

# LAW WATCH

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A Legal Newsletter from Foley & Lardner

APR. 12, 2000

The United States Supreme Court has recently ruled in *Shalala v. Illinois Council on Long Term Care, Inc.*, that hospitals, nursing homes and other participants in the Medicare program may not file an anticipatory challenge to the validity of Medicare regulations, but must first exhaust their administrative remedies before seeking relief in the federal courts.

## Background

An association of Illinois nursing homes participating in the Medicare program filed suit in federal District Court, claiming that certain Medicare regulations concerning penalties for nursing homes that failed to meet safety and health standards violated various federal laws and the United States Constitution. The regulations were promulgated following Congress' 1987 OBRA amendments to the Social Security Act, which provided for stricter health and safety standards, as well as penalties for nursing facilities that did not satisfy those standards. After these new regulations were implemented, the percentage of nursing homes in Illinois found out of compliance with the requirements of Medicare and Medicaid jumped from 6% to nearly 70%. In its lawsuit, the association alleged that this drastic change occurred because the new regulations are vague and leave too much discretion to the individual surveyors, and therefore the regulations are invalid.

## The Decisions of the Lower Courts

The District Court dismissed the suit brought by the nursing home asso-

## UNITED STATES SUPREME COURT RULES THAT ANTICIPATORY CHALLENGES TO MEDICARE REGULATIONS MAY NOT BE BROUGHT IN FEDERAL COURT

### Executive Summary

*Action: The United States Supreme Court recently ruled that federal courts lack jurisdiction to address anticipatory challenges to the validity of Medicare regulations. Instead, the Court held, all challenges to the validity of Medicare regulations must first be channeled through the special administrative review process created by the Medicare Act before such challenges can be heard by the federal courts.*

*Impact: Before bringing their claims in federal court to challenge the facial invalidity of a Medicare regulation, providers must first resort to the same administrative review procedures currently established by the Medicare Act to address challenges to individual benefit determinations or enforcement measures. The Court's decision does not affect the ultimate ability of Medicare providers to obtain federal court review of their challenges to the validity of Medicare regulations; the decision impacts only the timing of such challenges. As a practical result, however, the inability to obtain immediate federal court review will often prove prohibitive to a provider's challenge given the expense and length of time involved in taking a challenge through the administrative process.*

*Effective Date: Immediately.*

ciation on the ground that the court lacked jurisdiction to hear the case. The District Court held that the Medicare Act adopted a set of special statutory provisions which created a separate and virtually exclusive administrative and judicial review process for the denial of Medicare claims, and that this exclusive system included facial challenges brought against Medicare regulations. Under this system, Medicare-related claims must be first addressed by an administrative tribunal, and then pass through the administrative review process, before a federal court is empowered to entertain the matter. The District Court held that the association's lawsuit must be dismissed because it had been filed directly in federal court, without exhaustion of the prescribed administrative review process.

The Seventh Circuit Court of Appeals (WI, IL, IN) reversed the decision of the District Court. Relying upon earlier decisions of the Supreme Court which seemed to draw a distinction between claims for benefits and other challenges under Medicare regulations, the Court of Appeals held that a facial challenge to a Medicare regulation falls outside of the exclusive administrative appeal and judicial review system established by the Medicare Act. Therefore, the Court of Appeals held, the federal courts do possess jurisdiction to address anticipatory challenges to Medicare regulations.

## The U.S. Supreme Court's Holding

On February 29, 2000, by a narrow five to four majority, the United States

Supreme Court in ***Shalala v. Illinois Council on Long Term Care, Inc.*** overturned the ruling of the Seventh Circuit and held that a federal court may not entertain an anticipatory constitutional or statutory challenge to the validity of a Medicare regulation.

The nursing home association argued that the Medicare Act's exclusive administrative review procedures were crafted to relieve the courts from the burden of handling the oftentimes trivial and minor matters of individual eligibility and benefit determinations which might otherwise flood the courts, and that this concern does not exist where a provider challenges the validity of a regulation. As the association further argued, the administrative review process established by the Medicare Act's rules and regulations is lengthy, complicated, and costly, and this process does not assist in the determination of constitutional and statutory challenges to the Secretary's rules and regulations. Such protracted delay, according to the association, merely serves to discourage providers from pursuing otherwise valid claims against the government.

The Court rejected the association's argument that Congress did not intend for the special administrative review process for Medicare determinations to handle anticipatory constitutional and statutory challenges to regulations. The Court held that channeling all legal attacks through the administrative process furthered Congress' goal of enabling the agency to apply, interpret, or revise its policies and regulations without the premature interference of the courts.

## The Decision's Impact

Under the Court's decision in ***Shalala v. Illinois Council on Long Term Care, Inc.***, hospitals, nursing homes, and other participants in the Medicare program may not seek pre-enforcement relief from facially invalid rules and regulations promulgated under the Medicare Act in federal court. Instead, providers must endure

the long, complex, and costly administrative review process, which may be unrelated to their constitutional and statutory claims, before those claims can be heard by a federal court. It further appears that, in practice, providers who have been found to be out of compliance with a Medicare requirement will have to refuse to submit a proposed plan of correction to the agency, and will have to incur a penalty, in order to test the lawfulness of a Medicare regulation.

The Court's decision is especially significant in light of the fact that the Department of Health and Human Services has proposed voluminous new regulations concerning the conditions for participation of hospitals in the Medicare program, which may result in an increase in the number of hospitals found to be out of compliance. If implemented, these new regulations may trigger the same constitutional or statutory concerns on the part of the affected hospitals as experienced by the Illinois nursing homes in this decision.

If you have any questions about the Supreme Court's ruling, please contact **Fredric Entin** in our Chicago office, **Anita Lee** or **Jeff Bates** in our Los Angeles office, **Frederick Geilfuss** in our Milwaukee office, **Steven Simerlein** in our San Diego office, **Judith Waltz** or **John Douglas** in our San Francisco office, **Jeffrey Micklos** in our Washington, D.C. office, or the member of the firm who normally handles your legal matters.

**Law Watch** is a review of recent legal developments prepared by the law offices of **Foley & Lardner**.

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