

Legal Challenge of Kentucky's Medicaid Waiver Has Broader Implications

A Medicaid waiver granted to the state of Kentucky by the federal government is barely a month old, and it's already being challenged in court. Republican governor Matt Bevin has responded with a lawsuit of his own, as well as a promise to pull the state on his state's Medicaid expansion altogether if the court rescinds the waiver.

A class action lawsuit against the U.S. Department of Health and Human Services (HHS) is challenging the Kentucky waiver that breaks from the traditional Medicaid model by allowing the state to charge all beneficiaries premiums for coverage, as well as to institute work requirements for some individuals.

Under waiver, KY has highest Medicaid premiums & copays in the nation

The waiver makes Kentucky's Medicaid copays and premiums the steepest in the country (the latter on a scale of up to 4% of household income). Three other states have asked the government to grant them comparable waivers. Depending on the outcome of the suit, it's likely that other states will do the same.

At the heart of the lawsuit is the question of whether or not HHS and the Centers for Medicare & Medicaid Services (CMS) has the right to grant states the permission to charge low-income Medicaid beneficiaries premiums. At the federal level, the law states that enrollees with income that puts them under 150% of the federal poverty mark must not be charged copays or premiums. Kentucky's Medicaid expansion (as in some other states) drops that coverage ceiling to 138% of the federal poverty level.

The lawsuit alleges that CMS inappropriately used its limited waiver authority to "comprehensively transform Medicaid," a task that should have been relegated to Congress.

Nearly 100K enrollees likely to leave Medicaid under the waiver

It is predicted that an estimated 95,000 individuals will exit the Medicaid program in Kentucky over the course of five years due to premium charges and work requirements within the newly-approved waiver. Bevin has repeatedly said that the Medicaid expansion is not "fiscally sustainable," and he is not the only GOP official to hold that view. Many conservative lawmakers are in favor of scaling back the Medicaid expansion begun under the Affordable Care Act (ACA). The class action lawsuit is especially notable because if the court rescinds the Medicaid waiver, the ruling would likely prevent other states from levying charges on enrollees.

Kentucky's five-year demonstration has premiums starting at \$1 per month for Medicaid enrollees with no income or very little income, and ranging up to \$37.50 per month for beneficiaries with income that puts them at the 138% poverty line. Individuals with income above that will be required to pay premiums; if they do not, they will be prevented from getting any coverage whatsoever for a six-month period, and will be required to pay past-due premiums before coverage would be reinstated. Should individuals with incomes below the 138% marker fail to pay, they would see their rewards accounts garnished.

Although earlier this month a spokesperson for the governor conveyed Bevin's confidence in the court ruling in his favor, a legal precedent doesn't exactly justify that confidence.

2011 federal appellate decision found HHS lacked authority to grant state waiver

Seven years ago, the 9th Circuit Court of Appeals ruled that HHS did not have the authority to permit the state of Arizona to begin



up Medicaid copays. The court argued that in the absence of research that demonstrated the benefit of cost-sharing on low-income individuals (and quite the contrary; it said the impact of cost-sharing had been studied for years), it seemed the only benefit to cost-sharing would be the state's reduction in spending, and therefore HHS did not have the authority to approve the waiver.

Most recently, Gov. Bevin has initiated a countersuit that requests the action opposing the waiver be shifted to a federal court in Kentucky rather than D.C. In a statement, Bevin's general counsel Steve Pitt said, "A Kentucky court, with the full participation of the Commonwealth, should decide this vital issue. We have complete confidence that Kentucky HEALTH ["Helping to Engage and Achieve Long Term Health," the new state program for low-income individuals and families] will be upheld and will serve as a successful national model."

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