



Medicaid Rate Setting:

What you don't know CAN hurt you

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PART I
Medicaid Rate Setting, Some
Background

Medicaid: What it is

Medicaid: What it is (cont'd)

Medicaid is a joint program between the States and Federal Government.

Medicaid: What it is (cont'd)

Medicaid intended to provide health care to the poor.

Medicaid: What it is (cont'd)

Traditional Medicaid.

Medicaid Waiver

Medicaid: What it is (cont'd)

Federal Government provides funding

State and Local government provide funding

Medicaid: What it is (cont'd)

Terminology:

Federal Financial Participation (FFP): this is the federal share of Medicaid Funding.

FMAP: this is the FFP for services.

Medicaid: What it is (cont'd)

FMAP ranges from 50% to 83% depending upon the State's income. Federal law sets the formula for FMAP.

Medicaid: What it is (cont'd)

Federal law also states requirements for state Medicaid program.

These requirements are very broadly worded.

Medicaid: What it is (cont'd)

States have a great deal of freedom within Medicaid to determine:

- eligibility
- services
- rates
- and many other aspects of the program.

Medicaid: What it is (cont'd)

Because of this freedom, Medicaid programs vary widely from state to state.

This makes it hard to address Medicaid programs at a national level.

Medicaid: What it is (cont'd)

Federal government monitors states.

State agencies are audited, are instructed to correct their programs, and even have to make paybacks.

Medicaid: What it is (cont'd)

A state's Medicaid budget is often its largest budget item. This makes it subject to lots of lobbying.

Medicaid: State Plan

Medicaid: State Plan (cont'd)

In order to obtain this federal funding, states have to participate in Medicaid program.

States “apply” to federal government.

Medicaid: State Plan (cont'd)

The application is known as the State Plan.

The state plan defines the state’s Medicaid program. 42 U.S.C. § 1396.

Medicaid: State Plan (cont'd)

Federal law sets forth what a state plan must address.

How it addresses these areas is up to the state.

Medicaid: State Plan (cont'd)

The State Plan, as well as future amendments, is submitted to the Secretary of Health and Human Services. The Secretary reviews and approves the plan.

Medicaid: State Plan (cont'd)

The State Plan addresses all aspects of the state's Medicaid program, including:

- Identification of eligible groups;
- establishment and administration of standards of eligibility for each group;
- designation of available services;

Medicaid: State Plan (cont'd)

- waiver services
- conditions of participation for providers;
- rate-setting for payment to providers;
- reimbursement of providers;
- enforcement of liens and recovery from estates;

Medicaid: State Plan (cont'd)

- establishment of administration and utilization review requirements;
- identification of liable third parties and enforcement of their obligations.

Medicaid: State Plan (cont'd)

State plans tend to be very lengthy. Broken into sections by service, provider type, etc.

Most state agencies post the entire plan on their website.

Medicaid: State Plan (cont'd)

Reviewing your state plan can be very helpful.

Medicaid: State Plan (cont'd)

The state plan on your state agency's website is the plan that was submitted to the Secretary and approved by the Secretary.

Medicaid: State Plan (cont'd)

NOTE: Once approved by the Secretary, state plans tend to receive a great deal of deference from courts.

(This will be important to remember in part II.)

Medicaid: State Plan (cont'd)

States may change plans, but must follow the procedures set out in federal law.

This includes notice and comment periods.

Medicaid: State Plan (cont'd)

Notice and comment period allows “stakeholders”, including providers, to offer input before plan changes.

Medicaid: State Plan (cont'd)

Disputes over plans and changes in plans can lead to litigation between states and feds.

Providers may be invited to participate in these disputes.

Medicaid: State Plan – Rate Setting

Medicaid: State Plan – Rate Setting (cont'd)

Title 19 of the Social Security Act (42 U.S.C. 1396 – 1396v) outlines the specific requirements for State Plans.

It specifically addresses rate setting.

Medicaid: State Plan – Rate Setting (cont'd)

A state Medicaid Plan must:

provide such methods and procedures relating to the utilization of, *and the payment for*, care and services available under the plan ... *to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area...* 42 U.S.C. 1396(a)(30)

Medicaid: State Plan – Rate Setting (cont'd)

Note what it says:

1. provide a method and procedure this does not dictate what that procedure is.

Medicaid: State Plan – Rate Setting (cont'd)

Note what it says:

2. to assure payments are consistent with efficiency, economy, and quality of care;

Again, this is a vague standard.

