



## Issue Brief

# Private Enforcement of the Medicaid Act Under 42 U.S.C. § 1983

Jane Perkins

This Fact Sheet provides an overview of the history of private enforcement of the Medicaid Act pursuant to 42 U.S.C. § 1983. It then highlights developments in 2020. In contrast to the circuit court opinions issued in 2019 (all four allowed beneficiaries to enforce the Medicaid provisions in question), the 2020 federal circuit opinions refused to allow private enforcement (with one exception).<sup>1</sup>

### Overview of § 1983 enforcement

During the twentieth century, Congress enacted legislation designed to improve conditions for lower-income Americans, often using its authority under the Constitution's Spending Clause. The Social Security Act, with Medicaid as title XIX, is an example of a Spending Clause enactment. Like many such enactments, the Medicaid Act makes federal funding available to states that implement Medicaid consistent with federal requirements and authorizes the federal government to withhold or terminate funding to a state that violates those requirements.<sup>2</sup>

Reflecting the rights-remedy principle under which Congress was operating at the time of its enactment (1965), the Medicaid Act does not authorize the statute's beneficiaries to bring enforcement actions.<sup>3</sup> From the beginning, however, beneficiaries relied upon a civil rights statute, 42 U.S.C. § 1983, for the cause of action that allows them to go to court. For example, in the early case, *King v. Smith*, the Supreme Court allowed welfare recipients to obtain timely benefits by enforcing the "reasonable promptness" provision of the Social Security Act's welfare law pursuant to § 1983.<sup>4</sup>

Section 1983 provides a "procedure of redress for the deprivation of rights established elsewhere."<sup>5</sup> Specifically, § 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 laws. The law states:

<sup>1</sup> For in-depth discussion, see Jane Perkins, Nat'l Health L. Prog., *Q&A: 2020 Circuit Decisions on Private Enforcement of the Medicaid Act* (Dec. 2020) (available from TASC).

<sup>2</sup> See U.S. Const., art. I, § 8, cl. 1.

<sup>3</sup> See *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964) (noting that courts would "provide such remedies as are necessary to make effective the congressional purpose"). *But cf. Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (abandoning that understanding).

<sup>4</sup> *King v. Smith*, 392 U.S. 309 (1968).

<sup>5</sup> *Thomas v. Roach*, 165 F.3d 137, 142 (2d Cir. 1999).

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.<sup>6</sup>

The 1980 case, *Maine v. Thiboutot*, held that “the phrase ‘and laws’ means what it says,” so enforcement applies not only to constitutional rights but also to federal laws.<sup>7</sup>

Just a year after it decided *Thiboutot*, the Court began to cut back on private enforcement in *Pennhurst State School & Hospital v. Halderman*.<sup>8</sup> Discussing 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.<sup>9</sup> 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.<sup>10</sup> In *Blessing v. Freestone*, the Court reiterated the “traditional” three-part test for determining whether a federal law creates such a right:

- (1) Is 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?
- (3) Does the provision create a binding obligation on the state?<sup>11</sup>

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 foreclosed enforcement through § 1983, expressly or by including a comprehensive remedial scheme in the underlying substantive federal law.<sup>12</sup> The Medicaid Act does not expressly foreclose resort to § 1983, and the Supreme Court has held that the Medicaid Act does include a comprehensive remedial scheme.<sup>13</sup>

<sup>6</sup> 42 U.S.C. § 1983.

<sup>7</sup> *Maine v. Thiboutot*, 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 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).

<sup>8</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981).

<sup>9</sup> *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.”).

<sup>10</sup> *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*).

<sup>11</sup> 520 U.S. at 341-42.

<sup>12</sup> *Id.* at 341

<sup>13</sup> *See Wilder*, 496 U.S. at 521; *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).

