



Adelanto HealthCare Ventures L.L.C.

HARMLESS OR HARMFUL?

*Allegations of Agency Overreach
in Texas v. Brooks-LaSure*

Prepared for FAH

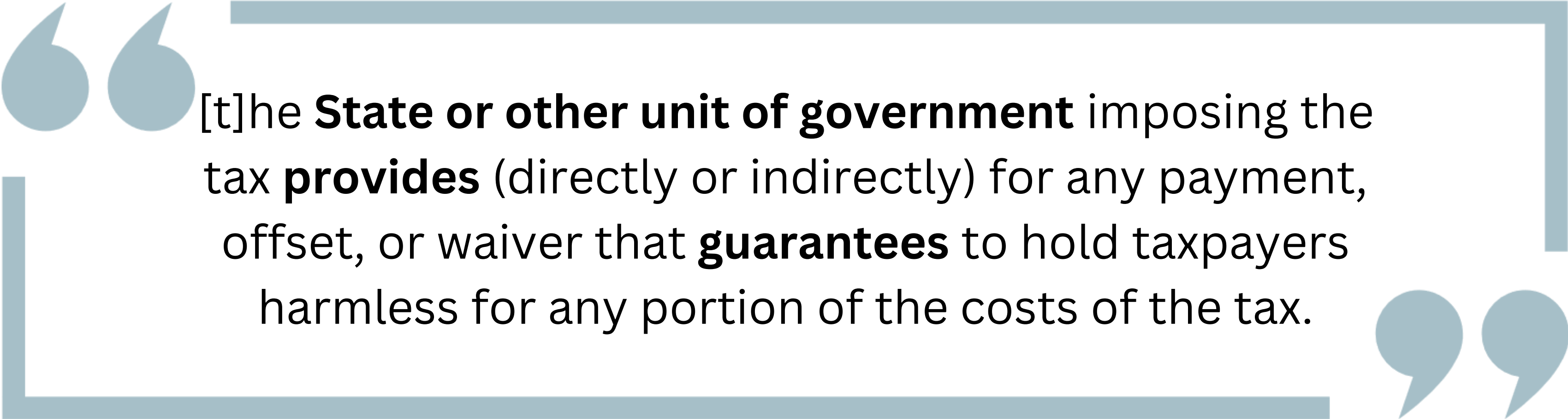
JUNE 2024

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 care-related 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

After receiving 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.”**

regulations.gov
Your Voice In Federal Decision-Making

Medicaid Fiscal Accountability Regulation (CMS-2393-P)

Docket Folder Summary [View all documents and comments in this Docket](#)

Docket ID: CMS-2019-0169
Agency: Centers for Medicare Medicaid Services (CMS)
Parent Agency: Department of Health and Human Services (HHS)

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4,230
Comments Received*

Regulatory Timeline

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

RIN: 0938-AT50 Impacts and Effects: None
CFR Citation: 42 CFR 430,42 CFR 433,42 CFR 447,42 CFR 455
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.



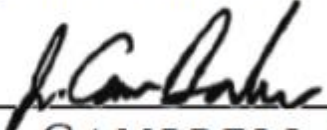
Court Ruling

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.

Hospital Relief: Feds Drop Battle Over 1115 Waiver, but There Is 'A Lot of Work to Be Done'

The on-again off-again saga for uncompensated care funding Texas reaches a new chapter

By Will Maddox | May 11, 2022 | 10:00 am

Biden can't rescind Texas' Medicaid waiver, court rules

By Brendan Pierson

August 20, 2021 6:00 PM CDT · Updated 3 years ago



Biden administration drops fight over Texas' Medicaid waiver, now in place until 2030

Debate over the waiver was key to the federal government's push for Texas to expand Medicaid for more working poor.

