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The Continuing Viability of Medicaid Rights After the Deficit Reduction Act of 2005

In a recent note in *The Yale Law Journal*,[1] Jon Donenberg argued that (1) program changes in Medicaid ushered in by the Deficit Reduction Act of 2005 (DRA)[2] sub silentio rendered Medicaid's basic availability provision[3] unenforceable under 42 U.S.C. § 1983, and (2) state fair hearing procedures constitute the best alternative for enforcement of beneficiary rights. Donenberg misreads both the DRA and § 1983 jurisprudence, overstates the usefulness of fair hearings, and overlooks the better alternative of preemption claims to enforce the Medicaid Act.

THE LIMITED IMPACT OF THE DEFICIT REDUCTION ACT

The DRA did not bring about wholesale reform of Medicaid, but rather made a number of discrete amendments to the program, including some that expand states' ability to impose cost sharing and premiums for some services and populations.[4] The DRA also allows states, with approval from the federal government, to replace the statutorily defined benefit package with a "benchmark" or "benchmark-equivalent" package (based on federal or state employee or commercial plans) for certain populations.[5]

These discrete amendments do not fundamentally alter Medicaid. Prior to the DRA, federal law allowed states to impose "nominal" cost sharing and

1. Jon Donenberg, *Medicaid and Beneficiary Enforcement: Maintaining State Compliance with Federal Availability Requirements*, 117 YALE L.J. 1498 (2008).
2. Pub. L. No. 109-171, 120 Stat. 4 (2006) (codified in scattered sections of 42 U.S.C.).
3. 42 U.S.C. § 1396a(a)(10)(A) (2000).
4. 42 U.S.C.A. § 13960-1 (West Supp. 2008).
5. *Id.* § 1396u-7.

premiums.[6] Federal law also previously provided many options for states to deviate from the standard package of benefits through demonstration waivers.[7] The DRA significantly expanded these possibilities, but the changes were ones of degree rather than of kind.

Section 1396a(a)(10)(A) (§ 10(A)), which was left untouched by Congress, still provides the fundamental requirement that states must "mak[e] medical assistance available . . . to all [eligible] individuals."[8] The content of that "medical assistance" is defined by other provisions that have changed over time, and it is true that the DRA brings additional changes to the content of this right. Thus, it is now the case that if the state imposes cost sharing in accordance with the DRA, affected beneficiaries cannot assert that § 10(A) guarantees them services without liability for payment. Likewise, a beneficiary cannot assert a right to a particular service under § 10(A) if the state (with federal approval) has switched the beneficiary to benchmark coverage that excludes that service.

But far from being a dead letter, § 10(A) still places substantial restrictions on states' flexibility with regard to all populations. Beneficiaries who are subject to cost sharing still have the right to services if they pay deductibles and co-payments. Individuals still have a general right to services covered by their plan, whether it is a benchmark plan or the original statutory package of benefits. Although states' options have expanded, § 10(A) still "requires states to provide particularly specified benefits to particularly specified types of individuals."[9] A right with exceptions, even substantial ones, is still a right.

THE *GONZAGA* ANALYSIS IS UNCHANGED

In *Gonzaga University v. Doe*, the Supreme Court held that the availability of a § 1983 claim depends on whether the precise "provision in question" contains "rights-creating language."[10] Every court of appeals to address the question has concluded the language of § 10(A) satisfies *Gonzaga*.[11] The DRA did not change one word of that rights-creating language.

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6. 42 U.S.C. § 1396o(a)(3). *See generally id.* § 1396o (listing pre-DRA cost-sharing provisions).

7. *See id.* § 1315 (demonstration waivers); *see also id.* § 1396n (managed care and long-term care waivers).

8. *Id.* § 1396a(a)(10)(A).

9. Watson v. Weeks, 436 F.3d 1152, 1161 (9th Cir. 2006).

10. 536 U.S. 273, 282, 287 (2002) (internal quotation marks omitted).

11. Okla. Chapter, Am. Acad. of Pediatrics v. Fogarty, 472 F.3d 1208 (10th Cir. 2007); Westside Mothers v. Olszewski, 454 F.3d 532 (6th Cir. 2006); Watson v. Weeks, 436 F.3d 1152; S.D. *ex rel.* Dickson v. Hood, 391 F.3d 581 (5th Cir. 2004); Sabree *ex rel.* Sabree v. Richman, 367 F.3d 180 (3d Cir. 2004).

One circuit court has considered and rejected the argument that the § 10(A) right can be eclipsed by other Medicaid provisions. In *Sabree v. Richman*, the Third Circuit held that the rights-creating language of § 10(A) is so clear and unambiguous that it cannot be "neutralize[d]" by other non-rights-creating provisions–in that case, Medicaid's introductory and appropriations provisions.[12] Similarly, the program changes introduced by the DRA cannot neutralize § 10(A).

