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March 02, 2012 Vol. X Issue 9

Supreme Court Decides Not To Resolve Medicaid Rates Cases. . . For Now

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In *Douglas v. Independent Living Center of Southern California*, No. 09-958 (U.S. Feb. 22, 2012), the U.S. Supreme Court declined to determine whether Medicaid beneficiaries and providers may sue in federal court to challenge the legality of state Medicaid rates. The Court had granted certiorari in this case and several related cases[1] to decide the issue of whether beneficiaries and providers may maintain a cause of action under the Supremacy Clause of the United States Constitution to enforce the Medicaid equal access provision, 42 U.S.C. § 1396a(a)(30)(A), against state Medicaid programs.[2]

Instead, in a 5-4 decision, the Court remanded the cases back to the Ninth Circuit. The Ninth Circuit was instructed to examine whether the Supremacy Clause affords such a cause of action in light of the fact that the Centers for Medicare and Medicaid Services (CMS) had given federal approval to most of the Medicaid plan amendments at issue after the Ninth Circuit's decisions and the Supreme Court's grant of certiorari.

In this article, we first provide a brief factual overview of the cases. Next, we examine the majority opinion. We then turn to a synopsis of the dissent. Finally, we discuss the potential ramifications of the Court's decision for states and for Medicaid providers and beneficiaries.

Background

Faced with a severe budget crisis, California enacted three statutes in 2008 and 2009 reducing or capping Medicaid rates to various providers of services. These measures eventually were distilled into a series of proposed Medicaid plan amendments submitted by California to CMS as required by federal law.

In the meantime, Medicaid providers and beneficiaries filed five lawsuits challenging these statutes. Eventually, the Ninth Circuit issued seven different decisions that either affirmed or directed preliminary injunctive relief precluding implementation of the contested legislation. In those decisions, the Ninth Circuit acknowledged that its case law precluded Medicaid beneficiaries and providers from having a private right of action to enforce the equal access provision.[3] Nonetheless, the Ninth Circuit ruled that the plaintiffs could bring such suits under the Supremacy Clause, claiming that the state's actions contravened the equal access provision and, as such, violated the Supremacy Clause, which makes federal law paramount over state law. The Ninth Circuit further held that California had not demonstrated compliance with the requirements of the equal access provision and, accordingly, its actions violated both that provision and the Supremacy Clause.

Ultimately, the Supreme Court granted certiorari to review these decisions and the issue of whether the Supremacy Clause afforded Medicaid beneficiaries and providers a basis for enforcing the equal access provision. Interestingly, the United States and CMS were not parties below but urged the Supreme Court *not* to grant certiorari. Once it did, however, the United States filed a brief arguing that the Supremacy Clause did not furnish such a right of action. Further, when the Ninth Circuit issued its decisions and when the Supreme Court decided to review them, CMS had not rendered final administrative determinations on the pending state plan amendments. In fact, CMS initially disapproved all of the plan amendments. But, California sought further administrative review and, about a month after oral argument in the Supreme Court, CMS approved some of the plan amendments and California withdrew several others.

The Majority Opinion

Justice Breyer authored the majority opinion in which Justices Kennedy, Ginsburg, Sotomayor, and Kagan joined. At the outset of the majority's legal analysis, Justice Breyer noted that all of the parties agreed that CMS' approval of the plan amendments did not make the cases moot. At the same time, although CMS' actions did not alter the question of whether California's statutes complied with federal law, they might change the answer.

In the majority's view, the plaintiffs might have to proceed by seeking review of CMS' actions under the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., instead of pursuing California officials under a Supremacy Clause claim. The majority cited several reasons why that might be the case:

- The APA would probably permit an authoritative judicial determination of the merits of the claims.
- The APA envisions judicial review of final agency actions.

- The APA allows aggrieved or adversely affected persons to obtain such review, and it directs reviewing courts to invalidate agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.
- The legal challenges at this juncture pose the type of questions normally encompassed by APA review, which affords some weight to the agency's decisions due to its expertise.

