



Fact Sheet

Update on Federal Court Access—Medicaid § 1983 and Preemption Cases

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Protection and Advocacy offices continue to encounter problems with state Medicaid programs that are not meeting the requirements of the federal Medicaid Act. When clients are being harmed by ongoing violations of the Act, these offices must consider federal court litigation to obtain injunctive relief. Particularly since the mid 1990s, federal court access has been hampered by a judiciary that is increasingly hostile to individuals who are seeking to enforce the Medicaid Act against the state.

This Fact Sheet discusses recent trends affecting private enforcement of the Medicaid Act in federal court, focusing on 42 U.S.C. § 1983 and preemption actions grounded in the Supremacy Clause of the United States Constitution.

Background on 42 U.S.C. § 1983

When it was added to the Social Security Act in 1965, the Medicaid Act did not include a provision authorizing individuals to enforce the Act in federal court. However, individuals have traditionally relied upon another federal statute, 42 U.S.C. § 1983. This law confers an express cause of action against state actors who violate “rights, privileges, or immunities secured by the Constitution and laws.”¹

¹ 42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In 1980, the Supreme Court recognized that § 1983 means what it says and, thus, allows injured individuals to enforce federal laws.² However, the Court has also long-stressed that a plaintiff must assert a violation of a federal “right,” not merely a violation of federal law.³ The plaintiff must also show that Congress has not foreclosed resort to § 1983 expressly or by including a comprehensive remedial scheme in the federal law.⁴

The Supreme Court has applied a three-part test to determine whether a federal law creates a federal right: (1) Was the provision in question intended to benefit the plaintiff; (2) Does the provision contain sufficient mandatory language to create a binding obligation on the state or merely express a congressional preference; and (3) Is the provision specific or too vague and amorphous for a court to enforce?⁵ This is called the *Blessing/Wilder* test after the Supreme Court cases that applied it.

In 2002, the Court tightened the enforcement test in *Gonzaga Univ. v. Doe*, a case involving a spending clause program.⁶ The National Health Law Program has discussed this case extensively, so it will only be summarized here.⁷ Writing for the majority, Chief Justice Rehnquist initially noted that spending clause programs are similar to contracts, with the typical remedy for a violation being termination of funding by the federal agency. A provision is not enforceable by a program beneficiary unless Congress has unambiguously manifested its intent to confer individual rights. Moreover, according to the Court, the initial inquiry into whether a statute creates a federal right under § 1983 “is no different from the initial inquiry in an implied right of action case.”⁸ The provision must contain “rights- or duty-creating language” and have an individual rather than an aggregate focus.

² See *Maine v. Thiboutot*, 448 U.S. 1 (1980) (discussing Social Security Act).

³ See, e.g., *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989)); *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) (5-4 decision enforcing a Medicaid Act provision).

⁴ See *Wilder*, 496 U.S. at 521-23 (finding enforcement of Medicaid Act through § 1983 has not been foreclosed); see also *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (including *Wilder* and Medicaid in a list of cases concerning statutes whose enforcement is not foreclosed).

⁵ *Blessing*, 520 U.S. 329; *Wilder*, 496 U.S. at 509.

⁶ 536 U.S. 273 (2002) (refusing to allow § 1983 enforcement of a Federal Educational Rights and Privacy Act provision that prohibited federal funding to any entity with a policy or practice of permitting the release of private records without written consent of the student/parent).

⁷ See, e.g., National Health Law Program, *Monthly Q&A: Gonzaga University v. Doe* (July 5, 2002); National Health Law Program, *Fact Sheet: Section 1983 and Private Rights of Action: A Court Watch Update* (Dec. 31, 2002); National Health Law Program, *42 U.S.C. § 1983 and Enforcement of the Medicaid Act* (Sept. 28, 2006).

⁸ *Gonzaga*, 536 U.S. at 279.

Recent Trends in § 1983 Enforcement of Medicaid Provisions

Since *Gonzaga* was decided on June 20, 2002, numerous courts have cited the case. As of January 4, 2007, over 160 published opinions have mentioned *Gonzaga*. Not surprisingly, the vast majority of these cases concern programs enacted pursuant to Congress' spending clause power. Some aspects of these rulings deserve particular mention.

