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42 U.S.C. § 1983 states:
“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.”

Enforcing Federal Rights Under Section 1983
New Barriers to Public Benefits and Related Litigation

by Vicki Gottlich, Gerald McIntyre, Herbert Semmel, and Ethel Zelenske

Advocates at programs funded by the Legal Services Corporation are all too familiar with the effect of litigation restrictions on their ability to represent their clients adequately. Limitations on class actions and representation on certain issues have forced advocates to think creatively about how to achieve the best result for their clients.¹

Recent decisions by the U.S. Supreme Court and several circuit courts of appeals add other potential barriers to litigation. They affect the issues that may be raised, the forum in which they must be raised, who can be named as a defendant, and the relief that can be requested. In this article we address several obstacles that may arise in the course of public benefits and related litigation and suggest possible ways to avoid them.

I. Sovereign Immunity and State Court Suits

In 1996 the Supreme Court, by a 5-3 majority, held that the Eleventh Amendment prohibited Congress, in the exercise of its powers under the Commerce Clause, from abrogating a state’s immunity from suit in federal court.² This past term, in *Alden v. Maine*, the Court held that Congress did not have the power under Article I of the U.S. Constitution to authorize suits against a state without its consent, even in state court.³ In doing so, the Court abandoned its oft-touted strict constructionist views and instead based its decision on the general structure and history of the Constitution.

A. *Alden v. Maine*

Plaintiffs were state employees who alleged that the state violated the overtime provisions of the Fair Labor Standards Act of 1938, authorizing private actions against states by aggrieved individuals seeking compensation.⁴ The Supreme Court held that Congress did not have the power under Article I to authorize such suits since “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.”⁵ The Court could not cite a specific provision

⁵ *Alden*, 119 S. Ct. at 2246–47.

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of the Constitution to support its conclusion but instead relied on its reading of the original intent of the Founders as determined from its reading of some of the Federalist Papers, debates of the state Constitutional Conventions, and accounts of English law in the 18th century.

According to the Court, sovereign immunity does not bar the following suits: (1) cases in which the state has consented to suit; (2) suits brought by other states or the federal government (in this case, ratification of the Constitution constituted consent); (3) suits authorized by Congress to enforce Fourteenth Amendment rights; (4) suits against municipalities or other lesser entities within a state; (5) certain actions against state officers for injunctive or declaratory relief; (6) suits for money damages against a state officer in his individual capacity for conduct attributable to the officer himself if relief is sought from the officer himself and not from the state treasury.

B. The Florida Cases

On the same day the Supreme Court decided Alden v. Maine, it decided two Florida cases in which federal legislation purported to abrogate the state’s sovereign immunity. In both cases the Court found that Congress lacked the power to do so.

In the Florida patent infringement case, Congress had amended the patent laws to make more explicit its intent to abrogate state sovereign immunity. Plaintiff argued that the abrogation of sovereign immunity was a valid exercise of congressional power under section 5 of the Fourteenth Amendment to enforce Fourteenth Amendment due process rights. Although the Court agreed that Congress had author-

ity under the Enforcement Clause to abrogate state sovereignty, it held that, to legislate pursuant to that clause, Congress “must identify conduct transgressing the Fourteenth Amendment’s substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.” The Court found insufficient instances of patent-infringement suits against the states and observed that Congress did not identify any pattern of patent infringement by the states. Further, a pattern of patent infringement alone would not suffice to justify the statute under the Enforcement Clause. While a patent is property within the meaning of the Due Process Clause, a patent infringement by a state is not unconstitutional unless the state fails to provide an adequate remedy. What is needed is a “history of widespread and persistent deprivation of constitutional rights.”

In the false advertising case, the Court found that the congressional abrogation of sovereign immunity could not be upheld under section 5 of the Fourteenth Amendment because no property interest was in protection from a competitor’s false advertising. Even more important, the Court rejected the proposition that there ever could be a constructive waiver of state sovereign immunity. This holding allows states to engage in any profit-making activity, and Congress may be powerless to provide private enforcement against states of the regulations that individuals and other competitors can enforce against private enterprises competing with the state. However, the Court’s opinion distinguishes this case from situations where Congress explicitly conditions a grant of funds on the state taking actions they could not otherwise be required to take.

