

Healthcare Regulation in a Post-Chevron World

4sight Health Roundup Podcast
July 11, 2024

David Burda:

Welcome to the 4sight Health Roundup podcast, 4sight Health Podcast series for healthcare revolutionaries, outcomes matter customers, count and value rules. Hello again, everyone. This is Dave Berta, news editor at 4sight Health. It is Thursday, July 11th. It's seven 11. Now, seven 11 means a lot of different things to a lot of different people. If you play craps and you're on the pass line, rolling a seven or an 11 on the come out roll is very good news. If you like Slurpees, you can get one free at your local seven 11. Small Slurpees only, please. And if you wanna know what the recent Supreme Court decision in a case called Relentless versus the US Commerce Department means for healthcare, you're listening to the right podcast because that's what we're gonna talk about on today's show with Dave Johnson, founder and CEO 4sight Health, and Julie Murchinson partner at Transformation Capital. Hi Dave, Hi, Julie. How you two doing this morning, Dave?

David W. Johnson:

Well, summertime in the living is easy. Doing fine, Dave. Given our topic today Chevron, I, I just wanted to share a fun fact with our audience. I took one law school course in graduate school. It happened to be administrative law with future Supreme Court, justice Steven Breyer. And after learning how to diagram law cases, which was sort of cool I was completely bored, except when Breyer was talking economics, that's when I'd lift my head up off the desk. And he's, he was a fantastic economist, in addition to being a superior jurist. But that, that set the course of my life right, which is economics, really interesting. And in law, not so much, at least until today.

Burda:

Yeah, yeah. Fork in the road. And I think you took the, the right turn. Julie, how are you?

Julie Murchinson:

We're, well, other than some crazy heat in the Pacific Northwest, which is nothing compared to what you all get in Chicagoland Summer's been treating the merchants in impact.

Burda:

Good, good to hear. Now, before we talk about the serious implications of the Supreme Court's decision, let's talk about a less serious topic. Slurpees, they're basically those polar bear icees that you

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can get at the movie theaters but in a lot more flavors. Dave, have you ever had a Slurpee? And if so, did you wait till seven 11 to get a free one? I know you do like things like may the fourth be with you. So I'm, I'm compelled to ask,

Johnson:

You know, when seven 11 was sponsoring the White Sox, also known as the worst team in baseball, <laugh> they moved the start, start time to all the White Sox game, home games to seven 11. What I remember of Slurpees in seven 11 is something called Brain Freeze. Oh, yeah. I don't know if you've ever had that, but I would take a slug of one of those things, and your brain actually hurts. And so I haven't subjected myself to that in decades, but that is my enduring memory of Slurpees

Burda:

<Laugh>. That's great. Thanks, Steve. Julie, have you ever had one? And if so, what's your favorite flavor?

Murchinson:

Well, I can remember as a child with my very health nut mom begging her for a Slurpee at seven 11. So it happened in my life, but now, today, [00:23:30] I've become my mother under no circumstances, <laugh>, would I let the contents of a Slurpee anywhere near my body? End of story, <laugh>.

Burda:

Oh, that's great. I honestly have never had one. Obviously it's one of the few things never had. At one point we had three kids in a minivan, and the thought of them bouncing in a car seat and holding a slurpee was just too much for me to bear. It would be sticky forever. So I had to set a good example. But did the US Supreme Court set a good example in the relentless case and there's your transition? It was a long way around the block. In the case. The owners of two fishing vessels challenged the commerce department's interpretation of a federal law passed by Congress to prevent overfishing. The Supreme Court on June 28th in a six three decision sided with the fishermen. In doing so, the court overturned its own 1984 decision in a case called Chevron versus National Resources Defense counsel. That ruling, which came to be known as the Chevron doctrine, said courts must defer to federal agencies and federal

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agency experts when their regulations implementing a law passed by Congress are unclear. In the relentless case, the high court changed its mind and said courts shouldn't defer to agencies and agency experts. Instead, courts can use their own independent judgment to interpret federal regulations implementing a law passed by Congress. Given the fact that healthcare is one of the most, if not the most regulated industry in the US, shifting the power to interpret regulations, implementing federal law to the courts from the agencies could have a major impact on health policy and innovation. Dave, let me ask you about the policy implications. What do you see happening in the short term? What do you see happening in the long term? And is what you see good or bad for healthcare consumers?

