

**Preserving Access to the Courts for Low-Income People
2009 ABA-NLADA Equal Justice Conference
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**Preserving Access to the Courts for Low-Income People-
Background & Recent Developments**

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Brief Description: This session will focus on SCOTUS and COA developments regarding a private individual's ability to enforce provisions of federal statutes that ensure public benefits or protect individual rights. Low-income plaintiffs must carefully navigate around litigation barriers if they are to prevail when seeking to enforce rights under laws and programs like Title VI, the Americans with Disabilities Act, and Medicaid.

Topical Outline:

- I. The need for court access
 - a. Less than perfect compliance by state actors
 - b. Government accountability
 - c. Problems with administrative relief

- II. History of private enforcement in the SCOTUS and the remedial imperative
 - a. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)
 - b. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)
 - c. *Rosado v. Wyman*, 397 U.S. 397 (1970)
 - d. *Cort v. Ash*, 422 U.S. 66 (1975)

- III. Rehnquist Court rejects *ancien regime* in civil rights & spending clause cases
 - a. Implied rights of action
 - i. *Lau v. Nichols*, 414 U.S. 563 (1974)
 - ii. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979)
 - iii. *Alexander v. Sandoval*, 532 U.S. 275 (2001)
 - iv. Alexander's aftermath
 - b. 42 U.S.C. § 1983
 - i. State action deprives citizen of rights, privileges, or immunities
 - ii. *Maine v. Thiboutot*, 448 U.S. 1 (1980)
 - iii. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981)
 - iv. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990)
 - v. *Blessing v. Freestone*, 520 U.S. 329 (1997)
 - vi. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)
 - vii. Recent cases from the CsOA

- IV. Preemption
 - a. Supremacy Clause - U.S. Const. art. VI, cl. 2
 - b. *Gibson v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)

- c. *Shaw v. Delta Airlines*, 463 U.S. 85 (1983)
 - d. *Verizon Md. Incorporated v. Pub. Service Comm'n*, 535 U.S. 635 (2002)
 - e. Recent cases from the CsOA
- V. Deference
- a. *Chevron v. NRDC*, 467 U.S. 837 (1984)
 - b. *Wis. Dep't of Health & Family Services v Blumer*, 532 U.S. 473 (2001)
 - c. Recent case examples from the CsOA
- VI. Additional Areas of Interest
- a. Abstention
 - b. Enforcement/termination of consent orders

Bibliography & Website Links:

1. Jane Perkins, National Health Law Program, Developments Affecting Medicaid Cases Filed Under 42 U.S.C. § 1983 (Dec. 31, 2008) (available at www.healthlaw.org) (Court Watch folder)
2. Jane Perkins, *Using Section 1983 to Enforce Federal Laws*, 38 Clearinghouse Rev. J. of Pov. L. & Pol. 720 (Mar.-Apr. 2005)
3. Lauren Saunders, *Preemption as an Alternative to Section 1983*, 38 Clearinghouse Rev. J. of Pov. L. & Pol. 705 (Mar.-Apr. 2005)
4. Sarah Somers, *Preemption and the Medicaid Act* (Jan. 2007), available at www.healthlaw.org (Court Watch folder)
5. Sarah Somers, *A Medicaid Advocates Guide to Deference* (Jan. 2008) (available from NHeLP)
6. Graham G. Martin & David A. Super, *Judicial Deference to Administrative Agencies and its Limits*, 40 Clearinghouse Rev. J. of Pov. L. & Pol. 596 (Mar.-Apr. 2007)
7. Jane Perkins, *Negotiating Consent Decrees that Work*, 41 Clearinghouse Rev. J. of Pov. L. & Pol. 500 (Jan.-Feb. 2008)

Fact Sheet

Developments Affecting Medicaid Cases Filed Under 42 U.S.C. § 1983¹

Prepared by: Jane Perkins

December 31, 2008

Medicaid recipients and applicants may encounter problems when state Medicaid programs do not comply with mandatory requirements of the federal Medicaid Act, 42 U.S.C. §§ 1396-1396v. These individuals may consider a court action to obtain injunctive relief.

