UPDATE: Biden White House Drops Appeal in Co-Pay Assistance Case

The government withdrew its appeal, which means health insurers must count co-pay assistance toward deductibles for most prescription drugs.

January 22, 2024 By Trent Straube

UPDATE January 22, 2024: The Justice Department moved to withdrawal its appeal in a case in which a U.S District Court ruled that health insurers must count co-pays when tabulating a patient's deductibles and out-of-pocket costs. The ruling was considered a big win for patient advocacy groups representing people with HIV, hepatitis and diabetes.

"We are pleased that the government has withdrawn its appeal of our court victory for patients who struggle to afford their prescription drugs and rely on copay assistance," said Carl Schmid, executive director of the HIV+Hepatitis Policy Institute, one of the plaintiffs in the lawsuit, in a press release. "Now, insurers must heed the court ruling by ending their cruel policy of collecting co-pay assistance and not applying it to patients' cost-sharing obligations."

Below is our original December 19, 2023, reporting on the court ruling and appeal:

Advocacy groups for people with HIV, hepatitis and diabetes thought they scored a big win this fall when a U.S. District Court ruled that health insurers must count co-pays when tabulating a patient's deductibles and out-of-pocket costs. But last month, the Biden administration took "an extraordinary position," in the words of the patient advocacy groups, and said it would not enforce the court's ruling and filed an appeal.

In a countermove, the patient advocacy groups filed a brief December 11 urging the court to enforce its ruling despite the Biden administration's stance. What's more, the groups—HIV+Hepatitis Policy Institute, Diabetes Leadership Council and Diabetes Patient Advocacy Coalition, plus three patients affected by the ruling—filed their own appeal o the U.S. Court of Appeals for the D.C. Circuit.

"We continue to be astonished by the government's continued siding with big insurers and the length they are going to allow them to make money off of co-pay assistance that is meant for patients to help pay for their essential prescription drugs," said Carl Schmid, executive director of

the HIV+Hepatitis Policy Institute, in a press release. “First, they defended insurers in court to allow them to implement co-pay accumulators, and now, even after losing, they are refusing to enforce the court’s decision.”

“While we remain baffled by the Biden administration’s actions in this case, we look forward to a quick positive ruling from the court and the relief it will provide to patients in affording their prescription drugs,” added George Huntley, CEO of the Diabetes Leadership Council and the Diabetes Patient Advocacy Coalition. “We and the entire patient community urge the Biden administration to ensure copay assistance counts for patients.”

In an October 3 article on the judge’s initial ruling, POZ noted that the outcome was a win for people who need expensive prescription drugs, notably those with HIV, hepatitis, cancer, arthritis, diabetes and multiple sclerosis. It was also a win for the advocacy groups, which represent over 42 million people. POZ wrote in part:

> A district judge struck down a federal rule implemented under the Trump administration that allowed health insurers to ignore co-pay assistance when tabulating a patient’s out-of-pocket costs….
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> Under the Trump administration’s 2020 rule from the Centers for Medicare & Medicaid Services, when health insurers add up the costs that patients have paid, they don’t have to include co-pay assistance as part of patients’ deductible and out-of-pocket expenses. This co-pay accumulator policy allowed “the insurer to divert the benefit of the assistance away from the patient to the plan then make the patient pay that amount again before meeting their deductible and other out-of-pocket cost obligations,” explained the three advocacy groups when they filed the lawsuit in 2022….
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> Health insurers and the government had argued that the co-pay assistance ultimately reduced the patient’s cost of a drug. The plaintiffs argued that high deductibles and cost-sharing often resulted in prices as high as 50% of the list price of the drug, forcing patients to depend on the assistance.”
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> In related health insurance news, another legal case is working its way through the courts and could affect patient costs. Earlier this year, in Braidwood v. Becerra, a Texas judge ruled that insurers do not have to cover certain preventive services, including some cancer and diabetes screenings, HIV tests and pre-exposure prophylaxis (PrEP) to prevent HIV.
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> In May, a U.S. Court of Appeals temporarily paused the judge’s ruling. For details, see “UPDATE: Court Pauses Judge’s Ruling to End Health Coverage of Some Preventive Services.” And for more insight, see “Judge’s Decision Would Make Some No-Cost Cancer Screenings a Thing of the Past” by Kaiser Health News.

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