I. Brief Overview of History and Structure of Medicaid Act Relating to Private Enforcement of Federal Payment Standards

A. Statutory History
- History of Sec. 30A’s “Equal Access” Mandate
- Rise and Fall of Sec. 13A (“Boren Amendment”)

B. CMS Administration – History of Federal Agency Enforcement of Sec. 30A’s Equal Access Mandate

C. Provider Litigation Since 1980
- Wilder v. Virginia Hospital Ass’n
- Gonzaga Univ. v. Doe and Section 1983
- Balanced Budget Act of 1997

Payment Rule Statutory Background

- Section 30(A)
  - From 1968 to 1981 required states to ensure “payments . . . are not in excess of reasonable charges consistent with efficiency, economy, and quality of care”
  - 1981 amendment removes reasonable charge language. As amended Section 30(A) requires that “payments are consistent with efficiency, economy, and quality of care”
  - Amended in 1989 to add requirement that payments to be sufficient to enlist enough provider to ensure equal access to services. This requirement had previously been in the regulations
Payment Rule Statutory Background

- Section 13(A)
  - Before 1980 nursing home and hospital rates had to be based on reasonable costs
  - In 1980, Congress enacted the Boren Amendment as revised Section 13(A), requiring that nursing home rates be reasonable and adequate to meet the costs of efficiently and economically operated providers. Extended to hospitals in 1981
  - In 1997, Congress repeals the Boren Amendment in response to National Governor Association lobbying
  - Amended 13(A) requires that nursing home and hospital rates be adopted through a public process

CMS Enforcement of 30(A)

- CMS review of SPAs under section 30(A) until very recently has generally been very cursory
- CMS has rarely disapproved SPAs implementing rate changes under 30(A)
- One example of a disapproval is a 1992 proposed 40% reduction in physician rates by Tennessee

CMS Enforcement of 30(A)

- Cases before Supreme Court spur CMS into a somewhat more active role
  - CMS disapproves California rate reductions that are at issue in case before the Supreme Court on November 18, 2010 because state fails to respond to Requests for Additional Information for more than 20 months after deadline
  - CMS submits RAI to Arizona Medicaid concerning access in response to proposed 5% hospital rate cut
- May 5, 2011 for the first time CMS proposes regulations to govern review under 30(A) of SPAs including rate changes
  - Focus is on access
  - Solicitor General reports the regulations have been delayed
Provider Litigation Since 1980—Boren Amendment

- Boren Amendment
  - Much successful litigation
  - Focus often on state’s failure to make supportable findings that rates were adequate to meet costs of efficient and economical providers
  - Initially, many providers sued without identifying a source for a private right of action
  - Then, plaintiffs began relying on section 1983 for a private right of action
  - Supreme Court rules providers have a 1983 private right of action to sue for a Boren Amendment violation in *Wilder v. Virginia Hospital Ass’n*, 496 U.S. 498 (1990)

Provider Litigation Since 1980—Section 30(A)

- Results more mixed than under Boren Amendment
- Varying court interpretations of 30(A)
  - All courts agree that section 30(A) is violated if rate changes create an actual access problem
  - Several courts require that states at least consider efficiency, quality of care, and access in adopting rates
  - Ninth Circuit requires rates bear a reasonable relationship to provider costs and be based on credible cost studies in the absence of other special circumstances

Gonzaga and its Progeny

- Before 2002, most courts held that beneficiaries could bring a 1983 claim to enforce section 30(A), and many courts held that provider could as well
- Supreme Court in 2002 significantly narrows claims that can be brought under 1983 by requiring underlying statute to have “rights creating language” in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)
- After *Gonzaga*, courts hold generally that a 1983 claim cannot be brought to assert a 30(A) violation
In Douglas v. ILC and related cases, providers and beneficiaries rely on the Supremacy Clause of the U.S. Constitution as the source of a private right of action. Argue state rate cuts are pre-empted by Section 30(A) because they are incompatible with it.

Supremacy Clause states that the laws of the United States “shall be the supreme Law of the Land” and “the Judges in every State shall be bound thereby, any Thing in . . .the laws of any State to the contrary notwithstanding.” Necessary to create a mechanism to compel States to comply with federal law. Articles of Confederation declared federal law to be supreme, but contained no enforcement vehicle.

