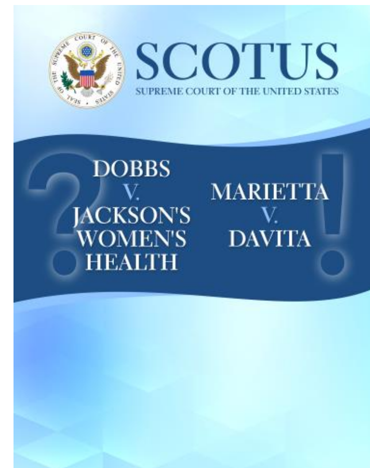
2022: A Supreme Summer?

A Detailed Look Into This Summer's Supreme Court Decisions that Affect Employer Health Benefits and Plan Decisions

(SCOTUS Cases Dobbs v. Jackson Women's Health, Marietta Memorial Hospital Employee Health Plan v. DaVita, Inc.)



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It was definitely a summer to remember, but not for the reasons most of us would think. Instead of taking extensive dream vacations, many stayed closer to home, with shorter and more cost-effective adventures, due to the high cost of flights, hotels and basic living expenses. Not to mention concern over lost luggage! With inflation at a near-record level, many were, and continue to be, on pins and needles grasping for financial relief. Coming off COVID years, we had hoped to be calmer in 2022, but instead, stress has been at a high level so far for many, with rent prices and mortgage and overall interest rates rising, the cost of basic goods and services increasing above budget-levels, and of course, the cost of gas for automobiles (not to mention jet fuels, which are keeping flight prices high) throughout the summer months. Many families have said forget vacations; I need to be able to pay for gas to get to work and groceries to feed my family!

As if all of this wasn't enough, there has been a lot in the news causing discord and overall political controversy across the nation. On June 24, 2022, although there had been rumors of it for weeks in the news after a leaked draft of the decision, the U.S. Supreme Court upheld Mississippi restrictions on abortions, in the Dobbs v. Jackson Women's Health Organization decision. As I'm sure all of you know by now, the Dobbs case overturned the Roe v. Wade and Planned Parenthood of Southeastern Pennsylvania v. Casey decisions from 1973 and 1992, respectively, which pre-empted state restrictions on abortion, and determined that access to pregnancy terminations/abortions is not a constitutionally protected right.

In another case that was decided this summer, which was announced just prior to the Dobbs decision, but was quickly overshadowed in the news and therefore in the minds of many, the U.S. Supreme Court decision on June 21, 2022 found in favor of an employer's health plan (Marietta) in a 7-2 opinion, which stated that the Marietta Hospital Employee Health Benefit Plan did not violate the Medicare Secondary Payer Act (MSPA) in limiting dialysis payments to DaVita dialysis centers. This was a huge victory for the self-insurance industry, as well as ERISA protections.

Where Dobbs caused stress and anxiety, Marietta v. Davita should have been cause for celebration for many health plans, but again, many are not even aware of this because the spotlight turned almost immediately to the Dobbs decision. I will attempt to provide information on both cases.

Dobbs v. Jackson Women's Health Organization

Before we dive into the Dobbs case, I think it's important that we look back briefly in history on cases involving federal reproductive rights.

Historical Cases Related to Federal Reproductive Rights & How They Relate to Dobbs v. Jackson Women's Health Organization

In the first case, Griswold v. Connecticut, way back in 1965, the Supreme Court ruled that a state's ban on the use of contraceptives violated the right to marital privacy. The case concerned a Connecticut law that criminalized the encouragement or use of birth control. The court determined that the Constitution does not explicitly protect a general right to privacy, the various guarantees within the Bill of Rights create what they call penumbras, or zones, that establish a right to privacy. Put together, the First, Third, Fourth, and Ninth Amendments create the right to privacy in marital relations. The Connecticut statute they said conflicted with the exercise of this right and was therefore held null and void.

This was followed by Roe v. Wade in 1973, which found that the Constitution of the United States conferred the right to have an abortion. According to Wikepedia, "On January 22, 1973, the Supreme Court issued a 7–2 decision holding that the Due Process Clause of the Fourteenth Amendment to the United States Constitution provides a fundamental "right to privacy", which protects a pregnant woman's right to an abortion. The Court also held that the right to abortion is not absolute and must be balanced against the government's interests in protecting women's health and prenatal life. The Court resolved these competing interests by announcing a pregnancy trimester timetable to govern all abortion regulations in the United States. The Court also classified the right to abortion as "fundamental," which required courts to evaluate challenged abortion laws under the "strict scrutiny" standard, the most stringent level of judicial review in the United States."

