COPY

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

STARKO, INC., d/b/a MEDICINE CHEST #1 and JERRY JACOBS d/b/a PILL BOX PHARMACY #4, for and on behalf of themselves and all other similarly situated,

Plaintiffs-Appellants,

v.

PRESBYTERIAN HEALTH PLAN, INC., a New Mexico corporation, d/b/a PRESBYTERIAN SALUD; and CIMARRON HEALTH PLAN, INC., a New Mexico corporation, d/b/a CIMARRON HEALTH MAINTENANCE ORGANIZATION a/k/a CIMARRON HMO,

Defendants-Appellees.

COURT OF APPEALS OF NEW MEXICO
FILED
JUL 09 2008

No. 27,992

On Appeal from the Second Judicial District, County of Bernalillo
Honorable Linda M. Vanzi, Case No. D-0202-CV-1997-06599

ANSWER BRIEF OF PRESBYTERIAN HEALTH PLAN, INC.

LONG, POUND & KOMER, P. A.
JOHN B. POUND
2200 Brothers Road
P. O. Box 5098
Santa Fe, NM 87502-5098
505-982-8405
505-982-8513 (FAX)

RODEY, DICKASON, SLOAN,
AKIN & ROBB, PA
EDWARD RICCO
201 Third Street NW, #2200
P. O. Box 1888
Albuquerque, NM 87103-1888
505-765-5900
505-768-7395 (FAX)

Attorneys for Appellee Presbyterian Health Plan, Inc.

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE ii

TABLE OF AUTHORITIES iii

SUMMARY OF PROCEEDINGS 1

Nature of the Case 1

Statement of Facts and Proceedings 2

ARGUMENT 9

I. The Plaintiff Class Has No Direct Claim Against PHP Under § 27-2-16(B). 9

II. The District Court Correctly Concluded That the Plaintiff Class Does Not Have a Contract Claim Against PHP 20

A. Section 27-2-16(B) does not apply to Managed Care and therefore is not included in PHP's agreement with HSD 21

B. Section 27-2-16(B) cannot be made to support a private cause of action by incorporating the statute into a contract 26

C. Plaintiffs are not third party beneficiaries of the agreement between PHP and HSD 31

1. *The contracting parties, HSD and PHP, did not intend to make Medicaid providers third party beneficiaries of the MMCSAs* 31

2. *Incorporation of § 27-2-16(B) into the MMCSAs does not demonstrate an intent to make Medicaid providers third party beneficiaries to the MMCSAs* 32

D. Public policy, as expressed in the Federal Medicaid Act and the New Mexico Public Assistance Act, forecloses the third party beneficiary claim. 35

III. The Trial Court Did Not Err in Dismissing the Plaintiff Class's Claim for Unjust Enrichment 39

IV. The District Court Properly Dismissed the Plaintiff Class's Declaratory and Injunction Claims 41

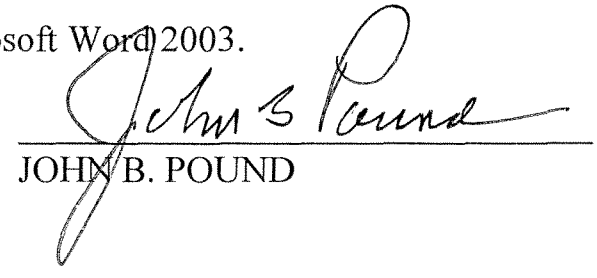
V. The Court Below Erred in Ruling that § 27-2-16(B) Cannot Be Waived by Pharmacies that Enter into Provider Agreements with PHP for Reduced Reimbursement 41

CONCLUSION 45

Certificate of Service 47

CERTIFICATE OF COMPLIANCE

The body of the attached brief exceeds the 35-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, I certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 10,880 words. This brief was prepared and the word count determined using Microsoft Word 2003.



