Medicaid Reimbursement Rate Litigation: An Overview of *Douglas v. Independent Living Center of Southern California*

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Summary

Given declining state revenues and increased demand for public programs like Medicaid, states have been faced with difficult choices about how to allocate limited funds. To address budget shortfalls, many states have sought to shrink their Medicaid costs in various ways, including reducing the rates at which health care providers are reimbursed for the services they provide to Medicaid beneficiaries. In several instances, providers and others have argued that the reduced rates do not comply with federal Medicaid requirements and have turned to the courts to challenge these reductions.

When challenging these reimbursement rates, Medicaid providers have often claimed that the rates violate the requirements of Section 1902(a)(30)(A) of the Social Security Act, commonly referred to as Medicaid's "equal access provision." This provision compels state Medicaid programs to assure that Medicaid payments "are consistent with efficiency, economy, and quality of care," and are "sufficient to enlist enough providers" so that care and services are available at least to the extent that they are available to an area's general population. Based on this provision, Medicare providers have argued that because of cuts in reimbursement rates, the state Medicaid program does not provide the level of care or services to beneficiaries that is required under federal law.

However, an important question arises in these cases: whether Medicaid beneficiaries and health care providers can sue state officials to enforce the equal access provision. Because the Medicaid Act contains no express language that allows private parties to challenge reimbursement rate cuts, plaintiffs desiring to challenge cuts in Medicaid payment rates under the equal access provision have sought out other legal vehicles to bring their claims. Since 2002, courts have often barred these suits when based on "section 1983." But on January 18, 2011, the Supreme Court granted certiorari in *Douglas v. Independent Living Center of California*, a set of consolidated cases in which plaintiffs took a different approach to challenging provider reimbursement rates. In *Douglas*, health care providers and Medicaid beneficiaries challenged cutbacks in reimbursement rates for certain health care providers, arguing that since the reduced reimbursement rates do not comply with Medicaid's equal access provision, they are preempted under the Supremacy Clause of the Constitution. The Ninth Circuit agreed, and blocked implementation of the reduced rates, explaining that the Supremacy Clause provides a basis for challenging a state's purported failure to abide by Medicaid's equal access provision.

Some commentators have noted that the Court's decision in *Douglas* may be significant, as the case could determine whether the Supremacy Clause provides a basis for judicial review of various issues related to a state's Medicaid program—issues that may have been immune from review because, for example, there appeared to be no private right of action. It has also been observed that the possible implications of *Douglas* go beyond the Medicaid program, as the Supreme Court's decision could determine whether a private party may bring a preemption challenge with respect to federal statutes that these parties could not otherwise enforce. This report provides relevant background on the Medicaid program and an overview of the *Douglas* case.

In addition, it may be noted that the Centers for Medicare and Medicaid Services (CMS) recently issued proposed regulations that address the equal access provision. Although proposed regulations do not address whether a private party may bring an enforcement action under the equal access provision, the regulations do provide guidance on how states can comply with it.

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Background

Medicaid is a cooperative federal-state program through which the federal government provides financial assistance to states for medical care and other services for poor, elderly, and disabled individuals.[1] Although participation in the Medicaid program is voluntary, states, as a condition of participation, are required to have a plan that complies with federal Medicaid statutes and regulations in order to qualify for federal assistance.[2] States also have considerable discretion in administering their Medicaid program, which generally includes setting the payment rates at which providers are reimbursed for their services to Medicaid beneficiaries. [3]

Given declining state revenues and increased demand for public programs like Medicaid, states have been faced with difficult choices about how to allocate limited funds. To address budget shortfalls, many states have sought to trim down their Medicaid costs in various ways, including reducing the rates at which Medicaid health care providers are reimbursed. In several instances, providers and others have argued that these reductions make reimbursement rates inadequate and have turned to the courts to challenge these reductions. When challenging these reimbursement rates, plaintiffs have often claimed that the rates violate the requirements of Section 1902(a)(30)(A) of the Social Security Act, often referred to as Medicaid's "equal access provision,"[4] which requires a state Medicaid plan to

> provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan…as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area....[5]

Medicaid beneficiaries and others have claimed that because of inadequate Medicaid reimbursement rates, the requirements of the equal access provision are not met (e.g., the state did not consider, or the state plan's methods or procedures do not assure, that Medicaid payments are consistent with efficiency, economy, quality of care, or are sufficient to enlist providers to provide Medicaid services). In other words, plaintiffs have generally argued that the provider reimbursement rates are so low that they do not allow for sufficient care and services to be provided to beneficiaries, as compared to the care in that area that is available to individuals who do not participate in the Medicaid program.

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[1] *See* 42 U.S.C. §1396 *et seq*.

[2] For a discussion of these requirements, *see* CRS Report RL33202, *Medicaid: A Primer*, by (name redacted).

[3] For the most part, states establish their own payment rates for Medicaid providers. Federal law does not establish any method for establishing rates, but sets out some general guidelines for Medicaid payments. *See id.*

[4] 42 U.S.C. §1396a(a)(30)(A). It should be noted that some refer to the section's requirement to "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the [state Medicaid] plan" as Medicaid's "quality of care provision, and the remainder of the section as Medicaid's "equal access provision." This report will refer to 42 U.S.C. §1396a(a)(30)(A) in its entirety as the "equal access provision."

[5] It should be noted that before it was repealed in 1997, the "Boren Amendment," directed states to pay rates for certain Medicaid services that were "reasonable and adequate" to cover the cost of "efficiently and economically operated" facilities. 42 U.S.C. §1396a(a)(13)(A) (1982 ed.) The amendment was often used to challenge Medicaid provider reimbursement rates.

In determining whether a state's provider reimbursement rates violate the equal access provision, a significant question arises in these cases: whether private parties can sue to enforce these requirements. Because the Medicaid Act contains no express language that allows private parties to challenge reimbursement rate cuts, plaintiffs desiring to challenge cuts in Medicaid payment rates under the equal access provision have sought out other legal vehicles to bring their claims. Historically, plaintiffs have brought their claims under 42 U.S.C. §1983,[6] which allows individuals to sue local governments and state and local officers in order to redress violations of federal law.[7] Based on this section, plaintiffs have alleged that state officials violated their rights because the reimbursement rates did not comply with the requirements of the equal access provision. Multiple courts found that Medicaid providers and beneficiaries could enforce the equal access provision by bringing an action under Section 1983.[8] However, in 2002, the Supreme Court's decision in *Gonzaga University v. Doe*[9] restricted plaintiffs' ability to bring an action under Section 1983. As the Court explained in *Gonzaga*, "we now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under section 1983." In the wake of *Gonzaga*, most appellate courts held that the equal access provision is not privately enforceable under Section 1983.[10] Thus, in light of this decision, Medicaid providers and beneficiaries have sought other legal avenues for challenging Medicaid reimbursement rates.

[6] Section 1983 provides in relevant part,

> 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....

[7] Sean Jessee, *Comment: Fulfilling the Promise of the Medicaid Act: Why the Equal Access Clause Creates Privately Enforceable Rights*, 58 Emory L.J. 791 (2009) (citing Erwin Chemerinsky, Federal Jurisdiction 480 (5th ed. 2007).

[8] *See, e.g.*, Ark. Med. Society v. Reynolds, 6 F.3d 519, 528 (8th Cir. 1993); Methodist Hosps., Inc. v. Sullivan, 91 F.3d 1026, 1029 (7th Cir. 1996).

[9] 536 U.S. 273 (2002). In *Gonzaga*, the Supreme Court considered whether a student could enforce the provisions of the Family Educational Rights and Privacy Act of 1974 (FERPA) by suing an institution for damages under Section 1983. The Court found that FERPA creates no personal rights that may be enforced under Section 1983. The Court noted that unless Congress expresses an unambiguous intent to confer individual rights, federal funding provisions like those included in FERPA provide no basis for private enforcement under Section 1983. The respondent had argued that as long as Congress intended for a statute to "benefit" putative plaintiffs, the statute could be found to confer rights enforceable under Section 1983. The Court disagreed: "it is the rights, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." *Id*. at 283.