In 1992, a third federal reproductive rights case, Casey v. Planned Parenthood, the Court upheld the right to have an abortion as established by the "essential holding" of *Roe v. Wade* (1973) and issued as its "key judgment" the imposition of the undue burden standard when evaluating state-imposed restrictions on that right. Wikepedia summarizes that the Court overturned the Roe trimester framework in favor of a viability analysis, thereby allowing states to implement abortion restrictions that apply during the first trimester of pregnancy. In its "key judgment," the Court overturned *Roe*'s strict scrutiny standard of review of a state's abortion restrictions with the undue burden standard, under which abortion restrictions would be unconstitutional when they were enacted for "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Applying this new standard of review, the Court upheld four provisions of the Pennsylvania law, but invalidated the requirement of spousal notification. Four justices wrote or joined opinions arguing that *Roe v. Wade* should have been struck down, while two justices wrote opinions favoring the preservation of the higher standard of review for abortion restrictions.

Today, we have a new law of the land; the Dobbs v. Jackson Women's Health decision, where the Court upheld the Mississippi law (Mississippi Gestational Act) in a 6-3 decision, stating that "except in a medical emergency or in the case of a severe fetal abnormality," abortions are prohibited, "if the probable gestational age of the unborn human being has been determined to be greater than 15 weeks." That same case overturned Roe v. Wade 5-4.

So what does this mean? I asked my benefits and insurance attorney, Marilyn Monahan, of Monahan Law Office, to explain: "The *Dobbs* case overturned *Roe v. Wade* and *Casey v. Planned Parenthood*, returning the issue of whether a woman has a right to an abortion to the states. So rather than relying on a federal standard--a federal right to abortion established by *Roe*—it is now up to each state to determine whether the women in that state are entitled to get an abortion, and under what circumstances."

In the Dobbs case, Justice Samuel Alito, Jr. stated that "We hold that Roe and Casey must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one which the defenders of Roe and Case now chiefly rely- the Due Process Clause of the 14th Amendment."

The end result: No more federal protections on abortions.

So where do we go from here, and what is the current state of the nation after this ruling? Obviously, this case resulted in high levels of emotion and debate.

State Immediate Actions on Abortion Following Dobbs v. Jackson

Amidst the media frenzy, frantic women's rights movements and shouting m across the nation, we have had numerous state actions on both sides. Surprisingly to some, the state of Kansas, a red state, voted on an August 2, 2022 ballot measure the "Kansas No State Constitutional Right to Abortion and Legislative Power to Regulate Abortion Amendment." Simply stated, a "yes" vote supported amending the Kansas Constitution to state that nothing in the state constitution creates a right to abortion or requires government funding for abortion, and states that the legislature has the authority to pass laws regarding abortion. A "no" vote opposed amending the Kansas Constitution, thereby maintaining the legal precedent established in a prior case, Hodes & Nauser v. Schmidt in 2019 that the Kansas Bill of Rights provides a right to abortion. In a 59% majority, the NO votes won, maintaining the right to an abortion. This case also took over the news cycle for at least two weeks.

Other states with similar measures on the ballot in upcoming elections include California, Kentucky, Montana and Vermont.

State Access to Abortions

The status of state abortion access has never been more in the forefront. In a recent study by Kaiser Family Foundation, as of August 17, 2022 (this is changing frequently), abortion is banned in 9 states, status of the pre-Roe ban is unclear in 2 states, abortions are banned/restricted but not yet implemented in 2 states, abortion bans are temporarily blocked, with abortions legal in 4 states, and various other statistics. California is one of 24 states (as of this writing) and DC that have abortions widely available. This map can be found at: https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/.

KFF also produced an interactive map showing each state's policies on abortion, which is available at: https://www.kff.org/womens-health-policy/issue-brief/interactive-how-state-policies-shape-access-to-abortion-coverage/ .

Certain states have enacted or are considering enacting laws that greatly restrict or completely ban abortion access for women. Other states have enacted (or are considering) laws that would make it a civil or criminal violation to "aid and abet" or otherwise assist an individual in accessing abortions. Currently, these include Texas and Oklahoma. Missouri is considering expanding prohibitions on abortions on state residents performed outside

of the state's borders. Texas is threatening to limit companies from doing business in their state based on covering, supporting, or permitting access to abortions.

