

## Kentucky Medicaid Decision: Implications for Florida

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*Florida's proposal to eliminate retroactive Medicaid eligibility, currently awaiting approval by the federal government, could be affected.*

A federal court recently halted Kentucky's radical proposals for modifying its Medicaid program. While the [decision](#) only applies to Kentucky, it has significant implications for Florida.

At the strong encouragement of the current federal administration, [multiple states](#) are using the Section 1115 waiver process to essentially re-write Medicaid law. Through this process, many states are requesting and obtaining approval from the Secretary of the U.S. Department of Health and Human Services (the Secretary) to condition Medicaid eligibility. This means that enrollees must comply with certain requirements not included in federal Medicaid law.

Section 1115 proposals are only supposed to be approved if they promote the overall objective of the Medicaid Act, which is to *provide health care coverage*, not take it away.

Using this benchmark, the Kentucky court determined that the Secretary's approval of Kentucky's proposal was "arbitrary and capricious." None of the state's multi-pronged plan-- including work requirements, lock-outs for not paying premiums, increased cost-sharing and expanded reporting-- promoted Medicaid's objective. Moreover, the Secretary failed to consider how many people might lose coverage. Kentucky's own waiver application projected the loss of coverage for nearly 100,000 beneficiaries.

While much of the Kentucky case focused on work requirements, key for Florida is another less publicized portion of the decision: that which addresses elimination of [retroactive Medicaid eligibility \(RME\)](#).

RME is a requirement written into federal Medicaid law since 1972. It allows people to get coverage up to three months prior to the month of application. The intent is to protect Medicaid-eligible persons who "do not apply for assistance until they have received care, either because they did not know about Medicaid eligibility requirements or because the sudden nature of their illness prevented their applying."<sup>1</sup>

During the 2018 session, the Florida Legislature [amended state law to eliminate RME](#) and directed the Agency for Health Care Administration (AHCA) to seek federal approval for going forward. Since pregnant women and children are exempt, Floridians with disabilities and seniors will bear the brunt of this cut. Based on 2015-16 data, AHCA projects 39,000 people would lose RME. Florida's proposal is [currently pending before the Secretary](#) awaiting approval.

There is no question that this cut was adopted by the Legislature as a cost-savings measure; however, in purportedly "saving" \$38 million state dollars, [the state is simultaneously giving up over \\$60 million in federal dollars.](#)

Similarly, AHCA's justification to the federal government in its waiver application is that the proposal would "increase fiscal predictability." AHCA attempts to supplement this justification in its waiver cover letter by asserting that eliminating RME will "...increase access to high quality, coordinated care in the most appropriate, least restrictive setting."

On the Kentucky application, the Secretary, in a single sentence, claimed that elimination of Kentucky RME would encourage "...beneficiaries to obtain and maintain health coverage, even when healthy." It's important to keep in mind a significant difference between Kentucky and Florida. Kentucky is a Medicaid expansion state where low-income uninsured adults are eligible to enroll in Medicaid when healthy.

Nevertheless, even in an expansion state, the court flatly rejected this justification:

"This sort of 'conclusory' reference cannot suffice, 'especially when viewed in light of' an obvious counterargument. [citation omitted]. As is documented in the comments, **restricting retroactive eligibility will, by definition, reduce coverage for those not currently on Medicaid rolls** (emphasis added)."<sup>2</sup>

As a non-expansion state, Florida's explanation for eliminating RME is even more absurd. Because of Florida's extremely restrictive Medicaid eligibility criteria, most healthy uninsured adults cannot access Medicaid until they are very ill. At that very point in time, when facing large medical debt, is precisely when people need RME coverage.

The Kentucky court highlighted, through the scenario described below, Congress' central concern that Medicaid make health care coverage affordable and protect people from financial ruin:

"[I]magine two Kentuckians, Joe and Dan. Both are diagnosed with Hodgkin's Lymphoma. Joe has health insurance and is able to receive treatment for a co-pay of \$100. Dan has no health insurance. He, too, is able to receive treatment, but he must pay out of pocket for the treatment, costing tens of thousands of dollars. To do this, he and his wife must sell the family ranch, which had been in Dan's family for over four generations. After 18 months, both Joe and Dan are cancer free; in other words, they are equally healthy. But Dan, unlike Joe, is in financial ruin."<sup>3</sup>

Notably, "Dan's" circumstances were based on actual testimony from Senate health care hearings.

The court also emphasized other Senate testimony relevant to affordability issues:

"...Committee Chairman Chris Dodd spoke about one of his constituents, 'a cancer survivor,' who paid 'as much for her healthcare as she does for the mortgage on her home.'" (citations omitted) More generally, witnesses testified that "[o]ver 60 percent of bankruptcies filed in 2007 were largely attributable to medical expenses," (citations omitted), and that over 7% of cancer patients needed to take a second mortgage to finance their care. (citations omitted)."<sup>4</sup>

In rejecting all components of Kentucky's proposal, the court underscored that the intent of Medicaid is not to promote health, *but rather to promote health care coverage*. Otherwise, permitting Medicaid waivers under the framework advocated by the Secretary would lead to "bizarre results":

".... imagine that the Secretary could exercise his waiver authority solely to promote health, rather than cover healthcare costs. Nothing could stop him from conditioning Medicaid coverage on consuming more broccoli (at least on an experimental basis). Or, as Plaintiffs suggest, he might force all recipients to enroll in pilates classes or take certain nutritional supplements..."<sup>5</sup>

The Kentucky court was clearly disturbed by the Secretary's actions to evade Medicaid law and impose his own conditions of Medicaid eligibility. While the Secretary may be frustrated by Congress' decision not to amend Medicaid law, he cannot re-write it through executive action.

It is likely that the Kentucky decision will be appealed to a higher court. In the meantime, the Kentucky waiver proposal, including elimination of RME, is on hold.

While this case applies only to Kentucky, it could be persuasive authority for another court considering a Florida legal challenge, if Florida's waiver request is approved. But at this point, it is unknown when, if, or how the Secretary will act on it. Nor is there any time limit for the Secretary to act.

The good news is that during this limbo state, RME remains in place and continues to provide an invaluable benefit for sick and uninsured Floridians.

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<sup>1</sup>*Cohen by Cohen v. Quern*, 608 F. Supp. 1324, 1332 (N.D. Ill. 1984) (quoting H. Rep. No. 92-231, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 4989, 5099). Accessed via: <https://law.justia.com/cases/federal/district-courts/FSupp/608/1324/1464958/>

<sup>2</sup> *Stewart v. Azar*, Memorandum Opinion, U.S. District Court, Civil Action No. 18-152 (JEB), p. 41, June 29, 2018. Accessed via: <https://www.kff.org/medicaid/issue-brief/explaining-stewart-v-azar-implications-of-the-courts-decision-on-kentuckys-medicaid-waiver/>

<sup>3</sup> *Supra.* at n.1, p. 45

<sup>4</sup> *Supra.* at n. 1, p. 46

<sup>5</sup> *Id.*