First, while a growing number of cases concern enforcement of housing and child welfare and adoption assistance provisions, the Medicaid Act has received the vast bulk of courts' post-Gonzaga attention. As of January 4, 2007, over 50 published cases cite *Gonzaga* and discuss whether the Medicaid Act can be enforced pursuant to § 1983. The National Health Law Program has collected over 25 additional unpublished Medicaid cases that discuss *Gonzaga*.

In addition, the body of federal circuit courts of appeal decisions is now growing. To date, the circuit courts are applying *Gonzaga* similarly and reaching fairly consistent conclusions on the enforceability of specific Medicaid Act provisions. Importantly, the majority of decisions have maintained Medicaid beneficiaries' access to the § 1983 remedy. Most courts continue to allow private enforcement of four of the most critical Medicaid protections:

- 42 U.S.C. § 1396a(a)(10) (requiring states to provide medical assistance to all individuals who meet the listed qualifications)—all five circuit court rulings, post *Gonzaga*, have allowed enforcement;⁹
- 42 U.S.C. § 1396a(a)(8) (requiring states to provide medical assistance with reasonable promptness)—all three circuit courts rulings, post *Gonzaga*, have allowed enforcement;¹⁰
- 42 U.S.C. § 1983a(a)(3) (requiring states to assure individuals receive the opportunity for a fair hearing when their claim is denied or not acted on with reasonable promptness)—the only circuit court ruling, post-*Gonzaga*,

⁹ See *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006); *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006), cert. denied sub nom. *Goldberg v. Watson*, 127 U.S. 598 (2006); *S.D. v. Hood*, 391 F.3d 581 (5th Cir. 2004); *Sabree v. Richman*, 367 F.3d 180 (3^d Cir. 2004); *Pediatric Specialty Care v. Ark. Dept. of Human Services*, 293 F.3d 472 (8th Cir. 2002). But see, e.g., *Oklahoma Chapter of Am. Acad. of Pediatrics v. Fogarty*, Nos. 05-5100, 05-5107, 2007 WL 10760 (10th Cir. Jan. 3, 2007) (finding (a)(10) guarantees only payment, not actual services).

¹⁰ See *Westside Mothers*, 454 F.3d 532 (6th Cir. 2006); *Sabree*, 367 F.3d 180 (3^d Cir. 2004); *Bryson v. Shumway*, 308 F.3d 79 (1st Cir. 2002). But see, e.g., *Oklahoma Chapter of Am. Acad. of Pediatrics*, 2007 WL 10760 (10th Cir. Jan. 3, 2007) (holding that (a)(8) only concerns "medical assistance," which is payment not actual services); *Mandy R. v. Owens*, 464 F.3d 1139 (10th Cir. 2006) (same); *Westside Mothers*, 454 F.3d 532 (same, but remanding to allow plaintiffs to amend complaint); see also *Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003) (dicta).

allows enforcement;¹¹ and

- 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(4)(B), and 1396d(r) (providing that Medicaid-eligible children will receive Early and Periodic Screening, Diagnostic and Treatment (EPSDT) and information about EPSDT)—all three circuit court rulings, post-*Gonzaga*, have allowed enforcement.¹²

By contrast, private enforcement of other Medicaid provisions is being sharply curtailed. The most affected provision is 42 U.S.C. § 1396a(a)(30)(A), which requires states to establish payments that are sufficient to ensure that Medicaid beneficiaries have access to covered services at least to the extent of the general population. Known as the “equal access provision,” this requirement was enforced in federal court by Medicaid beneficiaries and/or providers during the 1990s. Since *Gonzaga* was announced, however, four circuit courts have refused to allow private enforcement of the provision.¹³ Only the Eighth Circuit has ruled otherwise.¹⁴

Second, since Gonzaga, the primary focus of the judicial inquiry is clearly upon the first prong of the Blessing/Wilder test, that is whether the plaintiff is the “intended beneficiary” of the provision he seeks to enforce. However, most courts are continuing to apply all three parts of the test.¹⁵ This is not surprising given that *Gonzaga* did not overrule any of the Court’s previous § 1983 cases.¹⁶

Third, courts are reviewing cases on a provision-by-provision basis. Early on, three opinions seemed to adopt a sweeping application of *Gonzaga* to find that the Medicaid Act could not be enforced at all.¹⁷ The first of these decisions,

¹¹ See *Gean v Hattaway*, 350 F.3d 758 (6th Cir. 2003).

