

Health Care MVP: Akin Gump's Stephanie Webster

By Jeff Overley

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Akin Gump Strauss Hauer & Feld LLP's Stephanie A. Webster led hospitals to victory this year at the D.C. Circuit in a major challenge to Medicare reimbursement policies, one of several high-profile court fights that landed her a place among Law360's Health Care MVPs.

The April triumph saw circuit judges agree that the Centers for Medicare and Medicaid Services a decade earlier had failed to give proper notice when doing a hugely important about-face on so-called disproportionate share hospital payments.

"The agency made a 180-degree policy change without any acknowledgment or discussion of the change or its impact," Webster said.

At a high level, that was a big win on behalf of hospital clients simply because regulators tend to get great deference from courts, making it hard to invalidate even questionable actions.

"It is difficult to get a rule vacated by a court for lack of notice because agencies are given considerable leeway as they develop their policies through rulemaking," Webster said.

More importantly, it's a win with financial implications that could reach into the hundreds of millions of dollars, depending on how the notoriously perplexing DSH formula ultimately is interpreted.

"The amount at stake is very significant," Webster said.

At issue in the case, *Allina v. Sebelius*, was whether Americans enrolled in private Medicare Advantage plans should be viewed as "entitled to benefits" under traditional Medicare. If they are, as CMS contended, then they'd wind up in a different part of the DSH formula, and hospitals would end up with less money.

It's not clear how the dispute will ultimately shake out because the D.C. Circuit only ordered CMS to



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provide better notice if it wishes to depart from its old approach. So far, the agency hasn't said how it will proceed, but Webster said that CMS subsequently has made some policy determinations that suggest it may not back down.

"One could very reasonably take those determinations as an indication that the agency thinks it's going to be able to apply the same policy again," Webster said.

Elsewhere, Webster and her Akin Gump colleagues are lead counsel in a case where 400 hospitals are challenging a 0.2 percent rate reduction — \$220 million annually nationwide — that CMS instituted to offset projected spending increases in connection with its "two-midnight" policy on inpatient admissions.

That policy is among the most controversial topics affecting hospital reimbursement, with most providers asserting that it places a meaningless timeframe above physician judgment when determining whether admissions are appropriate. Things have become so heated that Congress delayed enforcement and is looking to create a new middle-ground payment that would nullify the two-midnight policy.

The legal challenge, *Shands v. Burwell*, is now the subject of competing motions for summary judgment, with Webster and colleagues advancing a wide range of attacks on the rate cut.

Broadly speaking, there is "a strong argument" that the 0.2 percent reduction "is arbitrary and capricious and irrational for a variety of reasons," Webster said.

In a third suit, Webster is representing Tampa General Hospital in a potentially momentous dispute over the Affordable Care Act's changes to the DSH formula. One issue is whether CMS used obsolete data for Tampa General when making new DSH determinations; if a court sides with the hospital, there could be implications for other providers.

More broadly, Tampa General's case involves a provision of the ACA that Congress explicitly said is not subject to judicial review. Tampa General is trying to get around that prohibition by saying the ACA didn't shield use of obsolete data from review, and the outcome could have far-reaching implications because many portions of the landmark law are ostensibly walled off from second-guessing by the courts.

"That's in part why this case is significant," Webster said. "The ACA contained a lot of provisions that purported to preclude appeal of the agency's interpretation of a lot of new payment methodologies, and this is one of them."

--Editing by Christine Chun.