

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

THE AMERICAN HOSPITAL ASSOCIATION,)
ASSOCIATION OF AMERICAN MEDICAL)
COLLEGES, THE FEDERATION OF)
AMERICAN HOSPITALS, NATIONAL)
ASSOCIATION OF CHILDREN’S)
HOSPITALS, INC., MEMORIAL COMMUNITY)
HOSPITAL AND HEALTH SYSTEM,)
PROVIDENCE HEALTH SYSTEM -)
SOUTHERN CALIFORNIA d/b/a)
PROVIDENCE HOLY CROSS MEDICAL)
CENTER, and BOTHWELL REGIONAL)
HEALTH CENTER,)
))
Plaintiffs,)
))
v.)
))
ALEX M. AZAR II,)
in his official capacity as SECRETARY OF)
HEALTH AND HUMAN SERVICES,)
))
Defendant.)
))

Civil Action No. 1:19-cv-03619

**DECLARATION OF KATHLEEN TENOEVER IN SUPPORT OF
PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

I, Kathleen Tenoever, hereby declare and state the following:

1. My name is Kathleen Tenoever. I am over 21 years of age and competent to testify to the facts set forth herein. I am an adult citizen of the United States. I reside in Washington, DC.
2. The facts set forth in this declaration are based on my personal knowledge and upon information available to me through the files and records of the Federation of American Hospitals (FAH). If called upon as a witness, I could and would testify to these facts.

3. I am the Senior Vice President and General Counsel of FAH. I have served in this capacity since September 2015. In this role, I am responsible for legal, regulatory, and legislative policy issues affecting investor-owned hospitals and helping to shape and implement advocacy strategies on the issues important to FAH membership. In my capacity as Senior Vice President and General Counsel, I have personal knowledge of the impact that the new CMS Final Rule challenged in this lawsuit will have on FAH's members.

4. FAH is the national representative of more than 1,000 investor-owned or managed community hospitals and health systems nationwide. Its members include rural and urban hospitals, as well as inpatient rehabilitation, psychiatric, long-term acute care, and cancer hospitals. FAH is an advocate for a market-based healthcare system that benefits consumers by continually providing high quality care, patient safety, and high value of care through competition and innovation. FAH works to address its members' needs by advocating for their interests in national health-policy development, legislative and regulatory debates, and judicial matters.

5. On behalf of its members, FAH (with its co-plaintiffs) has filed this lawsuit challenging a recent rule issued by Centers for Medicare & Medicaid Services (CMS) requiring the public disclosure of charges privately negotiated between hospitals and insurers (Final Rule).

6. In the Final Rule, CMS requires hospitals to publicly disclose the following information on their websites:

- a. "Gross charges," "payer-specific negotiated charges," "the amount the hospital is willing to accept in cash from a patient," and "the minimum and maximum negotiated charges" for "all items and services"; and

- b. “Payer-specific negotiated charges,” “the amount the hospital is willing to accept in cash from a patient for an item or service,” and “the minimum and maximum negotiated charges for 300 common shoppable services.”

7. FAH’s members are committed to providing patients with high quality healthcare, patient safety, and ensuring that patients have access to the information they need to make informed decisions about their health care.

8. Research shows that what patients care about most is their own out-of-pocket costs, not the rates negotiated between hospitals and insurers. To that end, FAH supports policy options that would require disclosure of the out-of-pocket amounts patients will be expected to pay for care, recognizing that each patient’s circumstances will be differently affected by numerous variables in their individual health insurance coverage.

9. The Final Rule, however, does not do that. Instead, the Final Rule suggests that there is a necessary correlation between negotiated rates and out-of-pocket costs, which is not true. And by requiring hospitals to disclose negotiated rates under the guise of helping patients make informed healthcare decisions, the Final Rule is likely to confuse patients. So the Final Rule is far more likely to hinder patients’ abilities to make well-informed decisions than it is to help them.

10. The Final Rule will cause concrete and imminent injury to FAH’s members, which constitute the vast majority of the investor-owned hospital community. Virtually all of FAH’s members will suffer immediate, non-remediable harm if the Final Rule is permitted to go into effect.

11. FAH’s members typically negotiate contracts with insurers governing the prices that specified insurance plans will be expected to pay for specific services. The payment

arrangement varies by insurer and plan: some contracts provide for a fee-per-service, some contemplate a per diem, still others involve payment based on diagnosis, some type of risk-sharing or alternative payment arrangements. The contracts with insurers also typically contain confidentiality clauses that require FAH's member hospitals to keep that information confidential. The non-public nature of insurer-specific rates allows FAH's member hospitals to negotiate effectively with insurers at arm's length.

12. By mandating public disclosure of insurer-specific negotiated charges, the Final Rule makes these arm's length negotiations impossible. Indeed, the Final Rule will threaten open competition in the market place, hurting FAH's member hospitals and ultimately patients. Insurers will demand lower rates when they learn that a member hospital has given one of its competitors a better rate for a specific service.

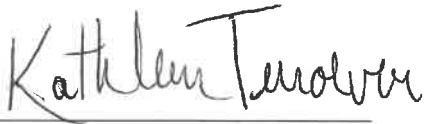
13. The Final Rule's requirement that hospitals disclose "the amount the hospital is willing to accept in cash from a patient" is no better. FAH's member hospitals usually make decisions about how much to charge uninsured patients or patients choosing not to use their insurance on an ad hoc, patient-by-patient basis. The hospital must account for patient-specific factors like the patient's financial resources, how quickly the patient pays the bill, compassionate circumstances, and the total amount due. By mandating disclosure of a one-size-fits all number for "discounted cash price"—or worse, mandating disclosure of gross charges instead—the Final Rule will misleadingly suggest to patients that there is less of a discount (or no discount) available for patients who do not use insurance. That may prevent some patients from seeking needed care.

14. The Final Rule requires hospitals to publicly disclose their negotiated rates and amount that they would be willing to accept in cash by January 1, 2021. But that deadline is

unreasonable and unrealistic. To meet that deadline, hospitals would have to start devoting substantial resources to complying with the rule almost immediately—identifying the enormous amount of data necessary to populate the database, formatting the database to comply with the rule (particularly as it relates to “shoppable services”), and loading and hosting the database on the hospital’s website. That would result in a diversion of critical resources that could better be devoted to patient care. Plaintiffs therefore respectfully request a ruling as soon as practical.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 9th day of December, 2019.

By: 
Kathleen Tenover
Senior Vice President and General
Counsel of the
Federation of American Hospitals