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Will DC Circ. Sidestep Dispute A Decade In The Making?

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The D.C. Circuit heard oral argument on Sept. 22 in UPMC Braddock v. Perez, No. 13-5158, a closely watched case that could have far-reaching effects on the health care industry and beyond. The dispute, which has been wending its way through the administrative and judicial systems for nearly a decade, involves a simple question: Are Federal Employees Health Benefits Plan (FEHBP) network providers "government subcontractors"? Although easily stated, the analysis and resolution of this question is far from straightforward, and the issue has been central to a flurry of litigation and agency action in recent years.

At stake is whether FEHBP network providers are required to comply with a host of additional affirmative action obligations and reporting requirements administered by the U.S. Department of Labor's Office of Federal Contract Compliance Program. A definitive ruling from the D.C. Circuit has been highly anticipated by both health care providers and agency officials, as well as numerous high-profile amici curiae who have been drawn into the long-running dispute.[1] In the wake of the recent oral argument, however, it appears that the wait for definitive guidance may continue.

Background

Three hospitals affiliated with the University of Pittsburgh Medical Center (UPMC Braddock, UPMC Southside, and UPMC McKeesport) contracted with UPMC Health Plan to provide medical services to individuals covered by Health Plan's program. Subsequently, Health Plan entered into a contract with the Office of Personnel Management under which it agreed to provide medical coverage to FEHBP beneficiaries. Because the hospitals provided services to Health Plan, which in turn contracted to provide medical services to OPM, the OFCCP took the position that the hospitals qualified as government subcontractors and therefore were subject to nondiscrimination and affirmative action requirements.

In 2004, the OFCCP initiated an audit of the UPMC hospitals' employment practices to examine compliance with affirmative action regulations. The hospitals resisted, stating that they were not subject to the agency's jurisdiction. Litigation soon ensued, and an administrative law judge and the Department of Labor's Administrative Review Board (ARB) both sided with OFCCP and held that the hospitals were

subcontractors.

The ARB's decision was appealed to the U.S. District Court for the District of Columbia in 2009, and the district court affirmed the ARB decision in April 2013. The case was then appealed to the D.C. Circuit. While the case was pending on appeal, the Department of Labor instituted a five-year moratorium on enforcement actions againstTRICARE health care providers with respect to affirmative action obligations applicable to federal contractors. See Dep't of Labor, Directive 2014-01: TRICARE Subcontractor Enforcement Activities (May 2014).

The Merits

The dispute centers on the status of the UPMC hospitals under the Department of Labor's regulations, which define "subcontractor" as any person holding:

(1) a contract under which some portion of a contractor's obligation under another contract is undertaken or assumed; or

(2) a contract for the purchase or sale of "nonpersonal services" that are "necessary to the performance" of some other contract.

See 41 C.F.R. § 60-1.3. Focusing on the second of these prongs,[2] the UPMC hospitals argued that they were not "subcontractors" because the medical services they provided were not "necessary to the performance" of Health Plan's contract with OPM asserted that their services were not "necessary to the performance" of Health Plan's contract. According to the hospitals, Health Plan's contract with OPM only required it to provide "insurance coverage" and not "actual medical services," so the medical services provided by the hospitals did not contribute to the fulfillment of Health Plan's contractual obligations. For support, the UPMC hospitals relied on OFCCP v. Bridgeport Hospital, ARB Case No. 00-034 (Jan. 31, 2003), in which the ARB held that a hospital was not a subcontractor where it held a medical services contract with Blue Cross/Blue Shield, which in turn had contacted with OPM to provide federal employees with health insurance.

The government responded that Bridgeport Hospital was distinguishable on the ground that Blue Cross/Blue Shield had agreed to provide only insurance coverage in that case, whereas Health Plan, an HMO instead of a more traditional insurer, had agreed to "provide medical services to federal employees." Thus, the government argued — and the district court agreed — that the health care services provided by the UPMC hospitals were indeed "necessary for [Health Plan] to meet a portion of its obligations under its contract with OPM."

