

Health Advocate

E-Newsletter of the National Health Law Program

Volume 32

December 2014

2014 Litigation Round Up

Prepared by: Jane Perkins

Key Resources

Perkins & Singh, *ACA Implementation: The Court Challenges Continue*, 23 LOYOLA U. CHICAGO SCH. OF L. ANNALS OF HEALTH L. 59 (2014)

Tawatao, Deford, Perkins & Smith, *The Supreme Court's 2013-2014 Term: Both Divided and Unanimous*, 48 CLEARINGHOUSE REV. J. OF POV. L. & POL. 159 (Nov.-Dec. 2014)

Perkins, *Update on Private Enforcement of the Medicaid Act: The Supremacy Clause and 42 U.S.C. § 1983* (Oct. 13, 2014), available [here](#).

Mayhew v. Burwell, Amicus Brief of NHeLP, Maine Equal Justice Partners et al. (Aug. 2014), available [here](#).

Halbig v. Burwell, Amicus Brief of AARP, NHeLP and Southern Poverty Law Center (Nov. 2014), available [here](#).

This issue of the Health Advocate provides NHeLP's annual summary of the year's important cases. The 2014 litigation sets the stage for Supreme Court action in 2015 which could radically alter health reform and advocacy on behalf of low-income people.

ACA Litigation – Taking Aim at Affordable Health Care

The Affordable Care Act (ACA) establishes health insurance exchanges where people can go to purchase coverage and, if they have limited income, obtain premium assistance to help them afford it. The ACA gives states the option to establish a state-run exchange, a partnership exchange with the federal government, or not to create an exchange and allow the federal government to run the exchange in that state instead.

During 2014, litigants in Virginia, the District of Columbia, Oklahoma and Indiana focused on a seven-word phrase in an ACA subsection to argue that premium subsidies are available only “through an Exchange *established by the State*.” 26 U.S.C. § 36B(b)(2)(A) (emphasis added). Citing the provision, they challenged IRS regulations implementing the ACA to allow all individuals access to premium assistance through an “Exchange,” whether it is operated by the state or by the federal government for the state.

In the leading case, *King v. Burwell*, the Fourth Circuit Court of Appeals rejected that argument. *See* 759 F.3d 358 (4th Cir. 2014). The Court relied upon traditional rules of statutory construction that require courts to read statutes as a whole, not as phrases in isolation. Doing so, the Court placed the disputed seven-word phrase in context and concluded that Congress clearly intended the subsidy provisions to apply in all exchanges. The Court noted, however, that even if the phrase was ambiguous, the IRS had authority to implement the statute and its regulations took a reasonable path to implementation. The *King* plaintiffs immediately asked the Supreme Court to take the case and reverse it.

On November 7, 2014, the Supreme Court agreed to accept the case. This was a surprise because there is no split among the federal circuit courts on the underlying issue, and a circuit split is the usual precursor to Supreme Court review. Notably, the D.C. Circuit Court of Appeals had vacated the opinion of a deeply split panel in *Halbig v. Sebelius* that had limited the subsidies to state-run exchanges. The full D.C. Circuit

**Coming in
January's
Health Advocate:
New Year's Resolution**

was set to hear oral arguments in December 2014. *See* 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014), *granting rehearing en banc and vacating* 758 F.3d 390 (D.C. Cir. 2014). Meanwhile, briefing was underway in the Tenth Circuit, with no date set for an oral argument. Nevertheless, at least four Supreme Court justices—the number needed for the Court to decide to review a case—decided not to wait on the lower courts and agreed to take the case. As a result, the D.C. and Tenth Circuit cases are being held in abeyance pending the decision in *King*.

The Supreme Court will likely hear oral argument in March of 2015, with a decision expected in June. The case should be followed closely, not only because of the subject matter, but for what it will reveal about how justices decide cases. For example, Justice Scalia strongly supports focusing on the words of the statute to determine congressional intent. Just last term, however, he acknowledged “the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Utility Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2441 (2014).

Beyond the question of whether the Court engages in principled decision-making, the underlying decision will be critical. If the Court reverses the Fourth Circuit and strikes down the IRS regulations, the ACA will have been dealt a potentially fatal blow. Thirty-six states, serving about 75 percent of the people nationwide who qualify for premium subsidies, allow the federal government to operate the exchange. People living in these states with limited income will almost certainly be unable to afford health insurance without the subsidies.

