Case Summary: Georgia v. Brooks-LaSure--Medicaid Work Requirements Reappear[1]

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A federal court has set aside a decision by the Centers for Medicare & Medicaid Services (CMS) that had rescinded the work requirement and premium components of a section 1115 Medicaid project. The US Department of Justice did not appeal the ruling.

After summarizing section 1115, we will discuss the case, *Georgia v. Brooks-LaSure*, No. 2:22-cv-6, 2022 WL 3581859 (S.D. Ga. Aug. 19, 2022).

Discussion

Georgia v. Brooks-LaSure concerns a section 1115 Medicaid waiver. Section 1115 of the Social Security Act authorizes the U.S. Secretary of Health and Human Services to allow a state to depart from otherwise mandatory requirements of the Medicaid Act. To be approvable, the project must, first, be an "experimental, pilot, or demonstration" project—one that takes a "novel approach" to program administration.[3] *Second*, the project must be "likely to promote the objectives of the Medicaid Act."[4] The Medicaid Act's purpose is to enable states "to furnish[] medical assistance" to individuals "whose income and resources are insufficient to

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[3] *Beno v. Shalala*, 30 F.3d 1057, 1069 (9th Cir. 1994) (discussing 42 U.S.C. § 1315(a)).
[4] 42 U.S.C. § 1315(a)).

meet the costs of necessary medical services" and to provide "rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care."[5] Thus, the "central objective" of the Act is "to provide medical assistance," that is to provide health coverage to those who cannot afford it.[6]

Third, section 1115 only allows the Secretary to waive the provisions of one section of the Medicaid Act, section 1396a. This places much of the Act off limits: sections 1396-1 and 1396b through 1396w-6.[7] *Fourth*, projects are supposed to be time-limited, approved only "to the extent and for the period … necessary" to carry out the experiment.[8]

Citing section 1115, the Trump administration authorized 13 states to condition Medicaid eligibility on individuals meeting work requirements and, in some instances, paying heightened premiums.[9] The waivers permitted states to kick people off the Medicaid rolls who could not comply, including those who did work the requisite number of hours or otherwise qualify for coverage under a state's project, but did not sufficiently report their hours to the state or satisfy other burdensome administrative requirements. Medicaid beneficiaries from five of the affected states (KY, AR, NH, MI, IN) challenged these approvals as violating the Administrative Procedure Act. Multiple federal district court and court of appeals decisions followed, in each case vacating the waivers because, among other things, they were inconsistent with the objectives of the Medicaid Act.[10] Upon taking office, President Biden withdrew the work

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[5] *Id.* at § 1396-1; *id.* § 1396d(a) (defining "medical assistance" as provision of, or payment for, specified health care and services). The Trump administration tried to "excise[] the language about 'independence or self-care,' treating those as stand-alone objectives of the Act. The text, however, quite clearly limits its objectives to helping States furnish *rehabilitation and other services* that might promote self-care and independence." *Stewart v. Azar*, 313 F. Supp. 3d 237, 271 (D.D.C. 2018) ("*Stewart I*").

[6] *Stewart v. Azar*, 366 F. Supp. 3d 125, 138 (D.D.C. 2019) ("*Stewart II*"); *id.* at 144 (rejecting "promoting health" as an independent objective, noting the Medicaid Act is "designed … to address not health generally but the provision of care to needy populations" through health insurance).

[7] 42 U.S.C. § 1315(a)(1).

[8] *Id.*

[9] Kaiser Fam. Found., *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State* (Sept. 20, 2022), https://www.kff.org/report-section/section-1115-waiver-tracker-work-requirements/ (AZ, AR, GA, IN, KY, ME, MI, NE, NH, OH, SC, UT, WI).

[10] *Gresham v. Azar*, 950 F.3d 93 (D.C. Cir. 2020), *aff'g*, 363 F. Supp. 3d 165 (D.D.C. 2019) (vacating Arkansas project), *vacated and remanded as moot*, 142 S. Ct. 1665 (2022) *Philbrick v. Azar*, No. 1:19-cv-00773-JEB, 2020 WL 2621222, *aff'g*, 397 F. Supp. 3d 11 (D.D.C. 2019) (vacating New Hampshire

requirement policies and, after providing the states with the opportunity to submit additional information, rescinded the approved work requirement waivers in each state with an approved waiver, including Georgia.

