Issue Brief

Private Enforcement of the Medicaid Act

Pursuant to 42 U.S.C. § 1983[[1]](#footnote-1)

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The Supreme Court has restricted the ability of private citizens to enforce federal laws pursuant to 42 U.S.C. § 1983. The Court has established a demanding test for private enforcement, in particular in the *Gonzaga University v. Doe* and *Blessing v. Freestone* cases. The *Blessing* case reflects the majority’s particular interest in narrowing private enforcement of laws enacted by Congress pursuant to the Spending Clause of the U.S. Constitution. The Medicaid Act is a Spending Clause program.

Since 2002, when *Gonzaga* was decided, the federal courts of appeal have decided 41 Medicaid cases. The appellate courts have consistently applied the test for private enforcement, uniformly finding some Medicaid provisions enforceable and others not. To date, there are no splits among the circuit courts. Significantly, § 1983 remains the primary vehicle for enforcing a number of the Medicaid Act’s most important consumer protections. Moreover, the Supreme Court has not hastened to revisit the statute. During its 2012-2013 Term, for example, the Court denied petitions for certiorari filed by state attorneys seeking to overturn appellate courts’ enforcement decisions in four Medicaid cases.

This Fact Sheet will provide background on § 1983 and the leading Supreme Court cases discussing it.[[2]](#footnote-2) It will then provide a current point-in-time assessment of Medicaid Act enforcement in the circuit courts of appeal and conclude by offering recommendations for lawyers who are considering a § 1983 Medicaid claim.

**Background on § 1983**

At the time of our Nation’s founding, the constitutional framers worked against the backdrop of English laws and principles. Among these was the “invariable principle ... that every right, when withheld, must have a remedy, and every injury its proper redress.”[[3]](#footnote-3) The Supreme Court’s landmark decision, *Marbury v. Madison,* reflects this notion, stating that “the very essence of civil liberty” is the “right of every individual to claim the protection of the law, whenever he receives an injury. One of the first duties of government is to afford that protection.”[[4]](#footnote-4)

Over the years, private individuals have gone to court to obtain prospective injunctive relief when they are being harmed by state actions that are inconsistent with federal law. Some of these federal laws were enacted by Congress pursuant to the Spending Clause of the Constitution. The Social Security Act, of which Medicaid is a part, is an example of a Spending Clause enactment. Like many other Spending Clause enactments, the Medicaid Act makes federal funding available to states that participate in Medicaid consistent with the requirements of federal law and authorizes the federal government to withhold or terminate federal funding to a state that is not operating according to the federal requirements.[[5]](#footnote-5) When it added Medicaid to the Social Security Act in 1965, Congress did not include a provision authorizing private (as opposed to federal) enforcement by program beneficiaries and/or applicants. But in enacting Medicaid, Congress acted with the understanding that courts would “provide such remedies as are necessary to make effective the congressional purpose.”[[6]](#footnote-6)

Even without an express cause of action in the original Social Security Act, program beneficiaries enforced various titles of the Act pursuant to a civil rights statute, 42 U.S.C. § 1983 (§ 1983). Section 1983 provides an express cause of action to individuals when a state actor is depriving them of their rights under the U.S. Constitution or a federal law.[[7]](#footnote-7) For example, in *King v. Smith*, the Court allowed welfare recipients to enforce the “reasonable promptness” provision of the Social Security Act’s welfare law pursuant to § 1983.[[8]](#footnote-8) In *Maine v. Thiboutot*, the Court again addressed enforcement under § 1983 and held that “the phrase ‘and laws’ means what it says” and, thus, § 1983 enforcement applies not only to constitutional rights but also to rights defined in federal statutes.[[9]](#footnote-9)

Subsequently, the Court cautioned that § 1983 actions require a plaintiff to assert a violation of a federal “right,” not merely a violation of federal law.[[10]](#footnote-10) The Supreme Court thereafter announced a three-prong test for lower courts to use to determine whether a federal law creates a right: (1) Was the federal provision in question intended to benefit the plaintiff; (2) Does the provision contain sufficiently specific language so that a court knows what to enforce; and (3) Does the provision create a binding obligation on the state?[[11]](#footnote-11) If these questions are answered affirmatively, there is a presumption that the plaintiff can enforce the provision. The defendant can overcome the presumption by showing that Congress has foreclosed enforcement through § 1983, expressly or by including a comprehensive remedial scheme in the substantive federal law.[[12]](#footnote-12) The Supreme Court has explicitly held that the Medicaid Act does not include such a remedial scheme.[[13]](#footnote-13)

