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Q & A

Koenning v. Janek (DME Decision): Fifth Circuit decision sidesteps major substantive issues – persuasive reasoning of lower court decision unaffected

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National Health Law Program
with a grant from the Training and Advocacy Support Center (TASC)

September, 2013

Q: I have heard that the Fifth Circuit recently issued a decision vacating a favorable district court decision on Medicaid coverage of durable medical equipment (DME). What is this case about?

A. In *Koenning v. Janek,* the Fifth Circuit dismissed and vacated a district court decision that struck down an absolute exclusion of custom power wheelchairs with integrated mobile standers. The Court of Appeals dismissed the case based on the mootness of the three plaintiffs' individual claims. Though it faulted the district court for making technical errors in its order, it did not call into question its reasoning on the substantive issues.

Discussion

The District Court's Decision

In September 2012, the District Court for the Southern District of Texas granted partial summary judgment to three individual plaintiffs seeking Medicaid coverage of custom power wheelchairs with integrated mobile standers. The District Court held that the state's policy excluding custom power wheelchairs with integrated mobile standers from Medicaid coverage violated Medicaid's statutory requirement that states use "reasonable standards" when making coverage decisions, as well as federal requirements governing the scope of coverage of home health services and durable medical equipment (DME).[1] It then remanded

[1] *See* 42 U.S.C. § 1396a(a)(17); 42 C.F.R. § 440.70 (describing home health services and requirement that such services include coverage of durable medical equipment, appliances, and supplies).

the case to the state Medicaid agency's utilization review contractor to make individual medical necessity determinations for each of the plaintiffs.[2]

The District Court's decision reaffirmed several important precedents. First, it followed cases like *Lankford v. Sherman* and held that Plaintiffs have a private right of action under the Supremacy Clause to enjoin a state policy that conflicted with the reasonable standards provision.[3] The Texas Health and Human Services Commission (THHSC) urged the District Court to find that a recent U.S. Supreme Court case, *Douglas v. Indep. Living Ctr of S. Cal.,* bars private actions under the Supremacy Clause to enforce the Medicaid Act, but the Court refused to do so. It noted that, though the dissent strongly asserted that the Medicaid provision at issue in that case was not enforceable, the Supreme Court majority did not address that issue.[4]

On consideration of the merits, the District Court held that the categorical exclusion of wheelchairs with integrated mobile standers violated the Medicaid Act. It noted that, although the Medicaid statute and regulations do not define the scope of DME, the Centers for Medicare & Medicaid Services (CMS) issued a letter that sets forth official guidance on the legal requirements governing DME coverage. This guidance, known as the "*DeSario* Letter" because it was issued in response to a decision of that name, allows states to develop lists of covered DME "as an administrative convenience" but requires states to have a "reasonable and meaningful procedure" for individuals to request and obtain items not on the list.[5] The Court agreed with numerous precedents refusing to allow a state to use a blanket exclusionary policy based on age.[6] It further noted that the state "failed to cite a single case supporting its position that states have broad discretion to categorically exclude an item of medical equipment that meets its definition of DME from Medicaid coverage for adult beneficiaries, regardless of medical necessity."[7]

The District Court further held that the policy violated Medicaid's due process requirements, because the agency "characterize[d] mobile standers as non-covered and then foreclose[d] any further consideration of the coverage question, including the issue of medical necessity, in a hearing by requiring that the same

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[2] For a more detailed description of the lower court's decision, *see* Jane Perkins, *Responding to Medicaid Coverage Exclusions and Monetary Caps: A Review of Recent Cases* (October 2012) (available from TASC or NHeLP).

[3] *Koenning v. Suehs*, 897 F. Supp. 2d 528, 540 (S.D. Tex. 2012), citing *Lankford,* 451 F.3d 496 (8th Cir. 2006).

[4] *Id.* at 542, citing *Douglas v., Indep. Living Ctr. of S. Cal.,* 132 S.Ct. 1204 (2012).

[5] *Id.* at 544-45, citing Letter from Sally K. Richardson, Director of Centers for Medicaid and State Operations (Sept. 4, 1998). The DeSario Letter responded to a Second Circuit decision that allowed Connecticut to use an exclusive list of covered DME that categorically excluded some medically necessary items. *See DeSario v. Thomas*, 139 F.3d 80 (2d Cir. 1998), *vacated by Slekis v. Thomas*, 525 U.S. 1098 (1999) (remanding for reconsideration in light of *DeSario* Letter).

[6] *Id.* at 546-48 (collecting cases).

