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U.S. Supreme Court Rejects HHS's Interpretation of the Medicare Statute, Declines to Address *Chevron* Deference

The Medicare statute does not permit HHS to set different Medicare reimbursement rates for different groups of hospitals unless it first conducts a survey of hospitals' acquisition costs.

SUMMARY

In a unanimous opinion by Justice Kavanaugh, the U.S. Supreme Court ruled in *American Hospital Ass'n* v. *Becerra*, 596 U.S. ___, 2022 WL 2135490 (June 15, 2022), that the Medicare statute prohibits the Department of Health and Human Services (HHS) from setting different Medicare prescription-drug reimbursement rates for different groups of hospitals unless the agency first conducts a survey of hospitals' acquisition costs. The decision is especially notable for what it does *not* say. Many commentators had predicted that the Court's opinion in the case would overrule or narrow a longstanding but controversial doctrine of administrative law known as *Chevron* deference. The Court's opinion, however, makes no mention of *Chevron* at all. In recent years, the Court has declined to apply *Chevron* in cases involving major questions, and this case arguably extends that trend by declining to apply *Chevron* without labeling the statutory question as a major one.

BACKGROUND

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 authorizes HHS to set reimbursement rates for certain outpatient prescription drugs provided by hospitals to Medicare patients.[1] The statute provides two alternative ways that HHS can set those rates. If HHS has conducted a survey of hospitals' acquisition costs for each covered outpatient drug, the agency may set reimbursement rates based on the hospitals' "average acquisition cost for the drug that year," and may "vary [the reimbursement

rates] by hospital group."[2] If HHS has not conducted a survey of acquisition costs, the agency must set reimbursement rates based on the average price charged by manufacturers for the drug "as calculated and adjusted by the Secretary."[3]

In 2018 and 2019, HHS cut reimbursement rates for a particular group of hospitals—those that participate in the 340B Drug Pricing Program—without first conducting a survey of hospitals' acquisition costs.[4] The 340B Program allows hospitals that serve a high proportion of low-income patients to purchase drugs from pharmaceutical companies at reduced prices. HHS reasoned that since 340B hospitals pay less for the drugs, their Medicare reimbursements for those drugs should reflect the lower costs.

The American Hospital Association, other industry groups, and several hospitals challenged the 2018 and 2019 rate reductions for 340B hospitals. They argued that because HHS had not conducted a survey of hospitals' acquisition costs, the Medicare statute did not permit the agency to vary reimbursement rates among groups of hospitals. HHS countered that (1) various statutory provisions precluded judicial review of the 2018 and 2019 reimbursement rates, and (2) the statute authorized HHS to vary reimbursement rates by hospital group, even though HHS had not surveyed acquisition costs, under the agency's authority to "adjust" the price-based reimbursement rates. The district court ruled for the hospitals, first finding that judicial review was available, and then finding that the statute permitted HHS to set different rates for different hospital groups only if it had first conducted a survey of hospitals' acquisition costs.[5] A panel of the U.S. Court of Appeals for the D.C. Circuit agreed with the district court about judicial review but divided on the merits. Over a dissent, the court held that HHS had permissibly interpreted the Medicare statute.[6]

THE U.S. SUPREME COURT'S DECISION

The U.S. Supreme Court unanimously reversed the D.C. Circuit's decision. The Court first agreed with the district court and the D.C. Circuit that no statute precluded judicial review of the rate reductions.[7] Turning to the merits, the Court held that the "text and structure" of the Medicare statute forbid HHS from varying the reimbursement rates between hospital groups if the agency does not first conduct a survey of hospitals' acquisition costs.[8] The Court explained that the statute expressly allows HHS to vary rates among hospital groups only if it has first conducted the survey of hospitals' acquisition costs.[9] The Court rejected HHS's argument that it could vary rates among hospital groups under its authority to "adjust" price-based reimbursement rates. The Court reasoned that adjusting average drug prices is different from setting categorically different reimbursement rates for different groups.[10]

HHS had urged the Court to defer to its interpretation of the statute under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* provides a two-step framework for analyzing the legality of the interpretation of a statute by an agency charged with the statute's administration. At the first step, the court determines whether the statute is ambiguous.[11] If the statute is

ambiguous, the court proceeds to the second step, where it determines whether the agency's interpretation is reasonable.[12] In response to HHS's position, several *amici curiae* urged the Court to overrule *Chevron*,[13] and some Justices discussed overruling *Chevron* at oral argument.[14] The six-and-a-half month delay between oral argument and the opinion—one of the longest of all cases heard this Term—suggested that the Court might be considering a major doctrinal overhaul that undoubtedly would have been met with robust dissent.

In the end, however, the Court neither overruled nor even invoked *Chevron*. Based on the Court's determination that the statute was clear, the Court could have easily applied *Chevron* and rejected HHS's position at the first step. Or the Court could have expressly held that *Chevron* should not govern its inquiry. But in a Term already packed with divisive cases, the Court may have decided to avoid overturning, narrowing, or even reaffirming *Chevron* in the interest of unanimity.

IMPLICATIONS

The Court's unwillingness to apply *Chevron* may be part of a growing trend. Since 1984, *Chevron* has been the dominant framework for analyzing agency interpretations of federal statutes. But over the last decade, *Chevron* has faced increased criticism. Scholars, lawyers, and even judges have argued that *Chevron* violates the separation of powers by effectively allowing agencies, rather than courts, to decide the meaning of federal law. Certain Justices have suggested that they are willing to overrule *Chevron*,[15] but the Court has so far avoided the issue by declining to apply *Chevron* deference in cases involving "major questions." The so-called major questions doctrine refers to judicial skepticism of agencies' attempts to assert regulatory authority on questions of "vast economic and political significance" without "clear congressional authorization."[16] That issue was presented again this Term in important cases dealing with the OSHA's vaccine mandate for large employers and the Obama Administration's Clean Power Plan. The Court's latest decision in *American Hospital Association* may signal that in addition to declining to apply *Chevron* in the category of major-question cases, the Court may further limit *Chevron* in particular cases simply by not finding any relevant statutory ambiguity. Some lower federal courts are likely to follow suit, and private litigants should continue to consider both broad and narrow challenges to *Chevron* deference.

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ENDNOTES

1 42 U.S.C. § 1395*l*(t)(14).

2 § 1395*l*(t)(14)(A)(iii)(I).

3 § 1395*l*(t)(14)(A)(iii)(II).

4 *Becerra*, 2022 WL 2135490, at *4.

5 *Am. Hosp. Ass'n* v. *Azar*, 348 F. Supp. 3d 62 (D.D.C. 2018).

6 *Am. Hosp. Ass'n* v. *Azar*, 967 F.3d 818 (D.C. Cir. 2020).

7 *Becerra*, 2022 WL 2135490, at *5.

8 *Id.* at *6.

9 *Id.*

10 *Id.* at *7.

11 467 U.S. at 842-43.

12 *Id.* at 843.

13 *E.g.*, Brief for Americans for Prosperity Foundation as *Amicus Curiae*, at 4; Brief for the National Right to Work Legal Defense Foundation as *Amicus Curiae*, at 3.

14 *E.g.*, Transcript of Oral Argument at 5, 30.

15 *E.g.*, *Michigan* v. *EPA*, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring); *see also Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring).

16 *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (internal quotation marks omitted).

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