Subsequently, lower courts applied this three-prong test, finding some federal laws created federal rights and were therefore judicially enforceable while others did not. Despite this history, recent Supreme Court Justices have been reluctant to allow private individuals to enforce spending clause enactments. One year after *Maine v. Thiboutot*,the Court began to cut back on the right to private enforcement in *Pennhurst State School & Hospital v. Halderman*.[[14]](#footnote-14) Discussing the Developmentally Disabled Assistance and Bill of Rights Act, Justice Rehnquist’s majority opinion equated legislation enacted pursuant to the Spending Clause to a contract between the federal government and the states with the typical remedy for state noncompliance being an action by the federal government to terminate funding.[[15]](#footnote-15) Notably, the Developmentally Disabled Assistance and Bill of Rights Act, unlike Medicaid, is not part of the Social Security Act.

In 2002, the Rehnquist Court issued *Gonzaga Univ. v. Doe* to clarify and tighten the enforcement test.[[16]](#footnote-16) Writing for the majority, Chief Justice Rehnquist cited *Pennhurst* and noted that *Gonzaga* involved a Spending Clause enactment.[[17]](#footnote-17) The *Gonzaga* Court then held that a federal law is not privately enforceable unless Congress has unambiguously manifested its intent to confer individual rights on the plaintiff.[[18]](#footnote-18) Moreover, this 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.”[[19]](#footnote-19) The provision must contain “rights- or duty-creating language” and have an individual rather than an aggregate focus.[[20]](#footnote-20)

Thus, *Gonzaga* turns on the need to discern congressional intent. Notably, in 1994, Congress added 42 U.S.C. § 1320a-2 to the Social Security Act expressly to recognize that provisions of the Social Security Act are privately enforceable.[[21]](#footnote-21) The amendment requires all courts, in Social Security Act cases, to apply the grounds for enforcement recognized by the Supreme Court prior to 1994 (grounds, which as discussed above, include both preemption and § 1983 claims). Interestingly, not all courts have deferred to § 1320a-2.[[22]](#footnote-22) Of particular note is a pithy, but incorrect, analysis by Ninth Circuit Court Judge O’Scannlain in a Medicaid case, *Sanchez v. Johnson*.[[23]](#footnote-23) The decision dismisses § 1320a-2, finding it is “hardly a model of clarity” and concluding that it does not disturb the reasoning of *Pennhurst.*[[24]](#footnote-24) However, Congress enacted § 1320a-2 specifically to preserve the long history of private enforcement of the Social Security Act, and *Pennhurst* is not a Social Security Act case.[[25]](#footnote-25)

**Medicaid enforcement under § 1983**

The Supreme Court has not decided a Medicaid/§ 1983 enforcement case since *Gonzaga* was decided on June 20, 2002. During the 2011-2012 Term, however, the Court did agree to consider the question of whether beneficiaries and providers may maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A), a provision of the Medicaid Act requiring states to establish adequate provider payment rates.[[26]](#footnote-26) While the case was remanded without a decision on the Supremacy Clause question, it is nevertheless important because Chief Justice Roberts’ strong, four-member dissent, stated without discussion that § (30)(A) cannot be enforced through § 1983 (indeed, every appellate court has said this as well) and would have decided the Supremacy Clause question against the plaintiffs.[[27]](#footnote-27)

A number of lower courts have applied the Gonzaga/Blessing enforcement test in the Medicaid context. Of particular note are the 41 cases decided by the federal courts of appeals. This activity is summarized in the tables, below.