This Fact Sheet will provide background and discuss trends affecting private enforcement of the Medicaid Act, focusing on 42 U.S.C. § 1983 (§ 1983). Private enforcement may also be accomplished through a preemption action grounded in the Supremacy Clause of the United States Constitution. The Medicaid developments in this area will be addressed in a future Fact Sheet, and the issue is discussed only briefly below.²

The National Health Law Program maintains § 1983 and preemption dockets that chart Medicaid Act enforcement provision-by-provision. Consult these dockets when considering litigation.

¹ Produced by the National Health Law Program with a grant from the Nathan Cummings Foundation and the Training Advocacy Support Center (TASC), a division of the National Disabilities Rights Network (NDRN), which is sponsored by the Administration on Developmental Disabilities, the Center for Mental Health Services, the Rehabilitation Services Administration, the Social Security Administration, and the Health Resources Services Administration.

² For additional background from NHeLP, see, e.g., Jane Perkins, National Health Law Program, *42 U.S.C. § 1983 and Enforcement of the Medicaid Act* (December 31, 2008 update) (docket of Medicaid cases routinely updated and published by the National Health Law Program since 1998); National Health Law Program, *Trends in Medicaid Enforcement Pursuant to Section 1983* (Nov. 2007); Sarah Somers, National Health Law Program, *The Supremacy Clause, Preemption and Enforcement of Medicaid* (May 21, 2007) (memorandum and docket); Jane Perkins, National Health Law Program, *Using Section 1983 to Enforce Federal Laws*, 38 CLEARINGHOUSE REV. J. OF POVERTY L. AND POL. 720 (Mar.-Apr. 2005); John Vail and Jane Perkins, *Chipping at the Core of Justice*, 40 TRIAL 28 (Apr. 2004) (hereafter *Chipping at the Core*); National Health Law Program, *Update on recent challenges to EPSDT enforceability* (Nov. 2004); National Health Law Program, *Section 1983 and Private Rights of Action: Court Watch Update* (Dec. 31, 2002); National Health Law Program, *Q&A: Gonzaga University v. Doe* (July 5, 2002).

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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."³ 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."⁴ A hundred years later, in 1901, the Court continued to acknowledge this principle, discussing "free access to the courts" as a "natural right enforced in the Constitution ... indispensable to a free government," equivalent to freedom of religion, freedom of speech, and freedom of the press.⁵

Over the years, private individuals have gone to court when they are being harmed by state actions that are inconsistent with federal law. Some of these laws were enacted by Congress pursuant to the Spending Clause of the United States Constitution, and they make federal funding available to states that agree to operate the funded programs consistent with the requirements of the federal law.⁶ The Social Security Act, of which Medicaid is a part, is an example of a spending clause enactment. When it added Medicaid to the Social Security Act in 1965, Congress did not include a provision authorizing individuals to enforce the Act in federal court. With Medicaid and other public benefits programs, Congress acted with the understanding that courts would "provide such remedies as are necessary to make effective the congressional purpose."⁷

Thus, early public benefits cases focus on the wrong and the remedy, with little discussion of how the plaintiff was in court in the first place.⁸ A number of these cases were filed using 42 U.S.C. § 1983, which provides injured individuals with an express cause of action against state actors who violate "rights, privileges, or immunities secured by the Constitution and laws."⁹

³ *Chipping at the Core*, *supra* n. 1 (quoting William Blackstone, Commentaries on the Laws of England 109 (1765)).

⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

⁵ *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901).

⁶ See U.S. Const., art. I, § 8, cl. 1.

⁷ *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). See, e.g., n. 2-4, *supra*. 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.").

⁸ For additional discussion, see, e.g. Brief of Plaintiffs-Appellants, *Westside Mothers v. Haveman*, No. 01-1494 (6th Cir. Aug. 31, 2001); Sarah Somers, National Health Law Program, *The Supremacy Clause, Preemption and Enforcement of Medicaid* (May 21, 2007).

⁹ 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.

