

Justices Say Feds Liable For Tribes' Healthcare Admin Costs

By **Crystal Owens**

Law360 (June 6, 2024, 10:30 AM EDT) -- A split U.S. Supreme Court on Thursday held that the federal government is required to reimburse two Native American tribes millions of dollars in administrative healthcare costs, saying the spending is necessary for the communities to operate programs assumed from the Indian Health Service.



The U.S. Supreme Court on Thursday said two Native American tribes are entitled to millions in back administrative costs tied to years of tribal-run health services. (AP Photo/Mariam Zuhaib)

In a 5-4 **opinion**, the justices determined that the San Carlos Apache and Northern Arapaho tribes are entitled to millions in back administrative costs tied to years of tribal-run services, such as emergency care, substance misuse treatment, mental health offerings and teen wellness programs.

"Because a self-determination contract requires a tribe to spend program income to further the programs transferred to it in the contract, these provisions require IHS to pay contract support costs when a tribe does so," Chief Justice John Roberts wrote for the majority.

The ruling is expected to have broad implications for Native American tribes, many of them with similar challenges with the federal government that have been on pause awaiting the high court's decision.

"The Supreme Court's decision will ensure that when tribes enter into self-determination agreements that

allow them to take the lead in providing tribal healthcare, they are fully reimbursed for overhead costs, freeing up resources for healthcare in chronically underserved communities," Adam Unikowsky, counsel for the Northern Arapaho, told Law360 in a statement on Thursday.

Before the justices was the question of whether, under the Indian Self-Determination and Education Assistance Act, or ISDEAA, a tribe is entitled to recover contract support costs for expenses it incurs when spending third-party revenues to operate its healthcare program.

The high court **agreed** on Nov. 20 to take up the federal government's petitions following decisions in two disputes that together have spanned more than a decade of litigation involving healthcare reimbursements to Native American tribes and, it argued, could potentially cost \$2 billion a year to support.

In November 2022, the Ninth Circuit **ordered** the IHS in *Becerra v. San Carlos Apache Tribe* to refund administrative costs tied to three years of tribal-run services. Federal officials must cover that spending, the court said, even though the Arizona tribe financed its health services with insurance revenue instead of government funding.

The Tenth Circuit, in a March 2023 ruling, **directed** the IHS to reimburse Wyoming's Northern Arapaho Tribe more than \$1.5 million in administrative costs that it incurred as it administered healthcare services for its citizens.

Equal Footing

The secretarial amount — the funding allotted to IHS each year for the healthcare programs — and program income the contracting tribes do receive do not place them on equal footing with the IHS, Justice Roberts said in the opinion, because the tribes must incur certain overhead and administrative expenses that the federal agency does not when it runs the healthcare programs.

To remedy the funding shortfall, he said, Congress amended the ISDEAA to require the IHS to pay the tribes contract support costs to cover such "reasonable costs for activities which must be carried on by a [tribe] as a contractor to ensure compliance with the terms of the [self-determination] contract."

Provisions of the ISDEAA peg contract support costs to the requirements of a self-determination contract, Justice Roberts wrote, and therefore if a tribe must collect and spend program income to ensure compliance with its agreement with the IHS, then the reasonable administrative and overhead costs it incurs in doing so are reimbursable.

"Chief Justice Roberts' opinion for the court is a ringing reaffirmation of the fundamental principle of tribal self-determination," Lloyd B. Miller, counsel for the San Carlos Apache Tribe, told Law360 on Thursday. "The court saw clearly that the government's position was penalizing tribes who have the courage and foresight to take on the operation of federal healthcare programs for their own people."

Tribal nations throughout the country now have six years to file back claims to recover full reimbursement of their overhead costs, Miller said.

"Moving forward, Congress will need to consider reclassifying contract support cost payments as a mandatory obligation so that tribes are fully reimbursed," he added.

Federal government attorneys told the U.S. Supreme Court **during March 25 arguments** that IHS might be forced to cut its budget by 40% if the tribes prevailed in their bids to uphold the appellate court rulings.

The agency's current total funding is about \$8 billion a year, with \$1 billion going to pay contract support costs that have discretionary funding caps, Caroline A. Flynn, attorney for the Department of Justice, told the justices.

"It stands to reason that if all the contract support costs just explode, Congress is going to have to find the cuts elsewhere to keep the budget under the discretionary spending caps. And we believe that there's a real danger that that funding is going to come from the other 40% of IHS' budget, which is providing direct services to tribes that decide not to enter into these contracts," Flynn said.

Attorneys for the tribes, however, questioned the federal government's overall estimate that it would take

up to an additional \$2 billion annually to support their programs, saying there was no context to back up that claim.

Greater Flexibility?

According to Thursday's opinion, the federal government argued that the tribes should not get contract support costs for spending program income because it would give them the flexibility to use the money on a broader range of activities than the IHS can provide, including services to non-Indians.

However, that argument didn't withstand the overall majority's scrutiny.

The difference between the IHS' and a tribe's ability to offer healthcare services to non-Indians is irrelevant because both must first make the same determination of whether doing so will result in a denial or diminution of services to eligible Indians, Justice Roberts said.

