

Courts Split on Whether Private Individuals Can Sue to Challenge States' Medicaid Defunding Decisions: Considerations for Congress (Part I of II)

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Last December, the Supreme Court declined to review two cases, *Andersen v. Planned Parenthood of Kansas* and *Gee v. Planned Parenthood of Gulf Coast Inc.*, in which private litigants challenged their respective states' decision to exclude specific health care providers—in these cases, Planned Parenthood affiliates—from participating in the state's Medicaid program. The plaintiffs argued that the state defendants had violated what is known as the “[free-choice-of-provider](#)” provision of the Medicaid Act. Under this provision, which is one of more than 80 federal requirements imposed upon a state Medicaid plan, a state Medicaid plan must ensure that “any individual eligible for medical assistance . . . may obtain such assistance from any institution . . . or person, qualified to perform the service or services required . . . who undertakes to provide him such services . . .” A threshold question in these suits is whether a private party has the right to sue to enforce this requirement, or if instead the requirement can be enforced only by the federal government through the Secretary of Health and Human Services (Secretary). The Supreme Court's decision to not review these cases leaves an unresolved division on this question amongst the lower federal courts. On one side, five circuits (the [Fifth](#), [Sixth](#), [Seventh](#), [Ninth](#), and [Tenth](#) Circuits) concluded that such a private right of action exists under 42 U.S.C. § 1983. On the other side, the Eighth Circuit concluded, in *Does v. Gillespie*, that it does not. The Eighth Circuit's decision is potentially significant because its reasoning, which turns on the overall structure of the Medicaid Act, could more broadly preclude the availability of a private right of action to enforce many of the Act's federal requirements and beyond.

This two-part Legal Sidebar provides an overview of the relevant context and background for this issue and an analysis of the circuit split and its importance for Congress. Part I provides an overview of implied private rights of action in the context of federal-state programs under the Social Security Act generally. Part II discusses the circuit split regarding the enforceability of the free-choice-of-provider provision under § 1983 and considers the implications of the split for Congress.

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Overview of Implied Private Rights of Action

During the mid-20th century, Congress enacted a number of programs—including Medicaid—under the Social Security Act to provide assistance to low-income individuals. These cooperative federal-state programs, enacted pursuant to Congress’s Spending Clause authority, “offer[] the States a [bargain](#): Congress provides federal funds in exchange for the States’ agreement to spend them in accordance with congressionally imposed conditions.” The Medicaid Act in particular was enacted in 1965 to provide healthcare services to low-income individuals. As enacted, the Act did not include a provision authorizing a private right of action to enforce its provisions. At the time, however, the Supreme Court “[followed](#) a different approach to recognizing implied causes of action than it follows now . . . [and] assumed it to be a proper judicial function to ‘provide such remedies as are necessary to make effective’ a statute’s purpose.” Under this rights-remedy presumption, the Court inferred causes of action not explicit in the statutory text “as a routine matter with respect to statutes.”

Consistent with this presumption, courts, for [decades](#), permitted beneficiaries of these federal-state programs to assert a cause of action to enforce certain program requirements. Historically, such private rights of action have generally been implied from three sources. First, for some time, private plaintiffs asserted, and the Supreme Court [accepted](#), the theory that the Supremacy Clause created an implied right of action to enjoin enforcement of state laws that violate federal law. Second, the Court interpreted [42 U.S.C. § 1983](#), a civil rights statute from the Reconstruction Era, to provide a cause of action to enforce a program requirement if the relevant statutory provision evidences a congressional intent to create an enforceable right. Section 1983 generally makes a state official acting under color of law liable to a party for [depriving](#) her of “any rights . . . secured by the Constitution and laws.” Third, the Court also looked to the statute allegedly violated by a state official to determine whether a cause of action may be implied from the statute itself. The analytical framework for determining an implied cause of action under § 1983 versus a statute itself overlaps substantially. One principal [difference](#), as the Court has explained, is that to demonstrate an implied private right of action from the statute itself, a plaintiff—in addition to demonstrating that the statute evidences a congressional intent to create an enforceable right—must also demonstrate an intent to create a private remedy for a violation of that right.

Over time, the Supreme Court began to restrict the availability of private enforcement of federal-state program requirements. In *Armstrong v. Exceptional Child Center, Inc.*, the Court held that the Supremacy Clause creates only a rule of decision and not a cause of action, formally rejecting the Clause as a basis for asserting a private cause of action. Additionally, out of concerns grounded in [separation-of-powers](#) principles, the Court also turned away from the rights-remedy presumption and the practice of implying a cause of action from statutes. Under the Court’s current view, whether and how to provide a private remedy is usually a decision best left to Congress because the legislature is in the better position to consider “the host of considerations that must be weighed and considered,” including “if the public interest would be served by imposing a new substantive legal liability.” Thus, over time and especially after *Armstrong*, § 1983 has emerged as the principal vehicle for private enforcement of federal-state program requirements like Medicaid.

