

## **Judicial Enforcement of Medi-Cal Laws and How it is Evolving<sup>1</sup>**

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Medi-Cal beneficiaries have historically turned to the courts when they are being harmed by the state's refusal to adhere to the requirements of the federal Medicaid Act. When a violation of the federal law is established, the courts have issued injunctive relief against the state to bring the illegality to a halt. Access to the courts has proven critical to insuring beneficiaries the benefits and protections that Congress intends the Medi-Cal program to provide. Unfortunately, the U.S. Supreme Court has issued a series of precedent-changing opinions that are now being used to threaten Medi-Cal beneficiaries' access to the courts. This paper will:

- ?? provide an overview to the history of judicial enforcement by program beneficiaries;
- ?? describe how the federal law has traditionally been enforced against the states;
- ?? explain how recent Supreme Court decisions are affecting enforcement; and
- ?? focus on how California's courts are responding to the changing legal landscape.

### *Background on court enforcement*

Throughout the history of this country, the federal courts have underscored the fundamental American principle of social justice by rendering decisions that allow low-income and working poor people to enforce their rights to public housing, food stamps, welfare benefits, and health care when states are not providing these benefits as federal law requires. The holdings of these cases—indeed, their very existence—are not familiar to the vast majority of Americans; however, their importance cannot be overstated: The ability of private citizens to enforce their federal rights against states in court is absolutely essential if governments are to be held accountable. Otherwise, a legal right without a remedy becomes no right at all.

Among the most important federal programs is Medicaid. While participation in Medicaid is not required, once a state chooses to participate, it obligates itself to operate its program in compliance with the requirements of the federal Medicaid Act. As the Supreme Court put it, "An individual is entitled to Medicaid if he fulfills the criteria established by the State in which he lives." *Schweiker v. Gray Panthers*, 453 U.S. 34, 36-37 (1981); *see also Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990) (participating States must comply with

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#### OTHER OFFICES

requirements of the Medicaid Act and regulations promulgated by the Secretary of Health and Human Services). It is this entitlement that allows beneficiaries to depend on and enforce Medicaid coverage. It also allows providers to depend on and enforce their rights to Medicaid payments. This entitlement makes Medicaid *insurance* as opposed to charity, giving holders of a Medicaid card the right to obtain needed services in a timely manner and assuring them due process of law if their claims for assistance are denied or not acted on with reasonable promptness. California participates in Medicaid and calls its program “Medi-Cal.”

States have not always complied with the federal Medicaid Act. Often, the state’s failure to comply has affected not just a single individual, but the entire Medicaid population or large subgroups of beneficiaries. When this happens, access to the courts has been critical to providing individuals who are experiencing harm with a decision maker who has the authority to order the state to comply with the federal law. Indeed, since Medicaid was enacted in 1965, hundreds if not thousands of cases have been filed by the beneficiaries of the program. Some of the very first reported cases were filed by Medi-Cal beneficiaries in California. Over the years, courts have ordered the Medi-Cal agency to comply with numerous federal protections, including:

- ?? requirements to provide lead blood testing to young Medi-Cal eligible children (*Matthews v. Kizer*)
- ?? requirements to assure adequate dental provider participation in the Medi-Cal Program (*Clark v. Kizer*)
- ?? requirements to cover restorative and pain-relieving dental treatments, including root canals (*Jackson v. Stockdale*)
- ?? requirements to provide adequate notice and opportunity to be heard when services are terminated (*Frank v. Kizer*).

Despite the importance of access to the courts, some judicial activists are chipping away at the ability of individuals to obtain relief when states are violating their rights. The Supreme Court has issued a series of decisions, decided by a slim 5-4 majority, that expand the concept of “states’ rights,” limit Congressional authority, insulate states from accountability to federal law, and position the Court itself as the final decision-maker over all disputes involving this “new federalism.” To reach these conclusions, the Court and other activist jurists and policy makers are using dry concepts, such as state flexibility and state sovereign immunity. Already, the Supreme Court has insulated states from suits by elderly individuals to enforce the Age Discrimination in Employment Act, by people with disabilities to enforce the Americans with Disabilities Act, and by women to enforce the Violence Against Women Act.