¹² See *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006); *S.D. v. Hood*, 391 F.3d 581 (5th Cir. 2004); *Pediatric Specialty Care v. Ark. Dept. of Human Services*, 293 F.3d 472 (8th Cir. 2002).

¹³ See *Oklahoma Chapter of Am. Acad. of Pediatrics*, 2007 WL 10760 (10th Cir. Jan. 3, 2007); *Mandy R.*, 464 F.3d 1139 (10th Cir. 2006); *Westside Mothers*, 454 F.3d 532 (6th Cir. 2006); *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005); *Long Term Care Pharm. Alliance v. Ferguson*, 362 F.3d 50 (1st Cir. 2004).

¹⁴ See *Pediatric Specialty Care*, 453 F.3d 1015 (8th Cir. 2006) (giving precedential value to a previous panel decision allowing enforcement).

¹⁵ See, e.g., *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004) (finding plaintiff met 3-prong *Blessing* test); *Bruggeman v. Blagojevich*, 324 F.3d 906 (7th Cir. 2003) (finding plaintiff failed to meet 2d prong); *Keup v. Wis. Dep’t of Health & Fam. Serv.*, 2004 WI 16 (2004), *cert. denied*, 125 S.Ct. 2957 (2005) (finding plaintiff failed to meet the third *Blessing/Wilder* prong).

¹⁶ This “trend” should be monitored. Notably, while citing *Blessing* and *Wilder*, the *Gonzaga* Court did not reaffirm or even mention the three-part test, and it cabined *Wilder* to concern only the payment of objective monetary payments.

¹⁷ *Sabree v. Houston*, 245 F. Supp. 2d 653 (E.D. Pa. 2003), *rev’d sub nom. Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004); *M.A.C. v. Betit*, 284 F. Supp. 2d 1298 (D. Utah 2003) (citing district court *Sabree* decision); *Capitol People First v. Dep’t of Dev. Serv.*, No. 2002038715 (Alameda Co. Super. Ct. Nov. 6, 2003) (on file with author) (citing district courts in *MAC* and *Sabree*).

Sabree v. Houston, formed the basis for the other two. Notably, *Sabree* was reversed by the Third Circuit Court of Appeals in 2004. And, at this point, the courts are fairly uniformly applying a provision-by-provision analysis.¹⁸ Although the provision-by-provision assessment does exact more painstaking briefing and analysis from the parties and the court,¹⁹ it is the consistent with the Supreme Court's teachings.²⁰

Fourth, a Social Security Act amendment recognizing private enforcement is receiving uneven deference. In 1994, Congress added 42 U.S.C. § 1320a-2 to the Social Security Act to recognize that provisions of the Act are privately enforceable.²¹ The amendment overruled parts of a Supreme Court decision, *Suter v. Artist M.*, which had appeared to hold that plaintiffs seeking to implement provisions of state spending clause plans could only enforce a right to have a written plan, not the contents of the plan itself.²² While the provision is forming the basis for some decisions, other courts have not found it persuasive.²³ Of particular concern is an analysis by Ninth Circuit Court Judge O'Scannlain which, while pithy, is incorrect. In *Sanchez v. Johnson*, Judge O'Scannlain dismissed the import of 42 U.S.C. § 1320a-2, finding that the amendment is "hardly a model of clarity" and concluding that it does not disturb the reasoning of *Pennhurst State School & Hosp. v. Halderman*, which said the "typical" remedy for state noncompliance with federally-imposed conditions is not private enforcement but rather the termination of funding to the state by the federal government.²⁴ However, Congress enacted § 1320a-2 specifically to preserve the long history of private enforcement of the Social Security Act,²⁵ and *Pennhurst* is not a Social

¹⁸ The most recent decision on point cited and specifically rejected *M.A.C.* See *Harris v. Olszewski*, 442 F.3d 456, 463 (6th Cir. 2006).