Certiorari Petition Stage--Issues

- State sought review over 2 questions:
  - Whether beneficiaries and providers have a private right of action under the Supremacy Clause to challenge Medicaid rates as being pre-empted by Section 30(A)
  - Whether the 9th Circuit’s interpretation of Section 30(A) is correct
- Supreme Court accepted only the first question
- This means that the Supreme Court must assume that the rate cuts are pre-empted by Section 30(A) in deciding whether there is a private right of action.

Certiorari Petition Stage--Amici

- 22 States in Support of California
  - Emphasizes state fiscal problems
  - A private right of action would “devastate the amici States’ financial ability to provide public assistance to its [sic] ever-growing low income citizens in the current economic climate
- Solicitor General in Support of the Respondents
  - Recommends that Petition be denied
  - Should not take case while administrative proceedings on SPA disapprovals are pending
  - There is not split in the Circuits on the question of an implied cause of action under the Supremacy Clause
  - Should not take issue while rulemaking on 30(A) is in process
  - Too interlocutory at this time
II. Merits Stage
   A. Arguments of State Petitioner
   B. Arguments of United States Solicitor General
   C. Arguments of Respondents
   D. Arguments of Amici in support of Respondents

Petitioners California Department of Health Care Services
- Private parties cannot enforce Sec. 30A because Congress has not explicitly created a private cause of action under Medicaid.
- Supremacy clause does not provide a mechanism for circumventing: Gonzaga, Sandoval and Cort.
- Secretary’s discretionary authority to withdraw all funding for a State’s Medicaid program is exclusive remedy; no role for private beneficiaries and providers.

United States Solicitor General
- In 2010, recommends that certiorari be denied because:
  -- SPAs have been denied by CMS
  -- CMS intends to publish new regulations clarifying states' obligations under Section 30A
  -- “A system that relies solely on agency reviewing often will be less effective in ensuring supremacy of federal law than a system of agency review supplemented by private enforcement. Those programs in which the drastic measure of withholding all federal funding ...is the only available remedy would be generally less effective than a system that also permits award of injunctive relief in private actions...”
Merits stage, Solicitor General reverses by filing “top side” with State Petitioners.

Allowing a non-statutory private cause of action for equitable relief to enforce Section 30A against state officials would not be compatible with the nature of the statutory scheme.

State Attorneys General, et al.

- Under the Supreme Court’s precedent, a plaintiff suing under a federal statute must show that Congress intended to create a private right of action to enforce that statute.
- Allowing “Supremacy Clause lawsuits” to enforce federal Medicaid laws will be a financial catastrophe for states.


Respondents - - ILC, CMA, CPhA, CHA, SEIU, SRMH

- Cause of action to enjoin state officials from implementing preempted state laws has been recognized by the Court for almost two centuries.
- Section 1983 claims and preemption injunction actions to enforce the Supremacy Clause are substantively, historically, and practically distinct.
- The Supreme Court’s preemption cases cannot be explained as all involving anticipatory defenses to state regulation or quasi-regulation.
Congress has ratified the existing equitable cause of action by not displacing it (though Congress could elect to do so).

- Congress intentionally preserved private enforcement of Sec. 30A even while eliminating the Boren Amendment.
- A preemption claim under the Supremacy Clause is consistent with the original understanding of the Framers who assigned this role to the judiciary.
- Express statutory authorization for private litigants is not a prerequisite to a preemption claim under the Supremacy Clause.


- State “flexibility” in administering the Medicaid program does not extend to reducing beneficiary access in response to budgetary shortfalls.
- Absent Supremacy Clause suits, states will continue making indiscriminate rate cuts, thus threatening Medicaid’s ability to serve its congressional purpose.


American Health Care Association, et al.

- Federal injunctive relief provides a necessary complement to HHS’ enforcement powers.
- Congress did not adopt an exclusive administrative system to enforce Section 30(A) that would preclude challenges under the Supremacy Clause.
California’s across-the-board Medicaid rate cuts are incompatible with and effectively nullify the Equal Access provision of the Social Security Act.

Amici Curiae
AARP, Families USA, National Legal Aid and Defender Association, National Health Law Program, National Disability Rights Network, Center for Medicare Advocacy, First Focus, Voices for America’s Children, Children’s Dental Health Project, National Center for Youth Law, National Housing Law Project, National REACH Coalition, Disability Rights Legal Center, American Network of Community Options and Resources, Planned Parenthood Federation of America, National Family Planning & Reproductive Health Association, National Latina Institute for Reproductive Health, Black Women’s Health Imperative, National Asian Pacific American Women’s Forum, and Asian & Pacific Islander American Health Forum.

