F I S C A L I M P A C T R E P O R T

SPONSOR: Hurt DATE TYPED: 3/03/03 HB

SHORT TITLE: Recovery of Medical Assistance Payments SB 299

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

Human Services Department (HSD)

SUMMARY

Synopsis of Bill

Senate Bill 299 changes the language of the Public Assistance Act, NMSA § 27-2-23, para. B, as follows: "…[HSD] is subrogated to any right of the recipient against a third party for recovery of one hundred percent of the medical expenses ~~to the extent that~~ for which the department has made payment."

Significant Issues

The intent of SB 299 is to require that Medicaid be reimbursed 100% anytime a Medicaid recipient makes a recovery from a liable third party. The statutory section of SB 299 that would be modified is one of two requiring that Medicaid be reimbursed by liable third parties.

HSD reports that suits that result in Third Party Liability (TPL) recoveries for Medicaid are not brought by Human Services Departments (HSD) directly against the liable third party; rather, HSD asserts its claim after a personal-injury suit is brought (or threatened) by a private attorney, acting on behalf of the injured Medicaid recipient, against the liable third party. Currently,

amounts recovered by Medicaid in these cases are negotiated with the recipient's attorney and are highly variable depending on the individual circumstances.

As an example, Medicaid might pay medical expenses of $200,000; the injured recipient might only recover $50,000 (due to an insurance policy limit) from the person who caused the injury; and the severity of the person's injuries (including pain and suffering, lost income, etc.) might be "worth" $1 million if the case were to go before a jury. In this example, Medicaid would probably only be able to negotiate a settlement of a few thousand dollars under the present system. It is apparently the intent of SB 299 that Medicaid would be entitled to the entire amount Medicaid has paid in medical expenses.

For calendar year 2002, the Medical Assistance Division (MAD) recovered $1.9 million on subrogation Tort claims of the $5.4 million that were billed. In many Tort claims, the subrogation Lien amounts were greater than the Medicaid client settlements. Between 30% and 45% of the settlement claims goes to attorney's fees and related costs. The remainder goes to the lien and the client, usually about ? each. Basically the settlement is divided three ways so that the client and HSD recover same amount.

In summary, passage of SB 299 might provide HSD with slight additional leverage in negotiating TPL recoveries, but is probably insufficient to legislatively overturn the existing case law that governs this area (Reference is made to "technical issues" below).

FISCAL IMPLICATIONS

According to HSD, the passage of SB 299 might result in marginal increase in negotiated TPL Medicaid recoveries.

TECHNICAL ISSUES

While the goal of increasing third party liability (TPL) recoveries is financially desirable for HSD, the department notes the following problems with the approach of SB 299:

1. Relevant state case law, in particular *Kahrs v. Sanchez,* 125 N.M. 1 (Ct. App. 1998), holds that courts may apply equitable principles in apportioning TPL recoveries among Medicaid, the injured Medicaid recipient and their attorney. While *Kahrs* is lacking in specific guidance as to how these equitable principles ought to be applied, it has been accepted that the injured Medicaid recipient's attorney is probably entitled to take the usual 33-40% of the recovered amount as his or her fee. Next, partly as a matter of sympathy toward the injured plaintiff and lack of sympathy for "deep-pocket" HSD, in the above example, the court is unlikely to order that all of the balance (after attorney fees) of the recovered amount be turned over to Medicaid, leaving the injured Medicaid recipient with no recovery for pain and suffering, etc., and no compensation for taking the trouble of bringing the lawsuit in the first place.

   From HSD's point of view, a carefully drafted statute could undo the financial effects of Kahrs lawsuit, as written SB 299 is insufficient for the HSD. First, it is not clear that SB 299's "one hundred percent" language is significantly different from the deleted "to the extent that" language. That is, "one hundred percent" of medical expenses are arguably the same as "to the extent" of medical expenses paid. Thus, a court taking a new look at

the TPL issue in light of SB 299 would probably reach the same conclusion as the *Kahrs* court.

2. Second, SB 299 would leave § 27-2-23 stated in terms of "subrogation," which is an equitable concept. Equity is the principle that allows a court great leeway as to what it considers a fair result in given circumstances. Removing or changing the "is subrogated to.." language would at least allow HSD to argue that the court must reach a certain result rather than factor in its unquantifiable version of what it considers fair, usually at HSD's expense.

3. Third, SB 299 addresses only one of the two statutes requiring Medicaid to be reimbursed. The other is found at NMSA 1978, § 27-2-28 G. While § 27-2-23 (the one SB 299 would modify) is stated in terms of "subrogation," § 27-2-28 G. is stated in terms of "assignment of rights." The existence of the latter section did not stop the *Kahrs* court from allowing equitable principles to be applied to reduce Medicaid's reimbursement below 100%, thus § 27-2-28 G. probably would also need to be modified in order to accomplish SB 299's goal.

4. Finally, there is ongoing litigation in the U.S. Supreme Court that might have nationwide implications with respect to states' rights to be reimbursed for Medicaid expenditures. Last fall the Court agreed to review *Minnesota v. Martin*, a Minnesota state court case that construed Minnesota's Medicaid "lien law" so as to limit Medicaid's recovery. The state court used a "bundle of rights" view of tort recoveries to rule that Medicaid, in spite of Minnesota's seemingly strict law requiring Medicaid reimbursement, could only exercise its claim against that portion of the plaintiff's financial recovery that was intended for medical expenses, not from the entire award that included compensation for pain and suffering, lost income, loss of consortium, and other specific items. New Mexico's statutes on Medicaid recovery do not reach the level of a "lien law," which would be the best way of ensuring greater recoveries in TPL Medicaid cases but which would probably receive strong lobbying opposition from plaintiff's personal injury lawyers. Office of General Council recently completed a survey of other states' existing lien laws and found significant variations among them. In any event, many of these might require modification depending on the outcome of *Minnesota v. Martin.*

Pending the outcome of *Minnesota v. Miller*, a carefully drafted lien law would lead to fairer, more uniform TPL recoveries in greater amounts. A minor gain would possibly also result if the "is subrogated to…" language in existing § 27-2-23 were modified so as to limit a court's application of principles of equity.

BD/njw