Medicaid: State Plan – Rate Setting (cont'd)

Note what it says:

3. sufficient to enlist enough providers so that services are available *at least* to the extent services are available to the general population;

Medicaid: State Plan – Rate Setting (cont'd)

The state plan will set forth the methodology or formula used to meet these goals.

This one paragraph is the basis for the state's rate plan.

Medicaid: State Plan – Rate Setting (cont'd)

Note on Waiver Rate Setting: This same formula applies, but a state's waiver plan must meet one other criteria.

Medicaid: State Plan – Rate Setting (cont'd)

The State Plan must demonstrate that providing waiver services to a target population is no more costly than caring for the individuals in an institution.

Think of this as an upper rate limit.

Medicaid: Rate Setting - Methodologies

Medicaid: Rate Setting – Methodologies (cont'd)

There are numerous rate setting methodologies.

Medicaid: Rate Setting – Methodologies (cont'd)

Methodologies vary not only by state, but within state by provider type and/or service type.

Medicaid: Rate Setting – Methodologies (cont'd)

It is possible for providers to have rates set by multiple methodologies.

Medicaid: Rate Setting – Methodologies (cont'd)

Often, once the rate setting methodology is in place, rate increases or decreases are simply a result of “plugging in the data”.

Medicaid: Rate Setting – Methodologies (cont'd)

There are numerous options in Rate Setting. Rates can be:
Provider Independent or they can be provider dependent;
Prospective or Retrospective;
Cost Based or Relative Value Based

Medicaid: Rate Setting – Methodologies (cont'd)

State Plans often have many of these elements.

Medicaid: Rate Setting – Methodologies (cont'd)

The elements they adopt often is linked to what the agency thinks will best control costs.

Medicaid: Rate Setting – Methodologies (cont'd)

Provider Independent v. Provider
Dependent.

Medicaid: Rate Setting – Methodologies (cont'd)

There are two categories of provider independent rates:

- Flat Rates
- Prices

Medicaid: Rate Setting – Methodologies (cont'd)

Flat Rates are set solely based upon budget considerations.

Medicaid: Rate Setting – Methodologies (cont'd)

Example: State has \$100,000 in budget for service. State agency projects it will need to purchase 10,000 hours of the service.

Rate gets set at \$10.00 an hour for the service.

Medicaid: Rate Setting – Methodologies (cont'd)

This makes it easy from a budget standpoint – set a budget amount then set a rate.

Need to be fairly accurate about amount of services needed.

Medicaid: Rate Setting – Methodologies (cont'd)

Prices are similar to flat rates, they are provider independent and are essentially what the state is willing to pay.

Medicaid: Rate Setting – Methodologies (cont'd)

Unlike flat rates, prices may be linked to provider costs.

Medicaid: Rate Setting – Methodologies (cont'd)

Provider Dependent Rates

As the name implies, these rate setting methodologies are dependent upon the providers costs.

Medicaid: Rate Setting – Methodologies (cont'd)

Provider Dependent Rates

Dependent Rates are set based upon either historical costs or or projected costs.

Medicaid: Rate Setting – Methodologies (cont'd)

Provider Dependent Rates

The costs are used in a formula to calculate the rate the state will pay.

Medicaid: Rate Setting – Methodologies (cont'd)

Provider Dependent Rate Setting may
be either prospective or retrospective.

Medicaid: Rate Setting – Methodologies (cont'd)

Prospective Rate Setting v.
Retrospective Rate Setting

Medicaid: Rate Setting – Retrospective Rate Setting

Medicaid: Rate Setting – Retrospective Rate Setting (cont'd)

Retrospective Rate Setting is not used
as frequently any more.

This is a cost based methodology.

Medicaid: Rate Setting – Retrospective Rate Setting (cont'd)

Payer makes an “interim payment”
during the rate period.

This interim payment is based upon an
interim rate.

Medicaid: Rate Setting – Retrospective Rate Setting (cont'd)

At the end of the period a final rate is
calculated.

This calculation is based upon the
provider’s actual costs during the year.

Medicaid: Rate Setting – Retrospective Rate Setting (cont'd)

A final payment is then made to cover the difference between the interim rate and the final rate.

Medicaid: Rate Setting – Retrospective Rate Setting (cont'd)

This has resulted in providers receiving notices of overpayments at the end of the period.

Medicaid: Rate Setting – Prospective Rate Setting

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Prospective rate setting methodologies
have become much more common.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

In prospective rate setting, a rate is set
based upon the provider's costs from the
previous year.

