

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN HOSPITAL ASSOCIATION,)
et al.,)

Plaintiffs,)

v.)

Case No. 1:14-cv-00609

SYLVIA MATHEWS BURWELL, in her)
official capacity as Secretary of Health and)
Human Services,)

Defendant.)

**PLAINTIFFS’ RESPONSE TO DEFENDANT’S NOTICE OF SUPPLEMENTAL
AUTHORITY**

Plaintiffs hereby respond to Defendant’s Notice of Supplemental Authority, filed on October 20, 2014. Defendant cites *American Hospital Association v. Burwell*, ___ F. Supp. 3d ___, No. 12-1770, 2014 WL 4628312 (D.D.C. Sept. 17, 2014) and argues that this opinion supports her contention that Count II of Plaintiffs’ Complaint should be dismissed. It does not, as the cited opinion itself explicitly recognizes.

Count II challenges CMS’s decision, announced in a final rule issued last year (the “IPPS Final Rule”), to apply an impossible one-year filing deadline to hospitals’ attempts to rebill under Medicare Part B. *See* Cmplt. ¶¶ 51-56, 102-109. In the opinion Defendant now cites, unlike here, a group of plaintiffs challenged a similar policy that existed *prior* to the IPPS Final Rule. Judge Kollar-Kotelly dismissed that action. But she took pains to point out that she was doing so on grounds that do not apply to this case. First, she wrote that the plaintiffs’ action predated the IPPS Final Rule, that those plaintiffs accordingly could not “point to the actual decision introducing the policy they claim to be challenging,” and that, by contrast, “one of the

Plaintiffs, the American Hospital Association, has challenged the 2013 Final Rule in a separate action, which is currently pending.” Slip op. 9-10 & n.8. The “separate action” she then cited is this litigation. *See id.* n.8. She thereby made clear that her rationale would not control this case.

Judge Kollar-Kotelly’s dismissal also rested on a second ground not applicable here: She wrote that the plaintiffs in her case were seeking reimbursement on outdated claims for payment—claims dating from 2012 or earlier, for which CMS clawed back Part A payment and the hospitals never filed an administrative appeal. *See id.* at 14. Judge Kollar-Kotelly found that the lack of a timely administrative appeal foreclosed Plaintiffs’ claims. *See id.* That rationale has no application here because Plaintiffs are challenging a brand-new policy—the one adopted in the IPPS Final Rule—which applies only to claims for services furnished on or after October 1, 2013.

For these reasons, Judge Kollar-Kotelly’s decision does not govern the present dispute.

Dated: October 22, 2014

Respectfully Submitted,

/s/ Dominic F. Perella
Sheree R. Kanner (D.C. Bar No. 366926)
Dominic F. Perella* (D.C. Bar No. 976381)
Margia K. Corner (D.C. Bar No. 1005246)
Jennifer D. Brechbill (D.C. Bar No. 1011454)
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600

* *Counsel of Record*

Melinda Reid Hatton (D.C. Bar No. 419421)
Lawrence Hughes (D.C. Bar. No. 460627)
AMERICAN HOSPITAL ASSOCIATION
325 Seventh Street, NW
Washington, DC 20001
(202) 638-1100