I asked Marilyn Monahan about the current landscape in the states. "Some of the issues of most concern center on the civil and criminal penalties that some states are imposing.   Various states, such as Texas, have passed or are looking into imposing civil penalties that could be levied on those who assist a woman who obtains an abortion. In other circumstances, criminal penalties could be imposed for performing an abortion, or assisting someone who obtains an abortion, when the procedure is illegal in the state. Two factors that complicate the situation are that the laws vary from state-to-state and that they are constantly changing. Whether and when these penalties might be imposed are some of the most critical open issues we are facing right now. Women seeking medical care, their families, providers, and health plans are among those who are attempting to understand and comply with the new standards that are being put in place. While many people are analyzing these issues, we don't have definitive answers with regard to a number of these questions yet."

Employer Health Plans and Dealing with Abortion

Many employers are now scrambling to make plan changes that allow for access to abortions since the Dobbs v. Jackson decision, due to employee pressure or their management's stance on the issue. Many large employers have recently made public statements that of course hit the news cycles, about providing access to abortions to their employees who may reside in a state where the state law does not allow for abortions, including Amazon, Apple, Citigroup, Disney, Microsoft and others.

What can employers do? Much of that depends on whether the employer's health plan is fully-insured or self-funded. Options being considered include a) amending existing plans to enhance or expand travel and out-of-area and expanding prescription drug benefits to cover pharmaceutical abortion options, b) offering a travel benefit by means of a secondary health plan, c) providing a medical travel reimbursement benefit through a non-traditional type of health program, d) making travel and lodging expenses reimbursable through a Health Savings Account (HSA) or Health Care Flexible Spending Account (FSA), e) establishing a separate, stand-alone travel expense reimbursement program, f) including travel expenses in an existing taxable reimbursement program.

It's important to note that travel can be a valid medical expense under certain plans. Section 213-D of the IRS code allows for travel expenses, but there are limits. There are other issues that will need to be discussed, however. Will there be a Mental Health Parity issue if the medical/surgical benefit for abortion does not match the mental health benefits? Is Aiding and Abetting a concern, or should it be?

The Dobbs v. Jackson case will impact covered services in health plans within certain states most definitely, particularly when they have significant restrictions in place on abortion. Some states will attempt to block patients and health plan beneficiaries from traveling across state lines for abortions.   Others may restrict patients or health plan beneficiaries from receiving abortion-producing drugs through mail order or telehealth services. ERISA self-funded plans will likely have the most flexibility, and will likely argue that ERISA pre-emptions will protect them; at least in non-criminal cases. We'll discuss potential criminal issues below.

I asked Marilyn Monahan about the ERISA argument regarding pre-emption in the states and whether that would apply in these types of state abortion issues. “If the travel costs are part of an ERISA plan, an argument could be made that ERISA pre-empts any criminal or civil penalties that might apply under state law. That is one of the arguments that has been presented but, so far as I know, it hasn’t been explicitly tested yet.”

It’s important to note that fully insured health plans are of course subject to state laws. Some states that do not provide for abortion coverage allow for certain abortion riders. Let’s talk first about amending existing medical plans to enhance travel and out-of-area benefits and prescription benefits. If self-funded, plans may be able to expand travel benefits to include travel to out-of-state providers, including network providers, in other states where abortions are legal.

Before making drastic changes immediately, I’d suggest (I’m not an attorney, but I’m sure attorneys would likely agree with me on at least this) that the plan sponsor first discuss in detail with their brokers/consultants, third party administrators and benefits attorney. The benefits attorney may also suggest consultation with one or more other attorneys to be sure the plan’s ducks are in a proverbial row. Does the plan already cover travel for benefits and if so, what are the current restrictions? Does the plan even cover abortions now, and if so, does it allow for surgical abortions, pharmaceutical abortions (i.e. the morning after pill) or both? Do the states that plan participants would be likely to travel to or from contain laws such as criminal penalties against aiding and abetting or other criminal laws that could get pulled into this? Does the plan currently cover pharmaceutical abortions in your drug plan? What about your telehealth plan?

