

MEMORANDUM

To: American Society of Transplant Surgeons
From: Peter W. Thomas, Joel Hamme, and Theresa Morgan
Date: October 5, 2011
Re: Supreme Court Kicks Off Term with Important Medicaid Case

On Monday of this week, the Supreme Court of the United States heard [oral argument](#) in [Douglas, et al., v. Independent Living Center, et al.](#), a case that raised the issue of whether Medicaid providers and beneficiaries may sue to challenge Medicaid provider reimbursement reductions under the U.S. Constitution's Supremacy Clause, which makes federal law supreme over state law. Under Medicaid, a state that accepts federal matching money for the program must pay health care providers at rates that are high enough to ensure both quality of and access to care for beneficiaries. The Court's decision will affect whether beneficiaries and providers may sue their states when they believe that reimbursement cuts restrict access to services or impair the quality of those services.

A close review of the oral argument in this case suggested there is no clear path to a decision, either way. A number of justices raised arguments on both sides of the issue and seemed skeptical at times of many of the arguments made by all of the parties. What may tip the scales in favor of the states prevailing in this case is that the United States has sided with the states, contending that private individuals and providers do not have a right to sue in these types of cases and arguing that the exclusive remedy in such matters is for the United States Department of Health and Human Services (HHS) to disapprove the proposed plan amendments containing those rate changes.

In [this instance](#), Medicaid providers and beneficiaries successfully sued California state officials to head off steep reimbursement cuts (i.e., 10%) they said would greatly harm access to services under the program. California implemented the cuts prior to getting them approved by

HHS and argued that private plaintiffs have no right to sue because Congress included no explicit basis in the Medicaid statute for them to enforce the law.

HHS does have the authority to deny provider reimbursement cuts included in the proposed state plan amendments, and, in fact, HHS rejected plan amendments containing all of the cuts now in question before the Court. In addition, the agency issued a proposed regulation in May 2011 that would implement a transparency and accountability process that states would have to complete prior to altering reimbursement rates. During oral argument, it was mentioned that the release date for this final rule may slip past its originally anticipated release date in December 2011.

If the Court decides that Medicaid beneficiaries and providers cannot sue states to prevent reimbursement cuts, then the administrative approval process may be the only remaining avenue for challenging reimbursement cuts in the Medicaid program. Depending on the Court's decision, this case could also have implications for beneficiaries and providers challenging other aspects of the Medicaid program, or other federal and state partner programs, using the Supremacy Clause.

For instance, a decision to deny a right of action in this case may undercut the line of cases where individuals have sued states to "deinstitutionalize" their Medicaid programs and shift the focus to home and community based care. While this could be very problematic on a variety of Medicaid fronts, there potentially could still be one more legal option available, that of the state courts. Depending on how this case is decided, there may still remain state court options to challenge actions of the state under the Medicaid program in the future.