For example, in *King v. Smith*, the Court allowed enforcement under § 1983 of a “reasonable promptness” provision of the Social Security Act.¹⁰ Invalidating the state law, the Court noted:

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.¹¹

Similarly, in *Rosado v. Wyman*, the Court struck down a state law governing the determination of financial eligibility as conflicting with a federal AFDC provision.¹² The *Rosado* Court employed an analysis of whether the state law violated the federal law and, therefore, whether “federal funds [were] being allocated and paid in a manner contrary to that intended by Congress.”¹³ In addition, the Court stated:

We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW [Health, Education and Welfare] the power to cut off federal funds for noncompliance with statutory requirements. 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.¹⁴

In *Edelman v. Jordan*, the Court stated that “[s]uits 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.”¹⁵ Finally, in *Maine v. Thiboutot*, a 6-3 ruling, the Court assessed § 1983 and held “the phrase ‘and laws’ means what it says” and, thus, applies not only to constitutional rights but also to rights defined in federal statutes.¹⁶ The Court cautioned that such actions require the plaintiff to assert a violation of a federal “right,” not merely a violation of federal law.¹⁷

¹⁰ 392 U.S. 309 (1968).

¹¹ *Id.* at 333.

¹² 397 U.S. 397 (1970).

¹³ *Id.* at 421.

¹⁴ *Id.* at 421, 422.

¹⁵ 415 U.S. 651, 675 (1974).

¹⁶ 448 U.S. 1, 6-8 (1980) (enforcing a Social Security Act provision). *See also*, e.g., *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498 (1990) (allowing private enforcement of a Medicaid Act provision concerning payment for institutional services). *But compare* Brief for the United States as Amicus Curiae Supporting Petitioners, *Wilder v. Virginia Hosp. Ass’n* (1990) (argument from Deputy Solicitor General John Roberts arguing *Pennhurst* precluded enforcement under § 1983).

¹⁷ *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989). *See also* *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden State Transit*).

Courts have traditionally applied a three-part test to determine whether the federal law at issue creates a federal right: (1) Was the federal law 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?¹⁸ 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 resort to § 1983, expressly or by including a comprehensive remedial scheme in the substantive federal law that creates the right.¹⁹ This test is often referred to as the *Blessing/Wilder* test, after Supreme Court cases applying it. Over the years, lower courts applied this test, finding some federal laws created federal rights while others did not.

Despite this history, not all of the justices have been comfortable with allowing private individuals to enforce spending clause enactments. Just one year after *Maine v. Thiboutot*, Justice Rehnquist delivered the opinion of the Court in *Pennhurst State School and Hospital v. Halderman*.²⁰ While the case concerned the Developmentally Disabled Assistance and Bill of Rights Act, which is not part of the Social Security Act, the decision established the foundation for the retrenchment in private enforcement that was to follow:

[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.²¹

Pennhurst has become a favorite case for a majority of the current Supreme Court Justices. In 2002, the Rehnquist Court issued *Gonzaga Univ. v. Doe*—accepting attorney John Roberts’ arguments in the case against private enforcement.²² The National Health Law Program has discussed this case extensively, so it will only be summarized here.²³ Writing for the majority, Chief Justice Rehnquist initially noted that *Gonzaga* involved a spending clause enactment. Citing *Pennhurst*, he noted that spending clause programs are similar to contracts, with the typical remedy for a

¹⁸ *Blessing*, 520 U.S. 329; *Wilder*, 496 U.S. at 509.

¹⁹ As recently as 2005, the Court reiterated that the Medicaid Act does not include a comprehensive remedial scheme. See *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (including *Wilder* and Medicaid in a list of cases concerning statutes whose enforcement is not foreclosed).

²⁰ 451 U.S. 1 (1981).

²¹ *Id.* at 17, 28.

²² 536 U.S. 273 (2002) (refusing to allow § 1983 enforcement of a Federal Educational 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).

²³ See, n. 1, *supra*.

violation of spending clause provisions being termination of funding by the federal agency. Thus, according to the *Gonzaga* Court, a federal law is not privately enforceable unless Congress has unambiguously manifested its intent to confer individual rights on the program beneficiary. Moreover, the 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.”²⁴ The provision must contain “rights- or duty-creating language” and have an individual rather than an aggregate focus.²⁵

Interestingly, while *Gonzaga* emphasizes the need to discern congressional intent, a provision enacted by Congress specifically to protect private enforcement has received uneven deference from the lower courts. Congress added 42 U.S.C. § 1320a-2 to recognize that provisions of the Social Security Act are privately enforceable.²⁶ As written, the amendment requires courts, in Social Security Act cases, to apply the Supreme Court enforcement test that existed prior to 1994. Section 1320a-2 is central to some decisions allowing private enforcement, but some conservative judges have refused to defer to it.²⁷ Of particular concern is an analysis by Ninth Circuit Court Judge O’Scannlain in *Sanchez v. Johnson* which, while pithy, is incorrect. Refusing to allow private enforcement of a Medicaid provision, the decision dismisses § 1320a-2, finding it is “hardly a model of clarity” and concluding that it does not disturb the reasoning of *Pennhurst*.²⁸ 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.

