

Adelanto HealthCare Ventures L.L.C.

## HARMLESS OR HARMFUL?

Allegations of Agency Overreach

in Texas v. Brooks-LaSure

Prepared for FAH JUNE 2024

# **MFUL?** erreach Sure



### Funding the Nonfederal Share

- States have several options for funding the nonfederal share of Medicaid expenditures. One key tool gaining traction in recent years is a "provider tax."
- Such taxes are gaining popularity, both in number and in financial significance.
  - In state fiscal year 2019, 49 states and the District of Columbia imposed at least one health care-related tax. That represents a significant increase from 35 states in 2004.
  - In state fiscal year 2018, 17 percent of state Medicaid funds came from health carerelated taxes, an increase from only 7 percent in fiscal year 2008.



### Governing Law

In the Social Security Act, Congress established that provider taxes qualify for federal match only where they meet certain criteria. An impermissible hold harmless exists where:

[t]he **State or other unit of government** imposing the tax **provides** (directly or indirectly) for any payment, offset, or waiver that **guarantees** to hold taxpayers harmless for any portion of the costs of the tax.



### Medicaid Fiscal Accountability Regulation

In 2019, CMS proposed the Medicaid Fiscal Accountability Regulation (MFAR). In the proposed rule preamble, CMS said the agency "became aware" of purportedly "impermissible arrangements" involving provider taxes. According to CMS, these arrangements were impermissible because:

"taxpayers enter into an agreement, which may or may not be written, to redistribute . . . Medicaid payments to ensure that taxpayers . . . receive all or any portion of their tax amount back."



### Medicaid Fiscal Accountability Rule

To remedy this perceived issue, CMS included a new "net effect" test in the proposed rule:

"The net effect of the arrangement is clear evidence that taxpayers have a reasonable expectation" that their forthcoming Medicaid payment (including any redistribution), which results in participating taxpayers being held harmless for all or a portion of the tax amount. Regardless of whether the taxpayers participate voluntarily, whether the taxpayers receive the Medicaid payments from a MCO, or whether taxpayers themselves make redistribution payments from funds other than Medicaid to other taxpayers, the net effect of the arrangement is the same: The taxpayers have a reasonable expectation to be held harmless for all or a portion of their tax amount."



### MFAR Undone

receiving After thousands of comments, CMS withdrew the proposed rule. 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."



**Docket Folder Summary** 

Docket ID: CMS-2019-0169 Agency: Centers for Medicare Medicaid Services (CMS)

### Summary:

This final rule aims to increase accountability, transparency, and clarity through improved reporting of Medicaid payments.

RIN: 0938-AT50 **Priority:** Economically Significant





### MFAR Interpretation Revived

- In April 2021, CMS rescinded the 10-year extension of Texas's section 1115 waiver.
- Texas sued. In defending the refusal to reinstate the extension, CMS cited "concerns" about possible redistribution amongst healthcare providers paying provider taxes to support state directed payment programs.





### Court Ruling

Judge Barker identified but did not dispositively resolve the interpretative dispute. Nonetheless, he observed that CMS's interpretive position was "distanced" from the text of the governing statute.

Judge Barker also suggested he would later consider whether CMS was making arguments based on "an exercise of putatively broad authority that is better explained as pretext than principled." The court has considered whether to impose sanctions for CMS's delay in issuing such a final decision. But the court does not act at this time on plaintiffs' argument, extensively documented, *e.g.*, Doc. 84-1, that CMS's negotiations to date have been some combination of internally contradictory, not in robust cooperation, or based on an exercise of putatively broad authority that is better explained as pretext than principled. That history and those arguments can be considered by any judicial or administrative tribunal reviewing any final CMS decision denying approval of the SDPs or any future CMS disallowance decision based on the agency's hold-harmless rationale. Plaintiffs' motion, however, is denied as to that further argument without prejudice to its reassertion in the future.

So ordered by the court on March 11, 2022.

J. CAMPBELL BARKER United States District Judge



### **Texas Waiver Extension Reinstated**

- Shortly after Judge Barker issued his order on the motion to enforce the preliminary injunction, CMS approved the waiver extension and related programs.
- The dispute ended before the court issued a definitive opinion.





### Crackdown on States

- Despite abandoning the Texas waiver fight, CMS continued to raise the hold-harmless issue in its dealings with certain states.
- CMS informed 3 states that they would undergo audits or focused reviews of their provider taxes:
  - Missouri
  - Texas 0
  - Florida 0







### 2023 Bulletin

- In February 2023, CMS issued an informational bulletin resuscitating the interpretive position proposed in MFAR and raised in the Texas waiver litigation:
  - "It is possible for a state to indirectly provide a payment within the meaning of section 1903(w)(4)(C)(i) of the Act that guarantees to hold taxpayers harmless for any portion of the costs of the tax, if some or all of the taxpayers receive those payments at issue through an intermediary (for example, a hospital association or similar provider affiliated organization) rather than directly from the state or its contracted managed care plan."

