2020 Circuit Decisions on Private Enforcement of the Medicaid Act[1]

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Individuals have relied on a civil rights statute, 42 U.S.C. § 1983, to enforce provisions of the Medicaid Act. Section 1983 confers a cause of action against state actors who violate "rights, privileges, or immunities, secured by the Constitution and laws." In *Blessing v. Freestone*, 520 U.S. 329 (1997), the Court applied a three-part test to determine when a federal law establishes a right: (1) Was the provision intended to benefit the plaintiff? (2) Is the provision too vague for a court to enforce? (3) Does the provision create a binding obligation on the state? In 2002, the Court clarified that the first prong requires the provision to reflect an unambiguous intent to create an individual right. *See Gonzaga University v. Doe,* 536 U.S. 273 (2002).[2]

During 2020, three circuits issued four decisions assessing private enforcement of the Medicaid Act. We begin with the only victory for Medicaid beneficiaries.

Waskul v. Washtenaw Co. Cmty. Mental Health, 979 F.3d 426 (6th Cir. 2020)

Waskul arose after Michigan changed its method of calculating budgets for individuals enrolled in the Community Living Support program, which allows individuals to structure their own support services based on their medical needs. Among other things, the plaintiffs complained that the new methodology left them unable to find providers willing to work at the low rates they were able to pay.

Plaintiffs first alleged that the methodology made it impossible for them to obtain services with reasonable promptness and, thus, violated three Medicaid provisions: 42 U.S.C. §§ 1396a(a)(8) (requiring states to provide medical assistance to individuals with reasonable promptness); 1396a(a)(10)(A) (requiring states to make services available to individuals who

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[2] For added discussion, see Jane Perkins, *Pin the Tail on the Donkey: Beneficiary Enforcement of the Medicaid Act Over Time*, 9 St. Louis U. J. of Health Law & Pol. 207, 209-17 (2016).

meet the eligibility requirements), and 1396a(a)(10)(B) (requiring comparability in the amount, duration, and scope of assistance available to individuals). The Defendant challenged the Plaintiffs' right to enforce these provisions, citing *Armstrong v. Exceptional Child Care Center*, 575 U.S. 320 (2015) (finding the Supremacy Clause did not provide a cause of action to preempt a state law as inconsistent with Medicaid's "equal access" payment provision). Writing for the court, Judge Clay said *Armstrong* does not provide the proper means of analysis. Rather, *Blessing v. Freestone* sets forth the test for determining when a statute confers an enforceable right. Applying that test, the court concluded that the Medicaid provisions are privately enforceable because each of them focuses on "individual entitlements," allows courts to "easily determine" whether a violation has occurred, and imposes "mandatory rather than precatory" obligations on the state. 979 F.3d at 447-48.

Next, the Plaintiffs argued that the Defendant's budget methodology violated Medicaid's necessary-safeguard and free-choice provisions: 42 U.S.C. §§ 1396n(c)(2)(A) (requiring assurances of necessary safeguards to protect health and welfare of individuals) and 1396n(c)(2)(C) (requiring assurances that individuals will be informed of alternatives to institutional care at the choice of the individual). The majority concluded these statutes satisfy the *Blessing* test and are enforceable. 979 F.3d. at 454-55 (finding the provisions concerned particular individuals, bereft of "fuzzy, undefined concepts," and mandatory on the state). This reasoning was not unanimous, however. In dissent, Judge Readler found these claims focused on the regulated state, not beneficiaries, and would have dismissed them. *Id.* at 466.

Judge Readler concluded his opinion with an observation regarding the a(8) and a(10) claims. He thought the Plaintiffs had not adequately explained whether their objection was to the *timing* of providing services or the budgeting methodology being used to fund the services. While the former could give rise to a claim, he said it would not be appropriate for the court to step in if the grievance concerned the *amount* of benefits. *Id.* at 472. He relied on *Nasello v. Eagleson*, to which we now turn.

