

SCOTUS Rules Against DaVita

Legislative Fix Possible, CMS Updates LDO Pay +3% in 2023

SCOTUS

- **SCOTUS ruled against Dialysis provider DaVita today**, in Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita. Court case found [here](#). The Supreme Court held that the Marietta Plan is not liable for the disparate impact that DaVita was claiming because of the limited coverage on outpatient dialysis and the Marietta Plans coverage terms do not violate the statutes because those terms apply uniformly to all covered individuals (same coverage for those with end stage renal disease and those without).
- **It was a 7-2 ruling.** Justice Kavanaugh delivered the opinion to court and Roberts, Thomas, Breyer, Alito, Gorsuch, and Barrett joined. Kagan opposed the opinion and Sotomayor joined. The Supreme Court reversed the order of the Court of Appeals and is sending it back to the lower courts. Kavanaugh wrote that while Congress could mandate health plans provide particular benefits, the Medicare Secondary Payer statute does not dictate any particular level of dialysis coverage by a health plan.
- **Background on the case.** DaVita sued the Marietta plan (OH) because it believed the plans limited coverage of outpatient dialysis violated the Medicare Secondary Payer statute. This statute says that a plan cannot differentiate coverage of individuals for services (including dialysis). The Court of Appeals ruled that the Marietta Plan was liable for disparate impact (disproportionate impact on a protected group). The US DOJ supported Marietta hospital and health plan in briefs submitted to the court.
- **Ripple effect.** DaVita said a ruling against the company could open the door to other private health plans adopting terms to limit coverage for expensive dialysis treatments, forcing patients ESRD to switch to Medicare.

CMS PAY 2023

- **The overall ESRD payment update is +3.0%, an increase of \$320 M, positive for LDOs such as DVA, FMS.** This update includes updates to the outlier threshold (+0.7%), to the wage index (0.0%) and to the proposed payment rate update (+2.4%). The proposed PPS base rate is \$264.09, reflecting the application of wage index budget neutrality adjustment factor and a productivity adjusted market basket increase of +2.4%. Total Medicare spending for ESRD facilities in the coming year is projected to be about \$8.9 B, taking into account a projected 2.0% decrease in FFS Medicare beneficiary enrollment in CY 2023.
- **There will be an increase in beneficiary co-insurance payments of +3.1%, approximately \$60M in CY 2023.** Beneficiaries are responsible for paying 20% of the ESRD payment amount which is reflected in the increase in co-insurance.
- **NEXT STEPS:** CMS Dialysis pay proposal ([here](#)) looks good (for 2023). Final rates will be out around Nov 1. New pay starts Jan 2023. Re SCOTUS case, DaVita can plea for a legislative fix via lobbying on Capitol Hill. Although LDOs can do little at this moment in the wake of the ruling, the case is remanded to the lower court.