Fact Sheet
Update on Private Enforcement of the Medicaid Act: 42 U.S.C. § 1983

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The Nation's founders relied on English laws and principles, among them the "invariable principle ... that every right, when withheld, must have a remedy, and every injury its proper redress."[1] 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."[2]

During the twentieth century, Congress enacted legislation designed to improve living conditions for lower-income Americans. A number of these laws were enacted by Congress under the Spending Clause. The Social Security Act, of which Medicaid is a part, is an example of a Spending Clause enactment. Like many Spending Clause enactments, the Medicaid Act makes federal funding available to states that implement Medicaid consistent with the requirements of the 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.[3]

Notably, enacting Congresses did not include provisions in these laws to expressly authorize the statute's beneficiaries to bring private enforcement actions when the law is being violated. That is not surprising. These Congresses were acting pursuant to the rights-remedy presumption, with the understanding that courts would "provide such remedies as are necessary to make effective the congressional purpose."[4] Over the years, beneficiaries have relied upon the Supremacy Clause or, more frequently, 42 U.S.C. § 1983, for the cause of action that allows them to go to court.[5] In recent years, however, the Supreme Court has turned away from the remedial

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[1] 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)).
[2] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).
[3] *See* U.S. Const., art. I, § 8, cl. 1.
[4] *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). *But cf. Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (stating that understanding has been abandoned).
[5] *See* Jane Perkins, *Using Section 1983 to Enforce Federal Laws*, CLEARINGHOUSE REV. J. OF POV. L. & POL. 720 (Mar.-Apr. 2005).

imperatives, particularly with respect to private enforcement of Spending Clause enactments. This has clarified private enforcement pursuant to § 1983.

Enforcement under 42 U.S.C. § 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.[6] 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.[7]

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.[8] *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 cut back on private enforcement in *Pennhurst State School & Hospital v. Halderman*.[9] 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.[10] Subsequently, the Court cautioned that § 1983 actions require a plaintiff to assert a violation of a federal "right,"

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[6] 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."

[7] *King v. Smith*, 392 U.S. 309 (1968).

[8] *Maine v. Thiboutot*, 448 U.S. 1, 6-8 (1980) (enforcing a Social Security Act provision). *See also*, *e.g.*, *Wilder*, 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).

[9] *Pennhurst State Sch. & Hosp. v. Halderman* 451 U.S. 1 (1981).

[10] *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. *Cf.* 42 U.S.C. § 1320a-2 (maintaining cause of action in Social Security Act cases).

not merely a violation of federal law.[11] It then 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?[12] 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.[13] The Supreme Court has held that the Medicaid Act does not include such a remedial scheme.[14]

In 2002, *Gonzaga University v. Doe* further clarified and tightened the enforcement test.[15] Writing for the majority, Chief Justice Rehnquist cited *Pennhurst* and noted that *Gonzaga* involved a Spending Clause enactment.[16] 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.[17] 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."[18] The provision must contain "rights- or duty-creating language" and have an individual rather than an aggregate focus.[19]

Thus, the *Gonzaga* test 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.[20] The amendment requires all courts, in Social Security Act cases, to apply

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[11] *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*).
[12] *E.g. Blessing*, 520 U.S. at 341-42.
[13] *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)).
[14] *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).
[15] *Gonzaga Univ. v. Doe*, 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).
[16] *Id.* at 279-80.
[17] *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)).
[18] 536 U.S. at 279.
[19] *Id.*
[20] 42 U.S.C. §§ 1320a-2 (repeated at § 1320a-10) states:

the grounds for enforcement recognized by the Supreme 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.[21]

Medicaid enforcement under § 1983

The Supreme Court has not decided a Medicaid § 1983 enforcement case since *Gonzaga* was decided on June 20, 2002. However, a number of lower courts have applied the *Gonzaga/Blessing* test in the Medicaid context. Of particular note are the 44 cases decided by the federal courts of appeals. This activity is summarized in tables, below.

Table 1 shows where the cases have occurred. As of January 15, 2016, 11 of the 12 federal circuits had reviewed at least one § 1983 Medicaid case since *Gonzaga* was decided. The Sixth and Ninth Circuits have been most active. The DC Circuit is the only appellate court that has not decided a Medicaid § 1983 case.[22]

Table 1

Medicaid § 1983 circuit court cases post *Gonzaga*

June 20, 2002-January 15, 2016

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

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.

[21] *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).

[22] 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).

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 the court, consistent with the Supreme Court's teachings.[23] 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, five appellate courts (the First, Second, 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.*, individuals with disabilities, older adults, 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 provision, § 1396a(a)(30)(A), does not create an enforceable federal right.[24] 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 44 cases) focus 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

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[23] *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.").

