

Sixth Circuit Opinion Reversed in Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita Inc.

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The Supreme Court on Tuesday issued an opinion in *Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita Inc.*, which reversed the Sixth Circuit’s October 2020 decision finding that DaVita Inc. plausibly asserted a claim against an Ohio hospital’s health plan for unlawfully discriminating against patients with end-stage renal disease by offering low reimbursement rates for outpatient kidney dialysis. Specifically, the Sixth Circuit majority found that the health plan violated the Medicare Secondary Payer Act’s anti-discrimination provision—which prohibits a health plan from differentiating its benefits based on whether an individual has end-stage renal disease—by offering lower reimbursement rates for services offered by dialysis providers. See *DaVita, Inc. v. Marietta Mem’l Hosp. Empl. Health Ben. Plan*, 978 F.3d 326 (6th Cir. 2020). The Sixth Circuit, over Judge Murphy’s dissent, concluded that the anti-discrimination provision authorized “disparate-impact” liability, and that the limited payments for dialysis treatment had a disparate impact on individuals with end-stage renal disease. See *id.* at 349.

In a succinct seven page opinion written by Justice Kavanaugh on behalf of a 7-2 majority, the Supreme Court reversed. Justice Kavanaugh, borrowing language from Judge Murphy’s dissent, rejected the Sixth Circuit majority’s “disparate-impact” theory because the text of the Act’s anti-discrimination provision “does not ask about ‘the effects of non-differentiating plan terms that treat all individuals equally.’” *Op.* at 5 (quoting 978 F. 3d at 363 (opinion of Murphy, J.)). And the text of the plan, according to the opinion, did not “differentiate in the benefits provided to individuals with and without end-stage renal disease,” because it provided the same benefits, “including the same outpatient dialysis benefits, to individuals with and without end-stage renal disease.” *Id.* at 4. In addition to being “atextual,” the Court also found that a disparate-impact theory “would be all but impossible to fairly implement.” *Id.* at 5. According to the opinion, “Courts would be entirely at sea in trying to determine an appropriate benchmark or comparator for outpatient dialysis.” *Id.* at 6.

Justice Kagan, joined by Justice Sotomayor, dissented. The dissent agreed with the Justice Kavanaugh’s opinion on disparate impact, but would have instead found outpatient dialysis to be a “proxy” for end-stage renal disease, because nearly all patients with end-stage renal disease, and hardly anyone else, undergo outpatient dialysis. Dissent at 1–2. The majority opinion, according to the dissent, “flies in the face of both common sense and the statutory text.” *Id.* at 2.

Reception of the opinion is, naturally, split, with Law360 reporting that counsel for the health plan is

“very pleased that the Supreme Court reads the Medicare Secondary Payment Act the way that it is written,” and the CEO of DaVita criticizing the Court’s “narrow interpretation of the” Medicare Second Payer Act and limiting the Act’s ability “to protect some of the most vulnerable patients in the healthcare system.”

With [Shoop v. Twyford](#), also decided Tuesday, the Court has issued opinions on each of the [ten](#) cert. petitions granted from the Sixth Circuit this term.

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