Supreme Court Holds Benefit Plan Limiting Dialysis Reimbursement Does Not Run Afoul of Medicare Secondary Payer Act

Article By

Caroline Turner English
Alison Lima Andersen

ArentFox Schiff LLP
Perspectives/Alerts

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On June 21, 2022, the Supreme Court concluded, in Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita Inc., No. 20-1641, 2022 WL 2203328 (U.S. June 21, 2022), that the terms of a benefit plan limiting reimbursement for dialysis treatment did not violate the Medicare Secondary Payer (MSP) Act. The benefit plan terms in question resulted in reimbursement for dialysis being roughly equivalent to the (low) Medicare rate. Dialysis provider DaVita challenged the provisions as violating the MSP Act.

By way of background, Medicare coverage is available to those who otherwise
qualify and are (1) at least 65 years old, (2) disabled, or (3) diagnosed with end-stage renal disease ("ESRD")—chronic kidney failure. The MSP Act and its implementing regulations dictate that, for most individuals who have both Medicare coverage due to ESRD and commercial health coverage under a benefit plan, the commercial benefit plan must remain the primary payer to Medicare during a 30-month coordination of benefits (COB) period. To prevent end-runs around that COB period, Congress included two relevant prohibitions in the statute: health plans are prohibited, during that COB period, from (1) “taking into account” the Medicare eligibility of an individual, and (2) “differentiating” in benefits provided “between individuals having [ESRD] and other individuals covered by such plan on the basis of the existence of [ESRD], the need for renal dialysis, or in any other manner.” 42 U.S.C. § 1395y(b)(1)(C).

DaVita argued that the benefit plan’s limitation on dialysis reimbursement violated the “taking into account” and “differentiation” prohibitions of the MSP Act, and in October 2020, the Sixth Circuit Court of Appeals agreed with DaVita. The Supreme Court has now reversed the Sixth Circuit decision, in a majority opinion drafted by Justice Kavanaugh. Six justices joined the majority, with Justices Kagan and Sotomayor dissenting in part.

The Court held that a benefit plan that provides limited benefits for outpatient dialysis, as the plan in question did, “but does so uniformly for all plan participants,” does not violate the MSP Act. The majority opinion explained that the prohibition against differentiation was not violated because the Plan terms addressing dialysis applied to individuals with and without ESRD, and “the text of the statute cannot be read to encompass a disparate-impact theory.” The majority cited the lack of any disparate-impact theory in CMS regulations and the difficulty in implementing a prohibition against disparate impact, and stated that the MSP Act does not require any particular level of dialysis coverage by a benefit plan or require parity between dialysis and other types of benefits.

DaVita had argued in the case that dialysis is a proxy for ESRD, because virtually all dialysis treatments are provided to individuals with ESRD. In a footnote, the majority held that DaVita’s “proxy theory” failed as unsupported by the statutory text. “This statute is a coordination-of-benefits statute, not a traditional anti-discrimination statute.”

The Court then held that the benefit plan similarly did not violate the prohibition against “taking into account” Medicare eligibility, because “the Plan provides the same outpatient dialysis benefits to all Plan participants, whether or not a participant is entitled to or eligible for Medicare.”

The dissent, in part, authored by Justice Kagan and joined by Justice Sotomayor, maintained that “the Court craft[ed] for the Medicare Secondary Payer Act (MSPA) a massive and inexplicable workaround” that Congress would have to correct. While the dissent agreed with the majority that the MSP Act does not authorize claims for disparate-impact liability, it “part[ed] ways with the majority as to DaVita’s ‘proxy’ theory (which the majority relegates to a footnote).” According to the dissent, the conclusion that it is acceptable to distinguish between dialysis and other treatments, but not between those with and without ESRD, is contrary to common
sense and the statute, because “[o]utpatient dialysis is an almost perfect proxy for end-stage renal disease.” Because 99.5% of DaVita’s patients have or develop ESRD, the dissent stated that targeting the use of dialysis is the same as targeting those with ESRD: “A tax on yarmulkes remains a tax on Jews, even if friends of other faiths might occasionally don one at a Bar Mitzvah.”

The dissent pointed out that the statute prohibits differentiation on the basis of ESRD, but also on the basis of “the need for renal dialysis, or in any other manner.” According to Justice Kagan, this encompasses indirect differentiation, by targeting the treatment required by those with ESRD. The dissent objected to what it saw as the Court telling benefit plans they can foist costs of dialysis onto Medicare, “so long as they target dialysis, rather than the patients who rely on it, for disfavored coverage.”

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