[10] *See, e.g.*, Equal Access for El Paso Inc. v. Hawkins, 509 F.3d 697, 703 (5th Cir. 2007), cert. denied, 2008 U.S. LEXIS 7278 (Oct. 6, 2008)("The Medicaid Act's Equal Access provision ... does not confer individual private rights that are enforceable under section 1983."); Mandy R. ex rel. Mr. & Mrs. R. v. Owens, 464 F.3d 1139, 1148 (10th Cir. 2006) ("We join the First, Sixth, and Ninth Circuits in concluding that [the equal access provision] does not create a federal right enforceable under section 1983.); Westside Mothers v. Olszewski (Westside Mothers II), 454 F.3d 532, 543 (6th Cir. 2006) ("[W]e are not persuaded that Congress has, with a clear voice, intended to create an individual right that either Medicaid recipients or providers would be able to enforce under section 1983… We therefore hold that §1396a(a)(30) does not confer enforceable rights ... "); Sanchez ex rel. Hoebel v. Johnson, 416 F.3d 1051, 1059-60 (9th Cir. 2005) (same). *But see* Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs., 443 F.3d 1005, 1015-16 (8th Cir. 2006) (finding equal access provision created an enforceable private right for recipients and providers).

Douglas v. Independent Living Center of Southern California[11]

In February 2008, the State of California legislature enacted a 10% cut in certain Medi-Cal (i.e., California's Medicaid program) provider reimbursement rates, in light of the state's fiscal distress. Plaintiffs, a group of pharmacies, health care providers, senior citizens' groups, and beneficiaries, claimed a violation of the Supremacy Clause of the Constitution[12] based on the idea that the state rate cut is preempted by the federal equal access provision.[13] The plaintiffs contended that the state failed to properly evaluate whether the reduced rates would comply with the equal access provision and bear a reasonable relationship to providers' costs, which they argued was required under Ninth Circuit precedent.[14] After the district court found that the plaintiffs did not have an implied right of action under the equal access provision or the Supremacy Clause, the Ninth Circuit vacated the district court's decision and remanded the case to the district court. The Ninth Circuit explained that "a plaintiff may bring suit under the Supremacy Clause to enjoin implementation of a state law allegedly preempted by federal statute regardless of whether the federal statute at issue confers an express 'right' or cause of action on the plaintiff."[15] On April 1, 2009, the director filed a petition for Supreme Court review, and the petition was denied.[16]

On remand, the district court found that the defendant, the director of California's Department of Health Care Services, did not meet the requirements of the equal access provision, as the director failed to demonstrate that the state of California considered whether the 10% rate reduction would be consistent with efficiency, economy, quality of care, and equality of access requirements. Accordingly, plaintiffs demonstrated a likelihood of succeeding on the merits of their Supremacy Clause claim. In addition, because it appeared that Medi-Cal patients could be irreparably harmed by the rate cut, the court granted in relevant part the plaintiffs' motion for preliminary injunction to enjoin enforcement of the reduction, which was affirmed by the court of appeals. The California legislature later enacted legislation amending the rate cuts, under which the 10% rate

[11] Douglas (formerly Maxwell-Jolly) v. Independent Living Center of Southern California, 131 S. Ct. 992 (No. 09-958) (2011). It should be noted that the Supreme Court also granted certiorari in *Douglas (formerly Maxwell-Jolly) v. Cal. Pharmacists Ass'n*, 131 S. Ct. 992 (2011), and *Douglas (formerly Maxwell-Jolly) v. Santa Rosa Mem'l Hosp*., 131 S. Ct. 996 (2011) and consolidated these cases. Given that the issues presented in these two other cases are similar, their facts and procedural history are not described in this report.