[24] 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).

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.[25] That conclusion is based on an earlier Tenth Circuit case 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.[26] 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 the earlier case absent *en banc* reconsideration or a contrary decision from the Supreme Court.[27]

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*, 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.[28] More recently, the Third Circuit concluded that paragraph (C) imposes mandatory obligations on the state and can be enforced under § 1983.[29] The Supreme Court denied certiorari in *Lewis*.[30]

[25] *See Hobbs v. Zenderman*, 579 F.3d 1171, 1179 (10th Cir. 2009).
[26] *Id.* at 1180 (citing *Keith v. Rizzuto*, 212 F.3d 1190, 1193 (10th Cir. 2000)).
[27] *Id. Cf. Gragert v.Lake*, 541F. App'x 853 (10th Cir. 2013) (finding 10th 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).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, at *2 (W.D. Okla. Jan. 24, 2014).
[28] *Ctr. for Special Needs Trust Admin. v. Olson*, 676 F.3d 688, 700 n. 2 (8th Cir. 2012).
[29] *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)).
[30] *See* 133 S. Ct. 933 (2013).

Table 2

Post-*Gonzaga* Circuit Enforcement of Medicaid Provisions

June 20, 2002-January 15, 2016

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)(A) - eligibility	3d (2004), 5th (2004), 6th (2006),7th (2012), 9th (2006)	
a(a)(10)(C)–medically needy		10th (2009)
a(a)(10)(E)–cost sharing for qualified Medicare beneficiaries (QMBs)	6th (2015)	
a(a)(13)(A)–institutional payment rates; notice process		2d (2006)
a(a)(17)-reasonable standards		8th (2006), 9th (2006), 10th (2009)
a(a)(18)-trusts	3d (2012)	
a(a)(19)-best interests		2d (2015), 7th (2003)
a(a)(23)(A)-free choice of provider	6th (2006), 7th (2012), 9th (2013)	

Medicaid Provision (42 U.S.C. § 1396)	Held Enforceable	Held Unenforceable
a(a)(30)(A)-provider payments[31]		1st (2004), 2d (2006), 5th (2007), 6th (2010, 2006), 9th (2007, 2005, 2005), 10th (2007, 2006)
a(a)(43)-EPSDT	6th (2010, 2006)[32]	
a(bb)-FQHC payment	1st (2008, 2005), 2d (2014), 3d (2013), 4th (2007), 9th (2013)	
b(m)-managed care		9th (2009)
d(a)-services	3d (2004), 6th (2006), 8th (2006)	
d(p)-cost sharing for QMBs	6th (2015)	
n(c)(2)(C) & (d)(2)(D)-home & community waiver informing	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)	

[31] Soon after *Gonzaga*, the Eighth Circuit allowed enforcement of § (30)(A) in a law-of-the-case decision that was subsequently vacated. *Pediatric Specialty Care v. Ark. Dep't of Human Servs.*, 443 F.3d 1015 (8th Cir. 2006), *vacated on other grounds*, *Selig v. Pediatric Specialty Care*, 551 U.S. 1142 (2007). *See Minn. Pharm Ass'n v. Pawlenty*, 690 F. Supp. 2d 809, 820-21 & n.8 & 9 (D. Minn. 2010) (discussing *Gonzaga*, *Pediatric Specialty Care*, and other Eighth Circuit precedent and holding (30)(A) does not create enforceable rights under § 1983).

[32] 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).

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.[33] However, a regulation can "define or flesh out" the content of a federal statute that is itself privately enforceable.[34] Thus, 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 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.[35]

Recommendations

1. Monitor § 1983 enforcement cases. For more than a decade, the courts of appeals have consistently applied the *Gonzaga*/*Blessing* enforcement test in Medicaid case. However, these opinions should be monitored.

2. Expect to bear the burden of proving the right to bring a § 1983 claim. 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, lower court judges are fairly routinely placing the burden on the plaintiffs to establish that the federal laws cited in their complaint create enforceable rights under § 1983.

[33] *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); *South 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).

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

[35] *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).

3. Plead the underlying statutory provisions 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." 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)). And, advocates should carefully step through the enforcement test establishing that each claim meets the prerequisites.

5. Rely only on federal laws that have an individual focus, precision, and mandates. Attorneys should continue to assess each Medicaid provision at issue against all three prongs of the enforcement test when briefing a motion to dismiss. Remember that privately enforceable Medicaid Act provisions typically speak in terms of the "individual," use words like "must" and "shall," and specifically describe the state's responsibilities to those individuals with specificity.

6. Avoid provisions with poor enforcement track records. 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. 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.