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Among its other provisions, the Affordable Care Act (the "ACA") broadened the population of persons eligible to enroll in Medicaid to include "individuals under the age of 65 with incomes below 133 percent of the federal poverty line,"^[2] collectively referred to as the "expansion population."^[3] Under the ACA, states enjoy the freedom to choose whether or not to extend coverage to the expansion population.^[4] Kentucky is among the majority of states that has elected to participate in the expansion,^[5] which took effect on January 1, 2014.^[6] As a result, nearly half a million Kentucky residents gained coverage based solely on their income.^[7]

Section 1115 of the Social Security Act permits the Secretary of the Department of Health and Human Services (the "HHS") to waive states' compliance with particular Medicaid requirements "to the extent and for the period" necessary for states to carry out "experimental, pilot, or demonstration project[s]."^[8] The waiver provision affords the Secretary considerable, though not absolute, deference to approve "those projects that 'in [his] judgment . . . [are] likely to assist in promoting the [Act's] objectives."^[9]

In 2016, Governor Matt Bevin applied for a Section 1115 waiver in a stated effort to "comprehensively transform [Kentucky's] Medicaid" program.^[10] The HHS, through its Centers for Medicare and Medicaid Services ("CMS") office, approved the five-year "KY HEALTH" project.^[11] The most controversial portion of the project, and the focus of this post, is an initiative entitled "Kentucky HEALTH."^[12] The current version of Kentucky HEALTH establishes the following: a static community engagement or work requirement of eighty hours per month for all non-disabled enrollees, online monthly reporting requirements, a six-month lockout period for failure to reenroll within a set timeframe, mandatory monthly premiums varied by income, and more.^[13] By its own estimate, the state predicts that roughly ninety-five thousand individuals will lose their coverage over the course of the program.^[14]

Traditionally, the HHS has rejected state waivers that sought to condition Medicaid eligibility on the fulfillment of work requirements.^[15] From the outset of President Donald Trump's tenure, he has made his desire to repeal the ACA clear.^[16] Consistent with that objective, the HHS, in a letter to every state governor, encouraged states to submit waivers to restructure their respective Medicaid programs.^[17] In its letter, the HHS denounced the expansion as "a clear departure from the core, historical mission" of Medicaid.^[18] Moreover, the CMS recently announced its intention to assist states with implementing waiver projects involving work and community engagement requirements,^[19] the execution of which would inevitably result in a reduction of Medicaid enrollees within the expansion population. Arkansas was the first state to implement work requirements into its Medicaid program.^[20] Due in large part to the confusing reporting mandates, the project has resulted in a loss of coverage for over eighteen thousand individuals since its implementation nearly eight months ago.^[21]

In 2017, a class of Kentucky Medicaid enrollees successfully challenged HHS's approval of Kentucky HEALTH in federal court.^[22] Applying an arbitrary and capricious standard of review, the court vacated the Secretary's



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approval because of his failure to consider whether Kentucky HEALTH would further one of Medicaid's primary objectives of "furnishing medical assistance" to eligible individuals.^[23] The court emphasized its narrow holding by declining to discuss the permissible scope of state demonstration waivers.^[24] Ultimately, the court remanded the Kentucky HEALTH program back to HHS for reconsideration.^[25] Prior to its reapproval, HHS opened a new comment period and received over 8,500 public comments.^[26] Despite strong opposition,^[27] the HHS reapproved a slightly revised version of the plan.^[28] Another class of plaintiffs has since filed an amended complaint in the same court.^[29] Pending the outcome of the renewed litigation, most of the Kentucky HEALTH program is slated to begin on April 1, 2019.^[30] The Kentucky Cabinet for Health and Family Services recently announced its decision to delay the enforcement of the community engagement requirements until at least June 1, 2019.^[31]

The primary critique among opponents of Kentucky HEALTH is that the program creates barriers to the continued receipt of coverage by adding more administrative hurdles for beneficiaries to overcome, which is contrary to the aim of Medicaid.^[32] Research indicates that complex Medicaid programs adversely affect enrollees' retention of coverage.^[33] For instance, an inadvertent failure to report an insignificant change in income could result in a temporary loss in coverage.^[34] Even a temporary loss in coverage could prove disastrous for those individuals whose prompt and uninterrupted access to care is imperative to their well-being.^[35]

On the other hand, proponents of Kentucky HEALTH applaud the program's objective of incentivizing self-sufficiency.^[36] Further, the CMS supports the program's goals of improving health outcomes, reducing dependency on government assistance, decreasing the financial burden on the federal and state governments, and preparing individuals for the commercial health insurance market.^[37]

The potential outcome of the renewed litigation is tough to predict. In its reapproval, the HHS heeded the court's criticism and offered a much more thorough analysis of its decision.^[38] Because of the highly deferential nature of the arbitrary and capricious standard of review for agency determinations,^[39] the court may elect to merely uphold the agency's reapproval without reaching the merits of the waiver itself. Alternatively, the court may decide to issue a broader ruling and address the issues it chose to set aside in its initial opinion, including whether the Secretary exceeded his waiver authority in his reapproval of Kentucky HEALTH and in his letter to state Medicaid directors.^[40]

The decision will have major implications in light of other states' attempts to follow in Kentucky's footsteps.^[41] If the court blocks Kentucky HEALTH again, Governor Bevin may order the Kentucky Cabinet for Health and Family Services to terminate the state's Medicaid expansion *altogether* once all appeals are exhausted.^[42] Regardless of the outcome, Kentucky's Medicaid battle is only one part of a much larger political discourse regarding the future of expanded Medicaid as a whole.^[43]

[1] J.D. expected 2020, University of Kentucky College of Law.