"[A]n arrangement in which providers receive Medicaid payments from the state (or from a statecontracted managed care plan), then redistribute those payments such that taxed providers are held harmless for all or any portion of their cost of the tax, would constitute a prohibited hold harmless provision under section 1903(w)(4)(C)(i) of the Act and 42 C.F.R. § 433.68(f)(3)."



### 2023 Bulletin

CMS asserted that states should:

(1) make clear to providers that these arrangements are not permissible;

(2) learn the details of how health care-related taxes are collected; and

(3) take steps to curtail these practices if they exist.

DEPARTMENT OF HEALTH & HUMAN SERVICES Centers for Medicare & Medicaid Services 7500 Security Boulevard, Mail Stop S2-26-12 Baltimore, Maryland 21244-1850



CMCS Informational Bulletin

DATE: February 17, 2023

FROM: Daniel Tsai, Deputy Administrator and Director

SUBJECT: Health Care-Related Taxes and Hold Harmless Arrangements Involving the Redistribution of Medicaid Payments

### Background

Recently, the Centers for Medicare & Medicaid Services (CMS) has been approached by several states with questions regarding the statutory and regulatory requirements applicable to health care-related taxes, including in connection with proposals to implement or renew Medicaid managed care state directed payments (SDPs) under 42 C.F.R. § 438.6(c). Many of these questions have focused on whether health care-related tax arrangements involving the redistribution of Medicaid payments among providers subject to the tax would comply with the statutory and regulatory prohibition on "hold harmless" arrangements—that is, arrangements in which the "State or other unit of government imposing the tax provides (directly) or indirectly) for any payment, offset, or waiver that guarantees to hold taxpayers harmless for any portion of the costs of the tax"—as specified in section 1903(w)(1)(A)(iii) and (w)(4) of the Social Security Act (the Act) and implementing regulations. In response to these questions, this informational bulletin reiterates our longstanding position on the existing federal requirements that pertain to health-care related taxes and re-emphasizes our goal of assisting states in ensuring appropriate sources of non-federal share financing.

CMS recognizes that health care-related taxes are a critical source of funding for many states' Medicaid programs, including for payments to safety net providers. CMS supports states' adoption of health care-related taxes when they are consistent with federal requirements. CMS approves many state payment proposals annually that are supported by health care-related taxes that appear to meet federal requirements. CMS recognizes the challenges faced by states and health care providers in identifying sources of non-federal share financing and implementing Medicaid payment methodologies that assure payments are consistent with federal requirements.

Medicaid statute and regulations afford states flexibility to tailor health care-related taxes within certain parameters to meet their provider community needs and align with broader state tax policies and priorities for their Medicaid programs. CMS remains committed to providing states with technical assistance aiming to ensure that health care-related taxes used to finance the nonfederal share of Medicaid expenditures meet the states' policy goals and comply with federal requirements. For example, CMS is authorized to waive the requirements that health care-related





### Litigation

Texas sued once more. Texas's four claims against CMS alleged:

(i) The bulletin exceeds CMS's statutory authority and is not in accordance with law,

(ii) The bulletin did not comport with the requirements of notice-and-comment rulemaking,

(iii) The bulletin is arbitrary and capricious, and

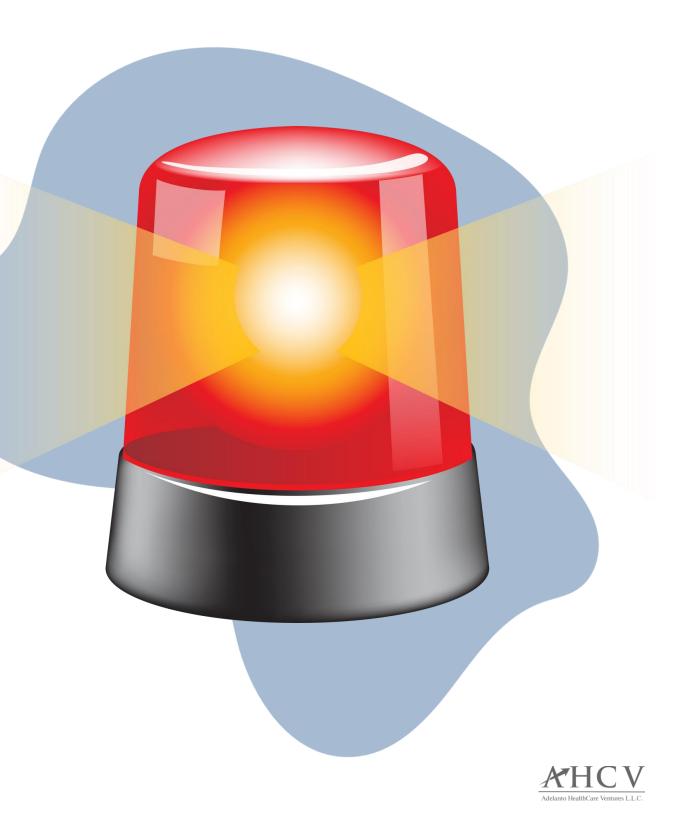
(iv) A 2008 Rule, which CMS cites for support in the bulletin, is not in accordance with law.



