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Legal Sidebar

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

Wen S. Shen
Legislative Attorney

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As discussed in Part I of this two-part Legal Sidebar, the Supreme Court recently declined to hear two cases, *Anderson v. Planned Parenthood of Kansas* and *Gee v. Planned Parenthood of Gulf Coast Inc.*, leaving in place a circuit split on the question of whether private litigants may sue to challenge a state's exclusion of Planned Parenthood affiliates from its Medicaid program as a violation of Medicaid's "free-choice-of-provider" provision. While Part I addressed the Supreme Court's evolving jurisprudence regarding private rights of action generally, this part examines the application of that case law to the free-choice-of-provider provision and the resulting circuit split on that question.

Private Right of Action to Enforce Medicaid Act's Free-Choice-of-Provider Provision

After the Supreme Court's decision in *Gonzaga*, which clarified the three-prong test for determining the existence of a private right of action under § 1983, private plaintiffs continued to file suit to enforce various requirements of the Medicaid Act under § 1983. In response to these actions, lower courts have applied the *Blessing*/*Gonzaga* test in a way that incorporates *Wilder*'s general approach and analyzed the requirements' enforceability on a provision-by-provision basis, analyzing whether a given provision contains the necessary rights-creating language that evidences an unambiguous congressional intent to create an individual right for the plaintiffs. According to one commentator, between mid-2002 and early 2016, federal appellate courts have applied this approach and reviewed the enforceability of 25 Medicaid requirements, finding 16 of them to be privately enforceable. One of those provisions was the free-choice-

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of provider provision, which the Sixth, Seventh, and Ninth Circuits reviewed during that period, with each court concluding the provision was privately enforceable under § 1983.

Armstrong v. Exceptional Child Center, Inc.

While the Supreme Court has not addressed the enforceability of a Medicaid requirement under § 1983 since *Wilder*, the Court considered the enforceability of such a requirement under the Supremacy Clause in its 2015 opinion in *Armstrong v. Exceptional Child Center, Inc*. In *Armstrong*, providers of habitation services sued state Medicaid officials alleging that the state reimbursed providers of habilitation services at rates that violate a Medicaid plan requirement, which directs states to "provide such methods and procedures to . . . payment for[] care and services available under the plan . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care ...." The lower court entered summary judgment for the providers, after concluding that they had "an implied right of action under the Supremacy Clause to seek injunctive relief against the enforcement or implementation of state legislation." The Supreme Court, however, held that the Supremacy Clause creates only a rule of decision that federal law prevails over conflict state law and does not confer a private right of action.

To reconcile this conclusion with past decisions in which the Court had considered private actions to enjoin enforcement of state laws that allegedly violated federal laws, the Court explained that those cases illustrated the exercise of its general equitable power to prevent an injurious act by a public officer. In the case of *Armstrong*, the suit could not proceed in equity because two aspects of the provision in question "establish[ed] Congress's 'intent to foreclose' equitable relief." First, the Court recognized that the sole remedy Congress provided for a state's failure to comply with this and other Medicaid requirements is the withholding of Medicaid funds by the Secretary. Second, the *Armstrong* Court considered the requirement to be "judicially unadministrable." In the Court's view, "[i]t is difficult to imagine a requirement broader and less specific than [the provision's] mandate that state plans provide for payments that are 'consistent with efficiency, economy, and quality of care,' all the while 'safeguard[ing] against unnecessary utilization of . . . care and services.'" By conferring enforcement of this "judgment-laden standard" upon the Secretary alone, Congress evidenced an intent to make the agency remedy the exclusive one in order to achieve "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking" and avoid "the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." As part of this analysis and in a footnote, the Court commented that the plaintiff providers did not assert a § 1983 claim or sought to rely on *Wilder*, likely because "our later opinions plainly repudiate the ready implication of a § 1983 action that *Wilder* exemplified." In support of this statement, the Court cited to *Gonzaga* with a parenthetical explanation that it "'reject[ed] the notion,' implicit in *Wilder*, 'that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.'"

In the plurality portion of the opinion, then-Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, also concluded the Medicaid Act itself does not create an implied cause of action because the relevant provision "lacks the sort of rights-creating language needed to imply a private right of action." Akin to the structural approach advanced in *Suter*, the plurality looked to the structure of the Medicaid Act and concluded that because "[t]he Act says that the 'Secretary shall approve any plan which fulfills the conditions specified in subsection (a)," and the provision at issue is merely one of the conditions under subsection (a), the statute "is phrased as a directive to the federal agency charged with approving state Medicaid plans, not as a conferral of the right to sue upon the beneficiaries of the State's decision to participate in Medicaid." Justice Breyer, who joined the rest of the *Armstrong* opinion, declined to address this issue, but concurred to broadly state his concerns about private litigation over a rate-setting provision that is "complex[] and nonjudicial [in] nature."