[7] *Id.* at 548.

unlawful policy be followed" by the state hearing officer.[8] The Court also easily disposed of the THHSC's claim that it did not violate due process because it had a process that allowed claimants to show that "exceptional circumstances" justified coverage of a mobile stander. The Court pointed to testimony by witnesses from THHSC and the agency's contractor Texas Medical Health Partnership (TMHP) stating that the exceptional circumstances rule did not apply when an item of DME is specifically excluded from coverage.[9]

Finally, despite the fact that it found that "plaintiffs have presented substantial evidence of their need for a mobile stander," the Court remanded the case to contractor TMHP, for a determination of whether the Plaintiffs' requests for the mobile standers would be granted.[10]

THHSC filed a notice of appeal to the Fifth Circuit Court of Appeals, but did not request a stay of the district court decision.

Post-decision activity

One month after the decision, THHSC issued a policy explaining how beneficiaries could request exceptions to the exclusion of mobile standers based on "exceptional circumstances."[11] In addition, TMHP considered whether Plaintiffs Morgan Ryals and Brian Martin were entitled to the mobile standers under this "exceptional circumstances" standard. Morgan's request was granted, but Brian's was denied, based on medical necessity rather than the absolute coverage of mobile standers. Plaintiff Bradley Koenning's request was granted by his MCO.[12] These pieces of equipment generally last for long periods of time.

In addition, the Plaintiffs filed a notice of subsequent authority with the Circuit Court. The notice attached a May 21, 2013 letter from CMS discussing the scope of coverage of DME. CMS reiterates that states must ensure that items of DME that meet the state's definition of such coverage are to be provided to individuals of any age if the State's medical necessity criteria are met.[13]

Arguments on Appeal

THHSC gave several reasons that Plaintiffs did not have a right to enforce the DME requirements:[14]

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[8] *Id.* at 897 F. Supp. 2d at 554-55.
[9] *Id.* at 553.
[10] *Id.* at 555.
[11] TEX. HEALTH & HUMAN SERVS. COMM'N, TEXAS MEDICAID PROGRAM POLICY MANUAL 43 (Oct. 2012).
[12] *See Koenning v. Janek,* __ Fed. App'x __, 2013 WL 4430365 (5th Cir. 2013).
[13] Letter to Kay Ghahremani, State Medicaid Director, Texas Health & Human Servs. Comm'n, from Melissa Harris Director, Division of Benefits and Coverage, Centers for Medicare & Medicaid Servs. (May 21, 2013) (on file with NHeLP).
[14] *Koenning v. Suehs*, No. 12041187 (Appellant's Brief) (Jan. 25, 2013).

- Although Fifth Circuit precedent holds that individuals have a private right of action to enforce claims that conflicting state law was preempted by federal Medicaid requirements, the agency claimed that this precedent conflicted with Supreme Court case law.[15] The agency cited *Maine v. Thiboutot*, a 1980 case; *Alexander v. Sandoval,* a 2002 case; and *Horne v. Flores,* a 2009 case for the proposition that statutes that do not have express private rights of action cannot be enforced.[16]
- The Medicaid statute cannot be violated because it is merely a condition for funding and does not impose affirmative obligations on states. Thus, states may knowingly engage in activity that violates the Medicaid Act, then simply wait to see if federal authorities take action against them.
- States cannot be bound by the DME requirements because the reasonable standards provision, regulation, and *DeSario* Letter do not unambiguously impose requirements to cover mobile standers. This argument is based on *Pennhurst State School & Hosp. v. Halderman*, which holds that spending clause statutes (like Medicaid) must impose funding conditions unambiguously in order for states to be bound by them.[17]

In response, Plaintiffs cited numerous cases recognizing a private right of action under the Supremacy Clause to enjoin state law that conflicts with federal Medicaid requirements governing DME.

THHSC also argued that the *DeSario* Letter does not prohibit states from excluding specific items from the definition of DME. It acknowledged that states must allow claimants the opportunity to prove that an item not listed as DME could fit within the state's definition, but urged that this was not the same as prohibiting states from excluding items.[18] As it had below, it argued that it provided a means for beneficiaries to show that they were entitled to mobile standers based on "exceptional circumstances."

In response, Plaintiffs cited numerous cases holding that absolute exclusions violate the Medicaid Act, explaining that Defendant's policy was an absolute exclusion, and arguing that Defendant's "exceptional circumstances" policy did apply to mobile standers and, in any event, did not comply with Medicaid requirements.

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[15] *See, e.g., Planned Parenthood of Houston and S.E. Tex. v. Sanchez,* 403 F.3d 324, 337 (5th Cir. 2005).
[16] *Maine v. Thiboutot,* 448 U.S. 1 (1980); *Alexander v. Sandoval,* 532 U.S. 275 (2001); *Horne v. Flores, 557* U.S. 433 (2009).
[17] *Pennhurst*, 451 U.S. 1 (1981).
[18] Appellant's Brief, 31-32.

