

Avoiding New Threats to Medicaid Enforcement

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Overview

- Private enforcement of the Medicaid Act
- Focus on: 42 U.S.C. § 1396a(a)(8)
- Abstention
- Exhaustion
- Questions?? Comments??

Enforcing the Medicaid Act: Sourcing the right

- Medicaid Act
 - 42 U.S.C. § 1396a(a)(3)
- Supremacy Clause – preemption
 - *Armstrong v. Exceptional Child Care Ctr.* (2015)
- 42 U.S.C. § 1983

- State law
 - Writs of mandate
 - Declaratory relief acts



42 U.S.C. § 1983

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.”

Section 1983:

- Requires:
 - state action
 - deprivation of a “**federal right**,” *Golden State Transit Corp. v. City of Los Angeles* (1989)
 - secured by the “Constitution and laws,” *Maine v. Thiboutot* (1980)
- Attorneys’ fees (§ 1988)
- Federal or state court
- NOTE: 1983 is not a cause of action.

Finding a federal “right”

- *Blessing v. Freestone* (1997)
 - Plead complaint in “manageable analytic bites”
 - Did Congress intend the provision to benefit the plaintiff?
 - Does provision establish clear requirements for the court to enforce?
 - Is the provision mandatory on the state?
- If so, does the statute evidence the lack of a comprehensive enforcement scheme?
 - *Wilder v. Va. Hosp. Ass’n* (1990); *City of Rancho Palos Verdes v. Abrams*, (2005)

Congressional Intent re: Social Security Act

- 42 U.S.C. §§ 1320a-2, 1320a-10
 - “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.*”
 - 1994 USCCAN 2901, 3257

The *Gonzaga* decision

- *Gonzaga Univ. v. Doe* (2002)
 - Private enforcement of spending clause enactments rare
 - Family Educational Rights and Privacy Act
 - Unambiguous congressional intent to create a federal right
 - “Rights or duty creating language”
 - Aggregate v. individual focus
 - Federal review mechanism to investigate, adjudicate violations

Private Enforcement: 42 U.S.C. § 1983

Medicaid §1983 Circuit Court cases post *Gonzaga*
June 20 2002 – May 31, 2020

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

Private Enforcement: 42 U.S.C. § 1983

- Provisions with **weak** track record
 - Single state agency – 1396a(a)(5)
 - Reasonable standards – 1396a(a)(17)
 - Best interest of recipients – 1396a(a)(19)
 - Payment/equal access - 1396a(a)(30)(A)
- Regulations, standing alone



Private Enforcement: 42 U.S.C. § 1983

- Provisions with **strong** track record:
 - EPSDT - 1396a(a)(10)(A), 1396a(a)(43)
 - Categorical coverage - 1396a(a)(10)(A)
 - Comparability – 1396a(a)(10)(B)
 - Fair hearing - 1396a(a)(3)
 - Qualifying trusts – 1396p(d)
- Provisions with strong record & **concern**:
 - Freedom of choice – 1396a(a)(23)
 - Reasonable promptness - 1396a(a)(8)



Private Enforcement: 42 U.S.C. § 1983

Freedom of choice – 42 U.S.C. § 1396a(a)(23)(A)

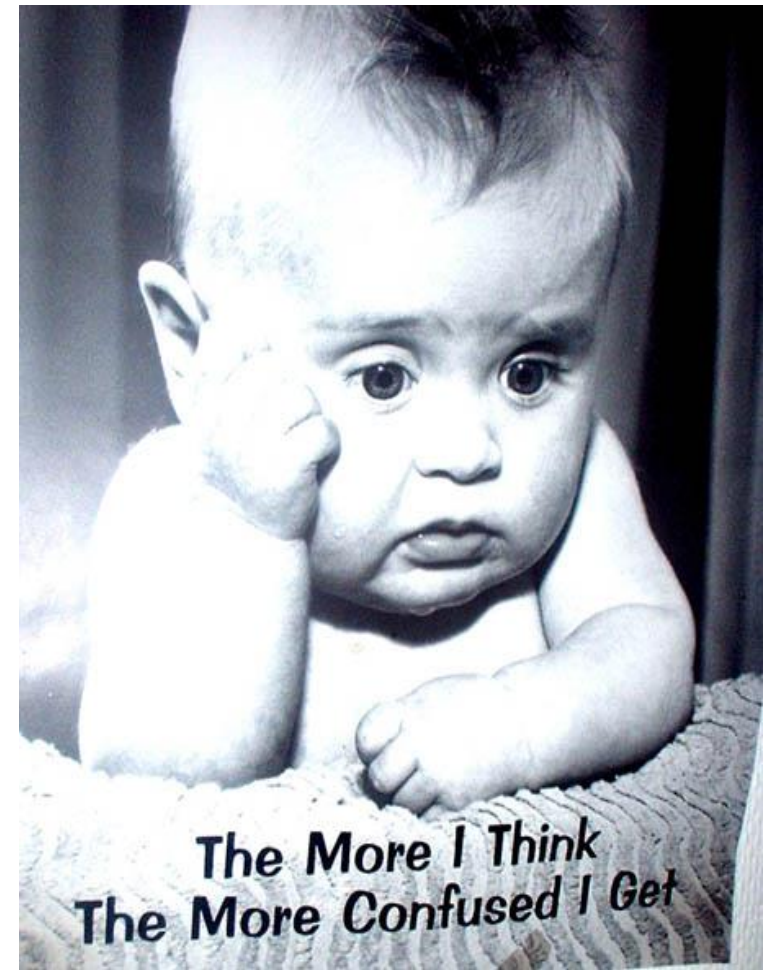
4th, 5th, 6th, 7th, 9th, 10th v. 8th (*Does v. Gillespie* (2017))

