

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE AMERICAN HOSPITAL ASS'N, *et al.*,

Plaintiffs,

v.

Case No. 1:14-cv-00609

SYLVIA MATHEWS BURWELL,

Defendant.

DECLARATION OF LUKE HERMANN, MD

I, Luke Hermann, hereby declare and state the following:

1. The facts set forth in this declaration are based upon my personal knowledge. If called upon as a witness, I could and would testify to these facts.
2. I am an adult citizen of the United States and reside in New York.
3. I am submitting this declaration on behalf of Plaintiff The Mount Sinai Hospital ("Mount Sinai") in support of Plaintiffs' Supplemental Brief in response to the Court's December 18, 2015 order in *American Hospital Association et al. v. Burwell*, No. 1:14-cv-00609.
4. Mount Sinai is a 1,171-bed, not-for-profit, tertiary-care teaching facility in New York City. It is part of a large academic medical center that provides numerous specialty services on its campus and serves as the teaching hospital to the Icahn School of Medicine at Mount Sinai.

5. I serve as the Senior Director of Observation Services, Appeals Management, and Hospital UM Mount Sinai Health System and I am an Associate Professor in the Department of Emergency Medicine at the Icahn School of Medicine.

6. In my capacity as Senior Director of Appeals Management, it is my responsibility to oversee the review denied Medicare claims, file requests for reconsideration and appeals and educate Mount Sinai faculty and staff on the Medicare rules and regulations.

7. It is my understanding that the Centers for Medicare & Medicaid Services (“CMS”) has instructed its Medicare Administrative Contractors (“MACs”) to conduct “Probe & Educate” reviews of small samples of each hospital’s Part A inpatient claims spanning less than two midnights. These Probe & Educate reviews were conducted on a prepayment basis to assess whether hospitals are in compliance with the admission order requirements and the two-midnights rule. If a MAC finds that a hospital’s claim does not meet the new requirements, the MAC determines that the hospital is not entitled to receive Medicare Part A reimbursement and the claim is denied.

Two-Midnights Denials

8. In March 2014, Mount Sinai responded to its first round of “Probe & Educate” reviews by its MAC, National Government Services (“NGS”). In July 2014, NGS denied a number of claims on the ground that the documentation in the medical record did not support an expected length of stay spanning two midnights or that the documentation failed to demonstrate that there was an unforeseen circumstance that interrupted the stay.

9. On or about the end of July 2014 and early August 2014, Mount Sinai appealed six of these denials. In each request for redetermination, Mount Sinai asserted the two-midnights rule is arbitrary and capricious and is therefore unlawful under the Administrative Procedure Act (“APA”). Mount Sinai further argued that had NGS applied the inpatient admissions criteria that

existed before the two-midnights rule, it would have concluded that the inpatient admission was eligible for payment under Part A.

10. In the fall of 2014, NGS issued unfavorable decisions based on the two-midnights rule for the six claims for which Mount Sinai had requested a redetermination.

11. Mount Sinai did not appeal these unfavorable reconsideration decisions to the Qualified Independent Contractor (“QIC”), Maximus Federal Services.

12. During this same timeframe, Mount Sinai responded to its second round of “Probe & Educate” reviews by NGS. In December 2014, NGS reviewed Part A claims for inpatient stays that lasted one night and that occurred in the fall of 2014. NGS denied a number of these claims on the basis of the two-midnights rule.

13. In or about February 2015, Mount Sinai appealed eighteen of the Probe & Educate denials. In its requests for redetermination, Mount Sinai argued that the two-midnights rule is arbitrary and capricious and is therefore unlawful under the APA and that had NGS applied the inpatient admissions criteria that existed before the two-midnights rule, it would have concluded that the inpatient admission was eligible for payment under Part A.

14. NGS issued unfavorable decisions based on the two-midnights rule for sixteen of the claims for which Mount Sinai had requested a redetermination.

15. Subsequent to receiving these denials, Mount Sinai requested reconsideration by the Qualified Independent Contractor (“QIC”), Maximus Federal Services, of all of the unfavorable redeterminations in its requests. Mount Sinai again challenged the two-midnights rule, arguing that the rule is unlawful under the APA because it is arbitrary and capricious, and that under the pre-two-midnights standard, the inpatient stay would have been eligible for Part A payment.

16. The QIC issued unfavorable reconsideration decisions in all of the sixteen cases.

17. Upon receiving these denials, Mount Sinai appealed each of these cases to an administrative law judge (“ALJ”) in the Office of Medicare Hearings and Appeals. The ALJ has acknowledged the request for a hearing in fifteen of these cases but has not scheduled a hearing date.

Rebilling Under Medicare Part B

18. For the appeals that are still pending, the original dates of service for the inpatient stay occurred in the fall of 2014.

19. It is my understanding that under CMS’s Part B rebilling policy, Mount Sinai is permitted to rebill under Part B after Part A payment is denied on the ground that the inpatient admission was not reasonable and necessary, which would include a denial on the basis that the two-midnights rule was not met. It is also my understanding that Mount Sinai must submit its request for Part B payment within one year of the original dates of service for the inpatient stay.

20. It is my understanding that there is a backlog of more than 800,000 Medicare claim appeals pending before the Office of Medicare Hearings and Appeals’ ALJs and that as of October 2015, it is taking on average 765 days for an ALJ to issue a decision on an appeal.

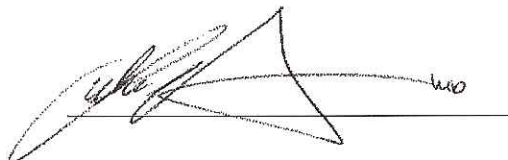
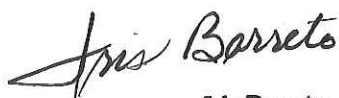
21. As a result of CMS’s application of the one-year time-limit to claims that can be rebilled under Part B, Mount Sinai is no longer able to rebill under Part B for any of the Part A appeals described above.

Costs of Compliance

22. In addition to the lost Medicare Part A reimbursement at issue in the appeals described above, Mount Sinai also has devoted significant resources and will continue to need to devote resources to comply with the technical requirements of the two-midnights and the

physician order rules. For example, Mount Sinai has provided hours of training to its physicians and medical staff regarding the two-midnights requirements and the physician order rule. The hospital also has incurred, and will continue to incur, additional costs for updating its medical records system, training its physicians and residents and revising its workflow processes

I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of January, 2016.

A handwritten signature in black ink, appearing to be 'Iris Barreto', written over a horizontal line.A handwritten signature in black ink that reads 'Iris Barreto'.

Iris Barreto
Notary Public, State of New York
Qualified in New York County
LIC# 01BA6101223
Commission Expires December 13, 2019