

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CLINICAL LABORATORY
ASSOCIATION,

Plaintiff,

v.

ALEX M. AZAR II,

Defendant.

Civil Action No. 17-2645 (ABJ)

NOTICE OF SUPPLEMENTAL AUTHORITY

The Secretary respectfully submits this Notice to inform the Court of the recent decision of the Court of Appeals in *Mercy Hospital, Inc. v. Azar*, --- F.3d ---, 2018 WL 2749727 (D.C. Cir. 2018). This decision is relevant to the Secretary’s argument that Plaintiff’s suit is precluded by the statutory bar on any challenge “to the establishment of payment amounts under this section.” 42 U.S.C. § 1395m-1(h)(1).

Mercy Hospital concerned a provision of the Medicare statute that bars review of “the establishment of . . . prospective payment rates,” 42 U.S.C. § 1395ww(j)(8)(B), for certain inpatient services. The plaintiff in that case challenged the formula for making certain adjustments that would be used to calculate the payment rates, but the D.C. Circuit held that the challenge was precluded, explaining that “[i]f the bar on reviewing the prospective payment rate protects th[is] rate . . . that bar must also include the adjustments used to calculate that rate.” *Mercy Hospital*, 2018 WL 2749727 at *3. The court held that “bars to review extend far enough to prevent indirect challenges to agency decisions that Congress expressly shielded from review.” *Id.* The court accordingly rejected the plaintiff’s attempt to separate the adjustments from the Secretary’s ultimate determination of the rates: “And realistically, a court cannot

review any of those adjustments without also reviewing the step-two rate. A flawed LIP formula would mean that a step-two rate incorporating that formula must be incorrect because that rate depends in part on the flawed formula.” *Id.* at *4. “Because reviewing a formula used by the prospective payment rate would effectively review the rate itself, we cannot review the former if we cannot review the latter.” *Id.*

The statute here uses language that is strikingly similar to the statutory language at issue in *Mercy Hospital*: “There shall be no administrative or judicial review . . . of the establishment of payment amounts under this section.” 42 U.S.C.A. § 1395m-1(h)(1). The challenge here is also strikingly similar to the one raised in *Mercy Hospital*. Plaintiff argues that, even though this Court may not review the payment amounts directly, it nevertheless may review the Secretary’s collection and use of data in calculating the statutory payment amounts. *Mercy Hospital* accordingly provides additional authority in support of the Secretary’s motion to dismiss.

Dated: June 11, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

JENNIFER D. RICKETTS
Director

JOEL McELVAIN
Assistant Director

/s/ Michael L. Drezner
Michael Drezner
Trial Attorney
(VA Bar No. 83836)
U.S. Department of Justice
Civil Division, Federal Program Branch
20 Massachusetts Ave, N.W.
Washington, D.C. 20530
Telephone: (202) 514-4505
Michael.L.Drezner@usdoj.gov
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2018 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Michael L. Drezner

MICHAEL L. DREZNER

Trial Attorney