The majority reasoned that the Ninth Circuit's judgments should be vacated and the cases should be remanded to it to decide whether the cases could still proceed with a Supremacy Clause claim against state officials.[4] At the same time, the majority opinion offered several reasons that appeared to suggest that such a claim is no longer viable. First, the Medicaid Act empowers the federal agency to administer the Medicaid program. Second, the agency has expertise as to that program and its authorizing statute. Third, the agency's expertise appears relevant. Fourth, APA review would still allow for a definitive judicial determination. Finally, simultaneous Supremacy Clause actions and agency enforcement efforts could conceivably lead to inconsistency, confusion, and lack of uniformity.

The Dissent

Chief Justice Roberts wrote the dissenting opinion in which Justices Scalia, Thomas, and Alito joined. Significantly, the dissent made clear that these four members of the Court believe that the Supremacy Clause simply does *not* furnish a vehicle for Medicaid providers and beneficiaries to enforce the equal access provision, particularly since Congress did not—in the dissenters' view—afford them a private right of action to enforce that portion of the Medicaid statute.[5]

The dissent questioned what the remand is designed to accomplish, particularly since the majority appeared to offer a number of reasons why the Supremacy Clause probably cannot provide a cause of action once CMS issued the plan approvals. It also raised a series of doubts about what the subsequent course of the litigation would be. Would there still be a Supremacy Clause action, if one ever existed, against state officials? Would there be a federal APA claim against CMS? Or, would there be both? These questions are complicated by several other factors. For example, CMS is not currently a party in these cases. Moreover, the state officials who are defendants cannot be sued under a federal APA claim, which covers only actions of federal agencies. In light of this, it is uncertain how future injunctive relief, if any, would be tailored—and against whom—to restrain implementation of the challenged plan amendments.

Ramifications

All of the repercussions of this decision will not be known until the Ninth Circuit addresses the outstanding cases on remand and, perhaps more likely, until the Supreme Court again decides to review another case raising these types of issues.

On the whole, however, Medicaid providers and beneficiaries—and the associations and business groups that supported them as amici curiae—can breathe a sigh of relief that the Court did not bar such actions and, in fact, appeared to suggest that judicial review of them is available. Meanwhile, the states, many of which had supported California as amici curiae and feel strongly that there is no support in the law for judicial scrutiny, are undoubtedly disappointed that the Court did not so find, at least for now. Obviously, the states had high hopes when the Court undertook review that a majority would end court review and provide greater flexibility for them to operate their Medicaid programs "more efficiently" in tough budgetary climates.

Based on the decision, several things are clear:

1. There was not a majority willing to hold unequivocally that there was a Supremacy Clause cause of action prior to CMS action on the contested plan amendments;
2. There was also not a majority prepared to rule that there was not a Supremacy Clause cause of action before CMS acted on the plan amendments.

Many more things, though, remain uncertain:

1. Was there a Supremacy Clause cause of action initially? (This issue will not be resolved in this particular litigation given the contours of the remand directive.)
2. Is there a Supremacy Clause cause of action against state officials after CMS reviewed the plan amendments? (The majority hints, but does not hold, that there is not.)
3. Is there an APA cause of action against CMS after it completed its review and approved the plan amendments? (The majority suggests, but does not rule, that there is.)
4. If some form of judicial review is available to Medicaid providers and beneficiaries, what does it consist of? A Supremacy Clause cause of action against state officials before CMS plan amendment review? An APA claim against CMS after such review results in any approval? A simultaneous Supremacy Clause cause of action against state officials and an APA claim against CMS *before* agency review? Or, *after* federal agency action? Or, both?
5. What about claims pertaining to Medicaid requirements other than equal access—claims such as adequate public notice,[6] furnishing plan services with reasonable promptness,[7] and assuring services sufficient in amount, duration, and scope to meet their purposes when compared to Medicaid services provided to similarly situated individuals?[8]

6. If and when courts get to the merits of these claims, what types of obligation will they impose on the states in determining Medicaid rates and on CMS in reviewing proposed plan amendments?[9]

