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Despite Early Success for Providers, August 2019 Appellate Court Decision Leaves Future Uncertain for Medicaid DSH Third-Party Payer Policy

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Over the last several years, courts in various jurisdictions have issued rulings in lawsuits challenging the Centers for Medicare & Medicaid Services' (CMS') policy requiring the inclusion of Medicare and commercial payments in the calculation of the Medicaid disproportionate share hospital (DSH) limit. Though hospitals succeeded in halting application of the third-party payer policy prior to 2017, the policy may ultimately take effect for 2017 and subsequent years following the D.C. Circuit's recent decision in *Children's Hospital Association of Texas (CHAT) v. Azar*.

Initially, providers and hospital associations in numerous states challenged CMS' policy as issued in 2010 through a set of Frequently Asked Questions (FAQs), applicable to DSH payment years dating back to 2011. Hospitals argued that one or both of FAQs 33 (commercial) and 34 (Medicare) are unlawful because they were not issued through notice and comment rulemaking (a procedural argument), and because they conflict with the Medicaid DSH statute (a substantive argument). After numerous unanimous district- and appellate-level decisions in favor of hospitals, **CMS formally withdrew the FAQs on December 30, 2018**. As a result, the third-party payer policy is unenforceable for periods prior to 2017, preventing substantial recoupments from DSH hospitals across the country.

More recently, CMS attempted to adopt the same third-party payer policies in a Final Rule issued in April 2017, which will impact DSH payments in 2017 and subsequent years if it takes effect. The Final Rule lacks the procedural deficiencies of the FAQs, but hospitals have argued it is substantively invalid because it conflicts with the federal DSH statute. Providers obtained multiple favorable district court rulings vacating the Final Rule, including in the *CHAT* case, where the D.C. District Court invalidated the Final Rule *on a nationwide basis* in March 2018. However, **the D.C. Circuit reversed in an August 2019 decision, reinstating the 2017 Final Rule** after finding it to be consistent with the federal DSH statute. The *CHAT* plaintiffs have until September 27th to request a rehearing, during which time the court's decision is effectively on hold. The Final Rule remains invalid in Mississippi and Missouri, where appeals before the Fifth and Eighth Circuits are pending.

Details of the cases vary and are summarized in the graphic that follows, which will be updated as new decisions are issued. If you have questions regarding the ongoing DSH litigation, or Medicaid DSH more generally, contact **Eyman Associates** attorneys.

"Contrary to the plaintiffs' contention, we believe the 2017 Rule is consistent with the statute's context and purpose, both of which suggest DSH payments are meant to assist those hospitals that need them most by covering only those costs for which DSH hospitals are in fact uncompensated."

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Eyman Associates Summary of Rulings in Ongoing Medicaid DSH Litigation

(updated September 12, 2019)

FINAL RULE LITIGATION

State	Case Name and Number	Date of Decision	Policy Challenged	Status of Relief	Rationale
DC Cir. (MN, TX, VA, WA)	<i>Children's Hospital Association of Texas et al v. Azar et al ("CHAT")</i> District of Columbia 1:17-cv-00844 (decision published at 300 F. Supp. 3d 190) D.C. Circuit No. 18-5135	D.C. Circuit Aug. 13, 2019 D.C. District Mar. 6, 2018	Final Rule	DC Circuit reversed nationwide injunction; Plaintiffs have 45 days (until September 27) to request rehearing	District court vacated the Final Rule nationwide after finding that CMS' third-party payer policy conflicts with the Medicaid DSH Statute; court did not reach Plaintiffs' argument that the Final Rule is arbitrary and capricious. D.C. Circuit reversed District's Court's decision to permanently enjoin the Final Rule. The Court rejected Plaintiffs' arguments that the policy exceeded CMS' statutory authority and is arbitrary and capricious, concluding that the Final Rule is consistent with the Medicaid DSH Statute.
MO	<i>Missouri Hospital Association v. Azar et al</i> Western District of Missouri 2:17-cv-04052 Eighth Circuit No. 18-1778	Feb. 9, 2018	FAQs 33 and 34 (commercial and Medicare) and Final Rule	Permanent, but CMS has appealed to 8 th Circuit and decision on Final Rule is pending (CMS conceded as to FAQs at appellate level)	District court set aside FAQs 33 and 34, as well as the Final Rule, finding that the FAQs were procedurally deficient and that both the FAQs and the Final Rule are unlawful because they conflict with the Medicaid DSH Statute. Eighth Circuit hearing held April 17, 2019; decision pending.
MS	<i>Baptist Memorial Hospital-Golden Triangle, Inc. et al v. Azar et al</i> Southern District of MS 3:17-cv-00491 Fifth Circuit No. 18-60592	June 25, 2018	FAQs 33 and 34 (commercial and Medicare) and Final Rule	Permanent, but CMS has appealed to 5 th Circuit	District court held that the FAQs are procedurally invalid, and also upheld Mississippi hospitals' challenge to the Final Rule based on the D.C. District Court's ruling in <i>Children's Hospital Association of Texas</i> vacating the Final Rule nationwide. Fifth Circuit oral argument scheduled for October 7, 2019.
DC Cir. (FL)	<i>Lee Memorial Health System v. Azar</i> District of Columbia 1:18-cv-00639	Filed March 20, 2018	FAQs 33 and 34 (commercial and Medicare) and Final Rule	Stayed pending conclusion of appellate proceedings in <i>CHAT</i> case in DC Circuit	Florida hospital is arguing that the FAQs are procedurally invalid and substantively invalid because they conflict with the federal DSH statute and are arbitrary and capricious, and that the Final Rule is procedurally invalid because CMS failed to respond to relevant comments or consider significant aspects of the problem, as well as substantively invalid.
DC Cir. (TX)	<i>Doctors Hospital at Renaissance v. Azar et al</i> District of Columbia 1:18-cv-00398	Filed Feb. 21, 2018	FAQs 33 and 34 (commercial and Medicare) and Final Rule	Stayed pending conclusion of appellate proceedings in <i>CHAT</i> case in DC Circuit	Texas hospital is arguing that the FAQs are procedurally invalid, and that the FAQs and the Final Rule are invalid because they conflict with the federal DSH statute and are arbitrary and capricious.

