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U.S. Supreme Court remands Supremacy Clause challenge to California's budget-driven Medicaid rate cuts

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On February 22, 2012, the United States Supreme Court in *Douglas v. Independent Living Center of Southern California, Inc.* declined to decide whether Medicaid providers and beneficiaries could maintain a Supremacy Clause cause of action under 42 § 1396a(a)(30)(A) ("Section 30(A)") of the Medicaid Act to challenge inadequate Medicaid reimbursement rates.[1] Instead, the Supreme Court vacated and remanded the cases to the Ninth Circuit Court of Appeals based on actions taken by the Centers for Medicare and Medicaid Services ("CMS") after oral argument. The Supreme Court directed the Ninth Circuit to consider "whether the cases [could] proceed directly under the Supremacy Clause now that the agency has acted."

The new wave of provider challenges under the Supremacy Clause

For years, federal courts had construed 42 § 1396a(a)(13)(A) (1997), also known as the Boren Amendment, as giving Medicaid providers and beneficiaries a substantive right to challenge the reasonableness and adequacy of Medicaid reimbursement rates. Concerned about the proliferation of litigation under this statute, Congress repealed the Boren Amendment in 1997 and replaced it with a right to notice-and-comment ratemaking for Medicaid providers and beneficiaries.

Providers and beneficiaries subsequently turned to Section 30(A), which employs similar language to the Boren Amendment, to bring private causes of action against states to challenge inadequate levels of Medicaid reimbursement. Section 30(A) requires that Medicaid state plans and state plan amendments "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that 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 in the geographic area."

In 2002, the United States Supreme Court issued its decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002). In *Gonzaga*, the Court tightened the requirements a plaintiff must meet in order to show that a statute provides him or her with a private cause of action. Prior to *Gonzaga*, most federal courts had held that Section 30(A) gave Medicaid providers and beneficiaries a private right of action to challenge inadequate Medicaid reimbursement rates. After *Gonzaga*, however, federal courts across the country changed course and began holding that Section 30(A) no longer provided Medicaid

providers and beneficiaries with a private cause of action to challenge the adequacy of state Medicaid rates.

Medicaid providers and beneficiaries subsequently began bringing actions against states under the Supremacy Clause of the United States Constitution, arguing that a Medicaid reimbursement rate reduction that conflicts with the requirements of Section 30(A) is contrary to federal law and therefore unconstitutional. This type of challenge forms the basis on which the plaintiffs in *Douglas* brought their cases.

Initially, the plaintiffs in *Douglas* had succeeded in obtaining preliminary injunctions in federal court halting implementation of California's budget-driven Medicaid rate cuts that were enacted in 2008 and 2009. At that time, the California Legislature approved Medi-Cal reimbursement cuts ranging from 1% to 10% to help address the state's dire and deepening financial crisis.

California submitted state plan amendments to CMS regarding the rate cuts. While CMS was reviewing them, Medicaid providers and beneficiaries brought suit under the United States Supremacy Clause arguing that Section 30(A) pre-empted those rate cuts. The various cases made their way to the Ninth Circuit, which either affirmed the lower court decisions in favor of the plaintiffs or ordered preliminary injunctions blocking the rate cuts. The Ninth Circuit held that Medicaid providers and beneficiaries could maintain a cause of action under the Supremacy Clause and accepted their claims that California did not show that the rate cuts at issue would comply with Section 30(A)'s requirements. As a result, the Ninth Circuit held that the state's reimbursement rate cuts conflicted with the provisions of Section 30(A) and were therefore pre-empted by it.

Supreme Court review: The majority decision

The United States Supreme Court accepted the cases on appeal to address whether the plaintiffs could maintain a cause of action under the Supremacy Clause to enforce Section 30(A). Briefs were submitted and oral argument was held. After oral argument, CMS completed its review of the underlying rate reductions and approved several of them. Because of this changed circumstance, Justice Breyer, writing for the majority, concluded that the question before the Court had changed: "In light of the changed circumstances, we believe that the question before us now is whether, once the agency has approved the state statutes, groups of Medicaid providers and beneficiaries may still maintain a Supremacy Clause action asserting that the state statutes are inconsistent with the federal Medicaid law." Because this issue had neither been briefed nor argued, the majority vacated the preliminary injunctions and sent the cases back to the Ninth Circuit for further consideration. The United States Supreme Court instructed the Ninth Circuit to consider whether the plaintiffs could still proceed with their Supremacy Clause claim or whether they now had to proceed under the federal Administrative Procedure Act (APA). The majority decision concluded that, in light of CMS's action, the "basic challenge now presents the kind of legal question that ordinarily calls for APA review."