¹⁹ The *Sabree* panel, which included then Circuit Judge Alito, noted that the analysis that the court noted was "assuredly not for the timid." 367 F.3d at 183.

²⁰ *E.g. Blessing*, 520 U.S. at 342 ("Only when the complaint is broken down into manageable analytic bites can a court ascertain whether each separate claim satisfies the various criteria we have set forth for determining whether a federal statute creates rights.")

²¹ 42 U.S.C. §§ 1320a-2 (repeated at § 1320a-10) states:

In an action brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 471(a)(15) of the Act is not enforceable in a private right of action.

²² 503 U.S. 347, 358, 112 S.Ct. 1350 (1992).

²³ *Compare Rabin v. Wilson-Coker*, 362 F.3d 190 (2d Cir. 2004) (citing § 1320a-2 to allow beneficiaries to enforce a Medicaid Act provision); *S.D. v. Hood*, 391 F.3d 581, 603 (5th Cir. 2004) (same) *with Sanchez*, 416 F. 3d at 1057.

²⁴ *Sanchez*, 416 F.3d at 1057 n.5 (citing *Pennhurst*, 451 U.S. 1, 28 (1981)).

²⁵ See, e.g., *Maine v. Thiboutot*, 448 U.S. 1, 6-8 (1980); *Edelman v. Jordan*, 415 U.S. 651, 675 (1974); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968); *Wilder*, 496 U.S. at 509-10 (1990). Cf. *Blessing*, 520 U.S. at 346-48 (1997) (remanding a Social Security Act

Security Act case.

Fifth, courts are holding that federal regulations are not “laws” within the meaning of § 1983. The Supreme Court has not directly decided the question. In *Wright v. Roanoke Redev. and Hous. Auth.*, the Court allowed individuals to enforce HUD regulations that defined “rent” as including an amount to cover utilities.²⁶ However, *Gonzaga* and other recent decisions such as *Alexander v. Sandoval*,²⁷ have caused lower courts to revisit the question of whether federal regulations can create rights under § 1983. The clear trend is to find that they cannot.²⁸ On the other hand, courts continue to cite regulations as evidence of Congressional intent and have enforced regulations that flesh out the terms of a statute that creates federal rights. For example, in *S.D. v. Hood*, a case involving the Medicaid Early and Periodic Screening, Diagnostic and Treatment provisions, the Fifth Circuit Court of Appeals found that “the rights-creating language relied upon by the plaintiff is contained in the statute itself. Furthermore, the regulations implementing the statute . . . are authoritative interpretations of the statute and are enforceable by § 1983.”²⁹

Finally, the courts have not been pressed to apply the full analysis recognized by the Gonzaga Court. Courts are focusing on whether the federal statute contains “rights-creating language” that reflects an intent to benefit the individual plaintiff. However, *Gonzaga* condones a broader analysis of whether the statute contains “rights- or duty-creating language” that has an “unmistakable focus on the benefited class.”³⁰ As noted by the leading implied right of action case, *Cannon v. Univ. of Chicago*, duty-creating language may be enforced by an individual as long as the duty runs “directly [to] a class of persons that include[s] the plaintiff in the case,” rather than to the “public at large.”³¹ In fact, the *Gonzaga* Court cited several statutes approved by the *Cannon* Court, all of

case for determination of whether provisions created enforceable rights under § 1983).

²⁶ See *Wright*, 479 U.S. 418, 431-32 (1987). *But compare id.* at 437 (O’Connor, J., dissenting) (“[I]t is necessary to ask whether administrative regulations *alone* could create such a right. This is a troubling issue....”) (emphasis in original).

²⁷ *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) (“Language in a regulation may invoke an [implied] private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”)

²⁸ See, e.g., *Save Our Valley Citizen in Action v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003); *Three Rivers Ctr. for Indep. Living v. Hous. Auth. of Pittsburgh*, 382 F.3d 412 (3d Cir. 2004). See also *South Camden Citizens v. New Jersey Dep’t of Environmental Protection*, 274 F.3d 771 (3d Cir. 2001); *Harris v. James*, 127 F.3d 993 (11th Cir. 1997).

