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NATIONAL HEALTH LAW PROGRAM

Fact Sheet

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Update on Private Enforcement of the Medicaid Act Pursuant to 42 U.S.C. § 1983[1]

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Medicaid beneficiaries and applicants may be harmed when state Medicaid officials do not comply with the requirements of the Medicaid Act, 42 U.S.C. §§ 1396-1396v. These individuals may file suit in court to obtain injunctive relief. Traditionally, individuals have enforced provisions of the Medicaid Act pursuant to a civil rights statute, 42 U.S.C. § 1983 ("§ 1983").[2] Over the last decade, however, courts have narrowed the ability to use § 1983 to enforce Medicaid provisions. Plaintiffs, therefore, have turned to long-standing constitutional precedents allowing them to rely on the Supremacy Clause of the Constitution to obtain relief under a preemption claim.[3] Last year, the U.S. Supreme Court considered but did not decide the question of whether beneficiaries and providers may maintain a cause of action under the Supremacy Clause to enforce a provision of the Medicaid Act, § 1396a(a)(30)(A), which requires states to establish adequate payment rates for participating providers.[4] While the case was remanded without a decision on the Supremacy Clause question, a strong four-member dissent authored by Chief Justice Roberts took it as established law that

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[2] The text of § 1983 reads: "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.

[3] *See*, *e.g.*, *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474 (1996); *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006).

[4] *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).

§ (30)(A) cannot be enforced through § 1983 and would have decided the Supremacy Clause question against the plaintiffs.[5]

While attention has lately focused on the preemption arguments, carefully constructed cases remain viable under § 1983. This Fact Sheet will provide background and discuss trends affecting private enforcement of the Medicaid Act under § 1983.[6]

Background

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."[7] 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."[8]

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.[9] 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."[10] 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

[5] 132 S.Ct. at 1213 (Roberts, C.J., dissenting).

[6] For NHeLP's previous discussion, *see*, *e.g.*, Jane Perkins, *Developments Affecting Medicaid Cases Filed Under Section 1983* (Nov. 2011) (available from NHeLP).

[7] 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)).

[8] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

[9] *See* U.S. Const., art. I, § 8, cl. 1.

[10] *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). *But see 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.").

§ 1983.[11] 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.[12]

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.[13] 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?[14] 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.[15] The Supreme Court has explicitly held that the Medicaid Act does not include such a remedial scheme.[16]

Over the years, 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

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[11] 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.").

[12] 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).

[13] *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*).

[14] *E.g. Blessing*, 520 U.S. at 341-42.

[15] *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)).

[16] *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).

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*.[17] While the decision concerned the Developmentally Disabled Assistance and Bill of Rights Act, which is not part of the Social Security 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.[18]

In 2002, the Rehnquist Court issued *Gonzaga Univ. v. Doe* to clarify and tighten the enforcement test.[19] Writing for the majority, Chief Justice Rehnquist cited *Pennhurst* and noted that *Gonzaga* involved a Spending Clause enactment.[20] 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.[21] 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."[22] The provision must contain "rights- or duty-creating language" and have an individual rather than an aggregate focus.[23]

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.[24] The

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[17] 451 U.S. 1 (1981).

[18] *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.").

[19] 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).

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

[21] *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)).

[22] 536 U.S. at 279.

[23] *Id.*

[24] 42 U.S.C. §§ 1320a-2 (repeated at § 1320a-10) states:

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.[25] Of particular note is a pithy, but incorrect, analysis by Ninth Circuit Court Judge O'Scannlain in a Medicaid case, *Sanchez v. Johnson*.[26] The decision dismisses § 1320a-2, finding it is "hardly a model of clarity" and concluding that it does not disturb the reasoning of *Pennhurst.*[27] 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.[28]

Medicaid enforcement under § 1983

The Supreme Court has not decided a Medicaid/§ 1983 enforcement case since *Gonzaga* was decided in June of 2002. However, a number of lower courts have applied the case in the Medicaid context. Of particular note are the 38 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 2012, 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.[29]

> 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 to enforce provisions of the Social Security Act).

[25] *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).

[26] *Sanchez*, 416 F. 3d at 1057.

[27] *Id.* at 1057 n.5 (citing *Pennhurst,* 451 U.S. 1, 28 (1981)).

[28] *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. . . . .").

[29] A Medicaid 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).

Table 1
Medicaid § 1983 cases in the circuits, June 2002-Oct 31, 2012

1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th	DC
5	3	3	3	2	4	3	5	6	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. Table 2 shows that, since the 2002 *Gonzaga* ruling, federal appellate courts have reviewed the enforceability of 23 Medicaid Act provisions.[30] 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 First and Fourth Circuits have recognized 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 a Medicaid provider payment provision, § 1396a(a)(30)(A), does *not* create a federal right enforceable by health care providers (or, more recently, providers joined by some program beneficiaries).[31]

The vast majority of appeals court cases (33 of the 36 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.