There is usually an inflation adjustment
factor, such as adjusting based upon
CPI.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

This formula is used to calculate the rate
for the year *in advance* there is no
reconciliation at the end of the year.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

This improves upon retrospective rate setting, because the providers do not have the uncertainty of wondering what will happen at the end of the year.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Costs v. Relative Value Units (RVU)

Payment systems can use costs or RVUs to determine rates.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Costs v. Relative Value Units (RVU)

Cost information is collected from providers through cost reporting.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Costs v. Relative Value Units (RVU)

Cost reporting is done according to rules set forth by the payer.

There are allowed costs and unallowed costs.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Costs v. Relative Value Units (RVU)

In systems that collect costs in this fashion, provider's need to report cost information very accurately.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Costs v. Relative Value Units (RVU)

Cost based systems may use resource groups.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Costs v. Relative Value Units (RVU)

Resource groups attempt to group services by the resources required to provide them.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Costs v. Relative Value Units (RVU)

The resource group then determines the rate you receive. This is a “cost control” measure.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Costs v. Relative Value Units (RVU)

GIGO – garbage in garbage out

If cost data is flawed, rates will be flawed.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Costs v. Relative Value Units (RVU)

RVUs are a system where value is determined by the provider training, time, and skill involved for the service.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Costs v. Relative Value Units (RVU)

Values for services are set using these factors which creates a scale of values “relative” to each service.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Costs v. Relative Value Units (RVU)

Rates are set based upon the relative value of each service.

This model tends to be used for physicians and other practitioners.

Medicaid: Rate Setting – Prospective Rate Setting (cont'd)

Note: Some reimbursement systems have both retrospective and prospective elements.

Medicaid: Rate Setting – Cost Based v. Relative Value

For example, in 2008, a report described Alaska's system as including both provider dependent and independent rates. HCB rates were set based upon projected costs (dependent).

Personal care agencies received flat rates and/or prices (independent).

Medicaid: Rate Setting – State Methodology Examples

Medicaid: Rate Setting –State Methodology Examples (cont'd)

OHIO

Ohio uses a bidding process for some services and sets rates for other services.

Medicaid: Rate Setting –State Methodology Examples (cont'd)

OHIO

Ohio – Chore services. These include heavy cleaning and minor household repairs.

Medicaid: Rate Setting –State Methodology Examples (cont'd)

OHIO

Ohio – Chore services.

Provider gives a verbal quote to case manager, followed with a written quote. If accepted, Provider performs service and submits bill for no more than quoted rate.

Medicaid: Rate Setting –State Methodology Examples (cont'd)

OHIO

Ohio – Adult day services, home delivered meals, personal care services and others.

For these services Ohio uses a “unit rate”

Medicaid: Rate Setting –State Methodology Examples (cont'd)

OHIO

The formula is a weighted average for rate in region using cost and unit data.

This is a prospective provider dependent methodology.

Medicaid: Rate Setting –State Methodology Examples (cont'd)

Colorado

Colorado just revised their rates and implemented a new system.

They were required to do so by CMS.

Medicaid: Rate Setting –State Methodology Examples (cont'd)

Colorado

Colorado's Supported Living Services waiver now uses a cost based approach.

Rates set using a support level for some services.

Medicaid: Rate Setting –State Methodology Examples (cont'd)

Colorado

Patient is assessed and provided a support level based upon a Supports Intensity Scale and other modifying factors.

Medicaid: Rate Setting –State Methodology Examples (cont'd)

Colorado

This level is then used to determine the rate for certain services.

Higher intensity patients are reimbursed at a higher rate.

Medicaid: Rate Setting –State Methodology Examples (cont'd) Colorado

This is similar to the resource group concept. It is an attempt to reflect that some patients cost more to serve and to reimburse accordingly.

Medicaid: Rate Setting –State Methodology Examples (cont'd) Colorado

The rates themselves are calculated using the following model:
The model employs assumptions regarding salaries, wages, and employee benefits, the type of employee, staffing ratios, non-direct cost allocations and the intensity of the service.

Medicaid: Rate Setting –State Methodology Examples (cont'd) Colorado

The assumptions are based upon data “derived from the targeted provider cost and wage survey, the Bureau of Labor Statistics (national and statewide) and industry standards.”

Medicaid: Rate Setting –State Methodology Examples (cont'd)

Colorado

This is a cost based model, although it does not use actual Colorado provider data.

Medicaid: Rate Setting –State Methodology Examples (cont'd)

Indiana

Is in the midst of a similar change with regards to some of its waiver services.

