PUBLICATION

Court Upholds CMS's Inclusion of Part C Days in the Medicare Fraction of the DSH Calculation for FYE 2012 [Ober|Kaler]

2016

On August 17, 2016, the United States District Court for the District of Columbia upheld the position of the Secretary of Health and Human Services (Secretary) that Part C patients were to be considered as “entitled to benefits under Part A,” and therefore counted in the Medicare and not the Medicaid fraction of the Medicare disproportionate share hospital (DSH) calculation. *Allina Health Servs. v. Burwell.* This case involves a challenge by a group of hospitals to CMS's DSH calculations for 2012. CMS included Part C patient days in the Medicare and not the Medicaid fraction of the DSH calculation.

The case has a complex procedural history that relates back to a previously decided case, *Allina I*, discussed by Ober|Kaler here. In that previous case, the court struck down the Secretary's 2004 rule that adopted a policy whereby Medicare Part C patients were considered as “entitled to benefits under Part A” and as such would be counted in the Medicare fraction. The court found that the 2004 Final Rule was not a logical outgrowth of the proposed rule and violated procedural requirements of the Administrative Procedure Act (APA). The court remanded the case, and, on remand, the Secretary addressed the issue of the appropriate DSH calculation methodology through an adjudication that reached the same result as the Secretary's vacated regulation.

Following the court's decision in *Allina I*, the Secretary published the 2012 DSH calculations, which are the subject of the court's August 2016 decision. The hospitals contended that these calculations were based upon the 2004 Final Rule that was vacated and that the calculations were therefore procedurally invalid and arbitrary and capricious. The District Court denied the hospitals' motion for summary judgment and concluded that: the evidence was not convincing that CMS improperly calculated the 2012 DSH payments based on a vacated 2004 final rule rather than on CMS's independent interpretation of the controlling statute; notice-and-comment rulemaking was not necessary in making the 2012 DSH calculations because the calculations were "interpretive" rather than legislative; and CMS's decision to include Medicare Part C days in the Medicare fraction of the DSH calculation was not arbitrary and capricious.

The court noted that although CMS adopted the same interpretation as the 2004 final rule, it did not mean that CMS relied on it and CMS was not required to provide an explanation of the methodology used for the 2012 DSH calculations. The court also found that notice and comment rulemaking was not required for the updated DSH calculations in 2012. This determination was based upon the court's analysis of the 2012 DSH calculations as an interpretation of the DSH statute rather than a legislative rule. The hospitals argued that the APA and the Medicare statute require CMS to undergo notice and comment rulemaking to make changes to the calculation of the Part C days in the Medicare fraction for DSH calculation. However, the court disagreed and found the statute itself provides an “adequate legislative basis” for including Part C days in the Medicare fraction, thereby classifying the 2012 DSH calculations rule as interpretive and not requiring rulemaking under the APA or Medicare statute.

Ober|Kaler's Comments

The court's decision supports CMS's use of adjudication rather than notice-and-comment to adopt rules that are considered interpretations of statutes. This could have far reaching effect for how CMS adopts policies and even changes in policies, beyond how CMS calculates the DSH adjustment. The hospitals have, however, appealed to the United States Court of Appeals for the District of Columbia (Case No. 16-5255), so stay tuned.