### Emergency Relief

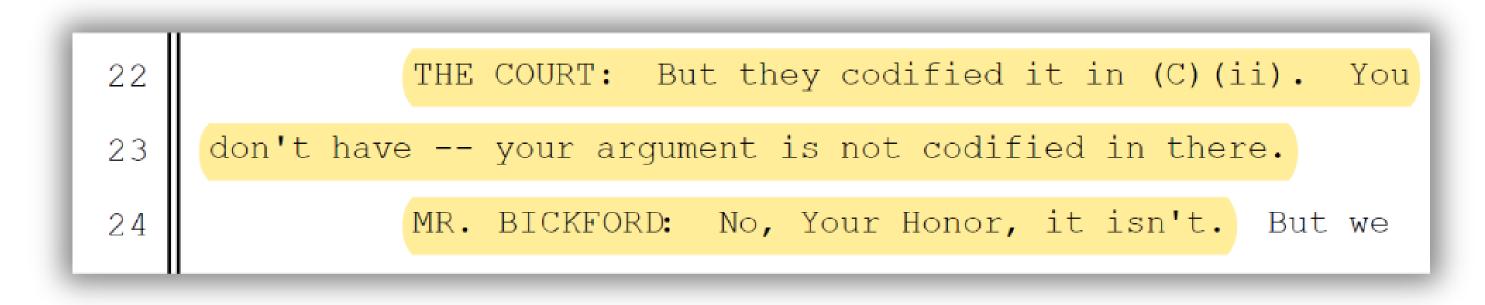
Texas sought a preliminary injunction, arguing that the bulletin imposed an immediate and unlawful burden on the state Medicaid agency.





### Preliminary Injunction Hearing

- In the preliminary injunction hearing, counsel for CMS made some key concessions:
  - Admission that the interpretation was not codified in the statutory text
  - Admission that MFAR was the first example of the agency taking this definitive interpretive stance
  - Concession that the new administrative burden on the state Medicaid agencies constituted harm





### Preliminary Injunction Order

- Judge Kernodle granted the preliminary injunction.
- He found that the 2023 bulletin represents a change in the agency's formerly "equivocal" position on the matter.
- He also cited to Judge Barker's prior statement that there is a "tight grammatical link between the government, as the actor providing for something, and a guarantee, as the thing provided for." He concluded that the CMS interpretation decouples that tight link "and conditions a state's Medicaid funding on private agreements over which states have no knowledge or control."



### Notice of Proposed Rulemaking

- While the dispute was pending, CMS proposed a new rule that would revive the MFAR interpretation of the hold harmless statute.
- A diverse array of stakeholders responded.
  Comments came from elected leaders, civil rights advocates, hospital associations, and members of Congress.

ptember 7, 2023

he Honorable Chiquita Brooks-LaSure Iministrator Inters for Medicare & Medicaid Servic epartment of Health and Human Servic abert H. Humphrey Building 0 Independence Avenue SW

ashington, DC 2021 the Honorable Daniel Tsai eputy Administrator and Director ntters for Medicaid & CHIP Services partment of Health and Human Servi abert H. Humphrey Building 0 Independence Avenue SW ashington, DC 2021

Thank you for your time on August 17. I am grateful for you an pleased that you recognize the need for a health care sa communities of our nation. Your commitment to racial equ

remain concerned, however, that the proposed Medicaid deficiald Managed Care Proposed Rule disparately impact the American Hospital Association previously estimated privides' (CMS) financing proposals could result or the new expenditure limits, those policies would result or to billion. This threat is further compounded by the pr prected payment program disapprovals to the Departmenta use and Medicaid beneficiaires of immediate access to e ay again, at I said in our meeting: these actions have devo color and for the communities with how property values

My concern is rooted our allies at the N disproportionate harr expressed appreciation integrity of NMQF's



Reverend Al Sharpton, President & Founder Leverend W. Franklyn Richardson, Chairman of the Boar

rooks-LaSure and Director Tsai:

n hard data. During our meeting, I hi tional Minority Quality Forum ( CMS' policies pose for black A for my concern, yet at least som ta set and results.

