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Hospitals

Hospitals Score Big Win on Appeal of Medicare Payment Rule

By Eric Topor

An HHS rule that affects how Medicare Advantage patients are accounted for in Medicare payments to hospitals with high shares of low-income patients was invalidated July 25 (*Allina Health Servs. v. Price*, 2017 BL 256447, D.C. Cir., No. 16-5255, 7/25/17).

The U.S. Court of Appeals for the District of Columbia Circuit said the rule, which is worth potentially hundreds of millions of dollars in Medicare reimbursements to hospitals nationwide, wasn't exempt from standard notice and comment procedures before taking effect. The rule said Medicare Advantage patients were deemed as entitled to Part A benefits for purposes of calculating one portion of the disproportionate share hospital (DSH) payment for fiscal year 2012, which would lower reimbursements for hospitals with high shares of low-income patients.

The appeals court panel of three judges rejected the Department of Health and Human Services' argument that the rule was merely "interpretive" and exempt from notice and comment requirements, holding instead that the interpretive rule exception wasn't applicable to the Medicare Act at all. The court's ruling on this issue broke with four other federal appeals courts—which the D.C. Circuit acknowledged, but deemed those other courts incorrect—and sets up a possible rehearing in front of the full D.C. Circuit, or potentially the U.S. Supreme Court to resolve the circuit split.

The HHS declined to comment on the court's decision. Stephanie A. Webster with Akin Gump Strauss Hauer & Feld LLP in Washington represented the plaintiff hospitals and told Bloomberg BNA July 25, "We are pleased with the Court's decision in this case."

> **Snapshot**
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> • Medicare rule on low-income patient reimbursement is invalidated; public notice and comment required
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> • Ruling could set up circuit court rehearing, or U.S. Supreme Court showdown on circuit split

Attorney Reactions

Although the decision represents a win for hospitals, its effects are dependent on whether the HHS decides to pursue a rehearing at the appeals court, or petitions the U.S. Supreme Court for review. "Depending upon whether [HHS] pursues these opportunities, and the outcome, this decision will not be final many months," or not until after 2017, if the HHS is successful in further appeals, according to Kenneth Marcus, an attorney with Honigman Miller Schwartz and Cohn LLP in Detroit, and Bloomberg BNA advisory board member.

Marcus, who frequently represents providers in Medicare matters, told Bloomberg BNA July 25 that hospitals nationwide have pending appeals at the Provider Reimbursement Review Board (PRRB) concerning the same DSH payment issue and are watching the litigation closely. Attorney Joseph D. Glazer, principal in the Law Office of Joseph D. Glazer PC in Princeton, N.J., told Bloomberg BNA July 25 that "this decision could go a long way to eliminating a big chunk of the Board's appeal backlog."

Thomas W. Coons and Leslie Goldsmith, attorneys at Baker Donelson in Baltimore, told Bloomberg BNA July 26 that the appeals court's ruling on the interpretive rule reception "would have broad application across the country" if it isn't overturned. Coons and Goldsmith, whose practices focus on representing health-care providers, noted that Medicare providers may bring Medicare appeals to the D.C. federal court's jurisdiction no matter where they are located, and "all providers would be able to avail themselves of these more stringent requirements" for the HHS.

Glazer said it's possible that HHS Secretary Tom Price could accept and implement the appeals court's ruling rather than seek a rehearing or further appeal. Glazer noted that the appeals court said the HHS's rule was invalid on multiple grounds, making a further reversal less likely, or convincing Price to "conclude that this fact pattern is not ideal to put before the Supreme Court."

Coons and Goldsmith said the decision was "excellent for providers," but wasn't final yet. Coons and Goldsmith said the issue may stir the U.S. Supreme Court's interest because it involves two issues with circuit court splits, "has significant impact for HHS rulemaking beyond this decision," and involves a significant amount of government funds.

The two circuit-split issues are whether the interpretive rule exception applies to the Medicare Act, and whether an order from the PRRB granting a provider expedited judicial review is itself reviewable. The appeals court ruled that "providers are guaranteed expedited judicial review" when the PRRB determines that it doesn't have authority to hear a provider appeal,

The PRRB generally doesn't have authority to hear Medicare disputes that challenge the constitutionality of a Medicare statutory provision, or the "substantive or procedural validity of a regulation." Marcus said the 9th Circuit has previously ruled that an expedited judicial review order from the PRRB is reviewable, contrary to the D.C. Circuit's view.

Glazer, Goldsmith, and Coons noted that the ruling would affect Medicare DSH payment for fiscal years 2005 through 2013.

No 'Interpretive Rule' Exception

The HHS's previous attempt at implementing the DSH rule promulgated in 2004 to count Medicare Advantage patients as entitled to Part A benefits was struck down by the court in a 2014 ruling because it wasn't a "logical outgrowth" of the proposed rule. The HHS implemented a new rule in 2013 to the same effect, but it was to take effect for FYs 2014 and later.

The plaintiffs' lawsuit concerned the HHS's 2014 determination sent to Medicare intermediaries of how DSH payments were to be calculated for FY 2012, which said Medicare Advantage patient days were to be counted as being entitled to Part A benefits. The 2014 determination wasn't preceded by a public notice and comment period, but the trial court said none was needed because the rule fell under the interpretive rule exception in the Administrative Procedure Act.

The appeals court, however, said the the APA's interpretive rule exception to regular notice and comment requirements didn't apply to the Medicare Act. Judge Brett M. Kavanaugh, who wrote the appeals court's opinion, said the Medicare Act "expressly requires notice-and-comment rulemaking" with no exception for interpretive rules (42 U.S.C. §1395hh(a)(2)).

Kavanaugh noted that other exceptions to notice and comment requirements were included in the Medicare Act, making the omission of an interpretive rule exception significant. Further, Kavanaugh said the Medicare Act requires a public notice and comment process when a final regulation isn't a "logical outgrowth of a previously published notice of proposed rulemaking," which was the reasoning for the 2004 rule's demise in the D.C. Circuit.

The court acknowledged that its view on the interpretive rule exception was at odds with four other circuit courts (the 1st, 6th, 8th, and 10th circuits) but said it "respectfully disagree[d] with those opinions."

Marcus said that the Centers for Medicare & Medicaid Services "had a long history of failing to promulgate regulations in accordance with APA notice and comment rule making requirements," and that "Congress enacted §1395hh specifically to require compliance with notice and rule making requirements."

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

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For More Information

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