Johnson:

Hmm. public policy and the regulations that accompany it, essentially define government's role within American society given that reality. It's not surprising. And the, the relentless ruling brought this, this out in with crystal clear clarity that there is a gaping difference of opinion on the subject of government's role in society. Writing for the minority, Justice Kagan, in her 33 page dissent, basically called bullshit on the majority's line of reasoning, saying that they were throwing away 40 years of precedent for adjudicating questions of administrative law. She brought this home with a remarkable quote. Here it is: "...in one fell swoop, the majority today gives itself exclusive power over every open issue. No matter how expertise driven or policy laden involving the meaning of regulatory law, as if it did not have enough on its plate, the majority turns itself into the country's administrative czar." You could argue the administrative capture of the regulatory, legal, and regulatory process is so overwhelming that basically special interests were writing that law. And when you take it back into healthcare and the massive healthcare industrial complex it's not hard to be sympathetic to align a reasoning that says given all the complexities we've basically handed the keys of our system over to special interests. And in that regard, it's not surprising that there was amicus brief filed by 19 associations, including the American Heart Association, the American Cancer Association, the American Leukemia Association arguing against the majority's ruling in, in favor of keeping the status quo intact. And in a way that's not surprising, because the incumbents have figured out how to work within the status quo to their own benefit. And we can argue about who benefits and doesn't benefit from that. You know, the big challenge is how to get the Goldilocks balance on regulation. Exactly right. Not too hot, not too cold regulation that's not too loose and not too tight. We need this Goldilocks balance. So Mark markets function efficiently and fairly while protecting consumers. The courts are gonna have the power to decide all this in terms of impact, short term more lawsuits <laugh>, you know, if you don't like how an agency's interpreting something, you know, sue for it. So I think we're gonna see more lawsuits, and that probably means, as Justice Kagan suggested, the courts are gonna get more clogged not less clogged. It potentially means a resource shift away from drafting and defending regulations toward enforcement to the extent the agencies can based on actual language and statutes. Longer term, Dave, to your question. more laissez-faire capitalism with all that implies more growth, less regulation more inequality, less

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protection. So that gets to your consumer question, and that's gonna continue, I believe, until we have a broader societal consensus on the proper role of government in American society.

Burda:

Really interesting conflicts. Thanks Dave. Julie, any questions for Dave?

Murchinson:

So Dave, the patchwork of 50 state interpretations of healthcare regulations now is quite realistic. Where are we headed? When you think about the fact that, well, we used to say healthcare is local. We now have major, you know, mass region or national businesses operating healthcare. We have people living in different states than which they were traveling in the whole thing that we're, we need a, a healthcare system that can operate across state lines. Will this patchwork start to really unravel? Is there some reason why healthcare or maybe even some other industries should be subject to a different level of agency activity than, you know, what, what this says?

Johnson:

Wow. you know, I, I started off my response by saying that that public policy and the regulations that accompany it, essentially defined government's role within American society. And of course, because the United States has a federal model, that means we have 50 state laboratories that have their own version of, of this conflict going on to get the right balance between regulation and, and market function and consumer protection. And the right answer to your question is probably yes. It would be nice to be able to go from state to state as we get these bigger and bigger companies and have kind uniform ways of conducting business I think we're gonna go the opposite direction. But that doesn't prevent states from undertaking the type of reform you're talking about. We just need a, a handful of brave governors to step up and say, you know what? We're gonna be the state that invites healthcare workers from all over the country to practice at the top of their license. We're gonna throw out a lot of again, another technical term, crappy regulation that really is a form of medical protectionism in order to allow much more effective and efficient market function and to deliver more value to consumers. And I think that's likely <laugh> as we get into this kind of world where some states go one way and other states go another way, and some are more independent of the industrial complex, and some are more dependent on it. And so I think that's how this will unfold.

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Burda:

Centralization versus decentralization, right? That's a classic [00:40:00] battle. Yeah. Thanks Dave. Julie, let me ask you about the implications of the ruling for healthcare market innovation. What do you see happening in the short term? What do you see happening in the long term? And what is the good and bad for consumers in what you see?

Murchinson:

Well, you know, short term, I don't think this will be felt overnight. The expected opportunistic litigation to both existing and new regulations, or even other agency decisions, which is scary. I think we'll create a lot of confusion and be kind of overhyped in the headlines. But I suspect business as usual for, you know, most of the innovators you know, just making their way along the way until many of these cases start to come to fruition in the courts. I was struck though by a quote I read from an attorney in McDermott that said, anything controversial, any administration does, is now more likely than it's ever before to be litigated, and litigants are more likely to prevail than they ever were before. So when you really think about that, like we are headed into one of the best times to be a lawyer in the United States of America, <laugh>, like it's really disturbing. So short term confusion, business as usual, we'll see how it pans out. But I think long term you know, with less certainty regarding where compliance will stand and more opportunity to challenge agency policies, the fact that agencies will take more time, be slower or more methodical as, as many have said in the rulemaking, which, you know, Dave, to your point, I, it could be a very good thing in many ways to try to craft regulation that stands to all the scrutiny. It's, it's gonna change the way innovators look at what can be done or what they're designing for. And it's really meaningful in healthcare agencies like HHS won't be able to create the kinds of programs or impose new requirements that aren't like really clearly authorized in legislation. So, I mean, look, for example, the Inflation Reduction Act was born outta the Chevron deference. I mean, most of what we've seen from CMS and our government batch programs has been developed during the time of, you know, Chevron deference. And a tremendous amount of innovation has been targeted at these areas. And may Medicaid, you know, it'll be a confusing time to try to understand what the implications are for current solutions on the market that are aimed at current programs. So it's a double-edged sword to be sure. And a lot of healthcare innovation is really closely tied to simplifying, automating, integrating around regulations. So reduced compliance requirements could really significantly decrease the need or the value for some of these solutions. So definitely pros and cons. One pro I thought that's kind of interesting is, you know, Congress will have greater responsibility for drafting technical and really precise language with far less expertise in agencies. So while one would hope that Congress and agencies could work together, you know, I bet this is a massive opportunity for the private sector to really bolster its lobbies to weigh in on exactly what should happen. And it could be a faster path to innovation in some ways. Again, pros and cons to that, but the market would love that. On the con side, many expect the interpretation of federal litigations to create a patchwork, as I said before, to Dave.

