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Hospitals' Free Speech Argument on Prices Draws Wary Response

By Lydia Wheeler Mar 11, 2020

- • Other areas of commerce require similar disclosures
- • Pressure to lower prices likely main concern for hospitals

The legal fight over the Trump administration rule requiring hospitals to publicly list their prices and the discounts they give insurance companies is testing the bounds of free speech protections.

Health-care industry groups and two private hospitals are using the First Amendment to try and block the Department of Health and Human Services rule before it takes effect in January 2021. The American Hospital Association, which is leading the challenge, argues the rule unconstitutionally compels each hospital in the nation to publicize on their websites a huge quantity of confidential pricing information.

At stake in the litigation is the government's authority to curb the rising cost of health care. The Centers for Medicare & Medicaid Services in 2018 projected national health spending to grow at an average rate of 5.5% per year and reach nearly \$6 trillion in 2027. The HHS believes the rule will help increase competition in the health sector and drive down the cost of services, making them more affordable for everyone.

But convincing a federal judge the new regulation is unconstitutional may be tough because similar disclosures are already required in other areas of commerce.

The Federal Trade Commission forces funeral homes to disclose their prices, the Securities and Exchange Commission makes companies list detailed financial information in an initial public offering, and the Truth in Lending Act requires banks to include their rates, terms, and fees in each credit card agreement.

"Unless a judge thinks all of those are unconstitutional too, it's hard for me to see how you would rule in favor of the hospitals," said Ronald Krotoszynski, a constitutional law professor at the University of Alabama School of Law.

Patient advocacy groups have praised the rule as a common sense way to cut down on the number of people who receive surprise medical bills.

"Every other person in every other area of the economy is told what things cost before they buy them," said Jeffrey Harris, a partner at Consovoy McCarthy PLLC, who filed an amicus brief in support of the government on behalf of the Patient Rights Advocate and three other groups.

"I think the First Amendment arguments are meritless," he added.

Disclosing Discounts

The industry groups challenging the rule say it mandates speech in a way that fails to directly advance the government's goals of increasing the information given to patients about the cost of hospital services.

"The rates negotiated between hospitals and commercial health insurers do not reliably predict the patient's out-of-pocket costs, and there is no easy way to reverse-engineer one from the other to determine what the patient's co-payment and deductible will be or even if the service is covered at all," the groups argue in their

complaint.

But some health scholars say patients, particularly those willing to shop around for medical services, aren't stupid.

"This isn't complicated stuff," said Robin Fretwell Wilson, a law professor and director of the Institute of Government and Public Affairs at the University of Illinois System.

If patients know they have a 20% copay, they are more than capable of doing the math to figure out what they will owe based on the discounted, negotiated price the hospital has worked out with the insurer, she said.

Wilson thinks hospitals are more worried that insurance companies will see the deep discounts some insurers are getting and then be forced to give the lowest possible rate to everyone.

"There will be tremendous pressure on them to come all the way to bottom of what they can possibly agree to," she said.

Other health scholars counter that not every patient knows how much of their deductible they've spent and neither do hospitals.

"The hospital does not have the complete picture of information that would be necessary to provide the patient with what their costs are going to be associated with a particular service," said Emily Cook, a partner at McDermott Will & Emery LLP who represents health-care providers. "Frankly, on a day to day basis, or even month to month, I don't know that I know how much of my deductible I've expended."

The government argues that patients already see the negotiated rates in the explanation of benefits, or EOB.

Depending on the specific state requirements and plan contract requirements, it's true that EOBs may include information about specific charges, contractually negotiated discounts, and other adjustments, but the information is specific to that particular service and that particular patient's coverage, Cook said.

And disclosing that information in an EOB "is very, very different than making all of that information publicly available," she said.

Standard Charges

If there is a property interest at issue, Krotoszynski said the industry groups might have had an easier time claiming the rule violates the takings clause of the Fifth Amendment, which prohibits the government from taking private property for public use without just compensation. But that claim has not yet been made.

"If in fact these disclosures would destroy the value of property held by these hospitals or their corporate parents, I could foresee a regulatory takings claim," he said. "And if the government required them to disclose, the government would have to pay for the lost value of the data or information if in fact the claim is true."

If the court rules against the First Amendment allegations, the industry challengers could still prevail on either of their other two claims: that the rule is arbitrary and capricious in violation of the Administrative Procedure Act or that it exceeds the administration's rulemaking authority under the Public Health Service Act.

The 2010 Affordable Care Act amended the 1944 Public Health Service Act to require all hospitals to disclose

their standard charges for the items and services they provide. In its new rule the government defined standard charges to include negotiated rates.

The whole case will turn on whether the judge thinks the definition of standard charges includes negotiated rates, Wilson said.

A hearing on the requests for summary judgment in the case will be held April 22.

The case is Am. Hospitals Assoc. v. Azar , D.D.C., No. 1:19-cv-03619, Motions hearing set 3/5/20 .

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General Information

Court

District Court, District of Columbia