***Nasello v. Eagleson*, 977 F.3d 599 (7th Cir. 2020)**

In this case, nursing home residents complained that Illinois was improperly calculating the amount of medical expenses that individuals needed to incur before Medicaid would begin paying for their care. They claimed violations of 42 U.S.C. § 1396a(r)(1)(A), which describes the types of incurred expenses the state must include when making the calculation, and § 1396a(a)(8), the reasonable promptness provision. The district court dismissed the case, 2019 WL 4958239 (N.D. Ill. Oct. 8, 2019), and the Seventh Circuit affirmed.

Judge Easterbrook's opinion uses expansive language. After quoting § 1396a(r)(1)(A), he finds a "threshold problem"—Medicaid is a federal-state program that

> does not establish anyone's entitlement to receive medical care (or particular payments); it requires only compliance with the terms of the bargain between the state and federal governments. Congress could make those terms enforceable in suits by potential beneficiaries such as plaintiffs, but it has not done so. Instead it has created a system of administrative remedies.

Id. at 601. While acknowledging that some "older decisions" used § 1983 as the source of a private remedy, the court finds that more recent decisions "do not permit a court of appeals to enlarge the list of implied rights of action when the statute sets conditions on states' participation in a program, rather than creating direct private rights." *Id.*

The reasonable promptness claim fares slightly better. While expressing "skepticism" about the reasoning of other circuits which have allowed private enforcement, the Seventh Circuit "avoid[s] creating a conflict" by assuming that (a)(8) is enforceable, "without suggesting that we would follow the other circuits if push came to shove." *Id.* at 602. However, the plaintiffs lost on the facts. The court sees (a)(8) as concerning only the timing of benefits, but the plaintiffs' "grievance concerns not the *time* at which ongoing benefits are paid but the *amount* of those benefits." *Id.*

In sum, the Seventh Circuit refused to allow private enforcement of § 1396a(r)(1)(A). The court used expansive reasoning that future courts may not confine to that specific provision. Notably missing is any reference to the *Blessing* test. Rather, the court says relief depends on Congress enlarging the list of implied rights of action. *Id.* at 601. "This remits beneficiaries to the administrative process," and if that fails they can ask federal officials to withhold funding. *Id.* Notably, Medicaid laws do not set forth such a process for beneficiaries. And assuming one could be used, the relief would be dubious because a victory would result in the state losing federal funding without directly addressing the individuals' complaints.

***Thurman v. Medical Transp. Management, Inc.*, 982 F.3d 953 (5th Cir. 2020)**

A federal regulation requires state Medicaid agencies to "ensure necessary transportation for beneficiaries to and from providers." 42 C.F.R. § 431.53. The Mississippi Medicaid program contracted with Medical Transportation Management (MTM) to provide non-emergency medical transportation (NEMT). Mr. Thurman contacted MTM to take him to a doctor's appointment, but MTM did not pick him up. When Thurman complained, MTM told him that the trip was never confirmed because he did not provide necessary information during the scheduling call, placed the call on hold, and never returned to the line. After losing at the trial level, Mr. Thurman, proceeding *pro se*, appealed. The Fifth Circuit initially dismissed the case for lack of prosecution. However, "on further review," it reopened the appeal and ordered briefing so that it could decide "whether *any* agency regulation can ever independently create individual rights enforceable through § 1983." *Id.* at 956 (emphasis in original).

The court ruled that regulations cannot be enforced because "it is Congress, and not an agency of the Executive Branch, that creates federal rights." *Id.* at 957 (relying on *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) ("Agencies may play the sorcerer's apprentice but not the sorcerer himself."), and *Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002) ("[W]e must first determine whether Congress *intended to create a federal right.*") (emphasis in original)).