Part II: HOW TO CHALLENGE RATE SETTING

Challenging Results of Rate Setting

There are many ways to address rate setting issues:

1. Lobbying
2. Administrative Remedies
3. Litigation
4. Leaving the Program

Challenging Results of Rate Setting

Lobbying

Lobbying includes going to legislators and going to administrators.

Challenging Results of Rate Setting

Lobbying

Working with a State Agency can be very effective.

Challenging Results of Rate Setting

Lobbying

Establish credibility/expertise
Explain impact of rates
Review rate calculations
Explain benefits of waiver services.

Challenging Results of Rate Setting

Lobbying

State trade associations can often serve as a "backstop" to a state's calculations.

Need to develop cost data to use in formula.

Challenging Results of Rate Setting

Lobbying

State association needs to have thorough, accurate information on costs, profit margins, etc.

Challenging Results of Rate Setting

Lobbying

This information is necessary to be able to explain to state why rate reduction is harmful. Provides a counterpoint to state's assumptions.

Challenging Results of Rate Setting

Lobbying

Trade association can also use state formulas to calculate rates in advance.

Challenging Results of Rate Setting

Lobbying

State association may know before state makes official announcement what effect of data will be on annual rates.

Challenging Results of Rate Setting

Lobbying

Provider group may be able to identify mistakes made by state.

Challenging Results of Rate Setting

Lobbying

State's data or assumptions may be bad.
State may have miscalculated rates.

Challenging Results of Rate Setting

Lobbying

Trade association can also educate state on a number of rate related issues.

Impact of rate on provider availability
Cost effectiveness of HCBS

Challenging Results of Rate Setting

Lobbying

Educating Medicaid agency on cost effectiveness of waiver program is a very effective focus.

Challenging Results of Rate Setting

Lobbying

The focus is on showing the state how many more people they can care for with the same amount of money in waiver services vs. nursing facilities.

Challenging Results of Rate Setting

Lobbying

Working with beneficiary groups is also helpful. The state needs to be reminded that losing waiver providers means more beneficiaries go into facilities.

Challenging Results of Rate Setting

Lobbying

Beneficiaries do not want to go into facilities.

Challenging Results of Rate Setting

Lobbying

This is a zero sum game getting state agency to attribute a larger piece of the pie to your sector will improve rates.

Challenging Results of Rate Setting

Lobbying

Traditional lobbying can also work. Go to friendly legislators to plead your case.

Oversight committee.

Challenging Results of Rate Setting

Lobbying

State legislature has authority over state Medicaid agency. Often, state agency will be much quicker to listen to legislature.

Challenging Results of Rate Setting

Administrative Remedies

State plan should set out provider remedies related to rates.

State will provide notice and comment period prior to change in plan/rate

Challenging Results of Rate Setting

LITIGATION

When all else has failed, providers, beneficiaries, and/or trade associations will often seek help from the federal courts.

Challenging Results of Rate
Setting
LITIGATION

Primary remedy sought is an injunction.

This is a court order ordering the subject to refrain from certain activities, like cutting rates.

Challenging Results of Rate
Setting
LITIGATION

Standing – you must have standing, or else you cannot bring the lawsuit.

Challenging Results of Rate
Setting
LITIGATION

Who has standing, if anyone, depends upon the theory under which you are suing.

Challenging Results of Rate
Setting
LITIGATION

42 U.S.C. 1983 – this was the primary tool
for suing to challenge rate setting.

Challenging Results of Rate
Setting
LITIGATION

Arguing that 42 U.S.C. 1396a (30)(a)
creates a right for providers relating to
reimbursement.

Challenging Results of Rate
Setting
LITIGATION

Under the Boren Amendment courts held
providers had a right under 42 U.S.C.
1396(a)(30) that would support a claim
under 42 U.S.C. 1983.

**Challenging Results of Rate
Setting
LITIGATION**

This has changed:

Repeal of the Boren Amendment
Gonzaga University v. Doe

**Challenging Results of Rate
Setting
LITIGATION**

Repeal of the Boren Amendment. Boren amendment required rates to be "reasonable and adequate".

This led to a great deal of litigation.

**Challenging Results of Rate
Setting
LITIGATION**

Congress repealed the Boren amendment in 1997. Congress did this with the express purpose of reducing Medicaid rate litigation.

Challenging Results of Rate
Setting
LITIGATION

Gonzaga v. Doe. U.S. Supreme Court addressed when a statute creates an independent right actionable under 42 USC 1983.

