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Reimbursement

High Court to Review Medicaid Dispute, Providers' Rights to Force Higher Payments

The U.S. Supreme Court Oct. 2 agreed to review whether Idaho health-care providers may sue the state's Medicaid agency under the supremacy clause of the U.S. Constitution to force it to raise its reimbursement rates (*Armstrong v. Exceptional Child Ctr., Inc.*, U.S., No. 14-15, *review granted* 10/2/14).

At issue is whether providers have any basis to sue in federal court state Medicaid agencies that want to reimburse for Medicaid services at rates providers say do not cover their costs. Idaho and 27 other states, led by Texas, filed a supporting brief, arguing that the Centers for Medicare and Medicaid Services is the sole determiner of Medicaid rate adequacy and that allowing provider actions under the supremacy clause intrudes on state sovereignty.

Attorneys told Bloomberg BNA that if the Supreme Court decides to eliminate a cause of action under the supremacy clause, Medicaid recipients and their providers will have no avenue for ensuring reimbursement rates are sufficient to attract an adequate number of providers.

Access Provision. The Medicaid Act's equal access provision, 42 U.S.C. § 1396a(a)(30)(A), requires payments that ''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.''

The ability of providers to sue under the supremacy clause has been the object of litigation in many states that have tried to reduce Medicaid reimbursement in response to budgetary constraints. There is no federal guidance on how reimbursement rate adequacy should be assessed under Section (a)(30)(A), the attorneys said.

The high court will review a decision by the U.S. Court of Appeals for the Ninth Circuit that allowed claims by Idaho Medicaid providers of residential treatment to be brought against Idaho Medicaid officials, even though the Medicaid Act provides no private right to sue. The providers challenged what they said were inadequate reimbursement rates.

The Ninth Circuit, building on a series of its prior rulings, found Idaho health-care providers had direct right to challenge Idaho's reimbursement rates under the supremacy clause, despite the fact that the Medicaid Act contains no private right of action.

The ruling said that under the law of the Ninth Circuit, providers alleging violations of Section (a)(30)(A) may bring claims under the supremacy clause and that compliance with that section of the Medicaid Act requires states to consider ''reasonable cost studies'' in setting reimbursement rates.

Justice Kennedy Swing Vote? With constant budgetary pressure on states to contain Medicaid expenditures, and with the number of Medicaid-eligible individuals increasing as the Affordable Care Act is implemented, the concern is that too few providers will participate in Medicaid to ensure that Medicaid recipients have the same access to care as others.

A decision closing off this avenue of judicial review will significantly limit the ability of providers to challenge inadequate Medicaid rates in court.

—Joel M. Hamme,
Powers Pyles Sutter & Verville PC, Washington

Attorneys also told Bloomberg BNA they believe it is likely that Chief Justice John G. Roberts Jr. and Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. voted to grant review and intend to overturn the Ninth Circuit's decision. Those four justices, who dissented in the court's 2012 decision in *Douglas v. Indep. Living Ctr. Inc.*, 2012 BL 42477 (U.S. 2012), which sidestepped the supremacy clause issue, will need one justice—presumably Justice Anthony M. Kennedy—to join their ranks to do so, they said.

The majority in *Independent Living Center*, which included Kennedy, remanded the matter because the Centers for Medicare & Medicaid Services had approved, while the case was pending, the Medi-Cal reimbursement rates providers challenged in that case. The dissent, written by Roberts, chided the majority for not addressing the supremacy clause issue head-on and concluded: ''When Congress did not intend to provide a private right of action to enforce a statute enacted under the Spending Clause, the Supremacy Clause does not supply one of its own force.''

Review Not Surprising. Joel M. Hamme, with Powers Pyles Sutter & Verville PC, in Washington, said he wasn't surprised that the court agreed to review the Ninth Circuit's decision and said that it may portend ''bad news'' for health-care providers and Medicaid beneficiaries. A decision closing off this avenue of judi-

cial review will significantly limit the ability of providers to challenge inadequate Medicaid rates in court, he explained.

Hamme said it was noteworthy that the high court limited its grant of certiorari to the supremacy clause issue, declining to hear the second issue raised by the petition filed by the Idaho attorney general: whether budget-based Medicaid rates constitute a violation of the statute. He also noted that the four justices who dissented in *Independent Living Center* believe that there is no right of action in these circumstances.

''So, absent a very unanticipated change of heart by any of them or one or more of Justices [Ruth Bader] Ginsberg, [Stephen G.] Breyer, [Sonia] Sotomayor or [Elena] Kagan agreeing that there is no such right, it will all come down to Justice Kennedy,'' he added.