Additionally, the Court refused to construe three statutes, in conjunction with the regulation, to establish an enforceable right: 42 U.S.C. §§ 1396a(a)(8) (the reasonable

promptness provision); 1396a(a)(19) (the best interests of recipients provision); and 1396a(a)(70) (the NEMT brokerage program provision). The Court said "none of these provisions even come close" to establishing an enforceable right to NEMT. Sections (a)(8) and (a)(19) "do not mention transportation at all" at "at most, establish only a right to receive certain health care services." *Id.* at 958. The Court further sidelined section (a)(19) by agreeing with the Eleventh Circuit that the provision is "insufficiently specific" to confer an individual right. *Id.* (quoting *Harris v. James*, 127 F.3d 993 (11th Cir. 1997)). Finally, while section (a)(70) does expressly concern NEMT, the court dismissed it as establishing a right because it is optional for states, not mandatory. *Id.*

Thus, the Fifth Circuit refused to allow private enforcement of regulations. It also refused to allow enforcement of three statutes. The court's ruling on the reasonable promptness provision is of the most concern. This provision has a good track record of private enforcement, and while the language of the opinion is tied to NEMT, future courts could untether the holding.

***Planned P'hood of Greater Tex. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020)**

On rehearing *en banc*, the Fifth Circuit concluded that individuals cannot enforce the Medicaid "freedom of choice" provision, 42 U.S.C. § 1396a(a)(23). *See Planned Parenthood of Greater Texas*, 981 F.3d 347 (2020), *vacating*, 913 F.3d 551 (5th Cir. 2019). The decision also expressly overruled *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir.2017).

Like all recent circuit court cases involving (a)(23), this case arose after a pro-life organization released videos depicting individuals posing as representatives from a fetal procurement company and discussing a possible research partnership with Planned Parenthood of the Gulf Coast. Citing the video, some states, including Texas, terminated Planned Parenthood providers from their Medicaid programs. The providers and individual patients challenged the terminations.

In *Planned Parenthood of Greater Texas*, the court assessed two Medicaid statutes: 42 U.S.C. §§ 1396a(a)(23)(A) (providing that individuals may obtain services from any qualified provider who undertakes to provide such services) and 1396a(a)(23)(B) (providing that enrollment in a managed care plan shall not restrict the individual's choice of the qualified provider of family planning services). The court held that individual patients cannot enforce the provisions pursuant to § 1983.

Judge Owen's majority opinion rests heavily on *O'Bannon v. Town Court Center*, 447 U.S. 773 (1980). *O'Bannon* was brought by nursing home residents pressing for a hearing before the government could revoke the home's license to provide them nursing care at government expense. Judge Owen cites *O'Bannon* as explicitly holding that (a)(23) "does not grant Medicaid beneficiaries the right 'to continue to receive benefits for care in a home that has been decertified.'" 981 F.3d at 357 (quoting *O'Bannon*, 447 U.S. at 785). Thus, *O'Bannon*

> resolves the case. It establishes that § 1396a(a)(23) does not give Medicaid beneficiaries a right to question a State's determination that a provider is unqualified. Medicaid beneficiaries have an "absolute right" under§ 1396a(a)(23) to receive services from a provider whom the State has determined is "qualified," but beneficiaries have no right under the statute to challenge a State's determination that a provider is unqualified.

Id. But see id. at 398-99 (dissent, arguing majority relied "heavily on a misinterpretation" of *O'Bannon*, which concerned a novel constitutional theory, not § 1983).

