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### Medicare

## HHS Can't Stop Hospitals' Medicare Pay Suit



By Eric Topor

The HHS failed in its bid to derail a lawsuit challenging how Medicare Advantage patients are accounted for in certain Medicare payments to hospitals (*Allina Health Servs. v. Price*, 2017 BL 273018, D.D.C., No. 16-cv-150, 8/4/17).

The U.S. District Court for the District of Columbia Aug. 4 denied a motion to dismiss a lawsuit from 30 hospitals over Medicare's treatment of Medicare Advantage payments when calculating disproportionate share hospital (DSH) payments.

The ruling comes on the heels of a U.S. Court of Appeals for the District of Columbia Circuit decision on July 25 that invalidated a rule on the same issue, but applied to a different fiscal year (FY 2012). The issue in the July 25 appeals court ruling "presents the identical substantive issue" to the current district court litigation, Honigman Miller Schwartz and Cohn LLP attorney Kenneth Marcus said. It "would not be surprising" if the district court stayed the litigation until a final resolution is reached in the appeals court litigation, Marcus said.

The HHS can still petition the appeals court for a rehearing, or it can petition the U.S. Supreme Court for review of the July 25 ruling.

The Department of Health and Human Services argued that the hospitals' current lawsuit improperly challenged a different part of the DSH payment rule than in the original remanded lawsuit. However, the court rejected that argument because both parts of the challenged rule were interrelated.

The lawsuit was filed in January 2016 after a federal appeals court vacated an earlier lawsuit challenging the 2004 Medicare DSH payment rule, but sent the issue back to the administrator for the Centers for Medicare & Medicaid Services, who reiterated the policy through adjudication, and set up the plaintiffs' current lawsuit.

Counsel for the hospitals declined to comment on the court's decision. The HHS didn't respond to Bloomberg BNA's request for comment.

### HHS Loses Jurisdictional Argument

The DSH payment contains two fractions—the Medicare and Medicaid fractions—that together are designed to account for a hospital's lower-income patient population. The HHS's challenged rule characterized Medicare Advantage patients as being "entitled to Part A benefits" and counted in the Medicare fraction, which would have the effect of lowering the plaintiffs' DSH payments.

The HHS's argument for dismissal was that the prior litigation specifically challenged the Medicare fraction of the DSH calculation, and the present litigation, which is an appeal of the administrator's decision, challenges both the Medicare and Medicaid fractions. The HHS said the hospitals couldn't challenge the Medicaid fraction now in the appeal of the administrator's decision, which was based on a lawsuit involving only the Medicare fraction.

The hospitals countered that their initial challenge to the Medicare fraction necessarily involved the Medicaid fraction because if the DSH statute excludes Medicare Advantage patients from the Medicare fraction (as they argued in the initial lawsuit) then they must instead be included in the Medicaid fraction.

The court agreed, stating that the appeals court decision that ultimately sent the initial litigation back to the CMS administrator put both DSH fractions at issue when it said the DSH statute "unambiguously requires that Part C days be counted in one fraction or the other."

Marcus, who frequently represents hospitals in Medicare disputes and is a Bloomberg BNA advisory board member, said the court "rejected the Secretary's attempt to split hairs" on whether both DSH fractions could be challenged, and "[i]n truth, it is a single issue."

Marcus also said the decision could be important in other provider disputes with the HHS "where the Secretary contests whether an issue has been asserted and/or preserved for appeal."

Akin Gump Strauss Hauer & Feld LLP and Deutsch Hunt PLLC represented the plaintiffs. The Department of Justice represented the HHS.

### Snapshot

- Court denies HHS attempt to dismiss Medicare hospital reimbursement rule challenge
- Latest court loss for HHS on rule validity; stay of case possible pending appeals court outcome

To contact the reporter on this story: Eric Topor in Washington at [etopor@bna.com](mailto:etopor@bna.com)

To contact the editor responsible for this story: Peyton Sturges at [psturges@bna.com](mailto:psturges@bna.com)

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