It does not matter whether the new DRA provisions create § 1983 rights. Because § 10(A) still provides a general right to covered services–even for those whose coverage has changed pursuant to the DRA–claims based on denial of covered services still arise under § 10(A). It also does not matter that the DRA has, by design, driven down Medicaid enrollment.[13] Nothing in § 1983 jurisprudence suggests that the choice of some individuals not to avail themselves of statutory rights can eliminate those rights for others.

Most importantly, the DRA did not alter one word of § 10(A), which is the relevant focal point under *Gonzaga*. There is no question that § 10(A) satisfies *Gonzaga*. Furthermore, *Gonzaga* holds that a provision meeting this test is enforceable unless Congress either expressly "shut[s] the door to private enforcement" or provides "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."[14] States lobbied Congress to add language to the DRA to expressly remove the right of private enforcement, and Congress refused to do so.[15] Accordingly, the DRA did nothing to alter preexisting § 1983 rights.

PREEMPTION IS A BETTER ALTERNATIVE TO SECTION 1983

While § 10(A) remains enforceable through § 1983, alternatives to § 1983 enforcement are still important because other key provisions in Medicaid have been held unenforceable following *Gonzaga*.[16] State fair hearing procedures have long been used to redress violations of federal law in individual cases, but are not adequate for bringing the kind of systemic challenges for which § 1983 has been most important. As Donenberg acknowledges, challenging state laws

12. Sabree ex rel. Sabree v. Richman, 367 F.3d at 191-92.

13. Donenberg, *supra* note 1, at 1525.

14. Gonzaga Univ. v. Doe, 536 U.S. at 284-85 n.4 (internal quotation marks omitted).

15. Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413, 463 (2008).

16. *See* Rochelle Bobroff, *Section 1983 and Preemption: Alternative Means of Court Access for Safety Net Statutes*, 10 LOY. J. PUB. INT. L. (forthcoming 2009) (manuscript at 46-50), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273664).

or regulations before an administrative law judge (ALJ) is uncertain at best and futile at worst.[17] Even if beneficiaries are able to bring individual claims based on federal law before a reviewing state court, federal courts retain the critical advantage of being more familiar with complex federal statutes like the Medicaid Act. Finally, while Donenberg suggests "the potential for class action-style fair hearing actions" through the use of consolidated group hearings,[18] this procedure falls far short of equaling federal class actions because ALJs are unable to grant class-wide relief.[19]

In contrast to the limitations of fair hearings and state court review, actions for injunctive relief on the basis of federal preemption constitute a more effective alternative to § 1983. Preemption actions provide the benefits of class-wide relief for all similarly situated beneficiaries. All courts of appeals to consider such claims have held that they are not subject to the requirements of § 1983.[20] In recent decisions, both the Eighth and Ninth Circuits have permitted preemption claims to enforce Medicaid provisions that those courts had held unenforceable under § 1983.[21] Numerous precedents confirm that Medicaid provisions generally can be enforced through preemption actions, whether or not a § 1983 remedy is available.[22]

CONCLUSION

There is no basis in law for Donenberg's claim that an act of Congress can be deemed to repeal unambiguous rights sub silentio. The expansion of cost sharing and coverage limitations in the DRA allows for some limits to the substance of Medicaid's basic availability provision, but does not affect its enforceability through § 1983. To the extent that § 1983 rights under Medicaid have been restricted in recent years, expanded use of fair hearing procedures

17. Donenberg, *supra* note 1, at 1544 (noting that such challenges are "difficult, if not impossible" in many states, and that ALJs may be unwilling to invalidate state laws).

18. *Id.* at 1540.

19. *Compare, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, § 358-5.10 (2006) (providing for a consolidated hearing for "two or more persons" to present their own claims in one proceeding), *with* Fed. R. Civ. P. 23(a) (permitting class members to bring claims "on behalf of all [class] members"). While at least one state provides that the agency may be directed "to review other cases with similar facts" when it has misapplied the law, N.Y. COMP. CODES R. & REGS. tit. 18, § 358-6.3, such a directive is not binding.

20. *See, e.g.*, Planned Parenthood of Houston & Southeast Tex. v. Sanchez, 403 F.3d 324 (5th Cir. 2005); Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66 (1st Cir. 2001), *aff'd sub nom.* Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003).

21. Indep. Living Ctr. of S. Cal. v. Shewry, 543 F.3d 1050 (9th Cir.), *reh'g en banc denied* (9th Cir. Nov. 3, 2008); Lankford v. Sherman, 451 F.3d 496 (8th Cir. 2006).

22. *See* Bobroff, *supra* note 16 (manuscript at 55-63).

may have a role to play, but their usefulness for enforcing federal law remains limited. Federal preemption remains the best alternative to Medicaid suits under § 1983.

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