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Medicaid Preemption Claims in *Douglas* Avert the *Astra* Abyss

The Supreme Court's five-to-four opinion in *Douglas v. Independent Living Center of Southern California, Inc.*[1] is a significant court-access victory for the private enforcement of the federal Medicaid statute,[2] which lacks a private right of action. A year earlier, in *Astra USA, Inc. v. Santa Clara County*, the Court unanimously dismissed a suit seeking to enforce another statute that similarly lacked a private cause of action.[3] Although both the *Douglas* majority[4] and dissent[5] cited *Astra*, they proffered sharply contrasting interpretations of that opinion. While the dissent would have relied on *Astra* to dismiss Medicaid preemption claims entirely, the majority's analysis of *Astra* keeps the courthouse doors open for future litigants to bring such claims.

The Court granted certiorari in *Douglas* to determine whether a cause of action exists under the Supremacy Clause[6] for a claim that the federal Medicaid statute preempts an allegedly conflicting state law.[7] Medicaid providers and beneficiaries sought to enjoin a California law slashing reimbursement rates. They alleged that the State's rate reduction conflicted with Medicaid's requirement to ensure quality of care and sufficient providers.[8]

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1. No. 09-958 (U.S. Feb. 22, 2012), http://www.supremecourt.gov/opinions/11pdf/09-958.pdf (to be published at 132 S. Ct. 1204). The majority opinion was written by Justice Breyer and joined by Justices Kennedy, Ginsburg, Sotomayor, and Kagan. The dissent was written by Chief Justice Roberts and joined by Justices Scalia, Thomas, and Alito.
2. 42 U.S.C. § 1396a(a)(30)(A) (2006).
3. 131 S. Ct. 1342 (2011).
4. *See Douglas*, slip op. at 8 (majority opinion).
5. *See id.* at 4 (Roberts, C.J., dissenting).
6. U.S. CONST. art. VI, cl. 2.
7. *See Douglas*, slip op. at 1-2 (majority opinion).
8. *See id.* at 4.

Historically, safety-net statutes such as Medicaid were enforced against states through the express cause of action provided by 42 U.S.C. § 1983.[9] But in *Gonzaga University v. Doe*,[10] the Court limited the availability of § 1983 actions to statutory provisions that contain "rights-creating terms,"[11] i.e., language "phrased in terms of the persons benefited."[12] As a result, the Medicaid provision at issue in *Douglas* could not be enforced under § 1983, and an alternative remedy was needed.[13]

In the scantly noticed *Astra* opinion, however, the Court cast doubt on the possibility of using remedial alternatives. *Astra* held that the lack of a statutory right of action warrants denial of a totally distinct remedy under third-party beneficiary tort law because an alternative remedy would be "incompatible with the statutory regime."[14] The *Astra* Court relied heavily on the argument in the amicus brief of the Solicitor General that private enforcement would undermine federal agency authority.[15] In *Douglas*, the Solicitor General went further to contend that *Douglas* raised "similar considerations" to *Astra* and advocated dismissal of the Medicaid preemption claims on that basis.[16]

The *Douglas* majority explicitly declined to decide whether the Supremacy Clause supplied a cause of action.[17] Instead, it focused on the fact that the

9. 42 U.S.C. § 1983 (2006) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . . ."); *see* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 512 (1990) (concluding that an amendment involving Medicaid reimbursements "imposes a binding obligation on states participating in the Medicaid program to adopt reasonable and adequate rates and that this obligation is enforceable under § 1983 by health care providers").

10. 536 U.S. 273 (2002).

11. *Id.* at 284.

12. *Id.* (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 692 n.13 (1979)).

13. *See* Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, 10 LOY. J. PUB. INT. L. 27, 63-65 (2009) (discussing enforcement of Medicaid provisions under § 1983 after *Gonzaga*).

14. Astra USA, Inc. v. Santa Clara Cnty., 131 S. Ct. 1342, 1345 (2011).

15. *See id.* at 1349 (citing the federal government's amicus briefs before the Supreme Court and Ninth Circuit).

16. Brief for the United States as Amicus Curiae Supporting Petitioner at 25-26, *Douglas*, 132 S. Ct. 1204 (No. 09-958).

17. Douglas v. Indep. Living Ctr. of S. Cal., Inc., No. 09-958, slip op. at 6 (U.S. Feb. 22, 2012) (majority opinion), http://www.supremecourt.gov/opinions/11pdf/09-958.pdf (to be published at 132 S. Ct. 1204) ("[That agency decision] may require respondents now to

Centers for Medicare and Medicaid Services (CMS) approved California's rate cuts shortly after oral argument. In light of the changed circumstances, the Court remanded the case to the Ninth Circuit to consider the impact of the availability of a claim against the federal government under the Administrative Procedure Act (APA).[18] By contrast, the dissent in *Douglas* argued that the agency's approval of California's plan has "no impact on the question before this Court,"[19] and would have held that "there is no private right of action under the Supremacy Clause to enforce [the federal Medicaid provisions]."[20]

Douglas elevates ducking the question to a high form of art. Although the dissent berated the majority for dodging the question presented, neither cited a single preemption case in their respective opinions. For at least a century,[21] the Court has reached the merits of preemption claims without identifying the source of the cause of action.[22] Both scholars and circuit courts have pointed out that the Supreme Court has relied, albeit *sub silentio*, on an implied cause of action in the context of the Supremacy Clause.[23]

For example, the Court has reached the merits of two Medicaid preemption cases in just the past decade. A unanimous 2006 decision contained no discussion of the applicable cause of action, simply concluding that a state law that conflicts with Medicaid is "unenforceable."[24] In the 2003 case *Pharmaceutical Research & Manufacturers of America v. Walsh*,[25] seven Justices reached the merits of a Medicaid preemption claim, without acknowledging the concurrences of Justices Scalia and Thomas, which argued that Medicaid preemption claims are not permissible.