Judge Owen also finds that, even absent *O'Bannon*, § 1396a(a)(23) does not grant Medicaid patients the right to contest a state's determination that a provider is unqualified. Her opinion rests on three Supreme Court cases. First, *Gonzaga University*. To be privately enforceable, *Gonzaga* requires a statute to unambiguously confer a right on a particular individual or class of persons. Second, *Armstrong*. Acknowledging that (a)(23) "unambiguously provides a Medicaid beneficiary has the right to obtain services from the qualified provider of her choice," Judge Owen points out that the statute does not say that a beneficiary can challenge a government's determination that the provider of their choice is unqualified. Rather, Medicaid patients "can only *infer*, at best" that they have a right to contest the determination. And that is significant because *Armstrong* "disavowed … the ready implication of a § 1983 action." *Id.* at 359-60. Third, *Suter v. Artist M.*, 503 U.S. 347 (1992). Judge Owen finds the wording of (a)(23) to be similar to the provisions at issue in *Suter*. And there as here, the provisions "within broad limits, left up to the State" how to comply with the directives and established enforcement mechanisms allowing the federal government to deny funding if the state's plan was out of compliance. Thus, just as private enforcement was precluded in Suter, so too here. *Id.* at 362. Judge Dennis's dissenting opinion argues the majority reasoning is an "egregious" error. *Id.* at 400-03 (explaining that neither *Armstrong* nor *Suter* dealt with Medicaid patients' rights and that, after *Suter*, Congress enacted an "express legislative statement to the judiciary [42 U.S.C. § 1320a-2] reaffirming that Congress intended to create individual rights—like the free-choice-of-provider right—within the state plan requirements of the Medicaid Act and related acts").

So, where does this leave private enforcement of (a)(23)? Five circuits hold that it is privately enforceable (4th, 6th, 7th, 9th, 10th); two hold not (5th, 8th). The Eighth Circuit's split opinion is expansive and could affect enforcement well beyond (a)(23). *See Does v. Gillespie*, 867 F. 3d 1034 (8th Cir. 2017). By contrast, the Fifth Circuit has issued a more tailored opinion. That court acknowledges that (a)(23) "does give a Medicaid beneficiary the right to receive care or services from a provider that a State has determined is 'qualified[.]'" *Id*. at 363. However, the provision does not give beneficiaries a right to contest a state's decision that a provider is not qualified. *Id.*

CONCLUSION & RECOMMENDATIONS

For most of its history, courts enforced Medicaid broadly to allow individuals to bring actions to enjoin ongoing harms. However, that history does not reflect the current trajectory. When developing a Medicaid case:

1. Do not try to enforce regulations. They cannot independently create rights under § 1983. *E.g., Thurman v. Med. Transp. Mgmt, Inc.*, 2020 WL 7351089 (5th Cir. 2020); *Caswell v. City of Detroit Hous. Comm'n*, 418 F.3d 615 (6th Cir. 2005); *Price v. City of Stockton*, 390 F.3d 1105, 1112 n.6 (9th Cir. 2004); S*o. Camden Citizens in Action v. New Jersey Dep't of Environ. Prot.*, 274 F.3d 771 (3d Cir. 2001); *Harris v. James*, 127 F.3d 993, 465 (11th Cir. 1997); *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987).
2. Only seek to enforce Medicaid Act provisions that have an unambiguous focus on Medicaid beneficiaries/applicants, for example by directing specified actions with respect to "individuals" or "all individuals."
3. Only seek to enforce provisions that have a solid track record of enforcement. NHeLP maintains an enforcement docket, available upon request.
4. Do not take a provision with strong enforcement track record and bend it to address facts that are not covered by the words of the statute. That strategy could result in unfavorable dicta or holdings.
5. Do not, as the Seventh Circuit put it, attempt to take a provision that cannot be enforced "through the back door" in the name of a provision that has an enforcement record. *Nasello*, 977 F.3d at 602. That strategy will not change the court's view of the unenforceable provision and could produce unfavorable dicta or holdings on the provision with the strong track record.
6. Do not treat the reasonable promptness provision as a "jack of all trades." Attorneys have cited (a)(8) to obtain relief when the facts do not support an (a)(8) claim. The resulting dismissals include harmful holdings or dicta. See NHeLP, *Q&A: Medicaid's Reasonable Promptness Provision Gets Tested* (Nov. 28, 2019).
7. Explore alternatives. It can be difficult to accept that a client cannot obtain relief from a court for a state's violation of a Medicaid Act provision. But that is the current reality with respect to many provisions. Attorneys will need to seek relief elsewhere, if it is available—for example, in state writ or declaratory relief actions, administrative procedure act cases, or administrative hearings.