Beginning in 2001, the “new federalism” jurists began focusing their aim on legislation Congress has enacted pursuant to the Spending Clause of the U.S. Constitution, U.S. Const. Art. 1, § 8, cl. 1. Under the Spending Clause, Congress can tax and spend for the general welfare and impose conditions on entities, such as states, that accept federal funding. Medicaid is a Spending Clause program.

### *Traditional Medicaid Enforcement*

In 1965, when Medicaid was enacted, courts operated under the “remedial imperative,” the understanding that the judiciary would enforce federal statutes to protect individuals from the harmful acts of other branches of government. Congress was acting against this backdrop and, not surprisingly, did not include extensive discussion of how private individuals could enforce the Medicaid Act when it is being violated.

Individuals have traditionally enforced the Medicaid Act through another federal statute, 42 U.S.C. § 1983. This statute confers an express cause of action to individuals against state actors who violate “rights, privileges, or immunities, secured by the Constitution and laws.” The Supreme Court has read the provision literally and held that the word “laws” includes the laws of Congress, including the Social Security Act, of which Medicaid is a part. *See Maine v. Thiboutot*, 448 U.S. 1 (1980). In *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003), a divided panel of the Ninth Circuit court of Appeals held a federal agency’s regulations cannot create individual rights enforceable through § 1983.

The Supreme Court has stressed that individual plaintiffs can only enforce laws that vest them with a federal “right” and cannot merely assert that a federal law has been violated. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989)). Over the years, the Supreme Court has applied the *Blessing/Wilder* test to determine whether a federal law creates an enforceable federal right pursuant to § 1983. This test looks at the particular provision of the federal law that the plaintiff seeks to enforce and asks three questions:

- (1) Was the provision in question intended to benefit the plaintiff?
- (2) Does the provision contain sufficient mandatory language to create a binding obligation on the state, or does it merely express a congressional preference?
- (3) Is the provision specific enough to create an enforceable right, or is it too vague and amorphous for a court to enforce?

*E.g.*, *Blessing v. Freestone*, 520 U.S. 329, 509 (1997); *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 509 (1990) (finding a Medicaid Act provision enforceable).

If these three questions are answered affirmatively, then the plaintiff must also show that Congress has not foreclosed resort to § 1983. This is a “difficult showing,” *Blessing*, 520 U.S. at 346, and for Medicaid purposes, the Court has held that Congress did not foreclose beneficiaries’ use of § 1983. *See Wilder*, 496 U.S. at 521-23.

In a 1992 case, *Suter v. Artist M*, 503 U.S. 347 (1992), the Supreme Court held that § 1983 could not be used to enforce a provision of the Adoption Assistance and Child Welfare Act which, like Medicaid, is part of the Social Security Act. Moreover, Chief Justice Rehnquist, writing for the majority, further stated that a Social Security Act provision did not create enforceable rights if it was placed in a statute that listed mandatory elements of state plans submitted to receive federal funds. This part of the decision had potentially far-reaching

ramifications because most Social Security Act titles, including Medicaid, are written in terms of what a state plan must include in order for a state to receive federal funds to operate the plan.

Congress reacted quickly to correct the *Suter* error and reestablish the private right of action pursuant to § 1983 as it existed before this decision. It amended the Social Security Act explicitly to provide:

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.

42 U.S.C. §§ 1320a-2, 1320a-10. The Congressional Conferees explained that:

The intent of this provision is to assure that individuals who have been injured by the 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 federal courts to the extent they were able to prior to the decision in *Suter v. Artist M.*

H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess., at 926 (1994), reprinted in 1994, U.S.C.C.A.N. 2901, 3257.