Pl. P'hood v. Andersen (10th Cir. 2018), *cert. denied* (2018)

Pl. P'hood v. Gee (5th Cir. 2016, *cert. denied* (2018)

Pl. P'hood v. Smith (5th Cir. 2019), *rehearing en banc granted* (2019)

Pl. P'hood v. Baker (4th Cir. 2019), *pet. for cert. filed*: Mar. 27, 2020



Private Enforcement: 42 U.S.C. § 1983

- Reasonable promptness – 42 U.S.C. § 1396a(a)(8)
 - 42 C.F.R. § 435.912(c)(3)
 - 42 C.F.R. § 435.930(a)

Cf. Murphy v. Harpstead (D. Minn. 2019) with *Mental Hyg. Legal Serv. v. Delaney* (N.Y. S. Ct. 2019)

Other concerns: 42 U.S.C. § 1396a(a)(8)

- Applies only to initial applications
 - *Darjee v. Betlach* (D. Ariz. 2017)
- Reg. timeframes are targets, not requirements
 - *Rivera v. Kent* (2019) (citing 42 C.F.R. § 435.912) (appeal)
- LTSS governed by test of reasonableness
 - *Hanley v. Zucker* (S.D.N.Y. 2016)
- Applies only to timely payment
 - *Waskul v. Washtenaw Co. Commtty Mental Health* (E.D. Mich. 2019) (appeal)

Pleading the case-claims

First Cause of Action (Violation of Medicaid Act)

- ___ Plaintiffs incorporate and re-allege paragraphs 1-97, as if fully set forth herein.
- ___ Defendants' practices and procedures, as described herein, violate 42 U.S.C. § 1396a(a)(19), which requires Medicaid to operate in the best interests of recipients.

Pleading the case-claims 📢

First Cause of Action (Violation of Medicaid Act)

___ . Plaintiffs incorporate and re-allege paragraphs 1-97, as if fully set forth herein.

___ . Defendant's rule allows coverage of DME needed by people who are Blind but excludes coverage of DME when needed by a Medicaid recipient who does not fall within this group.

___ . Defendants' practices violate 42 U.S.C. § 1396 and the implementing regulations.

___ . Defendants' practices violate N.C. Gen. Stat. § 3-3-01.

Pleading the case-claims

Third Cause of Action (Violation of Medicaid Act)

- ___ Plaintiffs incorporate and re-allege paragraphs 1-101, as if fully set forth herein.
- ___ Defendants' practices and procedures for administering home health services to, as described herein, violate 42. C.F.R. §§ 435.912(c)(3) and 435.930(a).
- ___ This violation, which has been repeated and knowing, entitles Plaintiffs to relief under 42 U.S.C. § 1983.

Pleading the case-claims

First Cause of Action (Violation of 42 U.S.C. § 1983)

- ___ Plaintiffs incorporate and re-allege paragraphs 1-97, as if fully set forth herein.
- ___ The Medicaid Act requires Defendants' to furnish medical assistance, which includes home health services, with reasonable promptness. 42 U.S.C. § 1396a(a)(8).
- ___ Defendant's failure to furnish home health services with reasonable promptness violates 42 U.S.C. § 1983.

Pleading the case-claims

First Cause of Action (Violation of Medicaid Act)

- ___ Plaintiffs incorporate and re-allege paragraphs 1-97, as if fully set forth herein.
- ___ Defendants' practices and procedures for administering home health services, as described herein, violate 42 U.S.C. § 1396a(a)(8).
- ___ This violation, which has been repeated and knowing, entitles Plaintiffs to relief under 42 U.S.C. § 1983.

Exhaustion

- Not required for Section 1983 actions
 - *Patsy v. Board of Regents of the State of Florida* (1982)

Abstention

- Federal courts should decline to decide unsettled issues of state law.
 - Should be rare.

Burford Abstention

- Authorized when there is:
 - Timely and adequate state court review
 - Difficult questions of state law bearing on important policy problems
 - Complex administrative scheme
 - Federal review would disrupt coherent state policy

Younger abstention

- Ongoing judicial proceedings
- Important state interests
- State proceeding involved important state interests
 - Coercive state proceeding
 - Can include administrative proceedings
- *Hudson v. Campbell* (8th Cir. 2011)
 - Abstained in a Medicaid case

Younger abstention

- *Sprint Communications, Inc. v. Jacobs* (2013)
 - Limits *Younger* to:
 - Ongoing state criminal proceedings
 - Civil enforcement proceedings involving complaint of wrongdoing (usually after investigation)
 - Civil proceedings involving orders uniquely in furtherance of state courts' ability to perform judicial functions

Colorado River abstention

- Allows a court to stay or dismiss when there is a substantially similar suit pending in state court.
 - Multiple, flexible factors

Other

- *Pullman* abstention from hearing federal constitutional claim
 - Uncertain state law issues could be interpreted by state court
 - Federal court's erroneous construction of state law would disrupt important state policies
- *Rooker-Feldman* doctrine
 - Federal courts may not hear appeals of state court decisions
 - Asking for review/reversal

Resources—through TASC

- Jane Perkins, Fact Sheet: *Private Enforcement of the Medicaid Act Under 42 U.S.C. § 1983* (Dec. 2019)
- Jane Perkins, Q&A: *Medicaid's Reasonable Promptness Provision Gets Tested* (Nov. 2019)
- Sarah Somers, Q&A: *Alternative Routes for Medicaid Enforcement: Mandamus under State Law* (Jan. 2020)
- Sarah Somers and Jane Perkins, Q&A: *Abstention Update* (Aug. 2014) (update forthcoming)

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