



# Explaining the *Stewart v. Azar* Decision and Implications for States

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**Questions?** Email Heather Howard at [heatherh@princeton.edu](mailto:heatherh@princeton.edu)

# About Manatt Health

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Deborah Bachrach, Michael Kolber, and April Grady with Manatt Health prepared this presentation. Manatt Health integrates legal and consulting expertise to better serve the complex needs of clients across the healthcare system. Combining legal excellence, first-hand experience in shaping public policy, sophisticated strategy insight, and deep analytic capabilities, we provide uniquely valuable professional services to the full range of health industry players. Our diverse team of more than 160 attorneys and consultants from Manatt, Phelps & Phillips, LLP and its consulting subsidiary, Manatt Health Strategies, LLC, is passionate about helping our clients advance their business interests, fulfill their missions, and lead healthcare into the future. For more information, visit <https://www.manatt.com/Health>.

## HHS Has Championed Increased State Flexibility and Encouraged States to Add Work Requirements

- In March 2017, HHS announced its “intent to use existing Section 1115 demonstration authority to review and approve meritorious innovations that build on the human dignity that comes with training, employment and independence.”
- In January 2018, CMS issued a State Medicaid Director Letter encouraging states to apply for waivers conditioning coverage on work/community engagement (CE) and describing the circumstances under which such waivers would be approved.
- Since January 2018, CMS has approved waivers with work/CE requirements in Kentucky, Indiana, Arkansas and New Hampshire
- On June 29, 2018, the DC District Court, in the *Stewart* case, overturned CMS’s approval of the Kentucky waiver.
- On July 17, 2018, the CMS Administrator indicated that CMS remains committed to work/CE requirement, and that the agency is...”looking at what the court said. We want to be respectful of the court’s decision while also wanting to push ahead with our policy initiatives and our goals...”

## The Kentucky HEALTH Waiver Reviewed in *Stewart*

- Conditions coverage on work/community engagement
- Eliminates retroactive eligibility for most populations
- Requires monthly premium payments
- Limits non-emergency medical transportation
- Imposes more stringent beneficiary reporting requirements
- Locks out of coverage for up to 6 months, beneficiaries with incomes > 100% FPL who fail to pay premiums or meet reporting requirements
- Imposes a \$75 penalty for non-emergency use of the emergency room

Plaintiffs did not challenge the substance use disorder program in Kentucky's waiver

## Overview of *Stewart v. Azar*

- Kentucky waiver application submitted to CMS August 2016 and revised July 2017
- CMS approved January 2018
- Beneficiaries in Kentucky immediately filed suit in D.C. district court
- Court declined to transfer case to Kentucky federal court
- Court concludes beneficiaries have standing and that court may review legality of CMS's decision to approve the 1115 coverage waiver
- Key question before Court: Was approval of the waiver arbitrary or capricious?



## Standard of Review

- Federal court can set aside CMS action that is “arbitrary” or “capricious”
- Agency action is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem”
- Court concluded that CMS’s waiver approval was arbitrary and capricious
- To reach this conclusion, court examined:
  - What standard CMS was supposed to apply; and
  - What analysis CMS actually undertook



# Standard for Approving an 1115 Waiver Demonstration

## 1115 waivers must be:

- Experimental, pilot or demonstration project
- Likely to assist in promoting the objectives of Title XIX
- Limited to the extent and period necessary to carry out demonstration



## Court concludes:

- Review must focus on “project as a whole,” not particular provisions
- Medicaid was created to provide federal funding to enable states to pay all or part of the cost of medical care and services for needy populations; Medicaid’s central concern is “covering health costs.”
- At least since the ACA, Medicaid is an element of a “comprehensive national plan to provide universal health insurance coverage”

# What Court Concludes CMS Considered in Approving the Kentucky Demonstration



Examined whether the demonstration would impact “only” these four factors (that Court concludes are not equivalent to the “objective” of Title XIX):

- Likely to improve health outcomes
- Address behavioral and social factors that influence health outcomes
- Incentivize beneficiaries to engage in own care and achieve better outcomes
- Familiarize beneficiaries with commercial insurance-type benefit to facilitate smoother transition to commercial coverage



Did not examine whether the program promoted the objective of providing medical assistance to needy populations

- The Secretary “paid no attention” to the projected loss of coverage for 95,000 enrollees under the demonstration nor to additional estimates from commentators
- Nothing in record rationally supports idea that demonstration would promote coverage
- Secretary failed to consider: “First, whether the project would cause recipients to lose coverage. Second whether the project would help promote coverage.”

## Court's Findings

- Coverage is a primary objective of the Medicaid program
- After the ACA, Medicaid's coverage objective includes the expansion population should a state decide to cover them
- Promoting "health" is not equivalent to promoting coverage
- Other bases for approving waiver (i.e., cost considerations to state, promoting beneficiaries' self-sufficiency) are either not supported by administrative record or impermissible bases for approving waiver, or both