The Supreme Court has consistently recognized that program beneficiaries can enjoin state laws that are invalid under the Supremacy Clause, and Congress has recognized this right.

The Medicaid Act’s statutory scheme is not inconsistent with the need for private enforcement of the Supremacy Clause to prevent state Medicaid officials from acting contrary to Federal law.

Chamber of Commerce of the United States of America

The Supreme Court’s decisions and longstanding practice already establish this cause of action.

The Supreme Court should reject petitioners’ efforts to sow doubt about, and to limit, this important cause of action based on inapposite case law involving either Section 1983 or implied rights of action under federal statutes.

The Framers assigned the principal responsibility to enforce federal supremacy to the courts rather than to Congress.

Petitioners’ rule would harm businesses and consumers and undermine the significant benefits flowing from the preemption doctrine.
Congress has relied on the Supreme Court’s long tradition of allowing private suits for equitable relief under the Supremacy Clause. A remedy under the Supremacy Clause is particularly useful in Spending Clause cases. Cf. Rosado v. Wyman (U.S. Supreme Ct., 1970) (Court rejects argument that a federal court is without enforcement power in view of the fact that Congress has empowered HHS to cut off federal funds for noncompliance with federal statutory requirements).

Congress intends the ultimate beneficiaries of Spending Clause funds to be able to obtain equitable relief when a state fails to comply with its obligations. The history of Section 30(A) demonstrates with particular clarity that Congress did not intend to foreclose actions under the Supremacy Clause. Cf. Boren Amendment repeal in 1997.

Exclusive enforcement of Section 30(A) by HHS is logistically, practically, legally, and politically unfeasible. Private enforcement of Section 30(A) does not materially interfere with the Secretary’s discretion.
The Supreme Court’s longstanding authority to enforce the Constitution through direct actions has been particularly critical for civil rights and civil liberties.

Precluding direct rights of action under the Supremacy Clause would have broad and harmful consequences for maintaining the supremacy of Federal law.

*Amici Curiae American Civil Liberties Union, NAACP Legal Defense and Educational Fund, Inc., and Mexican American Legal Defense and Educational Fund.

Medicaid beneficiaries must have access to the courts to enforce the Equal Access Provision in order to uphold the rule of law and because judicial enforcement is the only viable means to remedy States’ noncompliance with the Medicaid Act.


If Court determines that there is no cause of action under the Supremacy Clause of U.S. Constitution, then no one will have judicial recourse in cases where federal law preempts laws enacted by State Legislatures.

Contrast between causes of action under Supremacy Clause and those brought under 42 U.S.C. § 1983 (Civil Rights Act).

III. Report from Oral Arguments

A. Principal questions for State Petitioner

- Justice Ginsburg: “the government doesn’t have injunctive power to stop the rate cuts, even if it thinks the state is violating the Medicaid law.”
- Justice Kagan: administrative process didn’t happen here because California “end-ran the administrative process, putting rate changes into effect before submitting them to the Department of Health and Human Services.”
- Justice Alito: “Congress never explicitly creates a right to sue in a case like this involving federal spending. Are you asking us to adopt a rule that’s good for this case only?”

- Justice Kennedy: “The courts have the prerogative, perhaps even the obligation, to freeze the status quo and simply withhold adjudication until the agency acts.” Justice Kennedy suggested that private lawsuits may serve a valuable role in supplementing federal enforcement, referring to a friend-of-the-court brief filed by former officials of the Department of Health and Human Services that said, “Fewer than 500 federal employees are today tasked with supervising 56 different Medicaid programs administering nearly $400 billion in federal funds every year.”
- Justice Sotomayor: “Private lawsuits under the supremacy clause have been commonplace since 1824.”

A. Principal questions for Provider Respondents

- Chief Justice Roberts: “Why can Phillips’ clients sue when Congress did not authorize lawsuits?”
- Justice Breyer: “What limits could there be under that theory? Wouldn’t there be lawsuits galore?”
- Justice Ginzburg: “You would be satisfied with a limitation that the court can issue an injunction pending the administrative procedure without going on to the substance of the questions?”

