IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHANDS JACKSONVILLE MEDICAL CENTER, INC., *et al.*

Plaintiffs,

v.

SYLVIA M. BURWELL,

Defendant.

Civil Action No. CIV-14-263-RDM

DEFENDANT'S REPLY MEMORANDUM REGARDING VACATUR

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ARGUMENT

Plaintiffs agree that, even if the Secretary were to re-affirm the 0.2% downward adjustment on remand, vacatur could cost the taxpayers hundreds of millions of dollars. Plaintiffs' Supplemental Brief in Support of Vacatur ("Pl. Br.") at 15 (government would have to pay back funds); *id.* at 8–9 (arguing that adjustment could not be re-applied retroactively). But they nonetheless contend that it would be "unfair" to give the agency what they call "a costless and leisurely do-over," and that fairness requires vacatur so that the agency may not "flout the APA with total impunity." *Id.* at 15–16; *see also id.* at 16 ("Fair is as fair does.").

Plaintiffs forget that hospitals and the Secretary are not the only interested parties here. The money at stake is derived from taxes paid by the American public and depended on by millions of Medicare beneficiaries. In order to ensure fairness for *all* of the parties affected by an agency action, courts do not reflexively vacate upon finding an APA violation, but instead consider (1) the likelihood that the agency could correct the error on remand, and (2) the disruption that vacatur would cause in the interim.

Our opening brief explained why this test established by *Allied-Signal Inc. v. NRC,* 988 F.2d 146 (D.C. Cir. 1993), favors remand without vacatur here. Plaintiffs contend that other considerations govern the Court's inquiry, or that the *Allied-Signal* test itself favors vacatur. They are doubly wrong.

I. Standard of Review

"Fair" remedy for rulemaking defect: Plaintiffs argue that, if the Secretary committed procedural violations, fairness requires that the "remedy the statute and this Circuit imposes for those violations is vacatur." Pl. Br. at 16. To the contrary, the fair result in cases alleging procedural error under the APA is that, as this Court put it, "the Government usually does get a mulligan." Tr. 56:1-2. In determining how to exercise federal courts' equitable power after

finding an APA procedural violation, the Court of Appeals has recognized that frequently, the "fair" outcome is one that leaves the rule in place pending proceedings on remand to cure any procedural violations.[1] *Allied Signal,* 988 F.2d at 150.

Willfulness: Plaintiffs suggest that the alleged violations here were avoidable, Pl. Br. at 5 (notice and comment requirements are "not buried in the fine print of the rulemaking process"), that those violations were therefore willful, *id.* (agency "flouted" notice requirement), and that a remand without vacatur would encourage the Secretary to ignore the APA in the future, *id.* at 16. Plaintiffs cite no cases indicating that the presumed willfulness of a defect matters under *Allied-Signal*; it does not. Nor should the Court invent such a rule, the very premise of which runs contrary to the "presum[ption] that executive agency officials will discharge their duties in good faith." *CTIA-The Wireless Ass'n v. FCC*, 530 F.3d 984, 989 (D.C. Cir. 2008). In any event, there is no basis for Plaintiffs' insinuations. The Secretary's annual payment rulemakings address many aspects of the Medicare program over hundreds of pages in the Federal Register. Given the complexity of the Medicare program and the number of issues on which the Secretary must act each year, occasional errors can occur despite the best efforts of agency employees. When a court finds such an error (as Plaintiffs incorrectly ask the Court to do here), the *Allied-Signal* test governs the remedy, not speculation about improper motives.

Multiple deficiencies: Plaintiffs contend that vacatur is appropriate simply because the Secretary allegedly violated the APA in three senses. Pl. Br. at 7. But as support Plaintiffs point only to three cases that ordered remand without vacatur upon finding a single violation. *Id.* None addresses or supports their assertion that the mere *number* of violations of the APA matters

[1] Plaintiffs' suggestion that the *Allied-Signal* test is more properly applied in an adjudication than in a rulemaking, Pl. Br. at 3 n.2, ignores a long line of D.C. Circuit cases applying the test in rulemaking cases. *See e.g. Sugar Cane Growers Co-op of Fla. v. Veneman,* 289 F.3d 89, 98 (D.C. Cir. 2002).

in applying the first *Allied-Signal* prong. The test looks to the "seriousness of the order's deficiencies" only to the extent that those deficiencies are relevant to the ultimate question of "the extent of doubt whether the agency chose correctly." *Allied-Signal*, 988 F.2d at 150. That is presumably why the D.C. Circuit has remanded without vacating in several multiple-deficiency cases without suggesting any need for special treatment.[2]

Neither is the number of alleged deficiencies here relevant to the inquiry into the likelihood that the agency would come out the same way on remand. The three primary alleged deficiencies here are connected; they all flow from the alleged initial failure to explain in the proposed rule (and so enable meaningful comment on) the actuaries' methodological assumptions. *See* Pl. Br. at 6 ("In the Final Rule, CMS failed—again—to explain the basis for its actuaries' assumptions."). That is why, as we have explained, a remand curing that defect "would also cure any [] downstream violations[.]" Def.'s Supp. Mem. at 6 n.1.

