Issue Brief

Update on Private Enforcement of the Medicaid Act: The Supremacy Clause and 42 U.S.C. § 1983[1]

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Over the years, Medicaid beneficiaries have asserted claims under the Supremacy Clause of the U.S. Constitution and 42 U.S.C. § 1983 in litigation to enjoin state violations of the Medicaid Act. This Fact Sheet will summarize the history of § 1983 and Supremacy Clause enforcement, provide current point-in-time assessments of Medicaid Act enforceability, and conclude by offering recommendations for lawyers who are considering asserting Medicaid claims in federal court.[1] Of particular import, the Supreme Court has just granted certiorari to decide whether private individuals can bring a claim under the Supremacy Clause to enjoin state actions that are inconsistent with the federal Medicaid Act.

Introduction

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."[2] 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."[3]

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

[1] For previous NHeLP discussion, *see, e.g.*, Jane Perkins, *Update on Private Enforcement of the Medicaid Act Pursuant to 42 U.S.C. § 1983* (October 1, 2013) (available from TASC or NHeLP); Sarah Somers, *The Supremacy Clause, Preemption, and Enforcement of Medicaid* (Jan. 10, 2009) (available from NHeLP).
[2] 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)).
[3] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

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.[4] 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."[5]

Even without an express cause of action in the original Social Security Act, program beneficiaries enforced various titles of the Act against state violators in federal court, primarily through two vehicles: a civil rights statute, 42 U.S.C. § 1983 (§ 1983), and preemption claims under the Supremacy Clause of the U.S. Constitution.

Enforcement under the Supremacy Clause: Background

Under the Supremacy Clause, the laws of the United States "shall be the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[6] The underlying rationale for this preemption doctrine, "stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that 'interfere with or are contrary to, the laws of congress.'"[7]

There are three types of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. Medicaid advocates most frequently encounter conflict preemption. 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.'"[8]

In *Shaw v. Delta Air Lines, Inc.*, the Supreme Court confirmed that it was "beyond dispute" that federal courts have jurisdiction to hear claims for injunctive relief asserting that a state law is preempted by a federal statute that does not provide an express cause of action:

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[4] *See* U.S. Const., art. I, § 8, cl. 1.
[5] *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). *Cf. Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (stating that understanding has been abandoned).
[6] U.S. Const. art. VI, cl. 2.
[7] *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)).
[8] *English v. General Electric Co.*, 496 U.S. 72, 79 (1990).For a brief but helpful discussion of conflict preemption principles, *see Hillman v. Maretta*, 133 S. Ct. 1943, 1949-50 (Sotomayor, J.)

> 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.... This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture.[9]

The Court resolved *Shaw* on the merits, holding that the state law was preempted insofar as it prohibited practices that were permitted under federal law.[10] The Court reaffirmed *Shaw* in *Verizon Maryland., Inc. v. Public Service Commission of Maryland*.[11] *Verizon* verified that courts must find at least an "arguable" cause of action to uphold jurisdiction, and it thereafter held that Verizon's claim that the Telecommunications Act preempted state regulation presented a federal question over which the federal courts have jurisdiction.[12]

Private individuals have enforced the Supremacy Clause in a variety of cases. On numerous occasions dating from the early 1970s up through the present, the Supreme Court has held that beneficiaries of Social Security Act programs can bring preemption actions to enjoin state laws that conflict with federal law and are, thus, "invalid under the Supremacy Clause."[13] More recently, Justice Kennedy's opinion for a 6-3 majority in *Wos v. E.M.A* found a state law ran afoul of the Supremacy Clause because it conflicted with the Medicaid Act and was "pre-empted for that reason."[14]

Medicaid Enforcement under the Supremacy Clause

In light of *Shaw*, *Verizon*, and similar cases, the federal courts of appeals have long-recognized the Medicaid Act is "supreme" federal law and on this basis invalidated conflicting state law.[15] However, as discussed below, given the narrowing of § 1983 claims as a result of *Gonzaga Univ. v. Doe*, some state attorneys are now arguing that plaintiffs cannot bring Supremacy Clause actions..

