

Health Group Of The Year: Akin Gump

By **Rachel Slajda**

Law360, New York (January 18, 2012, 5:36 PM ET) -- Winning a Medicare reimbursement victory over the U.S. Department of Health and Human Services this year worth hundreds of millions of dollars for hospitals around the country helped Akin Gump Strauss Hauer & Feld LLP's health industry practice earn a place among Law360's Health Groups of 2011.

Akin Gump represented Northeast Hospital Corp. in its fight against a change in the way HHS calculates certain Medicare reimbursements for hospitals with a disproportionate share of low-income patients. HHS changed the calculation in 2004, but applied the change retroactively, significantly lowering reimbursement rates for Northeast's Beverly Hospital and others.

In September, the D.C. Circuit agreed with Akin Gump that the HHS could not apply the change retroactively. In November, the court denied a rehearing en banc. It was the first decision in a series of lawsuits and administrative challenges to the policy change.

"These cases involve hundreds of millions of dollars for these institutions," Jorge Lopez, head of the practice, told Law360. "These kinds of recoveries can make the difference between an institution surviving or not."

Akin's health practice puts substantial muscle into Medicare reimbursement cases on behalf of hospitals. Christopher Keough, a partner in the group, said Akin has the largest practice in the country focused on reimbursement.

The group also defends health care providers against False Claims Act cases, with two substantial victories in 2011, and drug manufacturers in patent cases and disputes with the U.S. Food and Drug Administration. The group also has a successful lobbying practice on health care matters, Lopez said.

The group has 47 attorneys, most of whom operate out of Washington, D.C. Eight health industry attorneys work in the firm's Philadelphia office.

In a Medicare reimbursement case decided last January, Akin represented Cape Cod Hospital in a suit in which the D.C. Circuit vacated HHS rulemaking that effectively decreased the Medicare base payment rate for inpatient services in 2007 and 2008.

The decision was the first-ever court order to change a Medicare base payment rate, according to Akin. The reimbursement change HHS made in response, for the 2012 fiscal year, will increase Medicare payments to hospitals nationwide by a total of \$1 billion, Akin says.

The rulemaking at issue was supposed to keep payments budget-neutral, but Cape Cod and other hospitals in the case argued that HHS had “botched the math,” according to the circuit opinion, and actually lowered Medicare’s payments to hospitals.

In vacating the rule, the court found that the department had failed to adequately explain its rationale in response to the hospitals’ public comments during rulemaking.

The HHS lost again in June, when Akin won a victory for another hospital client, the University of Texas M.D. Anderson Cancer Center, which argued that the HHS had improperly denied it reimbursement for the costs of expensive new cancer drugs.

The D.C. Circuit found that the government had acted unfairly by not telling the cancer center about a new requirement that it prove the net financial impact of the drugs, rather than their gross cost, until after a hearing on the center’s request for reimbursement.

“In essence, the board sprung this requirement on the hospital after the hearing — when it was too late for the hospital to put forward evidence to satisfy the requirement,” the ruling said. “That won’t do.”

The ruling led the Centers for Medicare & Medicaid Services to raise the cancer center’s payment ceiling by several million dollars a year for several years, Keough said.

Akin Gump’s False Claims Act practice is led by Robert Salcido, who worked for five years in the Justice Department office that handles FCA cases and wrote a book on the law. Salcido had two major victories for healthcare clients in 2011.

In one \$20 million case, Salcido defended Golden Living, a company that operates about 350 nursing homes and assisted living facilities, against government claims that the company created a sham supplier subsidiary. The DOJ claimed that the subsidiary submitted \$20 million worth of false claims to Medicare for medical equipment.

In March, Golden Living, whose official name is GGNSC Holdings LLC, won partial summary judgment on several of the claims in a Mississippi federal court.

Golden Living had successfully argued that administrative proceedings by HHS agencies had already found that its subsidiary was in compliance with Medicare regulations. Therefore, it argued, the DOJ could not now claim that all of the subsidiary’s claims were false based on an assertion — debunked by the administrative findings — that the subsidiary was a sham company.

The court agreed and granted summary judgment on the compliance-based FCA claims. Other claims, however, based on the Medicare anti-kickback statute, are still standing, and a trial is scheduled to begin in February.

A few months later, the Akin Gump team had another victory in the case when a Fifth Circuit panel upheld a decision booting the government’s relator from the case.

As it turned out, the relator had filed qui pro tam suits against more than 400 companies, using nothing but publicly available information — a problem, Salcido said, when the law is meant to encourage insiders to come forward with otherwise hidden information. Relators in successful cases are entitled to a cut of the government’s judgment or settlement.

“If the relator were successful in [the case], then that would serve as a template for other relators going out and suing whole sectors of the health care industry, relying totally on public materials,” Salcido said. “It’s contrary to the entire purpose of whistleblower actions, which is to break a conspiracy of silence. ... This will keep those opportunistic, purported whistleblower actions out of court.”

Salcido said his team discovered the relator’s reliance on public materials when the government, either accidentally or on purpose, produced all of the relator’s evidence.

“We were lucky,” he said.

In another FCA case, Akin Gump successfully defended a hospital management company, HealthTech Management Services Inc., against claims that it participated in a scheme to retain more than \$1 million in overpayments by Medicare. The plaintiff, a former executive of Summit Healthcare Regional Medical Center, sought damages of at least \$7.5 million.

The plaintiff claimed that HealthTech had conspired with Summit to retain overpayments made for ineligible inpatient stays. HealthTech, however, argued that as a third party, it had only known about the overpayments, and could not be held responsible for the hospital keeping them.

An Arizona federal judge agreed in March and dismissed HealthTech from the case.

“The reason it’s significant is, there’s all kinds of vendors for hospitals who may or may not have suspicions that the hospital may or may not owe money to the government,” Salcido said. “If you develop different standards where suspicions ... constitute sufficient knowledge ... it would significantly expand FCA exposure beyond what it currently is.”

The group’s FDA practice also had a big victory this year, when client Amphastar Pharmaceuticals Inc. received FDA approval to manufacture the generic form of the blood thinner Lovenox after a years-long battle with the agency.

Amphastar had accused the agency of tipping the scales in favor of a competitor, Momenta Pharmaceuticals Inc., and delaying the approval of its drug through a number of “arbitrary, capricious and vindictive actions,” according to a suit it filed against the FDA in 2010.

The suit focused on the FDA’s decision to block Amphastar’s shipments of a raw material needed in the drug. The FDA lifted the import ban in November of that year, but Amphastar, represented by Akin Gump, pressed forward, citing a pattern of allegedly vindictive behavior by the FDA in failing to approve its drug.

In September 2011, the FDA approved the generic, and a day later Amphastar dropped its suit.

Immediately, however, Momenta sued Amphastar in Massachusetts federal court, claiming patent violations, and won a preliminary injunction barring Amphastar and its partners from marketing the drug. Akin Gump is defending the company, and a hearing on the injunction is scheduled for Jan. 24.

--Additional reporting by Allison Grande. Editing by Sarah Golin.