Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Supreme Court Allows Health Plans to Limit Dialysis Benefits

September 14, 2022

This past term, the Supreme Court issued a variety of impactful decisions in the health care arena, including some that affect coverage and reimbursement for health care services under federal programs, such as Medicare and Medicaid. Among these decisions is *Marietta Memorial Hospital Employee Benefit Plan v. DaVita*, a case about the intersection of Medicare and employment-based health benefits for patients with end-stage renal disease (ESRD). In *DaVita*, the Court held that an employer-sponsored health plan could limit benefits for kidney dialysis services without running afoul of the Medicare Secondary Payer (MSP) statute, a provision designed to reduce Medicare spending by moving health care costs from the Medicare program to private payment sources. This Legal Sidebar provides background on the MSP statute, discusses the Court's decision in *DaVita*, and concludes with selected legal considerations for Congress.

Background

Medicare is a federal health care program that provides benefits to persons age 65 and older and other qualified beneficiaries, including eligible individuals with ESRD. ESRD is a medical condition involving permanent cessation of kidney function. Patients with ESRD must receive routine dialysis treatment or a kidney transplant to survive. Health care costs for ESRD patients are high. Recent reports estimate that Medicare annually spends approximately $51 billion on ESRD-related treatment.

Typically, Medicare is the default "primary payer" for an eligible beneficiary's covered medical expenses, even when a beneficiary has an additional form of health insurance. Under the MSP statute, however, there are conditions in which payment responsibility shifts to another insurance plan or program and Medicare becomes a back-up, secondary payer, thereby reducing Medicare expenditures. Under the MSP statute, Medicare is a secondary payer to employment-based health plans during a 30-month coordination period. However, federal law does not prevent Medicare-eligible individuals from terminating their employment-sponsored coverage, enrolling in Medicare, and receiving benefits through the program rather than through their employer (although Medicare coverage may not begin immediately).

Most relevant to the *DaVita* case, the MSP statute includes two provisions aimed at preventing employers from transferring ESRD-related treatment costs to the Medicare program:

Congressional Research Service
https://crsreports.congress.gov
LSB10819

Pocket Constitution

The Declaration of Independence
The Constitution of the United States
The Bill of Rights
Amendments XI–XXVII
Gettysburg Address

TheCapitolNet
TCNFPC.com

1. First, health plans that provide ESRD benefits cannot "differentiate" in the benefits provided between individuals with and without ESRD on the basis of the existence of ESRD, the need for renal dialysis, or in any other manner.
2. Second, a health plan cannot "take into account" that an individual is entitled to or eligible for Medicare benefits due to ESRD during the coordination period.

Implementing regulations specify that a health plan cannot, for instance, impose longer waiting periods for benefits or set higher premiums only for individuals with ESRD.

DaVita Decision

In *DaVita*, a dialysis provider filed suit against an employment-based group health plan and others, alleging that the plan's out-of-network coverage classification for dialysis benefits and "artificially low" provider reimbursement rates for outpatient dialysis services violated the MSP statute's anti-differentiation and take-into-account requirements. The provider asserted, among other things, that the plan's policies forced ESRD patients to shoulder high out-of-pocket costs and incentivized them to drop their employment-based coverage and enroll in Medicare before the end of the coordination period.

The district court dismissed the provider's claims under the MSP statute, but the U.S. Court of Appeals for the Sixth Circuit reversed on this issue. The appeals court generally determined that the MSP statute prohibits facially neutral plan policies that have a disparate impact on ESRD patients, even if such policies do not expressly target these individuals. Subsequently, the health plan petitioned the Supreme Court for review of the case.

In a 7-2 decision by Justice Brett Kavanaugh, the Supreme Court sided with the health plan, holding that because the plan's terms uniformly applied to all plan participants (i.e., those with and without ESRD), there was no violation of the MSP statute. Examining the MSP statute's anti-differentiation requirement, the Court determined that the language did not allow for the provider's disparate impact claim. As the Court observed, the MSP statute does not speak to "the *effects* of non-differentiating plan terms that treat all individuals equally." Such a reading, the Court explained, would ultimately compel the health plan to provide some level of outpatient dialysis benefits, and there was no textual support for such a result. The Court further explained that the MSP statute is structured as a coordination-of-benefits statute, not an anti-discrimination statute. Additionally, the Court concluded that because the plan offered the same dialysis benefits to all covered individuals, regardless of their Medicare entitlement or eligibility, the plan did not violate the MSP statute's take-into-account requirements. The Court reversed the Sixth Circuit's judgment and remanded the case to the lower court for further proceedings.