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[9] 463 U.S. 85, 96 n. 14 (1983).
[10] *See id*. at 108-09.
[11] 535 U.S. 635 (2002).
[12] *Id.* at 642-43 (citing *Shaw*).
[13] *Townsend v. Swank*, 404 U.S. 282, 285 (1971). *See also*, *e.g.*, *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988); *Blum v. Bacon*, 457 U.S. 132, 138 (1982) (holding New York welfare regulations that conflicted with Social Security Act regulations "are invalid under the Supremacy Clause").
[14] 133 S. Ct. 1391, 1398 (2013).
[15] *See, e.g.*, *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66 (1st Cir. 2001); *Concourse Rehab. & Nurs. Ctr., Inc. v. Whalen*, 249 F.3d 136 (2nd Cir. 2001); *Michigan v. Engler,* 73 F.3d 634 (6th Cir. 1996); *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995); *Elizabeth Blackwell Health Ctr. for Women v. Knoll,* 61 F.3d 170 (3d Cir. 1995); *Hope Medical Group for Women v. Edwards,* 63 F.3d 418 (5th Cir. 1995); *Lewis v. Hegstrom*, 767 F.2d 1371, 1375 (9th Cir. 1985); *Randall v. Lukard*, 709 F.2d 257 (4th Cir. 1983), r*ev'd on other grounds*, 728 F.2d 966 (4th Cir. 1984); *Hodgson v. Board of County Comm'rs*, 614 F.2d 601 (8th Cir. 1980); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979).

Lankford v. Sherman is an example of an early Medicaid case where this argument was raised.[16] The Medicaid beneficiaries in *Lankford* challenged a newly enacted state law that significantly reduced Medicaid coverage of durable medical equipment. They claimed an express private right of action under 42 U.S.C. § 1983 to enforce 42 U.S.C. § 1936a(a)(17), which requires states to employ reasonable coverage standards, and an implied right of action under the Supremacy Clause to enjoin the state law as conflicting with the reasonable standards provision. The court rejected the § 1983 claim.[17] On the other hand, the court held that the state law did conflict with the Medicaid reasonable standards provision and was, thus, preempted under the Supremacy Clause.

Lankford explains why the enforcement question was answered differently under § 1983 and the Supremacy Clause: Preemption under the Supremacy Clause "concerns the federal structure of the Nation rather than the securing of rights, privileges and immunities [established by Congress] to individuals" under § 1983.[18] Thus, "[p]reemption claims are analyzed under a different test than section 1983 claims, affording plaintiffs an alternative theory for relief when a state law conflicts with a federal statute or regulation."[19] After citing a number of Supreme Courts cases that concerned Supremacy Clause actions by corporations, the Eighth Circuit noted that "[w]hile Medicaid is a system of cooperative federalism, the same analysis applies; once the state voluntarily accepts the conditions imposed by Congress, the Supremacy Clause obliges it to comply with federal requirements."[20]

While the reasoning of *Lankford* is strong, the decision pre-dates *Douglas v. Independent Living Ctr. of Southern California, Inc*.[21] The Supreme Court accepted certiorari in *Douglas* to assess "[w]hether Medicaid recipients and providers may maintain a cause of action under the Supremacy Clause to enforce § 1396a(a)(30)(A) [the Medicaid equal access provision] by asserting that the provision preempts a state law reducing reimbursement rates."[22] Ultimately, the Court refused to decide the question because the Centers for Medicare & Medicaid Services (CMS) expressly approved of the state's position in the underlying substantive dispute while the case was pending before the Court. At that point, a 5-member majority of the

