



Court Rulings Continue in Ongoing DSH Litigation, Now With Nationwide Impact and Several Appellate Court Decisions

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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. A final rule implementing this policy was permanently enjoined on a nationwide basis in March 2018, but litigation is still ongoing across the country.

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 four appellate courts have issued decisions on the FAQs, and all have held the FAQs invalid. 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. Although CMS has appealed the rulings, to date, the First, Fourth, Sixth and Eighth Circuits all have affirmed the lower courts' decision to enjoin the FAQs on procedural grounds. The Sixth Circuit was the first appellate court to take up the substantive argument, and the first court to rule unfavorably in finding no statutory conflict between the FAQs and the federal DSH statute, though the FAQs remain invalid in the Sixth Circuit on procedural grounds.

"[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

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, three 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 all final rule decisions, now pending in the DC, Fifth, and Eighth Circuits. (The recent Sixth Circuit decision did not involve the Final Rule and thus does not impact the nationwide injunction that remains in effect.)

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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Eyman Associates Summary of Rulings in Ongoing Medicaid DSH Litigation

(updated December 12, 2018)

State	Case Name and Number	Date of Decision	Policy Challenged	Status of Relief	Rationale
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	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	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 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	Eighth Circuit Aug. 20, 2018 District Court June 26, 2017	FAQ 33 (commercial)	Permanent, affirmed by Eighth Circuit	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
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	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	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	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
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	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

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DC Cir. (MN, TX, VA, WA)	<i>Children's Hospital Association of Texas et al v. Azar et al</i> District of Columbia 1:17-cv-00844 D.C. Circuit No. 18-5135	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
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	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
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 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
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)	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
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 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
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	Complaint filed; hearing delayed indefinitely in light of nationwide impact of D.C. Circuit Final Rule case involving MN, TX, VA and WA	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

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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 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
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 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