a provider's participation in Medicaid if the provider's participation in Medicare or another State's Medicaid program is terminated. Although the Centers for Medicare & Medicaid Services ("CMS") published a definition of "termination" in February 2011<sup>2</sup>, some states have requested additional clarification. A recent informational bulletin, issued by CMS through its Center for Program Integrity and Center for Medicaid and CHIP Services, clarifies

Jason M. Healy  
Attorney at Law  
1667 K Street, NW  
Suite 1050  
Washington, DC 20006

(202) 706-7926  
(888) 503-1585 fax

[jhealy@healylawdc.com](mailto:jhealy@healylawdc.com)

the circumstances under which a state Medicaid agency must terminate a provider's participation.<sup>3</sup>

The new termination requirement, codified at 42 U.S.C. § 1396a(a)(39), expands the existing rule that a state Medicaid agency must terminate a provider from participation in the state's Medicaid plan when the provider engages in certain prohibited activity, described under Sections 1128 or 1128A of the SSA. For example, under Section 1128, a provider who has been convicted of a program-related crime, patient abuse, or health care fraud must be excluded from participation in Medicare. A provider is terminated when "the Medicare program has revoked the provider or supplier's billing privileges, and the provider has exhausted all applicable appeal rights or the timeline for appeal has expired," and there is no expectation that the revocation is temporary.<sup>4</sup> State Medicaid agencies then must terminate any provider that "had their billing privileges revoked *for cause* which may include, but is not limited to fraud, integrity or quality."<sup>5</sup>

In an earlier informational bulletin, CMS stated that "for cause" does not include "any voluntary action by the provider to end its participation in the program except where that 'voluntary' action is taken to avoid sanction."<sup>6</sup> Nevertheless, some states were terminating providers for neutral acts, such as allowing a medical license to expire because the provider was relocating.<sup>7</sup> In the recent informational bulletin, CMS clarified that "for cause" revocations are limited to those based upon issues relating to fraud, integrity or quality.<sup>8</sup> CMS also reminded states that they may seek a waiver from program termination under 42 U.S.C. §§ 1320a-7(c)(3)(B) or 1320a-7a(d)(3)(B) if the termination of a provider's participation in the state's Medicaid program would impose a hardship on Medicaid beneficiaries, and the provider is the sole source of essential specialized services in a community.<sup>9</sup>

**SNF Obtains Temporary Restraining Order to Stay Termination.** An Alabama SNF was granted a temporary restraining order ("TRO") barring CMS from terminating its Medicare and Medicaid participation less than 24 hours before the termination was to take effect. In *GOS Operator, LLC v. Sebelius*, \_\_\_ F. Supp. 2d. \_\_\_, No. 12-0035-WS-N (S.D.Ala. Jan. 20, 2012), the Alabama Department of Public Health reported escalating deficiencies in surveys of Gordon Oaks Healthcare Center in July, September and October 2011, including nine that posed "immediate jeopardy" to residents' health and safety. In revisit surveys in November and December 2011, the state agency reported that the "immediate jeopardy" conditions had been addressed satisfactorily, but the SNF was still out of substantial compliance with certain lower level deficiencies.<sup>10</sup> CMS proceeded towards terminating Gordon Oaks' Provider Agreement effective January 21, 2012.<sup>11</sup>

Gordon Oaks filed an administrative appeal on January 13, 2012 challenging the pending termination. With CMS and Alabama Medicaid intent on terminating the SNF's Medicare and Medicaid participation, Gordon Oaks also took the additional step of filing a lawsuit on January 19, 2012 in federal court. Just two days before the effective date of the termination, the SNF sought a TRO that would restrain CMS and Alabama Medicaid from effectuating terminations until the administrative appeal process concluded.<sup>12</sup>

A party may seek a TRO to prevent an action that would cause "immediate and irreparable injury, loss, or damage."<sup>13</sup> Generally, a party seeking a TRO must establish "a substantial likelihood of success on the merits," "that irreparable injury will be suffered if the relief is not granted," "that the threatened injury outweighs the harm the relief would inflict" on the enjoined party, and that the TRO would "serve the public interest."<sup>14</sup> The court analyzed these four factors and determined that Gordon Oaks had met each of them.<sup>15</sup> The court found persuasive the argument that the SNF would be put out of business by the termination, that the residents would be "uprooted and scattered to the four winds," and that "by the time any administrative hearing happens, it will be too late to put Humpty Dumpty back together again."<sup>16</sup> Three weeks later, the court denied the SNF's request for a preliminary injunction because it found that Gordon Oaks was unlikely to prevail on the merits, but the court retained jurisdiction to consider whether the SNF is entitled to permanent injunctive relief from the termination.<sup>17</sup>

**Challenging a Notice of Termination.** As the *GOS Operator* case illustrates, providers need to understand all of the options available to challenge a Medicare or Medicaid termination and be ready to act quickly, on multiple fronts, to allow the administrative process time to work. The CMS informational bulletin is intended to help prevent States from terminating a provider's Medicaid participation for less than serious offenses. But when a provider's plan of correction is not deemed acceptable and program termination is looming, the provider must involve legal counsel to mount an effective challenge. In general, CMS must provide 15 days prior written notice of termination.<sup>18</sup> However, if CMS believes patients are in "immediate jeopardy," the provider might have as little as 48 hours to act. If faced with imminent termination, a provider has certain administrative and judicial options.