Challenging Results of Rate
Setting
LITIGATION

Gonzaga v. Doe. It effectively narrowed the availability of 1983.

Challenging Results of Rate
Setting
LITIGATION

In the seven years since *Gonzaga*, courts have had numerous opportunities to review 42 U.S.C. 1396a(30)(a).

**Challenging Results of Rate
Setting
LITIGATION**

The majority of courts have held that 42 U.S.C. 139a(30)(a) does not create a right actionable under 1983 for providers.

**Challenging Results of Rate
Setting
LITIGATION**

Ninth Circuit – No individual right.
Fifth Circuit - No individual right.
Sixth Circuit – No Individual right.
Tenth Circuit – No Individual right.
First Circuit No Individual right

**Challenging Results of Rate
Setting
LITIGATION**

In these circuits, providers cannot sue under 42 U.S.C. 1983 to challenge rate setting.

Challenging Results of Rate
Setting
LITIGATION

Two other circuits have addressed this matter and come to different conclusions.

Challenging Results of Rate
Setting
LITIGATION

The Eighth Circuit found that there is a private right of action under 42 U.S.C. 1983.

Challenging Results of Rate
Setting
LITIGATION

The Seventh Circuit reached a slightly different result.

The Seventh Circuit continues to recognize a cause of action under § 1983.

Challenging Results of Rate
Setting
LITIGATION

Seventh Circuit treats state as any other purchaser of services. Free to set rate however it wishes. If rate does not attract enough providers, then rates must be increased.

Challenging Results of Rate
Setting
LITIGATION

This gives providers a right under §1983, but it requires providers to wait and see what happens after a rate is set before pursuing litigation.

Challenging Results of Rate
Setting
LITIGATION

Recently, providers have pursued a new theory – rate setting as a violation of the Supremacy Clause.

**Challenging Results of Rate
Setting
LITIGATION**

This does not require bringing suit under § 1983.

Instead providers challenge the state rate as violating federal law.

**Challenging Results of Rate
Setting
LITIGATION**

Already three cases in 2009 raising this theory.

The courts look to see if the action regarding rates obstructs Congress' purpose.

**Challenging Results of Rate
Setting
LITIGATION**

In *Maxwell-Jolly*, providers sued to stop a 10% rate reduction.

Court of Appeals granted injunction.

Challenging Results of Rate
Setting
LITIGATION

In that case, California failed to consider any factors other than its budget.

Challenging Results of Rate
Setting
LITIGATION

Court noted that "budget factors alone will not justify a rate cut."

Challenging Results of Rate
Setting
LITIGATION

Martinez v. Schwarzenegger

This is another case arising out of California's budget crisis.

Challenging Results of Rate
Setting
LITIGATION

Martinez v. Schwarzenegger

In this case the Plaintiffs raised the supremacy clause and challenged an across the board rate reduction.

Challenging Results of Rate
Setting
LITIGATION

Martinez v. Schwarzenegger

The Court granted the request for an injunction.

Challenging Results of Rate
Setting
LITIGATION

Martinez v. Schwarzenegger

As in *Maxwell-Jolly* and the other cases, Court noted California failed to consider the section 30a factors.

Challenging Results of Rate
Setting
LITIGATION

Martinez v. Schwarzenegger

In this case, California conceded it failed to consider the factors.

Challenging Results of Rate
Setting
LITIGATION

Martinez v. Schwarzenegger

Plaintiffs also provided expert testimony regarding impact of rate cuts.

Challenging Results of Rate
Setting
LITIGATION

The other cases that are currently proceeding under the Supremacy Clause all involve this kind of "budget-centric" rate cut.

**Challenging Results of Rate
Setting
LITIGATION**

NOTE: When proceeding under the
Supremacy Clause, providers cannot
obtain money damages. Only injunctive
relief is available.

**Challenging Results of Rate
Setting
LITIGATION**

If a state considers the Medicaid statute
factors and then reduces rates, providers
may not be as successful.

**Challenging Results of Rate
Setting
LITIGATION**

Although Courts have been willing to
intervene, they have generally been
unwilling to second guess "proper" rate
setting.

**Challenging Results of Rate
Setting
LITIGATION**

This is in part due to the fact that CMS has approved the State Plan.

**Challenging Results of Rate
Setting
LITIGATION**

Medicaid Statute allows providers to change plan, including rate setting.

Requires notice and comment period.

**Challenging Results of Rate
Setting
LITIGATION**

If notice and comment period followed,
Courts tend to defer to resulting formula.

