Meeting with OMB on CMS's Proposed Rule on Treatment of Medicare Part C Days

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CMS's Proposed Rule Pending Before OIRA

- On March 12, 2020, the Office of Information and Regulatory Affairs (OIRA) received CMS's proposed rule on the *Treatment of Medicare Part C Days in the Calculation of a Hospital's Medicare Disproportionate Patient Percentage (CMS-1739).*

CMS's Proposed Rule Pending Before OIRA

- King & Spalding represents over 150 hospitals in Federal court appealing CMS's treatment of Part C days.
  - Those cases are currently pending in a consolidated action before Judge Amy Berman Jackson in the U.S. District Court for the District of Columbia.
- We requested this meeting in light of our substantial interest in the outcome of this rulemaking and our concerns regarding the validity and contents of CMS's retroactive rulemaking.
  - We have also discussed the proposed retroactive rulemaking with other firms representing hundreds of additional hospitals who share the same concerns.
- Since retroactive rulemaking is an unusual remedy and has never been conducted on this scale before, we believe that OMB/OIRA would benefit from our preliminary comments.

Agenda

- Brief Background Leading to CMS's Proposed Rule
- Retroactive Rulemaking is Not Required and is Therefore Inappropriate
  - CMS had a valid pre-2004 policy that Part C days should be excluded
  - In any event, CMS can restore its prior practice of excluding Part C since a "practice" is not a "requirement"
- If Retroactive Rulemaking Proceeds, CMS Should Codify Its Pre-2004 Practice
  - Re-adopting CMS's invalidated policy would short-circuit the notice and comment process
  - Excluding Part C days from the Medicare fraction is the better policy on the merits
  - Retroactive rulemaking with detrimental effect is especially disfavored and should be avoided
  - Basic equities and principles of sound agency administration favor codifying CMS's pre-2004 practice of excluding Part C days

Background Leading to CMS's Proposed Rule

Background

- In the FFY 2003 proposed rule, CMS proposed to "clarify" its practice of *excluding* Part C days from the Medicare fraction of the DSH calculation. 68 Fed. Reg. 27154, 27208 (May 19, 2003).
- In the 2004 final rule, however, CMS reversed course and adopted a policy to *include* Part C days in the Medicare fraction. 69 Fed. Reg. 48916, 49099, 49246 (Aug. 11, 2004).
- In 2014, the DC Circuit stated that CMS's "surprise switcheroo" violated notice and comment rulemaking and was not a logical outgrowth of its proposed rule. *See Allina Health Services v. Sebelius*, 746 F.3d 1102, 1106 (D.C. Cir. 2014) ("*Allina I*").

Background

- The DC Circuit left open, however, the question of whether CMS was *required* to undertake notice and comment rulemaking to adopt its policy of treating Part C days as being "entitled to benefits under Part A." *Allina I*, 746 F.3d at 1106.

- In 2017, the DC Circuit answered that question by stating that the Medicare statute required CMS to undertake notice and comment rulemaking before changing its prior standard of excluding Part C days from the Medicare fraction. *See Allina Health Services v. Price*, 863 F.3d 937 (D.C. Cir. 2017) ("*Allina II*").

- The Supreme Court upheld the D.C. Circuit. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019).

Retroactive Rulemaking is Not Required and is Therefore Inappropriate

Retroactive Rulemaking is NOT Required

- Typically, invalidation of a final rule would reinstate the status quo ante. *See, e.g.*, *Croplife Am. v. EPA*, 329 F.3d 876, 879 (D.C. Cir. 2003) (vacating rule and holding that "[a]s a consequence, the agency's previous practice . . . is reinstated").
- CMS contends, however, that it cannot simply return to its prior practice of excluding Part C days because that, too, would violate the Supreme Court's ruling that any policy regarding the treatment of Part C days requires notice and comment rulemaking.
- While the Medicare statute generally prohibits retroactive rulemaking, it contains two limited exceptions if: "(i) such retroactive application is necessary to comply with statutory requirements; or (ii) failure to apply the change retroactively would be contrary to the public interest." 42 U.S.C. § 1395hh(e)(1)(A).
- To justify its retroactive rulemaking, CMS has invoked the first exception claiming that such rulemaking is *required*.
- CMS, however, is wrong.

Retroactive Rulemaking is NOT Required

- First, CMS *had* a pre-2004 policy that *was* adopted through notice and comment rulemaking and codified in regulation of only including "covered" Part A days in the Medicare fraction. 42 CFR § 412.106(b)(2).
- Because Part C days are not "covered" under Part A, CMS appropriately excluded them from the Medicare fraction prior to 2004.
- Through the 2004 rulemaking, CMS removed the word "covered" and began including Part C days and other days for which Part A made no payments.
- Since CMS's 2004 policy has been invalidated, CMS should restore its pre-2004 policy. Retroactive rulemaking is not required to do so.