JOHN B. POUND

TABLE OF AUTHORITIES

SUPREME COURT CASES:

Blessing v. Freestone, 520 U.S. 329 (1997) 14, 15

Gonzaga University v. Doe, 536 U.S. 273 (2002) 14, 15, 16, 18

Newton v. Rumery, 480 U.S. 386 (1987) 44

United States v. Mezzanatto, 513 U.S. 196 (1994) 44

Venegas v. Mitchell, 495 U.S. 82 (1990) 44

Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990) 14

FEDERAL JURISDICTIONS:

Allstate Transportation Co. v. Southeastern Pennsylvania Transportation Authority, 2000 WL 329015 at **15, 16 (E.D. Pa.) 38

Angleton v. Pierce, 574 F. Supp. 719 (D.N.J. 1983), *affirmed* 734 F.2d 3 (3d Cir. 1984), *cert. denied* 469 U.S. 880 (1984) 38

Association of Residential Resources in Minnesota v. Minnesota Commissioner of Human Services, 2003 U.S. Dist. LEXIS 15056 (D. Minn. 2003) 18

Ball v. Rodgers, 492 F.3d 1094 (9th Cir. 2007) 20

Baltimore Gas & Electric Co. v. United States, 133 F. Supp. 2d 721 (D. Md. 2001), *appeal dism'd*, 290 F.3d 734 (4th Cir. 2002) 24

Brogdon v. National Health Care Corp., 103 F. Supp. 2d 1322 (N.D. Ga. 2000) 30

Brown v. Sun Healthcare Group, Inc.,
476 F. Supp. 2d 848 (E.D. Tenn. 2007) 30

Buck v. American Airlines, Inc.,
2007 U.S. App. Lexis 2618 (1st Cir. 2007) 27

Carr v. Wilson-Coker, 203 F.R.D. 66 (D. Conn. 2001) 10

Carson v. Pierce, 546 F. Supp. 80 (E.D. Mo. 1982) 26

Catanzano v. Dowling, 60 F.3d 113 (2d Cir. 1995) 10

City of Las Cruces v. El Paso Elec. Co.,
904 F. Supp. 1238 (D.N.M. 1995) 39

Clayworth v. Bonta, 295 F. Supp. 2d 1110 (E.D. Cal. 2003) 20

Council Oaks Learning Campus, Inc. v.
Farmington Casualty Co.,
2000 U.S. App. Lexis 6771 (10th Cir. 2000) 27

D'Amato v. Wisconsin Gas Co.,
760 F.2d 1474 (7th Cir. 1985) 36, 37

Davis v. United Air Lines, Inc., 575 F. Supp. 677 (E.D.N.Y. 1983) 27

Debolt v. Espy, 832 F. Supp. 209 (S.D. Ohio 1993),
affirmed, 47 F.3d 777 (6th Cir. 1995) 38

Electrostim Medical Services v. Aetna Life Insurance Co.,
2007 U.S. Dist. LEXIS 9857 (D. Fla. 2007) 29

Evergreen Presbyterian Ministries v. Hood,
235 F.3d 908 (5th Cir. 2000) 18, 33

Gary v. D. Agustini & Asociados, S.A.,
865 F. Supp. 818 (S.D. Fla. 1994) 40

Grochowski v. Phoenix Construction, 318 F.3d 80 (2d Cir. 2003) 26, 27

Hodges v. Atchison, Topeka & Santa Fe Railroad Company,
728 F.2d 414 (10th Cir. 1984) 26

Jama v. United States Immigration and Naturalization Service,
334 F. Supp. 2d 662 (D.N.J. 2004) 38

Keehn v. Carolina Casualty Insurance Co.,
758 F.2d 1522 (11th Cir. 1985) 27

Kroekel v. United States Marshal's Service,
1999 WL 33919792 (D. Colo.) 38

Long Term Care Pharmaceutical Alliance v. Ferguson,
362 F.3d 50 (1st Cir. 2004) 18, 33

Mandy R. v. Owens, 464 F.3d 1139 (10th Cir. 2006) 18

McCall v. United States Postal Service, 839 F.2d 664 (Fed. Cir. 1988) 45

McClendon v. City of Albuquerque,
272 F. Supp. 2d 1250 (D.N.M. 2003) 41

Murphy v. Villanova University, 547 F. Supp. 512, 521 (D. Pa. 1982) 27

National Medical Care, Inc. v. Rullan,
2005 U.S. Dist. LEXIS 27994 (D.P.R. 2005) 19