ACA Litigation – Taking Aim at Reproductive Health Services

In *Burwell v. Hobby Lobby Stores, Inc. et al.*, the Supreme Court held that some closely held for-profit corporate employers do not have to comply with the ACA requirement to include coverage of contraception in their employee health plans. *See* 134 S. Ct. 2751 (2014). The plaintiffs in *Hobby Lobby* objected to four contraceptive methods because of their religious beliefs. Albeit not supported by evidence-based medicine, they believe that those methods are abortifacients. The corporations filed suit under a federal statute, the Religious Freedom Restoration Act (RFRA), and the U.S. Constitution. The Court decided the case on the RFRA claim. RFRA provides that the federal government “shall not substantially burden a person’s exercise of religion” unless the burden “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”

In a 5-4 decision, the Court held that RFRA allowed the corporate employers before it to deny their employees (and dependents of those employees) the mandated contraceptive coverage. The Court concluded that the companies were “persons” within the meaning of RFRA and that the ACA’s requirement to provide insurance coverage of contraception was not the least restrictive means of guaranteeing that coverage. The majority expressly noted that it was not addressing other coverage requirements, such as immunizations, or handing a shield to employers seeking to discriminate in hiring on the basis of race or other prohibited factors. The Court, however, did not explain why its analysis would not apply to these other contexts. As a result, at least some closely held companies can offer their employees insurance coverage that excludes contraception. The federal government has proposed rules that would extend an accommodation to such companies. Under the proposal, the companies would not have to pay for contraceptive coverage, but their employees would nonetheless still receive payment for contraceptive services.

Federal courts of appeals also decided cases where non-profit entities challenged a U.S. Department of Health and Human Services (HHS) “accommodation,” which allowed them to refuse to cover or pay for contraceptive coverage, but ensured that impacted employees would still receive the contraceptive coverage benefit. At first, federal regulations provided an accommodation allowing non-profit religious organizations to complete a form

asserting a religious objection, provide the form to their health plan or third-party administrator (TPA), and thereby transfer responsibility for contraceptive coverage to that health plan or TPA. Some religious groups argued that the act of completing such a “permission slip” violates their religious beliefs because it facilitates the provision of contraceptive coverage by a third party.

Every appellate court that heard the permission slip argument—the D.C., Sixth and Seventh Circuits—rejected it and upheld the accommodation. All reasoned that the obligation to cover contraception was triggered by enactment of the ACA, not the form. Further, the inability to restrain religiously objectionable behavior by a third party does not impose a burden on the exercise of religion. See *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, ___ F.3d ___, 2014 WL 5904732 (D.C. Cir. Nov. 14, 2014) (noting that the regulatory requirement to “use a sheet of paper to signal the[] wish to opt out is not a burden that any precedent allows us to characterize as substantial”); *Michigan Catholic Conference v. Burwell*, 755 F.3d 372 (6th Cir. 2014); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547 (7th Cir. 2014), *pet. for cert. filed* (Oct. 3, 2014). In a similar case, *Wheaton College v. Burwell*, the Seventh Circuit refused to enjoin the accommodation requirement while the appeal is pending. But just after issuing *Hobby Lobby*, the Supreme Court enjoined the same requirement pending appeal. The Court held that if Wheaton College informed HHS in writing that it qualified for the accommodation, HHS could not apply the provision to the college. The *Wheaton College* order came over the strong objections from Justices Sotomayor, Ginsburg and Kagan. See 134 S. Ct. 2806 (2014). Since then, HHS adopted an interim final rule that allows non-profits seeking the accommodation to complete the form and send it to their health plan or TPA or send written notice directly to HHS stating the entities’ desire to receive the accommodation.

ACA Litigation – Enforcing the Medicaid Maintenance of Effort Requirement

In *Mayhew v. Burwell*, the First Circuit upheld the constitutionality of 42 U.S.C. § 1396a(gg)(2), which prohibits states from implementing Medicaid eligibility standards for children that are more restrictive than those in effect when the ACA was enacted on March 23, 2010. See 772 F.3d 80 (1st Cir. 2014). This maintenance of effort (MOE) requirement lasts until October 1, 2019. *Mayhew* rejected the Maine Department of Health and Human Services’ argument that the provision was unconstitutional under *National Federation of Independent Business (NFIB) v. Sebelius*, 132 S. Ct. 2566 (2012) (finding the ACA’s mandatory Medicaid expansion to childless adults with incomes below 133 percent of the poverty level to be unconstitutionally coercive on the states). The Court found the MOE for children is “simply an unexceptional alternation” of the boundaries of the Medicaid program that *NFIB* expressly found to be constitutional.

Access to Court – Preemption

Under the Supremacy Clause, the laws of the United States “shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.

