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Supreme Court Grants Review in *Allina Health Services* Case

Written by Thomas W. Coons – 10/11/18

Is the Department of Health and Human Services (HHS or the government) required to engage in notice and comment rulemaking when it changes a requirement that has an important impact on hospitals' reimbursement? As we reported last year, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) ruled in July 2017 that rulemaking was required under those circumstances. The Supreme Court, however, has now granted the government's petition to review that decision.

The Court of Appeals' Ruling

Allina involves a challenge by hospitals to HHS's 2014 published Medicare fractions used to calculate hospitals' 2012 DSH adjustments. In those fractions, HHS included Medicare Part C days in the Medicare fraction of the DSH calculation even though, in earlier litigation involving certain prior years, the D.C. Circuit had concluded that HHS's rulemaking that included the Part C days in the Medicare fraction was invalid because it was not a "logical outgrowth" of the proposed rule.

Despite the earlier "not a logical outgrowth" decision, HHS continued to include the Part C days in the DSH Medicare fraction in later year calculations, taking the position that it was simply interpreting the statute. In its 2017 decision, however, the D.C. Circuit rejected HHS's 2014 effort related to the 2012 adjustments.

The Court of Appeals' decision rested on language contained in the Medicare statute providing, in part, that "no rule, requirement, or other statement of policy … that establishes a substantive legal standard governing … the payment of services … shall take effect unless it is promulgated by the Secretary in such manner as provides for public notice and comment." The Court of Appeals concluded that the inclusion of Part C days in the formula, if not a rule or statement of policy, was at least a "requirement" because the fiscal intermediaries were commanded to use that fraction in calculating the DSH adjustment and thus were required to use the Part C days in CMS's new interpretation. Furthermore, the Court of Appeals concluded that the Part C days inclusion amounted to a "change" in HHS standards because, prior to 2004, the standard practice was to exclude Part C days.

Significantly, the Court of Appeals found that the inclusion of Part C days in the Medicare fraction established a "substantive legal standard" because it created, defined, or regulated the rights, duties, or powers of the parties. Also, the inclusion of the Part C days governed "payment for services." Thus, the Court of Appeals concluded, there was a change in a requirement affecting a substantive legal standard for the payment of services, squarely fitting within the Medicare statute's requirement that HHS engage in notice and comment rulemaking.

Before the Court of Appeals, HHS argued strongly that the inclusion of Part C days was simply an interpretive rule, and that it was exempt from notice and comment rulemaking by virtue of the Medicare statute's adoption of certain Administrative Procedure Act (APA) provisions. The Court of Appeals, however, rejected this argument,

concluding that the Medicare statute does not incorporate the APA's interpretive rule exception.

HHS's Request for Review

In April of this year, the government filed a petition for a writ of certiorari, requesting that the Supreme Court take up the *Allina* case for review. The government noted, as the D.C. Circuit had acknowledged, that the ruling departs from other decisions of other courts of appeals that have decided this issue and have held that the Medicare statute's notice and comment provisions do not apply to interpretive rules. HHS argued that substantive rules carry the force and effect of law, while interpretive rules do not. It further argued that the Medicare statute requires rulemaking procedures only to "substantive legal standards" governing Medicare reimbursement, benefits, and eligibility. The government maintained that nothing in the Medicare statute suggests that Congress intended to apply a notice and comment requirement for Medicare beyond that described in the APA.

The government then went on to assert that the D.C. Circuit's decision undermines HHS's ability to administer the annual Medicare reimbursement process by essentially converting the agency's non-binding manuals and other interpretive materials into regulations requiring notice and comment, thereby jeopardizing the flexibility needed by the agency in interpreting complex and frequently changing statutory context and administrative developments. Finally, the government noted that the D.C. Circuit's ruling would have a very significant adverse impact, because universal venue lies in the District of Columbia over Medicare actions brought by a provider. Indeed, as the government pointed out, HHS calculates that the proper

interpretation of the Medicare fraction statute alone implicates between $3 and $4 billion dollars in reimbursement for FY 2005 through FY 2013.

Implications for Providers

The Supreme Court's ruling in *Allina* will be extremely important. As the government pointed out, the issue of how the DSH payments are properly calculated and whether they include Medicare Part C days in the Medicare fraction is, by itself, extremely impactful. Many thousands of hospital cost years are at stake, and millions if not billions of dollars are at issue. Equally, if not more important, however, is the impact of the decision on other agency actions. HHS has for decades relied on manual instructions and other interpretive rules to reflect what the government believes is required to implement the program. And often these manual provisions or interpretations contain changes in requirements that affect payment. Under the D.C. Circuit's ruling, however, these provisions would be subject to challenge for not having gone through notice and comment rulemaking.

How the Supreme Court will rule will be closely watched. Historically, when the Supreme Court grants the government's request to review a Court of Appeals decision, the government usually prevails on the merits, with the Supreme Court reversing the decision below. Certainly, that is what the government is hoping for here. One interesting complication, however, could be that Judge Kavanaugh wrote the decision below. Now that he has been elevated to the Supreme Court, he will likely rule on the case in the same fashion as he did when he was sitting below. And his vote, together with the votes of certain other justices, could well lead to the Court's affirming that decision. Stay tuned.