Table 1 shows where the cases have occurred. As of October 2013, 11 of the 12 federal circuits had reviewed at least one § 1983 Medicaid case since *Gonzaga* was decided. The First, Sixth, and Ninth Circuits have been most active. The DC Circuit is the only appellate court yet to decide a Medicaid case.[[28]](#footnote-28)

**Table 1**

**Medicaid § 1983 cases in the circuits, June 2002-September 2013**

|  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| 1st | 2d | 3d | 4th | 5th | 6th | 7th | 8th | 9th | 10th | 11th | DC |
| 5 | 3 | 4 | 2 | 3 | 5 | 3 | 3 | 9 | 3 | 1 | 0 |

Courts review enforcement on a provision-by-provision basis. Although such assessment requires careful pleading of the complaint and exacts more painstaking analysis from the parties and the court, it is consistent with the Supreme Court’s teachings. [[29]](#footnote-29) Table 2 shows that, since the 2002 *Gonzaga* ruling, federal appellate courts have reviewed the enforceability of 23 Medicaid Act provisions. These courts have allowed just over half of the provisions to be privately enforced by the plaintiffs. The vast majority of the cases involve enforcement by Medicaid beneficiaries; however, the Ninth and Third Circuits have now joined the First and Fourth to recognize the right of federally qualified health centers to enforce 42 U.S.C. § 1396a(bb), a Medicaid provision that specifically addresses payment requirements for FQHCs.

A few Medicaid provisions have received particular attention post-*Gonzaga*. Federal courts of appeals have consistently allowed Medicaid beneficiaries to enforce two provisions that are of the utmost importance: 42 U.S.C. § 1396a(a)(8), which requires the state Medicaid agency to provide medical assistance to “all individuals” with reasonable promptness, and § 1396a(a)(10)(A), requiring the state agency to provide medical assistance to “all individuals” who are described in the section’s listing of covered populations (e.g. SSI, qualified pregnant women, low-income children). By contrastall six of the federal circuits to have reviewed the question (the First, Second, Fifth, Sixth, Ninth, and Tenth) have held a Medicaid provider payment provision, § 1396a(a)(30)(A), does *not* create a federal right enforceable by health care providers.[[30]](#footnote-30) And, some of these courts have decided the (30)(A) question on multiple occasions (more recently, in cases where providers have joined some program beneficiaries).

The vast majority of appeals court cases (38 of the 41 cases) turn on the *first* prong of the enforcement test (whether the provision in question unambiguously manifests congressional intent to confer individual rights on the plaintiff). The courts have reached the same conclusion when assessing a Medicaid provision against the first prong, and there are no splits among the circuits.

The Tenth, Eighth and Third Circuits have, however, reached different conclusions when applying the *third* prong of the enforcement test (whether the provision creates a binding obligation on the state). Their assessments pertain to subsections of 42 U.S.C. § 1396d(p)(4), a Medicaid provision that addresses eligibility when an applicant has a trust. In 2009, the Tenth Circuit held § 1396d(p)(4)(A) does not impose an unambiguous, binding obligation on the state. *See Hobbs v. Zenderman*, 579 F.3d 1171, 1179 (10th Cir. 2009). That conclusion is based on an earlier case, *Keith v. Rizzuto*, 212 F.3d 1190 (10th Cir. 2000), that did not discuss private enforcement under § 1983 but held that § 1396p(d)(4)(A) left the states free to decide whether and under what conditions to count trusts for eligibility purposes. *Id.* at 1180 (citing *Rizzuto*, 212 F.3d at 1193)). While acknowledging that “the statute might have been read in the first instance to require States to exempt special needs trusts,” *Hobbs* held that construction was foreclosed by *Keith* absent *en banc* reconsideration or a contrary decision from the Supreme Court. *Id.*

By contrast, the other two circuits have held the applicant can enforce other subsections of § 1396d(p)(4). In *Center for Special Needs Trust Administration v. Olson*, 676 F.3d 688 (8th Cir. 2012), the Eighth Circuit acknowledged *Hobbs* but pointed out that *Hobbs* concerned paragraph (A) while the case before it raised a claim under paragraph (C). The court declined to apply *Hobbs*, finding paragraph (C) contains the mandatory language “shall not” when describing the obligation imposed on the state and, thus, creates a binding obligation on the state. *Id.* at 700 n.2. Most recently, the Third Circuit concluded that paragraph (C) imposes mandatory obligations on the state and can be enforced under § 1983. *See Lewis v. Alexander*, 685 F.3d 325, 333-34, 342 (3d Cir. 2012); *id.* at 344 (acknowledging *Rizzuto* and *Hobbs* but stating, “Here, Congress has not only provided a comprehensive system of asset-counting rules, it has actually legislated on this precise class of asset” and required states to exempt any trust meeting the provision of § 1396p(d)(4)). The Supreme Court denied certiorari in *Lewis*. *See* 133 S. Ct. 933 (2013).