Some of these issues may be decided by the Ninth Circuit on remand. Others may have to await disposition of other pending cases in federal court in California that have already resulted in preliminary injunctive relief against state officials *and* the federal agency for various Medicaid actions.[10] Still others may be affected by CMS' currently pending proposed rulemaking on the equal access provision.[11] Although final rules have not yet been issued, they are likely to specify the states' legal duties when submitting plan amendments affecting Medicaid rates. The rules or the preamble to them may also address the role, if any, that beneficiaries and providers may play in the administrative process. Conceivably, the extent or nature of any such role could have ramifications as to whether beneficiaries and providers have a right to judicial review of adverse CMS plan approvals and, if so, the degree of that right.

In sum, stay tuned for future developments on multiple fronts.

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Messrs. Hamme and Tettlebaum have extensive experience in litigating Medicaid rate issues. They will be presenting a session on this case and related issues at AHLA's Annual Meeting in June 2012.

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[1] *Douglas v. California Pharmacists Ass'n*, No. 09-1158 and *Douglas v. Santa Rosa Mem'l Hosp.*, No. 10-283.

[2] The equal access clause specifies that states must assure that Medicaid payment for care and services:

> are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at

> least to the extent that such care and services are available to the general population in the geographic area.

[3] *E.g., Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005). There is a split in the circuits on this issue. *See, e.g.*, *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) (neither beneficiaries nor providers have a private right of action); *Pediatric Specialty Care, Inc. v. Arkansas Dep't of Human Servs.*, 443 F.3d 1005 (8th Cir. 2006) (both providers and beneficiaries have a private right of action). *See generally Gonzaga University v. Doe*, 536 U.S. 273 (2002).

[4] The majority did not comment on whether the injunctions should remain in effect pending the Ninth Circuit's further review. Assumedly, vacating the judgments would likewise vacate the injunctions, which are predicated on those judgments. But, the Ninth Circuit may now have to resolve that question as well.

[5] Technically, the Supreme Court itself has never resolved the question of whether the equal access provision furnishes a private right of action. In *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), a 5-4 majority of the Court ruled that the now repealed provisions of the so-called Boren Amendment, which mirror those of the equal access clause in several respects, did provide for a private right of action. The composition of the Court has changed considerably, however, since then (only Justices Scalia and Kennedy, both dissenters in *Virginia Hospital Ass'n*, remain on the Court). Likewise, Supreme Court case law adjudicating private right of action questions has been altered substantially since that time and has generally tended to foreclose private rights of action. *See Gonzaga University, supra.*

[6] 42 U.S.C. § 1396a(a)(13)(A); 42 C.F.R. § 447.205.

[7] 42 U.S.C. § 1396a(a)(8).

[8] 42 U.S.C. § 1396a(a)(10)(B).

[9] In both Boren Amendment and equal access cases, the Ninth Circuit has ruled that states must engage in empirical analyses or cost studies that support their Medicaid rate methodologies. *E.g., Independent Living Ctr. v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009); *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1492 (9th Cir. 1997), *cert. denied*, 522 U.S. 1044 (1998). Some other courts and CMS have not subscribed to that view, however. *E.g., Rite Aid of Pa. Inc. v. Houstoun,* 171 F.3d 842 (3d Cir. 1999).

[10] *E.g., California Med. Ass'n v. Douglas*, No. CV-11-9688 CAS-MANx (C.D. Cal. Jan. 31, 2012), *California Med. Transportation Ass'n v. Douglas*, No. CV-11-9830 CAS-MANx (C.D. Cal. Jan. 10, 2012); *Managed Pharmacy Care v. Sebelius*, No. CV-11-9211 CAS-MANx

(C.D. Cal. Dec. 28, 2011); *California Hosp. Ass'n v. Douglas*, No. CV-11-9078 CAS MANx (C.D. Cal. Dec. 28, 2011).

[11] 76 Fed. Reg. 26342 (May 6, 2011).

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