In 2002, *Gonzaga University v. Doe* further clarified and tightened the enforcement test.<sup>14</sup> Writing for the majority, Chief Justice Rehnquist cited *Pennhurst* and noted that *Gonzaga* involved the Family Educational Rights and Privacy Act, a Spending Clause enactment (that is not part of the Social Security Act).<sup>15</sup> Focusing on the first prong of the enforcement test, the Court clarified that a federal law is not privately enforceable unless Congress has unambiguously manifested its intent to confer individual rights on the plaintiff. 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.”<sup>16</sup> The provision must contain “rights- or duty-creating language” and have an individual rather than an aggregate focus.<sup>17</sup>

Thus, the *Blessing/Gonzaga* test turns on discerning congressional intent. In 1994, Congress enacted 42 U.S.C. § 1320a-2, to expressly recognize that provisions of the Social Security Act are privately enforceable.<sup>18</sup> As legislative history confirms,

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.*....<sup>19</sup>

### Developments in the appellate courts

In the 18 years since *Gonzaga* was decided, the federal courts of appeals have decided 58 cases that assess whether a particular Medicaid provision can be enforced through § 1983. These cases are particularly important because they establish precedent for all states in the affected circuit. Table 1 shows where the cases have occurred. As of January 31, 2021, 11 of the 12 circuits had decided at least one § 1983 Medicaid case. The Fifth and Ninth Circuits have been most active, while the D.C. Circuit has not decided a case. In 2020, three federal circuits issued opinions—two, from the Fifth Circuit and one each from the Sixth and Seventh Circuits.<sup>20</sup>

<sup>14</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

<sup>15</sup> *Id.* at 279-80.

<sup>16</sup> 536 U.S. at 279.

<sup>17</sup> *Id.* (refusing to allow enforcement of a FERPA 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).

<sup>18</sup> 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.

*Suter v. Artist M.*, 503 U.S. 347 (1992), appeared to hold plaintiffs had no enforceable rights so long as the state had a federally approved plan for implementing the Child Welfare Act.

<sup>19</sup> H.R. Rep. No. 103-761, at 819 (1994) (Conf. Rep.).

<sup>20</sup> See *Waskul v. Washtenaw Co. Cmty. Mental Health*, 979 F.3d 426 (6th Cir. 2020) (allowing enforcement of 42 U.S.C. §§ 1396a(a)(8), (10)(A), and (10)(B), and 1396n(c)(2)(A) & (2)(C)). Cf. *Planned P'hood of Greater Tex. v. Kauffman*, 981 F.3d 347 (5th Cir. 2020) (refusing to allow enforcement of 1396a(a)(23)); *Thurman v. Medical Transp. Management, Inc.*, 982 F.3d 953 (5th Cir. 2020) (refusing to allow enforcement of non-emergency

**Table 1**  
**Medicaid § 1983 circuit court cases post *Gonzaga***  
**June 20, 2002-January 31, 2021**

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

Table 2 shows that, since the 2002 *Gonzaga* ruling, federal appellate courts have reviewed the enforceability of 29 Medicaid Act provisions. The vast majority of the cases focus on the *first* prong of the enforcement test (whether the provision in question unambiguously manifests congressional intent to confer individual rights).<sup>21</sup>

The circuit courts have allowed just over half of the provisions to be privately enforced. Most cases involve Medicaid beneficiaries; however, six circuits (1st, 2d, 3d, 4th, 5th, and 9th) have allowed federally qualified health centers to enforce 42 U.S.C. § 1396a(bb), a provision that addresses payment requirements for FQHCs. By contrast, all six of the circuit courts to have reviewed the question (1st, 2d, 5th, 6th, 9th, and 10th) concluded that the “equal access” provision, 42 U.S.C. § 1396a(a)(30)(A), does not create an enforceable right allowing providers and/or beneficiaries to sue states for inadequate Medicaid payment rates.

The circuit courts have consistently allowed beneficiaries to enforce two provisions of the utmost importance: 42 U.S.C. § 1396a(a)(8), which requires the state Medicaid agency to furnish medical assistance to “all individuals . . . with reasonable promptness,” and § 1396a(a)(10)(A), which requires 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, low-income children). However, with respect to the (a)(8), the Seventh Circuit recently expressed skepticism.<sup>22</sup>

//

---

transportation provisions); *Nasello v. Eagleson*, 977 F.3d 599 (7th Cir. 2020) (refusing to allow enforcement of 1396a(r)(1)(A) and assuming without deciding that 1396a(a)(8) is enforceable).

