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Supreme Court Review of Provider Medicaid Challenge: Is a Remand Good News for Providers?

By Ruth E. Granfors and Raymond P. Pepe

A recent United States Supreme Court decision suggested, in a remand back to the Ninth Circuit Court of Appeals, that once the Centers for Medicare and Medicaid Services (CMS) approve a Medicaid state plan amendment, a provider's "likely" available remedy is under the federal Administrative Procedure Act.¹ That process, the Court clarifies, would allow for judicial review of whether the plan approval is arbitrary and capricious or contrary to law. However, the Court preserved for another day the question of whether a provider has a private right of action in federal court to challenge a pre-approval implementation of a state plan amendment under the Supremacy Clause of the U.S. Constitution. Medicaid providers who are contemplating a challenge to a state's administration of the Medicaid program should consider the reasoning of the Court's decision and applicability to the facts of the situation when deciding whether and through what avenue to pursue such a challenge.

Background

In 2008 and 2009, California passed three laws reducing Medicaid payment for nearly all Medicaid providers in the State. A combination of Medicaid providers and recipients filed lawsuits in federal district court to enjoin implementation of the Medicaid payment changes. They argued that pursuant to the Supremacy Clause, the statutes were inconsistent with and preempted by federal law requiring that the state Medicaid agency develop "methods and procedures" to ensure that Medicaid "payments 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."² The Ninth Circuit Court of Appeals enjoined the implementation of the California statutes finding that the providers could bring an action to enforce section (30)(A) under the Supremacy Clause and that California violated section (30)(A) because it had failed to consider the necessary factors before passing the legislation in question.

The State of California filed petitions for certiorari with the United States Supreme Court. The Supreme Court agreed to hear the petitions and consolidated them on the single issue of whether the Supremacy Clause gives health care providers and Medicaid recipients the right to enforce section (30)(A). The Supreme Court declined to consider the other issue that was raised—whether the California statutes indeed violated section (30)(A).

¹ *Douglas v. Independent Living Center of Southern Cal., Inc.*, 565 U.S. ____ (2012). The Court's February 22, 2012 decision is available on the United States Supreme Court website: <http://www.supremecourt.gov/>.

² 42 U.S.C. § 1395a(a)(30)(A). This section is commonly referred to as "(30)(A)." In 2005, the Ninth Circuit Court had determined that section (30)(A) does not give providers or recipients a private right of action under section 1983 of the Civil Rights Act. The providers brought these actions under the Supremacy Clause, rather than section 1983.

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The Change in Circumstances

A state Medicaid agency is required to obtain approval from the United States Department of Health and Human Services, Centers for Medicare and Medicaid Services on any state Medicaid plan amendment to the methods and procedures for payment of Medicaid providers. CMS must determine whether the amendments comply with federal law, including section (30)(A).

When California passed statutory changes to the methods and procedures for determining Medicaid provider rates, the California Medicaid agency submitted a state plan amendment to CMS after the legislative rate changes took effect. The provider lawsuits were first filed in the district court of California before CMS made a decision on the amendments. After the lawsuits were filed, CMS denied approval of the state plan amendments. California asked for further review by CMS, and that review was pending when the Supreme Court granted review of the cases.

The Supreme Court heard oral argument on October 3, 2011. On October 28, 2011, the United States Solicitor General, on behalf of the United States as amicus curiae in support of the State of California, advised the Supreme Court that CMS had approved the majority of the California state plan amendments at issue. California abandoned the amendments that were not approved. The Supreme Court then ordered the parties and the United States to address the question of the impact the CMS approvals had on the matter before the Supreme Court. In response, the parties agreed that the CMS approval did not moot the questions before the Court.

