

Hospitals Prevail in 340B SCOTUS Case

Next Steps: Remand to Lower Ct & Hospitals May Get Some \$ Back

Today, the Supreme Court released a long awaited opinion that Medicare reimbursement cuts made to 340B hospitals were unlawful and that the HHS did not have the power to do so.

- **The highest court in the land today sided with the American Hospital Association ([here](#)).** SCOTUS found that because CMS did not conduct a survey of hospitals' acquisition costs in 2018 and 2019, its decision to vary reimbursement rates 340B hospitals in those years was unlawful.
- **By way of background, CMS reduced payment to 340B hospitals by ~30%.** The HHS did not conduct a survey of hospitals' acquisition costs for each covered outpatient drugs from 2006 until 2019. From 2006 until 2017, the reimbursement rates did not vary, and they were set at 106%. However, in 2018, the HHS did not conduct a survey of hospitals' acquisition rate and yet still established separate reimbursement rates for hospitals that serve low income or rural populations through the 340B program. In 2019, the reimbursement rates were set the same way. These reimbursements rates were a near 30% cut from Medicare (77.5% of the average sales price for each drug).
- **This news is positive for hospitals, though most publicly traded hospitals are not designated as 340B (UHS, THC, HCA, CYH others).** Although the HHS said they had the power to adjust the average price as necessary, the court ruled that HHS's power to increase or decrease the price is distinct from its power to set different rates for different groups of hospital. The American Hospital Association (AHA) states that "this decision is a victory for vulnerable communities and the hospitals on which so many patients depend on."
- **NEXT STEPS/OUR TAKE:**
 - **We believe that hospitals ultimately will get some money back for those years.** AHA notes in a press release it will be working with the Administration and the courts to develop a plan to reimburse 340B hospitals affected by these cuts while not taking away from other hospitals as they continue to serve their communities
 - **SCOTUS remanded "the case for further proceedings consistent with this opinion" to the Circuit Court of Appeals to assess mitigation.** The hospital outpatient rule (HOPPS) draft is still at the White House Budget office (OMB) for review.
 - **We doubt CMS will have meaningful commentary in the HOPPS on this matter.** Perhaps at most we see a high level paragraph in the preamble. Going forward the survey has been completed, so CMS could propose a new rule that mitigates SCOTUS' concerns.
 - **Medicare Advantage (MA) contracts are all over the place.** We would expect some hospital/plan contract litigation over this matter.
 - **Pharma manufacturers recently are opting out of 340B contracts as hospitals arbitrage low pharmaceutical prices.** While we do not expect HRSA to change 340B regulations anytime soon, the Hospital vs Manufacturer battle continues. We do not view legislation to alter the 340B program as likely this year or next.