The Supreme Court and all of the federal courts of appeals have repeatedly recognized Supremacy Clause claims brought by individual plaintiffs, from large businesses to Medicaid beneficiaries. In 2011 the Court took a case, *Douglas v. Independent Living Center of Southern California*, to decide whether Medicaid recipients and providers can maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) [the Medicaid equal access provision] by asserting that the provision preempts a state law reducing reimbursement rates. 131 S. Ct. 992 (2011). The Court ultimately refused to decide the question because the Centers for Medicare & Medicaid Services (CMS) expressly approved the state’s position in the underlying substantive dispute while the case was pending before the Court. At that point, a 5-member majority of the justices voted to remand the case to the lower court to determine whether CMS’s action was entitled to deference or whether it was arbitrary under the Administrative Procedure Act. 132 S. Ct. 1204 (2012). Chief Justice Roberts wrote a strongly worded dissent and argued that Spending Clause enactments, such as Medicaid, cannot be enforced through the Supremacy Clause.

During 2014, the Fifth and Ninth Circuit Courts of Appeals refused to accept arguments to adopt the *Douglas* dissent. The Fifth Circuit rejected the argument that Medicaid beneficiaries do not have an implied cause of action under the Supremacy Clause to enjoin state laws that conflict with the Medicaid Act's reasonable standards provision. *Detgen ex rel. Detgen v. Janek*, 752 F.3d 627 (5th Cir. 2014). Noting that the Supreme Court had "dodged the question" of Supremacy Clause enforcement, the Fifth Circuit applied controlling precedent and held that the "Supremacy Clause confers an implied private cause of action to enforce all Spending Clause legislation by bringing preemption actions." *Id.* at 630.

The Ninth Circuit confirmed the availability of the Supremacy Clause cause of action in *Exceptional Child v. Armstrong*, 567 F. App'x 496 (9th Cir. 2014). In that case, a group of Medicaid-participating health care providers complained that Idaho's Medicaid payment rates for supported living services are inconsistent with, and thus preempted by, the equal access provision. In a brief two-page opinion, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the providers, citing the "well-established law of the Supreme Court, this court, and other courts" recognizing an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement of a state law. 567 Fed. App'x at 497.

On October 2, 2014, the Supreme Court granted certiorari in *Exceptional Child* to decide the question that was dodged in *Douglas*: "Does the Supremacy Clause give Medicaid providers a private right of action to enforce § 1396a(a)(30)(A) against a state where Congress chose not to create enforceable rights under that statute?" 135 S. Ct. 34. Oral argument in this case will likely occur in January 2015, with a decision to come later in the term.

Notably, the post-*Douglas* appellate decisions are not uniform. During 2014, the Tenth Circuit ruled against the plaintiffs in a case involving Title X of the Social Security Act. Much about the case, *Planned Parenthood of Kansas & Mid-Missouri v. Moser*, is unusual. 747 F.3d 814 (10th Cir. 2014). Two members of the *Moser* panel, over the objection of the third, asked for supplemental briefing on the Supremacy Clause issue even though all parties agreed that the plaintiffs had a cause of action under the Supremacy Clause. In a split opinion, the majority opinion explicitly adopts the Chief Justice's dissent in *Douglas*. Judge Lucero issued an extensive, forceful dissent, noting that:

[I]tigators and the public at large are entitled to receive decisions from our court rooted in precedent and based on rigorous analysis of the parties' submissions. Today's decision meets neither test. Instead, the majority conveniently defenestrates controlling precedent and proceeds on substituted premises. *Id.* at 843 (Lucero, dissenting).

Conclusion

Federal and state policy making—both legislative and administrative—receive everyday attention. Activity in the judicial branch of government does not have the same profile. In 2014, appellate courts issued opinions that go straight to the heart of health care reform and court access for low-income people. What remains to be seen is what the nine justices of the Supreme Court will do in 2015.

About Us

The National Health Law Program protects and advances the health rights of low income and underserved individuals. The oldest non-profit of its kind, NHeLP advocates, educates and litigates at the federal and state level.

Author

The following NHeLP attorney contributed to this month's *Health Advocate*:

[Jane Perkins](#)
Legal Director
DC Office



Offices

Washington, DC

1444 I Street NW, Suite 1105
Washington, DC 20005
(202) 289-7661
nhelpdc@healthlaw.org

Los Angeles

3701 Wilshire Blvd, Suite 750
Los Angeles, CA 90010
(310) 204-6010
nhelp@healthlaw.org

North Carolina

101 East Weaver Street, Suite G-7
Carrboro, NC 27510
(919) 968-6308
nhelpnc@healthlaw.org

Support

NHeLP's work is supported by individual donations, which are tax deductible. To learn more, please visit www.healthlaw.org