[16] 451 F.3d 496 (8th Cir. 2006).
[17] *Id.* at 509.
[18] *Id.* (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 117 (1989) (Kennedy, J. dissenting).
[19] *Id.* (citing *Golden State Transit*, 493 U.S. at 108) ("it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law preempts state regulatory authority"); *id.* (stating that, under the Supremacy Clause doctrine, state laws that "interfere with, or are contrary to laws of congress" are preempted); *see also Golden State*, 493 U.S. at 117 (Kennedy, J., dissenting) (stating that preemption under the Supremacy Clause "concerns the federal structure of the Nation rather than the securing of rights, privileges, and immunities to individuals.").
[20] *Id.* at 510; *id.* at 511-13 (finding state law preempted by reasonable standards provision).
[21] 132 S. Ct. 1204 (2012).
[22] 131 S. Ct. 992 (2011).

justices voted to remand the case to the lower court to determine whether CMS's action was entitled to deference or whether it was arbitrary under the Administrative Procedure Act.[23]

Significantly, Chief Justice Roberts wrote a strongly worded dissent arguing that Spending Clause enactments such as Medicaid cannot be enforced through the Supremacy Clause.[24] Some state attorneys have seized on this dissent and are filing motions to dismiss Medicaid cases on grounds that the court should adopt the *Douglas* dissent. These arguments must be forcefully opposed in the lower courts by advocates for Medicaid beneficiaries. "A dissenting opinion is, of course, not binding precedent," and as noted above, all of the federal circuit courts have held that Medicaid beneficiaries can enjoin state laws that conflict with federal laws pursuant to the Supremacy Clause.[25] To date, the vast majority of lower courts have refused to adopt the *Douglas* dissent, including the Third, Fourth, Fifth, and Ninth Circuits.[26]

The post-*Douglas* decisions are not uniform, however, and an adverse ruling in a case involving Title X, another Social Security Act program, created a split among the circuits. Much about the case, *Planned Parenthood of Kansas & Mid-Missouri v. Moser*, is unusual.[27] Two members of

[23] 132 S. Ct. at 1210.
[24] *Id*. at 1211 (Roberts, C.J., dissenting).
[25] *U.S. v. Romain*, 393 F.3d 63, 74 (1st Cir. 2004).
[26] *See*, *e.g.*, *Detgen ex rel. Detgen v. Janek*, 752 F.3d 627, 630 (5th Cir. 2014) (noting that *Douglas* "dodged the question" of Supremacy Clause enforcement and holding that the "Supremacy Clause confers an implied private cause of action to enforce all Spending Clause legislation by bringing preemption actions"); *Id.* (citing *Harris v. McRae*, 448 U.S. 297, 301 (1980) and noting that numerous courts, including the Supreme Court, have "held that once a state accepts federal funding, it must conform to the requirements of the relevant federal law, including the Medicaid Act"); *Exceptional Child Ctr., Inc. v. Armstrong*, 567 Fed. App'x. 496 (9th Cir. 2014),*cert. granted*, _ S. Ct. _, 2014 WL 3107841 (Oct. 2, 2014); *Lewis v. Alexander*, 685 F.3d 325, 345, 346 & n.20 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 933 (2013) (Medicaid case noting that *Douglas* expressly declined to address the Supremacy Clause issue, acknowledging that "the Supreme Court is free to revisit *Shaw* if it so desires, we are not," and holding "*Shaw* is binding precedent unless and until it is abrogated by the Supreme Court");*United States v. South Carolina*, 720 F.3d 518, 525-26 (4th Cir. 2013) (string citation omitted) ("Nothing in the Chief Justice's dissent disturbed the prior holdings of the Supreme Court or circuit courts that have allowed private parties to seek injunctive relief from state statutes allegedly preempted by federal law. A long line of cases confirms this right of action."); *see also Dartmouth-Hitchcock Clinic v. Toumpas*, No. 11-cv-358-SM, 2012 WL 4482857, at *3 (D.N.H. 2012) (Medicaid case noting that the *Douglas* Court "by-passed the Supremacy Clause issue altogether," leaving First Circuit precedent "unchanged" and concluding that First Circuit precedent "generally supports plaintiffs' claim of right to a cause of action challenging the validity of state laws under the Supremacy Clause on grounds that they conflict with federal law); *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310, 329 (M.D.N.C. 2012) ("The opinion in *Douglas* neither provides additional support for nor undermines ... precedent ... Therefore, absent a Supreme Court decision to the contrary, the Court finds no reason to disturb the Court's previous finding that 'Plaintiff in the present case can raise a claim under the Supremacy Clause for declaratory and injunction relief based on the contention that a state statute ... is preempted by Title X [of the Social Security Act], even if Plaintiff could not assert a claim under 42 U.S.C. § 1983.'"); *Planned Parenthood of Ariz., Inc. v. Betlach*, 899 F. Supp. 2d 868, 888-89 (D. Ariz. 2012) (rejecting argument that plaintiffs "may not raise a direct Supremacy Clause challenge under the Medicaid Act statute because the Medicaid Act was enacted under the Spending Clause" and "present weight of authority allows such a preemption claim under the Spending Clause.").
[27] 747 F.3d 814 (10th Cir. 2014).