²⁹ *S.D. v. Hood*, 391 F.3d 581, 607 (5th Cir. 2004). *Compare, e.g., Price v. Stockton*, 390 F.3d 1105, 1112 n.6 (9th Cir. 2004) (“It is well settled that regulations *alone* cannot create rights ... however, regulations ‘may be relevant in determining the scope of the right conferred by Congress’ and ‘therefore may be considered in applying the three-prong *Blessing* test.’”) (citation omitted). See also *Harris*, 442 F.3d at 465.

³⁰ *Gonzaga*, 536 U.S. at 284.

³¹ 441 U.S. 677, 690 n.13 (1979).

which focus more on the duty of the defendant than on the rights of the plaintiff.³²

Background on Preemption

The Supremacy Clause of the United States Constitution states that “Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”³³ State laws that conflict with federal law are “without effect.”³⁴ Both federal statutes and regulations may have preemptive effect.³⁵ Courts are, however, reluctant to infer preemption; the party claiming that a federal law has preemptive effect has the burden of proving preemption.³⁶

There are three categories of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. Express preemption occurs when Congress explicitly defines the extent to which a federal law preempts state law. An example is the Employee Retirement Income Security Act (ERISA), which explicitly preempts all state laws relating to employee benefit plans.³⁷ Field preemption invalidates state laws that attempt to regulate conduct in an area that Congress intended the federal government to occupy exclusively. “Such an intent may be inferred from a “scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where an Act of Congress “touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”³⁸ For example, the Supreme

³² See *Gonzaga*, 536 U.S. at 284 n.3 (citing *Cannon*, 441 U.S. at 690 n.13). Among these cases, *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 548 (1937), held the Railway Labor Act (RLA) imposed “the affirmative duty” on railroads, enforceable by unions to bargain only with the elected representative. *Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 560 (1930), found that the RLA “imposed a legal duty upon the Railroad Company, that is, an obligation enforceable by judicial proceedings,” to refrain from interfering with the employee’s choice of bargaining representative. *Texas & P. Ry. Co. v. Rigsby*, 241 U.S. 33, 37, 43 (1916), held that the Federal Safety Appliance Act “was intended for the especial protection of employees engaged in duties such as that which plaintiff was performing” and “imposes an absolute and unqualified duty to maintain the appliance in secure condition.” For each of these cases, the *Cannon* Court italicized statutory language showing that the provisions were enacted on behalf of specific, identifiable groups: in *Virginian*, the RLA requirement that “the carrier shall treat with the *representative* so certified”; in *Texas & N.O.R.*, the RLA requirement that “[r]epresentatives . . . shall be designated by the respective *parties* . . . without interference, influence, or coercion exercised by either party. . .”; and in *Texas & P. Ry.*, the reference in the Federal Safety Appliance Act to “*any employee of any such common carrier.*” 441 U.S. 690 n.13.

³³ U.S. Const. art. VI, cl. 2.

³⁴ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

³⁵ See *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141 (1982); *Lankford v. Sherman*, 452 F.3d 496 (8th Cir. 2006).

³⁶ See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *Olszewski v. Scripps Health*, 30 Cal. 4th 798, 815 (2003).

³⁷ 29 U.S.C. § 1144(a); see, e.g., *Shaw v. Delta Airlines*, 463 U.S. 85 (1983).

³⁸ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Court has held that the federal government controls the nuclear and safety aspect of power generation.³⁹

Finally, conflict preemption occurs when state law actually conflicts with federal law. A conflict occurs “where it is impossible for a private party to comply with both state and federal requirements, or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”⁴⁰ In order to determine whether a conflict exists, courts are required to determine Congress’ intent. When Congress enacts a statute pursuant to the Spending Clause, as it did with the Medicaid Act, it is necessary for Congress to “speak with a clear voice” in order for the statute to have preemptive effect.⁴¹ Once a state voluntarily accepts the conditions imposed by Congress in the Spending Clause statute, the Supremacy Clause obliges it to comply with federal requirements. There is a particular presumption against conflict preemption of state laws regulating public health or where state and federal governments are pursuing the same purpose, such as the Medicaid program.⁴² In this Fact Sheet, we focus on conflict preemption, as this is the type of preemption implicated when determining whether the Medicaid Act and similar statutes can be enforced.

