Increased Access to Court for People with Disabilities
“SUPREME LAW”

For Medicaid Patients or Just Business?

By Simon Lazarus

 unnoticed amid recent serial blockbuster oral arguments, the U.S. Supreme Court on March 20 issued a game-changer of a decision, portending large doctrinal and real-world reverberations. On its face, the case, *Wos v. E.M.A.*, presented simply a granular, brow-furrowing question about the federal Medicaid statute. But the court’s opinion reached out to resolve—or at least, to signal how a majority is prepared definitively to resolve—a broad underlying issue at the heart of a long-running, nastily contentious and highly consequential constitutional war. This decades-old row has engaged rival doctrinal theories about whether spending clause–based (mainly, safety net) laws are “the supreme law of the land,” or some second-class species of enactment. At stake, in practical terms, is whether the supremacy clause empowers individual beneficiaries to get into court to redress state violations of Medicaid or other federal spending clause–based statutory requirements—in the same way that the court has repeatedly empowered business interests to seek to “pre-empt,” i.e., invalidate, as inconsistent with overlapping federal regulatory statutes, nettlesome state consumer, employee, and similar statutory and common-law safeguards.

This is not just inside-baseball for litigators. Keeping states accountable to federal judges is crucial for making federal patient protections available, in fact as well as on paper, for the more than sixty-two million Americans—approximately one in five—dependent on Medicaid. And Obamacare could soon expand that number by fifteen million or more.

In *E.M.A.*, a young North Carolina resident and Medicaid beneficiary, allegedly injured at birth by an obstetrician’s negligence, challenged a state law recouping, on behalf of the state’s Medicaid program, one-third of the $2.8 million settlement she obtained in a tort suit against the obstetrician. Her claim was that the North Carolina law violated a federal requirement that bars state Medicaid programs from seizing more than that portion of tort recoveries attributable to a recipient’s medical expenses.

Somewhat surprisingly, a 6-to-3 majority ruled in her favor, including ordinarily conservative Justices Anthony Kennedy, who wrote the opinion, and Samuel Alito Jr. More noteworthy, Kennedy’s opinion did not stop at assessing the specific textual conflicts between the challenged North Carolina law and the pertinent Medicaid provision. He went on to recite the boilerplate foundations for supremacy clause–based preemption. Under the supremacy clause, he began, citing 2011 and 2012 business-initiated, regulatory statute–based preemption rulings, “Where state and federal law ‘directly conflict,’ state law must give way.” North Carolina’s statute, he continued, runs afoul of that rule, and is therefore pre-empted. “And,” he added with gratuitous emphasis, “it is pre-empted for that reason.” Asserting that the North Carolina law

[Editor’s Note: See preceding introductory piece by Rochelle Bobroff, Director, Access to Courts Program, Constitutional Accountability Center.]
“arbitrar[ily]” labeled one-third of a Medicaid recipient’s tort recovery as conclusively “representing payment for medical care,” he scolded. “Preemption is not a matter of semantics.”

With these flourishes, Kennedy seems to have been intent on making indelibly clear that the decision implicitly answers the elephant-in-the-room question—Does the supremacy clause authorize preemption by a federal spending clause–based law that itself contains no express right of action?—and that the answer is yes. This reading appears especially compelled, because, barely a year ago, the Supreme Court quite awkwardly ducked that very question, in Douglas v. Independent Living Center [of Southern California Incorporated], a case that, unlike E.M.A., garnered considerable attention. In Independent Living Center, after months of dithering, a 5-to-4 majority issued a muddled decision that backed off actually resolving the supremacy clause preemption question presented by the parties. Chief Justice John Roberts Jr.’s dissent, for himself and three other members of the conservative bloc (not including Kennedy), embraced a theory, devised in 1997 and 2003 by Justices Antonin Scalia and Clarence Thomas, that would strip from spending clause–based statutes the power to authorize individual preemption suits.

In E.M.A., if the memory of last year’s Independent Living Center anticlimax was not enough to remind the justices of the background Medicaid/spending clause preemption conundrum, prominent amici curiae raised it squarely. Texas’ chronically aggressive attorney general’s office, on behalf of itself and ten other states, filed an amicus brief brandishing the Scalia-Thomas theory. Solicitor General Donald Verrilli’s E.M.A. brief for the Department of Justice dismissed that claim in a footnote—evidently to repudiate his immediate predecessor, Acting Solicitor General Neal Katyal, for his decision last year in Independent Living Center to side with Scalia and Thomas. (Katyal’s decision had, according to news reports, bucked fierce opposition from Health and Human Services Secretary Kathleen Sebelius, Rep. Henry Waxman (D-Cal.), “every health policy professional in the administration,” and progressive advocates and academics.)

More than a decade ago, beneficiary advocates first turned to preemption to secure court access, in the wake of the high court’s drastic narrowing of 42 U.S.C. § 1983 in the 2002 case Gonzaga v. Doe. Section 1983 had long served civil rights and safety-net plaintiffs as the jurisdictional vehicle for enforcing federal statutory rights against state governments. By 2010 this preemption approach had won acceptance from all federal circuit courts of appeal. But when the Supreme Court granted certiorari in Independent Living Center, it appeared poised to overrule the lower courts and bar safety-net beneficiaries from invoking preemption. And, although five members of the court, including Kennedy, stepped back from that brink, at least one court has followed the Douglas dissent as if it were, or soon would become, the law. In E.M.A. the court seems to have curtly scuttled that prospect.

Note on the Author
Simon Lazarus is senior counsel to the Constitutional Accountability Center, a public interest law firm, think tank, and action center.

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