> Melinda Kenned President &





hiquita Brooks-LaSure dministrator enters for Medicare & Medicaid Services S. Department of Health & Human Services ubert H. Humphrey Building, Room 445-G 20 Independence Ave. SW

Re: CMS-2439-P; Medicaid and CHIP Managed Care Access, Finance, and Quality

Deal Administrator property castre.

Ine sately NeT Hospital malarice of normal SIAHAD appreciates the opportionity to comment on CNS proposed rule argending Medicate and CHP Managed Care Access, Finance, and Quality. SIAHAT membership includes Fondrá's world-cass public hospitals teaching hospitals, chidren's hospitals, and hospitals world Regional Pernainal Intensive and CHP hospital administrations, along with a maior portion of the tata's uninversid patients. Moneyer, Florida delivers the bulk of ISK Medication and CHP Anaged Care Organizations, maiorig this proposed null of particular interests to the state generality, and to our members particularly.

We urge CMS to ensure the ready continuation of State Directed Payment programs. Floridia utilize State Directed Payments (SDP) to hole finance it is Medical program and has done so for a number of years. Currently, these programs provide critical funding to hospitals throughout the state, along with hysicians with porticite at public hospitals, cancer hospitals, and as faculty physicians at the state's academic medical centers. These programs bridge the gap between low Medicaid relimbursement rates and the cost of providing services, and in some cases relimburse provides at a rate comparable to the average commercial rates. As such, these programs ensure that Medicaid and CHI emolles have ready access to world case heath curve with the state's highest

In ensuing the continuation of SDPs, CMS should allow SDPs to enhourse up to the average commercial rate and should not netristic total SDP progenditures to an arbitrary total amount, such as 1D percent or 25 percent of total costs. Medicaid is a federalstate partnership with two overarching goals: [1] to make quality health care accessibe to Medicaid entrolles in a way that is comparable to other people in the community (i.e., Medicaid is NGT a second class health care system); and (2) to pay for health care in amaner that is subject to the average commercial rate in a region, the payments almost certainly subject both the overarching goals of the program. By paying at rates the most emission with the average commercial rate in a region, the payments amount emission with point of the program. By paying at rates and cost provides the source of the program. By paying at rates and the source the program of the paying at rates and the source part of the pay of the program. By paying at rates and the paying the pay in the paying t

125 S. Gadsden Street, Suite 300 + Talianassee, FL 32301 + Unice: 850.201.2096 + Fax: 850.201.2095



April 11, 2024

President Joseph R. Biden, Jr. The White House 1600 Pennsylvania Avenue, NW Washington, D.C. 20500

> bject - Joint Governers Response to CMCS Informational Bulletin entitled Health re-Related Taxes and Hold Harmless Arrangements Involving the Redistribution of decial Psymmets & Document DJ 203249861 - Proposed CMS Rule on Medicaid and ildren's Health Insurance Program (CHIP) Managed Care Access, Finance, and ality (CMS-248P-P)

Mr. President,

insider and immediately disavow policies included in a final Informational osed rule issued by the Centers for Medicare & Medicaid Services (CMS) e the Medicaid safety net for elderly and disabled adults, pregnant women, dren in our states and aeross the country.

B. CMS issued an Informational Bulletin entitled "Health Care-Related mless Arnangements Involving the Redistribution of Medicaid Psyments" months later, CMS issued a proposed rule for Medicaid and Children's gram Managed Care Access, Friance, and Quality. Both the Bulletin and that change long-standing practices for how states fund the non-federal gments.

by prescriptive, administratively burdensome, and contrary to the interests ficarises who receive services in our states and nation. The policies expand ity beyond the express and limited prohibition of section 1903(w) of the Moreover, the policies contradict prior CMS-approved program structures heightened oversight burdens not supported by law. The Fullelin is of ongoing it ligation. Already, a federal court in Feasur luded hat the to decades of agency conduct, and to the statements of two agency ire than 10 years apart—affirmed that the policies in the Fullelin were not not attempt to subvert the judicial process by imposing controversial and feitons.

forges ahead and implements these policies, Medicaid funding could be on each year, impacting 49 states that rely on provider taxes to bolster their Suffering most would be states like Louisiana, Missouri, Texas, and Florida.



