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FISCAL IMPACT REPORT

SPONSOR: Martinez DATE TYPED: 3/5/03 HB 601

SHORT TITLE: Private Enforcement on Long-Term Care Act SB

ANALYST: Dunbar

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
			See Narrative		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

Responses Received From
 Department of Health (DOH)
 Health Policy Commission (HPC)
 Human Services Department (HSD)
 State Agency on Aging (SAA)

SUMMARY

Synopsis of Bill

House Bill 601 establishes the right of persons to enforce the statues and rules applicable to long term care facilities by way of civil action or injunctive relief. This includes awarding punitive damages for the facility’s “violation of a federal or state statute or rule.” In addition, this bill would permit residents to enforce state and federal statutes and rules, even in the absence of any actual harm, by way of civil action or injunctive relief, and provides minimum awards of no less than \$1000 together with attorney fees. In short, this bill creates a new legal cause of action, and the *prima facie* case is established merely by proof that the Department of Health (DOH) found *at least one* regulatory violation during its required inspection of the facility

Significant Issues

DOH states that the bill’s provision for private enforcement of **federal** Medicare and Medicaid rules would appear to be preempted by the federal statutory enforcement scheme.

The Medicaid Act itself creates no express private right of action in beneficiaries against private participating long term care providers, nor does it appear that an implied private right of action against a private provider exists. Harding v. Summit Medical Center, 41 Fed. Appx. 83, 2002

WL 1453743 (9th Cir.). This bill would create such a right to enforce federal Medicare and Medicaid rules against Medicare and Medicaid long term care facilities. The federal Medicare and Medicaid scheme has an existing comprehensive enforcement mechanism for remedying violations of Medicare and Medicaid requirements applicable to long term care facilities. Thus, under the supremacy clause of the Constitution, the federal Medicare and Medicaid law would likely be viewed as preempting the right that this bill would seek to establish in private Medicare and Medicaid beneficiaries to sue for violation of federal Medicare and Medicaid requirements. Wallace v. Estate of Jackson, 972 P.2d 446, 357 Utah Adv. Rep. 11 (Utah 1998).

The Department of Health, Health Facility Licensing and Certification (HFL&C) Bureau currently is understaffed. HFL&C is charged with “surveying” or inspecting all the facilities that fall within the scope of this bill. The activities of these state surveyors will be, in effect, performing free discovery for attorneys. DOH expresses concern that these surveyors will become government paid investigators who will be called upon to “prove” the violation of the applicable statute or rule. DOH states that any regulatory violation – no matter how minor – is actionable, and there is no incentive not to sue, since any lawyer will get awarded “reasonable attorney fees” for prevailing in proving even the most minor violation, and will have free governmental investigators and witnesses.

The workload of the HFL&C’s staff, according to DOH, will inevitably increase under this bill. The increase in work will hinder HFL&C’s abilities to meet existing statutory duties. For example, surveyors time will be required (1) in responding to attorneys for free discovery under the Inspection of Public Records Act; (2) in preparation for, and in appearing in depositions; and, (3) in testifying in trials -- all for the mere cost to the plaintiff of a witness fee (which is a “cost” that the prevailing party will be awarded).

Conversely, the SAA indicates that:

- The bill does not require a finding of a violation by the agency, but rather permits the person bringing the action to prove the violation.
- The bill requires the movant to prove “injury” which is described as physical harm, pain or mental suffering. Because some courts have refused to acknowledge that mental pain or suffering equals actual harm, the bill makes clear that these types of harms constitute injury for purposes of bringing a successful case.
- Federal law does not prevent enforcement of regulations, because the regulations establish duty.
- This will have no impact on the HFL&C – the bill merely provides an enforcement mechanism for violations that the agency has not caught and corrected.

FISCAL IMPLICATIONS

The cost to the Department of Health could be significant in additional legal time, surveyor time and additional employees.

ADMINISTRATIVE IMPLICATIONS

The potential for an increase in litigation provides the potential for increased requests by attorneys for HFL&C documentation, and for DOH surveyors who would need to witness in private litigation because these surveyors could be the only witness able to testify about situation at the health facility and the fact such a situation constitutes a “violation of a federal or state statute or

rule.” This increase in litigation would result in HFL&C Bureau staff time spent in records research and copying being diverted from their primary licensing and certification tasks.

RELATIONSHIP

Relates to HB535, Coordinated Investigations of Abuse, which requires coordinated investigations of abuse neglect and exploitation in health care facilities, including long-term care facilities.

TECHNICAL ISSUES

DOH points out that the definition of long-term care facility is broad and should be narrowed to exclude Home and Community Based Service (HCBS) providers. HCBS providers are not facility based and should be excluded from this definition. The definition of injury is inconsistent with other statutory definitions.

The legality of the bill is questionable, according to DOH, in that it seeks to provide a private right to enforce federal Medicaid and Medicare statutes and regulations.

OTHER SUBSTANTIVE ISSUES

Critics of the way nursing homes are overseen in New Mexico allege:

- The four NM State agencies (Department of Health, Medicaid Fraud Unit of the Office of Inspector General, Adult Protective Services of CYFD, and the State Agency on Agency) designated to police nursing do not work together.
- The system called “joint protocol” does not outline how these four agencies are supposed to work together, or who is responsible for preserving evidence of possible crimes. It doesn’t explain when or under what circumstances an agency should notify law enforcement.
- The General Accounting Office of Congress issued a report that 19% of New Mexico nursing homes have violated federal and state regulations by causing actual harm to their residents. (“Policing of Nursing Homes Often Lost in a Bureaucratic Maze.” Albuquerque Journal, 12/8/02).

According to the Department of Health, Division of Health Improvement Incident Management System Trends Data Report, SFY 2002:

- The number of total reported cases of abuse, neglect, exploitation, emergency services, environmental hazards, law enforcement involvement and death has steadily increased since SFY 1999.
- In SFY 2002 there were 2,384 reported cases of abuse, neglect, exploitation with only 477 confirmed cases.

HPC indicate’s that:

- HB601 will provide long-term care patients/residents another option for redress of grievances relating to deviations from the standards of care within long term care facilities.

- Two rural facilities, one in Santa Rosa and another in Ruidoso, came close to closing their doors last year due to financial difficulties. The Santa Rosa facility is currently being operated by the Department of Health and is in receivership. Access to existing nursing facilities could be compromised further with more expenses and management attention devoted to legal action versus solving fundamental financing, recruitment, training and retention issues that this industry has currently.
- Many of the facilities in NM are experiencing financial difficulties. Some of the NM nursing facilities are owned or operated by Beverly Enterprises, Integrated Health Services, Kindred Healthcare, or Sun Healthcare, all of who are under bankruptcy protection or are close to emerging from bankruptcy.
- The additional financial concerns raised by the prospect of unlimited liability suits could work to discourage long term care facilities from locating or remaining in New Mexico, ultimately defeating the purpose of the bill, which is to provide better long term care in the state.

AMENDMENTS

SAA proposes the following amendment to address issues of the DOH:

Add a Section 4.E. stating:

This statute does not provide a right of action for any regulatory violations that has been identified and is in the process of being corrected, or which a regulatory body has corrected. However, if a violation has been identified but not corrected by the facility, a private right of action to enforce the violated regulation will be permitted.

Recommend the exclusion of Home and Community Based Service Providers, since they do not provide facility-based services.

QUESTIONS

Does this bill have the potential of increasing the cost of providing care?

BD/yr:sb