Established CMS Rules and Practice Acknowledge the Hold Harmless Prohibition Is Triggered Only By State Action

1993

CMS responds to comments on a proposed rule relating to hold harmless agreements and **focuses only on the State's role in such agreements without ever mentioning private mitigation agreements.**

2003

An OIG audit of a Missouri provider assessment finds that **CMS has no authority to preclude private voluntary arrangements between providers.**

2004

Another **OIG audit** of a Missouri provider assessment **allows for private voluntary pooling arrangements between providers.** CMS adopts all of the OIG's recommendations for reporting requirements for these voluntary pool disbursements. After this, CMS continues to allow the Missouri supplemental payments supported by the Missouri provider assessment with which the voluntary pool is associated.

2008

CMS issued a rule that it would later cite in the Texas litigation to support its position that states indirectly hold providers harmless through reliance on the existence of private agreement. **In reality, the agency specifically rejected this tenuous interpretation in the rule preamble language.** CMS abandoned the term "influenced by the state" as "too broad," and instead concluded: "We believe 'controlled or directed by the state' is a more accurate description of the types of payments that will be considered in evaluating whether an impermissible hold-harmless arrangement exists."

In a hearing before the Provider Reimbursement Review Board, Patrick Cogley, a regional inspector general for the Office of Inspector General at Health and Human Services, discussed the details of the Missouri pooling arrangement. He said that while the arrangement was designed to mitigate, it did not constitute a hold harmless. **A Board member asked, "The question in my mind is, if one is looking at substance, does this arrangement violate the federal law with regard to Medicaid funding?" Cogley responded, "The answer is no."**

2010

The California Hospital Association (CHA) released a presentation **intimately detailing the CHFT Private Program, a financing vehicle used to coordinate private agreements among hospitals** surrounding redistribution..

The Patient Protection and Affordable Care Act was signed into law by President Obama. The ACA reduced the amount individuals and families paid in uncompensated care and required every American to have health insurance.

2012

The Court of Appeals for the Eighth Circuit upheld CMS's decisions about the proper cost reporting practices for Missouri's pool payments in Kindred Hospitals East, LLC v. Sebelius, 694 F.3d 924 (8th Cir. 2012). In its brief, the government detailed its knowledge of the pooling arrangement purpose—to reduce the economic burden of Missouri's provider tax on participating hospitals, and to redistribute Medicaid money from hospitals that treated many low-income and uninsured patients ("winner" hospitals) to "loser" hospitals that treated few low income and uninsured patients (and therefore received much less in supplemental payments). At oral argument, the government acknowledged that pooling arrangements existed around the country in "various iterations" for twenty years.

2018

HHS OIG conducted a review of seven States—California, Illinois, Indiana, Michigan, Missouri, Ohio, and Pennsylvania—to determine if hospital tax programs complied with hold-harmless requirements. **OIG determined that taxes in these states were compliant because "[t]he States did not directly guarantee to hold hospitals harmless for the taxes, and hospital taxes did not exceed the threshold of 6 percent in the first prong of the indirect guarantee test."** Even though Missouri was included where private agreements were well-known, no mention was made of any prohibition on private agreements amongst providers.

2019

CMS confirms that it does not have statutory authority to address private mitigation agreements in an email response.

CMS proposes the Medicaid Program; Medicaid Fiscal Accountability Regulation, 84 Fed. Reg. 63722 (Nov. 18, 2019) (MFAR), that would change the standard for determining whether a hold harmless exists. Language in the preamble indicated that CMS intended this revision to remove the requirement for State action.

2020

At least 14 states indicate that MFAR's new definition of hold harmless would have a detrimental effect on their Medicaid programs if the existence of private agreements invalidated a provider tax.

2021

CMS withdrew the proposed rule after a broad array of stakeholders filed over 4,000 comments in opposition. CMS acknowledged that numerous commenters stated CMS "lacked statutory authority for its proposals and was creating regulatory provisions that were ambiguous or unclear and subject to excessive Agency discretion."

CMS approves preprints for multiple states that had previously indicated that MFAR's new definition of hold harmless would have a detrimental effect on their Medicaid programs if the existence of private agreements invalidated a provider tax.

2022

In 2022, CMS initially withheld approval of Texas Medicaid directed payment programs because of "concerns" about possible redistribution arrangements, but CMS eventually approved the payment programs.

In the process of approving Texas Medicaid directed payment programs (see above), a federal judge observed that **CMS's interpretive position—very similar to that set forth in the bulletin—was "distanced" from the text of the governing statute.**

Despite this loss in a federal court, CMS sent "focused audit" letters to several states, including Missouri, Texas, and Florida, indicating the agency planned to **review state Medicaid financing plans for compliance with the expanded hold harmless definition first announced in MFAR.**

2023

On February 17, **CMS issued an Informational Bulletin providing new guidance on health care related taxes and hold harmless arrangements,** specifically arrangements involving the redistribution of Medicaid payments.

CMS published a proposed rule on May 3 that largely mirrored the Bulletin interpretation.

The **State of Texas sued CMS over the Informational Bulletin released on February 17**. Texas contended that the bulletin is contrary to law and that the bulletin's policies, if implemented, "will have an immediate impact on not just [Texas's] ability to provide vitally needed healthcare services to Texans but also on Texas's sovereign interest in enforcing its laws."

In a June 8, 2023, hearing, counsel for CMS acknowledged that the statute did not codify the CMS position that states indirectly hold harmless providers when the arrangements are entirely private and entirely outside state control. . After Texas identified the preamble language where CMS stated that state action was necessary in order for there to be a violation of the hold-harmless, **CMS seemingly abandoned its reliance on the 2008 rule and instead cited the preamble of MFAR, a withdrawn and never-adopted rule.**

The court granted Texas a preliminary injunction against CMS on June 30 ordering CMS and anyone acting in concert with CMS, and their respective agents not to rely on the Bulletin, or use the interpretation of hold-harmless identified in the Bulletin, for any purpose during the pendency of the litigation.