#### *The 2002 Gonzaga Decision*

Although Congress amended the Social Security Act in 1994 specifically to address private enforcement, another Supreme Court decision is now being used to argue against private enforcement of Medicaid. In *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court addressed enforcement under § 1983. The case concerned the Federal Educational Rights and Privacy Act (FERPA), which is a Spending Clause enactment but not part of the Social Security Act.

John Doe was an undergraduate in the School of Education at Gonzaga University, a private university in Spokane, Washington. At the time of his graduation, the State of Washington required all new teachers to obtain an affidavit of good moral character from the dean of their school. Gonzaga launched an investigation of John Doe after a school administrator overheard one student tell another that Doe had committed date rape. During the investigation, the school contacted the state agency responsible for teacher certification, revealed John Doe's name, and discussed the case. John Doe did not learn of the investigation until five months later, when the school told him that he would not receive the affidavit.

John Doe sued the University in state court, alleging violations of contract and tort law, as well as a violation of § 1983 for release of personal information without the student's consent in violation of FERPA. A jury found for John Doe on all counts, and awarded him damages. The Washington Court of Appeals reversed in part, holding that private individuals could not enforce FERPA under § 1983. 99 Wash. App. 338, 992 P.2d 545 (2000). The Washington Supreme Court reversed, finding the FERPA provision could be enforced. 143 Wash. 2d 687, 24 P.3d 390 (2001). The Supreme Court accepted certiorari on this issue alone.

The specific FERPA provision at issue provides:

No federal funds shall be made available ... to any education agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information ...) of students without the written consent of their parents.

20 U.S.C. § 1232g(b)(1). John Doe contended that this provision provided him an enforceable federal right for damages under § 1983 when the University disclosed his educational records without his prior consent.

The Supreme Court refused to allow Doe to enforce the provision. While citing *Blessing* and *Wilder* with favor, the majority stated, “[W]e have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights.” According to the Court, Congress’ authority to place conditions on the granting of federal funds makes Spending Clause programs “much in the nature of a contract.” Unless Congress “speak[s] with a clear voice,” and manifests an “unambiguous” intent to confer individual rights, federal funding provisions provide no basis for private enforcement under § 1983. Writing for the majority, Justice Rehnquist found the provision unenforceable because: (1) it contained no rights-creating language; and (2) it had an aggregate, not an individual focus. The Court also found its conclusion “buttressed” by the fact that Congress chose to provide for enforcing the provision by creating a federal review board to receive individual complaints and investigate violations. Each of these reasons is discussed below.

**No rights-creating language.** The majority found that rights-creating language is critical to showing the requisite congressional intent to create new rights enforceable against the state. The majority contrasts the language of FERPA –“no funds shall be made available”- with the language of Civil Rights Act statutes, which the Court stated confer individual rights by providing that “No person in the United States shall . . . be subjected to discrimination” on the basis of race, color or national origin (Title VI) or on the basis of sex (Title IX).

**Aggregate, not individual focus.** The majority notes that FERPA’s nondisclosure provisions speak only in terms of institutional policy and practice, not individual instances of disclosure. According to the Court, the provision does not show concern for the needs of a particular individual, but rather the policies of an educational institution. Moreover, the provision primarily directs the Secretary of Education’s distribution of public funds.

**Provisions for Enforcement.** Congress authorized the Secretary of Education to deal with violations of FERPA by creating a centralized investigatory office and review board for investigating and adjudicating violations. This, according to the majority, further counseled against finding a congressional intent to create individually enforceable private rights.

State attorneys and conservative activists are now citing *Gonzaga* to argue that Medicaid Act provisions—and in some cases, the Medicaid Act as a whole—cannot be enforced by individual program beneficiaries. And, they are receiving encouragement from Justices Scalia and Thomas. In *Pharmaceutical Research and Manufacturers of Am. v. Walsh*, 123 S.Ct 1855

(2003), for example, Justice Scalia filed a separate opinion to opine that the Medicaid Act claim at issue in the case should have been rejected because the remedy for a state’s failure to adhere to the Medicaid Act is termination of funding by the Secretary of Health and Human Services, not a private action in court. According to Justice Scalia, a plaintiff must seek enforcement of the Medicaid condition through the termination authority and may seek and obtain relief in the courts only when the denial of enforcement is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” For his part, Justice Thomas observed that Spending Clause legislation is “much in the nature of a contract,” and the “contract analogy raises serious questions as to whether third parties may sue to enforce Spending Clause legislation.” He said that third party beneficiaries can sue only if they are the intended beneficiaries of the contract, and when Congress wishes to allow private enforcement of a federal law, it must clearly state this intent. Citing *Gonzaga*, Justice Thomas concluded that the petitioner “obviously” could not meet this showing.