New York Stock Exchange Inc. v. Sloan,
394 F. Supp. 1303, 1316 (D.N.Y. 1975) 27

Nguyen v. United States Catholic Conference,
548 F. Supp. 1333 (W.D. Pa. 1982),
affirmed, 719 F.2d 52 (3d Cir. 1983) 38

Pennsylvania Pharmacists Association v. Houstoun,
283 F.3d 531 (3d Cir. 2002) 18, 33

Pharmaceutical Research & Manufacturers of America v. Walsh, 538 U.S. 644 (2003) 18, 20, 33

Raetsch v. Lucent Techs., Inc.,
2006 U.S. Dist. LEXIS 78422 (D.N.J. 2006) 29

Rio Grande Community Health Center v. Rullan,
397 F.3d 56 (1st Cir. 2005) 19

San Lazaro Association v. Connell, 286 F.3d 1088 (9th Cir. 2002) 10

Sanchez v. Johnson, 416 F.3d 1051 (9th Cir. 2005) 18, 20, 33

Saunders v. General Services Corporation,
659 F. Supp. 1042 (E.D. Va. 1987) 14

Stroman v. West Coast Grocery Co., 884 F.2d 458 (9th Cir. 1989) 45

United States v. Oak Manor Apts.,
11 F. Supp. 2d 1047 (W.D. Ark. 1998) 13

Van Zanen v. Qwest Wireless, L.L.C.,
522 F.3d 1127 (10th Cir. 2008) 40

Walgreen Co. v. Hood, 275 F.3d 475 (5th Cir. 2001) 18

Walker v. Crow, 2007 U.S. Dist. LEXIS 77841 (S.D. Cal. 2007) 44

Westside Mothers v. Olszewski, 454 F.3d 532 (6th Cir. 2006) 18, 33

Whitfield v. Public Housing Agency of St. Paul,
2004 U.S. Dist. LEXIS 24714 (D. Minn. 2004) 44

Williams v. Phillips Petroleum Co., 23 F.3d 930 (5th Cir. 1994) 45

NEW MEXICO CASES:

Callahan v. New Mexico Federation of Teachers-TVI,
2006-NMSC-010, 139 N.M. 201, 131 P.3d 51 ..... 31, 35

City of Artesia v. Carter, 94 N.M. 311, 610 P.2d 198 (Ct. App. 1980) 42, 43

Clear v. Patterson,
80 N.M. 654, 459 P.2d 358 (Ct. App. 1969) 13

Cockrell v. Board of Regents of New Mexico State University,
2002-NMSC-009, 132 N.M. 156, 45 P.3d 876 28

Dellaira v. Farmers Insurance Exchange,
2004-NMCA-132, 136 N.M. 552, 102 P.3d 111 13

Gallegos v. Pueblo of Tesuque,
2000-NMSC-012, 132 N.M. 207, 46 P.3d 668 40

Gallegos v. State Board of Education,
1997-NMCA-040, 123 N.M. 362, 940 P.2d 468 13

Gill v. Public Emplees Retirement Board,
2003-NMCA-038, 133 N.M. 345, 62 P.3d 122 41

Hovet v. Allstate Insurance Co.,
2004-NMSC-010, 135 N.M. 397, 89 P.3d 69 ..... 15, 16

McKinney v. Davis, 84 N.M. 352, 503 P.2d 332 (1972) 31

Morningstar Water Users Association v.
New Mexico Public Utilities Commission,
120 N.M. 579, 904 P.2d 28 (1995) 23

National Trust for Historic Preservation v.
City of Albuquerque, 117 N.M. 590,
874 P.2d 798 (Ct. App. 1994) 19

New Mexico Board of Veterinary Med. v. Riegger,
2007-NMSC-044, 142 N.M. 248, 164 P.3d 947 23

New Mexico Right to Choose/NARAL v. Johnson,
1999-NMSC-005, 126 N.M. 788, 975 P.2d 841 19

Patterson v. Globe American Casualty Co.,
101 N.M. 541, 685 P.2d 396 (Ct. App. 1984) 12, 16