the *Moser* panel, over the objection of the third, asked for supplemental briefing on the Supremacy Clause issue even though all parties agreed that the plaintiffs had a cause of action under the Supremacy Clause.[28] In an opinion that explicitly rests upon the "recent Supreme Court dissent by Chief Justice Roberts [in *Douglas*],"[29] those judges decided that the plaintiffs' claim lacked merit—a holding that deeply distressed dissenting Judge Lucero, who complained that

> [l]itigants and the public at large are entitled to receive decisions from our court rooted in precedent and based on rigorous analysis of the parties' submissions. Today's decision meets neither test. Instead, the majority conveniently defenestrates controlling precedent and proceeds on substituted premises.[30]

The substituted premise is a four-part test introduced by the majority for deciding whether the Supremacy Clause authorizes injunctions against state laws that conflict with federal laws. However, application of the test cannot be squared with the cases and precedents that have come before. The first two elements of the test—whether the underlying statute specifically authorizes injunctive relief and whether it creates an individual right—are precisely the sort of statutory interpretation questions that multiple courts have ruled are not part of the analysis for deciding whether a plaintiff may proceed directly under the Supremacy Clause. These questions are not relevant because the essence of this type of suit is not to enforce a federal statute but to enforce the Supremacy Clause—which bars state officials from implementing preempted state laws.[31]

Application of the third element, whether the statute was enacted under the Constitution's Spending Clause, also runs into problems because, as noted above, many Supreme Court and circuit cases concern Spending Clause programs.[32] Finally, the fourth part of the test, whether the state action is an enforcement action in an adversary legal proceeding to impose sanctions, is "to put it mildly, an invented claim that finds no support in precedent or practice."[33] As the dissent points out, if an "enforcement action by the state" were a relevant factor in deciding

[28] *Id.* at 843 (Lucero, dissenting).
[29] *Id.* at 826, 828.
[30] *Id.* at 843 (Lucero, dissenting).
[31] *Id.* at 842 (Lucero, dissenting). *See also*, *e.g.*, *PhRMA*, 249 F.3d at 73 (citation omitted) ("We know of no governing authority to the effect that the federal statutory provision which allegedly preempts enforcement of local legislation by conflict must confer a right on the party that argues in favor of preemption. On the contrary, a state or territorial law can be unenforceable as preempted by federal law even when the federal law secures no individual substantive rights for the party arguing preemption.").
[32] *See* 747 F.3d at 851, 854-58 (Lucero, dissenting) (collecting and discussing cases).
[33] *Id.* at 858.

whether a cause of action exists, then thousands of cases would have been decided differently.[34]

Cert Granted: *Armstrong v. Exceptional Child Center*

On October 2, 2014, the Supreme Court granted certiorari in *Armstrong v. Exceptional Child Ctr., Inc.*, _ S. Ct. _, 2014 WL 3107841 (Oct. 2, 2014), *cert. granted*, 567 Fed. App'x 496 (9th Cir. 2014).

