

With All Due Deference

On July 1, 2008, B&H Medical, LLC contracted with the Health & Human Services (HHS) Centers for Medicare & Medicaid Services to provide diabetic supplies in nine different metropolitan areas. On July 15, 2008, Congress passed legislation terminating all contracts, including B&H's contract. HHS then promulgated a regulation in which it established an administrative process through which it would pay specified damages to terminated suppliers. In that regulation, HHS interpreted the judicial review provision in the implementing statute to mean that the agency's determination on damages would be final and not subject to judicial review.

B&H submitted a damages claim through the administrative process but the agency ultimately offered only partial payment of the claim, which B&H rejected as inadequate. B&H then filed suit in the U.S. Court of Federal Claims alleging a breach of contract. B&H claimed that HHS breached the agreement by terminating the supply contract and failing to pay for certain sales that B&H made to Medicare recipients.

The Government moved to dismiss under 12(b) (1) and (6). The Government argued first that the CFC lacked jurisdiction because the agency had interpreted the implementing legislation to mean that agency damages determinations would not be subject to judicial review. The Government argued that this interpretation was entitled to Chevron deference.

The trial court, however, disagreed, explaining that the agency "has no authority to limit this court's jurisdiction through its rule making powers. A federal court owes no deference to an agency's interpretation of the court's subject matter jurisdiction." The Court also rejected the Government's argument that it should defer to the agency's interpretation of its regulation (Auer deference). The Court explained that once again deference was not appropriate because the current interpretation appeared to be nothing more than a litigating position: "HHS's effort to advance its litigating position through its chosen regulatory interpretation, and the lack of clear notice regarding the agency's position prior to the filing of its current motion, also suggests that the offered interpretation may be more reflective of a favorable litigating position than a fair and considered judgment."

The Government did prevail on its motion to dismiss Count II of the complaint, which sought a Medicare reimbursement. The Court held that it lacked jurisdiction over these claims because of Federal Circuit decisions clearly holding that the CFC has no Tucker Act jurisdiction over a reimbursement dispute under the Medicare Act.

Read the full decision [here](#).