Pina v. Gruy Petroleum Management Co.,
2006-NMCA-063, 139 N.M. 619, 136 P.3d 1029 44

Saiz v. Belen School District,
113 N.M. 387, 827 P.2d 102 (1992) 13

State v. Burke, 2007-NMCA-093, 142 N.M. 218, 164 P.3d 99 23

State ex rel. Educational Assessments Systems, Inc.
v. Cooperative Education Services of New Mexico,
115 N.M. 196, 848 P.2d 1123 (Ct. App. 1993) 12

State ex rel. Helman v. Gallegos, 117 N.M. 346, 871 P.2d 1352 (1994) 24

State v. Ogden, 118 N.M. 234, 880 P.2d 845 (1994) 10

State v. Padilla, 2006-NMCA-107, 140 N.M. 333, 142 P.3d 921 23

State ex rel. Quintana v. Schnedar, 115 N.M. 573, 855 P.2d 562 (1993) 25

Tarin's, Inc. v. Tinley,
2000-NMCA-048, 129 N.M. 185, 3 P.3d 680 ..... 34, 35

United Water New Mexico v. New Mexico Public Utilities Commission,
1996-NMSC-007, 121 N.M. 272, 910 P.2d 906 23

United Wholesale Liquor Co. v. Brown-Forman
Distillers Corp., 108 N.M. 467, 775 P.2d 233 (1989) 42, 43

Valdez v. Cillessen & Son,
105 N.M. 575, 734 P.2d 1258 (1987) 31

Vigil v. State Auditor's Office,
2005-NMCA-096, 138 N.M. 63, 116 P.3d 854 31

Westland Development Company v. Romero,
117 N.M. 292, 871 P.2d 388 (Ct. App. 1994) 22

OTHER JURISDICTIONS:

Citizens' Ambulance Service, Inc. v. Gateway Health Plan,
806 A.2d 443 (Pa. Super. 2002) 4

Dierkes v. Blue Cross & Blue Shield of Missouri,
991 S.W.2d 662 (Mo. 1999) 30

Favel v. American Renovation & Construction Co.,
59 P.3d 412 (Mont. 2002) 29

Foundation Health Inc. v. Westside EKG Assocs.,
944 So.2d 188 (Fla. 2006) 28, 29

Nelson v. Grayhawk Props., L.L.C.,
104 P.3d 168 (Ariz. App. 2004) 13

Wogan v. Kunze, 623 S.E.2d 107 (S.C. App. 2005) 26

Yuchnitz v. PCA Health Plan of Texas, Inc.,
2000 Westlaw 12960 (Tx. App.) 36

Zigas v. Superior Court, 120 Cal. App. 3d 827 (Cal. Ct. App. 1981) 29

OTHER CITATIONS:

42 C.F.R. § 431.10(e) 9

42 C.F.R. § 447.361, 362 22

42 U.S.C. § 1396 37

42 U.S.C. § 1396a(a)(5) 9

42 U.S.C. § 1396a(a)(30)(A) 17

42 U.S.C. § 1396b(m) 3

42 U.S.C. § 1396b(m)(1)(A)(i) 3

42 U.S.C. § 1396b(m)(2)(A)(iii) 3

42 U.S.C. § 1396r-8(j)(1) 22

42 U.S.C. § 1983 ..... 15, 18, 44

NMAC § 8.305.1.7.C(1) 3

NMAC § 8.305.6.9.D(5) and (6) 4

NMAC § 8.305.11.9.A, B and D 3

NMRA 12-201(C) 42

NMSA 1978, § 26-3-3, 3(B) 9

NMSA 1978, § 27-2-1 9

NMSA 1978, § 27-2-2 9

NMSA 1978, § 27-2-7 17

NMSA 1978, § 27-2-12 17

NMSA 1978, § 27-2-12.6 17

NMSA 1978, § 27-2-12.6(A) 2

NMSA 1978, § 27-2-12.6(B) 17

NMSA 1978, § 27-2-12.6(B)(3) 2

NMSA 1978, § 27-2-12.13 17

NMSA 1978, § 27-2-15 9

NMSA 1978, § 27-2-16 17

NMSA 1978, § 27-2-16(A) 9, 37

NMSA 1978, § 27-2-16(B) 5-6, 8-12, 16, 19-23, 24-26, 29, 31-33, 41, 43-45

NMSA 1978, § 27-3-1 10

NMSA 1978, § 59A-16-20 16

Restatement (Second) of Contracts, § 302, 302(1)(a) 34, 35

Restatement (Second) of Contracts, § 313 ..... 37, 38

PRIOR OR RELATED APPEALS:

Starko, Inc. v. Gallegos, 2006-NMCA-085, 140 N.M. 136, 140 P.3d 1085 (reversing denial of motion for summary judgment by individual HSD-employee defendants on qualified immunity grounds), *cert. denied*, 2006-NMCERT-007, 140 N.M. 279, 141 P.3d 360.

Starko, Inc. v. Cimarron Health Plan, Inc., 2005-NMCA-040, 137 N.M. 310, 110 P.3d 526 (declining to consider MCOs' appeal regarding class certification as outside scope of Rule 1-023(F) NMRA).

SUMMARY OF PROCEEDINGS

Nature of the Case

Plaintiffs are pharmacies that serve the state's Medicaid patient population. They brought this class action originally against the New Mexico Human Services Department (HSD), the state's Medicaid agency, and its officials. Later, Plaintiffs also asserted claims against Presbyterian Health Plan, Inc. (PHP), in its role as a Medicaid managed care organization (MCO), and against other Medicaid MCOs.

MCOs are intermediaries in the Medicaid managed care program. They contract with HSD to furnish health care services to Medicaid patients, and they contract with health care providers to deliver those services. Members of the plaintiff class contracted with PHP to dispense drugs to Medicaid patients at an agreed-upon rate of reimbursement. Plaintiffs contend that the rate they agreed to accept from PHP is less than the rate required under a statute enacted prior to the advent of Medicaid managed care.

Plaintiffs assert no claims under their individual contracts with PHP. Instead, they claim a right to enforce the reimbursement statute. Alternatively, they claim a right to enforce the MCO contract between PHP and HSD. This case thus presents the question whether Plaintiffs may usurp the role of HSD in regulating the relationships between Medicaid MCOs and their contracted providers. The district court held that they could not. It concluded that the

reimbursement statute did not give rise to a direct action against PHP, that the contract between HSD and PHP also did not support such a claim, and that Plaintiffs, in any event, had no right to enforce a contract to which they were not parties. The district court was correct and should be affirmed.

Statement of Facts and Proceedings

At the inception of Medicaid in New Mexico, the State employed what is known as the fee-for-service model. The State, acting through the Medical Assistance Division of HSD, contracted directly with Medicaid providers, including pharmacies, for goods and services for Medicaid patients. (R Vol. 14, 4815)

In 1997, with the consent of the Federal government, and in an attempt to save money, New Mexico switched to the managed care concept in the administration of the greater part of its Medicaid program. The legislature's primary goal in moving from fee-for-service to managed care was "to provide cost-efficient . . . care for Medicaid recipients" that is "consistent with national and state health care reform principles." NMSA 1978, § 27-2-12.6(A), (B)(3). To achieve this goal, the State transferred the financial risk of providing health care to managed care organizations in the private sector. At the same time, the State gave the MCOs the authority and flexibility necessary to manage this risk to avoid insolvency. (R Vol. 11, 3426; Vol. 14, 4526-31; Vol. 23, 7798)

Under the managed care model, the State enters into competitively bid contracts, known as Medicaid Managed Care Service Agreements (MMCSAs), with the MCOs. 42 U.S.C. § 1396b(m); NMAC § 8.305.11.9.A. Those agreements require the MCOs to underwrite and administer coverage for Medicaid enrollees. In return, the State agrees to pay the MCOs predetermined, actuarially set monthly per capita amounts, based on each MCO's patient population. 42 U.S.C. § 1396b(m)(2)(A)(iii); NMAC § 8.305.11.9.A, B, and D. These monthly payments are known as "capitation" payments. NMAC § 8.305.1.7.C(1).

