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Medicaid

Supreme Court Says Providers Can't Sue States to Force Increase in Medicaid Pay

In a 5-4 decision, the U.S. Supreme Court March 31 said that Medicaid providers may not sue state officials under Section 30(A) of the Medicaid Act, by way of the supremacy clause or equitable principles, to force states to increase Medicaid payments for covered services (*Armstrong v. Exceptional Child Ctr., Inc.*, 2015 BL 90316, U.S., No. 14-15, 3/31/15).

The question of whether a private party may sue a state to enforce a federal law has been percolating for several years, with the Supreme Court dodging the issue in *Douglas v. Indep. Living Ctr., Inc.*, 2012 BL 42477 (U.S. 2012) (21 HLR 275, 2/23/12). There, the Supreme Court declined to decide if the supremacy clause provided a private right of action for providers to object to a state rate-setting scheme, over the objections of four dissenting justices.

In *Armstrong*, those four justices, Chief Justice John G. Roberts Jr. and Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr., pulled in an unusual fifth, Justice Stephen G. Breyer, to form a majority that rejected a claim by providers of Medicaid-covered services that reimbursement rates proposed by Idaho were inadequate and that the Medicaid Act's equal access provision, Section 30(A), 42 U.S.C. § 1396a(a)(30)(A), gave them a remedy to force the state to increase the rates. Section 30(A) requires states to ''assure payments are consistent with efficiency, economy, and quality of care.''

Lynn S. Carman, San Rafael, Calif., who filed an amicus brief on behalf of the Medicaid Defense Fund, called the decision a ''disaster,'' telling Bloomberg BNA that the Supreme Court has ''ripped the supremacy clause out of the Constitution.''

''The decision essentially destroys democracy, because if citizens can now no longer sue to prevent being injured from state violations of federal law, then there is no one, really, to see to it that federal laws are carried out by the states as intended, and written, by Congress,'' he said.

But the National Association of Medicaid Directors (NAMD) called the decision ''good news for states.'' In a press release, the group said the decision ''allays potential fears that individuals or providers'' would bring ''a tsunami of litigation'' that might have ''the effect of grinding the gears of the effective and efficient administration of the Medicaid program to a halt.''

In a statement e-mailed to Bloomberg BNA, Idaho Department of Health and Welfare Director Richard Armstrong also praised the ruling. ''This decision allows our Medicaid program to continue focusing on quality, accessible services at an economical cost to taxpayers,'' Armstrong said. He added that, in this case ''there were no quality of care or access issues at the rates Medicaid was paying.''

Lloyd A. Bookman, a founding partner at Hooper, Lundy and Bookman in Los Angeles, said the court's opinion was very ''result-oriented.'' The court basically ignored ''years of jurisprudence'' in which courts have held that private actors may challenge state action of the type at issue here, in an ''effort to reduce providers' access to the courts.''

Supremacy Clause Argument Rejected. The plaintiffs here provided habilitation services to people covered by Idaho's Medicaid plan. They sued two state officials, arguing that Idaho violated Section 30(A) by reimbursing providers at rates lower than those ''consistent with efficiency, economy, and quality of care.''

The court's opinion was very "result-oriented."

—Lloyd A. Bookman, Hooper, Lundy & Bookman, Los Angeles

The U.S. District Court for the District of Idaho granted the providers summary judgment, saying Idaho's rates weren't consistent with Section 30(A) (20 HLR 1858, 12/22/11). The U.S. Court of Appeals for the Ninth Circuit affirmed (*Exceptional Child Ctr., Inc. v. Armstrong*, 567 Fed. Appx. 496, 2014 BL 208281 (9th Cir. 2014)).

The appeals court said the providers had ''an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation.'' The Supreme Court granted review and heard oral argument Jan. 20 (24 HLR 90, 1/22/15).

In an opinion by Scalia, the Supreme Court overruled the Ninth Circuit. The supremacy clause, U.S. Const. Art. VI, cl. 2, says that the federal law is the ''supreme Law of the Land'' and that judges in every state are bound to apply federal law over contrary state laws.

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The clause, however, ''is silent regarding who may enforce federal laws in court, and in what circumstances they may do so,'' the court said.

The court concluded that the clause doesn't ''give affected parties a constitutional (and hence congressionally unalterable) right to enforce federal laws against the States.'' Such a reading would render the historical descriptions of the clause ''grossly inept,'' Scalia said. Nor did reading the clause in the context of the Constitution as a whole permit this result, the court said.

Equitable Actions Disallowed. The court also said the ''Medicaid Act implicitly precludes private enforcement of § 30(A).'' Providers may not, by invoking courts' equitable powers, ''circumvent Congress's exclusion of private enforcement.''

Congress provided a remedy for a state's refusal to comply with the Medicaid statute's requirements—the secretary of the Department of Health and Human Services may withhold the state's Medicaid funds. This remedy ''suggests that Congress intended to preclude others,'' the court said, especially when combined with ''the judicially unadministrable nature of § 30(A)'s text.''

