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## Health Care Cases To Watch In 2013

By **Rachel Slajda**

Law360, New York (January 01, 2013, 5:18 PM ET) -- Health care attorneys will be keeping a close eye this year on a range of litigation over Medicare payments to hospitals, including one case at the Supreme Court that could be worth billions of dollars for providers, as well as several still-pending challenges to the Affordable Care Act.

Here's a rundown of the most important health care cases to watch in 2013.

### **Sebelius v. Auburn**

Although this case before the U.S. Supreme Court concerns procedural details of Medicare's reimbursement appeals deadline, it could determine whether the hospitals involved, and hundreds more, can seek to rectify several years' worth of underpayments from Medicare.

The question in *Sebelius v. Auburn Regional Medical Center et al.* is whether the Medicare Act allows for equitable tolling of a 180-day deadline for appealing reimbursement decisions to the agency's Payment Reimbursement Review Board.

The hospitals in the case argue that the deadline is a claims-processing deadline, and therefore subject to equitable tolling. At issue are the hospitals' challenges of years' worth of incorrect disproportionate share hospital, or DSH, payments, the result of bad calculations on the part of the Centers for Medicare and Medicaid Services.

The hospitals claim CMS knowingly used bad data to make the calculations then hid their mistakes for years, long past the 180-day deadline. They say they should be allowed to bring appeals past the deadline, when the reason for the appeal could not have been known in time because of agency misconduct. CMS denies any misconduct.

If the Supreme Court, which heard arguments in December, rules for the hospitals, it could open CMS up to widespread challenges of DSH payments going back decades. The government said at arguments that such a move would be "chaotic" for Medicare.

And because CMS continues to keep some of the information it uses in its calculations secret, the case will be important in laying out for providers whether, and under what circumstances, they can challenge errors they couldn't have known about, experts say.

"It's certainly going to have some impact to the government or providers, whichever way it comes out," said Mark Polston, a partner at King & Spalding LLP and former deputy associate general counsel at CMS.

The hospitals are represented by Robert L. Roth of Hooper Lundy & Bookman PC.

The case is *Sebelius v. Auburn Regional Medical Center et al.*, case number 11-1231, in the U.S. Supreme Court.

### **Allina v. Sebelius**

The D.C. District Court in November struck down a CMS rule dealing with another aspect of DSH calculations, saying the agency had tried to use the complexity of Medicare to hide bad rulemaking that skipped proper notice-and-comment procedures, and lowered hospitals' DSH payments without their input.

At issue is whether Medicare Advantage patient stays should be included in a ratio that determines the levels of DSH payments. In 2004, CMS, with little notice, said it would include the Advantage payments, significantly lowering the ratio and therefore the payments for many hospitals.

Although the instant case has been decided, the agency's reaction will be closely watched. The government has not yet filed an appeal, but many observers are expecting one. If it doesn't, it will have to undertake full-fledged rulemaking to address how the ratios will be calculated.

All of this is taking place at the same time CMS is gearing up to implement parts of the Affordable Care Act changing DSH calculations. Under the ACA, the payments are scheduled to be cut starting in fiscal year 2014, which begins in October 2013. Some of the cuts will be made up for by new payments that will be based on a hospital's DSH cuts, the change in the uninsured population and a hospital's uncompensated care costs.

A proposed rule laying out the new calculations is expected this summer, and experts say the outcome of DSH litigation could affect the new rule, and vice versa.

"Litigation in the DSH area will have a big impact either way it comes down," Polston said.

The hospitals are represented by Stephanie Ann Webster of Akin Gump Strauss Hauer & Feld LLP and Dennis M. Barry of King & Spalding LLP.

The case is *Allina Health Services et al. v. Sebelius*, case number 1:10-cv-01463, in the U.S. District Court for the District of Columbia.

### **Catholic Health Initiatives v. Sebelius**

Oral arguments are expected in 2013 in the D.C. Circuit court in this case concerning whether beneficiaries who are eligible for both Medicare and Medicaid, known as dual-eligibles, should be counted in the DSH payment ratios. If the hospitals win, it could mean increased DSH payments for some hospitals.