“If you are adding travel benefits to your plan, you want to make certain that the travel benefits are structured to comply with any limitation contained within Section 213(d) of the Internal Revenue Code, as well as any other rules or limitations that might apply,” stated Marilyn. “For example, if you’re reimbursing milage, there is a specific standard reimbursement rate for medical purposes, which is different from the business reimbursement rate that the IRS announces every year. Also, there are limitations on reimbursements for lodging. While you can reimburse lodging expenses, the Code imposes certain limitations on the terms and conditions under which you can do so, as well as a limit on the total amount you can reimburse. You generally can’t reimburse meals, unless they are part of in-patient care.”

Fully insured plans are of course limited to the insurance carrier provisions and state laws, so the plan sponsor’s choices may be more limited.

Does it make sense to look at a travel benefit through a separate health plan, or a medical travel reimbursement? Can it be added to existing or newly added EAP programs, telehealth programs, HRA or FSA plans? Again, consultation with the broker consultant, TPA and one or more attorneys is recommended because of issues or potential issues with a variety of laws, including the ACA, COBRA, HIPAA Privacy & Security, etc. Many of these arrangements are considered group health plans, so ERISA and these various other federal laws may be applicable.

I recently discussed this with Jeff Strong, Vice President of Sales, Sterling Administrators. “As an HSA, FSA & HRA administrator, we have seen a lot questions and inquires into the travel for abortion due to the system change and now it being legal in some states and not in others,” commented Jeff. “Right now it is a bit of a moving ball; it reminds me a lot of the early days of the ACA with continual change. Dorothy had talked about all the tools that are defined and out there through IRS section 213 and blanketed by IRS Revenue Ruling 73-201. One thing we recommend to keep in mind is the definition of abortion being legal in that state. Where the challenge resides is in the definition of ‘legal’ in the state. Is the legal state the one where the medical care is, or if the employee is in a state that abortion is not legal and the company is situs in that state would it make it not legal to reimburse for claims and expense for travel to a legal state? If one gets drugs for abortion is it where they get the drugs, or where the drugs start to work? Then finally, how much enforcement will there be with this? Employers with a

strong legal arm will find they are busy as things continue to change and there is not a clean line of sight at this time."

Would the employer benefit from an outside stand-alone plan for travel expenses? In all travel plans, you need to look at reasonable expenses for each expense, including mileage rates, lodging rates, whether it would be tax-free or taxable, etc. A broader travel plan may be wise.

"It could be advantageous to make your travel reimbursement policy broader than just applying it to abortion services," stated Marilyn. "You need to look at the big picture and consider whether you should extend travel benefits to other covered items and services, such as centers of excellence, transplant centers, and the like. When designing these benefits, remember that one size does not fit all." As Marilyn and I discussed in a recent podcast (Benefits Executive Roundtable, Season 4, episodes 1 and 2), employers should not be rushing to make decisions. Take a deep dive with your broker consultant and related vendors (including your attorney) and consider all of your options.

California State Laws Related to Abortions

As of now, California state law requires that all private insurance plans cover abortion coverage, including full-insured group health plans, ACA Marketplace plans and in all Medi-Cal plans. Self-funded health plans in California are of course subject to federal ERISA laws, and are pre-empted from state mandates (more to come on how far that pre-emption will go related to abortion issues).

Primary Legal & Possible Criminal Issues

I will attempt to frame some of the most important legal issues today related to abortions and crossing state lines to get them. In a nut-shell, federal laws in place include of course ERISA (and the pre-emption issues that go with that), as well as the Pregnancy Discrimination Act issues, which was passed in the 1970s and requires plans to cover abortions if the life of the mother is at risk. There are of course restrictions on travel benefits, no matter how and in what type of plan they are included in.

Let's talk more about the potential for other legal issues, including possible criminal issues, which I mentioned briefly above. Some states have and more will be adding criminal liabilities for people who assist someone in getting abortions. Some have existing and others are considering adding aiding and abetting laws related to abortions.

In a state such as Texas, could an Uber or Lift or taxi driver be held liable for driving a patient across one or more state lines to receive an abortion? It's certainly possible with current aiding and abetting laws. What if it's your spouse, your sister, your daughter, your cousin, or a close friend that you've had discussions with about whether to get an abortion? What about a health benefit broker/consultant and/or their benefits attorney discussing the pros and cons of health plan provisions that could potentially circumvent state laws disallowing abortions and finding ways to get the abortion covered under the health plan? Does that broker/consultant or attorney, simply providing information on what states allow and do not allow certain types of abortions have liability? Would a plan's Third-Party Administrator have liability if they discussed certain scenarios with the plan sponsor or covered plan beneficiaries? Would there be TPA or PBM liabilities for shipping or delivering abortion pharmaceutical drugs? Again, I referred to Marilyn for her opinion.

