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Larger Issues Possibly at Stake in High Court Medicare Case

Among its first certiorari grants of the October 2018 term, the Supreme Court agreed to reassess the D.C. Circuit's decision in *Allina Health Servs. v. Price,* 863 F.3d 937 (D.C. Cir. 2017).

This case is of fundamental importance to every hospital or care provider that participates in Medicare. However, it also has the potential – and the risk – to become ensnared in much deeper issues about the foundations of administrative law.

Medicare involves a complex set of interlocking reimbursement formulae, administered by the Department of Health and Human Services ("HHS") through the Centers for Medicare and Medicaid Services and, then, through a network of contractors that actually review and decide reimbursement claims. HHS is constantly adjusting the reimbursement rules, in part as the agency's policy preferences change over time, and in part because the Medicare Act calls for annual recalculation of various figures used in reimbursement formulae. These tweaks – especially where they appear unexpectedly – are one of the difficulties of dealing with Medicare.

In *Allina,* a hospital challenged one of these tweaks. HHS decided to reinterpret the Medicare Act to include Part C enrollees as "entitled to benefits under Part A" even though Part C enrollment forecloses traditional Part A payments. The consequence, followed through the arcana of Medicare formulae, was that hospitals would receive many hundreds of millions of dollars less of one type of supplemental payment called the "disproportionate share hospital adjustment." The D.C. Circuit rejected HHS's changed treatment of Part C enrollees because the agency had not done a proper notice-and-comment process for the interpretation.

What attracted the Supreme Court's attention was the D.C. Circuit's handling of one defense the government offered. Under the Administrative Procedure Act ("APA"), an agency may dispense with notice and comment for "interpretive" rules. HHS argued that all it had done was interpret the statutory phrase "entitled to benefits," so it qualified for that exception. The D.C. Circuit – in an opinion written by then-Judge Kavanaugh and joined fully by Judges Henderson and Millett – said that the Medicare Act does not have a comparable exception. The Medicare Act requires notice and comment for any rule that "establishes or change a substantive legal standard" governing, among other things, payment for services. HHS's decision about how to treat Part C days established a "substantive legal standard," the court said, because it regulated how much reimbursement hospitals get.

Health-care providers' frustration with changes like the Part C/Part A interpretation is certainly understandable. Technical minutiae like this – a question whether beneficiaries count as "entitled to benefits under Part A" if they could have chosen Part A but chose Part C instead – can disrupt a hospital's budget by millions of dollars. Additionally, under the APA exception, HHS conceivably could make and unmake those interpretive decisions with no advance warning. There are good reasons to offer the type of protection that the D.C. Circuit acknowledged in this case.

However, there is also a straightforward analysis, under traditional theories of administrative law, which could conceivably lead to the opposite conclusion. The Supreme Court has repeatedly said – as recently as 2015 – that "interpretive rules do not have the force and effect of law." *Perez v. Mortgage Bankers Ass'n,* 135 S. Ct. 1199, 1208 (2015). The notion is that "interpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule." *Hemp Indus. Ass'n v. DEA,* 333 F.3d 1082, 1087 (9th Cir. 2003). On this theory, an interpretive rule would never establish or change a "substantive legal standard," because, by their nature, interpretive rules can only interpret existing substantive legal standards. Conversely, if a rule is changing a substantive standard, it isn't an interpretive rule. Accordingly, the Court observed in 1979 that "[t]he central distinction among agency regulations . . . is that between 'substantive rules' " – the same word that the Medicare Act uses – and "interpretive rules." *Chrysler Corp. v. Brown,* 441 U.S. 281, 301 (1979).

Why doesn't this principle mean the Court will simply reverse the *Allina* decision? There are two complicating factors. First, the Medicare Act does establish a rulemaking requirement, and it is not clear that Congress intended the Medicare Act to incorporate the same substantive/interpretive distinction for rulemaking processes that is already in the APA. There would have been sound reasons to expand the scope of notice-and-comment processes for Medicare, because interpretive decisions that might seem small on their own cascade into hugely impactful reimbursement rules.

Second, the principle that interpretive rules do not have the force and effect of law is, these days, open to question. As it is well known, many commenters, and several Justices, have criticized the strength and reach of the *Chevron* doctrine, under which a court must defer to certain interpretive choices that agencies make. The effect of *Chevron* is that a court can be obligated to accept, and work with, an interpretation that it considers inferior. Even if a court has interpreted the relevant text in a previous case, the court may be bound to respect an agency's later, different interpretation. In this state of affairs, it seems a bit disingenuous to insist that an interpretive rule lacks the force and effect of law. Justice Scalia, joined by Justices Thomas and Alito, made this point explicitly in *Perez:* "By deferring to interpretive rules, we have allowed agencies to make binding rules unhampered by notice-and-comment procedures." 135 S. Ct. 1199, 1212 (Scalia, J., concurring in the judgment).

Often, discussions of whether interpretive rules have the force of law are somewhat theoretical. The *Allina* case could give this question real-world significance, to the tune of many hundreds of millions or billions of dollars. The case could impose an interesting choice on any Justice who is thinking about the merits of *Chevron* deference. One possible view is that interpretive rules never have their own legal force. That position would be consistent with revising the *Chevron* doctrine, as some would like, to give courts more autonomy in the face of agency interpretations. It would also mean *Allina* was incorrect on this point. A second option, and apparently the path of the Perez concurrence, could accept that *Chevron* deference persists, and hold that any interpretation that merits *Chevron* deference is also a "substantive legal standard." For jurists that have expressed serious concern about *Chevron* – such as most of the conservative majority on the Court – this approach is likely to be uncomfortable. A final option would be that in the particular context of Medicare, some interpretive rules can be substantive, because of the effect they have on program policies like reimbursement rates. Whether that position is an attractive intermediate would likely depend on exactly how an opinion expressed it.

In short, the *Allina* case wakens the ghosts of administrative law. Every Justice has complicated ideas about the underlying principles; discussions and coalition building at the Court could lead to important restatements in administrative law or to a narrow decision about Medicare reimbursements. Even more than usual with Supreme Court cases, how this case turns out is hard to predict.

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