

PUBLICATION

Recent Court Decisions Affecting DSH Percentage Calculations May Impact Participation in the 340B Drug Discount Program [Ober|Kaler]

May 02, 2013

A number of recent developments affecting the Disproportionate Share Hospital (DSH) percentage calculation methodologies will likely have significant impact on 340B covered entities. DSH hospitals that participate in the 340B Drug Discount Program are required to maintain a disproportionate share percentage greater than 11.75% in order to remain eligible for 340B pricing. To the extent the calculation of this percentage changes, a DSH hospital may gain or lose eligibility to participate in the 340B Program. Currently, several recent court decisions addressing regulations promulgated by the Centers for Medicare and Medicaid Services (CMS) may have significant effect on DSH percentage calculations.

The United States Court of Appeals for the Sixth Circuit recently ruled in *Metropolitan Hospital v. U.S. Department of Health and Human Services* that days for dual-eligible patients who have exhausted their Medicare Part A benefits should be included in the *Medicare* fraction (as opposed to the *Medicaid* fraction) of a hospital's DSH percentage calculation. For a discussion of the *Metropolitan* decision, see our previously published article "[Court of Appeals Rules for Government in DSH Exhausted Benefit Day Appeal](#)." The net effect of including these dual-eligible, exhausted benefit days on the Medicare side typically lowers the hospital's DSH percentage. In another case pending in the D.C. Circuit Court of Appeals, *Allina Health Services v. Sebelius*, the court will be deciding question as to whether Medicare Part C days must be included in the Medicare fraction. For a discussion of the *Allina* decision, see our previously published article "[Providers Again Win in Medicare Disproportionate Share Adjustment Challenge](#)."

Comments

Currently, CMS regulations require DSH hospitals to include both the dual-eligible, exhausted benefit and Medicare Secondary Payor days, as well as Part C days, in the Medicare fraction of the DSH percentage calculation, but DSH hospitals should monitor case law developments on this as any significant changes may affect whether or not the DSH hospital is eligible to participate in the 340B Program.