[12] Congress's power to preempt state laws arises from the Supremacy Clause of the Constitution, which states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; ... any Thing in the constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Thus, when Congress legislates pursuant to its delegated powers, state laws, and even state constitutional provisions, must yield. For additional discussion of the Supremacy Clause, *see* Congressional Research Service, United States Constitution: Analysis and Interpretation, coordinated by (name redacted).

[13] Independent Living Center of California v. Shewry, 543 F.3d 1050 (9th Cir. Cal. 2008), on remand 2008 U.S. Dist. LEXIS 77525 (S.D. Cal. Aug. 8, 2008).

[14] Brief for Petitioner, Maxwell-Jolly v. Independent Living Center of Southern California, 131 S. Ct. 992 (No. 09-958) at 3. In an earlier case involving Section 1983 and the equal access provision, the Ninth Circuit held that in order to meet the requirements of the equal access provision, state Medicaid program must take into consideration several factors, including "responsible cost studies" when setting Medicaid reimbursement rates. *See* Orthopaedic Hosp. v. Belshe, 103 F.3d 1491 (9th Cir. 1997).

[15] Independent Living Center of California v. Shewry, 543 F.3d 1047, 1048-1049 (9th Cir. 2008).

[16] 129 S.Ct. 2828 (2009).

cut would expire and smaller rate cuts would be instituted. The director moved to vacate the Ninth Circuit's decision on the grounds that it became moot because of a change in law. The state's motion was denied.

In February 2010, the proceedings on remand led the director to petition the Supreme Court again for review of the case.[17] The Court invited the Solicitor General to express views on the lawsuit, and the Solicitor recommended that the Court decline to take the case.[18] Nevertheless, the Court granted certiorari on one of the two issues presented to the Court—whether Medicaid recipients and providers can bring an action under the Supremacy Clause to enforce the equal access provision by asserting that the federal provision preempts a state law reducing reimbursement rates. Accordingly, the Court will likely address the ability of private parties to bring an action under the Supremacy Clause to determine whether the California law is preempted by the Medicaid act.

With respect to the issue before the Court, the respondents (i.e., the Medicaid providers and beneficiaries) argued in briefs to the Supreme Court that based on Court precedent, a statutory cause of action is unnecessary in order to bring a preemption claim under the Supremacy Clause.[19] They also asserted that in order to prevent injury, the Court has permitted private parties to obtain relief from state laws that are preempted by federal law.[20] On the other hand, the director of California's Department of Health Care Services claimed that the Ninth Circuit improperly allowed use of the Supremacy Clause, as the decisions in question essentially allow Medi-Cal beneficiaries and providers to invoke the Supremacy Clause to enforce a federal statute (i.e., equal access provision) despite the fact that the statute does not expressly create any privately enforceable rights.[21] The director's petition urges the Supreme Court to find that "[d]ressing the lawsuit up as a preemption challenge should not change the conclusion that the [equal access provision] is not privately enforceable."[22] Further, the director argued that given that Congress did not provide for a private right of action under the equal access provision, allowing a private party's preemption claims to proceed based on an alleged conflict with a federal statute frustrates congressional intent and would negate the principle that "'private rights of action to enforce federal law must be created by Congress.'"[23] The Court will hear oral arguments in the *Douglas* cases during its October 2011 term.

[17] Petition for Writ of Certiorari, Maxwell-Jolly v. Independent Living Center of Southern California, No. 09-958 (Feb. 16, 2010) at 8.

[18] Brief for the United States as Amicus Curiae, Maxwell-Jolly v. Independent Living Center of California, 131 S. Ct. 992 (No. 09-958) (Dec. 2010) at 11. Interestingly, after opposing the petition for certiorari, the Solicitor General appeared to agree with the state official's argument that the Supremacy Clause should not be used as a vehicle for private judicial enforcement of the equal access provision. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, 131 S. Ct. 992 (Nos. 09-958, 09-1158, and 10-283) (May 2011).