BY KAREN BROOKS HARPER APRIL 22, 2022 UPDATED: 4 PM CENTRAL

SHARE REPUBLISH ↗

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**
 - **Florida**



2023 Bulletin

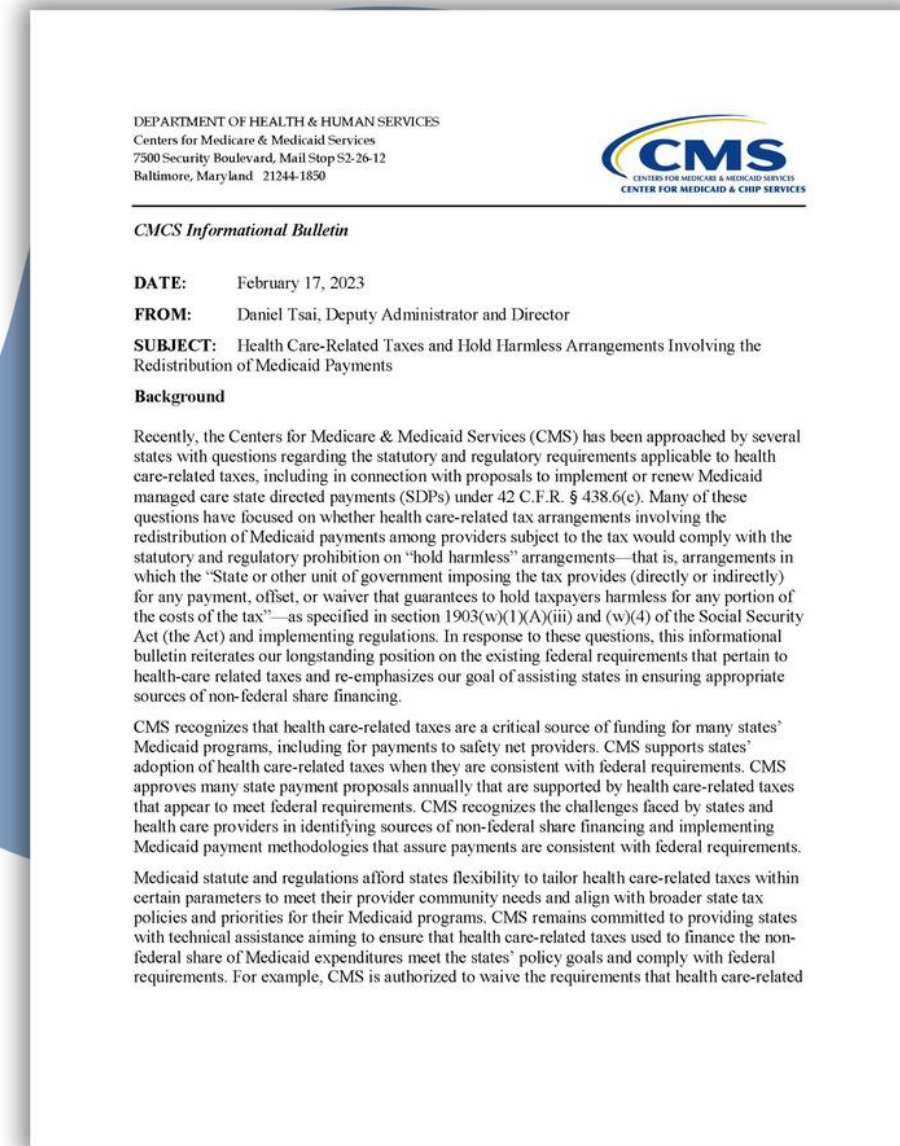
- In February 2023, CMS issued an informational bulletin resuscitating the interpretive position proposed in MFAR and raised in the Texas waiver litigation:
 - “It is possible for a state to indirectly provide a payment within the meaning of section 1903(w)(4)(C)(i) of the Act that guarantees to hold 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 state-contracted 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.



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

22 THE COURT: But they codified it in (C) (ii). You
23 don't have -- your argument is not codified in there.
24 MR. BICKFORD: No, Your Honor, it isn't. But we

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.



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.

THE WALL STREET JOURNAL.

NATIONAL REVIEW

Congressional Hearing

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

Director Tsai: ...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.

