



## Hot Topics in Health Care January 2023

Article

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### Court Remands Remedy for Unlawful 340B Rule to HHS

On January 10, 2023, the DC District Court remanded the issue of how to remedy five years of underpayments to 340B hospitals to the Department of Health and Human Services (HHS).

Under the federal 340B program, drug manufacturers are required to sell prescription drugs to qualifying providers at prices below those paid by other providers. Qualifying providers include governmental hospitals and certain non-profits that have a Medicare Disproportionate Share Hospital (DSH) percentage above a certain threshold. Investor-owned hospitals may not participate. Despite the reduced purchase price for prescription drugs, 340B hospitals historically received Medicare reimbursement for prescription drugs at the same rates as non-340B hospitals.

Effective in 2018, HHS adopted a rule that significantly reduced the Medicare reimbursement available to 340B hospitals for prescription drugs, on the theory that 340B hospitals were “overpaid” as a result of the reduced purchase price they received on prescription drugs (the 2018 Rule). HHS then used the \$1.6 billion in savings generated by the 2018 Rule to increase the outpatient reimbursement rates to all Medicare hospitals. HHS’ 2018 Rule was effective for five years, between federal fiscal years 2018 – 2022. During those five years, the impacted 340B hospitals and HHS engaged in a series of federal court cases and appeals, which culminated in a unanimous 2022 Supreme Court decision finding that HHS exceeded its statutory authority in implementing the 2018 Rule. The Supreme Court remanded the issue to the DC

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Circuit to determine how to remedy the five years of underpayments.

In the January 10, 2023 decision, the DC District Court determined that HHS was best suited to determine how to remedy the five years of underpayments, and accordingly remanded the issue to the administrative agency. Salient issues HHS must consider include: whether budget neutrality will require recoupments from non-340B hospitals in order to reimburse the underpaid 340B hospitals; whether HHS has authority to recoup from non-340B hospitals; and, whether to re-adjudicate five years of historical claims or to make 340B hospitals whole through increased payments on prospective claims. HHS committed to proposing its remedy prior to issuing its 2024 outpatient prospective payment rule.

Source: *American Hospital Ass'n, et al., v. Becerra*, No. 18-2084 (RC), 2023 WL 14337 (D.D.C. Jan. 10, 2023)

## HHS Extends COVID-19 Public Health Emergency to April

On January 11, 2023, the Department of Health and Human Services (HHS) extended the public health emergency (PHE) related to COVID-19 for another 90 days, to April 11, 2023.

Historically, HHS extending the PHE enabled the expanded use of telehealth in the Medicare and Medicaid programs, fast-tracked approvals for COVID-19 vaccines and drugs, and prevented states from discontinuing beneficiaries' Medicaid coverage. However, after the omnibus spending bill Congress passed in December 2022, states may begin the process of dis-enrolling Medicaid beneficiaries who no longer qualify for coverage regardless of whether the PHE is extended. The spending bill also extended the Medicare telehealth flexibilities through 2024, so that issue is no longer tied to the PHE. So long as the PHE is still in effect, state Medicaid programs will receive enhanced federal matching rates for Medicaid services.

Source: <https://aspr.hhs.gov/legal/PHE/Pages/covid19-11Jan23.aspx>

## CMS Awards 200 New Medicare Residency Slots to 100 Teaching Hospitals

On January 9, 2023, the Centers for Medicare and Medicaid Services (CMS) announced that it awarded 200 new Medicare-funded physician residency slots to 100 teaching hospitals.

Under CMS' 2022 Inpatient Prospective Payment System (IPPS) Final Rule, CMS committed to creating 1,000 new physician residency slots for U.S. hospitals over five years. Medicare reimburses hospitals for certain costs associated with training residents, limited to the number of Medicare resident slots allotted to each particular hospital. Many hospitals have far fewer Medicare resident slots than residents, meaning the hospitals bear the entire cost of training many of their residents.

CMS allocated the 200 new resident slots to hospitals across 30 states, Washington, D.C., and Puerto Rico. Around 75% of the new resident slots are for primary care (including obstetric) and psychiatric residencies. The new slots go into effect July 1, 2023.

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The application period for the second round of 200 new resident slots will open this month and close on March 31, 2023.

Source: <https://www.cms.gov/newsroom/press-releases/cms-awards-200-new-medicare-funded-residency-slots-hospitals-serving-underserved-communities>

## South Carolina Supreme Court Finds Fetal Heartbeat Bill Unconstitutional

On January 5, 2023, the South Carolina Supreme Court found that the South Carolina Legislature's "Fetal Heartbeat and Protection from Abortion" Law is unconstitutional.

In June 2022, the United States Supreme Court held in *Dobbs v. Jackson Women's Health Organization* that the "authority to regulate abortion is returned to the people and their elected representatives." Effectively, the *Dobbs* decision rendered abortion an issue of state law.

In the aftermath of *Dobbs*, South Carolina's Fetal Heartbeat Law went into effect. Under the Fetal Heartbeat Law, abortions after around six weeks gestation were prohibited. The Fetal Heartbeat Law went into effect June 27, 2022; however, the South Carolina Supreme Court enjoined enforcement of the Fetal Heartbeat Law effective August 17, 2022, while the court analyzed its constitutionality.

In its January 5, 2023 decision in *Planned Parenthood South Atlantic et al. v. State of South Carolina et al.*, the South Carolina Supreme Court found that the Fetal Heartbeat Law violated a woman's constitutional right to privacy, enshrined in the South Carolina Constitution in the wake of *Roe v. Wade*. As a result, the law on abortion in South Carolina reverts to pre-*Dobbs*. The South Carolina Supreme Court did not set forth any tests for what new limits on a woman's right to abortion would be acceptable under South Carolina's Constitution. The South Carolina Governor and Legislature will likely attempt to change the pre-*Dobbs* abortion laws in South Carolina during the current legislative session.

Source: [28127.pdf \(sccourts.org\)](#)