**Table 2**

**Circuit Court Enforcement of Medicaid Provisions, June 2002-Sept. 2012**

|  |  |  |
| --- | --- | --- |
| **Medicaid Provision (42 U.S.C. § 1396)** | **Held Enforceable** | **Held Unenforceable** |
| a(a)(3)-fair hearing | 2d (2012), 6th (2003) |  |
| a(a)(8)-reasonable promptness | 1st (2002), 3d (2004) 4th (2011, 2007), 5th (2013) 6th (2006) |  |
| a(a)(10)(C)–medically needy |  | 10th (2009) |
| a(a)(13)(A)–institutional payment rates; notice process |  | 2d (2006) |
| a(a)(17)-reasonable standards |  | 8th (2006); 9th (2006); 10th (2009) |
| a(a)(19)-best interests |  | 7th (2003) |
| a(a)(23)(A)-free choice of provider | 6th (2006), 7th (2012), 9th (2013) |  |
| a(a)(25) – third party liability |  | 11th (2012) |
| **Medicaid Provision (42 U.S.C. § 1396)** | **Held Enforceable** | **Held Unenforceable** |
| a(a)(43)-EPSDT | 5th (2004), 6th (2010, 2006),[[31]](#footnote-31) 8th (2002) |  |
| a(bb)-FQHC payment | 1st (2008, 2005), 3d (2013), 4th (2007), 9th (2013) |  |
| b(m)-managed care |  | 9th (2009) |
| d(a)-services | 3d (2004), 6th (2006), 8th (2006) |  |
| n(c)(2)(C) & (d)(2)(D)-home & community waiver informing | 9th (2007) |  |
| o-cost sharing | 9th (2007) |  |
| p(d)(4)(A)-trust remainders |  | 10th (2009) |
| p(d)(4)(C)–special needs trusts exclusion | 3d (2012), 8th (2012) |  |
| r(b), (e)-nursing home reform | 1st (2003), 3d (2009) |  |
| r-6-transitional Medicaid | 2d (2004) |  |

As discussed above, individual federal statutory provisions are the focus of the § 1983 inquiry. Circuit courts are consistently finding that federal regulations may not independently create privately enforceable rights under § 1983.[[32]](#footnote-32) However, a regulation can “define or flesh out” the content of a federal statute that is itself privately enforceable.[[33]](#footnote-33) Thus, in *Shakhnes v*. *Berlin*, the Second Circuit recently held the Medicaid fair hearing statute, 42 U.S.C. § 1396a(a)(3), as construed by the timeframe regulation, 42 C.F.R. § 431.244(f), creates a right, enforceable under § 1983, to receive a fair hearing and a fair hearing decision “[o]rdinarily, within 90 days” of a fair hearing request. By contrast, two federal circuit courts have refused to allow plaintiffs to enforce Medicaid regulations that establish the protocols for states to submit their state Medicaid plans and state plan amendments. *See New Jersey Primary Care Ass’n v. New Jersey Dep’t of Health Servs.*, 722 F.3d 527 (3d Cir. 2013) (regarding 42 C.F.R. § 430.12(c)); *Developmental Servs. Network v. Douglas*, 666 F.3d 540 (9th Cir. 2011) (same); *see generally John B. v. Emkes*, 710 F.3d 394 (6th Cir. 2013) (refusing to allow plaintiffs to enforce EPSDT regulation, 42 C.F.R. § 441.61(c), requiring state agency to work with other entities and agencies to achieve EPSDT).

