

Hospitals Sue to Keep Prices Secret

On December 4, 2019, the nation’s largest hospital groups united to commence a lawsuit against the Trump Administration related to the recently-finalized federal rule that requires hospitals to disclose negotiated prices starting in 2021.¹ The complaint was filed in U.S. District Court in Washington D.C. by the *American Hospital Association* (AHA), the *Federation of American Hospitals* (FAH), the *Association of American Medical Colleges* (AAMC), the *Children’s Hospital Association*, and three hospitals in Nebraska, California, and Missouri.²

As discussed more fully in the November 2019 *Health Capital Topics* article entitled, “*Trump Administration Brings Transparency to Healthcare*,” the *Centers for Medicare & Medicaid Services* (CMS) finalized requirements that certain healthcare service and item prices be posted publicly by all hospitals in a “*consumer-friendly manner*.”³ The rule requires hospitals to post online its (1) payor-specific negotiated charges; (2) discounted cash prices; (3) de-identified minimum negotiated charges; and, (4) de-identified maximum negotiated charges, for at least 300 “*shoppable*” services, defined as “*service[s] that can be scheduled by a healthcare consumer in advance*.”⁴

The hospital plaintiffs first argue that the CMS rule violates the First Amendment by compelling speech. Second, they assert that the rule’s requirements reach beyond both the *Patient Protection and Affordable Care Act* (ACA) mandate for transparency of standard charges and the statutory authority delegated by the ACA to CMS to carry out that mandate.⁵ The groups claim it is “*obvious*” that:

*“negotiated charges are not ‘standard charges.’ They are the opposite of standard, in fact, because they reflect the non-standard amount negotiated privately between a hospital and commercial health insurer.”*⁶

The hospital groups assert that the “*rates negotiated between hospitals and commercial health insurers do not reliably predict the patient’s out-of-pocket costs*,” but lack any fundamental factual basis to bolster that assertion.⁷

The complaint also asserts claims of business confidentiality and the proprietary nature of negotiated prices as reasons for keeping the information secret.⁸ The hospital groups state that the rule language would

eliminate hospitals’ “*ability to negotiate pricing with insurers at arms’ length*.”⁹ Importantly, the hospital groups boldly assert that the disclosure of negotiated rates would “*undermine competition*.”¹⁰ At face value, this statement appears to be counterintuitive, but the hospital groups argue that competition would be harmed because health insurers would not be incentivized to pursue innovative payment arrangements that could potentially lower costs and increase quality.¹¹ CMS’s response to this argument will likely stem from its statements in the Final Rule, i.e., that part of the rationale for the rule is the current trend of large employers utilizing price transparency to implement innovative approaches to healthcare payment.¹² Further, the hospital groups’ claim that insurers would not be incentivized to increase quality is flawed in two ways: (1) health insurers already recognize the inherent need for better patient outcomes and healthier patients to sustain the health insurance business model, which incentives insurers to improve healthcare service quality;¹³ and, (2) most reputable research on price transparency has shown a link between increased quality and the implementation of price transparency in healthcare.¹⁴

Third, the hospital groups asserted that the Final Rule is an arbitrary and capricious agency action:

*“The Final Rule is arbitrary and capricious and lacks any rational basis. The agency’s explanation for the Final Rule runs counter to both logic and evidence. In fact, it is belied by the agency’s own research regarding what patients care about most from a pricing standpoint when selecting a hospital: their own out-of-pocket costs. The agency’s justification for the Final Rule therefore does not stand up to even the barest of scrutiny. That is the epitome of arbitrary and capricious agency action.”*¹⁵

The groups are requesting an expedited decision in order to circumvent any preparations for the rule, which is expected to take effect in 2021.¹⁶ The hospital groups cite concerns such as the significant personnel and financial resources that would be drained from other pressing healthcare needs.¹⁷ The Final Rule estimated that the total burden for hospitals to review and post standard charges for the first year would be \$11,898.60 per hospital.¹⁸

The strongest argument the plaintiff hospital groups make against the implementation of the Final Rule is that CMS has exceeded its statutory authority by broadly interpreting the meaning of “standard charges” in the hospital services context.¹⁹ The hospitals rely on legal reasoning pointing to the meaning of the term as the hospital’s usual or customary chargemaster charges.²⁰ The hospital groups cite *Webster County Memorial Hospital v. United Mine Works of America Welfare & Retirement Fund of 1950* and *Lefler v. United Healthcare of Utah, Inc.*, both of which cases clearly favor the hospital groups’ more narrow interpretation of “standard charges” over the broader interpretation by CMS.²¹

The core of the Trump Administration’s efforts to reduce healthcare costs for Americans lies in tackling rising hospital costs. Hospital inpatient prices have increased by 42% from 2007 to 2014,²² and have now outpaced physician costs.²³ A recent *Health Affairs* study related to the increase in hospital prices concluded that healthcare

spending reduction efforts should be “*primarily focused on addressing growth in hospital rather than physician prices.*”²⁴ Seema Verma, the administrator for CMS, promoted the administration’s efforts to increase price transparency in an op-ed published in *The Chicago Tribune*, wherein she states:

*“The decadeslong [sic] norm of price obscurity is just fine for those who get to set the prices with little accountability and reap the profits, but that stale and broken status quo is bleeding patients dry. The price transparency delivered by these rules will put downward pressure on prices and restore patients to their rightful place at the center of American health care.”*²⁵

Verma titled her op-ed “*You wouldn’t buy a car without knowing the price. So why are health care prices hidden?*”²⁶ It appears that the hospital groups have chosen to answer this question via the court system.