[19] Brief for Respondent, Maxwell-Jolly v. Independent Living Center of California, 131 S. Ct. 992 (No. 09-958) at 13 (discussing Verizon Maryland Inc. v. Public Serv. Comm'n, 535 U.S. 635 (2002)).

[20] *Id.* at 18.

[21] Brief for Petitioner, Maxwell-Jolly v. Independent Living Center of California, 131 S. Ct. 992 (No. 09-958) at 12.

[22] *Id.* at 19.

[23] *Id.* at 20 (quoting Alexander v. Sandoval, 532 U.S. 275, 286 (2001)).

Observations

Some commentators have noted that the Court's decision in *Douglas* may be important, as the case could determine whether the Supremacy Clause provides a basis for court review of various issues related to a state's Medicaid program—issues that may have been immune from review because, for example, there appeared to be no private right of action.[24] More specifically, a holding for the Medicaid providers and beneficiaries could permit Medicaid litigation that *Gonzaga* had obstructed, by giving standing to individuals under the Supremacy Clause who did not have a private right of action under Section 1983. In addition, it has been observed that the potential significance of *Douglas* goes beyond the Medicaid program, as the Court's decision could determine whether a private party may bring a preemption challenge under other federal statutes that these parties could not otherwise enforce.[25] Advocates for Medicaid beneficiaries have opined that a decision in their favor is vital, because if the Court sides with the California Medicaid program, it may be difficult for providers and beneficiaries to enforce states' obligations under Medicaid, and this is increasingly critical given the expansion of the Medicaid program by recent health reform legislation, the Patient Protection and Affordable Care Act (PPACA),[26] as amended.[27] On the other hand, as several states have argued in an amicus brief, allowing private litigants to sue to enforce the equal access provision would lead to more court orders compelling states to increase spending for programs like Medicaid and would be detrimental to their ability to provide financial assistance.[28]

Since the Court only agreed to evaluate whether a cause of action may be brought under the Supremacy Clause for a potential violation of the equal access provision, it is unlikely that the Court will address whether the rate cuts actually violated the Medicaid Act. Also, in counseling against Supreme Court review of this case, the Solicitor General noted in an amicus brief that CMS regulations would address the requirements for Medicaid plans to meet the equal access provision. As the Solicitor noted, "[t]he nature and extent of the obligations imposed on States under [the equal access provision] are best suited for expert agency consideration in the first instance."[29] On April 29, 2011, CMS issued proposed regulations that address the equal access provision.[30] The proposed regulations contemplate a state-level process for reviewing reimbursement rates that involves identifying and collecting data on access to Medicaid services, analyzing and monitoring this data for access issues, and maintaining a corrective action plan to follow should access problems arise.

[24] *See* Peyton Sturges, *High Court Agrees to Decide if Providers, Beneficiaries May Challenge Medi-Cal Cuts*, BNA Health Care Policy Reporter, Jan. 24, 2011.

[25] Andrew E. Tauber, United States: Supreme Court Docket Report, Jan. 18, 2011, available at http://www.mondaq.com/unitedstates/article.asp?articleid=120616.

[26] P.L. 111-148 (2010). PPACA was amended by the Health Care Education and Reconciliation Act of 2010, P.L. 111-152 (2010). (HCERA).

[27] *See* J. Lester Feder, *California Medicaid Cuts Pit HHS v. DOJ*, Politico, June 7, 2011.

[28] *See* Brief of Amici Curiae Michigan and 30 Other States Supporting Petitioner, 131 S. Ct. 992 (Nos. 09-958, 09-1158, and 10-283) (May 2011) at 2.

[29] Brief for the United States as Amicus Curiae, Maxwell-Jolly v. Independent Living Center of Southern California, 131 S. Ct. 992 (No. 09-958) (Dec. 2010) at 11.

[30] Methods for Assuring Access to Covered Medicaid Services, 76 Fed. Reg. 26342 (proposed May 6, 2011) (to be codified at 42 C.F.R. pt. 447).

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