First, the notice that CMS intends to terminate the participation agreement is a determination that can be appealed to an Administrative Law Judge ("ALJ").<sup>19</sup> The provider should immediately appeal the determination and request expedited review from the ALJ. Depending on the outcome at the ALJ level, the provider can further appeal to the Departmental Appeals Board ("DAB") and eventually federal court. However, this administrative

appeal process takes time and does not stay (*i.e.*, put on hold) the termination.

Second, CMS can reconsider the termination, re-open the determination, or enter into a Systems Improvement Agreement (“SIA”) to defer termination for some period of time (*e.g.*, one year). A pending ALJ review may encourage CMS to work with the provider to craft an alternative remedy.

Third, the provider can seek a TRO and/or a preliminary injunction in federal court. Although the district court granted the TRO sought by Gordon Oaks, the granting of a TRO and/or preliminary injunction is rare. Many courts have held that Medicare participation is not a property interest giving rise to a due process right and that a provider is *not* entitled to a hearing *prior to* termination of the Medicare provider agreement.<sup>20</sup> While difficult to obtain, a TRO or preliminary injunction can buy the provider enough time to pursue its administrative remedies while still participating as a Medicare and Medicaid provider. If granted, a TRO or preliminary injunction also allows the parties a “cooling off period” in which to reach an alternative solution.

- 
1. *GOS Operator, LLC v. Sebelius*, \_\_\_ F. Supp. 2d. \_\_\_, No. 12-0035-WS-N (S.D.Ala. Jan. 20, 2012).
  2. See 76 Fed. Reg. 5682 (Feb. 2, 2011); 42 C.F.R. § 455.101.
  3. CPI-CMCS Informational Bulletin, Affordable Care Act Program Integrity Provisions – Guidance to States – Section 6501 – Termination of Provider Participation under Medicaid if Terminated under Medicare or other State Plan, Bulletin CPI-B 12-02 (Jan. 20, 2012).
  4. 42 C.F.R. § 455.101.
  5. *Id.* (emphasis added and formatting omitted).
  6. CPI-CMCS Informational Bulletin, Affordable Care Act Program Integrity Provisions – Guidance to States – Section 6501 – Termination of Provider Participation under Medicaid if Terminated under Medicare or other State Plan, Bulletin CPI-B 11-05 (May 31, 2011).
  7. *Id.*
  8. CPI-CMCS Informational Bulletin (Jan. 20, 2012).
  9. *Id.*
  10. *GOS Operator, LLC v. Sebelius*, \_\_\_ F. Supp. 2d. \_\_\_, No. 12-0035-WS-N (S.D.Ala. Jan. 20, 2012).
  11. *Id.*
  12. *Id.*
  13. Fed. R. Civ. P. 65.
  14. *Id.*
  15. *GOS Operator* (citing *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225-26 (11th Cir. 2005); *Int’l Long Term Care, Inc. v. Shalala*, 947 F. Supp. 15, 17 (D.D.C. 1996); *DeNovellis v. Shalala*, 135 F.3d 58, 62 (1st Cir. 1998)).
  16. *GOS Operator*.
  17. See *GOS Operator v. Sebelius*, \_\_\_ F. Supp. 2d. \_\_\_, No. 12-0035-WS-N (S.D.Ala. Feb. 10, 2012).
  18. 42 C.F.R. § 489.53(d).

19. See, e.g. 42 C.F.R. §§ 488.24(c), 489.53(e), 489.54(c).
20. See *Geriatrics, Inc., d/b/a Eventide of Lakewood Nursing Home v. Harris*, 640 F.2d 262 (10th Cir. 1981), cert. denied, 454 U.S. 832 (1981).

---

## About Us

The Law Offices of Jason M. Healy PLLC is a health care law firm that focuses exclusively on legal issues affecting health care providers. We help health care providers and their trade associations understand Medicare and Medicaid laws and regulations. We also represent health care providers in reimbursement audits, appeals, and litigation. Located in Washington, DC, we are well positioned to provide legal support for advocacy efforts. Our principal, Jason M. Healy, is a health care lawyer with over 14 years of experience with the array of legal issues facing health care providers.

This alert is published by The Law Offices of Jason M. Healy PLLC. It is not intended to provide legal advice or opinion. Such advice may only be given in connection with specific fact situations that the law firm has been engaged as counsel to address.

©2012 The Law Offices of  
Jason M. Healy PLLC