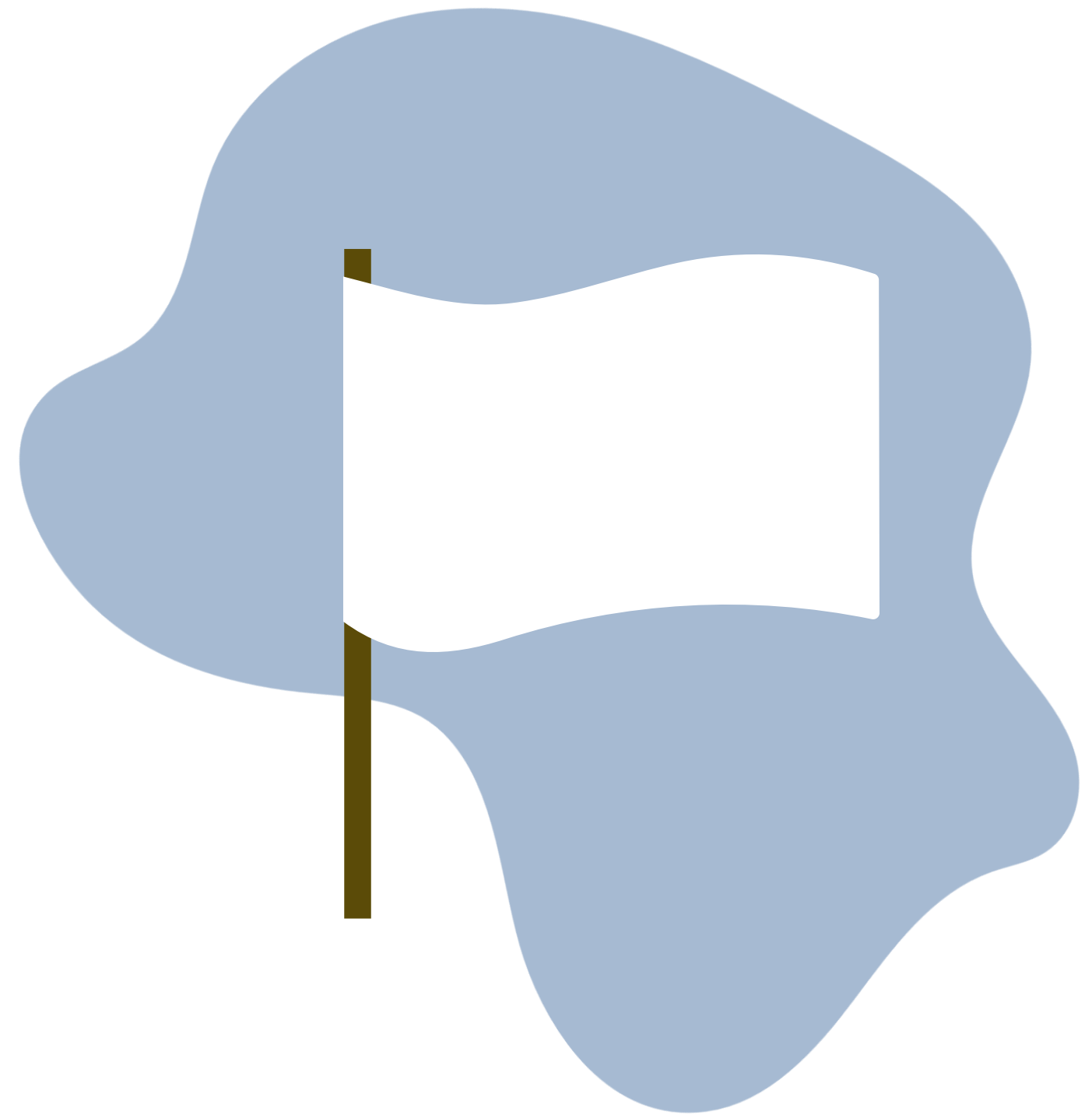
2024 Bulletin

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?