The MCOs enter into private contracts with providers to establish provider networks that ensure access to care for their members. 42 U.S.C. § 1396b(m)(1)(A)(i). (R Vol. 14, 4594) The MCOs reimburse providers at rates fixed in the providers' contracts. The MCOs are at risk for any difference between the capitation payments received from HSD and the outlays made to reimburse the providers. To remain viable, MCOs must manage their costs so that the payments from HSD will cover both their medical and their administrative expenses. The MCOs cannot look to HSD for additional payment if they fail in this task. NMAC § 8.305.11.9.B (MCOs accept capitation as "payment in full for all services to be provided pursuant to the agreement, including all administrative costs associated therewith").

The MMCSAs do not specify the reimbursement rates the MCOs must pay to any Medicaid provider. Instead, MCOs negotiate reimbursement rates with their providers, and those rates may differ from the fee-for-service rates paid by HSD. *Cf. Citizens' Ambulance Service, Inc. v. Gateway Health Plan*, 806 A.2d 443, 447 n.4 (Pa. Super. 2002) (provider's fee-for-service agreement with state did not govern payment rate between non-contracted provider and Medicaid MCO). Consistent with the risk-based nature of the managed care contracts, HSD guarantees the MCOs the right to manage the financial risk associated with their own provider networks. *See* NMAC § 8.305.6.9.D(5) and (6) (MCOs are allowed "to use different reimbursement amounts for different specialties or for different practitioners within the same specialty" and "to establish measures that are designed to maintain quality of services and control costs and are consistent with its responsibilities to members").

HSD gave the name "*SALUD!*" to the Medicaid managed care program. In order to prepare a proposal to serve as a *SALUD!* MCO, PHP developed a statewide network of provider pharmacies. (R Vol. 13, 4178) By July 1, 1997, when PHP was awarded an MMCSA, it had entered into provider agreements with a large number of pharmacies all across New Mexico. (R Vol. 14, 4814) It continued to build its network by negotiating provider agreements with pharmacies after that date. (R Vol. 8, 2161)

When a pharmacy sells prescription drugs, there are two components to its income from the sale. The first is reimbursement for the drug itself, *i.e.*, the ingredient component. The second is a dispensing fee. (R Vol. 11, 3419) In 1982, before the era of managed care in New Mexico, the legislature enacted NMSA 1978, § 27-2-16(B). As amended in 1984, § 27-2-16(B) states that, in the Medicaid program, provider pharmacies are to be reimbursed by the State for the wholesale cost of drugs dispensed (the ingredient component) plus a reasonable dispensing fee of at least $3.65. By its express terms the statute only applies when drug product selection is permitted by law, *i.e.*, when the prescribing health care provider has authorized the pharmacy to fill a prescription with a different drug than the one prescribed. The statute does not specify how to determine "wholesale cost." Nor does it specify the circumstances in which the $3.65 dispensing fee is to be paid.

The 1997 MMCSA between HSD and PHP made no mention of § 27-2-16(B). This was because HSD did not believe the statute pertained to the newly adopted managed care model. HSD personnel reached this conclusion because a statute that set pricing parameters was seen as fundamentally inconsistent with the concept of managed care. (R Vol. 11, 3355-59; 3424; Vol. 14, 4526-29; 4590; Vol. 16, 5825) PHP's contracts with its pharmacy providers typically provided that ingredient cost for prescription drugs in the *SALUD!*

program would be reimbursed using a trade concept known as Average Wholesale Price (AWP), minus a discount, plus a dispensing fee that was less than $3.65. (R Vol. 8, 2161)

This lawsuit was filed on August 1, 1997. The plaintiff class, comprising all pharmacies that had signed Medicaid contracts with the State, contended that the State, in the administration of the fee-for-service segment of the Medicaid program, was not reimbursing pharmacy providers in accordance with § 27-2-16(B). Only HSD and its upper level personnel were named as defendants. (R Vol. 1, 1) An amended complaint was filed in May 1998. (R Vol. 1, 503) The amended complaint added the *SALUD!* managed care program to the lawsuit. The MCOs were not named as defendants.

