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## D.C. Appeals Court Provides Mixed Victory to Provider on DSH Calculation Involving Medicare Part C Days

By: [Mark A. Stanley](#)

In a limited victory for providers, the United States Court of Appeals for the District of Columbia Circuit ruled in [Northeast Hospital v. Sebelius \[PDF\]](#) that CMS used an impermissibly retroactive policy when it calculated the provider's disproportionate share hospital (DSH) adjustment. Although the provider prevailed in Northeast Hospital, the decision threatens to dramatically reduce DSH reimbursement for any provider with a significant Medicare managed care population.

The DSH calculation measures the number of patient days associated with low income patients using two fractions: (1) the Medicare fraction, which includes only days associated patients that are "entitled to benefits under Medicare Part A," and (2) the Medicaid fraction, which excludes days associated with patients that are "entitled to benefits under Medicare Part A." The issue in Northeast Hospital was the proper treatment of patient days associated with beneficiaries who are both enrolled in Medicare Part C and eligible for Medicaid. Inclusion of days associated with such patients in the Medicare fraction, as opposed to the Medicaid fraction, significantly diminishes reimbursement under the DSH adjustment.

CMS argued that all Part C enrollees are "entitled to benefits under Medicare Part A," and therefore such days should be counted in the Medicare fraction. The provider argued that Part C enrollees are not entitled to benefits under Part A, and (assuming Medicaid eligibility) such patient days should only be included in the Medicaid fraction. The provider also argued that the policy of including days associated with Part C beneficiaries in the Medicare fraction was not articulated until August of 2004, and therefore its application to the cost years at issue (1999-2002) was impermissibly retroactive.

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The D.C. Circuit ruled for the provider, but limited the scope of that victory. While the D.C. Circuit accepted the provider's position regarding the impermissible retroactivity of the CMS policy, the court rejected the additional argument, which had been accepted by the district court, that inclusion of Part C patient days in the Medicare fraction was not allowed under the DSH statute. The court ruled that the language of the statute was not clear and, applying the time-honored Chevron analysis, ruled that the "statute does not unambiguously foreclose the Secretary's current interpretation."

#### **Ober|Kaler's Comments**

The decision in Northeast Hospital is unquestionably a win for the provider, but the salutary effects may be limited to pre-2004 cost reporting periods. Curiously, despite extensive analysis under Chevron step one, the D.C. Circuit declined to state whether CMS's interpretation of the DSH statute was reasonable, and thus allowable under Chevron step two. The Northeast Hospital opinion therefore walks right up to the point of accepting the CMS position for cost reporting periods after August 2004, without formally doing so. The result is a somewhat muddled picture for providers with DSH appeals applying to post-2004 periods.