The majority noted that "[i]n actions under the APA, the courts give due deference to the determinations of the agency charged with statutory enforcement, although the agency's decision is not necessarily dispositive. Even if the agency has determined that the California statutes comply with the federal law, the decision could be set aside under the APA if the court finds that the agency's action was 'arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law.' " 5 U.S.C. § 706(2)(A).

The Justices' dissenting opinion

In contrast, the dissenting opinion authored by Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito) did not agree that CMS's actions changed the question before the Court. The dissent noted that CMS review of the California statutes was well under way when the Court had granted *certiorari* and that the parties had debated the potential import of a parallel agency action during the Supreme Court's proceedings, both in their initial briefs and in their oral arguments, with both sides positing that CMS action should not derail the case.

The dissent concluded that only CMS had the authority to enforce the federal standards applicable to Medicaid state plans and that nothing in the Medicaid Act allows providers or beneficiaries to sue to enforce Section 30(A): "[I]f 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 itself must provide one. . . . Indeed, to say that there is a federal statutory right enforceable under the Supremacy Clause, when there is no such right under the pertinent statute itself, would effect a complete end-run around this Court's implied right of action and 42 U.S.C. § 1983 jurisprudence. We have emphasized that 'where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.' "

The dissent also contested the majority's suggestion that the cases "should morph into APA actions" because "[t]he APA judicial review provisions . . . seem to stand in the way of such a transformation." Chief Justice Roberts wrote that in an APA suit "the current defendant (the State) would need to be dismissed and the agency (which is not currently a party at all) would have to be sued in its stead. . . . Given that APA actions also feature—among other things—different standards of review, different records, and different potential remedies, it is difficult to see what would be left of the original Supremacy Clause suit. Or, again, why one should have been permitted in the first place, when agency review was provided by statute, and the parties were able to and did participate fully in that process."

Justice Roberts concluded, "I would dispel all these difficulties by simply holding what the logic of the majority's own opinion suggests: 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. The Ninth Circuit's decisions to the contrary should be reversed."

Implications

This case has attracted national attention in the health care industry. Budget-driven Medicaid rate cuts have been made in many states since the case began and provider challenges to those cuts have been filed in several states, also invoking the Supremacy Clause. Where does the Court's decision leave those cases?

The ability of Medicaid providers to challenge conflicting state law under a Supremacy clause theory remains undisturbed. In that respect, *Douglas* is a win for providers and beneficiaries. The simple truth is that the Court's conservative wing could not find enough support to outright reject the plaintiff's claim. Accordingly, those cases that hold that a Supremacy Clause claim may be maintained where CMS has not acted remain intact.

The California Medical Association's (CMA) website quotes CEO Dustin Corcoran as saying:

> This is a win for physicians and their patients in California. The lower court has previously ruled that interested parties indeed have the right to sue the state if the federal Medicaid Act

> is being violated. They will have the opportunity to decide that once again. The state cannot continue to propose sweeping cuts to programs for California's poorest and most vulnerable patients. Our hope is that they get the message loud and clear with the U.S. Supreme Court's decision today.

The question confronting the Ninth Circuit on remand is whether a Supremacy Clause cause of action can be maintained where CMS has acted and a right to review exists under the APA. How the Ninth Circuit will answer this question is unclear. The Ninth Circuit could conclude that a Supremacy Clause cause of action may be maintained in the face of a viable APA action. If this happened, the case would likely be appealed back to the Supreme Court. However, if the Ninth Circuit concludes that a Supremacy Clause cause of action cannot be maintained in the face of a viable APA action, the Ninth Circuit could dismiss the case without prejudice or transfer the case to CMS to allow the plaintiffs to proceed through the APA review process. It seems unlikely that the Ninth Circuit would actually rule on the merits of the APA claim on remand, but, if it did, providers and beneficiaries would stand a good chance of succeeding on that claim.