Retroactive Rulemaking is NOT Required

- Second, there is no dispute that, at a minimum, CMS had a well-established "practice" of excluding Part C days from the Medicare fraction prior to 2004:
  - "[T]he Secretary acknowledges, consistent with this Court's holding in *Northeast* . . . that the agency had a practice prior to the 2004 rulemaking of excluding Part C days from the Medicare/SSI fraction." Final Reply Brief for Appellant Kathleen Sebelius at 1, *Allina I* (Aug. 29, 2013); *see also Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) ("Part C patient days were not included in the Medicare fractions CMS computed [prior to 2004].").
  - "[T]he pre-2004 standard of excluding Part C days from Medicare fractions remains the baseline practice from which this Court must evaluate any decisions for 2012. The decision to include Part C days in the 2012 Medicare fractions is therefore a change from prior practice." *Allina II*, 863 F.3d at 943.

Retroactive Rulemaking is NOT Required

- CMS is free to reinstate that prior practice because the Medicare statute requires only that "rule[s], requirement[s], or other statement[s] of policy" be adopted through notice and comment rulemaking.
    - It does *not* require that every *ad hoc practice* be adopted through notice and comment rulemaking.
- For example, now-Justice Kavanaugh found that CMS's post-2004 policy necessitated notice and comment rulemaking *because* it constituted a "requirement":
    - "HHS's inclusion of Part C days in the fiscal year 2012 Medicare fractions is, at the very least, a '*requirement*'" since "fiscal intermediaries . . . [were] *required* to include Part C days in their calculations." *See Allina II*, 863 F.3d at 943.
- Since a "practice" is not a "requirement," the Medicare statute would not prevent CMS from restoring that pre-2004 practice.

Retroactive Rulemaking is NOT Required

- The D.C. Circuit's decision in *Northeast* and the Secretary's cert petition both support the argument that CMS can restore its prior practice of excluding Part C days from the Medicare fraction as argued here.

- If CMS were correct that any treatment of Part C days required notice and comment rulemaking, then the D.C. Circuit's prior decision in *Northeast* would also be invalid because the court instructed CMS to continue to adhere to its practice of excluding Part C days for periods prior to 2004, which is just what CMS claims it can't do.

  - Far from undermining this outcome, the Supreme Court's decision cited *Northeast* no less than four times without criticism.

- Similarly, the Solicitor General's request for certiorari stated that the D.C. Circuit's decision would result in "significant [monetary] costs on the government." Petition for a writ of certiorari at 14, *Azar v. Allina Health Services* (Apr. 27, 2018). He did not say that it would require retroactive rulemaking with costs to be determined. He, too, presumed a return to the *status quo ante*.

Retroactive Rulemaking is NOT Required

- Importantly, restoring CMS's prior practice does not mean that MACs would be free to randomly decide how Part C days should be treated each time the issue arises.
- First, CMS routinely excluded Part C days and would be acting arbitrarily and capriciously if it treated similarly situated providers differently.
- Second, before CMS's failed 2004 policy, CMS had no mechanism for tracking Part C days since, by definition, Part C days are not billed to Medicare.
  - It was not until 2007 that CMS required that hospitals submit Part C "shadow bills" for purposes of calculating DSH payments.

Since Retroactive Rulemaking is NOT Required, it Should Not Be Undertaken

- As stated above, the Medicare statute *prohibits* retroactive rules unless it is required by statute or in the public interest.
- Since, as discussed above, CMS is not *required* by statute to undertake retroactive rulemaking, and since not even CMS contends it would be in the public interest, retroactive rulemaking is affirmatively *prohibited* here.
- Instead, CMS should employ the typical remedy when a rulemaking is declared invalid, namely, restoring the prior status quo—in this case, its practice of *excluding* Part C days.

If Retroactive Rulemaking Proceeds, CMS Should Codify Its Pre-2004 Practice

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- If, despite the above arguments, CMS and the OMB believe retroactive rulemaking is required and should proceed, CMS should propose to codify its pre-2004 practice of excluding Part C days from the Medicare fraction for many of the same reasons stated above.
- Had CMS merely done what it had proposed in 2003, namely, codify its practice of excluding Part C days from the Medicare fraction, that policy would have been valid. It was the "surprise switcheroo" that rendered the rule invalid.
- It would be appropriate, therefore, for CMS to proceed in codifying its prior practice.
  - Since we do not know the specific content of the retroactive rule, we are hopeful CMS is either taking this approach or proposing some other mechanism for satisfactorily settling this issue with hospitals, like our clients, with pending litigation.

If Retroactive Rulemaking Proceeds, CMS Should Codify Its Pre-2004 Practice

- If, however, CMS is proposing to simply re-adopt its invalidated policy, that would clearly be an end run around its original notice and comment obligations and would set dangerous precedent whereby CMS could engage in retroactive rulemaking any time a court determined it had failed to provide proper notice in the first instance.
- Such an outcome would be especially anomalous given Justice Gorsuch's full-throated defense of the importance of notice and comment rulemaking, especially in the Medicare context:
  - "Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision. . . . Surely a rational Congress could have thought those benefits especially valuable when it comes to a program where even minor changes to the agency's approach can impact millions of people and billions of dollars in ways that are not always easy for regulators to anticipate . . . ." *Azar v. Allina*, 139 S. Ct. at 1816.
- Any suggestion, therefore, that Kavanaugh's and Gorsuch's respective decisions *require* CMS to engage in the extremely disfavored practice of retroactive rulemaking to announce new and potentially detrimental policies years after services have been provided, turns those decisions on their heads.

