



## Favorable Rulings Continue in Ongoing DSH Litigation, Now With Nationwide Impact and an Appellate Court Decision

June 28, 2018

Over the last several years, courts in various jurisdictions have issued favorable 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. This policy was permanently enjoined on a nationwide basis in March 2018, but the litigation is ongoing.

Initially, providers and hospital associations 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). Seven district courts and one appellate court have issued decisions on the FAQs, all siding with hospitals. CMS is enjoined from applying its FAQ policy permanently in **Minnesota, New Hampshire, Virginia, Tennessee, Texas, Washington, Mississippi, and Missouri**, meaning hospitals facing disallowances for past periods in those states will be able to retain their DSH funding. CMS has appealed the rulings, and in the first ruling at the appellate level, the First Circuit affirmed the lower court's decision to enjoin the FAQs on procedural grounds.

More recently, CMS attempted to adopt the same third-party payer policies in a Final Rule issued in April 2017, which would have impacted DSH payments for 2017 and beyond. The Final Rule lacked the procedural deficiencies of the FAQs. Nonetheless, two federal courts have now vacated the Final Rule, finding that it is contrary to the plain meaning of the federal DSH statute. The District Court in the D.C. Circuit expressly stated that its decision to vacate the Final Rule applies nationwide. CMS has filed a notice of appeal in both final rule decisions, now pending in the DC and 8<sup>th</sup> Circuit.

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.

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*"[T]he Court concludes [the DSH statute] is unambiguous that the calculation of a DSH hospital's [hospital-specific limit] does not involve consideration of private insurance or Medicare payments, and a DSH hospital's total uncompensated costs of care for calculating the HSL is reduced only by the total of other Medicaid program payments. . . . [T]he Final Rule is in excess of [CMS'] statutory authority and the Final Rule is set aside."*

*-United States District Court,  
Western District of Missouri*

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## Eyman Associates Summary of Rulings in Ongoing Medicaid DSH Litigation

(updated June 28, 2018)

State	Case Name and Number	Date of Decision	Policy Challenged	Status of Relief	Rationale
<b>MS</b>	<i>Baptist Memorial Hospital-Golden Triangle, Inc. et al v. Price et al</i> Southern District of MS 3:17-cv-00491	June 25, 2018	FAQs 33 and 34 (commercial and Medicare) and Final Rule	Permanent; awaiting CMS decision whether to appeal	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
<b>D.C. Cir. (TX/WA)</b>	<i>Texas Children's Hospital et al v. Burwell et al</i> District of Columbia 1:14-cv-02060 No. 14-2060	June 1, 2018	FAQ 33 (commercial)	Permanent; awaiting CMS decision whether to appeal	Years after granting preliminary relief, the court granted permanent relief, prohibiting CMS from implementing FAQ 33, finding the FAQ was illegally promulgated because it was not issued through notice and comment rulemaking
<b>NH</b>	<i>New Hampshire Hospital Association et al v. US Department of Health and Human Services</i> District of New Hampshire 1:15-cv-00460 First Circuit No. 17-1615	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
<b>DC Cir. (MN, TX, VA, WA)</b>	<i>Children's Hospital Association of Texas et al v. Price et al</i> District of Columbia 1:17-cv-00844	Mar. 6, 2018	Final Rule	Permanent, with nationwide applicability, but CMS has appealed to DC Circuit	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
<b>MO</b>	<i>Missouri Hospital Association v. Price et al</i> Western District of Missouri 2:17-cv-04052	Feb. 9, 2018	FAQs 33 and 34 (commercial and Medicare) and Final Rule	Permanent, but CMS has appealed to 8 <sup>th</sup> Circuit	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
<b>VA</b>	<i>Children's Hospital of the King's Daughters, Inc. v Price et al</i> Eastern District of Virginia 2:17-cv-139 Fourth Circuit No. 17-2237	Aug. 23, 2017 (converting June 20, 2017 opinion to final judgment)	FAQ 33 (commercial)	Permanent, but CMS has appealed to 4 <sup>th</sup> Circuit	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

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<b>MN</b>	<i>Children's Health Care v. Burwell et al</i> District of Minnesota 16-cv-04064 Eighth Circuit No. 17-2896	June 26, 2017	FAQ 33 (commercial)	Permanent, but CMS has appealed to 8 <sup>th</sup> Circuit	Court concluded that FAQ 33 was procedurally defective and declined to rule on the hospitals' substantive argument
<b>TN</b>	<i>Tennessee Hospital Association et al v. Burwell et al</i> Middle District of Tennessee 3:16-cv-03263 Sixth Circuit No. 17-5970	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; THA and CMS have appealed to 6 <sup>th</sup> Circuit	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  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
<b>DC Cir. (TX)</b>	<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 D.C. Circuit Final Rule case involving MN, TX, VA and WA	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
<b>DC Cir. (CO)</b>	<i>Colorado Hospital Association et al v. Hargan et al</i> District of Columbia 1:14-cv-02060	Filed Dec. 7, 2017	FAQs 33 and 34 (commercial and Medicare)	Stayed pending conclusion of appellate proceedings in D.C. Circuit Final Rule case involving MN, TX, VA and WA	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.
<b>DC Cir. (NV)</b>	<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 D.C. Circuit Final Rule case involving MN, TX, VA and WA	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
<b>NH</b>	<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	Complaint filed	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
<b>DC Cir. (PA)</b>	<i>Magee Women's Hospital of UPMC et al v. Price</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 D.C. Circuit Final Rule case involving MN, TX, VA and WA 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

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<b>DC Cir. (KY/CO)</b>	<i>Kentucky Hospital LLC et al v. Price 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 D.C. Circuit Final Rule case involving MN, TX, VA 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