"I'm not a criminal lawyer, but I do understand that the potential for criminal liability is one of the areas, for example, that doctors are worried about. This could also potentially be an issue for health plans, if states that outlaw abortion view payment for abortion services to constitute aiding and abetting a criminal act. For example,

could a state deem a health plan to have aided and abetted a criminal act if the health plan pays the expenses for a woman to travel from a state that outlaws abortion to one that permits abortions? These issues could also arise in the case of a medical abortion. We don't really have definitive answers to these questions."

Biden Administration Guidance & Executive Orders to Protect Access to Abortion & Contraception

Just two weeks after SCOTUS' decision in the Dobbs v. Jackson case, President Biden signed an executive order to protect a woman's access to reproductive health care services. The only way to truly secure that right, of course, would be to restore Roe v. Wade, but the Biden Administration says it's committed to defending reproductive rights and protecting access to a safe and legal abortion.

The executive order contains a 5-point action plan in response to the Dobbs v. Jackson case. These steps include safeguarding access to reproductive health care services, including abortion and contraception, by directing Secretary of Health & Human Services' Xavier Becerra, to report to him within 30 days on efforts to protect access to medication abortion, ensure all patients have access to the full rights and protection of emergency medical care, expend access to a full range of reproductive health services, including family planning services and providers, including access to emergency contraception and long-acting reversible contraception like IUDs. As these are preventive services, they should be covered with no co-pay under the ACA for non-grandfathered plans. Given the current state of the divided houses in Congress on this issue, I'm not convinced anything will happen on this any time soon, but they have promised something will be forthcoming in the way of regulations or guidance. How far the guidance will go and what precise guidance will be issued is unknown. We'll have to wait to see what HHS develops.

Marietta Memorial Hospital Employee Health Plan v. DaVita, Inc.

The first of the two SCOTUS decisions, which again was overshadowed by the Dobbs case, was the Marietta Memorial Hospital Employee Health Plan v. DaVita, Inc.

This case, which mentioned above, hit the news on June 21, 2022, and found in favor of an employer's health plan (Marietta) in a 7-2 opinion. In this case, which stated that the Marietta Hospital Employee Health Benefit Plan did not violate the Medicare Secondary Payer Act (MSPA) in limiting dialysis payments to DaVita dialysis centers, was a big win for self-funded health plans.

Brief History/Background of DaVita cases

DaVita v. Marrietta Hospital was one of three federal appeals court cases by DaVita, challenging plan sponsor's authority to carve out benefits for high-cost treatments under the Medicare Secondary Payor Act (MSPA). In 2020, two out of three judges announced a new interpretation of the MSPA, which turns it into an antidiscrimination law that prohibits plans from taking financial risks into account in designing benefits for members who have end-stage renal disease (ESRD). The plan and administrator asked the full court to reverse that decision. The Self-Insurance Institute of America (SIIA) joined other industry stake-holders in co-sponsoring an amicus brief in support of a petition for reconsideration in DaVita v. Marrietta Hospital.

Marietta Hospital is an opinion from the federal Sixth Circuit that was a dramatic departure from precedent and long-established deference to plan sponsors in plan design, according to SIIA. The other two cases related to these issues were DaVita v. Amy's Kitchen and DaVita v. Virgina Mason, both in the Ninth Circuit. Marietta hospital was not biding on them.

The MSPA has always been interpreted as the statute defining the basics of coordination of benefits with Medicare for plan members that are entitled to dual plan/Medicare coverage for any reason. Dialysis companies have for some time promoted a competing theory that what Congress really intended was for the MSPA to prohibit plans from discriminating against members who have end stage renal disease. (Incidentally, from my own personal