7 Although Congress also cited the Commerce Clause as authority, it lacks power to act under that clause. Seminole Tribe of Florida, 517 U.S. at 44.
8 Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. at 2207.
9 Id. at 2217 (Citation omitted).
10 College Sav. Bank, 119 S. Ct. at 2226. The authority also could not be upheld under Article I in light of Seminole Tribe of Florida, 517 U.S. at 44.
11 College Sav. Bank, 119 S. Ct. at 2228. The Court expressly overruled its prior decision in Parden v. Terminal Railroad Company of Alabama (377 U.S. 184 (1964)).
The acceptance of the funds constitutes agreement to the actions.\textsuperscript{12}

The final reach of the Court's new federalism is far from clear and will take a number of years to be further refined. The Court already has sovereign immunity cases on the docket for its next term. It will be faced with the question of whether the Age Discrimination in Employment Act contains an abrogation of sovereign immunity that is sufficiently unequivocal and, if so, whether it was, or properly could have been, enacted pursuant to section 5 of the Fourteenth Amendment.\textsuperscript{13} The Court will also have to decide whether actions under the False Claims Act may be brought against states or their instrumentalities. The issues are whether a qui tam suit can be viewed as being brought by the United States and not subject to the Eleventh Amendment, and whether a state is a "person" within the meaning of the False Claims Act.\textsuperscript{14} Other challenges are sure to follow.

II. Choice of Forum, Administrative Review, and Res Judicata

As a result of the three new sovereign immunity cases discussed above, claimants possibly may no longer sue in state courts to recover back benefits in programs such as Medicaid or food stamps unless the state consents to be sued. Most states allow suit only under the state's administrative procedure act with its requirement to exhaust administrative remedies. Thus state administrative review, followed by state court review of the administrative decision, may be the only available way to obtain back benefits. Even if proceeding in a state system is not necessary to obtain the desired relief, plaintiffs using the state administrative process may obtain relief more quickly than by filing a federal lawsuit.

Exhaustion of administrative remedies is not a prerequisite to a Section 1983 suit.\textsuperscript{15} A person denied a federal right by a state or local government may proceed directly to federal court without resort to administrative remedies. However, if the claimant first seeks review in the state administrative system, the federal remedy may be precluded under general principles of res judicata. In Section 1983 cases 28 U.S.C. § 1738 requires federal courts to give preclusive effect to state court judgments.\textsuperscript{16} The same preclusive effect is given to state administrative rulings made by an agency acting in its judicial capacity and when the parties had an adequate opportunity to litigate the issues.\textsuperscript{17}

This language speaks only to the "collateral estoppel" or "issue preclusion" side of res judicata, but courts have since applied the preclusion rule to claims as well. For example, the Ninth Circuit recently applied claim preclusion in a case where a psychologist lost his license to practice in a state administrative proceeding, did not appeal to the state court, brought a 1983 action in federal court, and raised constitutional issues not raised in the administrative proceeding.\textsuperscript{18} The court held that the claims were precluded by the administrative decision because, under state law, an administrative decision was final and binding if not appealed to state court and because the constitutional claims could have been raised in the administrative proceeding. The decision was particularly severe because, unlike a typical Section 1983 case where plaintiffs have the choice of going directly to federal court, the plaintiff had to participate in the administrative proceeding in which his license was being revoked.

Because state administrative proceedings may bar a subsequent suit for

\textsuperscript{12} College Sav. Bank, 119 S. Ct. at 2231.
\textsuperscript{13} Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998).
\textsuperscript{14} United States ex rel. Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998).
\textsuperscript{16} Allen v. McCurry, 449 U.S. 90 (1980).
\textsuperscript{17} University of Tenn. v. Elliot, 478 U.S. 788, 799 (1986).
\textsuperscript{18} Olson v. Morris, 1999 WL 494023 (9th Cir. 1999).
federal rights under Section 1983, litigants who believe the federal court will bring better results in federal claims should consider skipping the state administrative procedures and proceeding directly to federal court. The client should be fully advised of the advantages of both state and federal proceedings and make the decision which way to proceed.

