NOW + NEXT

HEALTH CARE ALERT | NIXON PEABODY LLP

APRIL 5, 2018

New Hampshire hospitals win dispute against CMS regarding the calculation of the "disproportionate share hospital" payment, which helps hospitals care for indigent patients

By W. Scott O'Connell and Morgan C. Nighan

The New Hampshire Hospital Association and five individual New Hampshire hospitals (the "Hospitals") have won a precedent-setting victory in the United States Court of Appeals for the First Circuit against the United States Secretary of Health and Human Services (the "Secretary") and the Centers for Medicare and Medicaid Services ("CMS") related to procedurally infirm efforts to change policies regarding the calculation of "disproportionate share hospital" payments ("DSH payments") under the Medicaid Statute. The decision stops CMS from requiring New Hampshire to reduce hospital payments to hospitals for uncompensated care based on criteria not specified in the Medicaid Act.

At issue is the calculation of DSH payments made to hospitals that treat a large number of indigent patients. CMS has made several attempts to change the policy to require DSH payments to hospitals to be offset by payments received from private insurance and Medicare. The effect of this policy change is to drastically reduce DSH payments to the Hospitals, which threatens their ability to continue to operate or to provide certain services.

Background

When hospitals treat Medicaid patients, the Medicaid payments received from the government do not cover the full costs of care. Recognizing this, Congress authorized the payment of additional sums to lessen the burden on hospitals that treat a high number of indigent patients. Years later, Congress passed a law capping those payments at each hospital's "cost incurred," due to a concern that some states were not using the funds for actual hospital services. Congress identified two specific sources of payment that must be offset against total costs. In 2010, the Secretary announced, for the first time, in the form of answers to "Frequently Asked Questions" ("FAQs") posted on its website, that the payments to be offset against total costs also included reimbursements received from Medicare and private insurance, even though there is no such directive in the statute.

District Court litigation

The Hospitals filed suit against the Secretary and CMS in the United States District Court for the District of New Hampshire, challenging the illegal policies articulated in the FAQs both substantively and under the Administrative Procedures Act ("APA"). The Hospitals argued, among other things, that the government failed to use notice and comment rulemaking when it enacted the policy stated in the FAQs.

The Hospitals prevailed against the Secretary and CMS in the district court, securing a preliminary, and then permanent injunction against CMS, which enjoined enforcement of the policies articulated in the FAQs. *See New Hampshire Hosp. Ass'n v. Burwell*, No. 15-cv-460-LM, 2016 WL 1048023, *14 (D.N.H. March 11, 2016) and *New Hampshire Hosp. Ass'n v. Burwell*, No. 15-CV-460-LM, 2017 WL 822094, at *1-6 (D.N.H. Mar. 2, 2017). Five other district courts across the country have also enjoined CMS' policies for the same reason. *See Missouri Hosp. Ass'n v. Hargan*, 17-cv-04052, 2018 WL 81589 (February 9, 2018) (enjoining enforcement of FAQs in Missouri); *Texas Children's Hosp. v. Burwell,* 76 F. Supp. 3d 224 (D.D.C. 2014) (same but in Texas and Washington); *Tenn. Hosp. Assoc. v. Price,* No. 16-cv-03263, 2017 WL 2703540 (M.D. Tenn. June 21, 2017) (same but in Tennessee), appeals docketed, *sub nom. Tenn. Hosp. Ass'n v. Azar*, No. 17-5970 (6th Cir. Aug. 22, 2017), No. 17-6033 (6th Cir. Sept. 6, 2017); *Children's Health Care d/b/a/ Children's Hosp. & Clinics of Minn. v. Burwell*, No. 16-cv-04064 (D. Minn. June 26, 2017) (same but in Minnesota), appeal docketed, No, 17-2896 (8th Cir. Aug. 30, 2017); *Children's Hosp. of the King's Daughters, Inc. v. Price*, No. 2:17CV139, 2017 WL 2936801, at *10 (E.D. Va. June 20, 2017) (same but in Virginia), appeal docketed, No. 17-2237 (4th Cir. Oct. 20, 2017).

First Circuit Court of Appeals decision

On April 4, 2018, the First Circuit, which is the first Circuit Court of Appeals to reach the issue, affirmed the trial court's ruling. The First Circuit held that the set-off rule announced in the FAQs represented a substantive policy decision that could not be adopted without notice and comment in violation of the APA. The court assumed without deciding that Congress delegated the Secretary the authority to determine "costs incurred." After an analysis of five factors, the Court concluded that "the FAQs announced a new policy on a matter of some considerable import" and thus required notice and comment rule making. The court also found that the 2008 preamble cited by CMS did not implement the policy stated in the FAQs, and therefore the notice and comment rulemaking done at that time was not sufficient.

Litigation regarding the Final Rule

During the pendency of the *Burwell* in New Hampshire, the Secretary promulgated a new rule through notice and comment rulemaking entitled "Medicaid Program: Disproportionate Share Hospital Payments—Treatment of Third Party Payers in Calculating Uncompensated Care Costs" promulgated pursuant to Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq. (the "Medicaid Act") with an effective date of June 2, 2017. 82 Fed. Reg. 16,114, 16,117 (April 3, 2017) (the "Final Rule"). The Final Rule enshrined the same policies articulated in the FAQs into law, this time using notice and comment rule making.

The Hospitals filed a lawsuit challenging the validity of the Final Rule in *New Hampshire Hospital Association v. Hargan*, No. 17-cv-349 (D.N.H. 2017). The parties are currently briefing motions for summary judgment in that case. However, on February 9, 2018, CMS was enjoined from enforcing the Final Rule in *Missouri Hosp. Ass'n,* 2018 WL 81589. Then, on March 6, 2018, the District Court

for the District of Columbia in *Children's Hospital Ass'n of Texas v. Azar*, Civil Action No. 17-844 (EGS), 2018 WL 1178024 (D.D.C. Mar. 6, 2018), issued an order vacating the Final Rule based on some of the same arguments that the Hospitals raised in New Hampshire. The court in *Children's Hospital* found that the Final Rule is inconsistent with the plain language of the Medicaid Act, and therefore is not entitled to any deference under *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984). CMS is currently deciding whether or not it will appeal those decisions.

Currently, the Final Rule remains vacated and CMS is not enforcing the policies articulated in the FAQs and the Final Rule. This will allow the Hospitals to continue to receive the vital DSH payments to which they are entitled under the Medicaid Act and to continue to serve indigent patients with quality care.

The authors of this alert represented the Hospitals in these proceedings.

For more information on the content of this alert, please contact your regular Nixon Peabody attorney or:

- W. Scott O'Connell at **soconnell@nixonpeabody.com** or 617-345-1150
- Morgan C. Nighan at **mnighan@nixonpeabody.com** or 617-345-1031