1 American Hospital Association, et al. v. Alex M. Azar II, Secretary of Health & Human Services, (D.D.C. December 4, 2019), available at: <https://www.aha.org/system/files/media/file/2019/12/hospital-groups-lawsuit-over-illegal-rule-mandating-public-disclosure-individually-negotiated-rates-12-4-19.pdf%20.pdf> (Accessed 12/16/19), p. 2.

2 *Ibid.*, p. 1-2

3 “Trump Administration Brings Transparency to Healthcare” Health Capital Topics, Vol. 12, Issue 11 (November 2019), https://www.healthcapital.com/hcc/newsletter/11_19/HTML/CHARGE/convert_charge-disclosure_hc_topics_draft-11.21.19.php#_ednref14 (Accessed 12/16/19).

4 Medicare and Medicaid Programs: CY 2020 Hospital Outpatient PPS Policy Changes and Payment Rates and Ambulatory Surgical Center Payment System Policy Changes and Payment Rates. Price Transparency Requirements for Hospitals To Make Standard Charges Public, Federal Register, Vol. 84, No. 229 (November 27, 2019), p. 65604.

5 Secretary of Health & Human Services, (D.D.C. December 4, 2019), p. 3-4.

6 *Ibid.*

7 *Ibid.*, p. 4.

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*, p. 5.

11 *Ibid.*, p. 4-5.

12 Finding self-insured employers are using price transparency in contracting. “Self-Insured Employers Are Using Price Transparency To Improve Contracting With Health Care Providers: The Indiana Experience” By Gloria Sachdev, Chapin White, Ge Bai, Health Affairs, October 7, 2019, <https://www.healthaffairs.org/doi/10.1377/hblog20191003.778513/full/> (Accessed 12/16/19); Federal Register, Vol. 84, No. 229 (November 27, 2019), p. 65550.

13 Finding the private health insurance plan sector has led the way in adopting strategies to improve the value of health care by using medical evidence to enhance both quality and affordability. “Leadership Commitments to Improve Value in Healthcare: Finding Common Ground: Workshop Summary” By John W. Rowe, LeighAnne Olsen, W. Alexander Goolsby, and J. Michael McGinnis, The Institute of Medicine of the National Academies, 2009, p. 273-274.

14 Finding that price transparency leads to more efficient outcomes, lower prices, and allows patients to obtain better value for

healthcare services. “Does Price Transparency Improve Market Efficiency? Implications of Empirical Evidence in Other Markets for the Health Sector (CRS Report for Congress)” By D. Andrew Austin and Jane G. Gravelle, Congressional Research Service, July 24, 2007, <https://fas.org/sgp/crs/secretary/RL34101.pdf> (Accessed 12/16/19), p. 1.

15 Secretary of Health & Human Services, (D.D.C. December 4, 2019), p. 5.

16 *Ibid.*, p. 6.

17 *Ibid.*

18 Federal Register, Vol. 84, No. 229 (November 27, 2019), p. 65525.

19 Secretary of Health & Human Services, (D.D.C. December 4, 2019), p. 16-18.

20 *Ibid.*

21 Differentiating between negotiated charges and standard charges. *Webster Cty. Mem’l Hosp., Inc. v. United Mine Workers of Am. Welfare & Ret. Fund of 1950*, 536 F.2d 419, 419–20 (D.C. Cir. 1976); Finding standard charges are discounted further to find negotiated charges for insurers. *Lefler v. United Healthcare of Utah, Inc.*, 72 F. App’x 818, 821 (10th Cir. 2003); Secretary of Health & Human Services, (D.D.C. December 4, 2019), p. 17.

22 “Hospital Prices Grew Substantially Faster Than Physician Prices For Hospital-Based Care In 2007-14” By Zack Cooper, Stuart Craig, Martin Gaynor, Nir J. Harish, Harlan M. Krumholz, and John Van Reenen, *Health Affairs*, Vol. 38, No. 2 (February 2019), p. 184.

23 Finding hospital pricing and physician costs are not as intimately connected as previously though with hospital prices growing substantially faster than physician costs between 2007-2014. Cooper, Craig, Gaynor, Harish, Krumholz, Van Reenen, (February 2019), p. 184.

24 Cooper, Craig, Gaynor, Harish, Krumholz, Van Reenen, (February 2019), p. 184.

25 “Commentary: You wouldn’t buy a car without knowing the price. So why are health care prices hidden?” By Seema Verma, *The Chicago Tribune*, December 3, 2019, <https://www.chicagotribune.com/opinion/commentary/ct-opinion-health-care-prices-20191203-mpphza4ofhwhftwid3od4mxoi-story.html> (Accessed 12/7/19).

26 *Ibid.*



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