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Q&A With Akin Gump's Chris Keough

Law360, New York (June 01, 2012, 1:11 PM ET) -- Christopher L. Keough is a partner in Akin Gump Strauss Hauer & Feld LLP's Washington, D.C., office. His practice focuses on Medicare and Medicaid reimbursement and compliance, and he has nearly 25 published federal court decisions in Medicare reimbursement litigation cases. He regularly represents hospitals in reimbursement litigation involving payments for disproportionate share hospitals, the calculation of prospective payment system rates, payments for graduate medical education costs and other reimbursement issues.

Q: What is the most challenging case you have worked on and what made it challenging?

A: It depends on how you keep score. The Cape Cod case, which overturned a component of the U.S. Department of Health and Human Services' calculation of the Medicare payment rate for inpatient hospital services, was the most intellectually challenging. Nothing like that had ever been done before in the Medicare context, at least not successfully. Cape Cod Hospital v. Sebelius, 630 F.3d 203 (D.C. Cir. 2011).

The Baystate case, which overturned previously undisclosed errors and omissions in the calculation of another Medicare payment for disproportionate share hospitals, was the most arduous. The calculation of that payment had been performed in a black box for decades, and it was a long and hard battle to discover the truth about errors the agency had committed but never disclosed. Baystate Medical Center v. Leavitt, 545 F. Supp. 2d 20, amended, 587 F. Supp. 2d 37 (D.D.C. 2008). A health care fraud case that I worked on many years ago took the greatest emotional toll. After a monthlong trial, the jury ultimately handed down a rare verdict of acquittal. But everything is different, and far more taxing, when an individual's personal liberty is at stake.

Q: What aspects of your practice area are in need of reform and why?

A: The Medicare reimbursement appeals process is quite one-sided and unfair to hospitals. Amounts in dispute are withheld or recouped from the hospitals at the outset of the process based on a determination made by an insurance company serving as a "fiscal intermediary" for the Medicare program. Hospitals must then exhaust an administrative appeal process, which ultimately takes five or more years to complete, with no interest accruing unless and until the hospital eventually gets its case heard and prevails in court.

The vast majority of those appeals involve routine issues that do not present substantial legal questions. They are eventually resolved administratively before they ever reach court, but then no interest is paid to the hospital on the underpayments made for vital health care services furnished many years earlier. As result, the typical run-of-the-mill appeals on routine issues languish unnecessarily for years in the agency's own administrative appeals system where there is a backlog of nearly 10,000 cases.

Of course, there would be no backlog, and the routine appeals would be routinely cleared out and resolved, if Congress amended the law to allow the hospitals to hold the sums in dispute during the course of an appeal or provided for payment of interest to the prevailing party in an appeal at the administrative level. The industry dropped the ball when this appeals process was created in the early 1970s.

Q: What is an important issue or case relevant to your practice area and why?

A: Congress is increasingly enacting statutory provisions that purport to preclude judicial review of agency actions to be performed under new or revised Medicare payment systems. I subscribe to the view that, even assuming utmost good faith on the part of decision-makers, power corrupts and absolute power corrupts absolutely. Judicial review serves as an important check on that. This is another area in which the industry needs strong advocates to protect hospitals' fundamental due process rights.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: I grew up as a young lawyer working for Ron Sutter, at Powers Pyles Sutter & Verville. He is great intellect, a kind soul and consummate gentleman, who also happens to possess a keen instinct for the jugular when it comes to arguing a case. He is a great mentor and a good friend.

Q: What is a mistake you made early in your career and what did you learn from it?

A: In one of the first briefs I drafted, it was plain as day that the reasons given for a reimbursement disallowance were ridiculous, but there were other, potentially more troublesome issues that had not been mentioned in the audit workpapers. Not wanting to ignore the elephant in the room, my first draft addressed all those issues. The partner on the case suggested, of course, that we should only address the arguments the other side had actually raised, at least for purposes of the opening brief. To my surprise, the other side never did raise the other issues, and we eventually overturned the disallowance. That experience yielded a simple, but all-important lesson: Don't shoot yourself in the foot.

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