Although the IHS must first use Medicare and Medicaid proceeds to ensure compliance with the programs, a tribe must also use that funding to ensure an ISDEAA agreement's provisions, the opinion said.

And although tribes may have a greater ability to expand their operations because, unlike the IHS, they're not prohibited from using Medicare and Medicaid proceeds to construct new facilities, the federal agency would not have to pay contract support costs for a tribe's new programs, the high court said.

"Contract support costs are necessary to prevent a funding gap between tribes and IHS," Justice Roberts wrote.

"If IHS does not cover costs to support a tribe's expenditure of program income, the tribe would have to divert some program income to pay such costs, or it would have to pay them out of its own pocket," the opinion said. "Either way, the tribe would face a systemic funding shortfall relative to IHS — a penalty for pursuing self-determination."

Native Americans spend about one-third less than the average American on healthcare, Justice Sonia Sotomayor said during arguments. Non-Indian medical facilities are reimbursed by patients' Medicare or Medicaid coverage, she said, and tribes are no exception.

"There's always a third-party contract — contract supports that are reimbursed by the government. Why is this any different? They're not providing the service because of Medicaid or Medicare. They're providing the service because of their agreement with the government," Justice Sotomayor said.

During arguments, Justice Neil Gorsuch seemed to take issue with the idea that tribal healthcare reimbursement money would be spent on areas outside their ISDEAA obligations.

"There's not so much money here that the tribes are spending this on frolics or detours, right?" Justice Gorsuch said. "There's not even enough money to provide healthcare to the Indians on the reservations, and you're operating out of decrepit old buildings in many cases and that's what we're really talking about."

"Nor are Indian healthcare services providing benefits to non-Indians all across America. We're talking about a reservation in central Wyoming with an incredibly poor population of Native Americans," he added.

No Free Money

Justice Brett Kavanaugh, in writing the dissent for the minority, argued that for the past 30 years, the executive branch has interpreted a separate law — the Indian Health Care Improvement Act — as requiring tribes to pay overhead costs out of the third-party income collected from Medicare, Medicaid and private insurers.

"But today, the court upends that long-settled understanding and requires the federal government to furnish additional funding to the tribes for the costs of spending the third-party income," Justice Kavanaugh wrote.

He was joined in his dissent by Justices Clarence Thomas, Samuel Alito and Amy Coney Barrett.

"Consider a tribe that assumes control of a healthcare program and receives federal funding pursuant to the Self-Determination Act. For its services to patients, the tribe also collects an additional \$1 million from Medicare and Medicaid pursuant to the Improvement Act. In order to spend that \$1 million on healthcare, the tribe must incur some amount of overhead costs — let's say \$100,000. Who pays that \$100,000? Must the federal government pay it by giving the tribe another \$100,000 in federal funding? Or does the tribe pay the \$100,000 out of the \$1 million in third-party income that it collected?" Justice Kavanaugh argued.

The relevant statutory provisions of the ISDEAA don't support the high court's decision, he said, and the extra federal money that it greenlights "does not come free."

The federal government estimates that adopting the tribes' position could cost \$800 million to \$2 billion annually, and potentially many billions more in retroactive payments to the country's 574 federally recognized tribes, Justice Kavanaugh wrote.

As of now, Congress appropriates about \$8 billion annually for Indian healthcare, he said, and if it doesn't change overall appropriations for the program, the high court's decision will divert funding from poorer tribes to more affluent ones and, in turn, pull money from other vital federal programs or require additional taxation.

"In my view, the court should leave those difficult appropriations decisions and trade-offs to Congress and the president in the legislative process, and not now upset the settled legal understanding that has prevailed for the last 30 years," he said.

The federal government declined to comment on the opinion on Thursday.

The government is represented by Elizabeth B. Prelogar, Brian M. Boynton, Edwin S. Kneedler, Caroline A. Flynn, Daniel Tenny, John S. Koppel and Joshua Dos Santos of the U.S. Department of Justice.

The San Carlos Apache Tribe is represented by Carter G. Phillips, Virginia A. Seitz, Eric D. McArthur and Chelsea A. Priest of Sidley Austin LLP, and Lloyd B. Miller, Rebecca A. Patterson, Whitney A. Leonard and Chloe E. Cotton of Sonosky Chambers Sachse Endreson & Perry LLP.

The Northern Arapaho Tribe is represented by Geoffrey D. Strommer, Caroline P. Mayhew, Stephen D. Osborne and Elliott A. Milhollin of Hobbs Straus Dean & Walker LLP, and Adam G. Unikowsky, Keith M. Harper, Charles W. Galbraith, Leonard R. Powell, Arjun R. Ramamurti and Andrew C. DeGuglielmo of Jenner & Block LLP.

The cases are *Xavier Becerra et al. v. Northern Arapaho Tribe*, case number 23-253, and *Xavier Becerra et al. v. San Carlos Apache Tribe*, case number 23-250, both in the Supreme Court of the United States.

--Editing by Robert Rudinger.

Update: This article has been updated to include attorney comments and the dissenting opinion.