III. Problems in Due Process Litigation

The Supreme Court’s decision in American Manufacturers Mutual Insurance Co. v. Sullivan raises potential problems for litigation challenging the failure of a state or federal agency to provide beneficiaries with due process. 19 That case held that insurers under Pennsylvania’s workers’ compensation law were not required by the Due Process Clause to provide injured employees with a hearing before refusing to pay medical bills on the ground that the treatment was not medically necessary.

A. State Action

The due process requirements of the Fourteenth Amendment only apply to state action, which is present only if the alleged constitutional deprivation is caused by the exercise of some right or privilege created by the State. The party charged must be a person who is a “state actor.” 20 The Supreme Court found that the insurer in the Sullivan case did not meet the “state actor” requirement. Focusing on the nature of the deprivation, the Court framed the issue as “whether a private insurer’s decision to withhold payment for disputed medical treatment may be fairly attributable to the State.” 21 The Court found that Pennsylvania workers’ compensation law simply allowed, but did not require, the insurer to withhold payment. The decision is made by a private entity, the insurer. The Court also found that the state had not delegated to private insurers a traditionally exclusive governmental function—the provision of compensation to injured employees. 22

Although unnecessary to the decision, the Court also found that injured workers had no property interest in having medical bills paid for treatment that had yet to be found reasonable and necessary. The Court was influenced by the prior law which did not permit the insurer to recover for payments that were “patently unreasonable, unnecessary, and even fraudulent.” 23

Before the Sullivan ruling, courts had consistently held that actions by Medicaid and Medicare health maintenance organizations (HMOs), home health agencies, and other providers that deny patients constitutionally or statutorily protected rights constitute state or federal action attributable to the governmental agency involved. 24 After Sullivan, however, the Supreme Court vacated and remanded the Ninth Circuit’s decision in Grijalva v. Shalala, which found that the Health Care Financing Administration had failed to provide proper due process rights for Medicare HMO enrollees, for consideration of the state action issue in light of its new ruling. 25

The Health Care Financing

20 Id. at 985.
21 Id. at 986.
22 Id.
23 Id. at 990.
Administration has also argued, in a case challenging the government’s failure to give adequate notice and appeals protection to Medicare home health beneficiaries, that previous decisions concerning state action are not applicable in light of the new Sullivan standards.  

In public benefit litigation the Sullivan decision can be distinguished. The Pennsylvania law imposed an obligation on private employers, not on the state. Further, the workers’ compensation payments had replaced tort awards for injured workers and were not public benefits.  

In the context of Medicare, Medicaid, and other public benefit programs, the obligation to administer the program through the determination of eligibility criteria, the establishment of conditions that private providers must meet to participate in the program, and the requirement to comply with constitutional protections is more clearly that of the state or federal government and not the private entity.

The Court’s finding that plaintiffs had no property interest in their workers’ compensation benefits should also be distinguishable. The Sullivan decision acknowledged the existence of a property interest in federal welfare and social security benefits.  

Other benefit programs, such as Medicaid and Medicare, are more closely analogous to those two programs than to the workers’ compensation program. The court noted that in Goldberg v. Kelly and Mattheus v. Eldridge the individual’s entitlement to benefits had already been established. Advocates should consider arguing that entitlement to benefits had been established in their case, even if they are challenging the denial of a particular service covered under the benefit.

B. Adequate Notice

Governmental defendants may also argue that City of West Covina v. Perkins limits the extent of the notice to be given when public benefits are denied, reduced, or terminated. The Supreme Court ruled that the Due Process Clause did not require a notice that property had been seized pursuant to search and seizure to include the available remedies under state law to recover the property and information about how to invoke the remedies. While individualized notice that property has been taken is needed to inform the property owner about who is responsible for his loss, no notice of state remedies is necessary when information about those remedies is available through public sources.

The City of West Covina decision should not be extended to cases involving deprivation of public benefits, however. The interests in obtaining the return of seized property are not as great as the interests of recipients of public benefit programs in obtaining the benefits to which they are entitled. Furthermore, the Supreme Court based its decision in part on the fact that a more detailed notice about remedies available when property is seized exceeds the notice that state and federal law enforcement agencies are traditionally required to provide. The opposite is true in the context of public benefits, where courts and implementing regulations have traditionally required notices to include more detailed explanations of rights, including an explanation of appeals procedures.