Finally, since *Gonzaga* was decided the Supreme Court has not accepted review of a Medicaid case applying the *Gonzaga/Blessing* enforcement test. During the 2012-2013 Term, for example, the Court denied certiorari in four cases where state attorneys were seeking to overturn an appellate decision allowing private enforcement of a Medicaid Act provision pursuant to § 1983.[[34]](#footnote-34)

**Recommendations, trends, and conclusions**

Consider § 1983 enforcement carefully. Do not seek to enforce Medicaid provisions that have a poor track record, and do not ask a judge to apply a provision to facts in novel ways, unsupported by the direct words of the statute and discussion in the case law. Remember that adverse decisions will affect not just the named plaintiffs but all Medicaid beneficiaries in the federal district or appellate jurisdiction and will be applied to other Medicaid provisions in future cases. Make sure to consult and address Medicaid enforcement decisions outside your jurisdiction and both Medicaid and non-Medicaid cases that establish § 1983 enforcement precedent in your jurisdiction.

The following trends should be carefully monitored and considered:

1. Just because the Supreme Court has not yet granted certiorari to review a

§ 1983 Medicaid case does not mean it will not change its mind. Advocates should remain vigilant. As mentioned above, the Court is clearly interested in deciding the extent to which private individuals can rely on the Supremacy Clause to enjoin state laws that are inconsistent with federal law. If a Supremacy Clause case is accepted for review, the Court’s opinion could affect § 1983 enforcement, depending on whether the Court mentions § 1983 enforcement.

1. While courts had long viewed § 1983 enforcement as within the broad remedial scope of the civil rights statutes, the Supreme Court has questioned this assumption. Accordingly, many lower court judges begin their review with the presumption that the Medicaid Act provision at issue is not enforceable.

It is critical, therefore, to establish the proper framework for the court’s review.

1. Consistent with *Blessing*, Medicaid enforcement questions should be decided on a provision-by-provision basis and, thus, complaints must be pled in “manageable analytic bites.” *Blessing*, 520 U.S. at 342. Given the difficulties that can arise, advocates should plead claims to the precise paragraph that is being enforced (for example, plead 42 U.S.C. § 1396a(a)(43)(A), not simply § 1396a(a)(43)).
2. Privately enforceable Medicaid Act provisions typically speak in terms of the “individual,” frequently use words like “must” and “shall,” and specifically describe the state’s responsibilities to those individuals with specificity.[[35]](#footnote-35)
3. *Gonzaga* focuses on the intent to benefit the named plaintiff; however, courts continue to apply the three-prong test.[[36]](#footnote-36) Thus, while some judges argue that *Gonzaga* replaced *Blessing* altogether,[[37]](#footnote-37) attorneys should continue to assess each provision at issue against all three prongs of the enforcement test when developing and briefing the claims in the case.
4. Courts are not allowing private enforcement of federal regulations, standing alone, through § 1983, but regulations can be cited in the complaint’s legal framework section. Regulations can also be cited in the complaint’s background section and in briefs to fill out the requirements of statutes that are themselves privately enforceable.

