

# Explaining *Stewart v. Azar*: Implications of the Court's Decision on Kentucky's Medicaid Waiver

MaryBeth Musumeci

## Key Take-Aways

On June 29, 2018, the DC federal district court issued a decision in *Stewart v. Azar*, the lawsuit brought by a group of Medicaid enrollees challenging the Health and Human Services (HHS) Secretary's approval of the Kentucky HEALTH Section 1115 waiver program, which includes a work requirement, premiums, coverage lockouts, and other provisions that the state estimated would lead 95,000 people to lose coverage. Key rulings by the court include that:

- The plaintiffs have the ability to bring the lawsuit;
- The court has the ability to review the waiver approval;
- The Secretary's waiver approval violates the Administrative Procedure Act;
- The Kentucky HEALTH waiver is vacated and remanded to HHS; and
- The separate "institution for mental disease" substance use disorder payment waiver continues.

While this decision may not be last word on such waivers, given the potential for an appeal in this case as well as possible similar challenges in other states, the court's decision is notable for its affirmation of Medicaid's status as a health insurance program and the program's equal treatment of all groups covered by the statute.

On June 29, 2018, the DC federal district court issued a much-anticipated [decision](#) in *Stewart v. Azar*, the case brought by 16 Kentucky Medicaid enrollees challenging the Secretary of Health and Human Services' (HHS) approval of the [Kentucky HEALTH Section 1115 waiver program](#). The waiver included several provisions approved for the first time in Medicaid -- a [work requirement](#), monthly [premiums](#) up to 4% of income, and [coverage lockouts](#) for failure to timely renew eligibility or timely report a change in circumstances -- as well as heightened [cost-sharing](#) for non-emergency ER use and elimination of [retroactive eligibility](#) and [non-emergency medical transportation](#). The court vacated the waiver approval and remanded to HHS to consider how the waiver would help furnish medical assistance consistent with Medicaid program objectives. This issue brief summarizes the court's decision and considers its implications. An earlier [issue brief](#) provides background and answers key questions about the lawsuit.

## The Court's Decision

### The Plaintiffs Have the Ability to Bring the Lawsuit

The court determined that the plaintiffs are actually injured by the waiver, and their injury is likely to be redressed by the relief they are seeking. The premiums imposed by the waiver would cause economic injury to at least two of the plaintiffs, whom CMS and Kentucky concede are unlikely to be determined medically frail or otherwise exempt from the payments. The court also found that a ruling that HHS illegally approved the waiver would grant meaningful relief to these plaintiffs. The court noted that the Kentucky Governor's [Executive Order](#) to terminate the state's Medicaid expansion if a final court judgment invalidates the waiver does not affect plaintiffs' standing to sue because the Executive Order would not be implemented until after all court appeals are exhausted or waived, the state submits a state plan amendment (SPA) to CMS, CMS approves the SPA, and CMS's decision on the SPA is potentially subject to judicial review.

### The Court Has the Ability to Review the Waiver Approval

The court rejected HHS's argument that the Secretary's Section 1115 waiver decisions are not subject to judicial review under the Administrative Procedure Act (APA) because such decisions turn on the Secretary's judgment about whether a waiver is likely to assist in furthering program objectives. The court noted that Congress placed this limit on the Secretary's authority in the statute, relying on the courts to act as a check on the executive branch's exercise of discretion. The Secretary is afforded deference in interpreting Medicaid's objectives but must exercise his discretion reasonably in light of text of the statute. The court also determined that the entire set of Kentucky HEALTH waiver provisions should be reviewed as a whole rather than considering each individually.

### The Secretary's Waiver Approval Violated the APA

The court determined that the Secretary's waiver approval was arbitrary and capricious, in violation of the APA, because he entirely failed to consider the waiver's impact on furnishing medical assistance – i.e., providing affordable health coverage -- to the low-income populations identified by Congress in the Medicaid statute. Specifically, the court found that the Secretary never discussed how many people would lose coverage when approving the waiver, despite the state's estimate of 95,000 people and numerous public comments citing research and concerns that the waiver policies and new administrative requirements would likely lead to coverage losses. The Secretary also failed to cite any evidence that some enrollees would gain private coverage as a result of the waiver or estimate how many might do so.

Additionally, the court concluded that the Secretary did not adequately consider how the waiver would promote coverage. The waiver approval contains only a single "conclusory" statement that eliminating retroactive coverage would encourage beneficiaries to obtain and maintain coverage even when healthy and does not acknowledge public comments that pointed out that this provision would reduce coverage for those not already enrolled in Medicaid. The court rejected the Secretary's argument that a separate waiver provision authorizing federal Medicaid payments for substance use disorder (SUD) treatment

services in “[institutions for mental disease](#)” (IMDs) shows that Kentucky HEALTH provides medical assistance, finding that the IMD SUD provision is an independent waiver program, as detailed below.