The Opinion of the Court

Justice Breyer delivered the opinion of the Court, which resulted in a remand to the Ninth Circuit Court of Appeals, stating:

While the cases are not moot, they are now in a different posture. The federal agency charged with administering the Medicaid program has determined that the challenged rate reductions comply with federal law. That agency decision does not change the underlying substantive question, namely whether California's statutes are consistent with a specific federal statutory provision (requiring that reimbursement rates be "sufficient to enlist enough providers"). But it may change the answer. And it may require respondents now to proceed by seeking review of the agency determination under the Administrative Procedure Act (APA)...rather than in an action against California under the Supremacy Clause.

The Court concluded that "the APA would likely permit respondents to obtain an authoritative judicial determination of the merits of their legal claim" by providing for judicial review by persons adversely affected or aggrieved by agency action which may "set aside agency action found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"

The Court states that the APA process has the following advantages: (1) judicial review of agency action is permitted, so there is a clear path for providers to "obtain an authoritative judicial determination of the merits of their legal claim"; (2) the underlying challenge of the providers is ideally suited for administrative review first by the agency charged with administering the statute and "expert in the statute's subject matter"; and (3) "to allow a Supremacy Clause action to proceed once the agency has reached a decision threatens potential inconsistency or confusion." Since the Ninth Circuit is to act "consistent with this opinion," the opinion provides a road map for concluding that a Supremacy Clause action is not appropriate once CMS has approved a state plan. Rather, the Court is suggesting that an APA appeal is the appropriate path. But the Court also acknowledges that the

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parties have not briefed this issue and suggests that further briefing may be required by the Ninth Circuit to address the new set of facts.

Perhaps the most interesting aspect of the Court's opinion is that it does not rule on the issue and facts that were before the Court, i.e., whether the Supremacy Clause is a vehicle for challenging implementation of a state plan amendment prior to a CMS decision on the amendment. It is hard to reconcile the conclusion that this issue was not made moot by the CMS approval with the Court's decision to remand the matter on the changed circumstances. This result leaves providers still wondering about their ability to seek an injunction under the Supremacy Clause if a state implements a state plan change before CMS approves. Indeed, the Court's non-decision on the issue before it seems to suggest that the issue is capable of repetition, and evading review, a commonly recognized exception for finding that a matter is not moot. This may be because the issue that is really at the heart of this and other challenges to Medicaid state plan changes is where these cases should be resolved. The Court is stating that in the normal course, an APA action is the most appropriate mechanism for challenge.

The Dissenting Opinion

Chief Justice Roberts wrote the dissenting opinion, joined by Justices Scalia, Thomas and Alito. The dissent maintains that Congress did not explicitly or impliedly give providers or Medicaid recipients a private right to enforce section (30)(A) of the Medicaid Act. Evaluating the basis for maintaining an action at law, the dissent concludes: "Thus, if Congress does not intend for a statute to supply a cause of action for its enforcement, it makes no sense to claim that the Supremacy Clause must provide one." After considering the viability of an action in equity, the dissent states: "A court of equity may not 'create a remedy in violation of, or even without the authority of law.' *Rees v. Watertown*, 19 Wall. 107, 122 (1874)."

The dissent answers directly the question that was before the Court, but it does not serve as precedent. The dissent sees no reason for a remand, and it provides no insight into an alternative mechanism for Medicaid state plan challenges.

Conclusion

Providers may view a remand to the Ninth Circuit as a victory, and to a certain extent it is. The Supreme Court sidestepped the issue of whether a court may enjoin implementation of a state plan amendment prior to CMS approval in favor of tackling the issue that occurs more often and on the facts presented during pendency of the appeal, i.e., the availability of a legal challenge *after* CMS approval of a state plan amendment. While the Supreme Court sent the matter back to the Ninth Circuit to answer that question, the Court was strongly suggesting that the proper legal challenge is an APA appeal of CMS's approval.

Authors:

Ruth E. Granfors

ruth.granfors@klgates.com
+1.717.231.5835

Raymond P. Pepe

raymond.pepe@klgates.com
+1.717.231.5988

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