experience in seeing self-funded health benefit claims over the years, DaVita is widely known in the industry as a primary over-charging chain of dialysis centers, with prices far exceeding usual, customary and reasonable rates. With the increase in self-funded plans moving to some sort of reference-based pricing, which uses a percentage over Medicare rates for claim payment, such as 130-175% of Medicare rates, we've seen the charges of DaVita escalate even more. If comparing to Medicare rates, I've seen DaVita's bills exceed 1,000% of Medicare, and even as high as 2,000% of Medicare rates). DaVita's alternate theory that it was promoting was that for members who have ESRD, by paying dialysis benefits differently from the way other benefits are paid, such plans were discriminating against dialysis claim payments. To date, no court or regulatory agency had ever interpreted the MSPA that way. SIIA then co-sponsored amicus briefs in all of the cases above in support of the self-funded group health plans. The goal of the DaVita theory was to increase dialysis provider revenues by preventing plans from implementing any kind of cost containment provisions. The worst part of it was that over the years, dialysis costs have seen severe inflation, and only two providers (DaVita is one of the 2) controls nearly 90% of dialysis facilities (i.e. a major near-monopoly). The dialysis charges have traditionally been so high that even PPO discounts can't offer plans much relief. Self-funded health plans therefore adopted cost containment strategies, including network carve-outs and Medicare-rate based pricing (RBP). DaVita sued health plans using this method arguing that any dialysis cost containment strategy violates the MSPA.

In the 2020 opinion in the Marietta case, 2 of 3 judges accepted the theory of DaVita and held that the MSPA is an antidiscrimination statute that prohibits sponsors from carving dialysis out of the network and requires dialysis benefits to be paid at the "same" rate as other benefits. Under that opinion, plan sponsors could not take financial risks into account in dialysis benefits. If a plan treated dialysis differently from other benefits, for any reason, the courts are to order the sponsor to re-write the plan.

The 2020 opinion also allowed dialysis providers to sue plans directly if a member should terminate plan coverage before the end of the coordination period. The prior opinion assumed that the plan's failure to comply "forced" the member to "switch" to Medicare. The opinion basically let a provider sue for twice the amount of anything Medicare paid for any service the plan would have covered, not just the dialysis, after the member terminated plan coverage.

SIIA and other stakeholder's view of the 2020 opinion was a serious break from all precedents not only on the MSPA, but from established ERISA laws and principals deferring to plan sponsors in benefits design. SIIA feared that while the case officially limited to members with ESRD and dialysis, since the MSPA also applied to members eligible for Medicare due to age or disability, it could open the door to suits for preferential benefits for almost all serious medical conditions. SIIA and other stakeholders felt that this opinion did not consider any of those factors, and suffered from a number of basic legal flaws.

DaVita V. Marietta Hospital, June 21, 2022 Decision

Much to the relief of the Self-Insurance Industry, as well as self-funded plan sponsors and the ERISA world in general, the Supreme Court, in a 7-2 decision, found in favor of arguments put forward by SIIA and other industry participants in the DaVita v. Marietta Hospital plan case, finding that the Marietta Hospital Employee Health Benefit Plan did NOT violate the Medicare Secondary Payor Act (MSPA) in limiting dialysis payments to DaVita, because it provides the same benefits, including the same outpatient dialysis benefits, to individuals *with and without end-stage renal disease*. The Court upheld that group health plans like Marietta's can utilize cost-control designs under the MSPA so long as the plans offer the same terms of coverage for outpatient dialysis to all of its participants.

I asked Marilyn Monahan to summarize the case for us: "Under the Medicare Secondary Payer Rules, one of the things a plan cannot do when structuring and designing its benefits is "take into account" that someone is eligible for or entitled to Medicare, whether the person is on Medicare due to age, disability, or ESRD. In short, when structuring benefits, the plan cannot do so in a way that would treat someone

who is on Medicare differently from someone is not on Medicare. Under the facts of the *Marrietta* case, Marietta was a self-funded health plan and DaVita argued that the Murietta health plan set very low reimbursement rates for dialysis services, and DaVita argued that this was a violation of the Medicare Secondary Payer rules. The Supreme Court determined that it wasn't."

This case, again one of 3 federal appeal cases by DaVita, challenged the authority of plan sponsors to carve out benefits for high cost treatments under the MSPA. The court's decision can be found at: https://www.supremecourt.gov/opinions/21pdf/20-1641_3314.pdf. The June 21, 2022 decision by the Supreme Court ensures that self-funded plan designs can continue to appropriately manage and pay for dialysis treatment for patients, without unnecessary payment increases to dialysis providers.

I asked Ryan Work, Senior Vice President, Government Relations of the Self-Insurance Institute of America (SIIA), what the Davita case does for the self-insured industry. "The Supreme Court decision in the DaVita case ensures that self-insured plan designs can continue to appropriately manage and pay for dialysis treatment for patients, without unnecessary payment increases to dialysis providers. SIIA is pleased that the ruling confirmed the ability of health plans to provide common-sense cost containment measures when it comes to high-cost services such as dialysis for those patients that need it the most. Nothing about this decision impacts the quality and care of patients, rather it allows plans to better serve all patients and continue to provide quality, affordable benefits."