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27 Sullivan, 119 S. Ct. at 988.
29 Id.
31 City of West Covina, 119 S. Ct. at 681-82.
32 Goldberg, 397 U.S. at 254.
33 City of West Covina, 119 S. Ct. at 682.
34 See, e.g., Goldberg, 397 U.S. at 254; Grijalva, 152 F.3d at 1122-23; Sarrasatt v. Sullivan, 1989 WL 208444 (N.D. Cal. 1989) (appeal from terminations of nursing home services).
IV. Effect of *Harris v. James*

In 1997 a class of Medicaid recipients brought under 42 U.S.C. § 1983 a claim stating that Alabama’s Medicaid plan did not comply with federal regulations requiring necessary transportation for recipients to and from providers.\(^5\)^ Plaintiffs alleged that under 42 C.F.R. § 431.53 a state plan was required to provide necessary transportation and to describe the agency methods used to meet this requirement.\(^6\) When the Eleventh Circuit reversed the ruling of the district court, and found that the regulation in question did not create any federal right enforceable under Section 1983, advocates were concerned about their future ability to use Section 1983 to obtain relief for their clients.\(^7\) Since then a number of federal circuit and district courts have read the *Harris* decision narrowly, avoiding so far the anticipated limitation to court access.

The Eleventh Circuit itself backed away from its holding in *Harris* the next year in a suit brought by Medicaid-eligible, developmentally disabled individuals challenging unreasonable delays regarding entry into intermediate care facilities.\(^8\) The court limited *Harris* to the narrow issue of whether Medicaid recipients had a federal right to transportation under Section 1983 and concluded that the transportation regulation had too tenuous a connection to the language of the statute to establish the existence of an enforceable right to transportation in the statute itself.\(^9\) The court, in finding that *Harris* did not decide the issue before it, was very careful to connect the language of the Medicaid statute requiring reasonable promptness with regulations specifying timeliness and benefits.\(^10\)

The Sixth Circuit rejected *Harris* both in the analysis of how to determine whether a statutory right existed and in the application of the analysis to Medicaid transportation policy.\(^11\) Because federal regulations have the force of law, the court ruled that they must be characterized as law under Section 1983.\(^12\) Then the court found that the content of the regulations clearly required states to “ensure that Medicaid recipients have transportation to and from medical service providers.”\(^13\)

Finding that regulation alone is not enough to create a federal right and that regulations are enforceable only if they define the substance of a statutory opinion, district courts have been more reluctant to depart from the *Harris* analysis.\(^14\) Whether the court finds an enforceable right depends upon the willingness of the court to construe the regulations closely with the statute.\(^15\)

V. Review Under 42 U.S.C. § 404(g)

For cases involving social security, Supplemental Security Income (SSI), and Medicare claims, judicial review under 42 U.S.C. § 405(g) is available only after the claimant has received a “final decision” from the Social Security Commissioner or Secretary of the Department of Health and Human Services (HHS). The “final decision” requirement consists of two ele-

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\(^5\) *Harris v. James*, 127 F.3d 993 (11th Cir. 1997).

\(^6\) Id. at 995.

\(^7\) The *Harris* court found the nexus between the regulation and congressional intent “too tenuous to create an enforceable right.” Id. at 1009. A valid regulation may merely define and flesh out the content of a right created by statute, so that the statute “in conjunction with the regulation” may create a federal right. Id.

\(^8\) Doe v. Chiles, 136 F.3d 709 (11th Cir. 1998).

\(^9\) Id. at 714.


\(^12\) Id. at 289.

\(^13\) Id.


ments. The nonwaivable requirement is that a "claim for benefits shall have been presented to the Secretary." The waivable requirement is that administrative remedies have been exhausted.

Obtaining a waiver of the exhaustion requirement is a critical element in class actions under 42 U.S.C. § 405(g), where each class member must meet the "final decision" requirement. However, exhaustion may be waived in individual cases as well. Advocates should be familiar with the waiver criteria so that, in appropriate cases, an appeal to court can be filed on behalf of an individual plaintiff before exhausting administrative remedies.

A. Presenting a Claim to the Commissioner

Filing a claim for benefits and obtaining "some decision" from the Commissioner satisfies the presentment requirement. Typically this requirement is met by filing a benefits application which has been denied. To satisfy this requirement, the plaintiff need not present the particular legal claim that is the basis of the lawsuit.

