

Hospital Court Victories Trigger CMS to Walk-Back Rule Lowering Caps on Medicaid DSH Payments

The Centers for Medicare and Medicaid Services (CMS) has withdrawn a controversial policy, first introduced in 2010, which changes how much a Medicaid disproportionate share hospital (DSH) may receive annually in supplemental DSH payments.

CMS took this [action](#) in response to several court rulings invalidating the agency's policy. Despite the agency's walk-back of its policy, hospitals should review their historical Medicaid DSH payments to ensure that they were calculated correctly.

Medicaid DSH Payment Caps

Congress established the Medicaid DSH program to help relieve the financial burden on hospitals that treat a disproportionate share of low-income Medicaid and uninsured patients. The Medicaid statute caps a hospital's annual DSH payments at the amount of the hospital's annual uncompensated care costs. The statute specifically defines uncompensated care costs as the total costs of providing treatment to Medicaid or uninsured patients minus the total Medicaid payments (or payments from the uninsured patients) received.

CMS's Revised Medicaid DSH Payment Cap Policy Has Placed Hospitals at Risk for Recoupment

CMS adopted a policy that broadens the definition of what payments must be subtracted from the sum of uncompensated care costs. Specifically, in addition to the two categories of payments the statute identifies, CMS's revised policy requires subtracting any payments received on behalf of Medicaid patients from third-party sources – these would include payments from Medicare (for those patients dually eligible) or from insurers. CMS's policy has the direct effect of reducing a hospital's annual Medicaid DSH payment cap to the extent of any such third-party payments.

CMS had originally introduced this Medicaid DSH policy in 2010, by way of answers to hypothetical Frequently Asked Questions (FAQs) (specifically, "FAQs 33 & 34") on its website. In 2017, HHS formally adopted the same policy through an amendment to its regulations. The impact of CMS's policy is that numerous hospitals' Medicaid DSH payment limits have potentially been subject to being significantly reduced (in some cases in the amount of US\$10 million or more), thus placing hospitals at risk for demands for recoupment by state Medicaid agencies.



Hospital Litigation Has Invalidated CMS's Policy

Hospitals and hospital associations throughout the country have filed several lawsuits challenging the legality of CMS's policy. See, for example, *New Hampshire Hosp. Ass'n v. Azar*, 887 F.3d 62 (1st Cir. Apr. 4, 2018); *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029 (6th Cir. Nov. 14, 2018); *Children's Health Care v. Price*, 900 F.3d 1022 (8th Cir. Aug. 20, 2018); *Children's Hosp. of the King's Daughters, Inc. v. Azar*, 896 F.3d 615 (4th Cir. July 23, 2018). Several courts, starting with the US District Court for the District of Columbia, have enjoined HHS from enforcing the policy. See, for example, *Tex. Children's Hosp. v. Burwell*, 76 F. Supp. 3d 224 (D.D.C. 2014). The *Texas Children's Hospital* case is currently on appeal before the D.C. Circuit. No. 18-5135 (D.C. Cir. May 9, 2018).

CMS Has Capitulated and Withdrawn Its Policy

As of December 30, 2018 – and expressly "in light of [the] recent appellate court decisions" – CMS has withdrawn the policy set forth in FAQs 33 & 34. Furthermore, CMS will accept revised Medicaid DSH-limit calculations covering services prior to June 2, 2017 (which is when CMS's regulation went into effect). Those revisions will take the form of revised audits by states of prior annual DSH payments. Lastly, and importantly, CMS stated it "will not be enforcing" its 2017 amended regulation, covering services provided after June 2, 2017, as long as the *Texas Children's Hospital* "decision remains operative in its current form."

Practical Tip

Medicaid DSH hospitals should proactively determine whether, as a result of CMS's now-withdrawn policy on counting third-party payments, they have either received a demand for recoupment and/or repaid any alleged overpayments. If so, hospitals should contact counsel to assist with protecting their rights, including taking steps necessary to remedy any invalid claim for recoupment.

For more information on this topic, please contact one of the individuals listed in this publication.

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