The Circuit Split

While *Armstrong* was not a § 1983 case and the part of the opinion that would be most relevant to a § 1983 analysis—i.e., whether the provision has the relevant "rights-creating" language to create an enforceable individual right—did not garner the votes of a majority of the Court, some states have sought to apply the structural argument from *Armstrong* to bar § 1983 claims seeking to enforce Medicaid requirements. Courts have generally rejected the states' invitation to apply *Armstrong*'s structural approach and instead continue to analyze whether a given Medicaid provision has the relevant rights-creating language that would create an enforceable right. With respect to the free-choice-of-provider provision, a circuit split emerged after the Eighth Circuit's decision in *Does v. Gillespie* in 2017.

In *Gillespie*, relying largely on the plurality portion of *Armstrong*, the Eighth Circuit concluded that the free-choice-of-provider provision did not unambiguously create an enforceable federal right. As an initial matter, the court interpreted *Armstrong*'s footnote about *Wilder* as overruling *Wilder* and its approach because *Gonzaga* established a higher standard for the first prong of the *Blessing* test, requiring an individual right be "unambiguously conferred" by a statute. As a result, according to the appellate court, the provision, under *Gonzaga*, lacks the requisite individual focus because the overall structure of the Medicaid Act "is two steps removed" from the Medicaid beneficiaries. "Like the provision at issue in *Armstrong*," the provision "is phrased as a directive to the federal agency charged with approving state Medicaid plans." Thus, according to the Eighth Circuit, the relevant requirement "focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agenc[y] that will do the regulating." Second, "Congress expressly conferred another means of enforcing a State's compliance with this provision—the withholding of federal funds by the Secretary." Third, looking at the provision in the context of the overall structure of the Medicaid Act, the court held that the provision has an "aggregate" focus because it is part of a statute that "links funding to substantial compliance with its conditions."

In the court's view, other circuits that reached the opposite result gave "insufficient weight to *Gonzaga*'s requirement of unambiguous intent and to the overall structure of the provisions." Even though the provision itself refers to an "individual," the Eighth Circuit observed that the provision "is nested within one of eighty-three subsections and is too far removed from the Act's focus on which state plans the Secretary 'shall approve.'" Because "the structural elements of the statute and language in a discrete subsection give mixed signals about legislative intent," Congress has not, in the court's view, spoken "with a 'clear voice' that manifests an 'unambiguous intent' to confer individual rights."

In addition, *Gillespie* rejected the argument that 42 U.S.C. § 1320a-2, enacted after *Suter*, evidenced an intent to authorize a private right of action under § 1983. Because "§ 1320a-2 was adopted seven years before *Gonzaga* clarified the law in this area," the statute, according to the appellate court, did not address the "same question that a court must decide today," i.e., whether a statute "unambiguously confers an individual right that can be enforced under § 1983." While recognizing that § 1320a-2 "meant that a provision of the [Social Security] Act cannot be deemed individually unenforceable solely because of its situs in a larger regime requiring a State plan or specifying the required contents of a state plan," the court nevertheless concluded that "[w]here a provision is included in a section of the Act requiring a state plan or specifying the required contents of a state plan, Congress still must create new rights in clear terms that show unambiguous intent before they are enforceable under § 1983."

Around the time that *Gillespie* was decided, the Fifth Circuit (in *Gee*) and the Tenth Circuit (in *Andersen*) each also considered the enforceability of the free-choice-of-provider provision under § 1983 and found it to be enforceable because it "is phrased in individual terms that are specific and judicially administrable," evidencing Congress's intent to grant an enforceable right to that specific class of beneficiaries. In *Andersen*, in particular, the court rejected the structural approach advocated by the plurality in *Armstrong*, concluding that *Wilder* and its approach were binding.

Considerations for Congress

Whether Medicaid beneficiaries may enforce the free-choice-of-provider provision of the Medicaid Act through § 1983 is principally a question about whether Congress intended to provide an individually enforceable right under this provision. Absent express congressional clarification, the Supreme Court's analysis—should it choose to take up the issue in the future—would likely focus on at least two issues: (1) the extent to which the overall structure of the Medicaid Act—as Spending Clause legislation requiring states to submit and maintain compliant state Medicaid plans—should be relied upon in discerning congressional intent; and (2) whether the applicability of this structural approach, in the Medicaid context, is limited by *Wilder* and § 1320a-2 after *Gonzaga*.