B. Exhaustion of Administrative Remedies

A court may waive exhaustion of administrative remedies—the second element of the "final decision" requirement—"where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." Courts generally consider three factors in determining whether waiver of the exhaustion requirement is appropriate. If all three factors are met, waiver of the exhaustion requirement is warranted.

The first factor is that when the issue is collateral to the substantive claim for benefits, the plaintiff does not ask the court to Muslim whether he or she is eligible for benefits. Courts have consistently found that claims of systemwide violations and challenges to the procedures by which determinations are made are collateral to claims for individual benefits.

The second factor is whether the plaintiff will suffer irreparable harm if required to exhaust administrative remedies. Denial of benefits results in the failure to receive income needed to purchase basic necessities of life. The Sixth Circuit stated, "[S]uffering months of delay in receiving income on which one has depended for the very necessities of life cannot be fully remedied by the restoration of back benefits."

The third factor involves a determination whether requiring exhaustion serves the policies underlying the exhaustion requirement. Exhaustion is generally required to prevent premature interference with agency decision making so that the agency may have an opportunity to correct its own errors; the parties and the courts are afforded the experience and

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47 Id.
49 E.g., Mathews, 424 U.S. at 328.
50 See id.
52 Bowen, 476 U.S. at 483 (quoting Mathews, 424 U.S. at 330).
53 Id. at 483–85.
55 Bowen, 476 U.S. at 483–84.
56 Day, 23 F.3d at 1059–60. See also Johnson v. Shalala, 2 F.3d at 918; Schoolcraft, 971 F.2d at 81; Marcus, 926 F.2d at 604; Bailey, 885 F.2d at 52; Hyatt, 807 F.2d at 380; Avery v. Heckler, 584 F. Supp. 312, 319 (D. Mass. 1984).
Collaborating with a National Support Organization

Imagine the following scenario: You are a legal services attorney who has just interviewed a client terminated from Medicaid by the local welfare office. You believe that your client's benefits were terminated improperly and that ultimately your client will prevail if you pursue the matter administratively.

But even if your client resecures coverage, you know that this will not likely change the state's Medicaid practice and that hundreds of recipients will continue to suffer from wrongful termination. But now it is going to be different, you say. This time you will bring a lawsuit to stop the practice once and for all.

Then you begin the hard analysis. You consider practical factors that militate against bringing suit on the issue:

- You do not have the time.
- Your project director says that your organization lacks resources to undertake extensive litigation.
- You wonder, "What, if any, would be the effect of the suit?"

In cases like this, the National Senior Citizens Law Center (NSCLC) can help.

In an era of tight funding for equal-justice causes, advocates face unprecedented hurdles to effective representation. No Legal Services Corporation (LSC) funding exists for support or for manuals, current materials, and periodicals. Training events largely are cut back. Contact among advocates has diminished. Most troublesome of all are the current restrictions on class actions, welfare litigation, and recovery of attorney fees. So what is a legal services attorney to do?

One recourse is to use support resources fully. Successful collaboration between centers and local programs is still practical. Support centers continue to function without LSC funding and restrictions. Many, like NSCLC, litigate and want to maintain regular contacts with advocates in field programs to help them do so as well. Start by calling a support center to consult informally with another attorney on a case. NSCLC and most other support centers do not charge legal services programs for case consultation.

Talking through a case can lead to filing suit under a cocounseling arrangement. Cocounseling with NSCLC or another support center can offer several advantages:

1. Case Assessment. Talking through a case with another attorney who is familiar with the law in that area is one of the most important needs faced by any attorney. Talking with an attorney specialist helps identify the most relevant facts, frame the legal issues, and pose strategies. An issue is often revealed as being controlled by standards found in circulars, opinion letters, and unpublished agency documents not readily available to the local practitioner.

2. Federal Court Practice. Strategy in litigating a public benefits claim may include recourse to federal court. Many legal services attorneys, however, are unfamiliar with federal courts and procedures and may be reluctant to file a case in federal court, even if it would best serve a client's interests. A support center attorney as cocounsel can open up the federal courts as an alternative forum and introduce the local attorney to federal practice.

