Health Advocate

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Health Advocate:
2013 Case Round Up – What the Courts Decided This Year

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Key Resources

Jane Perkins, Gill Deford, Gary F. Smith, & Mona Tawatao, The Supreme Court's 2012-2013 Term: Restrictions on Court Access Just "Too Darn Bad," 47 CLEARINGHOUSE REV. J. ON POV. L. & POL. 295 (Nov.-Dec. 2013).

Jane Perkins, Issue Brief: Update on Private Enforcement of the Medicaid Act Pursuant to 42 U.S.C. § 1983 (Oct. 1, 2013), here.

Coming in January's Health Advocate:

The Year to Come

Introduction

This issue of the Health Advocate offers NHeLP's annual case round up, highlighting cases that were decided by the U.S Supreme Court and the federal appeals courts this year. 2013 is notable for the sheer number of cases filed by corporations objecting to the Affordable Care Act's requirement that health insurance must include coverage of contraceptive services. Moreover, as these cases moved quickly through the courts, a number of Medicaid cases were decided.

ACA Requirements for Insurance Coverage of Contraception Services

The ACA requires most new group health plans and health insurance issuers to provide health insurance coverage, without cost sharing, of all FDA-approved contraceptive methods. More than 80 lawsuits have been filed challenging these coverage requirements, many of them by for-profit, secular corporations. During 2013, the federal circuit courts decided a number of cases brought by for-profit companies arguing that the contraceptive coverage requirement violates their rights under the First Amendment and the Religious Freedom Restoration Act (RFRA), which prohibits the government from placing substantial burdens on a person's exercise of religion unless there is a compelling reason to do so. In the cases, the circuit courts are reviewing decisions by lower courts to either grant or deny the plaintiffs' request for a preliminary injunction, and they focus, for the most part, on whether the plaintiffs are likely to succeed on the merits of their RFRA claim. As the chart below shows, the circuit decisions are split.

Case citation	Contraceptive coverage likely to violate company's religious rights	Company has no religious rights, no religious freedom violation
Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013)	●	
Armstrong v. Sebelius, 2013 WL 4757949 (10th Cir. 2013)	●	
Newland v. Sebelius, 2013 WL 5481997 (10th Cir. 2013)	●	
Conestoga Wood Spec. Corp. v. U.S. DHHS, 724 F.3d 377 (3d Cir. 2013)		●
Autocam Corp. v. Sebelius, 730 F.3d 618 (6th Cir. 2013)		●
Eden Foods, Inc. v. Sebelius, 733 F.3d 626 (6th Cir. 2013)		●
Korte and Grote v. Sebelius, 735 F.3d 654 (7th Cir. 2013)	●	
Annex Med., Inc. v. Sebelius, 2013 WL 1276025 (8th Cir. 2013)	●	
Gilardi v. U.S. DHHS, 733 F.3d 1208 (D.C. Cir. 2013)	●*	●*

*After deciding that the secular corporations "cannot engage in religious exercise, the *Gildari* Court was "left with the obvious conclusion: the right belongs to the Gilardis [Individual owners of closely held corporation], existing independently of any right of the … companies."

On November 26th, the Supreme Court granted writs for certiorari that were filed in *Conestoga Wood* and *Hobby Lobby*. In *Conestoga Wood*, a split Third Circuit panel held that a for-profit, secular corporation cannot engage in religious exercise and thus, did not reach the merits of the plaintiffs' First Amendment and RFRA claims. Conestoga Wood is a for-profit company that manufactures wood cabinets; the owners are Mennonites who object to two FDA-approved "emergency contraception" methods, Plan B and Ella, on grounds that they can act upon a "conceived but not yet attached human embryo." In *Hobby Lobby*, chain store owners (the Greens) and their stores, Hobby Lobby, a craft store chain, and Mardel, a Christian bookstore chain, object to providing coverage for four FDA-approved contraceptives that they view as abortion inducing. Sitting *en banc*, the Tenth Circuit Court of Appeals granted the plaintiffs' request for a preliminary injunction, finding the plaintiffs to be experiencing irreparable harm and likely to succeed on the merits of their RFRA claims. Unlike the Third Circuit, this Court found that Hobby Lobby and Mardel are persons within the meaning of RFRA, that the contraceptive requirements place a substantial burden on the companies' exercise of religion, and that the government failed to establish a compelling interest for the requirement. The Supreme Court is expected to decide the case next year.

Supreme Court and Circuit Court Cases Focusing on Medicaid

Supreme Court Decides Preemption Case

Wos v. E.M.A. ex rel. Johnson, 133 S. Ct. 1391 (2013) revisited one of the Supreme Court's favorite topics—federal law preemption of state law. In *Wos*, a North Carolina law established an irrebuttable presumption that up to one-

third of the damages recovered by a Medicaid beneficiary in a malpractice case had to be paid to the State to reimburse it for payments made for the beneficiary's medical treatment. A 6-3 majority of the Court found federal law preempted the state law. The State's "irrebuttable, one-size-fits all statutory presumption" was incompatible with the Medicaid Act's anti-lien provisions barring a state from demanding any portion of a beneficiary's tort recovery except the portion that is directly attributable to medical expenses. The Court emphasized that states must comply with Medicaid anti-lien laws, even if they find them "wasteful, time consuming, and costly."

