



CMS Appears to Fold on 2019 HOPD Site Neutral Payment Cuts Also: 340B and Price Transparency Updates

December 12, 2019

CMS appears to be backing off on 2019 hospital outpatient department site neutral payment cuts. **At least one trade press report today says that CMS will repay hospitals for the 2019 site-neutral pay cut.** (See below for the information available to us at this time.)

There have also been developments on other very important pending issues (340B, hospital price transparency), which we summarize here.

HOPD Site Neutral

In September, the US District Court for the District of Columbia ruled in favor of the hospital plaintiffs and vacated the cuts in the 2019 hospital outpatient pay rule. In a post-trial motion, hospital plaintiffs filed a Motion to Enforce Judgment before the US District Court for the District of Columbia in the site neutral litigation. Click [here](#) to read the Motion.

Plaintiffs asked the Court to issue an order finding the CY 2020 site neutral payment policy unlawful and vacating the relevant portion of the CY 2020 final rule on the grounds that the policy is a continuation of the now-vacated 2019 OPPS Rule.

Click [here](#) to read HHS' response to the Motion and [here](#) for the hospitals' reply and [here](#) for a supplemental notice in support of its Motion. In the last filing, the hospitals state they "have learned that some hospitals have recently received payments for claims processed over the past few weeks at the pre-2019 OPPS Rule payment rates for challenged services." An AHA Newsletter dated December 10 states "CMS Set to Repay 2019 Outpatient Payment Cuts in Response to AHA Lawsuit."

Trade press reports quote CMS as saying it plans to repay hospitals that sued over 2019 pay cuts and has updated the 2019 pay rates for clinic visits at certain off-campus hospital facilities to remove the cut. CMS reportedly started paying hospitals the higher pay rate as of November 4; MACs will reprocess claims that were initially subject to the cut during the first few months of 2019.

There have been no reports on CMS' intention regarding the 2020 pay rates, which include the second year of the cuts (which were not part of the underlying lawsuit).

We do not yet know how this will impact the pending Motion to Enforce Judgment which seeks to include the 2020 cuts.

At this time, there is no legislation pending to reverse the cuts.

340B

On November 8, the US Court of Appeals for the District of Columbia Circuit heard oral arguments on the government's appeal of the lower court's ruling in the 340B litigation that addressed the cuts for 2018 and 2019.

Click [here](#) for HHS' Initial Appellate Brief, [here](#) for Hospitals' Reply Brief and [here](#) for HHS' Reply Brief. We await the Court of Appeals' ruling.

Meanwhile, under a collection notice CMS proposed to survey 340B hospitals to obtain 340B drug acquisition cost data in response to the Court's ruling that HHS exceeded the statutory authority to adjust payment rates under the OPPS for separately payable, 340B-acquired drugs. While CMS stated it disagreed with the Court's decision, it believes it is important to begin obtaining acquisition costs for specified covered outpatient drugs to set payment rates based on cost for 340B-acquired drugs when they are furnished by certain covered entity hospitals to help determine payment amounts for drugs acquired under the 340B program. Click [here](#) to view the proposal. The comment period closed on November 29.

There is no legislation pending to reverse the cuts, and the 2020 cuts are not included in the case on appeal.

Hospital Price Transparency

On December 4, the American Hospital Association, Association of American Medical Colleges and three individual hospitals filed a lawsuit over CMS' final rule requiring public disclosure of individually negotiated rates (the Transparency Rule). Click [here](#) for the complaint. The hospital plaintiffs allege CMS exceeded its statutory authority in requiring disclosure of negotiated rates; violates the First Amendment by unlawfully compelling speech and is arbitrary and capricious. Hospital plaintiffs are seeking preliminary and permanent injunctive relief barring the government from enforcing the final rule. Click [here](#) for the hospitals' Motion for Summary Judgment filed on December 9, 2019. We await the government's response.

Unless the courts or Congress intervene, the rules will take effect in January 2021.

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