Challenging Results of Rate
Setting
LITIGATION

Example: *American Society of Consultant
Pharmacists v. Garner*

Challenging Results of Rate
Setting
LITIGATION

In *Garner*, pharmacists challenged Illinois' effort to change its pharmacy rates.

The state had issued three notices requesting comments.

Challenging Results of Rate
Setting
LITIGATION

All of the notices were published less than thirty days in advance of the change, but this was an emergency rule. This meant no procedural defect.

**Challenging Results of Rate
Setting
LITIGATION**

The Plaintiffs argued the reduced rates would reduce services thus violating Section 30(a).

**Challenging Results of Rate
Setting
LITIGATION**

The Court found that the Plaintiffs failed to provide sufficient proof of this claim.

Plaintiffs provided affidavits alleging certain harm.

**Challenging Results of Rate
Setting
LITIGATION**

REMEMBER: If you are challenging rate setting and claiming it will lead to a reduction in services, need evidence.

Challenging Results of Rate
Setting
LITIGATION

Depending upon the jurisdiction you need proof of the failure to consider the required factors or proof of the negative impact on services.

Challenging Results of Rate
Setting
LITIGATION

TIP: For many reasons, proof of the negative impact on beneficiaries is useful to have.

Businesses crying poor are not as sympathetic.

Challenging Results of Rate
Setting
LITIGATION
State Court

Although not as common, providers can raise state law claims – usually procedural challenges.

Challenging Results of Rate
Setting
LITIGATION
State Court

If the State Agency did not follow the proper process to change a rate formula there may be state law remedies.

Challenging Results of Rate
Setting
LITIGATION
State Court

Every state has some form of Administrative Rules and Procedures Act (ARPA).

Challenging Results of Rate
Setting
LITIGATION
State Court

ARPA sets out the procedures an agency must follow to promulgate new regulations It may also provide remedies available if a state fails to properly promulgate rules.

Challenging Results of Rate
Setting
LITIGATION
State Court

Specific requirements can vary from state to state.

Challenging Results of Rate
Setting
LITIGATION
State Court

At a minimum, most rule making statutes require:

1. Notice of intent to adopt a rule
2. Comment Period
3. Publication of Final Rule

Challenging Results of Rate
Setting
LITIGATION
State Court

Notice of Intent.

Notice is required to be published in a specific place.

Should state rule to be adopted.

Challenging Results of Rate
Setting
LITIGATION
State Court

Comment Period.

There is usually a set period for comments. This may include public hearings.

Challenging Results of Rate
Setting
LITIGATION
State Court

Comment Period.

This is an important part of rulemaking. Making clear comments that support objections to the proposed rule is important.

Challenging Results of Rate
Setting
LITIGATION
State Court

Publication of Final Rule.

Once the comment period has expired, usually required to publish a final rule. Rule becomes effective a certain number of days after publication.

**Challenging Results of Rate
Setting**
LITIGATION
State Court

If the state changes its rate setting methodology without proper notice and comment, the procedural defect may provide grounds to stop the changes.

**Challenging Results of Rate
Setting**
LITIGATION
State Court

NOTE: Title XIX requires notice and comment period before altering state plan as well.

**Challenging Results of Rate
Setting**

Leaving the Program

Ultimately, if the rates are low enough, providers can simply leave the program.

Challenging Results of Rate Setting

Leaving the Program

This provides proof that the rates are insufficient.

Challenging Results of Rate Setting

Leaving the Program

Providers cannot collude to leave the program together.

That is potentially an anti-trust violation.

Challenging Results of Rate Setting

Leaving the Program

This means trade association cannot encourage its members to withdraw.

However, providers are free to withdraw.

Challenging Results of Rate Setting

Leaving the Program

Providers are hesitant to leave the program for several reasons:

- Don't want to leave the patients behind
- Fear someone else will take your place

Challenging Results of Rate Setting

Leaving the Program

Other reasons to stay:

Medicaid waiver is only payer; This may be the most important one. No provider will leave if it means going out of business.

Challenging Results of Rate Setting

Leaving the Program

There have been cases where provider exodus from a program led to a rate increase.

Conclusion

Medicaid rate setting is very complex and very state specific. If the state follows the appropriate procedures, challenging an unfavorable rate can be difficult. Providers need to be aware of the rate setting process and understand what is happening in order to properly articulate a response and advocate for a change. In many cases, rate setting challenges are as much a political challenge as a legal challenge. Providers need to be prepared to raise these issues and explain why reduced rates are bad for beneficiaries and providers.