Argument Before D.C. Circuit

Oral argument before the D.C. Circuit largely tracked the parties' arguments raised before the district court. The UPMC hospitals asserted that obligations undertaken by Health Plan in its contract with OPM were akin to traditional insurance obligations assumed by the insurance carrier in the Bridgeport Hospital case, meaning that the medical services provided by the hospitals were not "necessary to the performance" of Health Plan's contractual obligations. The government rejoined that a close reading of the contract between Health Plan and OPM revealed that Health Plan had agreed to arrange for the provision of actual medical services, in addition to insuring its beneficiaries' healthcare costs. In outlining its argument, the government made clear that, in its view, the critical question was whether Health

Plan's contract with OPM contained a promise to provide medical services.

The court pressed both sides on the assumptions underlying their arguments. For instance, Judge Harry T. Edwards asked the UPMC hospitals why Health Plan should be treated as a traditional insurer (like Blue Cross/Blue Shield in the Bridgeport Hospital case) when in fact it was an HMO, which Judge Edwards characterized as "quite different" from a traditional insurer. Meanwhile, Judge Brett Kavanaugh questioned why this distinction was determinative, stating that "it doesn't seem to make a lot of sense from the hospital's perspective."

However, before the merits could be fully explored, the court took up the question of whether the dispute was truly ripe for judicial consideration in light of the five-year moratorium on enforcement actions against TRICARE providers announced earlier this year by the Department of Labor.

The UPMC hospitals stated that the government had signaled its intention to pursue enforcement actions against FEHBP network providers notwithstanding the enforcement moratorium in the TRICARE context. The government, however, informed the court that if an FEHBP network provider was also a TRICARE network provider, OFCCP would abide by the moratorium and "administratively close" any pending enforcement action. The UPMC hospitals then stated that they were, in fact, also TRICARE network providers, and the government represented that assuming that the hospitals could provide documentation of this fact, then it would not pursue its pending enforcement action at this time.

At this point, the court made clear that it was disinclined to address the merits of the underlying dispute if, as appeared to be the case, there would be no aggrieved party once the pending enforcement action was closed. The court then directed the UPMC hospitals to provide the government with documentation of their status as TRICARE network providers within the next 14 days, and the case was taken under advisement.

The Upshot

Assuming that the enforcement action against the UPMC hospital is administratively closed and the pending litigation is dismissed as unripe, this will bring to an end the long-running dispute regarding the status of FEHBP network providers — but only for now, and only under the facts of this case.[3]

In five years, when the OFCCP's enforcement moratorium in the TRICARE context has expired, FEHBP network providers may once again find themselves ensnared by this thorny issue. And perhaps more importantly, for FEHBP providers who are not also TRICARE network providers, the question of whether they are subject to federal affirmative action requirements is still very relevant, and very much unsettled. Companies who may find themselves in this category would be well advised to take stock of their existing contracting relationships and consider whether modifications of their employment-related policies and procedures may be warranted.

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[1] Among the many amici were the U.S. Chamber of Commerce, the National Women's Law Center, the Service Employees International Union, and the NAACP Legal Defense Fund.

[2] The 2012 National Defense Authorization Act, passed in December 2012, abrogated any argument that a provider might be considered a subcontractor under the first prong of the regulatory definition. The 2012 NDAA explicitly stated that a contract to establish a network of healthcare providers "may not be considered to be a contract for the performance of health care services." See 2012 National Defense Authorization Act, § 715. Because these prime contracts did not involve the provision of health care services (per the NDAA), healthcare providers cannot be deemed to be "perform[ing] a portion of a [prime contractor's] obligations" by providing medical services.

[3] If the appeal is dismissed as unripe, presumably the decision of the district court below would also be vacated, thereby eliminating the precedential value of that ruling.