On the one hand, there is an argument that Congress, in enacting § 1320a-2, unambiguously rejected the structural approach in the Medicaid context and sought to preserve availability of a private right of action for these state plan requirements to the extent permitted under the general standards and approach set forth under *Wilder*, subject to further judicial refinement of the relevant standards. Congress enacted § 1320a-2, after some lower courts began interpreting *Suter* as adopting the structural approach, to expressly reject *Suter* to the extent it applied such an approach and to preserve the availability of private right of action as provided under then-existing case law, including *Wilder*. Section 1320a-2 otherwise expressly states that it does not overturn *Suter*, which could be more narrowly construed as a case clarifying the relevant standard on juridical administrability. Section 1320a-2 thus could be interpreted as evidencing a clear congressional intent to preserve a private right of action under § 1983 to enforce state plan requirements under the Social Security Act, provided that the specific provision at issue meets the standards set forth under *Wilder* and subsequent cases that clarify those standards. Under this interpretation, *Gonzaga* could be read as a subsequent case that clarified the standard governing when a statute intends to benefit an individual plaintiff. As a case that considered a Spending Clause statute unrelated to the Social Security Act, *Gonzaga*, under this analysis, could not alter § 1320a-2's specific expression of congressional intent with respect to that statute.

On the other hand, as the *Gillespie* court concluded, the significance of § 1320a-2 as an indicator of congressional intent may be limited after *Gonzaga*. Under this interpretation (and as intimated by the dictum in *Armstrong*), *Gonzaga*, in clarifying the standard governing the "intended benefit" prong, implicitly overruled *Wilder* inasmuch as it authorized private suits by individuals (i.e., health care providers) who were merely within the "zone of interest" of the Medicaid Act. Thus, to the extent § 1320a-2 sought to preserve the availability of a private right of action under a now-overruled case, its exact import is no longer clear and as such, it falls short of "unambiguously conferring" an individually enforceable right. Without a clear expression of congressional intent from § 1320a-2, one is left with the text and structure of the Medicaid Act itself to discern the relevant congressional intent. Under this approach, the Supreme Court may follow the roadmap laid out in the plurality portion of *Armstrong* and formally adopt the structural approach. Under this approach, because the free-choice-of-provider provision is merely one of many conditions of approval embedded within an overall directive to the Secretary to approve compliant state plans, it could be viewed to not "unambiguously confer" upon the beneficiaries an individually enforceable right.

Until the Supreme Court decides to take up the issue, it is unclear which approach the courts in the remaining five circuits that have not addressed this issue would follow. Under the former approach, private enforcement of a particular Medicaid provision would be permitted if it "unambiguously confers" an enforceable right. The availability of private enforcement means that courts reviewing the same provision may reach different conclusions, resulting in variations in the availability of a private right of action across jurisdictions for a particular provision. Additionally, where courts have determined that a privately enforceable right exists as to a provision and consider an alleged violation on its merits, they could also reach inconsistent results as to the scope and nature of the right, particularly if the provision includes certain discretionary components (e.g., a reasonableness determination). Under the latter

structural approach adopted by the Eighth Circuit, all private rights of action under Medicaid and other similarly structured federal-state programs would likely be precluded. Because the Medicaid Act's statutory structure is common to other federal-state programs enacted under the Social Security Act (such as the Aid to Families with Dependent Children program and the Adoption Assistance and Child Welfare Act), the application of the structural approach has a potentially wide-reaching effect of broadly precluding private rights of action to enforce those program requirements. Following *Gillespie*, lower courts in the Eighth Circuit have applied its reasoning to reject private claims seeking to enforce requirements of the Adoption Assistance and Child Welfare Act. Thus, under the structural approach, the principal and perhaps only enforcement mechanism for a state's violation of a Medicaid requirement is the withholding or reduction of federal Medicaid funds by the Secretary. While this centralized enforcement is likely to produce more uniformity in the interpretation of the relevant statutes and regulations, it may result in under-enforcement. Because the withholding or reduction of Medicaid funds is a drastic remedy that could, at least temporarily, lead to a broader loss of services to vulnerable populations, the Secretary has historically been reluctant to invoke this authority. The effectiveness of this enforcement mechanism also depends significantly on the availability of resources to the Secretary to monitor for, investigate, and review potential violations.

Because the availability of a private right of action to enforce the free-choice-of provider provision (and potentially other Medicaid provisions) is fundamentally a question about congressional intent, Congress could address this uncertainty directly by amending existing state plan provisions, or enacting separate provisions (as it had with § 1320a-2) to better clarify whether and to what extent it intends to provide enforceable rights under the Medicaid Act and perhaps other state plan provisions.