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And this presents obvious challenges for healthcare companies that are trying to develop cross jurisdiction, cross state, you know, 50 state solutions. It would be more expensive for them to operate. That would be bad for consumers in the end. And, you know, while I think uncertainty and opportunity do create a path for the market it will drive up a lot of legal expense and just other expense for the market as well.

Burda:

Kids, go into healthcare law, right?

Murchinson:

That's right.

Burda:

<Laugh>. Thanks Julie. Dave, any questions for Julie?

Johnson:

I'm wondering and wanna get your take on whether market forces or the impact of market forces could actually accelerate industry transformation in the wake of the relentless ruling. Markets generally evolve to advance value creation while the healthcare status quo undoubtedly will pursue legal challenges, as you said, the greatest time ever to be a lawyer to maintain their prerogatives. Will those efforts largely fail as innovative business models relentlessly? See what I did there attack inefficiency in their pursuit of solving real consumers health and healthcare jobs to be done. Could this class really be half full?

Murchinson:

I certainly think that some of the current solutions are at risk because of confusion that could be created and things that could be unraveled and unwrapped. But the reality is, we're, we're at the phase now in digital innovation where we're getting beyond the how do you automate compliance and all the things around that, and into how do you really shift what, where care should be and how to create health and how to treat care providers, and how to, what the experience for consumers should be. And very little of that is truly regulated, even though we are a highly regulated industry. I agree with you. I I should be

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much more excited for this. I just, I see the, I see the, you know, lawyering on the wall and it's concerning.

Burda:

Yeah. Short term is gonna be very, very messy. Thanks, Julie. All I know is what I know. And I know one judge and he's a very smart guy. But I wouldn't trust him to regulate commercial fishing, and I would trust him even less to regulate healthcare. So I, I don't, and I don't trust this supreme Court to make any decision that's good for consumers or the public. Now let's talk about other big news that happened this past week. It wasn't all bad, was it, Julie? What else happened that we should know about?

Murchinson:

This might have been last week, but I think you probably saw that Cedar-Sinai tapped Peter Slavin from MGH to come and fill Tom Prizlak's shoes. And again, Tom Prizlak's been there for 45 years. <Laugh>, my God. I mean, that's amazing. There's no one graduating from college today who thinks they're gonna have a job, well, not a job, but be at one place for 45 years. But congratulations to Tom on well deserved, you know, next phase of his life. And congrats to Peter. Cedars is lucky to have him.

Burda:

That's great. Dave, what other news is worth mentioning?

Johnson:

Well, this one is bad news, Dave. Okay. I'm sure you both saw the Wall Street Journal analysis of how the big insurers, commercial insurers are manipulating RAF scores to get more money in the door and actually provide us care. Mm-Hmm. <affirmative>. Mm-Hmm. <affirmative>. And you know, we've known this game has been played for a long time. Speaking of government regulation the governments cut payment to Medicare Advantage to try and you know, create more economic balance. And that's, that's roiled market a bit. But the journal article actually names, names and you know, talks about 50 billion of government payment for services never rendered, and gives some just terrific examples of workers going in and, and pumping up risk adjustment factors, RAF scores to, to lock in higher payments for the commercial insurers. And, you know, again, another example of activity that is technically legal, but morally wrong. And we seem to have a society, speaking of all the litigation, Julie, you were mentioning, that operates more on what we can get away with than on doing, you know, what's right. So not happy that this exists. Happy that the journal is shedding some light on the level of dysfunction in Medicare Advantage payment. And hopefully the marketplace can, can adapt.

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Burda:

Yeah. Came in the system, right? Yeah, we see it all the time. Thanks Dave. And thanks, Julie. That is all the time we have for today. If you'd like to learn more about the topics we discussed on today's show, please visit our website at 4sighthealth.com. You also can subscribe to the roundup on Spotify, apple Podcast, YouTube, or wherever you listen to your favorite podcasts. Don't miss another segment of the best 20 minutes in healthcare. Thanks for listening. I'm Dave Burda for 4sight Health.