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# Supreme Court Rules against DaVita in Battle over Group Health Plan Dialysis Coverage

On June 21, 2022, the Supreme Court of the United States (SCOTUS) ruled against DaVita Inc. in the battle over dialysis coverage for participants with End Stage Renal Disease (ESRD). In its 7-2 decision, SCOTUS ruled that plans can limit dialysis coverage under the Medicare Secondary Payer (MSP) rules so long as benefits aren't differentiated between those offered to other participants without ESRD.

This Alert summarizes the SCOTUS decision in [Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita Inc.](#) and its impact on group health plans (GHPs).

## Medicare Secondary Payer Rules and Coverage of ESRD Treatment

Individuals with ESRD are generally eligible for Medicare regardless of age or disability.<sup>1</sup> To lessen the government's cost of covering ESRD treatment for these individuals, the MSP rules provide that Medicare is the secondary payer for the first 30 months of Medicare coverage due to ESRD or other permanent kidney failure. In other words, an employer-sponsored group health plan (GHP) will pay primary to Medicare for most covered ESRD treatments for a time, even for individuals covered under COBRA or a retiree plan.

To prevent Medicare from unnecessarily footing the bill for these services, the MSP rules provide that:

- Plans may not take into account an individual's entitlement or eligibility for Medicare due to ESRD;<sup>2</sup> and
- Plans may not differentiate the benefits provided to individuals with ESRD versus other individuals covered under the plan.<sup>3</sup>

## Courts Divided – Showdown in the U.S. Supreme Court

A split by the lower federal courts on this issue ultimately led to a showdown at the U.S. Supreme Court, with its ruling breaking the tie in favor of GHPs.

### Conflicting Case Law

The U.S. Courts of Appeal for the Sixth and Ninth Circuits (6<sup>th</sup> and 9<sup>th</sup> Circuits, respectively) both heard cases brought forth by DaVita (one of the largest dialysis providers in the country) arguing a plan's limited coverage of dialysis violated the MSP rules, and each resulted in a different outcome.

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<sup>1</sup> Medicare coverage for those on dialysis due to ESRD will generally start on the first day of the fourth month of dialysis treatments, but it is possible to start earlier in certain situations.

<sup>2</sup> [42 U.S.C. §1395y\(b\)\(1\)\(C\)\(i\).](#)

<sup>3</sup> [42 U.S.C. §1395y\(b\)\(1\)\(C\)\(iii\).](#)

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## 6<sup>th</sup> Circuit Finds Limited Coverage of Outpatient Dialysis Violates MSP Rules

In *Marietta*,<sup>4</sup> DaVita claimed that the plan's limited coverage for outpatient dialysis violated the MSP rules. The case moved through the District and Appellate Courts with the following outcomes:

- District Court Ruling: Dismissed DaVita's claim, finding no violation occurred because coverage for outpatient dialysis was uniform for all participants.
- Appellate Court Ruling: Reversed the District Court's decision, finding the limited payments for outpatient dialysis had a disparate impact on individuals with ESRD and thus violated the MSP rules.

## 9<sup>th</sup> Circuit Finds Lack of In-Network Dialysis Coverage Complies with MSP Rules

DaVita filed a similar suit in the 9<sup>th</sup> Circuit.<sup>5</sup> DaVita claimed that the lack of in-network coverage for dialysis under the plan and forcing all treatment to be out-of-network was a violation of the MSP rules. The 9<sup>th</sup> Circuit dismissed the claim, ruling that no MSP violation occurred since the plan treated all dialysis patients the same regardless of their ESRD diagnosis.

## Supreme Court's Tie-Breaking Decision Finds No MSP Violation, Favoring Group Health Plans

Given the split between the 9<sup>th</sup> and 6<sup>th</sup> Circuit Appellate Court decisions, SCOTUS agreed to review *Marietta*. In reading the text of the MSP rules, the majority of the Court held:

- The MSP rules only coordinate payment between GHPs and Medicare;
- The statute does not require any particular level of dialysis coverage, nor did DaVita offer a basis for determining what level of dialysis coverage is adequate; and
- The rules do not contemplate whether a plan's coverage of ESRD treatments has a disparate impact on individuals with ESRD or not, so disparate liability cannot exist.

In short, SCOTUS found that the rules merely require that plans do not differentiate benefits between those with and without ESRD. If a plan treats all individuals equally then the requirements are satisfied and no violation occurs. Using this reasoning, the Court found that *Marietta*'s plan does not violate the MSP rules because its terms apply uniformly to all covered individuals regardless of an ESRD diagnosis or their eligibility for, or enrollment in, Medicare.

## Group Health Plan Coverage of ESRD Treatments

This ruling seems to provide flexibility for GHPs to limit dialysis coverage for participants, including, but not limited to, excluding in-network coverage. What is clear from the opinion is any dialysis limitations or exclusions are present under the plan must be applied uniformly for all participants regardless of whether they have ESRD and regardless of their eligibility for, or enrollment in, Medicare.

**Example of Discriminatory Limitations:** Singling out plan participants with ESRD by imposing higher deductibles or by covering fewer services (e.g. dialysis treatments) for them is discriminatory and in clear violation of the MSP rules.

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<sup>4</sup> *DaVita, Inc. v. Marietta Mem'l Hosp. Emp. Health Benefit Plan*, Case No. 2:18-cv-1739 (S.D. Ohio Sep. 20, 2019)

<sup>5</sup> *DaVita Inc. v. Amy's Kitchen, Inc.*, (9th Cir. Nov. 24, 2020)

Plans need to be careful to limit the target to dialysis treatment itself and not specifically the patients using those benefits. Plans should also not put in new limitations mid-year due to HIPAA's nondiscrimination rules. Any changes to dialysis coverage should be reflected in plan amendments and communicated to individuals in accordance with applicable disclosure obligations.

## About the author



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