

Medicaid Litigation in the 21st Century: Choice of Claims and Choice of Forum Issues

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Overview

- Section 1983
- Preemption
- State law theories

The text of 42 U.S.C. § 1983

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.”

Section 1983:

- Requires deprivation of a “federal right” secured by the “Constitution and laws”
 - By a person acting under color of state law
- Provides for legal and equitable remedies
- Provides for attorneys’ fees
- Case can be filed in federal or state court

Cases framing § 1983

- *Maine v. Thiboutot*, 448 U.S. 1 (1980) (“laws” include federal statutes standing alone)
- *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (plaintiff must allege “federal right”)

Finding a federal “right”

- The “traditional” test:
 - Was provision intended to benefit plaintiff?
 - Does provision establish clear requirements for the court to enforce?
 - Is the provision mandatory on the state?
 - If so, does the statute evidence the lack of a comprehensive enforcement scheme?
 - *Blessing v. Freestone*, 520 U.S. 329 (1997); *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990)

Congressional Intent re: SSA

- 42 U.S.C. §§ 1320a-2, 1320a-10
 - “The intent of this provision is to assure that individuals who have been injured by the State’s failure to comply with the Federal mandates of the State plan titles of the Social Security Act are able to seek redress in federal courts to the extent they were able to prior to the decision in *Suter v. Artist M.*”
 - 1994 USCCAN 2901, 3257

The *Gonzaga* decision

- *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)
(Family Education Rights and Privacy Act)
 - Private enforcement of spending clause enactments rare
 - Need “unambiguous intent” to confer individual rights
 - Implied right of action test for intended beneficiary
 - “Rights creating language”
 - Aggregate v. individual focus
 - Provisions for enforcement

The *Rancho Palos Verdes* decision

- *City of Rancho Palos Verdes v. Abrams*, 125 S.Ct. 1453 (2005)
 - Telecommunications Act
 - Focus on: comprehensive enforcement scheme
 - Does statute contain a “more restrictive private judicial remedy”

Recent Supreme Court Medicaid Case

- *PHARMA v. Walsh*, 538 U.S. 644 (2003)
 - Justice Scalia: Use fund termination “process”
 - Justice Thomas:
 - 1396a(a)(19) (best interests of recipients) unenforceable
 - Medicaid a contract & no third party enforcement

Lower Courts & Medicaid/1983 Enforcement

- § 1396a(a)(8) -- reasonable promptness
 - see *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004); *Bryson v. Shumway*, 208 F.3d 79 (1st Cir. 2002)
 - BUT NOTE: “medical assistance” as payment argument, *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006); *Mandy R. v. Owens*, 464 F.3d 1139 (10th Cir. 2006); *Oklahoma Chap. Of Pediatrics v. Fogerty*, 472 F.3d 1208 (10th Cir. 2006)
- § 1396a(a)(10), 1396d(a) – services for eligible individuals
 - see *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006)
- § 1396r – Nursing Home Reform Act
 - see *Rolland v. Romney*, 318 F.2d 42 (1st Cir. 2003)

Lower Courts & Medicaid/1983 Enforcement

- § 1396a(a)(23) – freedom of choice
 - See *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006)
- § 1396a(a)(43), 1396d(r) -- EPSDT
 - see *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006); *SD v. Hood*, 391 F.3d 581 (5th Cir. 2004)

Lower Courts & Medicaid/1983 Enforcement

- § 1396a(a)(30) – equal access
 - see *Mandy R. v. Owens*, (10th Cir. 2006); *Oklahoma Chap. Of Am. Acad. Of Pediatrics v. Fogerty*, (10th Cir. 2006); *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005)
- § 1396a(a)(17) – reasonable standards
 - see *Watson v. Weeks* (9th Cir. 2006); *Lankford v. Sherman*, 451 F.3d 496 (8th Cir.)

Congressional intent

Citations to §§ 1320a-2, 1320a-10

- *Watson v. Weeks; Sanchez v. Johnson; ASW v. Oregon*, 424 F.3d (9th Cir. 2006);
S.D. v. Hood, 391 F.3d 581 (5th Cir. 2004);
Rabin v. Wilson-Coker, 362 F.3d 190 (2d Cir. 2004)

Preemption as an alternative to § 1983

- Three types of preemption
 - Express
 - Field
 - Conflict*
 - Direct
 - “State law stands as an obstacle”
 - *Hines v. Davidowitz*, 312 US 52, 67 (1941)

Tie to the Supremacy Clause

- “It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights.... A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.”
 - *Shaw v. Delta Airlines*, 463 US 85, 96 n. 14 (1983), quoted in *Verizon Md. Inc. v. Pub. Serv. Commn.*, 535 US 635 (2002), applied in *PHARMA v. Walsh*, 538 US 644 (2003)

The Supremacy Clause

- “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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.”

- US Const., Art. VI

Preemption

- “[T]he Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.”
 - Wright & Miller, Federal Prac. And Proc. Juris. 2d § 3566

Federal laws that preempt

- US Constitution
- Statutes
- Regulations
- Federal agency orders

State laws subject to preemption

- Statutes
- Regulations
- Agency orders
- Written policies and directives

Preemption v. § 1983

- Proof
 - Gonzaga/Blessing “federal right” test does not apply
 - Courts take broader view of congressional history and assess scheme of the statute
 - Federal regulation can form basis of the claim
- Relief
 - Injunction of the state law
 - No declaratory relief
 - No damages
 - No attorneys fees

Preemption Caveat

- There is little track record in cases filed on behalf of program beneficiaries.
- *Bates v. Dow Agrosciences LLC*, 125 S.Ct. 1788, 1801-02 (2005) (adopting presumption against preemption)
- *But see Ark. Dep't of Health and Human Servs. v. Ahlborn*, 126 S.Ct. 1752 (2006) (holding that Medicaid anti-lien provision invalidates conflicting Missouri law)

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

- Preemption claims are analyzed under a different test than § 1983
- Once a state accepts conditions imposed by Congress, obligated to comply with federal Medicaid requirements
- Because Missouri state regulation appears unreasonable under directives from court and CMS, likely preempted

State court?

- Cause of action?
- Attorneys fees provision?

Questions?

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