Medicaid enforcement using § 1983

Gonzaga has generated significant litigation in the six-and-one-half years since it was decided. Most of the litigation has been filed by state attorneys seeking to block private enforcement of the Medicaid Act.

Lower courts applying *Gonzaga* in the Medicaid context have tended to view the case as clarifying and narrowing the first part of the enforcement test, with most

²⁴ *Gonzaga*, 536 U.S. at 279.

²⁵ *Id.*

²⁶ 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.

The amendment overruled parts of *Suter v. Artist M*, 503 U.S. 347 (1992), which appeared to hold that plaintiffs only enforceable right for the state to have a written plan. *Id.* at 358.

²⁷ 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).

²⁸ *Sanchez*, 416 F.3d at 1057 n.5 (citing *Pennhurst*, 451 U.S. 1, 28 (1981)).

continuing to apply the remaining *Blessing/Wilder* prongs.²⁹ *Gonzaga* and another decision, *Alexander v. Sandoval*, have caused lower courts to revisit the question of whether federal regulations can create rights under § 1983.³⁰ The clear trend is to find that they cannot.³¹

Of particular note are the 25 cases decided by the federal courts of appeal. This activity is noted in the tables, below. Table 1 shows where the activity has taken place.

Table 1
Medicaid § 1983 cases in the circuits, 2002-2008

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

Source: NHeLP, 42 U.S.C. § 1983 and Enforcement of the Medicaid Act (Dec. 2008)

Table 2 shows that, since 2002, the appellate courts have reviewed the enforceability of at least 14 Medicaid Act provisions.³² The vast majority of these decisions recognize that beneficiaries have an enforceable right; however, actions by providers participating in the Medicaid program have not been nearly as successful. Moreover, multiple circuits have refused to enforce two provisions: 42 U.S.C. § 1396a(a)(17), which requires states to employ reasonable standards, and 42 U.S.C. § 1396a(a)(30)(A), which requires states to establish payments that are consistent with efficiency, economy, and quality of care and ensure access for Medicaid beneficiaries.

²⁹ 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), *cert. denied*, 125 S.Ct. 2957 (2005) (finding plaintiff failed to meet the third *Blessing/Wilder* prong).

³⁰ *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001) ("Language in a regulation may invoke an [implied] private right of action that Congress through statutory text created, but it may not create a right that Congress has not."). Compare *Wright v. Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 431-32 (1987) (allowing individuals to enforce HUD regulations that defined "rent" as including an amount to cover utilities) with *id.* at 437 (O'Connor, J., dissenting) ("[I]t is necessary to ask whether administrative regulations *alone* could create such a right. This is a troubling issue....") (emphasis in original).

³¹ 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); *South 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).

³² Courts review enforcement on a provision-by-provision basis. Although the provision-by-provision assessment does require careful pleading of the complaint and exact more painstaking analysis from the parties and the court, it is the consistent with the Supreme Court's teachings. 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.").

Notably, both of these provisions had been enforced by the federal courts prior to *Gonzaga*.

Table 2 also shows that activity at the federal appellate level was pronounced in 2006-2007, but only one decision was published in 2008. The circuit courts are applying the *Gonzaga/Blessing/Wilder* enforcement test consistently. The Supreme Court has not decided a Medicaid/§ 1983 enforcement case since *Gonzaga*.³³

