



Left: NIH Director Dr. Francis Collins; Right: HHS Secretary Kathleen Sebelius. (HHS photo/Chris Smith)

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## Obamacare bans new physician-owned hospitals

In 2010, Obamacare limited the expansion of physician-owned hospitals (POHs) and banned the establishment of new ones. By the end of 2010, Obamacare forced up to 84 new POHs in various stages of development to be abandoned.<sup>1</sup> These hospitals would have provided nearly 30,000 jobs.<sup>2</sup>

Prior to Obamacare, POHs had been increasing rapidly. Just between 2002 and 2004 the number of POHs nearly doubled, going from 46 in 2002 to 89 in 2004.<sup>3</sup> Then, by the spring of 2010 the number of POHs reached 265, nearly tripling in number from 2004.<sup>4</sup>

Physicians are restricted from referring Medicare patients to practices in which they have a financial interest. But there is an exception where the doctor owns part of a whole hospital.

Section 6001 of Obamacare changes this by banning new POHs from accepting Medicare payments. In addition, expansions of existing POHs must first seek approval from the Department of Health and Human Services (HHS) if they expect to accept Medicare. Even then, Obamacare restricts expansion to 200% of the capacity the hospital had in 2010.

Critics of POHs, such as the American Hospital Association and the Federation of American Hospitals, see POHs as a threat. They argue that

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## Court says to physician-owned hospitals seeking relief from Obamacare: Start Over

On August 17, 2012, one media source reported that the U.S. Court of Appeals for the Fifth Circuit, in *Physician Hospitals of America v. Sebelius*, upheld Obamacare's stifling limits on physician-owned hospitals.<sup>1</sup> A closer look at the case shows this report to be inaccurate.

On March 31, 2011, the U.S. District Court for the Eastern District of Texas ruled that Section 6001 of Obamacare, which bans new physician-owned hospitals and places severe restrictions on expansions of such hospitals, was constitutional as applied to the plaintiffs of the case: Physician Hospitals of America and Texas Spine & Joint Hospital (TSJH).

In fact the Fifth Circuit did not uphold the district court's decision, but vacated it. Furthermore, the Fifth Circuit did not even discuss the merits of the district court's holding that Section 6001 of Obamacare is constitutional. Instead, the Fifth Circuit ruled that, under the facts of this case, federal courts do not have jurisdiction to decide the matter.<sup>2</sup>

In this case, TSJH was in the process of expanding its facilities and had already spent \$3 million when Obamacare was passed on March

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## Obamacare bans new physician-owned hospitals (continued)

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POHs, while taking only the more profitable medical procedures, don't give as much uncompensated care as do non-profit hospitals.

It is true that POHs don't give as much uncompensated care. But unlike non-profit hospitals, POHs pay millions in taxes every year. Physician Hospitals of America reports that on average each POH pays \$3 million per year in local, state, and federal taxes.<sup>5</sup>

A study conducted by the Centers for Medicare and Medicaid Services (CMS) concluded that POH uncompensated care, plus the taxes they contribute to the community, surpasses the uncompensated care of non-profit hospitals.<sup>6</sup> The CMS study further noted that:

Even expanding the definition of uncompensated care to exclude Medicare DSH payments and to include Medicaid revenue shortfalls, the physician-owned specialty hospitals in the sample, still exhibited higher levels of net community benefits....<sup>7</sup>

Banning new POHs is not about good policy but about hospitals using the federal government to eliminate their competition.

This is particularly disturbing because competition lowers prices while improving quality.

A recent Wall Street Journal article reported that, as doctors sell their practices to hospitals, their new hospital-set prices are skyrocketing compared to what they were formerly charging in private practice for the same services.<sup>8</sup>

And POHs are known for their high-quality service. While there are only 275 POHs spread across 33 states, in 20 of those states Consumer Reports ranked a POH first in quality of care.<sup>9</sup> The high-quality of POHs is confirmed by the afore-mentioned CMS study which concluded that POHs "provide a high level of quality care."<sup>10</sup>

The restoration of better quality and lower costs through hospital competition is just another reason the "Affordable Care Act" should be repealed.

<sup>1</sup> *Physician Hospitals of America v. Sebelius*, No. 6:10-cv-00277-MHS, Complaint for Declaratory and Injunctive Relief, (E.D.Tex. June 3, 2010) at 6-7.

<sup>2</sup> Physician Hospitals of America, "Physician Hospital Impact of Implementation of Section 6001," (Feb. 17, 2011) at 3-4.

<sup>3</sup> Medicare Payment Advisory Commission, "Report to the Congress: Physician-Owned Specialty Hospitals Revisited," (August 2006) 3-4 available at [http://www.medpac.gov/documents/Aug06\\_specialtyhospital\\_mandated\\_report.pdf](http://www.medpac.gov/documents/Aug06_specialtyhospital_mandated_report.pdf).

<sup>4</sup> *Supra* note 1 at 6.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> RTC: CMS Study of Physician-owned Specialty Hospitals Required in Section 507 (c) (2) of the MMA (2005) at 64 available at <https://www.cms.gov/reports/downloads/RTCPhysSpecHosp.pdf>

<sup>7</sup> *Id.* at 64.

<sup>8</sup> Anna Wilde Mathews, THE WALL STREET JOURNAL, "Same Doctor Visit, Double the Cost," (August 27, 2012) <http://online.wsj.com/article/SB10000872396390443713704577601113671007448.html>.