What is perhaps most notable about *E.M.A.* is what it did not discuss. In the 2012 Term, the Court had agreed to decide whether Medicaid providers and beneficiaries have a claim under the Constitution's Supremacy Clause to preempt a state law as inconsistent with the Medicaid Act. The Court ended up remanding the case, *Douglas v. Independent Living Center of Southern California*, 132 S. Ct. 1204 (2012), on other grounds and did not decide the preemption issue. However, a four-member dissent strongly argued that the Medicaid Act cannot be enforced through the Supremacy Clause. Yet, the majority easily decided *E.M.A.,* neither questioning the availability of a Supremacy Clause cause of action nor mentioning *Douglas*.

Circuit Courts Review Medicaid's Child Health Provisions

On September 20, 2013, the Eleventh Circuit Court of Appeals decided *Garrido v. Dudek*, 731 F.3d 1152 (11th Cir. 2103), a case filed by several Miami parents who sued the Florida Medicaid agency when their children were denied coverage of Applied Behavioral Analysis (ABA), an evidence-based proven and effective treatment for autism. The Court affirmed District Judge Joan Lenard's ruling that the State violated the Medicaid Early and Periodic Screening, Diagnosis and Treatment (EPSDT) requirements when it excluded coverage of the ABA therapy that the children needed. The Appeals Court ordered the State to remove coverage restrictions and take the steps needed to assure Medicaid coverage of ABA therapy moving forward. The Florida Medicaid Agency had argued that ABA was not coverable under the Medicaid Act because it is not rehabilitative in nature (and thus not a covered Medicaid service) and, even if it were, the Agency had decided it was "experimental" and therefore not medically necessary for anyone. The appeal was co-counseled by Florida Legal Services, Legal Services of Greater Miami, and the National Health Law Program.

Meanwhile, the Sixth Circuit affirmed a district court decision vacating a consent decree in a class-action case challenging Tennessee's managed care program on grounds that it failed to provide EPSDT services to children. In *John B. v. Emkes*, 710 F.3d 394 (6th Cir. 2013), the Court said it would not force the district court to go on an "archaeological dig" to determine whether the plaintiffs' claims regarding non-compliance were well-founded and concluded that the lower court did not abuse its discretion when it found the State in "substantial compliance" with the decree.

Fourth Circuit Decides Due Process and ADA Cases

In *Pashby v. Delia*, 709 F.3d 307 (4th Cir. 2013), a divided panel of the Fourth Circuit affirmed the lower court's conclusion that North Carolina's policies were creating an illegal dilemma for people with disabilities, by making it harder for individuals living at home to qualify for Medicaid personal care services compared to those living in institutional adult care homes (ACHs). This case marks the first time that the Fourth Circuit has held that the Americans with Disabilities Act (ADA) requirement to provide services in the most integrated setting protects people at risk of institutionalization, not just those who are already institutionalized. In reaching this conclusion, the Appeals Court agreed with the district court that ACHs are "institutional settings that segregate residents from the community" and rejected the State's argument that budgetary concerns were a legitimate reason to stop providing in-home services to people with disabilities who need assistance with bathing, dressing, toileting, mobility, and

eating. At the time the case was filed, nearly 3,000 people with disabilities would have been negatively impacted if the State's policy had gone into effect.

The Fourth Circuit Court of Appeals also decided *K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107 (4th Cir. 2013), a case filed by Medicaid beneficiaries with developmental disabilities who require significant home and community-based services. The Fourth Circuit was asked to reverse a preliminary injunction entered by the district court after the state Medicaid agency and its managed care contractor, PBH Healthcare (since renamed Cardinal Innovations Healthcare), began cutting beneficiaries' services without first complying with constitutional and statutory requirements for providing individualized written notices, continued benefits, and opportunities for impartial hearings. The managed care company appealed the injunction order, but the state agency did not. The Fourth Circuit dismissed the appeal finding that, as an agent of the state, the managed care company had to follow the lead of the state agency—concluding that "[o]ne head chef in the Medicaid kitchen is enough."

Counsel for the plaintiffs in both of these cases are Legal Services of the Southern Piedmont, Disability Rights NC, and the National Health Law Program.

Private enforcement under § 1983

During 2013, the federal circuits issued four opinions discussing whether Medicaid beneficiaries can enforce provisions of the Medicaid Act. In all instances, the courts allowed private enforcement, thus allowing the individuals to proceed with the substantive challenges to ongoing state actions. The following chart summarizes the circuit level activity in 2013.

Medicaid Provision (42 U.S.C. §)	Enforceable	Case Citation
Medicaid must be provided with reasonable promptness (1396a(a)(8))	Yes	*Romano v. Greenstein*, 721 F.3d 373 (5th Cir. 2013)
Medicaid beneficiaries must have free choice of provider (1396a(a)(23)(A))	Yes	*Planned Parenthood of Ariz. v. Betlach*, 727 F.3d 960 (9th Cir. 2013).
Payments to federally qualified health centers must be adequate (1396a(bb))	Yes	*Cal. Ass'n of Rural Health Ctrs. v. Douglas*, 2013 WL 5184355 (9th Cir. 2013) *N.J. Primary Care Ass'n v. N.J. Dep't of Human Servs.*, 722 F.3d 527 (3d Cir. 2013)

About Us

The National Health Law Program protects and advances the health rights of low income and underserved individuals. The oldest non-profit of its kind, NHeLP advocates, educates and litigates at the federal and state levels.

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