The Secretary’s assertion that he considered whether the waiver would promote beneficiary health is not a substitute for considering whether the waiver promotes Medicaid’s primary purpose of covering health costs, the objective that Congress identified for the program. In creating Medicaid and expanding it under the Affordable Care Act (ACA), Congress focused not only on promoting health but also on making coverage affordable. The Secretary also cannot prioritize the impact on “traditional” or “vulnerable” Medicaid populations at the expense of the expansion group. Kentucky’s waiver applies to traditional low-income parents as well as expansion adults. Moreover, by amending the Medicaid statute to add the ACA expansion, Congress placed the expansion group “on equal footing” with other populations identified in the statute for whom Medicaid furnishes medical assistance. Consequently, the Secretary cannot prefer certain Medicaid populations over others and instead must consider the waiver’s impact on all affected enrollees, including coverage losses among the expansion group. The court also noted the record lacks substantial evidence that Kentucky’s Medicaid program is in danger of economic collapse without the waiver. Finally, statutory language about promoting independence and self-care is tied to providing rehabilitation and other services, not limiting medical assistance. Even if the Secretary could properly consider the waiver’s impact on self-sufficiency, he failed to balance that objective with any consideration of the impact on coverage.

## **The Kentucky HEALTH Waiver is Vacated and Remanded**

The Secretary’s approval of Kentucky HEALTH without considering Medicaid’s central objective of providing affordable coverage is a fundamental failure that invalidates the waiver. The court remanded the waiver to HHS to correct this error and make a decision that is supported by the administrative record. The court also vacated the waiver, preventing it from being implemented in the meantime, noting that doing so will preserve the status quo and protect the plaintiffs from harm.

## **The IMD SUD Payment Waiver Continues to be in Effect**

The court’s decision does not disturb Kentucky’s IMD SUD payment waiver authority. The IMD SUD payment waiver applies to a different population, with a different start date, and different purposes from the set of Kentucky HEALTH waivers challenged by the plaintiffs. The Secretary has approved stand-alone IMD SUD payment waivers in other states. When approving this provision in Kentucky, the Secretary evaluated whether IMD SUD payment would further program objectives independent of, and granted separate authorities for, the Kentucky HEALTH waivers challenged by the plaintiffs.

## **Implications**

As a result of the court’s ruling, HHS must reconsider its decision on the Kentucky HEALTH waiver, including all relevant facts based on the administrative record. The Secretary must evaluate the waiver’s impact on Medicaid’s primary objective of providing affordable health coverage, including the impact on coverage losses among the expansion group. While the Secretary does not have to address every public

comment in writing, concerns raised by the comments must be considered. In an appendix to the decision, the court excerpted a number of public comments raising concerns and citing evidence about the likelihood of coverage losses under the waiver. The court did not hold that the Secretary can never approve a waiver that reduces coverage nor identify the limits of any permissible coverage loss.

Given the court's decision, Kentucky cannot implement the Kentucky HEALTH waiver on July 1<sup>st</sup> as planned. In the meantime, ACA expansion coverage continues in Kentucky. The court's decision does not trigger the Governor's Executive Order to terminate Medicaid expansion. Instead, the Executive Order by its terms only would apply six months from the date that all judicial appeals have been exhausted or waived or otherwise as soon as legally practicable. Kentucky could implement other measures short of terminating the expansion. A June 20<sup>th</sup> presentation to the state legislature's Health and Welfare and Social Services Committee indicated that the state would consider eliminating certain benefits currently provided to the expansion group, including vision, dental, and "possibly" pharmacy,<sup>1</sup> in addition to undertaking an "immediate evaluation" of eliminating the expansion, if faced with an adverse court decision.<sup>2</sup>

## Looking Ahead

HHS and Kentucky have 60 days to file with the U.S. Circuit Court of Appeals for the DC Circuit if they choose to appeal the district court's decision. The defendants also can ask for the district court's decision to be stayed, or prevented from taking effect, during an appeal. This request would first go to the district court and if denied, could then be made to the appeals court.<sup>3</sup> The CMS Administrator indicated that the agency was conferring with the U.S. Department of Justice about how to proceed in light of the court's decision. Kentucky stated that it would work with CMS to address the issues raised by the decision.

Legally, the court's decision only impacts Kentucky's waiver. However, the decision is likely to have practical and political implications for other states considering similar waivers. States without waiver approvals to date might wait to see how the Kentucky case is finally resolved before proceeding. While this decision may not be last word on such waivers, given the potential for an appeal as well as possible similar challenges in other states, the court's decision is notable for its affirmation of Medicaid's status as a health insurance program and the program's equal treatment of all groups covered by the statute.

## Endnotes

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<sup>1</sup> Federal law requires that expansion enrollees receive a benefit package with the ACA's 10 essential health benefits, including prescription drugs. 42 U.S.C. §§ 1396a(k)(1); 1396u-7(b)(5); 18022(b)(1)(F); 42 C.F.R. § 440.347(a)(6).

<sup>2</sup> Sec'y Adam Meier, Cabinet for Health & Family Servs., *Kentucky HEALTH 1115 Medicaid Waiver Rollout Update*, Interim Joint Comm. on Health & Welfare & Family Servs., Meeting 1, June 20, 2018, [http://www.lrc.ky.gov/CommitteeMeetingDocuments/7/11398/June%2020%202018%20CHFS%201115%20Update.p](http://www.lrc.ky.gov/CommitteeMeetingDocuments/7/11398/June%2020%202018%20CHFS%201115%20Update.pdf)  
[df](http://www.lrc.ky.gov/CommitteeMeetingDocuments/7/11398/June%2020%202018%20CHFS%201115%20Update.pdf).

<sup>3</sup> In deciding whether to stay the decision, the court would consider the likelihood that HHS and Kentucky will ultimately prevail on the merits, the prospect of irreparable injury if relief is withheld, the possibility of harm to the plaintiffs if relief is granted, and the public interest. U.S. Court of Appeals for the DC Circuit, Circuit Rule 8(a)(1).