<sup>21</sup> The Third, Eighth, and Tenth Circuits 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 subsections of 42 U.S.C. § 1396d(p)(4), a Medicaid provision that addresses eligibility when an applicant has a trust. *Cf. Lewis v. Alexander*, 685 F.3d 325, 333-34, 342 (3d Cir. 2012), *cert. denied*, 568 U.S. 1123 (2013) (holding subsection d(p)(4)(C) is privately enforceable) and *Ctr. for Special Needs Trust Admin. v. Olson*, 676 F.3d 688, 700 n. 2 (8th Cir. 2012) (same) *with* *Hobbs v. Zenderman*, 579 F.3d 1171, 1179 (10th Cir. 2009) (relying on *Keith v. Rizzuto*, 212 F.3d 1190, 1193 (10th Cir. 2000) to hold subsection d(p)(4)(A) is not privately enforceable).

<sup>22</sup> *See Nasello*, 977 F.3d at 602 (7th Cir. 2020) (assuming that (a)(8) is enforceable, “without suggesting that we would follow the other circuits if push came to shove”).

Private Enforcement of Medicaid

**Table 2**  
**Post-Gonzaga Circuit Enforcement of Medicaid Provisions**  
**June 20, 2002-January 31, 2021**

Medicaid Provision (42 U.S.C. § 1396)	Held Enforceable	Held Unenforceable
a(a)(3)-fair hearing	2d (2016, 2012), 6th (2003)	
a(a)(8)-reasonable promptness <sup>23</sup>	1st (2002), 3d (2004) 4th (2011, 2007), 5th (2013), 6th (2020, 2006)	
a(a)(10)(A) - eligibility	3d (2004), 5th (2004), 6th (2020, 2006), 7th (2012), 9th (2006)	
a(a)(10)(B)–comparability	2d (2016), 6th (2020)	
a(a)(10)(C)–medically needy		10th (2009)
a(a)(10)(D)–home health	2d (2016)	
a(a)(10)(E)–cost sharing for qualified Medicare bene’s	6th (2015)	
a(a)(13)(A)–institutional payments; provider notice <sup>24</sup>	7th (2017)	2d (2006)
a(a)(17)-reasonable standards		2d (2016), 8th (2006), 9th (2006), 10th (2009)
a(a)(18)-trusts	3d (2012)	

<sup>23</sup> *Thurman v. Med. Transp. Mgmt., Inc.*, 982 F.3d 953, 958 (5th Cir. 2020), found that (a)(8) does not establish an enforceable right to non-emergency medical transportation and “at most” establishes a right to receive certain health care services.

<sup>24</sup> *BT Bourbonnais Care v. Norwood*, 866 F.3d 815, 822 (7th Cir. 2017), distinguished *N.Y. Ass’n of Homes & Servs. for the Aging, Inc. v. DeBuono*, 444 F.3d 47, 148 (2d Cir. 2006), noting that the Second Circuit had summarily affirmed *In re NYAHS Litig.*, 318 F. Supp. 2d 30 (N.D. N.Y. 2004), which held that (a)(13) conferred no *substantive* right regarding the adequacy of institutional payment rates.

a(a)(19)-best interests		5th (2020), 2d (2015), 7th (2003)
a(a)(23)-free choice of provider	4th (2019), 6th (2006), 7th (2012), 9th (2013), 10th (2018)	5th (2020), 8th (2017)
a(a)(25)-third party liability		11th (2012)
a(a)(30)(A)-provider payments <sup>25</sup>		1st (2004), 2d (2006), 5th (2007), 6th (2010, 2006), 9th (2007, 2005, 2005), 10th (2007, 2006)
a(a)(43)-EPSDT	6th (2010, 2006)	
a(a)(54)-outpatient drugs		3d (2016)
a(a)(70)-transportation brokerage program		7th (2020)
a(r)(1)(A)-post eligibility treatment of income	6th (2020)	
a(bb)-FQHC payment	1st (2008, 2005), 2d (2014), 3d (2013), 4th (2007), 5th (2018), 9th (2013)	
b(m)-managed care		9th (2009)
d(a)-services	3d (2004), 6th (2006), 8th (2006)	