Developments Affecting Preemption Claims in Medicaid Cases

In contrast to the issue of enforceability through § 1983, the use of preemption to vindicate rights established by the Medicaid statute and laws is still relatively undeveloped. Courts approach the preemption question in different ways and, in some cases, provide almost no analysis and may not even use the term “preemption” in their decisions.

Some basic conclusions can be made, however. First, “[I]t is well-established that the federal courts have jurisdiction under 28 U.S.C. § 1331 over a preemption claim seeking injunctive and declaratory relief.”⁴³ Moreover, some courts have suggested that there is an implied right of action to seek injunctive relief from a state statute purportedly preempted by federal Spending Clause legislation.⁴⁴ Other courts, however, have not been as specific regarding what cause of action enables individuals to pursue a preemption claim.

It is premature to state any hard and fast rules with regard to preemption. However, a few important points deserve emphasis:

³⁹ See, e.g., *Pac. Gas & Elec. Co. v. State Energy Resource & Conservation Cmm'n*, 461 U.S. 190, 212 (1983) .

⁴⁰ *English v. General Electric Co.*, 496 U.S. 72, 79 (1990) (citation omitted).

⁴¹ *Planned Parenthood of Tex. v. Sanchez*, 403 F.3d 324, 331 (5th Cir. 2005); see also *Shaw v. Delta Airlines*, 463 U.S. 324 (2005); see also *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

⁴² See *Pharm. Research & Manufacturers Ass’n of America v. Walsh*, 538 U.S. 644, 666 (2003).

⁴³ *Planned Parenthood*, 403 F.3d at 331; see also *Shaw v. Delta Airlines*, 463 U.S. at 96, n. 14.

⁴⁴ See *Planned Parenthood*, 403 F.3d. at 333-335.

- Courts have given regulations preemptive effect
- Lack of a right of enforcement under § 1983 does not preclude a cause of action for preemption
- Spending clause statutes are being given preemptive effect thus far, but signals from the Supreme Court suggest potential problems

The following cases provide illustrations of how these points have arisen.

Lankford v. Sherman, 451 F.3d 496 (8th Cir. 2006)⁴⁵

The plaintiffs in *Lankford* filed suit to challenge a Missouri regulation governing the coverage of durable medical equipment, supplies and appliances (DME). The regulation eliminated coverage of many items of DME for Medicaid recipients who are aged or disabled, but not blind. The plaintiffs alleged that this provision violated certain Medicaid requirements, including 42 U.S.C. § 1396a(a)(17), the requirement that states use “reasonable standards” when determining eligibility for, and the extent of, medical assistance. Plaintiffs argued that the statutes provisions could be enforced through an individual private right of action under 42 U.S.C. § 1983 and also that, under the Supremacy Clause, these federal statutory provisions conflicted with and therefore preempted Missouri’s regulation. The District Court denied plaintiffs’ request for a preliminary injunction and plaintiffs appealed to the Eighth Circuit Court of Appeals.

First, the Court held that the reasonable standards claim was not enforceable by plaintiffs through § 1983.⁴⁶ It then addressed the plaintiffs’ claim that the reasonable standards provision preempted the state’s DME regulation. Significantly, the Court considered the preemption claim despite its § 1983 holding, reasoning that preemption claims are analyzed under a different test than § 1983 claims.⁴⁷ The Court reasoned that the Supremacy Clause is not the direct source of any federal right, but secures federal rights by according them priority whenever they come in conflict with state law.⁴⁸

Plaintiffs contended that the state regulation is preempted under the Supremacy Clause because it fails to provide a sufficient amount of DME services to meet Medicaid’s basic objectives and to establish an appropriate

⁴⁵For an in-depth discussion of the *Lankford* case and history, see Jamie D. Brooks and Sarah Somers, July Q&A: The Eighth Circuit’s decision in *Lankford v. Sherman* (July 25, 2006), available from NDRN.

⁴⁶ *Id.* at 509.