[2] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576 (2012).

[3] Stewart v. Azar, 313 F. Supp. 3d 237, 243 (D.D.C. 2018).

[4] *Id.* at 244 (citing *Sebelius*, 567 U.S. at 587).

[5] *Status of State Action on the Medicaid Expansion Decision*, KAISER FAMILY FOUND. (Jan. 23, 2019), <https://www.kff.org/state-category/health-reform/medicaid-and-health-reform-health-reform/> (follow "Status of State Action of the Medicaid Expansion Decision" hyperlink under "Medicaid and Health Reform").

[6] ALISON MITCHELL, CONG. RESEARCH SERV., R43564, THE ACA MEDICAID EXPANSION (2014).

[7] *See Medicaid in Kentucky*, KAISER FAMILY FOUND. (Nov. 2018), <http://files.kff.org/attachment/fact-sheet-medicaid-state-KY> (finding that about 462,000 adults make up the expansion population in Kentucky).

[8] 42 U.S.C. § 1315(a) (2018).

[9] Stewart v. Azar, 313 F. Supp. 3d 237, 244–45 (quoting 42 U.S.C. § 1315(a)).

[10] *Kentucky HEALTH Demonstration Application*, MEDICAID.GOV 4–14 (Aug. 24, 2016), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-pa.pdf>.

[11] Letter from Demetrios L. Kouzoukas, Principal Deputy Adm'r, Ctrs. for Medicare & Medicaid Servs., to Stephen P. Miller, Comm'r, Commonwealth of Ky. Cabinet for Health & Family Servs. (Jan. 12, 2018), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By->

Topics/Waivers/1115/downloads/ky/health/ky-health-cms-appvl-011218.pdf (approving the entire demonstration project “Kentucky Helping to Engage and Achieve Long Term Health”).

[12] *Stewart*, 313 F. Supp. 3d at 243.

[13] *Kentucky HEALTH State Demonstration Application*, MEDICAID.GOV 4–32 (July 19, 2018), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-pa3.pdf>.

[14] *Stewart*, 313 F. Supp. 3d at 260.

[15] Kalena Thomhave, *Kentucky Sends an Ominous Signal About the Future of Medicaid*, THE AM. PROSPECT (Sept. 28, 2017), <https://prospect.org/article/kentucky-sends-ominous-signal-about-future-medicaid> (“Obama Medicaid officials denied these requests, arguing that work requirements are inconsistent with the intent of the Medicaid program; mandating that people work, . . . could undermine Medicaid’s goal of providing health care for all eligible people.”).

[16] See Exec. Order No. 13,765, 82 Fed. Reg. 8351 (Jan. 20, 2017).

[17] Letter from Thomas E. Price, Sec’y, Dep’t of Health & Human Servs., and Seema Verma, Adm’r, Ctrs. for Medicare & Medicaid Servs., to Governors (Mar. 14, 2017), <https://www.hhs.gov/sites/default/files/sec-price-admin-verma-ltr.pdf>.

[18] *Id.*

[19] Letter from Brian Neale, Dir., Ctrs. for Medicare & Medicaid Servs., to State Medicaid Dirs. (Jan. 11, 2018), <https://www.medicaid.gov/federal-policy-guidance/downloads/smd18002.pdf>.

[20] Robin Rudowitz et al., *Year End Review: December State Data for Medicaid Work Requirements in Arkansas*, KAISER FAMILY FOUND. (Jan. 17, 2019), <https://www.kff.org/medicaid/issue-brief/state-data-for-medicaid-work-requirements-in-arkansas/>.

[21] *Id.*

[22] See *Stewart v. Azar*, 313 F. Supp. 3d 237, 243 (D.D.C. 2018).

[23] *Id.* at 272–74.

[24] See *id.* at 272.

[25] *Id.* at 274.

[26] Letter from Paul Mango, Chief Principal Deputy Adm’r & Chief of Staff, Ctrs. for Medicare & Medicaid Servs., to Carol H. Steckel, Comm’r, Commonwealth of Ky. Dep’t for Medicaid Servs. 11 (Nov. 20, 2018), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-ca.pdf>.

