



Where's Our 340B Money?

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With the Supreme Court ruling in favor of hospitals in the litigation over the 2018 and 2019 340B payment cuts (click [here](#) for the opinion and [here](#) for our summary), hospitals want to know when they will be reimbursed for the nearly 30% payment cuts for each of those years. Summarized below are a variety of outstanding questions that bear on the timing of any reimbursement, leading us to conclude that it will likely be some time before 340B hospitals are properly reimbursed for 2018 and 2019.

The Supreme Court reversed and remanded the case without proscribing how the relief should be granted, leaving it to the lower court to determine next steps. Whether the lower court will leave it open for HHS to figure out the remedy or whether it will provide more instruction to HHS remains to be seen. There is a long line of case law to suggest that when an agency acts unlawfully, the court should send the issue back to the agency to determine how to provide relief. Also unknown is whether HHS will be given a deadline to determine how to comply and/or a deadline by which it must reimburse 340B hospitals.

Next Steps by HHS

If it is left to HHS to figure out how to make 340B hospitals whole, how will it proceed? Will HHS make retroactive payments for 2018 and 2019? Or adjust reimbursement rates going forward? In general, OPPTS payments must remain budget neutral – will that apply with respect to these remedial payments? If so, how will HHS reimburse 340B hospitals without negatively impacting other hospitals – and leading to more litigation?

All these outstanding issues – and more - lead us to the conclusion that the 340B remedial payments are not likely to be received by hospitals any time soon.

What About 340B Payments for 2020 and Later?

It remains to be seen how this ruling will impact 340B payments for 2020, 2021 and 2022. There are cases currently before the D.C. District Court that were stayed pending the Supreme Court decision. There was a “survey” conducted in 2020 that applied to 2021 and 2022, which HHS may try to argue justifies the reductions in 2021 and 2022. The OPPTS proposed rule for 2023 is at the Office of Management and Budget for final review. Whether CMS will hold off on issuing the proposed rule or proceed as scheduled – and what adjustments may be in that proposed rule - remain to be seen.

We will keep you updated as we learn new information.

For additional information, please contact our General Counsel Diane Turpin at diane.turpin@shcare.net or 202-578-5444. This information is offered for the general education and knowledge of our clients. It is not offered as legal advice.