Georgia v. Brooks-LaSure

CMS approved the "Georgia Pathways" project in October 2020. Importantly, Georgia has refused to expand Medicaid under the Affordable Care Act; thus, most low-income adults remain excluded from the state's Medicaid program. As approved by the Trump administration, individuals with incomes below the federal poverty level (FPL) are eligible to "opt in" to coverage. To opt in, they must engage in 80 hours of qualifying work activities each month and pay premiums if their incomes exceed 50% of the FPL.[11] On December 23, 2021 and before the project was ever implemented, the Biden administration issued a 37-page letter rescinding approval of the work and premium requirements and explaining the reasons for the rescission.[12] Georgia challenged the decision in federal court. In *Georgia v. Brooks-LaSure*, Judge Lisa Godbey Wood vacated the rescission, making Georgia the only state in the country currently allowed to implement a Medicaid work requirement. Discussion of the arguments presented and the court's rulings follows.

A. CMS's action rescinding the approval was reviewable.

The federal government argued that rescission of the waivers was committed to agency discretion—in other words, not reviewable by a court at all.[13] Courts have consistently rejected

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project), *remanded*, 142 S. Ct. 1665 (2022); *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019), *earlier opin.*, 313 F. Supp. 3d 237 (D.D.C. 2018) (vacating Kentucky project); *Young v. Azar*, No. 1:19-cv-03526 (D.D.C. Mar. 4, 2020 (Minute Order vacating Michigan work requirements); *see also Rose v Becerra*, No. 1:19-cv-02848 (D.D.C. filed Sept. 23, 2019) (stayed during COVID public health emergency).

[11] 2022 WL 3581859 at *3 (describing approved waiver).

[12] Letter from Chiquita Brooks-LaSure, CMS Admin., to Caylee Noggle, Comm'r, Ga. Dept. of Community Health ("CMS Rescission Letter") (Dec. 23, 2021), https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ga/ga-pathways-to-coverage-12-23-2021-ca.pdf.

[13] *See* Defs' Mot. to Dismiss or, in the Alternative, Cross-Motion for Summ. J. & Mem. in Support at 2, 11-12, *Georgia v. Brooks-LaSure*, No. 2:22-CV-6 (S.D. Ga. May 5, 2022), https://affordablecareactlitigation.files.wordpress.com/2022/05/3889140-0-49241.pdf.

the government's argument that the *approval* of a section 1115 waiver application is committed to agency discretion.[14] Here, CMS *revoked* its approval because the agency determined that the waiver is not likely to achieve Medicaid's statutory purposes.[15] This is the mirror image of the finding that CMS must make to approve a Section 1115 project, that the project is likely to promote the Medicaid Act's objectives. This standard provides courts with law to apply when reviewing the agency's decision. There is no reasoned way to distinguish the court's ability to review the agency's rescission of an approved project from the approval itself. Judge Wood easily rejected this argument.

B. CMS's rescission was arbitrary and capricious.

Georgia claimed the rescission violated the Administrative Procedure Act. The opinion begins with some hornbook law, noting for example that a court's role in an APA case is to "simply ensure[e] that the agency has acted within a zone of reasonableness" and the standard of review is "exceedingly deferential."[16] However, courts are "not a rubber stamp."[17] The court then identifies six critical errors made by CMS:

1. CMS failed to weigh the possibility that rescission would reduce coverage.

The opinion depends on the fact that Georgia had not extended coverage to adults living below the FPL at the time the project was approved. And from here "[t]he concept is simple: if Pathways increases Medicaid coverage in Georgia, then it inescapably follows there would be more Medicaid coverage in Georgia *with* Pathways than *without* it."[18] The Court finds that "CMS did not mention, let alone consider or weigh that fact."[19]

There are problems with this reasoning. It ignores what the rescission letter says. As it weighs the project's extension of coverage to additional people against the work and premium requirements, CMS acknowledges the State's estimates that 31,093 individuals would receive coverage in year one and 64,336 would gain coverage over the course of the five-year demonstration.[20] However, by the court's reasoning, *any* waiver that results in a coverage increase would have to be approved, a holding that severely limits the Secretary's discretion

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[14] 2022 WL 3581859, at *10 (citing cases).
[15] *See* CMS Rescission Letter, *supra* n. 11, at 2, 7.
[16] 2022 WL 3581859, at *11 (citations omitted).
[17] *Id.* (citation omitted).
[18] *Id.* at *12 (emphasis in original).
[19] *Id.*
[20] *See* CMS Rescission Letter, *supra* n. 11, at 12, 18-19.

under section 1115, which says "the Secretary may" approve a state's waiver request (not that he must).[21]

2. *CMS improperly measured the project against a baseline of full Medicaid expansion, rather than taking the demonstration on Georgia's terms.*

Judge Wood decided that CMS committed reversible error when it failed to accept the project on the terms presented to it by Georgia, namely that Pathways applies to some people who are not currently eligible for Medicaid in Georgia (adults with incomes below the FPL) and that conditions on coverage—work requirements and premiums—may extend coverage to fewer people than CMS would like.[22]