Medicaid Implied Private Right of Action Under § 1983

The Supreme Court applies a three-prong test for determining whether a particular federal statute creates an enforceable individual right for purposes of § 1983. The test, formally articulated in *Blessing v. Freestone* in 1997, requires that:

1. Congress intended the statutory provision to benefit the plaintiff;
2. the asserted right is not so “vague and amorphous” that its enforcement would strain judicial competence; and

3. the provision couch the asserted right in mandatory rather than precatory terms.

Five years later, in *Gonzaga University v. Doe*, the Supreme Court clarified the first prong of the *Blessing* test, holding that the congressional intent to benefit the plaintiff must be “unambiguously conferred” through, for instance, “individually focused terminology” and statutory language “phrased in terms of the persons to be benefited.” It is not enough for a plaintiff to be merely within “the general zone of interest” of the statute. Thus, a statute that focuses on the aggregate or systemwide policies and practices of regulated entities would not create an enforceable right for individuals subject to the policies for purposes of § 1983. If a given provision meets the three-prong *Blessing-Gonzaga* test, then there is a [presumption](#) that this individual right is enforceable under § 1983. The presumption is rebutted, however, if Congress expressly or impliedly foreclosed enforcement under § 1983. An implied foreclosure occurs if Congress created “a comprehensive enforcement scheme that is incompatible with individual enforcement.” Thus, under the § 1983 analysis—particularly in determining the existence of any enforceable right—the key inquiry is discerning congressional intent. A number of cases and congressional actions are relevant to this analysis in the Medicaid context.

Wilder v. Virginia Hospital Association

Before *Blessing* and *Gonzaga*, in 1990 the Supreme Court first addressed the availability of a private right of action under the Medicaid Act in *Wilder v. Virginia Hospital Association*, a 5-4 decision in which the majority’s and dissent’s various approaches foreshadow the current circuit split. There, health care providers sued Virginia to challenge the reimbursements it provided pursuant to its Medicaid plan. The providers argued that Virginia’s reimbursement rates violated a federal requirement that [requires](#) a state Medicaid plan to pay for “hospital services, nursing facility services, and services in an intermediate care facility” for the cognitively disabled through the use of rates that “the State finds . . . are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities. . . .” The Court held that this provision created an enforceable right under § 1983 for the providers [because](#) “[t]here can be little doubt that health care providers are the intended beneficiaries” of this provision, given that it “establishes a system for reimbursement of providers and is phrased in terms benefiting health care providers.” Moreover, this provision, “cast in mandatory rather than precatory terms,” was viewed to impose “a binding obligation on States participating in the Medicaid program to adopt reasonable and adequate rates.” The *Wilder* Court viewed this obligation to be “[judicially](#) enforceable” based on factors defined by statute and regulation, observing that an examination of the reasonableness of rates, while requiring “some knowledge of the hospital industry,” was “well within the competence of the Judiciary.” The *Wilder* Court also concluded that Congress did [not](#) foreclose § 1983 enforcement of the Medicaid Act. While the statute authorizes the Secretary to withhold approval of plans or curtail federal funds to states for noncompliance with the Act and more specifically requires states to adopt an administrative scheme to review reimbursement rates, these enforcement mechanisms provided limited oversight by the Secretary. As a result, the majority concluded that the federal enforcement mechanisms under the Act “cannot be considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983.”

Rather than focusing on the language of this particular provision, then-Chief Justice Rehnquist’s dissent in *Wilder* looked to the structure of the Medicaid Act to [conclude](#) that the text and structure of the statute “does not clearly confer any substantive rights on Medicaid service providers.” In particular, in the then-Chief Justice’s view, the provision at issue “is simply a part of the thirteenth listed requirement for [a state] plan” listed within an overall directive to the Secretary to approve compliant state plans. In light of the provision’s placement “within the structure of the statute,” as well as the absence of any focus “on providers as a beneficiary class” in the statute, the dissent concluded that this provision “is addressed to the States and merely establishes one of many conditions for receiving federal Medicaid funds” and does not confer an enforceable right for providers.

Suter v. Artist M.

Two years later and after the retirement of two Justices from the *Wilder* Court, in *Suter v. Artist M.*, the Supreme Court considered whether private individuals have the right to enforce a provision of the Adoption Assistance and Child Welfare Act of 1980 (AACWA) either under the statute itself or through an action under § 1983. Like the Medicaid Act, the AACWA is part of the Social Security Act and establishes a cooperative federal-state program wherein states agree to administer foster care and adoption services pursuant to certain federal requirements in exchange for receiving federal funds to support those services. The AACWA, like the Medicaid Act, directs the Secretary to approve state plans for administering the relevant benefits, and under one of the conditions of approval, the plan must ensure that states make “reasonable efforts . . . to prevent or eliminate the need for removal of [a] child from his home” prior to placing him in foster care.