<sup>25</sup> 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*, Eighth Circuit precedent and holding (30)(A) does not create enforceable rights under § 1983).

d(p)-cost sharing for QMBs	6th (2015)	
n(c)(2)(A)-home and community waiver safeguards	6th (2020)	
n(c)(2)(C)-home & community waiver informing	6th (2020), 9th (2007)	
n(d)(2)(D)- home & community waiver payments	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), 9th (2019)	
r-6-transitional Medicaid	2d (2004)	

The Supreme Court has not decided a Medicaid enforcement case since *Gonzaga*. In 2020, the Court (as it had done previously) refused to hear a case that allowed beneficiaries to enforce the Medicaid “freedom of choice” provision.<sup>26</sup> As discussed below, however, the Court’s action did not put enforcement disputes regarding this provision to rest.

## Conclusions and Recommendations

Medicaid beneficiaries can enforce only a few provisions of the Medicaid Act using § 1983. Caution is required, and there are reasons to be particularly careful at this time. When considering a § 1983 claim, advocates should:

1. Plead the underlying statutory provision precisely. A complaint must be pled in “manageable analytic bites.”<sup>27</sup> Thus, plead claims precisely (e.g., 42 U.S.C. § 1396a(a)(43)(C), not § 1396a(a)(43) ... and certainly not § 1396a(a) or § 1396a).
2. Rely only on federal laws that have an individual focus, specificity, and are stated as a mandate. Assess each Medicaid provision against all three prongs of the *Blessing/Gonzaga* test. When researching the enforcement history of a provision, consult and address opinions within and outside of your jurisdiction and those dealing with provisions outside of the Medicaid Act.<sup>28</sup>

<sup>26</sup> *Pl. P’hood of So. Atl. v. Baker*, 941 F.3d 687 (4th Cir. 2019) (holding provision enforceable), *cert. denied*, 141 S. Ct. 550 (2020); *see also Pl. P’hood of Kan. v. Andersen*, 882 F.3d 1205 (10th Cir. 2018) (same), *cert. denied*, 139 S. Ct. 638 (2018); *Pl. P’hood of Gulf Coast v. Gee*, 862 F.3d 445 (2017) (same), *cert. denied* 139 S. Ct. 408 (2018). In 2020, the Fifth Circuit overruled *Gee*. *See Pl. P’hood of Greater Tex. Fam. Pl. & Prevent. Health Servs. v. Kauffman*, 981 F.3d 346 (5th Cir. 2020).

<sup>27</sup> *Blessing*, 520 U.S. at 342.

<sup>28</sup> The National Health Law Program maintains a Medicaid case docket that is available upon request. Private Enforcement of Medicaid

