PUBLICATION

D.C. Circuit Precludes Review of DSH Uncompensated Care Data [Ober|Kaler]

2016

On July 26, 2016, the United States Court of Appeals for the District of Columbia Circuit decided *Fla. Health Sciences Ctr. v. Burwell* [PDF]. In that case, the Court analyzed a statutory bar against judicial review of estimates used by the Department of Health and Human Services (HHS) to make Disproportionate Share Hospital (DSH) payments. Specifically, Tampa General Hospital sought to challenge the data used to support the estimates. The Court held that the statutory bar precluded judicial review of not just the estimates, but the underlying data as well.

DSH payments are made to hospitals that serve low-income patients. *See* 42 U.S.C. § 1395ww(d)(5)(F). Before the Affordable Care Act (Act), DSH payments were based, in part, on the days per year during which a hospital served Medicaid and low-income Medicare patients. The Act revised the DSH formula to base payments on uncompensated care that hospitals provide, meaning the care provided to those patients who have no way to pay, as opposed to care provided to Medicaid and low-income Medicare patients. Following the Act, 25% of DSH payments are calculated in the same way as they were prior to the Act, and the remaining 75% of DSH payments are calculated based on estimates of the uncompensated care provided by the DSH hospital.

To calculate the portion of uncompensated care provided, HHS uses the "hospital's number of *insured* Medicaid and Medicare SSI patients as a proxy for its number of low-income *uninsured* patients." *Fla. Health Sciences Ctr. v. Burwell*, slip op. at 3. HHS used data from the hospitals' 2010/2011 annual reports as well as the March 2013 updates to those reports. In the final rule, HHS noted that it would "not use data submitted after the deadline when calculating DSH payments for 2014 because there would not be enough time to ensure its accuracy with an audit." *Id*. Nonetheless, Tampa General attempted to provide HHS with data in April 2013. When HHS refused to rely on the April 2013 data, Tampa General filed suit alleging that HHS's reliance on older data constituted a violation of the Administrative Procedure Act and the Medicare statute. The district court dismissed the suit for lack of subject matter jurisdiction, ruling that the statutory provisions authorizing the DSH payments precluded review. The Court of Appeals has now affirmed that dismissal.

Despite the Act's bar against administrative or judicial review of the estimates used by HHS to determine DSH payments, Tampa General argued that the Court could still review the data used to make those estimates. The Court rejected this argument, emphasizing that because the underlying data were inseparably interwoven with the estimates, a "challenge to the data would 'eviscerate the bar on judicial review.'" *Id*. (citing *El Paso Nat. Gas Co. v. United States*, 632 F.3d 1272, 1276 (D.C. Cir. 2011)).

Ober|Kaler's Comments

Increasingly, Congress is coupling payment reform provisions with language that precludes administrative or judicial review of key elements of those provisions. While this may benefit HHS by reducing second-guessing of its decisions, it can also lead to results that appear unfair and to imperfect decision making. Unfortunately, the courts appear disinclined to intervene, leaving any remedy in the hands of Congress.