

## ABA/NLADA 2007 Equal Justice Conference

### Medicaid Litigation Update

Presented by:

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#### Brief Description:

Over the last year, a number of courts have assessed claims regarding the amount and scope of Medicaid services, the prompt provision of covered services, children's health services, coverage of prescription drugs, and program eligibility. Courts also looked at whether individuals could enforce the Medicaid Act. This workshop summarizes important cases and previews important decisions of the coming year.

#### Topical Outline:

##### I. Supreme Court Cases

*Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006) (Medicaid Act, 42 U.S.C. § 1396p(a), precluded state from recovering more than the amount of the settlement allocated to cover past medical expenses)

##### II. Enforcement of Consent Decrees

*Frazar v. Ladd*, 457 F.3d 432 (5th Cir. 2006) (standard for dissolving or modifying consent decree is whether the objectives of the decree have been met, not whether the state is complying with federal law)

##### III. Private enforcement under section 1983

a. *Okla. Chapter of the Am. Acad. of Pediatrics v. Fogerty*, 472 F.3d 1208 (10th Cir. 2007) (“equal access” provision, 42 U.S.C. § 1396a(a)(30)(A), is not enforceable under section 1983); *Mandy R. v. Owens*, 464 F.3d 1139 (10th Cir. 2006) (same); *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) (same); *N.Y. Ass'n of Homes and Servs. for the Aging, Inc. v. Debuono*, 444 F.3d 147 (2d Cir. 2006) (same regarding providers); *Roob v. Fisher*, 856 N.E.2d 723 (Ind. Ct. App. 2006). *Contra Pediatric Specialty Care v. Ark. Dep't of Human Servs.*, 443 F.3d 1005 (8th Cir. 2006) (petition for cert. pending); *Equal Access for El Paso, Inc. v. Hawkins*, 428 F. Supp. 2d 585 (W.D. Tex. 2006) (5th Cir. appeal pending)

b. *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006) (“**reasonable standards**” provision, § 1396a(a)(17), does not create federal rights under section 1983; “**eligibility**” provision, § 1396a(a)(10)(A), does); *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) (same re: § 1396a(a)(10)(A)); *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006) (same, re: § 1396a(a)(17))

c. *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) (“**reasonable promptness**” provision, 42 U.S.C. § 1396a(a)(8), creates enforceable rights under section 1983); *Bertrand v. Maram*, 2006 U.S. Dist. LEXIS 68935 (N.D. Ill. Sept. 25, 2006) (same, on appeal), *Cf. Bio-Med. Applications of N.C. v. Elec. Data Sys. Corp.*, 412 F. Supp. 2d 549 (E.D.N.C. 2006) (providers cannot enforce (a)(8))

d. *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006) (“**freedom of choice**” provision, 42 U.S.C. § 1396a(a)(23), creates enforceable rights under section 1983)

e. *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) (“**early and periodic screening diagnosis and treatment provision**, 42 U.S.C. § 1396a(a)(43), creates enforceable rights under section 1983)

#### IV. Medicaid as payment

*Okla. Chapter of the Am. Acad. of Pediatrics v. Fogerty*, 472 F.3d 1208 (10th Cir. 2007) (Medicaid is “medical assistance,” which is payment for all or part of the service, not the care and services themselves); *Mandy R. v. Owens*, 464 F.3d 1139 (10th Cir. 2006) (same); *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) (same, but remanding to allow plaintiffs to amend complaint)

#### V. Preemption

*Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006) (“reasonable standards” provision, § 1396a(a)(17), could not be enforced under section 1983 but Plaintiffs had set forth a preemption claim), *on remand*, 2007 U.S. Dist. LEXIS 14950 (W.D. Mo. Mar. 2, 2007) (granting summary judgment for plaintiffs)

#### VI. CMS state plan approval

a. *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006) (CMS approval of the state Medicaid plan providing for a single-source contract for incontinence supplies was entitled to *Chevron* deference)

b. *Juneau v. Ctrs. for Medicare & Medicaid Servs.*, 2006 U.S. Dist. LEXIS 66490 (D. Alaska Sept. 15, 2006) (In APA case, hospital had standing to challenge CMS’ approval of a state plan amendment where that amendment violated 42 USC § 1396a(a)(13) because the state had not given CMS the required assurance that it had provided public notice and record did not reflect such notice)

VII. Early and Periodic Screening, Diagnosis and Treatment (EPSDT) for Children

- a. *J.D. v. Ditmore*, 2006 U.S. Dist. LEXIS 78446 (W.D. Mo. Oct. 27, 2006) (preliminary injunction) (requiring coverage of a liver transplant for a child with Maple Syrup Urine Disease)
- b. *Katie A. v. Bonta*, 433 F. Supp. 2d 1065 (C.D. Cal. 2006) (preliminary injunction) (requiring wraparound and therapeutic foster care services for children with serious emotional disturbances); *Rosie D. v. Romney*, 410 F. Supp. 2d 18 (D. Mass. 2006), *same case*, 2007 U.S. Dist. LEXIS 12754 (D. Mass. Feb. 22, 2007) (adopting remedial plan)
- c. *Ekloff v. Rodgers*, 443 F. Supp. 2d 1173 (D. Ariz. 2006) (requiring coverage of incontinence briefs)
- d. *C.F. v. Dep't of Children & Families*, 934 So. 2d 1 (Fla. Dist. Ct. App. 2005) (finding that administrative law judge improperly applied the overly-restrictive state regulatory definitions of "medical necessity" and "personal care assistance" rather than the federally-required EPSDT "correct or ameliorate" requirements)

