



Court of appeals rules that HHS has the authority to cut 340B hospitals' Medicare payments for outpatient drugs by 28.5 percent

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On July 31, 2020, the Court of Appeals for the District of Columbia Circuit dealt another loss to hospitals with its [decision](#) reversing the District of Columbia District Court's prior decision and reinstating the Department of Health and Human Services' (HHS) 28.5 percent cut to Medicare reimbursement for outpatient drugs at hospitals that participate in the 340B drug discount program. The policy was first announced in the 2018 Outpatient Prospective Payment System (OPPS) rule in which HHS reduced the reimbursement rate for the majority of drugs purchased by hospitals under the 340B program from their historic reimbursement rate of average sales price (ASP) plus six percent to ASP minus 22.5 percent. HHS justified this downward "adjustment" to the ASP as a conservative estimate equal to the average minimum discount that a 340B participating hospital received when purchasing outpatient drugs.

A group of hospitals and hospital associations (hospital plaintiffs) sued HHS to stop implementation of the policy, which was also included in the 2019 OPPS rule. As previously [reported](#) in May 2019, a federal judge in the District of Columbia District Court ruled in favor of the hospital plaintiffs, holding that the drastic cuts to Medicare reimbursement for drugs purchased through the 340B drug discount program contained in the 2018 and 2019 OPPS rules exceeded the statutory authority of the HHS secretary and were unlawful. HHS appealed the district court's decision.

On appeal, HHS argued first that the Medicare statute provision establishing the OPPS precludes judicial review of HHS's adjustments to the reimbursement rate for these outpatient drugs. The court of appeals disagreed, finding no "clear and convincing evidence that Congress intended" that result and concluding that the rate adjustment for 340B hospitals was subject to

judicial review. But the appeals court held in favor of HHS on the merits of the case, finding that HHS had the statutory authority to impose the 28.5 percent reimbursement cut for outpatient drugs for 340B hospitals because HHS' interpretation of the Medicare statute's OPPS provision was entitled to deference.

In reversing the lower court's decision, the court of appeals stated, "In our view, HHS reasonably interpreted [the statute]'s adjustment authority to enable reducing [outpatient drug] payments to 340B hospitals, so as to avoid reimbursing those hospitals at much higher levels than their actual costs to acquire the drugs." The resulting savings to be realized by HHS, approximately \$1.6 billion, will not be kept by the agency but, instead, will be distributed to all hospitals in a budget-neutral manner as additional reimbursement for other Part B services. We [previously reported](#) that this same court of appeals recently upheld HHS's site neutral payment policy for clinic visits provided in excepted off-campus provider-based departments. The hospital plaintiffs, in that case, are requesting a [rehearing](#) of the case.

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