

## EMPLOYEE BENEFITS

## Supreme Court Resolves Circuit Split Regarding Whether Dialysis Limitations Are Barred by the Medicare Secondary Payer Act

In recent years, there has been ongoing litigation regarding whether the End Stage Renal Disease (“ESRD”) non-differentiation provisions of the Medicare Secondary Payer Act (“MSP Act”) bar a group health plan from placing limitations or restrictions on dialysis treatment benefits. Group health plans often limit dialysis benefits, such as treating all dialysis providers as “out-of-network” or capping dialysis benefits at Medicare-based rates to help contain the cost of benefits for participants’ dialysis. The litigation has centered around whether these practices and the disparate effect they have on participants with ESRD, violate two provisions of the MSP Act: (1) the ESRD non-differentiation provisions (found in [42 CFR §411.161\(b\)](#)) which provide that plans may not differentiate in benefits provided under the plan for participants with ESRD and those who do not); and (2) the provision prohibiting group health plans from taking into account an individual’s Medicare eligibility or entitlement (found in [42 CFR §411.108](#)). In two very similar cases, the Sixth and Ninth Circuit Courts of Appeals took different views as to whether dialysis treatment limitations violated the MSP’s protections for individuals with ESRD, with the Sixth Circuit in *DaVita Inc. et al. v. Marietta Memorial Hospital, et al.* finding these practices did violate the statute, while the *Ninth Circuit in DaVita Inc. v. Amy’s Kitchen Inc.* found they did not.<sup>1</sup>

The Sixth Circuit case was appealed to the United States Supreme Court, and on June 21, 2022, the Supreme Court weighed in on the issue. In [\*Marietta Memorial Hospital, et al. v. DaVita Inc. et al.\*](#), the Court held that “a group health plan that provides limited benefits for outpatient dialysis, but does so uniformly for all plan participants” (i.e., those with and without ESRD) does not violate the MSP Act “[b]ecause [its] terms apply uniformly to individuals with and without end-stage renal disease, the plan does not ‘differentiate in the benefits it provides between individuals’ with and without end-stage renal disease.” The Court determined that “[b]ecause the Plan provides the same outpatient dialysis benefits to all Plan participants, whether or not a participant is entitled to or eligible for Medicare, the Plan cannot be said to ‘take into account’ whether its participants are entitled to or eligible for Medicare” as prohibited by the MSP Act.

The *Marietta Memorial Hospital* decision brings clarity to the many group health plans that use (or desire to use) similar design features to those noted in the cases above.

<sup>1</sup> The limitations at issue in *DaVita Inc. et al. v. Marietta Memorial Hospital, et al.* were the placing of all dialysis providers in the “out-of-network” reimbursement tier and limiting reimbursements for dialysis providers to 125% of the Medicare reimbursement rate (with dialysis providers being the only providers subject to such a limit). The limitations at issue in *DaVita Inc. v. Amy’s Kitchen Inc.* included placing dialysis providers neither under in-network nor out-of-network status and applying a unique “Usual and Reasonable Charge” reimbursement determination (differing from their normal “Customary, Usual, and Reasonable Charge” reimbursement determination for other medical expenses).

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