Table 2
Circuit Court Enforcement of Medicaid Provisions, 2002-2008

Medicaid Provision (42 U.S.C. § 1396)	Held Enforceable	Held Unenforceable
a(a)(3)-fair hearing	6th (2003)	none
a(a)(5)-single state agency	none	9th (2002)
a(a)(8)-reasonable promptness	1st (2002), 3d (2004) 4th (2007), 6th (2006), 10th (2007)*	none
a(a)(10)(A)-eligibility	3d (2004), 5th (2004), 6th (2006), 8th (2002), 9th (2006), 10th (2007)*	none
a(a)(17)-reasonable standards	none	8th (2006); 9th (2006)
a(a)(19)-best interests	none	7th (2003)
a(a)(23)-free choice	6th (2006)	none
a(a)(30)(A)- payments	none**	1st (2004), 3d (2002), 5th (2007), 6th (2006), 9th (2007), 10th (2007)
a(a)(43), d(a)(4)(B), d(r)-EPSDT	5th (2004) 6th (2006), 8th (2002)	none
a(bb)-FQHC payment	1st (2008, 2005), 4th (2007)	none
d(a)-services	3d (2004), 8th (2006)	none
n(c)-home and community-based waiver provisions	9th (2007)	none
o-cost sharing	9th (2007)	none
r(b), (e)-nursing home reform	1st (2003)	none
r-6-transitional Medicaid	2d (2004)	none

Source: NHeLP, 42 U.S.C. § 1983 and Enforcement of the Medicaid Act (Dec. 2008)

* The 10th circuit assumed the enforcement question, without deciding it.

** The 8th circuit decision was vacated by the Supreme Court on other grounds.

³³ *But see Selig v. Pediatric Specialty Care*, 127 S.Ct. 3000 (2007), a summary action by the Court, granting certiorari and vacating the judgment of the Eighth Circuit in a case involving enforcement of the Medicaid equal access provision. On remand, the Eighth Circuit entered judgment vacating its earlier decision. See No. 05-1668 (Sept. 17, 2007).

Concerns with § 1983 enforcement

Despite the relatively positive enforcement track record to date, individuals need to take great care when pursuing Medicaid claims under § 1983. First, adverse decisions affect not just the named plaintiffs but all Medicaid beneficiaries in the federal district or appellate jurisdiction.

Second, adverse decisions can become “runaway” decisions that incorrectly apply the enforcement test. An example is the recent case, *Casillas v. Daines*, which dismissed an individual’s request for Medicaid coverage of gender reassignment treatment on grounds that the underlying Medicaid provisions did not create federal rights.³⁴ The court improperly applied a merits-based review to decide the question of whether there is a right under § 1983.³⁵

Third, it is increasingly important to understand the case law affecting non-Medicaid enactments. While Medicaid has been the focus of most of the post-*Gonzaga* litigation in federal court, a growing number of cases concern enforcement of housing, child welfare and adoption assistance, and other spending clause provisions. The court’s reasoning in these decisions could represent precedent in your jurisdiction that will affect Medicaid. Two cases from the Third Circuit illustrate. In *Sabree v. Richman*, a panel composed of Judges Barry (writing for the court), Ambro, and Alito reversed the lower court decision and held Medicaid beneficiaries could enforce a provision of the Medicaid Act.³⁶ More recently, in *Newark Parents Ass’n v. Newark Public Schools*, a panel composed of Judges Barry (writing for the court), Ambro, and Jordan affirmed the lower court decision and held that parents could not enforce a provision of the No Child Left Behind Act.³⁷ The panel distinguishes *Sabree*, but also re-summarizes it and calls it a “very close case.”³⁸ Thus, litigation in the Third Circuit will need to account for the reasoning of both these cases.

Finally, the Supreme Court remains interested. Activities regarding a Medicaid case, *Equal Access for El Paso*, illustrate. In *Equal Access for El Paso*, the Fifth Circuit held that individuals cannot enforce the Medicaid equal access provision, 42 U.S.C. § 1396a(a)(30)(A), through § 1983.³⁹ The plaintiffs appealed. Conventional wisdom would give little chance for the Court to grant review: There is currently no circuit court split among post-*Gonzaga* decisions assessing this most heavily litigated provision—all refuse private enforcement. Yet, although the State had waived its right to file a

³⁴ 580 F. Supp. 2d 235 (S.D.N.Y. 2008).

³⁵ See also, *Sabree v. Houston*, 245 F. Supp. 2d 653, 659 (E.D. Pa. 2003), *rev’d sub nom. Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004).

³⁶ 367 F.3d 180 (3d Cir. 2004). Then-circuit Judge Alito wrote a separate, concurring opinion that states, in full: “While the analysis and decision of the District Court may reflect the direction that future Supreme Court cases in this area will take, currently binding precedent supports the decision of the Court. I therefore concur in the Court’s decision.” *Id.* at 194.