3. Representing Groups. A case may invite treatment as a class action to avoid a risk of mootness and to secure uniform relief. The LSC restriction on class actions need not prevent a recipient program from addressing these concerns. For example, an eligible client group may seek injunctive relief on behalf of its members in a manner that secures full prospective relief and avoids the prospect of mootness that results from the defendant providing relief to individual plaintiffs. See 45 C.F.R. § 1611.5(c). Documenting group eligibility and members' injury takes extra work, of course, but this can be addressed with additional cocounsel.

4. Discovery Resources. Many public benefit challenges can require extensive discovery in establishing an administrative agency's policy and practice. Discovery, particularly by deposition and document inspection, can become labor intensive. NSCLC support as cocounsel in such a case allows the case to go forward where otherwise doing so would be impractical. NSCLC creates a training device in discovery procedure for less experienced attorneys.

5. Attorney Fees. The LSC restriction on recovery of attorney fees carries a double whammy: It deprives a recipient of a source of needed revenue to replace funds it has expended. Worse, it removes a major incentive

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Collaborating with a National Support Organization (cont'd)

for a government agency to settle a case in which a plaintiff seeks equitable relief but not damages. The result is to withhold from any plaintiff who is represented by a legal services program a huge bargaining chip that all other plaintiffs have available. With NSCLC as cocounsel, the prospect of a fee award returns; the plaintiff's bargaining chip is restored.

Collaboration between NSCLC and local programs as cocounsel in litigation continues to be mutually helpful. What does NSCLC litigate? NSCLC litigates in courts across the country in substantive and procedural areas affecting the rights of older persons and persons with disabilities, Medicaid, Medicare, nursing homes, home care, other long-term care, health insurance, social security, Supplemental Security Income, pensions, Age Discrimination in Employment Act, Older Americans Act, attorney fees (court awarded), federal court jurisdictional and procedural issues, and the California cash assistance program for immigrants.

What is the NSCLC role in litigation? NSCLC's exact litigation role is determined by the nature of the litigation and the needs and desires of local counsel. Its roles include lead counsel, cocounsel with legal services provider, cocounsel with private law firms, sole counsel in cases referred by legal services programs, appellate counsel, expert witness, and consultant on an elder law issue.

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expertise of the agency; and a record, adequate for judicial review, is compiled.\textsuperscript{57}

None of these underlying purposes for exhaustion is served when the plaintiff challenges an agency policy. Allegations that a systemwide policy is inconsistent with the law cannot be remedied through administrative review since a policy does not depend on the particular facts of the case.\textsuperscript{58} When agency policy is pronounced through instructions or regulations, a systemwide challenge to a policy in an individual case is unlikely to result in having the policy overturned or in benefits being restored through the administrative process.\textsuperscript{59} When exhaustion is futile, "there is[,]" according to the Supreme Court, "nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise."\textsuperscript{60}

\textbf{C. Attempts to Limit Waiver of Exhaustion}

Believing that waiver is to be applied only in the rarest of circumstances, the government consistently and vigorously has fought waiving exhaustion, despite the overwhelming case law in support of waiver. In an individual case the representative should be prepared for the government to file a motion to dismiss for lack of section 405(g) jurisdiction due to failure to exhaust administrative remedies.

In its petition for \textit{certiorari} in \textit{Schoolcraft v. Sullivan}, the government argued that the circuit courts, unanimously at the time, had read \textit{Bowen v. City of New York} overbroadly and that exhaustion should be waived only where there were "unique circumstances," such as where a clandestine policy existed (re futility) or where plaintiffs suffered severe medical setbacks.

\textsuperscript{57} \textit{Bowen}, 476 U.S. at 484.
\textsuperscript{58} \textit{Id.} at 485.
\textsuperscript{59} See \textit{Johnson v. Shalala}, 2 F.3d at 922–23; \textit{Marcus}, 926 F.2d at 614.
\textsuperscript{60} \textit{City of New York}, 476 U.S. at 485. The futility of exhausting administrative remedies where there is a final agency position has also been found to result in irreparable harm. See \textit{Titus v. Sullivan}, 4 F.3d 590, 593 (8th Cir. 1993); Johnson \textit{v. Sullivan}, 922 F.2d 346, 353 (7th Cir. 1990).
(re irreparable harm). The Supreme Court denied the petition.