VIII. Prescription drug coverage

*Edmonds v. Levine*, 417 F. Supp. 2d 1323 (S.D. Fla. 2006) (required coverage of the drug Neurontin where the use was being prescribed for "medically accepted indications" within the Medicaid Act, § 1396r-8(k))

IX. Compelling agency action

*Tr. of Masonic Hall & Asylum Fund v. Leavitt*, 2006 U.S. Dist. LEXIS 37685 (N.D. N.Y. June 7, 2006) (dismissed provider challenge to obtain federal funding, finding that DHHS has administrative flexibility and cannot be compelled through the APA or otherwise to act in a certain way)

X. Deficit Reduction Act of 2005

a. *Bell v. Leavitt*, No. 06 C 3520, *reprinted in* Med & Med Guide (CCH) ¶ 301,896 (N.D. Ill. Sept. 14, 2006) (in a challenge to section 6036 of the DRA and the implementing regulations, which require states to obtain proof of citizenship from certain applicants for and recipients of Medicaid benefits, the court denied a TRO but certified a class of children in the foster care system. The Court dismissed the claims of many of the plaintiffs as moot, because regulations issued by the Secretary after the case was filed allowed them to qualify for Medicaid without having to comply with the documentation requirements. For the remaining plaintiffs, the Court reasoned that the plaintiffs had failed to satisfy the "redressability" component of standing, because an injunction preventing

implementation of the federal regulations, which plaintiffs were seeking, would not invalidate the statutory documentation requirement or the burden of complying with it. The Court granted class certification as to a narrow class of persons who acquire their eligibility for Medicaid coverage as a result of their eligibility for Foster Care and Adoption Assistance under Title IV-E of the Social Security Act. The recently-enacted Tax Relief Act excludes additional population groups from the documentation requirements, including children and youth who are in the title IV-E and IV-B foster care and adoption assistance program)

b. All cases to date have dismissed plaintiffs' challenge to the constitutionality of the DRA of 2005. The cases are being appealed. *See Cookeville Reg'l Med. Ctr. v. Leavitt*, 2006 U.S. Dist. LEXIS 68961 (D.D.C. Sept. 26, 2006); *Pub. Citizen v. Clerk*, 451 F. Supp. 2d 109 (D.D.C. 2006) (appeal pending); *Cal. Dep't of Soc. Servs. v. Leavitt*, 444 F. Supp. 2d 1088 (E.D. Cal. 2006); *Conyers v. Bush*, 2006 U.S. Dist. LEXIS 80816 (E.D. Mich. Nov. 6, 2006); *OneSimpleLoan v. Sec'y of Educ.*, 2006 U.S. Dist. LEXIS 38714 (S.D.N.Y. June 9, 2006) (appeal pending)

#### XI. Due process

a. *Estate of V.M. v. Div. of Med. Assistance & Health Servs.*, 896 A.2d 503 (Super. Ct. 2006) (notice regulations that permitted a denial notice to be sent to the person who applies on behalf of the intended beneficiary are valid despite being inconsistent with the terms, if not the spirit, of the federal regulation relating to notice in such cases)

b. *Reiff v. Colo. Dep't of Health Care Policy & Fin.*, 148 P.3d 355 (Colo. Ct. App. 2006) (in appeal of a decision finding that a Medicaid recipient no longer met the severity requirements for HCBS benefits, ALJ could consider evidence that was not available to the person who made the initial determination)

#### XII. Miscellaneous state court cases

a. *Diaz v. Div. of Soc. Servs.*, 628 S.E.2d 1 (S. Ct. 2006) (chemotherapy needed by an undocumented immigrant did not qualify as an "emergency medical condition" under § 1396b(v), once the patient's condition was stabilized)

b. *Gasper v. DSHS*, 129 P.3d 849 (Wash. Ct. App. 2006) (invalidated rule that reduced nursing care hours of waiver participants living with paid caregivers, finding a violation of the Medicaid comparability requirement, 42 U.S.C. § 1396a(a)(10)(B), and refusing to defer to "boilerplate language" in waiver), *review granted sub nom. Myers v. Wash. State Dep't of soc. & Health Servs.*, 143 P.3d 598 (Wash. Sept. 6, 2006)

c. *Jensen v. Mo. Dep't of Health & Senior Servs.*, 186 S.W.3d 857 (Mo. Ct. App. 2006) (after state reduced plaintiff's personal care services because she did not document that it would be an "undue hardship" for her parents to meet her needs, the court determined that the "undue hardship" requirements were preempted by

federal law, 42 U.S.C. § 1396a(a)(17)(D), to the extent that they considered family resources of adult aid recipients)

d. *Smallwood v. Cent. Peninsula Gen. Hosp.*, 141 P.3d 319 (Alaska 2006)  
(Medicaid recipient has a contract cause of action as a third party beneficiary of the provider agreement between the hospital and the Medicaid agency to enforce the balance billing prohibition of the Medicaid regulations, as reflected in the provider agreement)