Then-Chief Justice Rehnquist, this time writing for the Court, distinguished this provision from the Medicaid provision at issue in *Wilder*. For the *Suter* Court, the provision in *Wilder* created an enforceable right for providers because the states had a binding obligation to set reasonable reimbursement rates for them and “the statute and regulations set forth in some detail the factors to be considered in determining the methods for calculating rates.” The AACWA provision, in contrast, provides “[n]o further statutory guidance . . . as to how ‘reasonable efforts’ are to be measured.” As a result, “[h]ow the State was to comply with this directive . . . was, within broad limits, left up to the State.” Thus, under the structure of the AACWA, the only duty then-Chief Justice Rehnquist viewed the statute to place on the states is a duty “to ensure that the States have a plan approved by the Secretary which contains the 16 listed features.” The Court concluded that this “rather generalized duty on the State” is “to be enforced not by private individuals, but by the Secretary” by reducing or eliminating payments to a noncompliant state.

At the time, the Court had not yet formalized the framework for determining the existence of an enforceable right under § 1983 into the three-prong test recognized in *Blessing*. This ambiguity in the applicable framework led to diverging interpretations of *Suter* by the lower courts. A number of courts, picking up on the Court’s structural argument, interpreted *Suter* broadly and treated the placement of federal requirements within the state plan sections of the Social Security Act as a basis for precluding a finding of enforceable rights. Relying on this interpretation, those courts rejected private suits seeking to enforce a number of federal requirements for the Aid to Families with Dependent Children program, another federal-state program enacted under the Social Security Act. Other courts adopted a narrower reading, concluding that *Suter* turned on the fact that the provision was not judicially administrable, essentially concluding that the provision did not satisfy what would later be prong two of the three-prong *Blessing/Gonzaga* test.

Congressional Action after *Suter*

Following *Suter* and a number of subsequent lower court opinions, Congress enacted 42 U.S.C. § 1320a-2 in 1994 in an attempt to clarify the state of the law. Specifically, § 1320a-2 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 this chapter 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 671(a)(15) of this title is not enforceable in a private right of action.

The conference report for the bill states that “[t]he intent of this provision is to assure that individuals who have been injured by a 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 the federal courts to the extent they were able to prior to the decision in *Suter v. Artist M.*” At the same time, the provision “also mak[es] clear there is no intent to overturn or reject the determination in *Suter* that the reasonable efforts clause [in the AACWA] does not provide a basis for a private right of action.” While the Supreme Court has not yet considered the meaning of § 1320a-2, [lower courts that](#) have done so (with one exception that spurred the underlying circuit split) have generally agreed that it is intended to reject the broader, structural interpretation of *Suter* while preserving the narrower reading that focuses on judicial administrability.

The Three-Prong Test after *Gonzaga v. Doe*

A few years after *Suter* and the enactment of § 1320a-2, the Supreme Court, as noted above, formally articulated the three-prong test for determining the existence of an enforceable right under § 1983 in *Blessing*. Thereafter, in *Gonzaga* in the context of a federal-state program outside of the Social Security Act, it clarified the test’s first prong—whether Congress intended the statutory provision to benefit the plaintiff. In that case, a student sued a private university under § 1983 to enforce a provision of the [Family Educational Rights and Privacy Act of 1974](#), which prohibits the federal funding of educational institutions that have “a policy or practice of permitting the release of education records (or personally identifiable information contained therein ...) of students without the written consent of their parents to any individual, agency, or organization.” The Court held that this provision did not give rise to individual rights enforceable by a student under § 1983 because it [focused](#) on “institutional policy and practice” rather than “individual instances of disclosure.” Moreover, rather than using “individually focused terminology” or any “rights-creating language,” the statute “speak[s] only to the Secretary Education, directing that ‘[n]o funds shall be made available’ to any ‘educational agency or institution’ which has a prohibited ‘policy or practice,’” a focus that is [“two steps](#) removed from the interests of individual students and parents.” As such, the students at best fell within a “general zone of interest” that the statute was intended to protect, which was [insufficient to](#) evidence an “unambiguously conferred” individual right enforceable under § 1983.

Having considered the Supreme Court’s evolving jurisprudence regarding private rights of action generally in this Part, Part II discusses the relevant case law and circuit split regarding the availability of a private right of action to enforce Medicaid’s free-choice-of-provider requirement.

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