

Stewart v. Azar:

Victory on one front and only for now.

Context

- ❖ **FIRST IN A NATIONWIDE EFFORT**
- ❖ **KEJC WORKING WITH STATE AND NATIONAL PARTNERS
IN MULTIPLE ARENAS**
 - ❖ **COURT, LEGISLATURE, PUBLIC OPINION**

Who will review the reviewer?

Inc., 556 U.S. 502, 513 (2009). It requires courts to “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). Agency action is arbitrary and capricious if, for

The Secretary can only approve demonstration projects that are “likely to assist in promoting the objectives” of the Medicaid Act. See 42 U.S.C. § 1315(a). He must, consequently, **first identify those objectives**. Courts reviewing an agency’s statutory interpretation employ the two-step Chevron framework. That is, they first ask whether

Four Objectives

❖ FURNISH MEDICAL ASSISTANCE

As the Court concluded in Stewart I, a central objective of the Act is “furnish[ing] medical assistance” to needy populations. See 313 F. Supp. 3d at 243. Rather than adequately addressing Kentucky HEALTH’s potential to cause loss of medical coverage, the Secretary continues to press his contention that the program promotes his alternative proposed objectives of beneficiary health, financial independence, and the fiscal sustainability of Medicaid. The

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- ❖ **FURNISH MEDICAL ASSISTANCE**
- ❖ **BENEFICIARY HEALTH**
- ❖ **FINANCIAL INDEPENDENCE**
- ❖ **FISCAL SUSTAINABILITY OF MEDICAID**

Four Objectives

- ❖ **FURNISH MEDICAL ASSISTANCE**
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Court finds that the first two of those three goals are not objectives of the Act in their own right, and, regardless, the Secretary's failure once again to adequately consider the effects of Kentucky HEALTH on coverage is alone — as it was in Stewart I — fatal to the approval. To explain

his consideration of the program's effects on medical assistance inadequate. His examination of the other three aims, two of which the Court finds are not stand-alone objectives of the statute in the first instance, cannot make up for that failure. This is especially true where the Secretary made no attempt to weigh any of those three aims against the coverage-loss consequences of the program. Although the Court takes up fiscal sustainability last, the reader should be aware that this is the principal new position Defendants press in this round of litigation and the one requiring the most analysis.

unlawful. See AR 6726, 6729–30. That is certainly true: the Act expressly provides for a “demonstration project . . . that would result in an impact on eligibility.” 42 U.S.C. § 1315(d). That acknowledgment does not, however, sanction a demonstration that would result in significant coverage loss, nor does it relieve the Secretary of his obligation to consider the magnitude of coverage loss here. Indeed, the limitation remains that demonstration projects can only be approved if they “promote the objectives” of the Act. Here, the coverage loss is sufficiently significant — even at the low end of the estimated range — that it cannot be waved off by the rejoinder that some amount of coverage loss is legally permissible.

The Secretary first explains that the 95,000 number is misleading. It represents the number of member months Kentucky projected will be reduced by Kentucky HEALTH, divided by twelve to reach a figure representing one year's worth of coverage for a given individual. He argues that, rather than commenting on the number of member months, "Plaintiffs incorrectly assume, with no foundation for doing so, that every member month of coverage lost under the demonstration is part of a full year of coverage for a person who never regains coverage." HHS

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leg·er·de·main

/ˈleɪərdəˌmān/

noun

skillful use of one's hands when performing conjuring tricks.

synonyms: sleight of hand, juggling, conjuring, magic, prestidigitation, wizardry, illusion, dexterity;

rare thaumaturgy

"stage magicians practicing legerdemain"

- deception; trickery.

"a classic piece of management legerdemain"

synonyms: trickery, cunning, artfulness, craftiness, craft, wiles, chicanery, skulduggery, deceit, deception, artifice, cheating, dissimulation, double-dealing, artful argument, specious reasoning, sophistry, humbug, flimflam; [More](#)

Regardless of how the number of lost member months is distributed among Medicaid beneficiaries, it indisputably reflects that a substantial number of people will lose coverage. As such, the Secretary cannot avoid addressing that number. This is especially so where commenters detailed the widespread predicted nature of coverage loss and its devastating effects, see AR 13175, 15482, 19489, including the destructive effects of coverage gaps. See AR 12918, 12967, 15486, 19388–89, 19985–86; see also ECF No. 99 (Amicus Brief of American Academy of Pediatrics) at 10–15, 19–20. In other words, understanding of the loss estimate was baked

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In this explanation, the Secretary does not make entirely clear whether he interprets fiscal sustainability to be an independent objective of the Act, or whether making the program more fiscally sustainable is essentially a point about coverage promotion — that is, whether saving money by covering fewer people is ultimately coverage promoting because any number of people Kentucky still covers under the demonstration would be greater than the number of people covered if it terminated the ACA expansion. Based on federal Defendants'

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made no finding, supported by substantial evidence, that Kentucky HEALTH would improve the sustainability of Kentucky’s Medicaid program — either by accruing savings to the state or by any other mechanism. Second, he unreasonably prioritized program savings without weighing those against the consequences of lost coverage, rendering his determination arbitrary and capricious.

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The point is not to evaluate how Kentucky ought to spend its money. See Tr. at 29 (maintaining that Kentucky’s “budgetary priorities” are “[its] prerogative”). The Commonwealth, moreover, may well be free to pull out of the expansion entirely (or, indeed, all of Medicaid) if it chooses not to spend its money that way. The central point is that — without a finding about the savings that Kentucky HEALTH could be expected to yield — the Secretary could not make a reasoned decision that it would promote fiscal sustainability. If he is to rely on

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that this time around he has cured any critical omission. Defendants now rely primarily on a new argument to that effect — namely that, although Kentucky HEALTH may cause nearly 100,000 people to lose coverage, that number will be dwarfed by the approximately 450,000 people who would suffer that fate if Kentucky ends its coverage entirely of those who have joined the Medicaid rolls via the Affordable Care Act, as it has threatened to do if this project is not approved.

The Secretary did a bad, bad job.

- ❖ **"INCONSISTENT WITH THE MEDICAID ACT AND ARBITRARY AND CAPRICIOUS"**
- ❖ **"RED HERRING"**
- ❖ **"TAKEN TO ITS LOGICAL CONCLUSION...MAKES LITTLE SENSE."**
- ❖ **"RADICAL RESULTS"**
- ❖ **"STAGGERING BREADTH" OF DEFENDANTS' ARGUMENTS**
- ❖ **"UNREASONABLE"**

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❖ **“INCONSISTENT WITH THE MEDICAID ACT AND ARBITRARY AND CAPRICIOUS”**

The Supreme Court, in holding that Congress could not require states to adopt that Medicaid expansion by conditioning all their Medicaid funding on a decision to do so, explained that the states could not be compelled to engage in a program they had not bargained for with “a gun to the head.” Nat’l Fed. of Indep. Business v. Sebelius, 567 U.S. 519, 581 (2012).

Kentucky, it seems, has now picked up that gun by threatening to de-expand Medicaid.

❖ **“STAGGERING BREADTH” OF DEFENDANTS’ ARGUMENTS**

❖ **“UNREASONABLE”**

Defend Medicaid Everywhere Always

- ❖ **MEDICAID EXPANSION IS AN UNALLOYED GOOD IN KENTUCKY: IT MAKES PEOPLE HEALTHIER, SAVES LIVES, SAVES PEOPLE FROM FINANCIAL RUIN, PAYS HOSPITALS AND PROVIDERS FOR WORK THEY PREVIOUSLY GAVE AWAY, AND IS AN INCREDIBLE DEAL FOR TAXPAYERS.**