IV. Centers for Medicare & Medicaid Services – Federal Agency Enforcement of Section 30A’s Equal Access Mandate

A. State Plan Amendments Process –

- State Plan amendment (“SPA”) Requires Submission of SPA When Changes to “Methods and Standards”
- CMS has 90 Days to Approve, Deny or Request Additional Information
- Otherwise, Deemed Approved
- SPA can be Approved Retrospectively to the First Calendar Day of the Quarter Submitted
State Must Make Acceptable Assurances to CMS

Limited Waivers to SPA Submission/Approval
- Section 1915(b) waivers – potpourri of topics not relevant to LTC
- Section 1915(c) waivers – Home and Community Based Services
- Section 1916(a)(3)/(b)(c) on Cost-Sharing

Implementation of Unapproved SPAs Problematic for States
- California, Washington and Oregon – Can’t implement SPAs without CMS approval
- State Legislative Responses – California Example

Necessity of CMS Advocacy to Disapprove or At Least Request Additional Information to Buy Time

Use of Congressional “Champions” Given Lack of Transparency of the Process

Need for Legislative Action from Active Beneficiary/Provider Participation and Transparency into SPA Processes

Make Part of Any Medicaid Rate Strategy

B. Federal 1115 Waivers (42 U.S.C. Sec. 1315)

Section 1115 Demonstration Projects

Multiple Types of Waivers
- Experimental, Pilot or Demonstration Projects which “Promote” the Objectives of, Among Others, Title XIX (Medicaid)
- Experimental, Pilot or Demonstration Projects Under the Above Programs (Medicaid) that Would Result in an Impact on Eligibility, Enrollment, Cost-Sharing or Financing

Statewide Comprehensive Demonstration Project Under Title XIX (Medicaid)

CMMI/Waivers (Health Care Reform)

Tests for Waiver Compliance with Section 1315
- Whether Project is Experimental, Pilot or Demonstration
- Whether Project is Likely to Assist in Promoting the Objectives of the Act
- The Extent and Period for Which the Project is Necessary
C. Sec. 30A NPR
- Proposed Rule issued by CMS on May 6, 2011 to Interpret Section 30(A) Compliance for SPAs (76 Fed. Reg. 26392)
- Focused exclusively on “access” and not “efficiency, economy or quality of care” as described in Section 30(a)
- Sets for this “Corrective Action Plan” process that may Allow for the Equivalent of a “free bite”
- Need for Transparency in the Process
- Large Volume of Comments - Final Rule may not be out by end of calendar year 2011
- Final Rule will set up CMS review and advocacy for the future

D. SPA Disapproval -- Reconsideration Process
- Party Intervention and Amicus Curiae status - 42 C.F.R. 430.76
- State has Right of Appeal from SPA Disapproval
- Parties to the hearing include CMS and the State
- Other individuals or groups "may be recognized as parties”
  - If the issues to be considered at the hearing have caused them injury
  - Intent is within the zone of interests to be protected by the Medicaid Act
- Petition must be brought within 15 days of publication of notice of hearing in the Federal Register
- Even if denied, can still request amicus status but not as powerful as Intervenor Status

E. Court Review Process – Independent Living Centers SPAs at Reconsideration Phase – No ruling on Intervenor Status
- APA review of agency decisions on SPAs and Waiver Demonstration Projects
  - Beem v. Shalala, 30 F.3d 1057 (9th Cir. 1994) - Challenging Federal Approval
  - Case Arose in Context of a “waiver” as to AFDC Benefits
  - The waiver proposed a cut to AFDC recipients’ benefits
  - CMS approved the waiver
  - District Court Denied Consumer Injunction
On Appeal, the 9th Circuit reversed the Decision Finding that CMS Violated the Administrative Procedure Act ("APA")
APA Provides for Judicial Review of CMS approvals, including those of SPAs
Measured using an arbitrary and capricious standard – deferential
Record must be sufficient to support agency action, show that the agency has considered relevant factors and enable court to review agency decision

F. Recent Case Developments
McCants v. Betlach, 2011 WL 3689241 (9th Cir. 2011) – Rejecting Co-Payment Waiver
Case involves a Section 1315 waiver though in the context of an "expansion" program – one that covers individuals beyond that required by Medicaid
Had expanded coverage to these individuals but sought to increase co-payments
CMS approved the waiver
District Court Dismissed the Action, Beneficiaries appealed
Even though the coverage of affected individuals extended beyond Medicaid coverage, 9th Cir. Court of Appeals found the CMS approval to be unlawful
Applied APA requirements and determined that CMS failed to comply with its requirements

V. Contingency Planning
A. Favorable Supreme Court decision in Douglas
B. Unfavorable Supreme Court decision in Douglas
SPA Preapproval challenges
CMS Review process
APA challenges of SPA approval decisions
State court legal action