<sup>9</sup> Press Release, Physician Hospitals of America, "Physician-Owned Hospitals Will Continue to Push for Increased Patient Access to High-Quality Care," (Feb. 17, 2012) available at [http://www.physicianhospitals.org/resource/resmgr/Press\\_Releases/Exclusion\\_from\\_Bill\\_Press\\_Rel.pdf](http://www.physicianhospitals.org/resource/resmgr/Press_Releases/Exclusion_from_Bill_Press_Rel.pdf)

<sup>10</sup> *Supra* note 6 at 63.

## Obamacare Pays for Lottery Tickets

When Nancy Pelosi said we'd have to pass Obamacare before we'd find out what's in it, no one expected to find that Obamacare funds would be used to purchase lottery tickets. But that's exactly what the state of New York plans to do with part of the grant money it will receive under Obamacare's Medicaid Incentives for the Prevention of Chronic Diseases program.

Under the program, the state of New York has received a \$2 million grant to be used to pay people to be healthy.<sup>1</sup> Of the 18,456 participants in the program 13,842 participants will each receive an average of \$115-\$122 in incentives for healthy actions like:

- going to the doctor;
- filling and taking certain prescribed medications;
- attending certain health education classes and programs;
- losing weight; and
- quitting smoking<sup>2</sup>

Most of the incentives will be direct cash payments, but lottery tickets will be given to those who participate in the diabetes prevention

program.<sup>3</sup>

In all, the program will give away \$85 million dollars over five years. 10 states have received grants under the program including California, Connecticut, Hawaii, Minnesota, Montana, Nevada, New Hampshire, New York, Texas, and Wisconsin.<sup>4</sup>

<sup>1</sup> Centers for Medicare and Medicaid Innovation, MIPCD: The States Awarded, <http://www.innovations.cms.gov/initiatives/MIPCD/states-awarded.html> (last visited, August 30, 2012).

<sup>2</sup> Centers for Medicare and Medicaid Innovation, MIPCD State Summary: New York, <http://www.innovations.cms.gov/Files/x/MIPCD-NY.pdf> (last visited, August 30, 2012).

<sup>3</sup> *Id.*

<sup>4</sup> Fact Sheet, Centers for Medicare and Medicaid Services, Medicaid Incentives for Prevention of Chronic Diseases Grants (Sept. 13, 2011) available at <http://www.cms.gov/apps/media/press/factsheet.asp?Counter=4114>.

## Federal appellate court: Start over (continued)

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23, 2010. The expansion would have cost \$30 million, but TSJH abandoned the expansion upon Obamacare's passage.

Section 6001 of Obamacare allows for existing physician-owned hospitals to continue operating provided they were licensed by December 31, 2010. But TSJH's expansion, had they continued with it, would not have been completed in time.

The Fifth Circuit found that federal law requires that Medicare providers take their complaints against Medicare policy first to the Department of Health and Human Services (HHS). Providers can only seek redress from the courts after HHS decides against them and after no further appeal is possible within the agency.

The plaintiffs argued that this requirement is a "practical denial of their right to judicial

review."<sup>3</sup> They argued that they would have had to have done the following:

Knock down two commercial buildings, perfect financing, borrow tens of millions of dollars, finish the architectural and construction plans, pay a contractor, take two years to build a new hospital, treat a patient in the expansion, bill Medicare, appeal the denial of the payment administratively, receive a final denial of claim, and file a suit in federal court under Section 405 (g).<sup>4</sup>

The Fifth Circuit did not deny that TSJH would have to take significant risks to get to federal court, but said that TSJH cannot bypass HHS unless there is a *complete* inability to access the

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## How to Comment on a Regulation

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## Glossary of Agency Abbreviations

<b>CMS:</b>	Centers for Medicare and Medicaid Services
<b>DOL:</b>	Department of Labor
<b>EBSA:</b>	Employee Benefits Security Administration
<b>HHS:</b>	Department of Health and Human Services
<b>HRSA:</b>	Health Resources and Services Administration
<b>IRS:</b>	Internal Revenue Service
<b>OIRA:</b>	Office of Information and Regulatory Affairs
<b>TREAS:</b>	Department of the Treasury

### Regulations open for comment

#### Disregarded Entities and the Indoor Tanning Services Excise Tax

**RIN:** 1545-BK38     **Agency:** TREAS-IRS

**Status:** Final and temporary regulations.

Public comments accepted through

September 24, 2012.

#### Additional Requirements for Charitable Hospitals

**RIN:** 1545-BK57     **Agency:** TREAS-IRS

**Status:** Notice of proposed rulemaking.

Public comments accepted through

September 24, 2012.

#### Health Care Electronic Funds Transfers and Remittance Advice Transactions

**RIN:** 0938-AR01     **Agency:** HHS

**Status:** Interim final rule with comment

period. Public comments accepted through

October 9, 2012.

### Federal appellate court: Start over (cont.)

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courts.

Barring an unlikely overturning of the decision by the Supreme Court, new or expanding physician-owned hospitals may have to risk substantial losses if they are to successfully fight the stringent limits Obamacare places on them.

<sup>1</sup> See Joanne Kenen, PoliticoPro, "Court backs doctor-owned hospital limits" (Aug. 17, 2012; updated Aug. 20, 2012) <https://www.politicopro.com/story/healthcare/?id=13521> (subscription required).

<sup>2</sup> *Physician Hospitals of America v. Sebelius*, No. 11-40631, slip op. (5th Cir. Aug. 16, 2012).

<sup>3</sup> *Id* at 9 (quoting *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 22 (2000)).

<sup>4</sup> *Id* at 9-10.

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