³⁷ 547 F.3d 199 (3d Cir. 2008).

³⁸ *Id.* at 209.

³⁹ 509 F.3d 697 (5th Cir. 2007).

response, the Supreme Court took the unusual step of asking the State to file a response before it ultimately decided against review.⁴⁰

A word about preemption

Because of the complications associated with § 1983 enforcement, advocates are considering asking federal courts to preempt state laws that conflict with federal law under the supremacy clause. The Supremacy Clause of the United States Constitution states that “Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁴¹

As acknowledged by the Court in *Golden State Transport v. City of Los Angeles*, preemption and § 1983 enforcement are different. *Golden State* reaffirmed that the Supremacy Clause “is not the source of any federal rights enforceable through § 1983,” rather, it “secures federal rights by according them priority whenever they come into contact with state law.”⁴² The Court continued:

Given the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority. Conversely, the fact that a federal statute has pre-empted certain state action does not preclude the possibility that the same federal statute may create a federal right for which § 1983 provides a remedy.⁴³

The Supreme Court discussed preemption in the Medicaid context in *Dalton v. Little Rock Family Planning Services*.⁴⁴ *Dalton* considered whether federal law preempted a state constitutional amendment limiting state funding for abortions to circumstances in which the mother’s life is in danger. The Court held that the state law was preempted to the extent it conflicted with a federal Medicaid provision, known as the Hyde Amendment, which also requires state funding for abortions in cases of rape or incest.⁴⁵ Over the years, almost every circuit court has held that the Medicaid Act is “supreme” federal law and on this basis invalidated conflicting state law.⁴⁶ As with §

⁴⁰ Review was denied at 129 S.Ct. 34 (Oct. 6, 2008).

⁴¹ U.S. Const. art. VI, cl. 2. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (holding state law that conflicts with federal law is “without effect”).

⁴² *Golden State Transit Corp.*, 493 U.S. 103, 107 (1989), quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1999).

⁴³ *Id.* at 108.

⁴⁴ *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996).

⁴⁵ *Id.* at 475-76. See also, e.g., *Pharm. Research & Mfrg. of Am. v. Walsh*, 538 U.S. 644 (2003); *Harris v. McRae*, 448 U.S. 297, 301(1980) (“Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX”).

⁴⁶ For excellent discussion of preemption in the Medicaid context, see *Indep. Living Ctr. v. Shewry*, 543 F.3d 1050 (9th Cir. 2008); see also *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006); *Planned Parenthood v. Sanchez*, 403 F.3d 324 (5th Cir. 2005). See also, e.g., *Pharm. Research & Mfrs. of Am. v.*

1983 enforcement, the court must find that Congress has “[spoken] with a clear voice” for the federal statute to have preemptive effect.⁴⁷

Careful litigation of preemption claims is needed so that courts do not conflate the § 1983 and preemption enforcement tests and to avoid decisions where courts incorrectly place emphasis on the fact that Medicaid is a spending clause program. Care must also be taken because it is clear that at least two members of the Supreme Court do not believe that private individuals can enforce spending clause enactments at all. In *Pharm. Research & Manufacturers Ass’n of America v. Walsh*, the plaintiffs challenged a Maine law that required drug manufacturers to enter rebate agreements in order to avoid having their drugs subject to Medicaid prior authorization.⁴⁸ Plaintiffs argued that these requirements were preempted by conflicting Medicaid requirements. The Court accepted the premise of the claim but held that the state law was not preempted.⁴⁹ However, Justices Scalia and Thomas, while concurring in the result, would have ruled that no claim was stated. According to Justice Scalia, the only remedy for a violation of the Medicaid Act is for plaintiffs to pursue an action for termination of federal funding by the Secretary of Health and Human Services.⁵⁰ Justice Thomas, for his part, expressed doubts that Spending Clause statutes could be enforced by any third party, by preemption or otherwise.⁵¹ Clearly, the future composition of the Supreme Court will affect whether the views of these two justices gain additional support.

Recommendations, trends, and conclusion

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. Make sure to consult and address non-Medicaid cases that establish precedent in your jurisdiction.

Carefully consider a preemption claim in addition to, or instead of, seeking enforcement under § 1983.

