



**DuaneMorris®**  
Attorneys at Law

## THE MEDICARE BAD DEBT MORATORIUM: *Still Alive and Kicking*

**H**ealth care providers want to know: Does the Medicare Bad Debt Moratorium, long under fire from the Centers for Medicare and Medicaid Services (CMS), currently offer providers any protection from disallowances of bad debts? Recent court decisions indicate that the Moratorium may still prohibit CMS from disallowing providers' bad debts in some circumstances.

In the late 1980s, Congress passed a series of provisions intended to protect health care providers from disallowances of Medicare bad debt reimbursement based on the imposition of new requirements on providers. These statutory provisions collectively became known as the Medicare Bad Debt Moratorium (the "Moratorium"). Among other things, the Moratorium prohibits the Medicare program from requiring a provider to change its bad debt policy where (1) the provider's intermediary had accepted that bad debt policy prior to August 1, 1987, and (2) the intermediary's acceptance was in accordance with existing rules and regulations.

Ever since Congress acted to restrict new disallowances of bad debts, CMS has attempted to apply the protections of the Moratorium as narrowly as possible. However, the Moratorium still remains in the statute books, and recent court decisions strongly suggest that providers should not abandon all hope of protection under the Moratorium from disallowances of their bad debts.

### ATTEMPTS BY CMS TO RESTRICT THE MORATORIUM

Through informal guidance issued to intermediaries, CMS has contended that the Moratorium does not apply in numerous situations, such as when a provider undergoes a change in ownership, with a new provider number, or a change in its intermediary. Another way that the Medicare program has tried to defeat application of the Moratorium is to assert that the provider changed its bad debt policy so that the previously accepted policy is no longer applicable. In its latest attack on the Moratorium, CMS issued a "joint signature memorandum" in May 2008, instructing Medicare contractors to disallow Medicare bad debts for patient accounts remaining at an outside collection agency even where the contractors may have allowed such bad debts in past audits based on the Moratorium. CMS claims that its long-standing policy required that accounts be returned to providers from outside collection agencies before the providers may claim the unpaid balances as bad debts. According to CMS' logic, any previous allowance of bad debt reimbursement for accounts remaining at collection agencies would not have been in accordance with the rules in existence as of August 1, 1987, meaning that the Moratorium's protection is inapplicable.

### POSSIBLE PITFALLS FOR PROVIDERS

Based on CMS' directives, Medicare contractors are increasingly disallowing providers' bad debt claims that in prior cost report audits would have been allowed. Providers faced with potential disallowances of Medicare bad debts may feel that they have little choice but to consider

changes in their arrangements and practices involving outside collection agencies in an attempt to comply with current Medicare policy. For example, a provider that previously claimed Medicare bad debts after completing its internal collection efforts, but before instructing outside collection agencies to cease collection efforts, could decide that in the future, it will "recall" patient accounts from outside collection agencies before it claims the unpaid balances as Medicare bad debts. Before doing so, however, the provider must take into account that it will likely have to recall all patient accounts from the collection agencies (or at least the accounts with comparable balances and collection experience), not just the Medicare accounts. Otherwise, the Medicare contractor may next claim that the Medicare bad debts are not allowable because the provider engaged in dissimilar collection efforts for Medicare and non-Medicare accounts.

Another pitfall in changing practices regarding outside collection agencies for some providers is that the provider may lose potential protection from bad debt disallowances under the Moratorium. In future cost report audits, the Medicare contractor may well find fault with a different aspect of the provider's bad debt practices and claim that the Moratorium does not apply to the provider any longer because the provider has changed its policy.

### RETURN OF THE MORATORIUM

Recent federal court decisions demonstrate that the Moratorium still can be a potent weapon against arbitrary bad debt disallowances. In a 2007 decision, a California district court overturned an intermediary's disallowance of a hospital's bad debts for accounts remaining at a collection agency, finding that the Moratorium barred denial of reimbursement because the intermediary had previously accepted the provider's bad debt policy. More recently, the U.S. District Court for the District of Columbia held that the Moratorium prohibited CMS from making any change in its bad debt policies that were in effect as of August 1, 1987. This decision, if followed in subsequent cases, could expand the protection of the Moratorium to providers that cannot prove that the intermediary previously accepted the provider's own bad debt policies.

Despite CMS's attempts to consign the Moratorium to ancient reimbursement history, the Moratorium remains in effect and may serve as a potent weapon for providers considering whether they may be able to challenge bad debt disallowances.

If you have a question on this material or would like to discuss legal services, please contact us at [healthcare@duanemorris.com](mailto:healthcare@duanemorris.com).



**Christopher L. Crosswhite**, a Duane Morris Health Law partner in Washington, D.C., assists providers on a variety of Medicare and Medicaid issues, including reimbursement and billing, corporate compliance, and healthcare fraud and abuse.