In this case, a group of Medicaid-participating health care providers complain that Idaho's Medicaid payment rates for supported living services are inconsistent with, and thus preempted by, the Medicaid Act's equal access provision (42 U.S.C. § 1396a(a)(30)(A)). In a brief two-page opinion, the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the providers, citing the "well-established law of the Supreme Court, this court, and other courts" recognizing an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement of a state law. 567 Fed. App'x at 497 (citing *Shaw* and *Indep. Living Ctr. of S. Cal. v. Shewry*, 543 F.3d 1050, 1065 (9th Cir. 2008)).

The case arose when the Medicaid director, citing inadequate appropriations, failed to implement approved rate changes. As a result the reimbursement rates came into conflict with controlling Ninth Circuit precedent because they fell below the level needed to "reimburse providers their costs" and remained in place for "purely budgetary reasons." *Id.at 498 (citing Orthopaedic Hosp. v. Belshe,* 103 F.3d 1491, 1499 (9th Cir. 1997)).

Significantly, the Ninth Circuit expressly questioned whether it was appropriate for the case to proceed under the Supremacy Clause: "We express serious doubt over whether the Directors' inaction constitutes a "Thing" in state law that can be preempted under the Supremacy Clause. However, the Directors failed to make this argument …[t]herefore, we deem the issue waived." *Id.* at 498 n.2.

The National Health Law Program is closely monitoring this case and will be submitting an amicus brief. Please contact us for additional information.

[34] *Id. See also Detgen*, 752 F.3d at 630 & n.4 (declining to follow *Moser* because *Douglas* did not change current precedent recognizing that "the Supremacy Clause confers an implied private cause of action to enforce all Spending Clause legislation by bringing preemption actions").

Enforcement under 42 U.S.C. § 1983: Background

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.[35] 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.[36]

The 1980 case, *Maine v. Thiboutot*, 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 federal laws.[37] *Thiboutot*'s holding is simple and straightforward, but it did not satisfy a majority of the evolving Supreme Court, particularly with respect to laws enacted pursuant to the Spending Clause. .A year after *Thiboutot*, the Court began to restrict private enforcement in *Pennhurst State School & Hospital v. Halderman*.[38] 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.[39] 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.[40] It then announced a three-prong test 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?[41] If these questions are answered affirmatively, there is a presumption that the

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[35] 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."

[36] 392 U.S. 309 (1968).

[37] 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) (enforcing 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).

[38] 451 U.S. 1 (1981).

[39] *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."). Notably, while it is a Spending Clause enactment, the Developmentally Disabled Assistance and Bill of Rights Act is not part of the Social Security Act.

[40] *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*).

[41] *Blessing*, 520 U.S. at 341-42.

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.[42] The Supreme Court has held that the Medicaid Act does not include such a remedial scheme.[43]

In 2002, *Gonzaga Univ. v. Doe* further clarified and tightened the enforcement test.[44] Writing for the majority, Chief Justice Rehnquist cited *Pennhurst* and noted that *Gonzaga* involved a Spending Clause enactment.[45] The 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.[46] 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."[47] The provision must contain "rights- or duty-creating language" and have an individual rather than an aggregate focus.[48]

Thus, *Gonzaga* turns on the need to discern congressional intent. Notably, in 1994, Congress had 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.[49] The amendment requires all courts, in Social Security Act cases, to apply the grounds for enforcement recognized by the Supreme

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[42] *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)).

[43] *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).

[44] 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).

[45] *Id.* at 279-80.

[46] *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)).

[47] 536 U.S. at 279.

[48] *Id.*

[49] 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 Child Welfare Act.

