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D.C. District Court Upholds Rule Requiring Hospital Publication of Detailed Charge Data

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On Tuesday, the U.S. District Court for the District of Columbia ruled in favor of the government and rejected the plaintiffs' challenge to the validity of CMS's hospital price transparency Final Rule scheduled to take effect in 2021. *See American Hospital Association et al. v Azar*, Case No. 19-cv-3619 (D.D.C. June 23, 2020). The plaintiffs, the American Hospital Association, Association of American Medical Colleges, Federation of American Hospitals, National Association of Children's Hospitals and three hospitals, asserted that disclosing the contemplated range of rate information could confuse patients and place significant burdens on hospitals. The decision contrasts with last week's D.C. Circuit decision that CMS's requirement for disclosure of drug prices in direct-to-consumer ads exceeded the agency's authority. It also renders more significant CMS's proposal in the recently published inpatient prospective payment system proposed rule to use that same charge data for potential Medicare payment purposes.

The 2019 Final Rule at issue stems from provisions of the ACA requiring hospitals to make public "standard charges" for all items and services. While hospitals had previously only been required to publish their chargemaster data, the Final Rule requires a hospital to publish five types of "standard charges," which are: gross charge, discounted cash price, payer-specific negotiated charges, and de-identified minimum and maximum charges. The hospitals immediately challenged the rule change in late 2019, contending that the Rule exceeds the agency's rulemaking authority, violates the First Amendment, and is arbitrary and capricious. The Court rejected all of the hospitals' arguments and granted summary judgment in favor of the agency.

This Alert summarizes the key elements of the Court's analysis and the implications of the decision. If you have any questions, please do not hesitate to contact one of the authors or your usual Ropes & Gray advisor.

Court's Ruling and Reasoning

Beyond Statutory Authority

The hospitals first argued that the Final Rule exceeds CMS's statutory authority as the term "standard charges," should be interpreted narrowly to refer specifically to a hospital's chargemaster charges, and should not include negotiated charges with third-party payers. While the Court suggested that CMS's interpretation of "standard charges" could be over-inclusive, the Court deferred to the agency's definition, holding that "standard charges" is not defined in the ACA, and "chargemaster" does not appear in the ACA, which is strong evidence that "standard charges" does not mean only "chargemaster charges." In addition, the opinion explained that chargemaster rates are rarely the amounts actually billed to patients. The Court ultimately held that the agency's interpretation of "standard charges" to include rates negotiated with third-party payers is not unreasonable because patients have different levels of third-party coverage.

The court distinguishes the case from the D.C. Circuit's ruling last week relating to drug pricing transparency requirements. In the D.C. Circuit case, the court ruled that the Administration lacked the authority to require drug companies to disclose prices in their television ads. *See Merck & Co. v. U.S. Dept. of Health and Human Servs.*, 2020 WL 3244013 (D.C. Cir. June 16, 2020). The Court here found crucial differences between the regulatory schemes, the most important being that in the drug pricing context, the agency relied on its general authority to promulgate rules necessary to efficiently administer its Medicare and Medicaid programs and failed to show a nexus between the Final Rule and the implementation of those programs. Here, on the other hand, the ACA expressly requires the hospitals to

publish their "standard charges" and the Court found that the agency can interpret that term in the absence of a Congressional definition.

First Amendment Violation

The hospitals also argued that the Final Rule compels speech in violation of hospitals' First Amendment rights. More specifically, the hospitals argued that publication will chill negotiations between hospitals and insurers and that the Final Rule could result in anti-competitive consequences causing costs to increase. The Court rejected these arguments, reasoning first that the Final Rule only requires publication of the final agreed-upon price, not the content of the negotiations. Second, the Court found that while the agency did not conclusively prove that the Final Rule will be successful in its goal of lowering costs for patients, the agency reasonably concluded that their position is more persuasive than that preferred by the hospitals. The Court also did not entertain a proposed compromise the hospitals had made in their arguments that they only be required to provide patients their gross charges upon request.

Arbitrary and Capricious

Finally, the hospitals argued that the Final Rule is arbitrary and capricious due to a disconnect between the Final Rule and the agency's goal of improving patients' decision-making. The hospitals also argued that the Final Rule imposes a disproportionately large cost on hospitals. The Court rejected this line of argument by concluding that CMS considered commenters' related concerns about the rule during the rulemaking process and determined that those concerns were not persuasive. The Court further held that the agency acknowledged conflicting data and articulated which information it found most convincing, thereby fulfilling its duty to examine the evidence before it and connect it to the Final Rule.

IPPS Rule

In the context of the FY 2021 inpatient prospective payment system, the agency proposed to require hospitals to report this same information on gross charges on their hospital cost reports. Importantly, the agency also proposed to use this information to reevaluate the calculation of the MS-DRGs for inpatient hospital services. Comments on this provision of the proposed rule are due to CMS by July 10, 2020.

Next Steps

Unsurprisingly, on June 24, 2020 the day after the Court issued its ruling, the hospitals filed a notice of appeal to the D.C. Circuit. Each of the hospitals' claims could be argued again at the Court of Appeals.