Joel M. Hamme, a principal at Powers, Pyles, Sutter & Verville PC, Washington, told Bloomberg BNA that this conclusion defied reality. An HHS decision to withhold Medicaid funds from a state would be equivalent to dropping ''an atomic bomb,'' he said. The Centers for Medicare & Medicaid Services never has played that card. Bookman agreed that the CMS was unlikely ever to unleash this ''nuclear'' option.

Finally, in a section joined by only Scalia, Roberts, Thomas and Alito, the court said Section 30(A) ''lacks the kind of rights-creating language needed to imply a private right of action.''

Odd Lineup? When the high court granted review of Idaho's petition, attorneys who follow Medicaid issues predicted that Justice Anthony M. Kennedy would be the swing vote (23 HLR 1303, 10/9/14), but Kennedy was solidly in the minority camp led by Justice Sonia Sotomayor.

Hamme said he was ''astounded by the configuration of the court.'' But Bookman told Bloomberg BNA that, while Breyer's majority vote was ''disappointing,'' it wasn't entirely surprising.

Bookman said he was ''always concerned about Breyer,'' who, he said, ''tended to look at this case differently'' than the other justices.

In a concurring opinion, Breyer said that a decision allowing providers to sue states over their Medicaid rates might ''set a precedent'' for permitting judicial rate-setting that would be ''outside the ordinary channel of federal judicial review of agency decisionmaking.''

Hamme and Harvey M. Tettlebaum, a partner at Husch Blackwell LLP, Jefferson City, Mo., questioned Breyer's reasoning that such a ruling would result in ''increased litigation, inconsistent results, and disorderly administration of highly complex federal programs.''

Breyer's concern, Hamme said, wasn't ''consistent with experience.'' For over 30 years, providers have had the right to bring such an action, but generally haven't done so. There is nothing in the record to support Breyer's assertion that an explosion of litigation would follow this case had the court held otherwise, Tettlebaum said.

Similarly, the attorneys questioned Breyer's assertion that the legality of a state's rate-setting proposal ought to be left to the agency. That is a ''pipe dream,'' Hamme said. According to an amicus brief filed by former HHS and CMS officials, the HHS doesn't have the resources or the inclination to review rate-setting decisions outside the plan amendment context, he said.

Tettlebaum added that HHS likely wouldn't deny a plan amendment that would reduce costs, given the pressure being placed on it to hold down expenditures.

APA Remedy More Palatable. According to Bookman, Breyer viewed the issue as one of administrative law, to be resolved after the providers had asked the HHS to step in and force the state to revise its reimbursement rates. Depending on how the agency ruled, either the state or the providers then would be able to bring suit against the agency under the Administrative Procedure Act to challenge that decision.

Hamme and Tettlebaum agreed with this reading of Breyer's opinion, and said that may be an option for the providers going forward. It wasn't clear from the record, the attorneys said, whether the providers had tried this route. Hamme added, however, that it is ''very rare'' for a court to overturn the agency's approval of plan amendments relating to reimbursement rates.

'Very Real Consequences.' Sotomayor, in dissent, predicted the decision will have ''very real consequences.'' In the past, she said, states set rates so low that providers were unwilling to provide covered services. She implied that might happen again, given the court's ruling, unless the HHS threatens to cut off funds to states that decrease payment rates—a measure she called ''drastic and often counterproductive.''

Sotomayor, joined by Kennedy and Justices Ruth Bader Ginsburg and Elena Kagan, rejected the idea that Section 30(A)'s ''language was intended to foreclose private enforcement actions.''

Carman agreed with Sotomayor that the decision will have consequences for providers. ''States will now have carte blanche to reduce spending to obtain medical/hospital/prescription services in their Medicaid program, based purely on the amount of savings to the state's budget—without regard to whether or not this prevents access to adequate health care.'' Carman said.

Tettlebaum said states ''will feel that they have greater freedom'' to establish rates that will lower reimbursements. That will impact both access to and quality of care, and might cause a crisis for institutional providers, like hospitals and nursing homes, he said.

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Other Avenues for Relief? According to Hamme and Tettlebaum, providers may have other avenues for relief. Some state Medicaid provisions permit private lawsuits to challenge reimbursement rates, they said, though they cautioned that states might use the Supreme Court's decision to say the federal law preempts state law.

Hamme also said the providers can go to the HHS as whistle-blowers, arguing either that a state, in reducing rates, acted outside its federally approved plan or acted without amending its plan as required by federal law.

Hamme said a legislative fix, for example a provision amending Section 30(A) to explicitly provide for a private cause of action, is unlikely at a time when Congress is focused on reducing the budget and Republicans have proposed making Medicaid a block grant program.

James M. Piotrowski of Herzfeld & Piotrowski LLP, Boise, Idaho, argued for the providers. Carl J. Withroe, of the Idaho Attorney General's Office, Boise, argued for the state.

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The court's opinion is at http://www.bloomberglaw.com/public/document/Armstrong_v_Exceptional_Child_Ctr_Inc_No_1415_US_Mar_31_2015_Cour.