In a related case, in November 2011, some of the same providers involved in *Douglas v. Independent Living of Southern Cal., Inc.* appealed a CMS decision approving 10% legislative reimbursement rate cuts.[2] CMS approved the state plan amendment for these cuts in October 2011. The plaintiffs argued that the information supplied by the state to CMS did not measure whether and how a patient's access to care would be impacted or otherwise take into consideration the costs to provide the care, as required by law.

On February 1, 2012, Judge Christina Snyder granted plaintiffs' request for a preliminary injunction enjoining California from implementing these rate cuts under the APA finding that plaintiffs were likely to succeed on the merits of their claim that CMS acted either arbitrarily or capriciously or otherwise abused its discretion in approving the rate cuts at issue. The Court also found that the plaintiffs had demonstrated a likelihood of success on the merits of their claim that a California statute prohibiting an NP/NF facility from leaving the Medicaid program until all patients at the facility no longer reside there constituted an unconstitutional taking, in violation of the Fifth Amendment of the United States Constitution.

The overlay between parallel court and administrative actions in this context is complex. Providers and beneficiaries have no formal role and no voice in the CMS review. Recognizing this circumstance, some states have been able aggressively to work the system to reduce reimbursements without meaningful involvement by stake holders. This, in part, resulted in providers seeking relief from federal courts. For now, the ability to pursue relief in that forum remains alive and well.

Substantive impacts to access: The next frontier

The *Douglas* case arose on the discrete issue of whether a Supremacy Clause cause of action could be maintained to enforce Section 30(A). A recent federal district court case in New Hampshire has pushed this legal proposition further to assess what happens when access to Medicaid services is impacted.

In *Dartmouth-Hitchcock Clinic v. Toumpas*, 11-cv-358-SM (D.N.H. March 2, 2012), ten providers sued the Commissioner of the New Hampshire Department of Health and Human Resources to enjoin him from continuing to implement various budget-driven rate reductions and methodology changes in violation of Section 13(A) and Section 30(A) of the Medicaid Act. The court heard three days of testimony about the ways in which the providers are limiting services to Medicaid patients because of inadequate reimbursement. Regarding the providers' Section 30(A) claims, the court stated: "Substantively, the providers and beneficiaries make a strong case that the reduced Medicaid

reimbursement rates implemented by the Commissioner are far below the actual cost of providing care, inconsistent with the state's legal obligation to set Medicaid rates at a level that at least minimally supports their ability to deliver medical care to the most needy, and the product of a rate setting process completely untethered from the methods and standards the state is obligated to apply in setting rates."

The court concluded, however, that whether providers' Section 30(A) claims would succeed depended in part on how the court should interpret the *Douglas* case. The court therefore declined to decide whether the providers' Section 30(A) Supremacy Clause claims could be maintained and scheduled the matter for further briefing in light of the *Douglas* case.

Regarding the providers' Section 13(A) claims, the court found that Section 13(A) conferred upon providers a private right of action to enforce its provisions. The court also found that the Commissioner had disregarded his obligations under Section 13(A) and ordered him to provide Medicaid providers and beneficiaries with notice of the proposed rate reductions, to publish the justifications and methodologies underlying the proposed rate reductions, to provide a thirty-day comment period, and, subsequently, to publish the final rates, methodologies, and underlying justifications. The providers view this order as a clear victory for them.

Nixon Peabody is counsel to the ten plaintiff providers who secured the preliminary injunction.

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[1] *Douglas, Director, California Department of Health Care Services v. Independent Living Center of Southern California, Inc., et al.*, No. 09–958, 565 U. S. ____ (2012) (argued October 3, 2011—Decided February 22, 2012).

[2] *Cal. Hosp. Assoc. v. Douglas*, CV 11-9078 CAS (C.D. Cal. Dec. 28, 2011).