Lloyd A. Bookman, with Hooper, Lundy & Bookman PC, San Francisco, said the case arrives at the high court in a different posture than the *Independent Living Center* case because it challenges inaction by the state rather than a change or CMS's approval of a change. ''I would view this as a narrow issue that should not lead to a broad precedent concerning whether there is a private right of action under the Supremacy Clause to bring a Section 30(A) challenge to a specific state rate setting action,'' he said.

He predicted the court majority will not ''shut the door'' to challenges to state action, without federal approval, that are alleged to violate federal law, because such an action would allow states to ''adopt rates in violation of federal law with impunity, safe from challenges by providers and beneficiaries.''

Fundamental Liberty Issues. Lynn S. Carman, a San Anselmo, Calif., attorney who is the Medicaid Defense Fund's chief counsel, said the case also reflects broader issues implicating the erosion of liberty interests and federalism principles.

He assailed ''the assertion by the government and the *Independent Living Center* dissent that the right, or standing, of a person who is threatened with injury by continuing state action, in violation of a federal law, depends upon Congress 'creating' such a right. ''If that is true then this is the end of liberty in this country,'' he said.

Carman said the case raises important federalism issues because it involves the need for judicial review of actions by two government actors that have a conflict of interest. Although CMS is supposed to ensure the needs of Medicaid recipients are met, it saves money when it has to reimburse the state the federal share of a smaller total Medicaid outlay, he explained.

He cited a brief, submitted in the *Independent Living Center* case by former HHS secretaries and agency officials, that ''frankly stated that, because state violations of section 30A result in billions of savings by HHS, it has a conflict of interest which makes it 'unlikely' that HHS will ever apply the minimum requirements of 30A against states that violate it.''

This filing clarified the conflict of interest that ''beclouds the decisions of the HHS secretary and the State officials in the Idaho case and demonstrates why the Ninth Circuit was correct in the rulings it made,'' he said.

Bookman agreed. The typical response by states that CMS has the ability to rein in state failures to reimburse Medicaid providers adequately ''is largely illusory, as the only remedy available to CMS is to cut off funds to the state, and CMS is loath to do that,'' he said.

Lack of Guidance. Hamme said one disappointing aspect of the litigation is that HHS has had 17 years since the repeal of the Boren Amendment to issue meaningful regulations on the Medicaid reimbursement rate adequacy. That amendment, passed in 1980, required that states consider provider costs in setting Medicaid reimbursement rates for hospitals, nursing facilities and other providers.

''For whatever reasons, it has not done so, and never got around to finalizing the proposed rule that it issued more than three years ago in 2011,'' he added. HHS's May 6, 2011, proposed rule on equal access would have required states to compile and assess on a periodic basis a lot of data in making these decisions, he noted.

This lack of guidance has helped spur litigation by providers seeking to obtain judicial review of rates they allege are inadequate to cover their costs. ''They might have sued even if HHS had such regulations, but the absence of them meant that litigation would continue apace,'' Hamme said.

Harvey M. Tettlebaum, with Husch Blackwell LLP, Jefferson City, Mo., agreed that the lack of HHS guidance has complicated matters. ''Increasingly, we are seeing the Supreme Court unwilling to hold the Health and Human Services Department to account for its actions, or, in this case, its inaction in failing to issue regulations,'' he said.

He said he feared the court may use the case as an opportunity ''to add to its precedent giving increasing, unreviewable discretion to administrative agencies especially where Medicare or Medicaid is concerned by not allowing private litigants affected by the action or inaction of the agency to obtain judicial relief or just a declaration of the law.''

Idaho Rates Challenged. The petition filed by the Idaho attorney general challenged the Ninth Circuit's ruling that affirmed a decision by the U.S. District Court for the District of Idaho that addressed application of the equal access provision. The petition claimed that the Ninth Circuit's decision on the supremacy clause issue should be reversed. A brief in opposition filed in September argued that review wasn't warranted.

The state brief in support, submitted by the Texas attorney general, cited a split in the federal appeals court circuits on the supremacy clause issue, with the U.S. Court of Appeals for the Tenth Circuit rejecting the supremacy clause cause of action that has been embraced by the First, Second, Third, Fourth, Fifth, Sixth and Ninth Circuits.

A federal trial court in April 2012 held that the state was required to pay residential care providers at rates that reflected cost increases that had been documented by a public health consulting firm.

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The Ninth Circuit decision is at http://www.bloomberglaw.com/public/document/Exceptional_Child_Ctr_Inc_v_Armstrong_No_1235382_2014_BL_208281_9.

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