## What's Next?

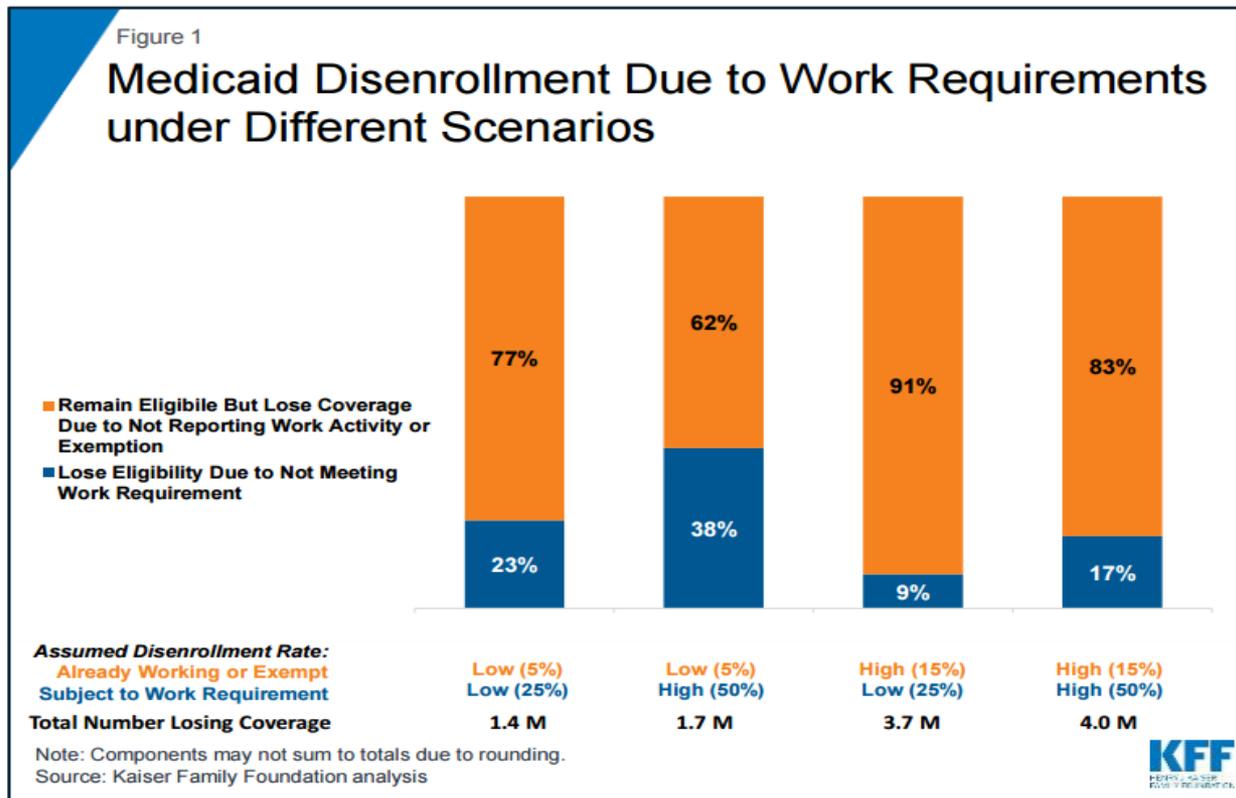
- Government can appeal to D.C. Circuit
  - Notice of appeal would need to be filed within 60 days of June 29<sup>th</sup> order
- CMS can reconsider the waiver request on remand
  - CMS has opened new comment period ending Aug. 18<sup>th</sup> at 11 p.m.
  - CMS will need to address concerns raised by court
  - Plaintiffs could challenge new waiver approval



# Coverage Implications of Pending and Approved Waivers

# National Estimates of Potential Coverage Losses Due to Work Requirements

If all states implemented work requirements similar to those currently proposed, loss of coverage estimates range from 1.4-4.0 million out of 23.5 million non-SSI, non-dual, nonelderly Medicaid adults



Source: R. Garfield, R. Rudowitz, and M. Musumeci. *Implications of a Medicaid Work Requirement: National Estimates of Potential Coverage Losses*. Kaiser Family Foundation, June 2018. <http://files.kff.org/attachment/Issue-Brief-Implications-of-a-Medicaid-Work-Requirement-National-Estimates-of-Potential-Coverage-Losses>.

# Estimated Coverage Impacts of States' Current and Proposed Waivers Vary



- ~15% of expansion adults projected to lose coverage under recent waiver approval



- 1% reduction in expansion adult enrollment due to lock-out for non-timely eligibility renewals
- 5% reduction due to work requirement



- Coverage loss for < 3% of expansion adults due to work requirement
- Assumes 95% of expansion adults will be exempt or already working, and that half of the remaining 5% will not comply



- 20% reduction in enrollment of low-income parents due to work requirement



- 1% reduction in expansion adult enrollment from eliminating retroactive coverage
- Projects average savings of \$11,000/enrollee

*It is not clear how CMS will view these coverage impacts in the context of the Stewart decision in the future*

Sources: Kentucky: <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-pa2.pdf>; Indiana: <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/in/in-healthy-indiana-plan-support-20-pa5.pdf>; Ohio: <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/oh/oh-work-requirement-community-engagement-pa.pdf>; Alabama: [http://www.medicaid.alabama.gov/documents/2.0\\_Newsroom/2.7\\_Special\\_Initiatives/2.7.5\\_Work\\_Requirements/2.7.5\\_Final\\_Work\\_Requirements\\_Waiver\\_Bookmarked\\_2-27-18.pdf](http://www.medicaid.alabama.gov/documents/2.0_Newsroom/2.7_Special_Initiatives/2.7.5_Work_Requirements/2.7.5_Final_Work_Requirements_Waiver_Bookmarked_2-27-18.pdf); Iowa: [https://dhs.iowa.gov/sites/default/files/Retroactivity\\_Public\\_Notice\\_6.22.17.pdf](https://dhs.iowa.gov/sites/default/files/Retroactivity_Public_Notice_6.22.17.pdf)

# Q&A

# Thank You

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