

# PUBLICATION

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## Court of Appeals Hands Down Significant DSH Ruling [Ober|Kaler]

June 27, 2013

**As we reported in a *Payment Matters* article dated February 16, 2012, early last year the United States District Court for the District of Columbia handed providers a significant victory in *Catholic Health Initiatives-Iowa v. Sebelius*.**

In that decision, the District Court ruled that when CMS calculated the provider's Medicare Disproportionate Share (DSH) adjustment, it impermissibly applied a 2004 regulation by excluding from the Medicaid fraction of the DSH computation exhausted benefit days associated with dual eligible beneficiaries. The District Court concluded that a final rule published by the Secretary in 2004, requiring that such days be included in the Medicare rather than the Medicaid fraction of the DSH calculation, had been impermissibly applied retroactively. The provider's victory, however, was short lived.

In a [ruling \[PDF\]](#) dated June 11, 2013, the United States Court of Appeals for the District of Columbia circuit reversed the District Court decision and concluded that the Secretary's policy had not been applied in an impermissibly retroactive fashion. The court first determined that the statute was ambiguous, calling the statutory language "downright byzantine" and having a meaning that was not "easily discernible." The court stated that, although the Secretary's interpretation was "the better one," both the Secretary's and the provider's interpretation of the statutory language was permissible. In such cases, the court said, it is required to defer to the Secretary's construction of the statute.

Moving to the retroactivity issue, the court ruled that although the 2004 rulemaking was phrased to appear to be a revised statutory interpretation, it was clear that the regulation – at least insofar as it addressed the question of whether the exhausted benefit days were to be included in the Medicaid fraction – simply reiterated a policy first announced in a 2000 adjudication before the Provider Reimbursement Review Board. The court then noted that "of course, it is black-letter administrative law that adjudications are inherently retroactive." Because the 2004 rulemaking was simply a reiteration of a policy that had been earlier articulated by the Secretary, the court said, the policy was not applied in an impermissible retroactive manner.

### **Ober|Kaler's Comments**

The Court of Appeals' decision is disappointing to providers and reflects the simple truth that providers' DSH litigation with the government will continue to be hard fought. Many decisions will turn on subtle factual distinctions of when and how the Secretary first announced her policy, just as the present case did.