State	Case Name and Number	Date of Decision	Policy Challenged	Status of Relief	Rationale
DC Cir. (CO)	<i>Colorado Hospital Association et al v. Azar et al</i> District of Columbia 1:17-cv-02613	Filed Dec. 7, 2017	FAQs 33 and 34 (commercial and Medicare) and Final Rule	Stayed pending conclusion of appellate proceedings in <i>CHAT</i> case in DC Circuit	Colorado Hospital Association is arguing that the FAQs are procedurally invalid because they were not issued through notice and comment rulemaking, and substantively defective because they conflict with the Medicaid DSH statute.
DC Cir. (NV)	<i>University Medical Center of Southern Nevada v. Azar</i> District of Columbia 1:17-cv-02568	Filed Nov. 30, 2017	FAQs 33 and 34 (commercial and Medicare) and Final Rule	Stayed pending conclusion of appellate proceedings in <i>CHAT</i> case in DC Circuit	UMC of Southern Nevada is arguing that the FAQs are procedurally and substantively invalid, and that the Final Rule is invalid because it conflicts with the federal DSH statute and is not the product of reasoned decision making.
NH	<i>New Hampshire Hospital Association et al v. US Department of Health and Human Services et al</i> District of New Hampshire 1:17-cv-349	Filed Aug. 10, 2017	Final Rule	Case dismissed without prejudice on Sept. 25, 2018 in light of <i>CHAT</i> case in DC Circuit	New Hampshire Hospital Association and individual hospitals are arguing that the Final Rule is unlawful because it conflicts with the federal DSH statute, and because CMS failed to consider important evidence and did not perform the required regulatory impact analysis.
DC Cir. (PA)	<i>Magee Women's Hospital of UPMC et al v. Azar</i> District of Columbia 1:17-cv-01599	Filed Aug. 9, 2017	FAQs 33 and 34 (commercial and Medicare) and Final Rule	Stayed pending final resolution of <i>CHAT</i> case in DC Circuit and TX/WA case challenging FAQ 33	Pennsylvania hospitals are arguing that the FAQs are procedurally and substantively invalid, and that the Final Rule is invalid because it conflicts with the federal DSH statute and is not the product of reasoned decision making.
DC Cir. (KY/CO)	<i>Kentucky Hospital LLC et al v. Azar et al</i> District of Columbia 1:17-cv-01201	Filed June 19, 2017	FAQs 33 and 34 (commercial and Medicare) and Final Rule	Stayed pending final resolution of <i>CHAT</i> case in DC Circuit and WA and TX/WA case challenging FAQ 33	Kentucky and Colorado hospitals are arguing that the FAQs are procedurally invalid, and that the FAQs and the Final Rule are substantively invalid because they conflict with the federal DSH statute.

