

Supreme Court to Medicare: Seek feedback before changing rules

JUL 1, 2019

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A recent U.S. Supreme Court ruling ensures that Centers for Medicare & Medicaid (CMS) officials must tell the public about proposed changes to Medicare benefits—even if they seem minor—and give physicians, patients and other stakeholders a chance to comment on modifications' potential impact.

Physicians are cheering the ruling, as the outcome is one the Litigation Center of the American Medical Association and State Medical Societies advocated for in a friend-of-the-court brief filed in the case before the high court on behalf of the AMA and the Medical Society of the District of Columbia. Physicians told justices that “even ‘seemingly minor’ modifications in reimbursement determinations give rise to extreme financial consequences for providers and ultimately their patients.”

The majority opinion, written by Justice Neil Gorsuch, opens by saying that in “one way or another, Medicare touches the lives of nearly all Americans,” noting that it provides health insurance for nearly one-fifth of the nation’s population. In explaining its reasoning for requiring the Department of Health and Human Services (HHS) to seek input, the court echoes arguments that the Litigation Center brief made about the importance of a notice-and-comment period for physicians, patients and other stakeholders.

“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,” the *Azar v. Allina Health Services et al.*, opinion says. “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.”

Court: process not burdensome

While trying to tell the court that HHS, the agency that oversees CMS, shouldn't have to open all Medicare interpretive rules up to a comment period, the government warned that the process would take "many years" to complete.

But the court ruled that the government failed to back up that argument, noting that it didn't document "any draconian costs associated with notice and comment" and it didn't refute claims in the Allina Health's brief that the government "regularly and without much difficulty undertakes notice-and-comment rulemaking for many other decisions affecting the Medicare program."

"If notice and comment really does threaten to 'become a major roadblock to the implementation' of Medicare ... the agency can seek relief from Congress, which—unlike the courts—is both qualified and constitutionally entitled to weigh the costs and benefits of different approaches and make the necessary policy adjustments," the court says in its opinion.

In its brief, the Litigation Center pointed out that HHS routinely seeks and incorporates feedback on Medicare changes. The brief notes that HHS publishes a Medicare fee schedule annually that the AMA analyzes and comments on. HHS then considers and incorporates the comments when drafting the final rule, making the final rules better informed and more effective, the brief explains.

The Azar case stems from a lawsuit that challenged whether CMS acted legally when it skipped the notice-and-comment rulemaking process when it changed the method it uses to calculate payments to hospitals to cover additional costs for serving low-income patients. The government estimated the change would impact between \$3 billion and \$4 billion in Medicare payments over nine years.

The Litigation Center brief does not comment on the question of how the hospital payment should be calculated. It instead focuses on the importance to physicians and patients of HHS following the notice-and-comment rulemaking statute.