The coordination of benefits issue with Medicare Secondary Payer rules has always been a sticking point with many self-funded health plans. "It is clear that the MSPA outlines coordination of benefits with Medicare for plan members entitled to dual plan/Medicare coverage for any reason," stated Ryan. "For some time, dialysis companies have promoted an idea that Congress intended the MSPA to restrict group health plans from setting reimbursement rates for dialysis services at anything other than an unspecified 'most favored nation' rate, which simply drives up costs unnecessarily."

So, what is the bottom line for the Murietta v. DaVita decision for self-funded health plans? Marilyn Monahan stated: "Here is the bottom line: As a result of the *DaVita* case, self-funded health plans now have more flexibility in how they set rates for dialysis reimbursement."

Ryan Work and SIIA were obviously very pleased with the outcome. "Under DaVita's interpretation of the MSPA, self-insured plans, which generally have great flexibility in determining healthcare coverage, would have to sacrifice coverage of other medical services to pay for dialysis services at a rate hundreds of times that of Medicare. These substantial cost increases would not benefit individuals with end-stage renal disease, who would continue to receive the same services. Nor would it save Medicare money. Rather, it would financially benefit dialysis providers."

Ryan continued: "With only two dialysis providers controlling nearly 90% of dialysis facilities, it is becoming increasingly necessary that self-insured health plans have the ability to appropriately control dialysis cost, which have risen exponentially against inflation," stated Ryan. "Put simply, plans adopting cost containment strategies such as network carve-outs and Medicare-rate based pricing, should not be in violation of the MSPA".

Conclusion

The summer is coming to end, but the stress of 2022 is not over. We're still dealing with inflation, high gas prices, high interest rates, increasing rent and mortgage costs, the overall cost of goods and services increasing, often beyond family budgets. Many people I know that were retired have gone back to work, at least part-time, just to

survive. As we tighten our purse strings or wallets and re-examine our spending and savings habits, we should pay close attention to what's happening around us; both in the news and in our communities. We may discover that by paying closer attention to details, we may yet find at least a glimmering light at the end of the tunnel.

With the Dobbs v. Jackson case still hovering over us, we have a lot of unanswered questions, and only time and many court and other decisions will determine the fate of many unanswered questions. Employers should not be rushing to make any quick decisions on health plan changes regarding abortion coverage just yet. Take some time, breathe, and have some conversations with trusted brokers, consultants and attorneys, and see what the states and the Biden Administration bring to the table in the next few months.

The DaVita case, however, should be a relief to many in the self-insured industry, and plan sponsors should be in a much better mood after this decision. On a personal note, and on behalf of my own self-insured clients, I am relieved that at least some of the high pricing of dialysis centers who have historically overcharged health plans have been curtailed from at least some of these practices.

As for self-funded health plans and other ERISA plans, you may be able to take a look at your plan benefits to see what cost containment provisions you can add for high-cost benefits, and seek the advice of reputable consultants and experts like Advanced Benefit Consulting!

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Disclaimer: This article is not intended to provide legal advice of any kind. We always recommend that you seek the advice of legal counsel before finalizing plan decisions.

Author's Note: I'd like to thank Marilyn Monahan, Jeff Strong and Ryan Work for their assistance with this article. They can be reached at marilyn@monahanlawoffice.com, jeff.strong@sterlingadministration.com and rwork@siia.org. I can be reached at (714) 693-9754 x 3, or by email at dmcociu@advancedbenefitconsulting.com.

Sources: Dobbs v. Jackson Women's Health Ruling; Kaiser Family Foundation resources sited in this article; Roe v Wade Overturned By Allen Smith, JD, June 24, 2022, SHRM Resources and Tools; NAHU Compliance Corner Webinar, The Impact of Dobbs v. Jackson Women's Health Organization, Jennifer Berman, MZQ Consulting and Jesse Hansen, One-Digital, Senior Benefits Attorney, August 16, 2022; Podcast Interview with Marilyn Monahan, Monahan Law Office, Benefits Executive Roundtable, Season 4, Episodes 1 and 2; Wikipedia; SIIA Regulatory Update, June 22, 2022, SIIA Legal Alert – Supreme Court Dialysis Decision; SIIA Legal Defense Update, November 6, 2022; Supreme Court Decision, June 21, 2022.