If Retroactive Rulemaking Proceeds, CMS Should Codify Its Pre-2004 Practice

- The legal merits of the issue also require CMS to codify its practice of *excluding* Part C days from the Medicare fraction.
- As now-Justice Kavanaugh explained when he explicitly stated that he would find CMS's policy invalid under *Chevron* Steps 1 and 2:
  - "Medicare beneficiaries must choose between . . . insurance plans under Part C and government-administered insurance under Part A, and after they choose, they are obviously not entitled on the same 'patient day' to benefits from both kinds of plans." *See Northeast Hosp.*, 657 F.3d at 20 n.1 (Kavanaugh, J., concurring).
- Now-Justice Kavanaugh cited no less than "[f]our mutually reinforcing textual points support that conclusion." *Id.*

If Retroactive Rulemaking Proceeds, CMS Should Codify Its Pre-2004 Practice

- For example, because Congress said a patient must be "entitled" to benefits under Part A—and not that the patient must be merely *eligible* for benefits under Part A—Congress was indicating that a patient must have an absolute right to payment under Part A.
  - In fact, Kavanaugh explained, that is precisely how CMS interprets "entitled" to SSI benefits, *i.e.*, as requiring actual payments from the SSI program: "HHS thus interprets the word 'entitled' differently within the same sentence of the statute. The only thing that unifies the Government's inconsistent definitions of this term is its apparent policy of paying out as little money as possible."

If Retroactive Rulemaking Proceeds, CMS Should Codify Its Pre-2004 Practice

- In addition, it is only retroactive rules that cause a *detriment* to a party that are disfavored.
- CMS, therefore, should especially avoid such a retroactive rule.
- The Tenth Circuit, *e.g.*, defined "retroactive effect" to be limited to an effect that would "impair the rights [of] a party":
  - "[A] new statute has "retroactive effect" when applied to a pending case "if '*it would impair rights a party possessed* . . . or impose new duties with respect to transactions already completed.'" *F.D.I.C. v. UMIC, Inc.*, 136 F.3d 1375, 1385 (10th Cir. 1998) (emphasis added).
  - *See also Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994) ("We have declined to give retroactive effect to statutes *burdening* private rights . . . .").

If Retroactive Rulemaking Proceeds, CMS Should Codify Its Pre-2004 Practice

- If CMS is going to pursue retroactive rulemaking, therefore, it should do so to codify what its practice was in 2004, namely, the exclusion of Part C days.
  - By doing so, no parties are harmed and no reliance interests are upset. Hospitals that have litigated this issue will get the benefit of their hard-earned wins and hospitals that were satisfied with CMS's prior payments would not have appealed and need not have those payments disturbed.
- If CMS instead uses retroactive rulemaking to retroactively change its pre-2004 practice of excluding Part C days, that is precisely the sort of detrimental retroactive rulemaking that is so heavily disfavored by the courts and would constitute a clear end-run around both the D.C. Circuit's and Supreme Court's decisions.
  - *See, e.g., Bowen v. Georgetown University* Hosp., 488 U.S. 208, 208–09 (1988), which the Supreme Court in *Landgraf* called "a paradigmatic case of retroactivity," in which the Supreme Court invalidated HHS's attempt to "recoup, under cost limit regulations issued in 1984, funds that had been paid to hospitals for services rendered earlier."

If Retroactive Rulemaking Proceeds, CMS Should Codify Its Pre-2004 Practice

- Basic equities augur against CMS simply re-adopting its invalidated policy through retroactive rulemaking.

- Hundreds of safety-net hospitals have spent years litigating to ensure they received the resources intended by Congress to allow them to serve indigent patients.

  - They claimed that CMS did not give them proper notice of its adverse 2004 policy, and they won.
  - They then contended that CMS was, in fact, *required* to undertake notice and comment rulemaking before adopting his adverse policy; and they won.
  - They defended that decision before the Supreme Court, and they won.

- It would offend fundamental notions of justice and would cause still further harm to these hospitals if the result of these years of litigation victories was simply that CMS re-adopted the same invalidated policy through retroactive rulemaking.

If Retroactive Rulemaking Proceeds, CMS Should Codify Its Pre-2004 Practice

- Finally, CMS has been (unsuccessfully) litigating this issue for almost a decade starting with *Northeast* in 2011, *Allina I* in 2014, and *Allina II* in 2017 and 2019.
- Retroactive rulemaking should not be used to simply excuse these prior mistakes.
- Any proposal from CMS that would simply readopt its invalidated policy is improper for all the reasons noted above and thus should be reviewed carefully by OMB in accordance with Executive Order 12866.

QUESTIONS?

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