3. Avoid provisions with a poor enforcement track record. When multiple courts have refused to allow enforcement of a provision, avoid it. To illustrate, courts (including five circuits, as of 2020) have refused to allow enforcement of the “best interests of recipients” provision, 42 U.S.C. § 1396a(a)(19). There is no reason to think this trend will change. Relatedly, avoid asking a judge to apply a provision to facts in novel ways not reflected in the direct words of the statute. See *e.g.*, *Mercer Cty. Children’s Med. Daycare v. O’Dowd*, No. 13-1436, 2014 WL 546346 (D.N.J. Feb. 10, 2014) (refusing to allow private enforcement of the EPSDT “correct or ameliorate” provision in a dispute that arose when provider was fined for repeatedly exceeding the number of children who could be treated in the medical daycare program at any one time).
4. Do not seek to enforce federal regulations. In three 2020 cases, plaintiffs sought to enforce federal regulations; none prevailed.<sup>29</sup> By now, it should be clear that courts will not allow private enforcement of regulations, standing alone.<sup>30</sup> A regulation can only “define or flesh out” the content of a federal statute that is itself privately enforceable.<sup>31</sup>
5. Be clear that the motion to dismiss does not involve plaintiffs’ standing. In the motion to dismiss, the defendant (and, sometimes, the court) will address the plaintiffs’ ability to enforce the Medicaid claim as a matter of standing. This confuses two distinct doctrines: constitutional standing and the availability of a cause of action. See *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (explaining difference between jurisdiction and a cause of action). Defendants’ arguments about whether a Medicaid provision confers an enforceable right concern whether plaintiffs have a valid cause of action under § 1983 and do not implicate their Article III standing or the court’s jurisdiction. See, *e.g.*, *Backer ex rel. Freedman v. Shah*, 788 F.3d 341, 344 (2d Cir. 2015) (finding plaintiff had standing, but that § 1396a(a)(19) was not privately enforceable). The distinction is significant: Whether the plaintiff has stated a valid claim for relief can be waived if not raised in a timely way. See *Ball v. Rodgers*, 492 F.3d 1094, 1102 (9th Cir. 2007). By contrast, standing implicates a court’s subject-matter jurisdiction and can be raised at any time, including *sua sponte* by the court.
6. Monitor developments regarding the freedom of choice provision. Until recently, only the Sixth Circuit had assessed the enforceability of the freedom of choice provision (finding it enforceable).<sup>32</sup> That changed in 2015, after an anti-abortion group released “a series of edited [YouTube] videos purportedly depicting PPFA [Planned Parenthood Federation of America] executives negotiating with undercover journalists for the sale of fetal tissue and body parts.”<sup>33</sup> In response, some states terminated PPFA affiliates from their Medicaid programs. Providers and beneficiaries sued, arguing that the exclusions violated their rights under 42 U.S.C.

<sup>29</sup> See *Thurman v. Med. Transp. Mgmt., Inc.*, 982 F.3d 953 (5th Cir. 2020); *Va. Hosp. & Healthcare Ass’n v. Kimsey*, No. 3:20cv587–HEH, 2020 WL 5947887 (E.D. Va. Oct. 7, 2020) *Ansley v. Banner Health Network*, 248 Ariz. 143 (2020).

<sup>30</sup> See *Price v. Stockton*, 390 F.3d 1105, 1112 n.6 (9th Cir. 2004) (noting 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 considered when applying the *Blessing* test); see also, *e.g.*, *Johnson v. City of Detroit*, 446 F.3d 614 (6th Cir. 2006); *So. Camden Cits. v. N.J. 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).

<sup>31</sup> *Shakhnes v. Belin*, 689 F.3d 244, 254 (2d Cir. 2012). Cf. *Evangelical Lutheran Good Samaritan Society, Inc. v. Randol*, No. 16-cv-2665, 2017 WL 3085778 (D. Kan. Jul. 20, 2017) (refusing to allow nursing facilities and facility patients to enforce 42 C.F.R. § 435.912(c)(3)), regarding timely eligibility decisions).

<sup>32</sup> See *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006).

<sup>33</sup> *Andersen*, 882 F.3d at 1212.



§ 1396a(a)(23), which requires the state to ensure that “any individual eligible for medical assistance ... may obtain such assistance from any ... person, qualified to perform the service....”

To date, five circuits (the 6th, 7th, 9th, and 10th, and—as of 2020—the 4th) have allowed private enforcement of the provision, and two (the 5th and 8th) have not.<sup>34</sup> The Supreme Court refused to consider the issue in 2017 and again in 2020 (the 4th Circuit case). When the Court denied certiorari in 2017, three justices—Thomas, Alito, and Gorsuch—dissented.<sup>35</sup> Citing the split between the Eighth Circuit and the other circuits, they complained that the lower courts are confused about how to decide private enforcement cases and argued “it is our job to fix it.”<sup>36</sup> The problem with the dissent’s reasoning is that, until the Eighth Circuit decision, the courts of appeals did not reflect confusion when applying the *Blessing/Gonzaga* enforcement test. As Table 2, above, illustrates, in the 15 years between 2002, when *Gonzaga* was decided, and 2017, when the Eighth Circuit decided *Does*, the appellate courts were remarkably consistent with respect to which Medicaid provisions can be privately enforced and which cannot. What changed in 2017 was the reasoning used by the majority in *Does*. The judges abandoned the three-prong enforcement test, and this path was followed by the Fifth Circuit, en banc, when it refused enforcement in 2020. Clearly, the reasoning in these cases is unsettling and must be monitored. As for monitoring, the Fourth Circuit is once again reviewing its enforcement ruling, thus setting up the potential for the enforcement question to make its way back to the Court.

