

Students from the Saint Louis University School of Law Center for Health Law Studies contributed the following items to this column. Amy N. Sanders, associate director, supervised the contributions of Drew Canning (J.D. anticipated Dec. 2018) and Merlow Dunham (J.D./MHA anticipated 2019).

Appeal of Medicare Payment Rule Splits Circuits

The U.S. Court of Appeals for the District of Columbia determined that a Medicare payment rule impacting disproportionate share hospitals was not exempt from standard notice and comment procedures. The payment rule counted Medicare Advantage patients as entitled to Part A benefits, thereby reducing reimbursement for indigent care, and was effective 2014. However, the U.S. Department of Health and Human Services (HHS) disregarded public notice and comment, arguing the payment rule was exempt under the Administrative Procedure Act's (APA) interpretive rule provision. Breaking with the First, Sixth, Eighth and Tenth Circuit, the D.C. Circuit through Judge Brett Kavanaugh's opinion, stated the APA exception does not apply to the Medicare Act. Additionally, the D.C. Circuit split with the 9th Circuit on the issue of reviewability of expedited judicial review orders granted from the Provider Reimbursement Review Board (PRRB). In the July 25th ruling, the D.C. Circuit found providers are guaranteed

expedited judicial review when the PRRB determines they have no authority to hear the appeal. HHS may decide to pursue a rehearing with the D.C. Circuit, petition the U.S. Supreme Court, or implement the appeals court ruling. Eric Topor, *BNA*, July 26, 2017

<https://www.bna.com/hospitals-score-big-n73014462411/>

Problem Solvers Caucus Hopes to Secure Health Exchange Market

Forty-four House of Representative members, named the Problem Solvers Caucus, are moving forward to "restore predictability" for insurance companies participating in the health exchanges. The 22 Republicans and 22 Democrats are petitioning committees that oversee areas of the Affordable Care Act to address key issues of stability. The bipartisan group's top goal is to appropriate reimbursement to insurance companies for covering low-income customers at reduced cost-share rates. The cost-share reduction funds have been challenged since 2014 when House Republicans withheld payments to health plans and successfully sued the Executive branch. Other items include sending money to states for reinsurance programs, applying the employer mandate to companies with 500 employees or more, and improving guidance on section 1333, which allows

insurers to sell health plans across state lines upon the agreement of state regulators. Currently the employer mandate impacts companies with 50 or more employees. Mara Lee, *Modern Healthcare*, July 31, 2017

<http://www.modernhealthcare.com/article/20170731/NEWS/170739986/bipartisan-coalition-looks-to-solve-problem-of-individual-market>

Cities Lose Health Marketplace Enrollment Support for 2018

Centers for Medicare and Medicaid Services (CMS) withdrew in-person health insurance enrollment support offered by two companies, McLean and CSRA Inc., for the 2018 marketplace open enrollment. The decision follows similar administration decisions such as implementing a shorter 45 day open enrollment period, as opposed to a 90 days, and cancelling advertising for the health insurance sign-up website HealthCare.gov. McLean and CSRA Inc. were awarded contracts in 2013 and operated in eighteen cities, focusing on sign-up assistance in libraries, business, and urban neighborhoods. The contracts contained a final option year which CMS elected not to renew and each will end services on August 29th. CMS continues to have a year-round call center and grant-funded sign-up programs. Impacted cities include Dallas, Houston, Miami, Tampa, Atlanta,

Philadelphia, Chicago, Cleveland, New Orleans, Indianapolis, Charlotte, San Antonio, Austin, El Paso, Orlando, Phoenix, and Northern New Jersey. Carla K. Johnson, *Washington Post*, July 20, 2017
http://wapo.st/2gNrtqr?tid=ss_mail&utm_term=.a436ea15b94f

