GT GreenbergTraurig

Alert | Health Care & FDA Practice

September 2019

There and Back Again: The Medicaid DSH Landscape Following the D.C. Circuit's Decision in *Children's Hospital Association of Texas v. Azar*

The Disproportionate Share Hospital ("DSH") payment landscape continues to evolve following the decision of the U.S. Court of Appeals for the District of Columbia to overturn a district court ruling that a 2017 Centers for Medicare & Medicaid Services ("CMS") rule (the "2017 Rule")[1] violated the Medicaid Act. In *Children's Hospital Association of Texas v. Azar*, the D.C. Circuit upheld the 2017 Rule that included Medicare and private insurance payments in the hospital-specific "costs incurred" DSH limit. While the 2017 Rule effectively limits DSH payments, hospitals may wish to continue to preserve their appeal rights while other circuits weigh the validity of the rule.

This GT Alert summarizes the material developments that hospitals must consider when seeking to maximize their DSH payments.

A Brief History of the Hospital-Specific DSH Limit

The calculation of the hospital-specific limit under Medicaid DSH has been in flux ever since Congress enacted section 1001 of the Medicare Prescription Drug, Improvement and Modernization Act ("MMA") requiring states to submit annual DSH program reports and independent certified audits. In 2008, CMS

[1] 82 Fed. Reg. 16114, 16122 (Apr. 3, 2017).

promulgated a rule implementing the MMA's state reporting requirement (the "2008 Rule"), but did not specify whether third-party payments, including payments by Medicare and private insurers, should be included in the hospital-specific limit. Subsequent courts of appeals came to different conclusions on whether Medicare and private insurer payments should be included.[2]

In 2010, CMS posted a Frequently Asked Questions document on its website clarifying that payments made by Medicare and private insurers should be included in "costs incurred" when calculating the hospital-specific limit (the "2010 FAQs"). A flurry of litigation quickly followed. As a result, five federal courts of appeals vacated the 2010 FAQs as procedurally invalid, holding that CMS failed to follow notice and comment rulemaking to change its existing interpretation embodied in the 2008 Rule.[3]

In 2017, CMS again attempted to clarify that Medicare and private insurance payments must be included in the hospital-specific "costs incurred" DSH limit. This time, though, CMS did so through notice and comment rulemaking. The 2017 Rule went into effect on June 2, 2017, and has been the subject of additional litigation.

Children's Hospital Association of Texas

Children's Hospital Association of Texas is the latest in the slew of litigation involving the hospital-specific DSH limit. Two questions were presented: (1) whether the 2017 Rule was unlawful because it exceeded CMS's authority under the Medicaid Act, and (2) whether the 2017 Rule was unlawful because it was the product of arbitrary and capricious reasoning. Both issues were questions of first impression for a federal court of appeals.

The D.C. Circuit answered the first question in the negative. It held that the 2017 Rule was a proper exercise of CMS authority because "the statute establishes that payments by Medicaid and the uninsured *must* be considered, [and] nowhere states that those are the only payments that *may* be considered" and because the inclusion of payments made by Medicare and private insurance in the calculation of "costs incurred" was "consistent with the [Medicaid Act's] context and purpose."

The D.C. Circuit also answered the second question in the negative. It determined that the 2017 Rule was not the product of arbitrary and capricious reasoning because CMS (which promulgated the rule) sufficiently explained the statute's purposes were "better fulfilled by a policy that requires consideration of payments by Medicare and private insurers … than one that does not…."

Because the D.C. Circuit serves as the universal common venue for all challenges to CMS reimbursement regulations, the impacts of *Children's Hospital Association of Texas* are broad. However, it does not foreclose similar challenges to the 2017 Rule in other circuits. Indeed, providers are currently awaiting a decision from the Eighth Circuit on the validity of the 2017 Rule.[4]

---

[2] *See Children's Health Care v. Ctrs. for Medicare & Medicaid Servs.*, 900 F.3d 1022, 1024-25 (8th Cir. 2018) (concluding that the 2008 Rule left uncertain whether Medicare and private insurer payments should be included); *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615, 621 (4th Cir. 2018) (same); *N.H. Hosp. Ass'n v. Azar*, 887 F.3d 62, 74-75 (1st Cir. 2018) (same); *but see Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1043-44 (6th Cir. 2018) (concluding that the 2008 Rule made clear that these payments should not be included).

[3] *See Children's Hosp. Ass'n of Tex. v. Azar*, __ F.3d __, 2019 WL 3783131, at *6 n.3 (D.C. Cir. 2019); *Children's Health Care*, 900 F.3d at 1026-27; *Tenn. Hosp. Ass'n*, 908 F.3d at 1042-46; *Children's Hosp. of the King's Daughters, Inc.*, 896 F.3d at 623; *N.H. Hosp. Ass'n*, 887 F.3d at 74, 77.

[4] *Missouri Hosp. Ass'n v. Azar*, No. 18-1778 (8th Cir. filed Apr. 13, 2018), *appealed from Missouri Hosp. Ass'n v. Hargan,* No. 17-cv-4052, 2018 WL 814589 (W.D. Mo. Feb. 9, 2018).

A Jagged Landscape

The 2008 Rule, 2010 FAQs, 2017 Rule, and *Children's Hospital Association of Texas* create a patchwork of laws whose applicability depend on when services were rendered and where the hospital is located. In navigating this jagged landscape, the following may serve as helpful guideposts:

- *For hospital services rendered prior to the 2010 FAQs:* CMS's 2008 Rule was silent on whether Medicare and private insurers should be included in the hospital-specific limit. Thus, the interpretation of the various circuit courts that have looked at this issue will govern therein.
- *For hospital services rendered prior to June 2, 2017, but after the 2010 FAQs*: Medicare and private insurance payments likely are not included in the calculation of "costs incurred." Though only four federal courts of appeals have invalidated the 2010 FAQs, the D.C. Circuit agreed with these circuits in finding the 2010 FAQs procedurally invalid. Further, CMS has conceded that as of Dec. 30, 2018, the 2010 FAQs are no longer operative, and CMS will accept revised DSH audits that cover hospitals services furnished before June 2, 2017.
- *For hospital services rendered on or after June 2, 2017*, armed with the *Children's Hospital Association of Texas* opinion, and pending further litigation in other circuits, CMS will likely include Medicare and private insurance payments in the hospital's calculation of "costs incurred." Given the pending litigation in other circuits, hospitals may wish to preserve their right to challenge any decrease in DSH payments resulting from the 2017 Rule.

GT will continue to monitor the *Children's Hospital* case and other DSH-related litigation.

Authors

This GT Alert was prepared by **Michi Tsuda**, **John Voorhees**, **Mimi Hu Brouillette**, and **Jennifer M. Little**. Questions about this information can be directed to:

- Michi Tsuda | +1 303.572.7432 | tsudam@gtlaw.com
- John Voorhees | +1 303.685.7465 | voorheesj@gtlaw.com
- Mimi Hu Brouillette | +1 303.685.7415 | brouillettem@gtlaw.com
- Jennifer M. Little | +1 303.572.6564 | littleje@gtlaw.com
- Or your Greenberg Traurig attorney

depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2019 Greenberg Traurig, LLP. All rights reserved.