Court prior to 1994 (grounds, which as mentioned above, include both § 1983 and Supremacy Clause claims). Interestingly, not all courts have deferred to § 1320a-2.[50] Of particular note is a pithy, but incorrect, analysis by Ninth Circuit Court Judge O'Scannlain in *Sanchez v. Johnson*, a Social Security Act Medicaid case.[51] The decision dismisses § 1320a-2, finding it "hardly a model of clarity" and concluding that it does not disturb the reasoning of *Pennhurst.*[52] However, there is no question that 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.[53]

Medicaid Enforcement under § 1983

The Supreme Court has not decided a Medicaid/§ 1983 enforcement case since *Gonzaga* was decided on June 20, 2002. 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 2014, 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 § 1983 case.[54]

Table 1
Medicaid § 1983 cases in the circuits, June 2002-September 2014

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 enforceability on a provision-by-provision basis. Such assessment requires careful pleading of the complaint and exacts more painstaking analysis from the parties and

[50] *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).
[51] *Sanchez*, 416 F. 3d at 1057.
[52] *Id.* at 1057 n.5 (citing *Pennhurst,* 451 U.S. 1, 28 (1981)).
[53] *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.…").
[54] The D.C. Circuit dismissed a Medicaid § 1983 case as an improper interlocutory appeal. *See Salazar v. D.C.*, 671 F.3d 1258 (D.C. Cir. 2012).

the court, consistent with the Supreme Court's teachings.[55] 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, four appellate court (the First, Third, Fourth, and Ninth) 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 contrast all six of the federal circuits to have reviewed the question (the First, Second, Fifth, Sixth, Ninth, and Tenth) have held the Medicaid equal access payment provision, § 1396a(a)(30)(A), does *not* create a privately enforceable right under § 1983.[56]

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) to two different 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

[55] *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.").

[56] 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 quite similar to what *Gonzaga* would eventually hold. *See Pa. Pharm. Ass'n v. Houstoun*, 283 F.3d 551 (3d Cir. 2002).

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. Cf. Gragert v. Lake*, 541F. App'x 853 (10th Cir. 2013) (finding Tenth Circuit has not resolved enforceability of 42 U.S.C. §§ 1396a(a)(10)(C)(i)(III), 1396a(r)(2)(A), and 1396p(c)(1)(I) and allowing district court to consider procedural posture on remand).[57]

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. 2013

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)

[57] On remand, the plaintiffs no longer argued these claims but rather sought to enforce 42 U.S.C. § 1396a(a)(8), the reasonable promptness requirement under § 1983. The district court held the provision enforceable. *Gragert v. Hendrick*, No. CIV-11-984-C, 2014 WL 287238, *2 (W.D. Okla. Jan. 24, 2014).

Medicaid Provision (42 U.S.C. § 1396)	Held Enforceable	Held Unenforceable
a(a)(19)-best interests		7th (2003)
a(a)(25) – third party liability		11th (2012)
a(a)(30)(A)-provider payments		1st (2004), 2d (2006), 5th (2007), 6th (2010, 2006), 9th (2007, 2005, 2005), 10th (2007, 2006)
a(a)(43)-EPSDT	5th (2004), 6th (2010, 2006),[58] 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 do not independently create privately enforceable rights under § 1983.[59] However, a regulation can "define or flesh out" the

[58] 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 state to work with other entities to implement EPSDT fully).

[59] *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

content of a federal statute that is itself privately enforceable.[60] For example, in *Shakhnes v. Berlin*, the Second Circuit 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 the 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.[61]

So far during 2014, there have been no appellate court decisions on whether a Medicaid provision is privately enforceable under § 1983. If this holds true for the remainder of the year, it would mark the first year without appellate activity since *Gonzaga* was decided in 2002.

Recommendations

1. **Monitor Supremacy Clause enforcement cases**. The Supreme Court is once again set to decide the extent to which private individuals can rely on the Supremacy Clause to enjoin state law that is inconsistent with federal law. If the Court reaches the merits, this case will have a profound effect on enforcement of Social Security Act provisions—at least as significant as *Gonzaga*'s effects on § 1983 enforcement. Moreover, the Court's opinion could affect not only Supremacy Clause enforcement but, depending on whether the Court decides to discuss it, § 1983 enforcement as well.

