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Supreme Court Ruling in *AHA v. Becerra* May Affect 340B Hospitals' Reimbursement Rights Against Medicare Advantage Plans

Hospitals that participate in the 340B program may be entitled to additional monies from Medicare Advantage plans in the wake of the Supreme Court's decision in *AHA v. Becerra*.

In *AHA v. Becerra*, a unanimous Supreme Court held that the Centers for Medicare & Medicaid Services's (CMS's) policy to pay 340B hospitals at Average Sales Price (ASP) minus 22 percent for separately payable outpatient drugs conflicted with the plain language of the Medicare statute which sets a statutorily prescribed rate for those services. Although the principles of the case applied most directly to traditional Medicare, the decision equally impacts Medicare Advantage reimbursement that is pegged to Medicare fee-for-service rates. We have assisted several hospital systems in analyzing their Medicare Advantage managed care agreements related to the reimbursement implications of *AHA v. Becerra*.

For traditional Medicare, CMS has stated that it intends to clarify what steps it will take to apply the *AHA v. Becerra* decision retroactively in a proposed rule issued in advance of the Calendar Year 2024 Outpatient Prospective Payment System (OPPS)/Ambulatory Surgery Center (ASC) Proposed Rule. What Medicare Advantage plans must do to address retroactive payments is a matter of contract, however, and not necessarily dependent on the route CMS takes to address retroactivity. When asked about making retroactive adjustments, payors often indicate they are waiting for instructions from CMS. Medicare Advantage Organizations' obligations to providers are not necessarily the same as those of CMS,



however, and we are working with 340B hospitals who wish to take a more proactive approach.

We have assisted clients in assessing their contract language to determine the impact of *AHA v. Becerra* on retroactive and going-forward payments and whether litigation may be warranted. There are several factors that impact a hospital's likelihood of success, including the language of the contractual reimbursement formula, the contractual language regarding retroactive adjustments and time limitations for disputes.

It is important that 340B hospitals take timely steps to preserve their rights. Sending dispute notices and initiating the reconsideration process is a way to force payors to have a formal dialogue about the issue and at a minimum accelerate outstanding adjustments to 2022 payments. 340B hospitals also may have enforceable rights to correct prior years' payments that were based on the 340B outpatient drug discount that the Supreme Court found to be illegal.

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