In a class action challenge to the Alabama Disability Determination Service’s disability determination process, the Eleventh Circuit became the first circuit court to refuse to waive exhaustion. The court declined to apply the three-part test for waiver used in Bowen v. City of New York and limited the waiver-of-exhaustion holding in Mathews v. Eldridge to constitutional challenges. The court then distinguished City of New York by asserting that the named plaintiffs in that case had exhausted administrative remedies and that the only question was whether the class could include those who had not exhausted such remedies. However, this appears to be a misreading of City of New York since the district court decision makes it clear that the named plaintiffs had not exhausted administrative remedies when the action was filed.

The Third Circuit held that a claim for interim benefits based on Appeals Council delay is not collateral to the claim for final benefits. While this reasoning seems consistent with all but the Eleventh Circuit’s reading of City of New York, the more troubling aspect of the case is that, although plaintiff filed an application for benefits, she did not request interim benefits from the Social Security Administration (SSA) pending the outcome of the proceedings. The Third Circuit stated, “The failure to raise such a claim violates the nonwaivable jurisdictional aspect of exhaustion and is fatal to her claim.”

In practical terms, this holding may be less problematic than it appears. Typically, if counsel is planning to challenge a policy, he or she will raise it before SSA, whether before an administrative law judge (ALJ) or the Appeals Council or in a letter to an SSA official, to obtain a response from the agency. This would appear to address the Third Circuit’s concerns.

D. Claims Against Medicare Providers

Alleging violations of various state and federal laws, Medicare beneficiaries have begun to bring both individual and class action cases directly against Medicare providers such as HMOs and home health agencies. Although these cases do not involve claims for Medicare benefits, the defendant providers often remove the cases to federal court and contend that the claims should be dismissed because plaintiffs have not exhausted their administrative remedies as required under section 405(g).

In coughing these tort, discrimination, and contract violation claims as claims for Medicare benefits, providers attempt to limit their liability for injuries. If they can show that the claim is really a claim for Medicare benefits, then the only relief available to the beneficiary is provision of or payment for the Medicare benefit, and only after the beneficiary has gone through the appropriate Medicare appeals process. While the characterization of a damage claim as a claim for benefits may successfully limit liability in lawsuits against private employer-sponsored health

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61 Schoolcraft, 971 F.2d at 81.
63 Crayton v. Callahan, 120 F.3d 1217 (11th Cir. 1997) (Clearinghouse No. 50,132).
66 Id. at 234-35.
plans, such characterization has not met much success in the Medicare context.  

The Medicare Act does not require beneficiaries who seek a remedy against health care providers because of inadequate care to initiate administrative review of those claims by the Secretary of HHS simply because Medicare happened to pay for the care. The Medicare claims and appeals process applies only to claims for Medicare benefits that are based on the Medicare Act and are against the Secretary of HHS.  

If claims are not against the Secretary and not for Medicare benefits, but are based on other state or federal law, then the Medicare claims and appeals process does not apply.

The leading case, Ardary v. Aetna Health Plans of California Inc., involved state law claims of negligence, misrepresentation, negligent/intentional infliction of emotional distress, and wrongful death against a Medicare HMO for its failure to approve an airlift for a Medicare beneficiary who suffered a heart attack. The court unanimously concluded that plaintiffs could proceed on the state law claims because their claims for damages were not brought under the Medicare Act but under state common-law theories. Damages were sought against the health care provider for failing to come through with promised services and not against the Secretary for deciding not to cover a given procedure. That the Medicare program was the ultimate source of reimbursement was irrelevant to the state law claims.

Beneficiaries have also been able on the basis of other federal laws to proceed in federal court on claims against health care providers. In Winkler v. Interim Healthcare Inc. the court concluded that the case was primarily a challenge to the termination based on an improper or discriminatory criterion of home health care services, not a case about whether plaintiffs were entitled to Medicare benefits. Likewise, in Zamora-Quezada v. Health Texas Medical Group, the court concluded that the discrimination claims, though against a Medicare HMO, were not related to the furnishing of Medicare benefits.