Initially, HSD took the position that its responsibilities in *SALUD!* had been shifted to the MCOs through the MMCSAs. (R Vol. 3, 756-757; 761-763) In June 2000, however, the District Court ruled that the State could not delegate away its Medicaid program responsibilities. The court ordered HSD to "make the MCOs comply with § 27-2-16(B)." (R Vol. 3, 781) Following these rulings, in February 2001, the plaintiff class filed its second amended complaint, bringing PHP and the other MCOs into the case as additional defendants.[1] (R Vol. 3, 866)

---

[1] Lovelace Health Plan reached a settlement with Plaintiffs and is not involved in this appeal.

The MCOs were awarded new MMCSAs by HSD in July 2001. In each of these contracts, HSD included a clause making express reference to the District Court's ruling and requiring the MCOs to comply with it. (R Vol. 27, 9311) PHP wrote to HSD in August 2001 asking for guidance as to what would constitute compliance with the ruling in HSD's view. In the meantime, PHP followed the most conservative approach by paying its provider pharmacies "straight AWP" (without a discount) and a $3.65 dispensing fee on all *SALUD!* prescriptions, regardless of whether there was evidence that a drug product selection had been made by the pharmacist. (R Vol. 8, 2168)

In December 2001, HSD responded to PHP's request for instructions. HSD suggested that PHP pay for the ingredient component of prescriptions at AWP minus a negotiated discount and pay a $3.65 dispensing fee whenever a pharmacy provider substituted a lower priced generic drug for a higher priced brand name drug that had been prescribed. (R Vol. 8, 2181) PHP followed this advice and amended its contracts with its *SALUD!* pharmacy providers accordingly. In the intervening months, *i.e.*, in the period when PHP was awaiting HSD's guidance, it lost a substantial sum in the pharmaceutical segment of its *SALUD!* program. (R Vol. 8, 2161-2187)

In September 2002, the plaintiff class filed its Fourth Amended Complaint (R Vol. 16, 5759), which was the operative complaint when the District Court

issued its rulings leading to the dismissal of the action against PHP. The Fourth Amended Complaint asserted three theories of recovery against PHP that are relevant to this appeal. Count II contended that PHP violated § 27-2-16(B) by paying the pharmacies too little for drug ingredients and dispensing fees. Count III contended that the sequential MMCSAs between the State and PHP impliedly or expressly incorporated § 27-2-16(B) and that Plaintiffs were third party beneficiaries of the MMCSAs. Count VI alleged unjust enrichment. In addition, Counts VIII and IX sought declaratory and injunctive relief based on the issues raised in the substantive counts.

The District Court held that § 27-2-16(B) does not provide a private right of action for providers against MCOs. (R Vol. 29, 10538; Vol. 30, 10595) It held that incorporating the statute into a contract, when the statute affords no private right of action, could not circumvent that result and create a right of action under a contract theory. Finally, it held that the plaintiff class is not a third party beneficiary to the MMCSAs. (R Vol. 35, 12608)

In large measure, the dispositive motions that were filed by the MCOs were based on facts and legal issues unique to the MCOs. The State did not contend that the same legal analysis applied to HSD. As this brief is written, the case against the State defendants proceeds in the District Court.

ARGUMENT

I. The District Court Correctly Held That Plaintiffs, as Medicaid Providers, Have No Claim Against PHP, a Managed Care Organization, Under § 27-2-16(B).

The pharmacy reimbursement statute at the heart of this case reads as follows:

> If drug product selection is permitted by § 26-3-3 NMSA 1978, reimbursement by the Medicaid program shall be limited to the wholesale cost of the lesser expensive therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least Three Dollars Sixty-Five Cents ($3.65).

NMSA 1978, § 27-2-16(B).[2]

The immediately preceding statutory subparagraph authorizes the Human Services Department to participate in the federal Medicaid program. NMSA 1978, § 27-2-16(A). The immediately preceding statutory section, § 27-2-15, names HSD as the single state agency, designated in accord with federal law, *see* 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10(e), that is responsible for administration of the Medicaid program within New Mexico. The surrounding statutory provisions comprise New Mexico's overarching Medicaid statute, the Public Assistance Act, NMSA 1978, § 27-2-1, *et seq.* The Act, which is replete with references to the Human Services Department, *see* NMSA 1978, § 27-2-2, contains a series of explicit directives to HSD regarding its duties and

[2] Section 26-3-3 NMSA 1978 (2005) specifies circumstances under which a pharmacist may make a substitution for a prescribed drug. For instance, the statute generally permits pharmacists to dispense therapeutically equivalent so-called "generic" drugs that are lower in cost than prescribed drugs. *See id.* § 26-3-3(B).

responsibilities in administering the Medicaid program in New Mexico. *See infra.*, p. 16. The Public Assistance Appeals Act, NMSA 1978, § 27-3-1, *et seq.*, explicitly provides an appeals mechanism, but only for Medicaid recipients.