While the *Douglas* dissent reached the same conclusion as the *Walsh* concurrences, the dissent did not acknowledge the long history of preemption

proceed by seeking review . . . under the Administrative Procedure Act (APA), rather than in an action against California under the Supremacy Clause." (citation omitted)).

18. 5 U.S.C. §§ 701-706 (2006).

19. *Douglas*, slip op. at 6 (Roberts, C.J., dissenting).

20. *Id.*

21. *See Ex parte* Young, 209 U.S. 123 (1908).

22. *See*, *e.g.*, Dalton v. Little Rock Family Planning Servs., 516 U.S. 474, 476 (1996) (per curiam) (addressing preemption under Medicaid); Blum v. Bacon, 457 U.S. 132, 138 (1982) (addressing preemption under the Social Security Act).

23. *See* Planned Parenthood of Hous. & Se. Tex. v. Sanchez, 403 F.3d 324, 331-34 & n.47 (5th Cir. 2005) (citing cases and treatises); *see also* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 360-61 (2004) (discussing how the Court has not yet recognized an implied cause of action under the Supremacy Clause).

24. Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 292 (2006).

25. 538 U.S. 644 (2003).

precedents and instead cited *Astra*. Because all the Justices avoided discussion of the preemption cases, the fate of Medicaid preemption claims in *Douglas* depended on the prevailing interpretation of *Astra*.

The majority viewed *Astra* as possible support for reaching the same result regardless whether the claim was brought under the Supremacy Clause or, following final agency action, the APA.[26] Under the majority's interpretation of *Astra*, the *Douglas* Medicaid preemption claims were viable for at least the three-and-a-half years before the agency made a final decision because there would be no "final agency action" that a court could review under the APA. After CMS acted, however, an APA claim might be required.

In contrast, the dissent regarded *Astra* as a means of eradicating all private enforcement of Medicaid against states. The dissent asserted that prior rulings limiting implied private rights of action and § 1983 claims would "serve no purpose" if a preemption claim is permitted.[27] The dissent quoted *Astra*'s statement that the absence of a statutory right of action "would be rendered meaningless" if a tort remedy is available.[28] By citing *Astra* in this way, the dissenters acknowledge, for the first time, that their goal is to completely eliminate private enforcement of safety-net statutes lacking a private right of action.

The dissenters have strongly supported the preemption claims of business litigants seeking to avoid state consumer-protection law and tort claims in the past.[29] Many preemption claims brought by business litigants seek to enforce federal statutory provisions that cannot meet *Gonzaga*'s requirement of rights-creating language for § 1983 actions.[30] Thus, business preemption claims, like Medicaid preemption claims, must rely on the availability of alternative remedies. And the Court has similarly ducked the question of the cause of action for business preemption claims, including a 2002 business preemption case squarely presenting the question of the cause of action.[31]

26. *See* Douglas v. Indep. Living Ctr. of S. Cal., Inc., No. 09-958, slip op. at 8 (U.S. Feb. 22, 2012) (majority opinion), http://www.supremecourt.gov/opinions/11pdf/09-958.pdf (to be published at 132 S. Ct. 1204).

27. *Id.* at 4 (Roberts, C.J., dissenting).

28. *Id.* (quoting Astra USA, Inc. v. Santa Clara Cnty., 131 S. Ct. 1342 (2011)).

29. *See, e.g.*, PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011); *see also* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 n.2 (2010) (referring to implied causes of action to obtain equitable or injunctive relief to prevent unconstitutional action).

30. *See, e.g.*, Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury, 445 F.3d 136 (2d Cir. 2006) (allowing the preemption claim but rejecting enforcement of a statutory provision under § 1983); Qwest Corp. v. City of Santa Fe, 380 F.3d 1258 (10th Cir. 2004) (same).

31. Verizon Md., Inc. v. Pub. Servs. Comm'n of Md., 535 U.S. 635, 642-43 (2002).

The *Douglas* dissent tried to limit its analysis to Spending Clause statutes, stating that courts should not allow preemption claims "to enforce a statute enacted under the Spending Clause."[32] Although this reasoning could potentially differentiate business from Medicaid preemption claims, the dissent's interpretation of *Astra* is equally applicable to business preemption cases, which have sought to enforce statutes lacking a statutory right of action. The reasoning of *Astra*, which did not mention the Spending Clause, would bar business claims as readily as any others. It remains to be seen whether the dissenters will continue to advocate extending the rationale of *Astra* in the context of a business preemption claim. If the Court ignores *Astra* when business litigants seek to uphold the supremacy of federal law, then the *Douglas* majority's interpretation of *Astra* as not precluding preemption claims will gain further support.

Looking to the future, the Patient Protection and Affordable Care Act[33] expands Medicaid eligibility in 2014, increasing the number of people who will rely upon Medicaid's provisions. As Medicaid becomes a more substantial player in the United States health-insurance system, the statute's enforceability assumes greater importance. The *Douglas* decision does not prevent court access to enforce Medicaid, but the threat of the dissent's interpretation of *Astra* still looms.

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32. Douglas v. Indep. Living Ctr. of S. Cal., Inc., No. 09-958, slip op. at 9 (U.S. Feb. 22, 2012) (Roberts, C.J., dissenting), http://www.supremecourt.gov/opinions/11pdf/09-958.pdf (to be published at 132 S. Ct. 1204).

33. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (to be codified primarily in scattered sections of 42 U.S.C.).