Hospital Cost Regulation
Certificate of Need Regulation

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

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TO: David E. Smith, Commissioner

FROM: David A. Williams, Assistant Attorney General

SUBJECT: Legislation to control hospital costs

You have asked me two questions:

1. Whether the State can by law regulate hospital costs and limit the increase in those costs to a certain amount or percentage per year; and
2. Would there be any conflict between such a law and the Federal regulations governing reimbursement to hospitals under the Medicare or Medicaid program?

I.

As to the question of whether or not the State may exercise its so-called police power to regulate hospital costs, both Federal and State statutes have clearly declared that the State can.

Maine Courts have described the police power as follows:

> To sustain a statute as an exercise of the police power, it must appear that enactment was for the object of prevention of some offense or manifest evil or preservation of public health, safety, morals or general welfare, that there is some clear, real and substantial connection between the assumed purpose of the enactment in the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend toward accomplishment of the object for which the power is exercised. State vs. Union Oil Company of Maine, 120 A.2d 708 (1956).

It would seem to me that regulating the cost of hospital care in order that it not continue to escalate in such a way as to be prohibitively costly to those who must pay for it out of their private funds, or so costly as to create a serious fiscal crisis for those who receive medical care under the Medicaid program, could come within this general description of the police power.

As to the question of whether the State can more specifically control prices, the Supreme Court of Maine has also ruled in the affirmative in general areas. See, for example, Maine Beauty Schools, Inc. vs. State Board of Hairdressers, 225 A.2d 424 (1967). Likewise, the Federal Courts, including the United States Supreme Court, have consistently upheld the right of States to regulate prices of various goods and commodities such as milk, agricultural produce, electricity, natural gas and transportation rates.

The earliest rationale used to justify regulations such as fixing the rates charged by business, was that the enterprise had become "affected with a public interest." Such businesses included those carried on under the authority of a public grant of privilege, such as common carriers, telegraph, telephone companies, and ferries, and those "exceptional" businesses such as inns and cabs which had a long in history of regulations. This narrow view of a business "affected with public interest" was enlarged by the Supreme Court, in Munn vs. Illinois, 94 U.S. 113 (1877) to include those privately owned businesses devoted to the public use even if not operating under a governmentally granted franchise. For a number of years this judicial phrase was interpreted in inconsistent ways by the Court until its decision in Nebbia vs. New York, 291 U.S. 502 (1934) when in upholding State price controls for milk, the Court said that "effected with the public interest [was] the equivalent of subject to the exercise of the police power." The Court went on to State that "so far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a State is free to adopt whatever economic policy may be reasonably deemed to promote the public welfare, and to enforce that policy by legislation adopted to its purpose." Indeed, it now appears that economic regulation is permissible under the Federal Constitution "if any state of facts can be conceded to justify legislative judgment." Williamson vs. Lee Optacle Company, 384 U.S. 483 (1955). Thus the conclusion is clear, regulation of hospital prices is within the power of the State of Maine to legislate upon.

II.

The second question concerns the possibility of a conflict between Federal and State regulation of health care. Specifically you are concerned with those regulations which require hospitals to be paid under the Medicaid program according to the terms and conditions of an extensive group of Federal regulations.

The possibility of a conflict between State and Federal law exists in this particular case on two levels. First, there is the general rule that where the Federal Government acting within its constitutional authority legislates on a subject, then the State law on the same subject is preempted by the supremacy clause of the Federal Constitution. But the second issue which arises here arises because the hospital is engaged in commerce and the State's powers to regulate commerce through its police power are severely limited.

As to the pure Federal preemption, it is my judgment that nothing in the Medicare or Medicaid programs, or any other Federal legislation of which I am aware, specifically seeks to control the costs of hospital care. (It is interesting to note in this regard that there was a bill designed to specifically control hospital costs before the Congress which recently adjourned. The bill was not passed.) Therefore there is no reason to believe that a pure Federal preemption problem exists. Certainly the fact that the Medicaid program has adopted regulations concerning the circumstances under which the Federal Government will pay for medical care in a hospital setting for those who are eligible under the program on the basis of the cost of providing that care by said hospital is not only not a cost control measure in general, it is not even a cost control measure with regard to that specific hospital. For by paying on a cost basis, the Government merely reflects, instead of controls, the rise in hospital costs. True, the adoption of health planning legislation and the creation of utilization reveiw programs does attempt in other ways to control hospital costs, but these programs operate indirectly at best and are somewhat tangential to the issue of rising hospital costs.

As to the question of whether or not there is a conflict between the State police power and the Federal police power over interstate commerce, the general rule is as follows:

> In determining whether the State has imposed a[n impermissible] burden on interstate commerce, it must be born in mind that the Constitution when conferring on Congress the regulations of commerce...never intended to cut the State off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly effect the commerce of the country. Legislation, in a great variety of ways, may effect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution...but a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. Huron Portland Cement Company vs. Detroit, 362 U.S. 442, 442-4.

Using this standard as a test, it seems to me that there would not be an impermissible burden on interstate commerce should the State enact legislation to control hospital costs within the State of Maine. The burden is no greater, for example, than that imposed on dairy farmers for the control of milk prices which has been upheld against similar challenges, and the law does not unequally treat, or protect the interests of, Maine hospitals as opposed to hospitals from other states.

Nor can the subject of hospital costs or prices be said to be a subject which requires uniformity of regulation on a national scale. Instead, the true nature of health care costs is one that reflects the unique nature of each state: rural vs. urban, wealthy vs. poor, etc. Therefore, the state is not presumptively forbidden to regulate this area of interstate commerce.

For these reasons then, I feel that the State does have the legislative authority to enact legislation regulating hospital costs, and that this legislation is not preempted by Federal legislation on the same subject or by the commerce clause of the Constitution of the United States.

DAW:bw