VI. Issues Not Raised Before the Appeals Council

A number of recent circuit court decisions have addressed whether social security and SSI claimants may raise issues in federal court for the first time. Some courts have held that issues not raised before the Appeals Council are considered waived and will not be considered by the court—the “issue preclusion” doctrine. At least one commentator has questioned

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69 General Accounting Office (GAO), ERISA’s Effect on Remedies for Benefit Denials and Medical Malpractice (GAO/HEHS-98-154) (July 1998). The appendix to the GAO report contains an excellent summary of many of the major cases in this area.

70 The Medicare appeals process also applies to claims against the Secretary of Health and Human Services that are “inextricably intertwined” with a claim for benefits, e.g., when suit is brought challenging the failure of Medicare to cover a certain surgical procedure. Heckler v. Ringer, 466 U.S. 602 (1984).

71 Ardary, 98 F.3d at 496.


75 See, e.g., James v. Chater, 96 F.3d 1341 (10th Cir. 1996); Paul v. Shalala, 29 F.3d 208 (5th Cir. 1994); Pleasant Valley Hosp. v. Shalala, 32 F.3d 67 (4th Cir. 1994) (Medicare case); Pope v. Shalala, 998 F.2d 473 (7th Cir. 1993). But see Limberopoulos v. Shalala, 17 F.3d 975 (7th Cir. 1994) (statement—to Appeals Council—challenging residual functional capacity finding of administrative law judge (ALJ) was adequate).
whether this doctrine should even apply in social security proceedings. Because appeals of Medicare decisions go through the same appeals process, the issue is also relevant for federal court appeals of Medicare determinations.

The Fifth Circuit held that the failure to raise an issue before the Appeals Council deprived the court of jurisdiction to consider the issue. The issue raised was the ALJ’s failure to allow the treating physician to supplement his or her initial report. At the Appeals Council plaintiff argued that the ALJ did not give adequate weight to the treating physician’s report. However, the Fifth Circuit found that this argument was “distinct” from the issue of the failure to supplement the report.

The Ninth Circuit held recently that represented claimants “must raise all issues and evidence at their administrative hearings in order to preserve them on appeal.” The only excuse for failure to comply with this rule is if manifest injustice will occur. This holding is particularly troublesome because it can be read to require that issues be raised at the ALJ level as well as before the Appeals Council. The court relied on an earlier Ninth Circuit Medicare case that dealt with the failure to raise an issue before the Appeals Council and not with the ALJ.

A district court within the Tenth Circuit refused to apply that circuit’s ruling on issue preclusion retroactively, where the circuit precedent was issued after the administrative appeals were final. Noting the circuit court’s concern that claimants be given notice that issues not raised may be deemed waived, the court also noted that the ALJ’s decision did not inform the claimant that the failure to raise issues before the Appeals Council might result in waiver.

To avoid issue preclusion, advocates who represent social security, SSI, and Medicare claimants need to remember to raise the issue(s) before the Appeals Council or Departmental Appeals Board or risk having the court refuse to consider them. They also should be as specific as possible. A general statement that “I am disabled and entitled to benefits” does not alert the Appeals Council to the specific points subsequently raised in court. If the claimant was unrepresented or when “manifest injustice” would occur, advocates need to argue that waiver should not apply. Representatives may want to argue that the ALJ notice of decision does not inform the claimant that waiver may apply if issues are not raised with the Appeals Council. This argument may be difficult to win when there is a clear circuit court pronouncement on the issue.

VII. Conclusion

Whether bringing an individual suit or a large class action, in federal court or state court, before or after exhausting administrative remedies, seeking damages and/or declaratory or injunctive relief, an advocate would do well to consider the potential new barriers to litigation that may be placed in her way. Careful preparation and thorough reading of recent decisions should help avoid the new pitfalls to litigation.

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77 29 U.S.C. § 405. Medicare, social security, and Supplemental Security Income claims are all heard by the same corps of ALJs. Since the Social Security Administration has become an independent agency, appeals of Medicare ALJ decisions go to the Health and Human Services Departmental Appeals Board rather than the Appeals Council.
78 Paul v. Shalala, 29 F.3d 208 (5th Cir. 1994).
79 Meanel v. Apfel, 172 F.3d 1111 (9th Cir. 1999).
80 Meanel, 172 F.3d at 1115, relying on Avol v. Secretary of Health & Human Servs., 883 F.2d 659 (9th Cir. 1989).
82 Id.