E-Cigarette Regulation Delayed, F.D.A Focuses on Nicotine

FDA Commissioner Dr. Scott Gottlieb announced a holistic approach to reduce tobacco deaths and nicotine addiction while postponing e-cigarette rules that would have required product approval. Public input will be sought to lower nicotine levels in combustible cigarettes to non-addictive levels. However, the commissioner will consider regulation of e-cigarette flavors aimed at children, such as Tutti Frutti and Banana Mash. Tobacco is the leading cause of preventable death, contributing to over 480,000 deaths a year, and the FDA views e-cigarettes as a possible cessation device because the vapor does not contain tar and other chemicals. The Tobacco Vapor Electronic Cigarette Association issued support for the new approach as well as the parent companies of Marlboro and R.J. Reynolds. Sheila Kaplan, *New York Times*, July 28, 2017
<https://www.nytimes.com/2017/07/28/health/electronic-cigarette-tobacco-nicotine-fda.html>

Medical Debt Will Have Delayed and Reduced Impact on Credit Score

Beginning September 15, Experian, Equifax, and TransUnion will institute a 180-day waiting period before medical debt appears on consumers' credit report. Also, the three major credit reporting agencies will remove medical debt from credit reports when it is paid by insurers. These updates arrive as FICO's newest credit-scoring model differentiates medical and non-medical debt, with the latter receiving smaller penalties in scoring. The change by credit reporting agencies originates from a settlement with New York Attorney General Eric Schliemann as well as agreements with 31 state attorneys general to aid the 42 million consumers with medical debt. The Financial Hope Collaborative at Creighton University indicated that "without a standardized process, some bills get sent to collections because they're 30 or 60 days past due." Additionally, the Financial Protections Bureau listed the average medical debt in collections as \$579. Michelle Andrews, *Kaiser Health News*, July 11, 2017

<http://khn.org/news/your-credit-score-soon-will-get-a-buffer-from-medical-debt-wrecks/>

Hospital Systems Await States' Approval for Monopoly, Avoid FTC

Mountain States Health Alliance and Wellmont Health Systems, located along the Tennessee and Virginia border, await those states' approval of their merger that would create a thirteen-county monopoly on health services. The attempted merger would avoid Federal Trade Commission scrutiny by utilizing a Certificate of Public Agreement (COPA) available in the states of Virginia and Tennessee. Their plan requires regulators in each state to determine if the merger is in the public interest and then each state would govern parts of the company going forward, including price setting. Revenue gained from the combined entity would need to be used on public health concerns such as obesity and smoking. Since the 1940s, COPA use in hospital mergers has occurred less than fourteen times, including in nearby Asheville, North Carolina and last summer in West Virginia. Studies by economists indicate consolidation means higher prices, however Mountain States and Wellmont argue the merger will allow them to focus on care the community needs as opposed to services that produce highest profits. The FTC has condemned the plan by dismissing promises made by the companies and indicating many of the health systems goals can be achieved without the merger.

Likewise, area residents question the move. About 17,000 employees await the COPA decision.

Phil Galewitz, Kaiser Health News, July 24, 2017

<http://khn.org/news/in-appalachia-two-hospital-giants-seek-state-sanctioned-monopoly/>

Judge Strikes Down Alabama Law Putting Pregnant Minors Through Trial

A federal magistrate judge held that a unique law in Alabama imposes “an undue burden” on girls seeking permission to have an abortion through a judicial bypass procedure, wherein a minor who lacks parental permission for an abortion can instead obtain a court’s permission. The judicial bypass is a trial-like proceeding where a judge may appoint a guardian ad litem to represent the interests of the fetus, and the minor is questioned in court to determine whether she is mature enough to make an informed decision to have an abortion without parental consent. The judge sided with the American Civil Liberties Union of Alabama, which argued that because a judicial bypass enables state attorneys to subpoena the girl’s teachers, friends, family, etc. to testify about her maturity, the girl’s right to confidentiality is violated and she is exposed to potential physical and mental abuse once her wish to abort is made known to others in her life. The judge noted that she knew of no other state

with such a law. The Associated Press, *The New York Times*, July 31, 2017

https://www.nytimes.com/aponline/2017/07/31/us/ap-us-abortion-law-alabama.html?utm_campaign=KHN%3A%20First%20Edition&utm_source=hs_email&utm_medium=email&utm_content=54831764&_hsenc=p2ANqtz-9-1WZ7zTe8FkQr53QXj7rH6Sv6Hlr7lSiHK_2MoqIvW-b-

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Trump Cites Health Care Costs Among Reasons for Not Allowing Transgender People in the Military