FAQ LITIGATION

State	Case Name and Number	Date of Decision	Policy Challenged	Status of Relief	Rationale
DC Cir. (TX, WA)	<i>Texas Children's Hospital et al v. Burwell et al</i> District of Columbia 1:14-cv-2060 (decision published at 315 F. Supp. 3d 322) D.C. Circuit No. 18-5238	D.C. Circuit Dec. 28, 2018 (dismissed) District Court June 1, 2018	FAQ 33 (commercial)	Permanent; D.C. Circuit appeal dismissed after voluntarily withdrawn by CMS (at same time as FAQ withdrawal)	District court permanently enjoined FAQ 33 on procedural grounds, because it was issued without undertaking required notice and comment rulemaking. D.C. Circuit dismissed the appeal after CMS voluntarily withdrew the case.
TN	<i>Tennessee Hospital Association et al v. Azar et al</i> Middle District of Tennessee 3:16-cv-03263 Sixth Circuit No. 17-5970 (decision published at 908 F.3d 1029)	Sixth Circuit Nov. 14, 2018 District Court June 21, 2017	FAQs 33 and 34 (commercial and Medicare) and Proposed Rule (Final Rule had not yet been issued when TN hospitals filed suit)	Permanent with respect to FAQs; relief related to Proposed Rule denied; Sixth Circuit affirmed invalidity of FAQs on procedural grounds but did not find statutory conflict	District court concluded that FAQs 33 and 34 were procedurally defective because they were not issued through notice and comment rulemaking, and substantively defective because they conflict with the Medicaid DSH statute. District court declined relief related to Proposed Rule because proposed rules are not subject to judicial review; did not consider Final Rule because it was not included in hospitals' complaint. Sixth Circuit affirmed district court's ruling that FAQs are procedurally invalid but held that CMS has the statutory authority to administer the underlying policy if done through notice and comment rulemaking.
MN	<i>Children's Health Care v. CMS et al</i> District of Minnesota 16-cv-04064 Eighth Circuit No. 17-2896 (decision published at 900 F.3d 1022)	Eighth Circuit Aug. 20, 2018 District Court June 26, 2017	FAQ 33 (commercial)	Permanent, affirmed by Eighth Circuit	District court concluded that FAQ 33 was procedurally defective and declined to rule on the hospitals' substantive argument. Eighth Circuit affirmed decision to enjoin FAQ 33 on procedural grounds.

State	Case Name and Number	Date of Decision	Policy Challenged	Status of Relief	Rationale
VA	<i>Children's Hospital of the King's Daughters, Inc. v. Azar et al</i> Eastern District of Virginia 2:17-cv-139 Fourth Circuit No. 17-2237 (decision published at 896 F.3d 615)	Fourth Circuit July 23, 2018 District Court Aug. 23, 2017 (converting June 20, 2017 opinion to final judgment)	FAQ 33 (commercial)	Permanent, affirmed by Fourth Circuit	District court granted preliminary relief, finding that FAQ 33 likely unlawful because it was not issued through notice and comment rulemaking (procedurally defective), and because it conflicts with the Medicaid DSH statute (substantively defective). Parties jointly agreed to convert preliminary injunction order into final judgment. Fourth Circuit affirmed decision to enjoin FAQ 33 on procedural grounds; expressly declined to reach substantive arguments.
NH	<i>New Hampshire Hospital Association et al v. Azar</i> District of New Hampshire 1:15-cv-00460 First Circuit No. 17-1615 (decision published at 887 F.3d 62)	First Circuit Apr. 4, 2018 District Court Mar. 2, 2017	FAQs 33 and 34 (commercial and Medicare)	Permanent, affirmed by First Circuit	District court concluded that FAQs 33 and 34 were both procedurally and substantively defective because they were not issued through notice and comment rulemaking. First Circuit affirmed decision to enjoin FAQs 33 and 34 on procedural grounds; expressly declined to reach substantive arguments.
CT	<i>Saint Mary's Hospital v. Wright et al</i> District of Connecticut 3:18-cv-00198	Filed Feb. 2, 2018 Dismissed after settlement April 26, 2019	FAQs 33 and 34 (commercial and Medicare)	Case settled by parties and dismissed	Connecticut hospital argued that FAQs 33 and 34 are procedurally and substantively invalid. District court dismissed case with prejudice after the parties reached settlement.
NY	<i>NYU Langone Hospitals v. Azar et al</i> Southern District of New York 1:18-cv-01912	Filed March 2, 2018 Dismissed Feb. 1, 2019	FAQs 33 and 34 (commercial and Medicare)	Voluntarily dismissed without prejudice after CMS withdrawal of FAQs	New York hospital argued that FAQs 33 and 34 are procedurally and substantively invalid. District court dismissed case without prejudice after the parties requested voluntary withdrawal following CMS withdrawal of FAQs.