
Health Law Daily Wrap Up

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By Bryant Storm, J.D.

There is no basis to alter judgment in a case based upon an agency action that is not referenced in the complaint and did not exist at the time of the judgment, a federal district court held. The court rejected the argument raised by hospitals and a hospital association that the court could rule on the HHS payment policies contained in an April 3, 2017 HHS Final rule because it constituted an intervening change in law regarding reimbursement policy for disproportionate share hospitals (DSHs)—the subject matter of the ongoing litigation. The court held that the judgment the hospitals sought to alter was based upon a challenge to a different agency action—CMS’s responses to FAQs 33 and 34 on its website regarding the calculation of the hospital-specific DSH limit. The court explained that the April 3, 2017 Final rule was a new agency action which could be challenged in a separate litigation, but could not be ruled upon in the context of the FAQ litigation (New Hampshire Hospital Association v. Price, April 18, 2017, McCafferty, L.).

DSH payment. Under Medicaid law, DSHs receive increased payments because they treat a disproportionate share of Medicaid patients. To monitor DSH payments, Congress enacted a requirement that each state provide an annual report and audit on its DSH program to the HHS Secretary. In 2008, CMS promulgated a Final rule (73 FR 77904) requiring states to annually submit information “for each DSH hospital to which the State made a DSH payment.” In 2010, CMS posted answers on its website to FAQs designed to clarify the audit and reporting requirements of the 2008 Final rule. CMS’s responses to FAQs 33 and 34 provided that, in calculating the hospital-specific DSH limit, a state must subtract payments received from private health insurance (FAQ 33) and Medicare (FAQ 34) for dually-eligible Medicaid patients from the costs incurred in providing hospital services to those patients.

Judgment. Several hospitals and the New Hampshire Hospital Association challenged the FAQs, asserting that they were unreasonable interpretations of the Medicaid Act (42 U.S.C. § 1396 et seq.). Initially, the court granted the hospitals and hospital association’s request for a preliminary injunction, finding that the association may succeed on the merits of its suit (see CMS unable to recoup so-called DSH overpayments from New Hampshire hospitals, March 14, 2016). Subsequently, the court granted summary judgment for the hospitals and hospital association on the grounds that the FAQs contradicted the plain language of the Medicaid Act and violated the Administrative Procedure Act (see FAQs aren’t a substitute for regulations, Mar. 3, 2017).

Final rule. On April 3, 2017, HHS published a Final rule (82 FR 16114) amending the 2008 Final rule and its regulations (42 C.F.R. Sec. 447.299). Specifically, the 2017 Final rule defines the term "costs" to mean the "net of third party payments, including, but not limited to, payments by Medicare and private insurance.” In other words, the Final rule adopts the policy set out in FAQ 33 and FAQ 34. The hospitals and hospital associations requested that the court amend its earlier judgment to establish that the policies of the April 3, 2017 Final rule are inconsistent with Medicaid law and are impermissible substantive interpretations, rising beyond the level of clarification of existing law. The court denied the request on the grounds that the hospital and hospital association offered no support accounting for why the court had authority to alter or amend its judgment and because the April 3, 2017 Final rule was not the administrative action at issue in the litigation. The 2017 Final rule was issued after the court issued the judgment the hospitals sought to amend. Thus, the court held, a motion to alter or amend judgment was not the appropriate vehicle to challenge the 2017 Final rule.

The case is No. 1:15-cv-00460-LM.
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Companies: New Hampshire Hospital Association; Mary Hitchcock Memorial Hospital; LRGHealthcare; Speare Memorial Hospital; Valley Regional Hospital, Inc.; U.S. Department of Health and Human Services

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