President Donald Trump announced that transgender individuals will no longer be allowed to serve in the United States military out of concern for “tremendous medical costs and disruption” that would result. The declaration via Twitter was made in response to a dispute over whether taxpayer money should be used to pay for gender transition and hormone therapy for service members who identify as transgender. A 2016 RAND Corporation study commissioned by the Pentagon estimates that between 2,000 and 11,000 active-duty service members are transgender. This same study concluded that openly transgender service members would increase health care costs from \$2.4

million to \$8.4 million, a mere 0.04 to 0.13 percent spending increase. While some conservative lawmakers have supported the president, many civil rights and transgender advocacy groups have expressed outrage and the president's decision is likely to end up in court. Julie Hirschfeld Davis and Helene Cooper, *The New York Times*, July 26, 2017

<https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html>

World Health Organization Releases New List of “Reserve” Antibiotics, Used to Combat Superbugs

The World Health Organization (WHO) released new categories of antibiotics in an effort to increase the reserve of “last resort” drugs used to combat superbugs. WHO cites overuse of antibiotics in humans and livestock as the main reason behind the increasing number of new pathogen strains that are resistant to traditional antibiotics. The WHO advises that antibiotics are placed in one of three categories – access, watch, and reserve – to designate which drugs can be used more regularly and which should only be used as a “last resort.” The “access” category includes common antibiotics like amoxicillin that should be “available at all times.” The “watch” category includes antibiotics such as ciprofloxacin that should only be used when needed. The third “reserve” category includes

antibiotics like colistin that are the last line of defense and should only be used “in the most severe circumstances when all other alternatives have failed.” The newly-categorized lists of antibiotics can be found in the WHO’s Model Lists of Essential Medicines for 2017, which is revised every other year to provide guidelines for the drugs that each country should keep in stock. Ariana Eunjung Cha, *Modern Healthcare*, June 6, 2017

https://www.washingtonpost.com/news/to-your-health/wp/2017/06/06/who-creates-controversial-reserve-list-of-antibiotics-in-new-response-to-superbug-threats/?tid=a_inl&utm_term=.370c9bd6c9d4

Accountable Care Organizations and Alternative Payment Models Grow in 2017

A recent *Kaiser Health* study shows that accountable care organizations (ACOs) and alternative payment models (APMs) continue to grow in 2017. In the past year in the United States, there was an increase in 2.2 million lives covered by an ACO, meaning over ten percent of the population is currently covered by an ACO. Commercial ACO contracts tend to cover the most lives (715 contracts, 59 percent of covered lives), followed by Medicare contracts (563 contracts, 29 percent of covered lives), followed by Medicaid contracts (88 contracts, 12 percent of covered lives). ACOs currently exist

in every state as well as Washington D.C. and Puerto Rico. Similarly, there has been increased growth in APMs, likely due to the passage of the Medicare Access and CHIP Reauthorization Act (MACRA), which provides incentives for physicians to join APMs. The majority of APM participants are involved in the medical home model (2,891 participants), followed by the episode-based model (792 participants), followed by the ACO model (480 participants in traditional Medicare Shared Savings Program ACOs, and 45 participants in Next Generation ACOs). David Muhlestein et al., *Health Affairs*, June 28, 2017 <http://healthaffairs.org/blog/2017/06/28/growth-of-acos-and-alternative-payment-models-in-2017/>

male veterans age sixty-six and older. The initiative's impact has been felt beyond the VA system, as it also resulted in over 3,000 community hospices making commitments to improve the quality of end-of-life care for veterans. This study demonstrates the impact that the VA system can have on increasing the quality of end-of-life care for veterans, even within a short duration of time. Susan C. Miller et al., *Health Affairs*, July 2017 <http://content.healthaffairs.org/content/36/7/1274>

Veterans Health Administration Proves Successful in Increasing Veterans' Hospice Use

The Comprehensive End of Life Care Initiative, a four-year investment implemented in 2009 by the Department of Veterans Affairs (VA) aimed at improving the quality of end-of-life care for veterans, has proven to be effective as reflected by increased hospice use. In the first two years following implementation, the initiative resulted in the establishment of fifty-four new hospice and palliative care inpatient units. A recent study published in *Health Affairs* shows that the initiative successfully increased rates of hospice use among