2. **Establish the proper Supremacy Clause framework.** While the Supreme Court and all courts of appeals have a long tradition of allowing individuals to enjoin state laws that conflict with federal law pursuant to the Supremacy Clause, four members of the Court have strongly questioned that assumption as applied to Spending Clause enactments. And given developments since the *Douglas* remand, lower court judges may begin their review skeptical of the cause of action. It is critical, therefore, to plead the proper framework for the court's review.

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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).

[60] *Shakhnes v. Belin*, 689 F.3d 244, 254 (2d Cir. 2012).

[61] *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.*, 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 implement EPSDT fully).

3. **Focus on federal law and state law.** When filing a Supremacy Clause claim make sure that the federal Medicaid law speaks in clear terms and that the state law speaks in equally clear terms that are inconsistent with the federal law. Avoid Supremacy Clause claims that are seeking to enjoin state practices and patterns of practice.

4. **Monitor § 1983 enforcement cases.** 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.

5. **Establish the proper § 1983 framework.** 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.

6. **Plead the underlying statutory provision precisely.** 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."[62] 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)…and certainly not § 1396a(a) or § 1396a).

Avoid claims that seek to enforce definitional sections standing alone. Provisions that set forth definitions are tied to one or more substantive provisions elsewhere in the law. Look to these substantive provisions for an enforceable federal right. A recent example is an EPSDT case, *Mercer Co. Children's Medical Daycare v. O'Dowd*, that holds 42 U.S.C. § 1396d(r)(5) is a definitional provision that defines the EPSDT benefit and, thus, does not unambiguously confer a right to specific judicially enforceable benefits.[63]

7. **Look for individual focus and mandates.** 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.[64]

8. **Avoid provisions with poor enforcement track records.** Do not seek to enforce Medicaid provisions that have a poor track record. For example, individuals could not enforce the best interest of recipients provision, 42 U.S.C. § 1396a(a)(19), prior to *Gonzaga*, and not

[62] *Blessing*, 520 U.S. at 342.
[63] No. 14-1436, 2014 WL 546346 (D. N.J. Feb. 10, 2014).
[64] NHeLP maintains a § 1983 docket that charts Medicaid Act enforcement provision-by-provision. Consult the docket when considering litigation.

surprisingly, have not been able to do so post-*Gonzaga.*

9. **Do not ask a judge to apply a provision to facts in novel ways, unsupported by the direct words of the statute.** A recent example is *Community County Day School v. School District of New York*, where the court, citing *Gonzaga*, refused to allow private enforcement of the Medicaid freedom of choice provision, 42 U.S.C. § 1396a(a)(23), because "Plaintiffs are asserting a right that goes well beyond the provision…and is actually nonexistent—namely, the 'right' to have their private-school tuition paid for by the School District."[65]

As to recommendations 8 and 9, 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. Moreover, because the arguments against enforcement will most likely be raised by the defendant in a motion to dismiss prior to filing an answer, an adverse ruling on a § 1983 issue will divert the court from the substance of the case, use resources unnecessarily and could cause the court to form a poor impression of the case. When researching enforcement history, consult and address Medicaid enforcement decisions outside your jurisdiction and both Medicaid and non-Medicaid cases that establish § 1983 enforcement precedent in your jurisdiction.

10. **Address all three *Gonzaga/Blessing* prerequisites.** *Gonzaga* focuses on the intent to benefit the plaintiff; however, courts continue to apply the three-prong test.[66] Thus, while some judges argue that *Gonzaga* replaced *Blessing* altogether,[67] 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.

11. **Avoid § 1983 claims that seek to enforce federal regulations, standing alone.** Courts are not allowing private enforcement of federal regulations, standing alone, 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.

12. **Monitor NHeLP's website.** NHeLP routinely posts information on case developments on its website, www.healthlaw.org. Please monitor the site.

[65] No. 14-19, 2014 WL 3535341, at *11 (W.D. Penn. July 16, 2014).
[66] *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).
[67] *E.g.*, *Doe v. Kidd*, 501 F.3d 348, 365-68 (Whitney, J., dissenting) (arguing the three-factor test of *Blessing* should not control).