[27] Deborah Yetter, *Thousands Plead with the Feds to Stop Bevin’s Medicaid Overhaul*, LOUISVILLE COURIER J. (Aug. 28, 2018), <https://www.courier-journal.com/story/news/politics/2018/08/28/matt-bevin-kentucky-medicaid-reform-ripped-thousands-public-comments-cms/1084756002/> (“Comments are running about 20 to 1 against the plan known as a ‘waiver,’ according to an analysis by a team of Kentucky health advocates who have been working since Aug. 18 to read all of the comments.”).

[28] Letter from Paul Mango, *supra* note 26, at 1.

[29] First Amended Class Action Complaint for Declaratory and Injunctive Relief, *Stewart v. Azar*, No. 1:18-cv-00152-JEB (D.D.C. Jan. 14, 2019).

[30] *Cabinet Releases Updated Medicaid Budget Predictions and Kentucky HEALTH Implementation Timeline*, KENTUCKY.GOV (Jan. 31, 2019), https://kentuckyhealth.ky.gov/SiteCollectionDocuments/Important%20Information%20Regarding%20Medicaid_Press%20Release_01312019.pdf.

[31] *Id.*

[32] See *Center Comments on the Kentucky HEALTH Medicaid Section 1115 Waiver*, CTR. FOR MEDICARE ADVOCACY (Aug. 18, 2018), <https://www.medicareadvocacy.org/center-comments-on-the-kentucky-health-medicaid-section-1115-waiver/> (“Kentucky HEALTH should be rejected as it will lead to substantial coverage losses due to its proposal to take health coverage away from individuals . . . who are working or eligible for an exemption but fail to meet the paperwork requirements.”); Judith Solomon, *Kentucky Waiver Will Harm Medicaid*

Beneficiaries, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 16, 2018), <https://www.cbpp.org/research/health/kentucky-waiver-will-harm-medicaid-beneficiaries>.

[33] Margot Sanger-Katz, *Hate Paperwork? Medicaid Recipients Will be Drowning in it*, N.Y. Times (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/upshot/medicaid-enrollment-obstacles-kentucky-work-requirement.html>, see also Yetter, *supra* note 27 (“Many critics say that it [Kentucky HEALTH] is overly complicated and the new reporting and documentation demands will confuse people or discourage them from participating.”).

[34] Solomon, *supra* note 32.

[35] See Julia Paradise & Rachel Garfield, *What is Medicaid's Impact on Access to Care, Health Outcomes, and Quality of Care? Setting the Record Straight on the Evidence*, KAISER FAMILY FOUND. (Aug. 2, 2013), <https://www.kff.org/report-section/what-is-medicaids-impact-on-access-to-care-health-outcomes-and-quality-of-care-setting-the-record-straight-on-the-evidence-issue-brief/> (“Continuity in Medicaid coverage makes a difference. Research has shown that interruptions in Medicaid coverage can lead to greater emergency department use as well as significant increases in hospitalization for conditions that can be managed on an ambulatory basis.”).

[36] See, e.g., *Bluegrass Institute for Public Policy Solutions Urges Approval for Kentucky's Section 1115 Medicaid Waiver Request*, BLUEGRASS INSTITUTE, <http://www.bipps.org/wp-content/uploads/2018/08/CMS-Submitted-Comment-BIPPS-urges-approval-for-Kentucky's-Section-1115-Medicaid-waiver-request.pdf>.

[37] Letter from Paul Mango, *supra* note 26, at 6–9.

[38] See *id.* at 1–20 (addressing the projected loss in coverage and opposing comments in detail).

[39] See *Stewart v. Azar*, 313 F. Supp. 3d 237, 259 (D.D.C. 2018).

[40] See First Amended Class Action Complaint, *supra* note 29, at 77–83.

[41] See *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, KAISER FAMILY FOUND. (Jan. 23, 2019), <https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/#Table2> (showing that fifteen states have been approved for or having pending waivers with work requirements and nine states have been approved for or have pending waivers with premium provisions).

[42] Jessica M. Pieklo, *Kentucky's Governor Wants to Gut Medicaid Benefits – One Way or Another*, REWIRE.NEWS (July 2, 2018), <https://rewire.news/article/2018/07/02/kentuckys-governor-wants-gut-medicaid-benefits-one-way-another/>. In response to the court's initial opinion, Governor Bevin cancelled dental and vision benefits entirely for the expansion population. Peter Sullivan, *Ky. Governor Cancels Medicaid Dental, Vision Benefits After Losing Work Requirement Ruling*, THE HILL (July 2, 2018, 11:20 AM), <https://thehill.com/policy/healthcare/395155-kentucky-governor-cancels-medicaid-dental-vision-benefits-after-losing>.

[43] See, e.g., *Texas v. United States*, 340 F. Supp. 3d 579, 619 (N.D. Tex. 2018) (holding that the individual mandate in the ACA is unconstitutional and that the remaining provisions of the ACA, including Medicaid expansion, “are inseverable and therefore invalid”). The district court stayed his judgment for the duration of the appeals process, and the case is currently pending appeal in the Fifth Circuit. *Update on Texas v. US Case*, AM. BAR ASS'N (Jan. 18, 2019), https://www.americanbar.org/groups/health_law/section-news/2019/01/updated-texas/.

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