At issue is whether patient stays for dual-eligible patients who have exhausted their Medicare benefits should be counted in part of the calculations, known as the Medicaid fraction.

The district court ruled in January 2012 for the hospital plaintiff, Catholic Health Initiatives-Iowa Corp., after finding that CMS was attempting to retroactively apply a new interpretation, reached in 2010, to CHI-Iowa's payments for fiscal years 1996 and 1997.

It did not rule on the soundness of the new interpretation, that the patient stays should not be included in the Medicaid fraction.

The case has been fully briefed, but the date for the oral arguments has not been set.

In a somewhat related case, the Fifth Circuit ruled in December that patient stays for dual-eligibles who do not qualify for Supplemental Security Income cannot be included in DSH calculations.

The hospital is represented by Christopher L. Keough, James Harold Richards and Hyland Hunt of Akin Gump Strauss Hauer & Feld LLP.

The case is Catholic Health Initiatives v. Kathleen Sebelius, case number 12-5092, in the U.S. Court of Appeals for District of Columbia Circuit.

### **Pruitt v. Sebelius**

This challenge to the ACA, brought by the state of Oklahoma, claims that the law allows federal subsidies to help people buy health insurance only on state-based exchanges, and that such subsidies are not available on federally facilitated exchanges. A ruling for Oklahoma, while unexpected, could damage one of the key aspects of the ACA.

"The most serious legal challenges to the Affordable Care Act are done," said Robert Weiner, a partner at Arnold & Porter LLP who oversaw the Justice Department's defense of the law before returning to private practice in May. "I think, if any of these got through, particularly the subsidies one, it would potentially throw a wrench in the works. But I think the risk of them getting through is pretty low."

Oklahoma claims that an Internal Revenue Service rule providing for the premium tax credits regardless of what type of exchange a taxpayer used violates the law. The state argues that its resident employers should not be hit with a penalty if their employees qualify for a subsidy, because such subsidies should not be allowed on Oklahoma's exchange, which will be federally run.

The Department of Justice has asked the Oklahoma federal court to dismiss the case, arguing that Oklahoma has no standing to challenge a rule on behalf of its residents. A group of restaurants based in Oklahoma has moved to intervene.

Like the ACA challenge that reached the Supreme Court, this case "began as an interesting intellectual question" and could, like the preceding challenge, gain momentum in the courts, said Stephen Weiner, chair of the health law practice at Mintz Levin Cohn Ferris Glovsky & Popeo PC. "We'll see more."

The case is *Pruitt v. Sebelius et al.*, case number 6:11-cv-00030, in the U.S. District Court for the Eastern District of Oklahoma.

### **Liberty University v. Geithner**

This religious-based challenge to the ACA's employer mandate was revived by the Supreme Court in November, when the justices remanded the case to the Fourth Circuit to hear issues that had not been explicitly decided by the high court's June decision upholding the law.

The case is considered a long shot in that it challenges the constitutionality of a law that the Supreme Court has already upheld, but a win could potentially expand religious exemptions under the ACA or de-claw the employer mandate, which fines employers that do not provide adequate, affordable coverage to their workers.

The Fourth Circuit had ruled earlier that Liberty University Inc. was barred from bringing the challenge until after it had been fined for failing to provide adequate insurance, under the Anti-Injunction Act. The Supreme Court's order directed the Fourth Circuit to further consider the case in light of its decision, which held that the AIA did not apply.

Liberty contends that the employer mandate is not valid under the Commerce Clause, and that the requirement for employers to offer adequate, affordable coverage to employers or potentially pay a fine violates the university's religious freedom by forcing it to subsidize abortions.

Liberty is represented by in-house counsel.

The case is Liberty University, Inc. v. Timothy Geithner, case number 10-2347, in the U.S. Court of Appeals for the Fourth Circuit.

--Editing by Richard McVay.

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