1. Produced with a grant from the Training Advocacy Support Center (TASC), which is sponsored by the Administration on Intellectual and Developmental Disabilities (AIDD), the Substance Abuse and Mental Health Services Administration (SAMHSA), the Rehabilitation Services Administration (RSA), the Social Security Administration (SSA), and the Health Resources Services Administration (HRSA). TASC is a division of the National Disabilities Rights Network (NDRN). [↑](#footnote-ref-1)
2. For previous NHeLP discussion, *see*, *e.g.*,Jane Perkins, *Update on Private Enforcement of the Medicaid Act Pursuant to 42 U.S.C. § 1983* (Sept. 26, 2012) (available from NHeLP). [↑](#footnote-ref-2)
3. John Vail & Jane Perkins, *Chipping at the Core of Justice*, 40 Trial 28 (Apr. 2004) (quoting William Blackstone, Commentaries on the Laws of England 109 (1765)). [↑](#footnote-ref-3)
4. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). [↑](#footnote-ref-4)
5. *See* U.S. Const., art. I, § 8, cl. 1. [↑](#footnote-ref-5)
6. *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). *Cf. Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (finding that understanding to have been abandoned and noting that “[h]aving sworn off the habit of venturing beyond Congress’s intent, we will not accept respondent’s invitation to have one last drink.”). [↑](#footnote-ref-6)
7. 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.” 42 U.S.C. § 1983. [↑](#footnote-ref-7)
8. 392 U.S. 309 (1968) (“There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.”); *see also, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 675 (1974) (“Suits in federal court under Section 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating states.”); *Rosado v. Wyman*, 397 U.S. 397, 421-22 (1970) (“We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program . . . . [W]e find not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field.”). [↑](#footnote-ref-8)
9. 448 U.S. 1, 6-8 (1980) (enforcing a Social Security Act provision). *See also*, *e.g.*, *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990) (allowing private enforcement of a Medicaid Act provision). *But cf.* Brief for the United States as Amicus Curiae Supporting Petitioners, Wilder v. Virginia Hosp. Ass’n, 498 U.S. 496 (1990) (No. 88-2043) (Deputy Solicitor General John Roberts arguing *Pennhurst* precluded enforcement under § 1983). [↑](#footnote-ref-9)
10. *Golden State Transit Corp. v. City of L.A.*, 493 U.S. 103, 106 (1989). *See also Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden State Transit*). [↑](#footnote-ref-10)
11. *E.g. Blessing*, 520 U.S. at 341-42. [↑](#footnote-ref-11)
12. *Id.* at 341 (“Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983. Because our inquiry focuses on congressional intent, dismissal is proper if Congress ‘specifically foreclosed a remedy under § 1983.’” (quoting Smith v. Robinson, 468 U.S. 992, 1005 n. 9 (1984)). [↑](#footnote-ref-12)
13. *See Wilder*, 496 U.S. at 521 (“The Medicaid Act contains no . . . provision for private judicial or administrative enforcement.”); *see City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (citing *Wilder* and listing Medicaid as a statute whose enforcement is not foreclosed). [↑](#footnote-ref-13)
14. 451 U.S. 1 (1981). [↑](#footnote-ref-14)
15. *Id.* at 17, 28 (“[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions…. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously…. In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.”). [↑](#footnote-ref-15)
16. 536 U.S. 273 (2002) (refusing to allow § 1983 enforcement of a Federal Education 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). [↑](#footnote-ref-16)
17. *Id.* at 279-80. [↑](#footnote-ref-17)
18. *Id.* (“We made clear [in *Pennhurst*] that unless Congress ‘speak[s] with a clear voice,’ and manifests an ‘unambiguous’ intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983.” (quoting *Pennhurst*, 45 U.S. at 17, 28 and n. 21)). [↑](#footnote-ref-18)
19. 536 U.S. at 279. [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
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.

