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Supreme Court Opinion in *Sebelius v. Auburn Regional Medical Center* Rejects a Challenge by Hospitals to Medicare's SSI Fraction Calculation

by Stuart M. Gerson and Robert E. Wanerman

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A unanimous Supreme Court has issued its opinion in *Sebelius v. Auburn Regional Medical Center*, No. 11-1231 (Jan. 22, 2013), rejecting a challenge by hospitals to Medicare's Supplemental Security Income ("SSI") fraction calculation, which affects the reimbursement amount health care providers receive for inpatient services rendered to Medicare beneficiaries and any upward payment adjustment for serving a disproportionate number of low-income patients. In doing so, the Court reversed the judgment of the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") allowing an administrative appeal made 10 years after the initial reimbursement determination.

While the Supreme Court held that the 180-day limitation in section 42 U.S.C. § 1395oo(a)(3) is not jurisdictional, it also held that the U.S. Department of Health and Human Services ("DHHS") Secretary reasonably construed the statute to permit a regulation extending the time for a provider's appeal to the Provider Reimbursement Review Board ("PRRB") to three years, but that any larger presumption in favor of equitable tolling does not apply to administrative appeals like this one. In so holding, the Court has given approval to an inequality between providers that are limited to three years' time to uncover and seek to recoup underpayments, and the government, that may reopen an intermediary's reimbursement determination "at any time" if it is alleged that an overpayment had been procured by fraud or the fault of the provider.

Providers Must Take Away Two Cautions

The upshot of the *Sebelius* decision is readily apparent as far as the timing issues are concerned: any reimbursement appeal to the PRRB of the sort at issue in *Auburn* must be made more quickly than many hospitals had previously presumed. At the same time, providers must recognize that the government has considerably more time

to seek recoupment of overpayments. These facts are themselves significant, but the *Sebelius* case signals even more.

The unanimity of the decision signals that all the Justices – judicial conservatives and liberals alike – are willing to accord administrative agencies considerable deference in exclusive appeals processes notwithstanding other equitable concerns. The Court distinguished Medicare Part A providers from other potential claimants on the ground that they are presumed to be sophisticated entities familiar with complex regulatory schemes. This expanded deference may have a significant impact on any challenges to the multiple regulations that must be promulgated to implement the Affordable Care Act.

The underlying dispute in *Auburn* involved Medicare Disproportionate Share Hospital ("DSH") payments, which are supplemental payments claimed by hospitals serving a disproportionate share of low-income patients. In 2006, the hospitals learned that the Centers for Medicare and Medicaid Services ("CMS") had been using erroneous data in calculating their Medicare DSH reimbursement between 1987 and 1994, and promptly appealed to the PRRB. However, under 42 U.S.C. § 1395oo(a), a Medicare provider may file an appeal with the PRRB only within 180 days of receiving the Notice of Program Reimbursement ("NPR"), subject to a regulatory extension based on good cause if the request is filed within three years of the date that the NPR is sent to the provider.[1]

In this case, the appeals were initially rejected because more than ten years had elapsed from the dates of the NPRs, and the PRRB could not exercise any equitable powers. On appeal, the D.C. Circuit held that the statutory filing deadline was subject to equitable tolling due to the agency's errors.

The Supreme Court reversed the decision, and made three related rulings. First, it held that the 180-day limitation in section 42 U.S.C. § 1395oo(a)(3) is not jurisdictional, because this would necessarily invalidate the extension of time for filing as permitted by 42 C.F.R. § 405.1841(b). Second, it held that the regulation that allows for extensions of the PRRB filing deadline was a reasonable procedural rule that was based on a permissible construction of Section 1395oo and was not arbitrary or capricious. Third, the Court found that the presumption in favor of equitable tolling that applies to limitations applicable to civil actions in a district court does not apply to administrative appeals of the kind at issue in *Auburn*. The Court gave significant weight to the fact that Congress had amended Section 1395oo six times since it was first enacted, and never changed the 180-day rule or altered the good cause extension permitted under the regulation. It concluded that the rationale for equitable tolling was inapplicable in this context, as hospitals are presumed to be "'sophisticated' institutional providers assisted by legal counsel, and 'generally

[1] 42 C.F.R. § 405.1841(b).

capable of identifying an underpayment in [their] own NPR within the 180-day time period specified in 42 U.S.C.§ 1395oo(a)(3)."[2]

The Supreme Court's decision reinforces earlier decisions that have adopted a highly deferential approach to administrative agency actions, especially those governing the operations of a complex program such as Medicare. It also foreshadows how federal courts are likely to deal with challenges to the numerous sets of regulations that must be promulgated to fully implement the Affordable Care Act, especially with respect to procedural issues. Given these conditions, health care providers, their trade associations and other stakeholders should pay the closest attention to the details of various DHHS procedural rules and, in a timely manner, formulate both persuasive factual defenses to determinations under these rules as well as reasoned administrative challenges to the rules themselves.

We at Epstein Becker Green have had considerable success with respect to both kinds of challenges and would be happy to address any questions that you might have. Feel free to contact Stuart Gerson (sgerson@ebglaw.com) or Robert Wanerman (rwanerman@ebglaw.com).

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This Client Alert was authored by **Stuart M. Gerson** *and* **Robert E. Wanerman**. *For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*

[2] Slip op. at 13 (quoting *Your Home Visiting Nurse Services, Inc. v. Shalala,* 525 U.S. 449, 456 (1999)) In a concurring opinion, Justice Sotomayor wrote that while the three-year exception for good cause was a reasonable balancing of administrative efficiency and fairness, there should be a presumption that equitable tolling might apply with less sophisticated claimants or in other circumstances. *Id.* at 2-3 (Sotomayor, J., concurring).

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