⁴⁷ *Id.*

⁴⁸ *Id.* at 31.

procedure for recipients to obtain non-covered DME items because it required individuals to be confined to their homes in order to receive DME.⁴⁹ These latter two requirements are contained in written directives set forth by the Centers for Medicare & Medicaid Services (CMS) in letters to state Medicaid directors.⁵⁰

The Court held that the Missouri regulation violated the reasonable standards requirement, relying not only upon the statute but also upon the written directives from CMS. The Court noted that CMS specifically instructed that a homebound requirement is an improper restriction for the provision of DME.⁵¹ In addition, the Court noted that CMS had informed Missouri that its DME policy was inconsistent with CMS's prohibition of "homebound" requirements.⁵²

Planned Parenthood of Tex. v. Sanchez, 403 F.3d 324 (5th Cir. 2005)

Plaintiff health care providers alleged that a Texas law imposed unlawful conditions on their eligibility for federal family planning funding. Among other claims, plaintiffs asserted that the state law was invalid under the Supremacy Clause because it imposed additional conditions on the receipt of family planning funds that were inconsistent with the federal statute authorizing the funds.

The defendant argued that, in order to state a claim, plaintiffs should be required to show that the statute they are seeking to enforce confers a right or duty that runs to them.⁵³ The court rejected this argument, reasoning that plaintiffs were not seeking to enforce rights established by the underlying statute, but rather the interests protected by the Supremacy Clause.⁵⁴ Accordingly, the court held that plaintiffs have an implied right of action to seek injunctive relief from a state statute purportedly preempted by federal Spending Clause legislation.⁵⁵

The court also rejected the argument that plaintiffs had to show that they had a right enforceable under § 1983 in order to state a claim for preemption:

Appellees are not asking the courts to enforce their "right" under § 1983 to secure enforcement of Title X, as TDH asserts. Rather, Appellees' Supremacy Clause argument is fundamentally different: they argue that [state law] imposes conditions on the receipt of federal funds that are

⁴⁹ *Id.* at 506-507.

⁵⁰ *Id.* at 511-512.

⁵¹ *Id.* at 513.

⁵² *Id.* at 511-512.

⁵³ *Planned Parenthood.*, 403 Fed.3d at 331.

⁵⁴ *Id.*

⁵⁵ The court noted initially that it was proper to analyze Supremacy Clause claims of this nature as preemption claims, even though courts have not always been explicit about doing so, citing e.g., *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968)). *Id.* at 330, 333 – 335.

incompatible with Title X. Therefore, we need not be concerned that the Supremacy Clause does not of its own force create rights enforceable under § 1983.⁵⁶

The court remanded the case for a determination of whether the requirements imposed by state law actually formed an obstacle of the accomplishment of the purposes of the federal funding law.

Jensen, v. Missouri Dept. of Health and Senior Services, 186 S.W.3d 857 (Mo. Ct. App. 2006)

In this case, an adult plaintiff argued that Missouri's restrictions on personal assistance services violated the Medicaid Act. Pursuant to an administrative hearing, the plaintiff's personal care services had been reduced because she lived with her parents and, under Missouri regulations, their potential contributions had to be taken into account. This decision was upheld by a state trial court.

The state appeals court reversed. It held that the state program requirements were preempted because they conflict with a federal law provision that says the state may only consider the resources of a spouse or parents when determining eligibility if the beneficiary is under 21 years of age.⁵⁷

The court stated that

[w]hat the Department is essentially requiring of Ms. Jensen is that she show that her parents will lose income (undue hardship) if they provide PCA services to her as volunteers two days each week. This is required for Ms. Jensen to demonstrate that she has unmet needs and thus qualifies for PCA services seven days a week. Federal Medicaid law, however, states quite plainly that state plans may not, when determining the extent of medical assistance to be provided, 'take into account the financial responsibility of any individual for any applicant or recipient of assistance ... unless such applicant or recipient is such individual's spouse or such individual's child under age 21.'⁵⁸

Olszewski v. Scripps Health, 30 Cal.4th 798 (2003)

At issue in *Olszewski* were federal regulations limiting the amount of payment that providers could receive for providing Medicaid services. Federal law requires Medicaid-participating providers to accept the Medicaid payment and any recipient co-payments as payment in full, even if the Medicaid

⁵⁶ *Id.*

⁵⁷ *Id.* at 863; see also 42 U.S.C. § 1396a(a)(17)(D).