Since *Gonzaga* was decided, at least 40 Medicaid decisions have cited the case. The majority of these cases have allowed individual enforcement of the underlying statutory provision. However, a few judges have used *Gonzaga* broadly to preclude private enforcement of the Medicaid Act. *E.g. Sabree v. Richman*, 245 F. Supp. 2d 653 (E.D. Pa. 2003) (on appeal to the Third Circuit Court of Appeals); *M.A.C. v. Betit*, 284 F. Supp. 2d 1298 (D. Utah 2003).

*Recent California Cases Regarding Medi-Cal Enforcement*

Since *Gonzaga* was issued on June 20, 2002, five California courts have assessed whether provisions of the Medicaid Act can be enforced. As shown by the table, below, the cases involve a number of Medicaid Act provisions and most provisions have been held unenforceable.

| <b>Medicaid provision</b>   | <b>Enforceable</b>  | <b>Unenforceable</b>  |
|---|---|---|
| § 1396: the Medicaid Act  |   | <i>Capitol People First v. Dept. of Developmental Services</i> , No. 2002038715 (Alameda Co. Super. Ct., Nov. 6, 2003)  |
| § 1396a(a)(8): requiring medical assistance with reasonable promptness                                  |   | <i>Capitol People First v. Dept. of Dev. Serv.</i> , No. 2002038715 (Alameda Co. Super. Ct., Nov. 6, 2003)  |
| § 1396a(a)(10)(B): amount, duration and scope of benefits must be comparable among eligible populations |   | <i>Capitol People First v. Dept. of Dev. Serv.</i> , No. 2002038715 (Alameda Co. Super. Ct., Nov. 6, 2003)  |
| § 1396a(a)(30): requiring payments to assure quality and equal access                                   | <i>Clayworth et al. v. Bonta</i> , 295 F. Supp. 2d 1110 (E.D. Cal. 2003) (on appeal to the Ninth Circuit) | <i>Sanchez v. Johnson</i> , 2004 WL 76111 (N.D. Cal., Jan. 5, 2004)<br><br><i>Capitol People First v. Dept. of Dev. Serv.</i> , No. 2002038715 (Alameda Co. Super. Ct., Nov. 6, 2003) |

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|---|--|--|
|   |  | <i>Cal. Ass'n of Health Facilities v. Dep't of Health Services</i> , No. C-03-736-VRW (N.D. Cal., July 15, 2003) |
| § 1396a(a)(37)(B): requiring procedures for claim review                      |  | <i>Maynard v. Bonta</i> , 2003 U.S. Dist. LEXIS 16201 (C.D. Cal., Sept. 3, 2003)                                 |
| § 1396b(m)(2)(A)(iii): requiring actuarially sound managed care rates         |  | <i>Clayworth et al. v. Bonta</i> , 295 F. Supp. 2d 1110 (E.D. Cal. 2003) (on appeal)                             |
| § 1396n(b)(4): regarding restricted provider waivers                          |  | <i>Clayworth et al. v. Bonta</i> , 295 F. Supp. 2d 1110 (E.D. Cal. 2003) (on appeal)                             |
| § 1396n(c): home and community based waiver provisions for persons with MR/DD |  | <i>Capitol People First v. Dept. of Dev. Serv.</i> , No. 2002038715 (Alameda Co. Super. Ct., Nov. 6, 2003)       |
| § 1396n(d): home and community based waiver provisions for elderly            |  | <i>Capitol People First v. Dept. of Dev. Serv.</i> , No. 2002038715 (Alameda Co. Super. Ct., Nov. 6, 2003)       |