7. Be sensitive to confusion in the courts and where courts may be headed. The situation in the Seventh Circuit illustrates: Judge Easterbrook’s 2020 opinion in *Nasello v Eagleson*, questions the continued relevance of “some older decisions” (*Maine v. Thiboutot* and *Wilder*) on the grounds that more recent cases (e.g., *Armstrong* and *Gonzaga*)

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.<sup>37</sup>

*Nasello* refused to allow the plaintiff to enforce the Medicaid provision. By contrast, Judge Wood’s 2017 opinion in Seventh Circuit’s *BT Bourbonnais Care* case concludes that

nothing in *Armstrong*, *Gonzaga*, or any other case we have found supports the idea that plaintiffs are now flatly forbidden in section 1983 actions to rely on a statute passed pursuant to Congress’s Spending Clause powers. There would have been

<sup>34</sup> *Pl. P’hood of So. Atl. v. Baker*, 941 F.3d 687 (4th Cir. 2019); *Andersen*, 882 F.3d 1205 (10th Cir. 2018), *Gee*, 862 F.3d 445 (5th Cir. 2016), *rehearing denied*, 876 F.3d 699 (2017), *cert. denied*, 139 S. Ct. 408 (2018); *Pl. P’hood of Ariz. v. Betlach*, 727 F.3d 960 (9th Cir. 2013), *cert. denied*, 571 U.S. 1198 (2014); *Pl. P’hood v. Ind. v. Comm’r*, 699 F.3d 962 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2736 (2013); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006).

<sup>35</sup> 139 S. Ct. 408 (Thomas, Alito, Gorsuch, JJ, dissenting).

<sup>36</sup> *Id.*

<sup>37</sup> *Nasello*, 977 F.3d 599, 601.

---

no need, had that been the Court's intent, to send lower courts off on a search for “unambiguously conferred rights.” A simple “no” would have sufficed.<sup>38</sup>

A case pending at the Seventh Circuit may clarify where that court is headed. In *Talevski v. Health & Hosp. Corporation of Marion County*, the district court held that the Nursing Home Reform Act cannot be privately enforced.<sup>39</sup> That opinion refused to follow federal circuits that recognize private enforcement.<sup>40</sup> It did not cite *BT Bourbonnais*, and it was issued before *Nasello* was decided. The case was argued on December 4, 2020 before Judge Kanne, who was part of the *Nasello* panel; Judge Wood, who wrote *BT Bourbonnais*; and Judge Scudder, who was appointed by President Trump.

---

<sup>38</sup> *BT Bourbonnais Care*, 866 F.3d 815, 820-21 (7th Cir. 2017).

<sup>39</sup> *Talevski*, No. 2:19-CV-13, 2020 WL 1472132 (N.D. Ind. Mar. 26, 2020) (discussing 42 U.S.C. § 1396r). The National Health Law Program, represented a number of disability organization in an amicus brief in the case. See Brief for Nat'l Health L. Prog. et al. as Amici Curiae Supporting Appellant, *Talevski v. Health & Hosp. Corp. of Marion Co.*, No. 2:19-CV-13 (2020) (No. 20-1664) (ECF No. 25).

<sup>40</sup> *Id.* at \*3 (citing *Anderson v. Ghaly*, 940 F.3d 1066 (9th Cir. 2019) and *Grammer v. John J. Kane Reg'l Ctrs.*, 570 F.3d 520 (3d Cir. 2009)).