Concannon, 249 F.3d 66, 75 (1st Cir. 2001); *Concourse Rehab. & Nursing Ctr., Inc. v. Whalen*, 249 F.3d 136, 146 (2nd Cir. 2001); *Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170 (3d Cir. 1995); *Randall v. Lukard*, 709 F.2d 257, 264 (4th Cir. 1983), *rev’d on other grounds*, 728 F.2d 966 (4th Cir. 1984); *Hope Medical Group for Women v. Edwards*, 63 F.3d 418 (5th Cir. 1995); *Planned Parenthood Affiliates of Michigan v. Engler*, 73 F.3d 634 (6th Cir. 1996); *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979); *Hodgson v. Board of County Comm’rs*, 614 F.2d 601 (8th Cir. 1980); *Lewis v. Hegstrom*, 767 F.2d 1371, 1375 (9th Cir. 1985) (finding it is a “settled proposition that state regulations which are inconsistent with federal [Medicaid] law are invalid under the Supremacy Clause”); *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995).

⁴⁷ *Planned Parenthood of Tex. v. Sanchez*, 403 F.3d 324, 331 (5th Cir. 2005); see also *Shaw v. Delta Airlines*, 463 U.S. 324 (2005); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

⁴⁸ 538 U.S. 644 (2003).

⁴⁹ *Id.* at 667.

⁵⁰ *Id.*, 538 U.S. at 675 (Scalia, J., concurring).

⁵¹ *Id.* at 683 (Thomas, J., concurring).

Trends should be carefully monitored and considered. These include:⁵²

1. Courts had long viewed § 1983 litigation as within the broad remedial scope of the civil rights statutes. The decisions of the Roberts and Rehnquist Court 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.
2. Consistent with the teaching of *Blessing*, Medicaid enforcement questions are being decided on a provision-by-provision basis.
3. The “safest” Medicaid Act provisions are those that speak in terms of the “individual.”
4. Most courts continue to apply the *Blessing* three-prong test, although some judges argue that *Gonzaga* replaced *Blessing* altogether.⁵³
5. Courts are not allowing private enforcement of federal regulations through § 1983, but federal regulations can preempt inconsistent state laws.
6. The *Wilder v. Virginia Hospital Association* case is critical but its future is uncertain. As noted, *Wilder*, a 5-4 decision from 1990, held that the Medicaid provision at issue created a right enforceable by hospitals under § 1983. The *Gonzaga* Court did not overrule *Wilder* but did limit the case, describing it as dealing with a provision that “conferred specific monetary entitlements upon the plaintiffs.”⁵⁴
7. A significant, looming issue is the Court’s interest in congressional power to enact laws pursuant to its spending clause authority. Over the last two decades, conservatives on the Court have stated that Congress needs to make its intention clear when enacting legislation. This reasoning applies with particular force to spending clause enactments. In a 2006 opinion, Justice Alito included (unnecessary) discussion in his majority opinion in an Individuals with Disabilities Education Act case stating that “when Congress attaches conditions to a State’s acceptance of federal funds, the conditions must be set out ‘unambiguously’ [in the statute]” and “[s]tates cannot knowingly accept conditions of which they are unaware or which they are unable to ascertain.”⁵⁵ Thus, he refused to give weight to clear legislative history that did not support the majority’s construction of the IDEA provision.

⁵² The trends continue from last year. See National Health Law Program, *Q&A: Trends in Medicaid Enforcement Pursuant to Section 1983* (Nov. 2007) (available from TASC or the author).

⁵³ See, e.g., *Doe v. Kidd*, 501 F.3d 348, 365-68 (Whitney, J., dissenting) (arguing the three-factor test of *Blessing* should not control).

⁵⁴ 536 U.S. at 280.

⁵⁵ *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Pennhurst*). Cf. *Id.* at 317 (J. Breyer, dissenting) (stating “neither *Pennhurst* nor any other case suggests that every spending detail of a Spending Clause statute must be spelled out with unusual clarity”) (emphasis in original).

Five justices joined in the opinion (Chief Justice Roberts and Justices Alito, Scalia, Kennedy, and Thomas).

Activities at the federal level in Congress and the administration should be monitored. Legislation could be proposed to address private enforcement, and appointments to the federal bench could affect cases in your jurisdictions.