Some aspects of these rulings deserve particular mention. First, most of the cases were filed by health care providers (*Cal. Ass'n of Health Facilities Maynard, Clayworth* (Cal. Med. Ass'n.)). Even before *Gonzaga* was decided, a number of courts across the country had refused to allow health care providers to enforce Medicaid Act provisions, stating instead that the Act was intended to benefit Medicaid beneficiaries. Since *Gonzaga* the courts have become even less receptive to provider suits, as illustrated by the California decisions. Unfortunately, as with all court decisions, the opinions include discussion beyond provider standing and these statements can be harmful to Medi-Cal beneficiaries who may later seek to enforce the Medicaid Act.

Second, one of the cases, *Capitol People First*, uses sweeping language saying that the Medicaid Act, in general, cannot be enforced. The court further sealed its decision by holding a number of individual Medicaid Act provisions to be unenforceable (see table, above). The court's broad statements reflect a radical departure from *Blessing/Wilder*. Rather than apply the traditional enforcement steps set forth in these cases, the court cited *Gonzaga* and makes assessments based on the Medicaid Act as a whole. Notably, the court does not acknowledge that *Gonzaga* concerned FERPA, which has qualitatively different text and structure from the Social Security Act and Medicaid. Nor does it acknowledge that Congress has specifically stated that the Social Security Act is privately enforceable. See 42 U.S.C. §§ 1320a-2, 1320a-10 (discussed above). Compare *Rabin v. Wilson-Coker*, 2004 U.S. App. LEXIS 5712 (2d Cir. Mar. 26, 2004) (citing § 1320a-2 to allow beneficiaries to enforce a Medicaid Act provision). Moreover, because the case was filed in state court, the judge did not need to adhere to the narrow enforcement tests of federal law.

Third, a number of the cases challenge the adequacy of Medi-Cal payment rates and allege that, because of low payments, few health care providers participate in Medi-Cal. These

claims allege a violation of the Medicaid Act's quality and "equal access" requirement, 42 U.S.C. § 1396a(a)(30). Interestingly, federal district courts in California have issued conflicting decisions regarding enforcement (see table, above). *Clayworth v. Bonta*, which allowed enforcement, is on a fast-track appeal to the Ninth Circuit Court of Appeals. Nationally, § 1396a(a)(30) has been the most litigated Medicaid Act provision since *Gonzaga* was decided. The decisions from the lower courts are evenly split. However, the First Circuit Court of Appeals recently ruled that a group of pharmacy providers could not enforce the provision. This disappointing case includes discussion by the court that could be problematic for Medicaid beneficiaries in the future. See *Long Term Care Pharmacy Alliance v. Ferguson*. 2004 U.S. App. LEXIS 5002 (1st Cir. Mar. 17, 2004).

Finally, a case from Oregon, *Watson v. Thorne*, No. 03-277-JE (D. Ore. Nov. 24, 2003), is important because it is on appeal to the Ninth Circuit Court of Appeals. California is in the Ninth Circuit, so the decision will bind its federal courts. *Watson* contests state cutbacks in eligibility for Medicaid long term care services; however, the federal district court broadly refused to allow the Medicaid Act to be enforced and specifically rejected private enforcement of provisions designed to assure an adequate amount, duration and scope of services (42 U.S.C. § 1396a(a)(10)(B)) and reasonable program standards (§ 1396a(a)(17)). The case has been argued to the court and awaits a decision.

### *Conclusion*

Individual enforcement of the Medicaid Act is critical to assuring the promise of the Medicaid entitlement. Recent Supreme Court and lower court cases are questioning whether private individuals can enforce the Act. Lower courts are issuing conflicting decisions. These issues will continue to evolve and Supreme Court intervention is likely. Please consult the National Health Law Program's CourtWatch website for updates, [www.healthlaw.org](http://www.healthlaw.org)