### Increased Attention on CMS Activity

- CMS officials were increasingly under scrutiny, especially for using the new interpretation in audits of select states.
- Both The Wall Street Journal and National Review published articles questioning why CMS focused audits and threats of disallowance only on Republican-led states, while turning a blind eye to states like California.





### **Congressional Hearing**

In an April 30, hearing, Congressman Crenshaw questioned Director Tsai about the disparate treatment:

> <u>Director Tsai:</u>...It appears that there are a range of states beyond those that you referenced, as you noted, that have these arrangements.





### 2024 Final Rule

- On April 22, CMS released the final rule.
- The rule's preamble text reiterated the same interpretation set forth in MFAR, the waiver litigation, and the 2023 bulletin.
- CMS maintained that any private redistribution agreements undermined the integrity of the federal Medicaid program.
- In operative text, CMS introduced a requirement that states must collect from providers attestations that they do not engage in a prohibited hold harmless arrangement.



### 2024 Bulletin

An accompanying bulletin made clear that CMS would not enforce the new interpretation of hold harmless until 2028. In the interim, CMS said it would:

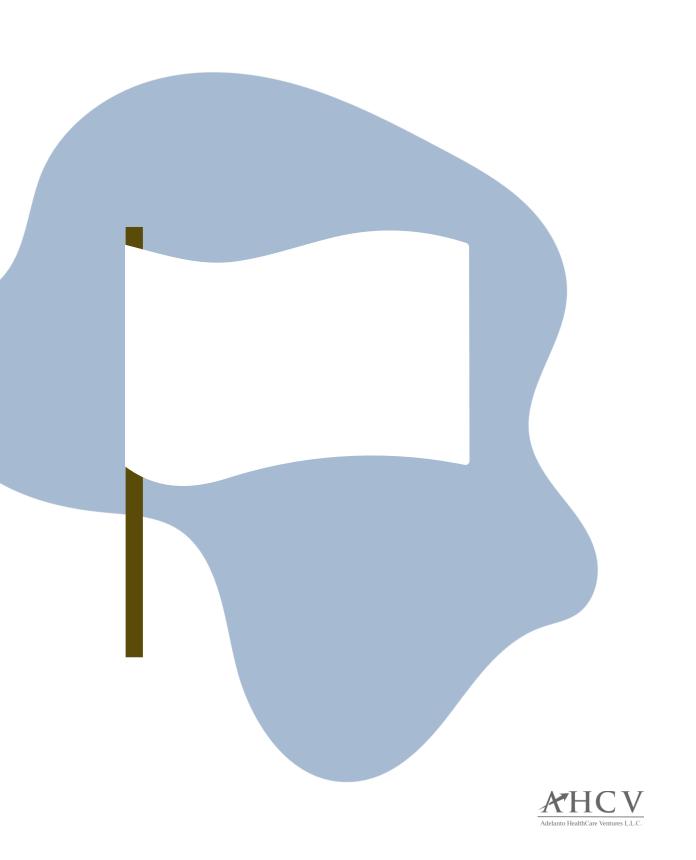
- "continue to gather information on these arrangements,"
- "assist states, where necessary, to identify and transition to allowable sources of non-Federal share [using its flawed and enjoined interpretation of the statute and regulations]," and
- "begin routinely asking questions about possible hold harmless arrangements in conjunction with reviews of health care-related tax waiver requests and state payment proposals funded, at least in part, by health care-related taxes... to ensure states are aware of which existing arrangements may be at risk of adverse action (such as deferral or disallowance of federal financial participation) beginning January 1, 2028, so that the state can proactively modify the payments or source of non-Federal share associated with those arrangements before that date [and] ... allow CMS to identify any states or program sectors particularly at risk due to a currently unknown concentration of impermissible arrangements."



### Effect of Litigation

- CMS did acknowledge that "a Federal district court in Texas issued a preliminary injunction enjoining the Secretary from implementing or enforcing the bulletin dated February 17, 2023, ... or from otherwise enforcing the interpretation of the scope of" the relevant Social Security Act provisions.
- CMS also made clear that the agency "will abide by [the preliminary injunction] as long as it remains in effect ...."





### Supplemental Complaint

- On May 22, 2024, Texas filed a supplemental complaint against the new rule and bulletin.
- In the new complaint, Texas raises the same statutory and arbitrary-and-capriciousness claims. It adds claims regarding the rule's direction of program denial appeals to the departmental review board.
- Texas seeks to prevent CMS from enforcing or implementing the final rule.





### Open Questions

- Will other states follow Texas's example?
- Would a new administration abide by the CMS 4-year plan?
- Will the attention on selective enforcement lead to greater scrutiny on CMS program administration?