II. First Factor: There is a Serious Possibility that the Secretary Would Re-Affirm the Adjustment After Correcting any Deficiencies on Remand

Remand for Supplemental Rulemaking Proceedings Does not Invalidate the FY 2014 IPPS Rule. Plaintiffs start on the right track, recognizing that a frequent remedy for opportunity to comment violations is remand to permit the agency to publish a new notice, disclosing material previously omitted and providing a further opportunity for comment. Pl. Br. at 8. After that, their analysis goes off the rails: "But even assuming CMS could develop the necessary support for some future across-the-board rate cut . . . that cut could apply *only to future payment years.* CMS cannot re-promulgate a rate reduction for fiscal year 2014." *Id.* (emphasis in

[2] *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) (failure to offer meaningful opportunity to comment and failure to provide reasoned explanation); *Gerber v. Norton*, 294 F.3d 173, 184 (D.C. Cir. 2002) (failure to offer meaningful opportunity to comment and failure to make required finding); *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin.*, 920 F.2d 960, 965–66 (D. C. Cir. 1990) (remanding to cure "three issues").

original). On the contrary, if the Court were to remand for correction of notice-and-comment violations, *without vacating*, that remand would constitute supplemental rulemaking proceedings for the FY 2014 IPPS rule, not a new rulemaking that could only be applied to future payment years.

"Futility" of Redress. Plaintiffs say that the agency could not re-affirm the adjustment on remand because "the agency could not offer any plausible basis—much less a reasonable one—to justify the cut on remand." Pl. Br. at 10. But as we have explained, the Secretary has already done that, in the CY 2016 OPPS rule. *See* Def.'s Supp. Mem. at 8–9. This includes a specific explanation of the point that Plaintiffs focus on, *viz.*, the related assumptions that one-midnight surgical cases would shift to outpatient under the two-midnight rule but one-midnight medical cases would not. In short: the "clinical assessments and protocols" for determining the length of stay in medical cases are "more variable and less defined" than for surgery cases, Medicare Program: Short Inpatient Hospital Stays, 80 Fed. Reg. 39,200, 39,369 (July 8, 2015). So for purposes of "estimat[ing]" the impact of the two-midnight rule, *id.*, the Secretary determined that a "model" assuming that medical cases would "extend past 2 midnights" after imposition of the rule (and so would all continue to be billed as inpatient) but surgery cases would not (and so would all shift to outpatient) "yielded a reasonable estimate of the net effect of the 2-midnight policy." *Id.* Remand would not be futile (if the Court finds error) because upon reconsideration there is a serious possibility that the agency would re-affirm the adjustment on these grounds, which are reasonable, supplemented as necessary in light of the record on remand.[3]

[3] Plaintiffs imply that the Secretary contradicted the explanation described above by stating, in response to comments, that her rule would not cause some previously one-midnight encounters to extend past two midnights. Pl. Br. at 12. But that is not what the commenters or the Secretary said. Rather, the commenters warned that hospitals might keep beneficiaries longer even where doing so was "medically unnecessary," R.R. 1359, and the Secretary responded that she would through fraud and abuse review "monitor[]" for "*unnecessarily* elongated hospital admissions."

III. Second Factor: Vacatur Would Cause Significant Disruption

Retroactivity and Vacatur. Plaintiffs' discussion of the supposed difficulty that the Secretary would face in exercising her retroactive rulemaking authority, 42 U.S.C. § 1395hh(e)(1)(A), *see* Pl. Br. at 9, only reinforces our argument against vacatur. But Plaintiffs are wrong to suggest that, were the Court to vacate, the "public interest" would not be implicated because the agency would merely be "required to pay money it owes." *Id*. That conclusion presupposes that Plaintiffs' critique of CMS's actuarial analysis is correct. But if CMS were to again conclude after a vacatur, as it did once already, that the two-midnight rule artificially increased hospital payments by $220 million beginning in FY 2014, then the funds hospitals would have received in the interim would amount to a windfall. As we explained in our opening brief, "[i]t would certainly be in the 'public interest' for [such] artificially-increased payments not to be made to hospitals in the first place," despite doubt about whether the Secretary would be able to recoup them after the fact. Def.'s Supp. Mem. at 17.

Multiple methods: Plaintiffs do not deny that vacatur would cost the taxpayers hundreds of millions of dollars, or even that the Government would incur administrative costs in doling out those funds. But they minimize the latter costs, pointing to "multiple methods in place" that the Secretary could use. Pl. Br. at 15. Such methods exist, of course, but this does not change the fact that needless administrative costs would be incurred under Plaintiffs' proposal, or that remand without vacatur would avoid this waste of taxpayer funds. *See* Def.'s Supp. Mem. at 19.

CONCLUSION

For the reasons set forth, remand without vacatur would be the proper remedy here.

Id. (emphasis added). That explanation is perfectly consistent with the CY 2016 OPPS rule's explanation that medical cases would extend past two midnights more often than surgical cases because "the clinical assessments and protocols" for determining a medically-necessary length of stay in medical cases are "more variable and less defined."

Dated: August 31, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August 2015, I caused the foregoing document to be served on Plaintiffs' counsel of record electronically by means of the Court's CM/ECF system.

/s/ Matthew J.B. Lawrence
MATTHEW J.B. LAWRENCE