Further, THHSC attacked the District Court's decision on technical grounds. It argued that the court's judgment failed to incorporate the order for injunctive and declaratory relief into its final judgment. The agency also argued that the Court has no authority to "reverse" the decision of the state agency and remand to an independent contractor.[19] It also noted that the district court had incorrectly stated that there was no right to appeal an unfavorable administrative decision to state court.

The Fifth Circuit's Opinion

At oral argument, the Fifth Circuit panel focused mainly on whether the action on the Plaintiffs' individual claims mooted the case. After argument, it requested additional briefing on whether any of the following events rendered the case moot:

- the adoption of the October 2012 exceptions policy;
- Bradley Koenning and Morgan Ryal's receipt of the relevant medical equipment;
- the denial of the medical equipment to Brian Martin based on lack of medical necessity; and
- Martin's right to appeal the denial based on medical necessity through the state administrative process and, if necessary, the state courts.[20]

The parties agreed that Bradley and Morgan's claims were moot but argued that Brian's claims were live. The parties disagreed about the impact of any decision that the case was moot. THHSC urged the panel to vacate the district court's opinion and order, while Plaintiffs argued that the decision should stand. [21]

In a short, per curiam opinion, the panel dismissed the case as moot, and vacated the District Court's decision. It held that Bradley Martin's claims were moot because TMHP had denied coverage for a stander based on lack of medical necessity. It based this holding on the fact that Bradley had a right to challenge the denial through the state's administrative process and appeal to state court. It further noted that Bradley's claims "presume a medical need for a mobile stander" and therefore are no longer live.

The Fifth Circuit vacated the opinion and judgment, finding that it was in the public interest. It noted that the defendant had not intentionally mooted the prevailing parties' claims, which would be a reason not to vacate the opinion. It further held that "meaningful errors" by the District Court mitigated in favor of vacating the opinion, citing both the "remand" to a non-party entity and the failure

[19] *Id.* at 2-4.
[20] *Koenning,* NO. 12-41187 (Letter from Lyle Cayce, Clerk, Fifth Circuit Court of Appeals to Parties) (Aug. 6, 2013), Dkt. No. 00512332998.
[21] *Id.,* Letter Brief from Plaintiffs, Dkt. No. 00512337281 (Aug. 9, 2013); Letter brief from Defendant, Dkt. No. 00512337425 (Aug. 9, 2013).

to include declaratory and injunctive relief in the judgment thus creating "uncertainty . . . about the relief that it in effect." Moreover, the Court observed that the district court had incorrectly stated that Texas law does not provide for state court review of administrative hearing decisions.[22]

The Fifth Circuit's opinion says nothing about the merits of the case.

THHSC has petitioned the Fifth Circuit for rehearing en banc. Such petitions are strongly disfavored in the Fifth Circuit, however, NHeLP will update advocates on any further action.

Conclusion and recommendations

This opinion can and should be cited for its persuasive value. Though the district court's opinion has been vacated, the Fifth Circuit's opinion does not in any way suggest that the substantive holdings of the case were erroneous. Thus, the lower court's opinion can be cited to support arguments that there is an individual cause of action under the Supremacy Clause to enforce Medicaid's reasonable standards statute and rules governing coverage of DME. It also provides one more example of a court recognizing that absolute exclusions of specific types of DME violate Medicaid requirements and citing the DeSario letter in support. When citing the substantive holdings in *Koenning*, advocates will need to note that it was "vacated on other grounds."

Watch for future recurrence of the arguments about enforceability. Attorneys representing state Medicaid agencies are taking a cue from the dissent in *Douglas v. Independent Living Center* and urging courts to place limits on rights of action under the Supremacy Clause to enjoin state laws that conflict with federal laws. As the state did in that case, other states have argued that federal laws should not be enforceable through a Supremacy Clause claim if they are not enforceable through Section 1983. These arguments are focused in particular on federal programs enacted pursuant to Congress' Spending Clause power. In addition, states may argue that Medicaid requirements are not binding on states because they do not pass the *Pennhurst* clear statement rule.[23]

Legal support is available. If the Medicaid agency denies your client's request for coverage of DME, you can obtain advice and assistance from support centers. In addition to TASC technical assistance and resources , www.tascnow.com, the National AT Advocacy Project has extensive knowledge and resources on assistive technology, www.nls.org/natmain.htm, and the National Health Law Program can provide assistance on Medicaid generally and with civil procedure/court access issues. NHeLP has significant

[22] *Koenning,* 2013 WL 4430365, at *1.
[23] *See* fn. 17, *supra.*

resources on enforcement through Section 1983 and the Supremacy Clause, including briefing. www.healthlaw.org.