⁵⁸ *Id.* at 862, citing 42 U.S.C. § 1396a(a)(17)(D).

reimbursement amount is less than their normal charges for the service.⁵⁹ A California statute, however, allowed health care providers to file liens against judgments or settlements obtained by a Medi-Cal beneficiary, and thus collect payment beyond the Medicaid full payment amount.⁶⁰

The Court held that the California law was preempted by the federal regulations.⁶¹ The Court found it clear that the intent of the federal Medicaid regulations was to bar health care providers from recovering any amount from recipients that exceeded the co-payment. Thus, because the state requirements allowed providers to obtain much more from the recipients than the co-payment, “they cannot co-exist with federal law and stand as an obstacle to the accomplishment of Congress’ intent.”⁶²

Hints from the Supreme Court

The Supreme Court has not squarely addressed enforcement of Spending Clause statutes like Medicaid through preemption. Two recent cases provide contradictory signals.

First, in *Pharm. Research & Manufacturers Ass’n of America v. Walsh*, the plaintiffs challenged a Maine law requiring drug manufacturers to enter into rebate agreements to avoid having their drugs subject to prior authorization under Maine’s prescription drug program.⁶³ Plaintiffs argued that these requirements were preempted by conflicting Medicaid requirements. The court held that state law was not preempted, reasoning that “the mere fact that prior authorization may impose a modest impediment to access to prescription drugs provided at [federal] government expense does not provide a sufficient basis for pre-emption of the entire Maine Rx Program.”⁶⁴

By reaching this conclusion, the Court implicitly accepted the premise that plaintiffs had stated a claim. While both Justice Scalia and Thomas concurred in the decision against Plaintiffs, they each would have ruled that no claim was stated. First, Justice Scalia opined that the only remedy for a violation of the Medicaid Act is an action for termination of federal funding by the Secretary of Health and Human Services and that plaintiffs should be restricted to pursuing that route for enforcement.⁶⁵ This advice, however, ignores that fact that there is no such remedy for plaintiffs – only the Secretary can initiate termination proceedings. Justice Thomas, for his part, expressed doubts that Spending

⁵⁹ 42 U.S.C. § 1396a(a)(25)(C); 42 C.F.R. § 447.15.

⁶⁰ Welf. & Inst. Code §§ 14124.74, 14124.791 (2002).

⁶¹ *Olszewski*, 30 Cal.4th at 814, 823.

⁶² *Id.*

⁶³ 538 U.S. 644 (2003).

⁶⁴ *Id.* at 667.

⁶⁵ *Id.*, 538 U.S. at 675 (Scalia, J., concurring).

Clause statutes could be enforced by any third party, by preemption or otherwise.⁶⁶

In *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, the plaintiff had originally sued in federal district court seeking a declaration that the anti-lien statute violated the Medicaid Act.⁶⁷ A unanimous Supreme Court affirmed the Eighth Circuit's decision that Arkansas' state statute regarding third party recovery in Medicaid was in conflict with the federal Medicaid law governing liens. The court concluded simply that "Federal Medicaid law does not authorize ADHS to assert a lien on Ahlborn's settlement in an amount exceeding \$ 35,581.47, and the federal anti-lien provision affirmatively prohibits it from doing so. Arkansas' third-party liability provisions are unenforceable insofar as they compel a different conclusion."

Interestingly, the court engages in no preemption discussion, no analysis of the Supremacy Clause and, in fact, never uses the words "preempt" or "preemption." The District Court and Court of Appeals decisions do not do so either.⁶⁸ Thus, the case does not provide a guide to advocates as to pleading a preemption case, or what type of analysis the Court might employ when determining whether there is jurisdiction or a cause of action. It is, however, significant that Justices Scalia and Thomas do not take the opportunity to further develop their thinking.

Conclusion

The National Health Law Program actively monitors and participates in Medicaid cases filed pursuant to § 1983 and/or claiming preemption. Please do not hesitate to contact us to discuss these issues.

⁶⁶ *Id.*, at 683 (Thomas, J., concurring).

⁶⁷ ___ U.S. ___, 126 S. Ct. 1752 (2006).

⁶⁸ *See* 397 F.3d 620 (8th Cir. 2005); 280 F. Supp. 2d 881 (E.D. Ark. 2003).