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[30] *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.").

[31] 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).

The Tenth, Eighth and Third Circuits have, however, reached different conclusions when applying the *third* prong of the enforcement test (whether the provision crates a binding obligation on the state) to the plaintiff's claim to enforce paragraphs of 42 U.S.C. § 1396p(d)(4), a Medicaid provision that addresses eligibility when an applicant has a trust. In 2009, the Tenth Circuit held § 1396p(d)(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 paragraphs of § 1396p(d)(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)).

Table 2
Circuit Court Enforcement of Medicaid Provisions, June 2002-Oct. 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), 6th (2006)	
a(a)(10)(A)-eligibility	3d (2004), 5th (2004), 6th (2006), 7th (2012), 8th (2002), 9th (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)

Medicaid Provision (42 U.S.C. § 1396)	Held Enforceable	Held Unenforceable
a(a)(18)-compliance with 1396p, trusts	3d (2012)	
a(a)(19)-best interests		7th (2003)
a(a)(23)-free choice of provider	6th (2006), 7th (2012)	
a(a)(30)(A)-provider payments		1st (2004), 2d (2006), 5th (2007), 6th (2010, 2006), 9th (2007, 2005, 2005), 10th (2006, 2007)
a(a)(43)-EPSDT	5th (2004), 6th (2010, 2006), 8th (2002)	
a(bb)-FQHC payment	1st (2008, 2005), 4th (2007)	
b(m)-managed care		9th (2009)
d(a)-services	3d (2004), 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)	

Recommendations, trends, and conclusions

Consider § 1983 enforcement of a Medicaid Act provision carefully. Do not seek to enforce provisions through § 1983 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 both Medicaid and non-Medicaid cases that establish § 1983 enforcement precedent in your jurisdiction.

The following trends should be carefully monitored and considered:

1. While courts had long viewed § 1983 litigation as within the broad remedial scope of the civil rights statutes, the recent Supreme Court decisions have reversed this assumption to the point where many judges begin their review with the presumption that the Medicaid Act provision at issue is not enforceable. Establishing the framework for the court's review is, therefore, important.

2. Consistent with *Blessing*, Medicaid enforcement questions are being 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, 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)).

3. Privately enforceable Medicaid Act provisions typically speak in terms of the "individual" and specifically describe the state's responsibilities to those individuals.[32]

4. *Gonzaga* focuses on the intent to benefit the named plaintiff; however, courts continue to apply the three-prong test.[33] Thus, while some judges argue that *Gonzaga* replaced *Blessing* altogether,[34] 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.

5. As noted above, even when a provision meets the three-prong test, a defendant can still prevent private enforcement by showing that Congress has foreclosed enforcement through § 1983, expressly or by including a comprehensive remedial scheme in the substantive federal law. The Medicaid Act's remedial provisions provide for the Secretary of the Department of Health and Human Services to withhold or terminate federal funding to a non-compliant state. *See* 42 U.S.C. § 1396c. The Supreme Court has held that the Medicaid Act does not include a comprehensive remedial scheme sufficient to displace private enforcement under § 1983.[35] Nevertheless, some state attorneys are citing § 1396c as evidence that Congress did not

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[32] NHeLP maintains a § 1983 docket that charts Medicaid Act enforcement provision-by-provision. Consult this docket when considering litigation.

[33] *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).

[34] *E.g., Doe v. Kidd*, 501 F.3d 348, 365-68 (Whitney, J., dissenting) (arguing the three-factor test of *Blessing* should not control).

[35] *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 under § 1983 is not foreclosed).

unambiguously intend to allow the plaintiff to enforce the Medicaid Act provision in question. Rather, they argue, Congress intended only the Secretary to enforce the Medicaid Act. To date, the argument has not grained traction; however, it should be carefully monitored and, if raised, responded to because, if adopted, the practical effect could be that no Medicaid Act provision could be enforced under §1983.

6. Courts are not allowing private enforcement of federal regulations through § 1983, but regulations can fill out statutes that are themselves privately enforceable.[36] For a recent example of a case allowing enforcement of a Medicaid statute and an implementing regulation, *see Shakhnes v. Berlin*, 689 F.3d 244 (2d Cir. 2012) (allowing enforcement of fair hearing provision, 42 U.S.C. § 1396a(a)(3), and an implementing regulation, 42 C.F.R. § 431.244(f)(1)(ii), requiring hearing decisions to issue, in most cases, within 90 days of the request for the fair hearing).

[36] *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); S*outh Camden Citizens v. New Jersey Dep't of Environmental Protection*, 274 F.3d 771 (3d Cir. 2001). *See also, e.g., Harris v. James*, 127 F.3d 993, 465 (11th Cir. 1997).