Justice Elena Kagan authored a partial dissent in *DaVita*, joined by Justice Sonia Sotomayor. In the dissent's view, the majority disregarded a central fact in the case—that almost every person that undergoes outpatient dialysis has ESRD. By ignoring this "perfect proxy" and comparing dialysis benefits for those with ESRD and the small number of non-ESRD patients, the dissent maintained that the majority created "a massive and inexplicable workaround" under the MSP statute that is inconsistent with the statute's text and purpose.

Considerations for Congress

The Court's decision in *DaVita* appears to benefit employer-based health plans. As the Court confirmed, these plans may provide limited ESRD-related benefits without running afoul of the MSP statute, so long as the same level of these benefits is offered to all insured individuals. The case has prompted debate over whether employer health plans will now seek to limit further ESRD-related benefits to employees, potentially leading employees with this condition to end their employment-based coverage to receive benefits through the Medicare program. Such an option may not be desirable for all ESRD patients.

Among other factors a patient might consider, Medicare typically requires enrollees to pay 20% coinsurance for Part B ESRD and other benefits (although cost sharing may be lower if a beneficiary participates in a Medicare Advantage managed care plan), potentially making dialysis and other treatments costly for beneficiaries. ESRD patients may also seek to remain enrolled in their employer plans if they have dependents that receive coverage through the plans, as these dependents may not receive Medicare coverage based on a family member having ESRD.

The Court's decision in *DaVita* only addressed the requirements of the MSP statute. Other federal requirements may continue to affect the provision of ESRD-related benefits in private employer-sponsored group health plans. For instance, federal law prevents group health plans from basing coverage eligibility rules on certain health-related factors, such as a medical condition. In addition, a health plan may not require an individual to pay a higher premium or contribution than another "similarly situated" participant, based on these health-related factors. Additionally, small group plans (i.e., typically businesses with 50 or fewer employees) must provide a core package of "essential health benefits" (EHB) to participants. The EHB package varies by state, but most states require dialysis benefits to be included.

Congress may consider legislation that further addresses the coordination of Medicare and employer-based coverage with respect to benefits for ESRD patients. Federal legislation could, among other things, address a level of dialysis coverage that must be provided by a group health plan, or amend the MSP statute to address further the circumstances under which employers may limit such benefits. Legislation introduced in the Senate and the House during the 117th Congress—the "Restore Protections for Dialysis Patients Act" (S. 4750 and H.R. 8594)—would amend the MSP statute to specify, for example, that a health plan impermissibly differentiates between ESRD and non-ESRD patients if the plan "limits, restricts, or conditions" plan benefits for dialysis services, as compared to plan benefits for other covered chronic medical conditions.

Author Information

Jennifer A. Staman
Legislative Attorney

Disclaimer

Learn how Capitol Hill really works

All of our programs and any combination of their topics can be tailored for custom training for your organization.

For more than 40 years, TheCapitol.Net and its predecessor, Congressional Quarterly Executive Conferences, have been teaching professionals from government, military, business, and NGOs about the dynamics and operations of the legislative and executive branches and how to work with them.

Our training, on-site and online, and publications include congressional operations, legislative and budget process, communication and advocacy, media and public relations, research, testifying before Congress, legislative drafting, critical thinking and writing, and more.

- **Diverse Client Base**—We have tailored hundreds of custom on-site and online training programs for Congress, numerous agencies in all federal departments, the military, law firms, lobbying firms, unions, think tanks and NGOs, foreign delegations, associations and corporations, delivering exceptional insight into how Washington works.™
- **Experienced Program Design and Delivery**—We have designed and delivered hundreds of custom programs covering congressional/legislative operations, budget process, media training, writing skills, legislative drafting, advocacy, research, testifying before Congress, grassroots, and more.
- **Professional Materials**—We provide training materials and publications that show how Washington works. Our publications are designed both as course materials and as invaluable reference tools.
- **Large Team of Experienced Faculty**—More than 150 faculty members provide independent subject matter expertise. Each program is designed using the best faculty member for each session.
- **Non-Partisan**—TheCapitol.Net is non-partisan.
- **GSA Schedule**—TheCapitol.Net is on the GSA Schedule for custom training: GSA Contract GS02F0192X.

Please see our Capability Statement on our web site at **TCNCS.com**.

Custom training programs are designed to meet your educational and training goals, each led by independent subject-matter experts best qualified to help you reach your educational objectives and align with your audience.

As part of your custom program, we can also provide online venue, classroom space, breaks and meals, receptions, tours, and online registration and individual attendee billing services.

For more information about custom on-site training for your organization, please see our web site: **TCNCustom.com** or call us: 202-678-1600, ext 115.

TheCapitol.Net

Non-partisan training and publications that show how Washington works.™

PO Box 25706, Alexandria, VA 22313-5706
202-678-1600 • www.thecapitol.net

GSA Contract GS02F0192X Advantage!®

TheCapitol.Net is on the GSA Schedule for custom training. GSA Contract GS02F0192X