Again, this reasoning is flawed. The district court says the only way to avoid the conclusion that Pathways will expand coverage is to compare the project to "a world where *everyone* is covered" and "[t]hat is not the test the statute or the regulations envision."[23] But that is the very test envisioned by the statute. As part of the Affordable Care Act, Congress added a provision to the Medicaid Act requiring states to extend coverage to adults with incomes below 133% of the FPL.[24] In *National Federation of Independent Business v. Sebelius*, the Supreme Court held that requiring states to implement that provision would be unconstitutionally coercive and prohibited the Secretary from enforcing it by withholding all federal Medicaid payments from a state refusing to take it up. However, as the Court stated, elimination of that financial penalty fully remedied the constitutional violation.[25] Thus, *NFIB* did not eliminate the statutory coverage requirement, it only removed the stick that Congress sought to use to ensure that all states expanded coverage.[26]

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[21] 42 U.S.C. § 1315(a). The court's opinion does acknowledge (in a footnote) that the agency does not have to approve or continue waivers that increase coverage. *See* 2022 WL 3581859, at *12, n. 10. Instead, the agency is only required to weigh the estimated coverage gains against the drawbacks of the waiver. But CMS did weigh these costs and benefits in its rescission letter. The court's disregard for the weight CMS gave to the negative consequences of the waiver demonstrates that its real problem with CMS's analysis is that CMS gave less weight than the court would like to the projected impact of coverage as framed by Georgia.

[22] 2022 WL 3581859, at *14.

[23] *Id.* (emphasis in original).

[24] 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

[25] 567 U.S. 519, 585-86 (2012).

[26] *See* Amicus Br. of Nat'l Health Law Prog. et al. at 4, *Georgia v. Brooks-LaSure*, No. 2:22-CV-6 (S.D. Ga. May 12, 2022), https://affordablecareactlitigation.files.wordpress.com/2022/05/3893815-0-49741.pdf. *Cf.* 2022 WL 3581859, at *14 n. 13 (discussing NHeLP brief). *See Stewart I*, 313 F. Supp.

This leaves the full Medicaid expansion described in the Medicaid Act as the proper baseline against which to measure section 1115 projects. As Judge Boasberg noted in *Stewart v. Azar*, another section 1115 case, any other baseline would allow a state to "implement the ACA expansion as an á la carte exercise, picking and choosing which of Congress's mandates it wishes to implement. *NFIB* did not sanction that."[27] He further explained that

> [t]he structure of the waiver provision assumes the implementation of the [Medicaid] Act. It confirms that the relevant baseline is whether the waiver will still promote the objectives of the Act as compared to compliance with the statute's requirements…. It would make little sense to have such waiver authority and limitations where the relevant consideration was not full compliance with the Act's requirements but instead no engagement whatsoever in the program.[28]

The Georgia district court distinguished *Stewart* on the grounds that Georgia had not already expanded Medicaid coverage at the time it sought the waiver while Kentucky, the state before the court in *Stewart,* had. But the opinion offers no principled reason as to why threatening to undo an expansion if not allowed to implement work/premium requirements is distinct from threatening to forego expansion if not allowed to implement those requirements—in both situations, fewer people than the Medicaid Act contemplates will receive coverage. *NFIB* does not leave "the Secretary so unconstrained, nor … the states … so armed to refashion the program Congress designed in any way they choose."[29]

3. *CMS judged Pathways by inapt comparisons to other demonstrations***.**

The district court criticizes CMS for citing data about the impact of work and premium requirements in other states, largely on the basis that those states had already taken up the ACA Medicaid expansion when they sought to introduce the requirements and therefore, unlike in Georgia, people who previously had Medicaid coverage in those states could lose it after the implementation of those waiver provisions.[30] Again, there are problems with the court's reasoning. They stem from the court's conclusions, just discussed, regarding the baseline against which to assess the project. Moreover, the statutory objective of coverage

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3d at 269 (noting that when evaluating a Section 1115 request, HHS "must start with the presumption that the expansion group is on par with other protected populations").

[27] *Stewart II*, 366 F. Supp. 3d at 153.

[28] *Id.* at 154.

[29] *Id.* at 131.

[30] 2022 WL 3581859, at **15.*

promotion concerns the ability to both *obtain* and to *maintain* coverage. Thus, it was reasonable for CMS to consider out-of-state data on work and premium requirements when assessing the potential impact of those same requirements in Georgia.

