

The Death of Chevron? Supreme Court Hears Oral Arguments on Medicare Cuts to 340B Reimbursement

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On Nov. 30, 2021, the U.S. Supreme Court heard oral arguments from a coalition of hospital plaintiffs who are challenging Medicare's nearly 30% reduction in outpatient drug reimbursement rates for 340B Program-participating hospitals. However, in addition to myriad effects this case may have on hospitals' participation in the 340B Program, the case also presents a significant administrative law question concerning whether the Court's Chevron deference doctrine could be overturned by a now conservative-leaning court.

The case, [*American Hospital Association v. Becerra*](#), is primarily focused on a technical dispute over how CMS pays for drugs hospitals dispense to patients in outpatient settings, such as expensive chemotherapy and anti-cancer medications. Particularly, it examines whether the Centers for Medicare and Medicaid Services (CMS) overstepped its statutory authority in 2018 when it implemented substantial cuts to outpatient drug reimbursement. It is estimated that as a result of CMS's imposed cuts, 340B Program-participating hospitals have lost an estimated \$1.6 billion in drug cost savings.

In 2003, Congress passed a statute giving CMS two options to pay for outpatient drugs in the Medicare system. First, CMS could survey hospitals about how much they paid to acquire drugs and then draw on the survey data to reimburse hospitals for their average acquisition cost. When using this first option, the statute may allow CMS to differentiate payment among hospitals based upon criteria such as their participation in the 340B Program. The second option, which results in significantly more cost to CMS, provides that in the absence of the survey data required by option one, CMS could pay all hospitals the average price of the drug as calculated and adjusted by CMS as necessary.

When CMS chose to implement the 30% cuts at issue in this case, CMS did not use its rate-setting power under option one, which would have allowed CMS to differentiate payment based upon the hospitals' 340B-participating status. Rather, CMS elected to implement the cuts pursuant to its "adjustment authority" under option two.

Following CMS's imposition of the cuts under option two, a number of affected 340B-participating hospitals argued that CMS overstepped its statutory authority by adjusting outpatient drug reimbursement based upon hospitals' 340B-participating status without first conducting the

necessary cost survey required under option one. However, CMS's position is that the survey is not required for purposes of the cuts, because CMS has statutory authority to adjust reimbursement based upon the average price of the drug, and even if a survey were required, CMS has access to 340B drug procurement data, which would satisfy the survey requirement. In this context, the case sets up a statutory interpretation problem as to whether ambiguity in CMS's outpatient drug reimbursement statute authorizes CMS to impose provider-specific reimbursement cuts without first undertaking a statutorily required cost survey.

Given the nature of the arguments in this case, however, a significant administrative law issue has arisen. Specifically, whether the Supreme Court – with the addition of conservative-leaning Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett – must eviscerate the Court's long-standing Chevron deference doctrine in order for the plaintiff hospitals' case to succeed.

The Chevron deference doctrine essentially requires courts to defer to reasonable interpretations of law by federal administrative agencies if: (a) Congress has vested administrative rulemaking power in the agency; and (b) the agency is interpreting an ambiguous or unclear provision of its authorizing statute. In broad strokes, Chevron provides federal administrative agencies significant power to interpret unclear federal laws, many of which involve payment for health care in the United States. With respect to the case at hand, if the Court finds ambiguity in how CMS must administer pricing cuts under reimbursement options one and two, the Chevron deference doctrine could take center stage in this case.

While it remains to be seen whether the Supreme Court will use *American Hospital Association v. Becerra* as an opportunity to reconsider the Chevron deference doctrine, Justices Clarence Thomas, Samuel Alito, Gorsuch, Kavanaugh, and Coney Barrett (a majority of the Court) each implied that in order for the plaintiff hospitals' argument to succeed, the Supreme Court would likely need to reexamine its Chevron deference standard. As such, resolution of this case could result in significant changes not only to the 340B Program and Medicare reimbursement policies, but also how courts may decide administrative law disputes in the future.

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