    The amendment overruled parts of *Suter v. Artist M.,* 503 U.S. 347 (1992), a Social Security Act case which appeared to hold plaintiffs had no enforceable rights so long as the state had a submitted and federally approved plan for implementing the Adoption Assistance and Child Welfare Act. *See also* Br. for the United States as Amicus Curiae Supporting Respondents, Blessing v. Freestone, 520 U.S. 329 (1997) (No. 95-1441) (emphasizing that the Court's pre-*Suter* precedents must continue to govern the availability of suits under [§ 1983](http://web2.westlaw.com/find/default.wl?tc=-1&docname=42USCAS1983&rp=%2ffind%2fdefault.wl&sv=Split&rs=WLW11.04&db=1000546&tf=-1&findtype=L&fn=_top&mt=208&vr=2.0&pbc=56757A84&ordoc=1996242189) to enforce provisions of the Social Security Act). [↑](#footnote-ref-21)
22. *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 v. Johnson*, 416 F. 3d 1051, 1057 (9th Cir. 2005). [↑](#footnote-ref-22)
23. *Sanchez*, 416 F. 3d at 1057. [↑](#footnote-ref-23)
24. *Id.* at 1057 n.5 (citing *Pennhurst,* 451 U.S. 1, 28 (1981)). [↑](#footnote-ref-24)
25. *See* H.R. Rep. No. 103-761, at 819 (1994) (Conf. Rep.) (“The intent of this provision is to assure that individuals who have been injured by a 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 the federal courts to the extent they were able to prior to the decision in Suter v. Artist M.....”). [↑](#footnote-ref-25)
26. *Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S.Ct. 1204, 1210 (2012). In *Douglas*, the plaintiffs brought a Supremacy Clause claim to enjoin state policies that were arguably inconsistent with § 1396a(a)(30)(A). After oral argument in the Supreme Court, the federal agency approved the state’s payments. The *Douglas* majority vacated the lower court decisions and remanded the case for a determination of whether plaintiffs could amend to bring an action under the APA against the federal agency (which was not a party in the Supremacy Clause action). For additional discussion, *see* Rochelle Bobroff, *Medicaid Preemption Remedy Survives Supreme Court Challenge*, 45 Clearinghouse Rev. 35 (May-June 2012). [↑](#footnote-ref-26)
27. 132 S.Ct. at 1213 (Roberts, C.J., dissenting). [↑](#footnote-ref-27)
28. A Medicaid § 1983 case pending before the D.C. Circuit Court of Appeal was dismissed as an improper interlocutory appeal. *See Salazar v. D.C.*, 671 F.3d 1258 (D.C. Cir. 2012). [↑](#footnote-ref-28)
29. *See, 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.”). [↑](#footnote-ref-29)
30. A decision from the Eighth Circuit that allowed private enforcement based on previously controlling circuit precedent was vacated by the Supreme Court. *See Ped. Specialty Care v. Ark. Dep’t of Human Servs.*, 443 F.3d 1015 (8th Cir. 2006), *vacated on other grounds by Selig v. Ped. Specialty Care*, 551 U.S. 142 (2007). A decision from the Third Circuit came slightly ahead of *Gonzaga*, applying an analysis remarkably similar to what *Gonzaga* would eventually hold. *See Pa. Pharm. Ass’n v. Houstoun*, 283 F.3d 551 (3d Cir. 2002). [↑](#footnote-ref-30)
31. In *John B. v. Emkes*, 710 F.3d 394 (6th Cir. 2013), the Sixth Circuit affirmed a district court decision that held §§ 1396a(a)(43)(B) and (C) to be privately enforceable but not an implementing regulation, 42 C.F.R. § 441.61(c) (requiring the state to work with other entities to implement EPSDT fully). [↑](#footnote-ref-31)
32. *Gonzaga* and another decision, *Alexander v. Sandoval,* 532 U.S. 275 (2001), have caused lower courts to revisit the question of whether federal regulations can independently create rights under § 1983, and the clear trend is that they cannot. *See, 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*, *e.g*., *Johnson v. City of Detroit*, 446 F.3d 614 (6th Cir, 2006); S*outh Camden Citizens v. New Jersey Dep’t of Environmental Protection*, 274 F.3d 771 (3d Cir. 2001). *See also Harris v. James*, 127 F.3d 993, 465 (11th Cir. 1997); *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987). [↑](#footnote-ref-32)
33. *Shakhnes v. Belin*, 689 F.3d 244, 254 (2d Cir. 2012). [↑](#footnote-ref-33)
34. *See Shakhnes v. Berlin*, 689 F.3d 244 (2d Cir. 2012), *cert. denied*, 133 S Ct. 1808 (2013) (regarding § 1396a(a)(3)); *Brontrager v. Ind. Fam.& Soc. Servs. Admin.*, 697 F.3d 604 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2002 (2013) (regarding § 1396a(a)(10)(A)); *Lewis v. Alexander*, 685 F.3d 325 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013) (regarding § 1336a(a)(18), 1396p(d)(4)(C)); *Planned Parenthood of Ind. v. Comm’r*, 699 F.3d 962 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2736, 2738 (2013) (regarding § 1396a(a)(23)). [↑](#footnote-ref-34)
35. NHeLP maintains a § 1983 docket that charts Medicaid Act enforcement provision-by-provision. Consult this docket when considering litigation. [↑](#footnote-ref-35)
36. *See, e.g*., *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) (finding plaintiff failed to meet 3d prong). [↑](#footnote-ref-36)
37. *E.g.,* *Doe v. Kidd*, 501 F.3d 348, 365-68 (Whitney, J., dissenting) (arguing the three-factor test of *Blessing* should not control). [↑](#footnote-ref-37)