4. *CMS considered impermissible factors like "health equity."*

The court finds the rescission was arbitrary and capricious because Medicaid's core objective is to promote coverage, and CMS considered impermissible factors like health equity.[31] Problems again. The rescission letter makes clear that CMS rescinded approval because Georgia's work and premium requirements do not promote coverage. While the letter also discussed health equity and Covid-19, it found that the requirements do not further Medicaid's objectives independently of those concerns.[32] The contention that an approval or rescission letter can only discuss coverage and is not allowed to even mention other issues related to whether the waivers will promote coverage makes no sense.

The district court opinion also cites the DC Circuit's opinion in another section 1115 case, *Gresham v. Azar*, that explains that an agency cannot "prioritize non-statutory objectives to the exclusion of the statutory purpose."[33] But, on its face, the rescission letter did not do that.

5. *CMS failed to consider or weigh reliance interests.*

The district court finds that CMS failed to consider or weigh Georgia's reliance interests on the original approval decision. As with other aspects of the opinion, this reasoning is problematic. To begin with, the Biden administration informed Georgia that it was reassessing the approval quite soon after it took office.[34] Thus, Georgia proceeded at its own risk to devote resources to the project. In addition, the opinion relies heavily on the 2020 Supreme Court Deferred Action for Childhood Arrivals case, *Dep't of Homeland Sec. v. Regents of the Univ. of California,* to assert that the agency must consider reliance interests when it changes its mind.[35] Importantly,

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[31] Id. at *16.
[32] *See* CMS Rescission Letter, *supra* n. 11 at 7, 11-13, 15-16, 19, 29-30.
[33] 2022 WL 3581859, at *17 (quoting *Gresham v. Azar*, 950 F.3d 93, 104 (D.C. Cir. 2020)).
[34] Letter from Elizabeth Richter, Acting CMS Admin., to Frank W. Berry, Comm'r, Ga. Dep't of of Community Health (Feb. 12, 2021), https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ga-pathways-to-coverage-cms-ltr-state-demo-02122021.pdf.
[35] 2022 WL 3581859, at *17-18 (citing *Dep't of Homeland Sec. v. Regents of the Univ. of California* 140 S. Ct. 1891 (2020)).

DACA was a program that had already been fully implemented for years and upon which individuals had relied and around which they had planned their lives. This is far different from Georgia's project, which had not gone into effect prior to the rescission.

6. *CMS failed to explain why it changed its mind on key issues underlying the approval.*

Finally, the opinion faults CMS for relying so heavily on the Covid-19 pandemic (given that it originally approved the waiver during the pandemic) and on data regarding health equity as the main reasons for changing its mind regarding whether the project is likely to promote the Medicaid Act's objectives.[36] Again, this part of the opinion hinges on the court's earlier finding that one can only view the waiver as coverage promoting. Given that perspective, CMS did not provide a sufficient enough explanation for doing a "one-eighty" on the demonstration.[37]

Conclusion

Georgia v. Brooks-LaSure takes a decidedly state-oriented approach. It describes Medicaid as a state program "with little to no oversight" by the federal government, borrowing the citations to support this proposition directly from Georgia's complaint.[38] Ignoring the Medicaid Act's requirement to cover adults with incomes below 133% of the FPL, the opinion incorrectly states that, "[a]t present, Medicaid requires only that participating states cover 'certain discrete categories of needy individuals-pregnant women, children, needy families, the blind, the elderly, and the disabled.'"[39] This foundational error, the failure to recognize the ACA expansion population as a mandatory population for which states do not have any more leeway to impose additional eligibility requirements, is central to the opinion. Also notable, the court found that CMS's rescission letter failed to consider the possibility that rescission would result in less Medicaid coverage. However, the letter discusses this issue and concluded that, on balance, the project should not go ahead.

Other states could use the district court's reasoning in ways that could undermine the Medicaid program. For example, the dozen or so states that have not yet taken up the ACA Medicaid expansion could seek to replicate the Georgia waiver—a move that would not be accepted by the Biden administration but could be palatable to a future administration.

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[36] 2022 WL 3581859, at *19.
[37] *Id.* at *20.
[38] 2022 WL 3581859, at *2. *Compare* Complaint at 5-6, *Georgia v. Brooks-LaSure*, No. 2:22-CV-6 (S.D. Ga. Jan. 21, 2022), https://affordablecareactlitigation.files.wordpress.com/2022/01/georgia-1115-complaint-1-21-22.pdf *with* Amicus Br. of National Health Law Program et al. at 7, *Georgia v. Brooks-LaSure*, No. 2:22-CV-6 (S.D. Ga. May 12, 2022), https://affordablecareactlitigation.files.wordpress.com/2022/05/3893815-0-49741.pdf.
[39] 2022 WL 3581859, at *2 (quoting *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 575).