Section 27-2-16(B) predates the advent of Medicaid managed care and was adopted before MCOs even existed. By its history and under ordinary rules of statutory construction, § 27-2-16(B) imposes a duty on HSD. *See State v. Ogden*, 118 N.M. 234, 243, 880 P.2d 845, 854 (1994) ("Statutes on the same general subject should be construed by reference to each other.").

Early in this lawsuit, before the MCOs were added as defendants, Plaintiffs obtained from the District Court (the Honorable Susan M. Conway)[3] a declaration that HSD officials "may not delegate or contract away their responsibilities under . . . § 27-2-16(B) by entering into contracts with Managed Care Organizations." (R Vol. 3, 781) Judge Conway's ruling was unquestionably correct. *See, e.g., Catanzano v. Dowling*, 60 F.3d 113, 118 (2d Cir. 1995) ("It is patently unreasonable to presume that Congress would permit a state to disclaim Federal [Medicaid] responsibilities by contracting away its obligations to a private entity"); *see also San Lazaro Association v. Connell*, 286 F.3d 1088 (9th Cir. 2002); *Carr v.*

[3] Three district judges have presided in the history of this lawsuit. When Judge Conway was peremptorily excused, the parties stipulated to the Honorable Peggy Nelson. When Judge Nelson retired, the case was assigned to the Honorable Linda M. Vanzi.

Wilson-Coker, 203 F.R.D. 66 (D. Conn. 2001). Plaintiffs not only invited this ruling; they continued to use it to support their case against the State.

PHP is not a surrogate of HSD for purposes of this statutory duty. Its contracts with the State expressly provide that PHP is not an agent of the State. (R Vol. 33, 11884) In Count XI of the Fourth Amended Complaint, Plaintiffs alleged that the MCOs conspired with the HSD defendants to violate their civil rights and that the conspiracy constituted state action in violation of federal law. (R Vol. 16, 5759) The District Court granted PHP's motion for partial summary judgment on this claim and, in so doing, held that PHP is not a state actor. (R Vol. 29, 10541-42) Plaintiffs have not challenged that ruling on appeal.

When PHP moved for judgment on the pleadings on Plaintiffs' claim based directly on § 27-2-16(B), the District Court (the Honorable Linda M. Vanzi) extended Judge Conway's prior ruling to its natural conclusion. Judge Vanzi reasoned that, as the court

> ha[d] already found the State has a non-delegable duty, any party challenging how that duty is handled must then logically sue the State and not the party to whom the duty has been delegated. This is especially so because Judge Conway also stated that "the MCOs are in direct relationship with the State, are contractually bound to carry out the Medicaid requirements pursuant to the provisions of their contracts [with the State], and are under an obligation to abide by all state and federal laws applicable to Medicaid." (Order, at 5.)

(R Vol. 29, 10539)

Judge Conway's determination that HSD could not delegate its statutory duty and Judge Vanzi's characterization of that duty as "non-delegable" are, as Judge Vanzi's reasoning further explains, determinations that no claim lies under the statute against an MCO. Whether a statute creates a private right of action is, at bottom, a question of legislative intent. *Patterson v. Globe American Casualty Co.*, 101 N.M. 541, 685 P.2d 396 (Ct. App. 1984). The legislature, which designated HSD as the single state agency responsible for the state's Medicaid program and vested HSD with plenary authority to administer the program consistent with the dictates of federal and state law, would not have intended that providers could insert themselves into the relationship between HSD and the MCOs and assert their own views as to how the Medicaid program should operate. Doing so would directly interfere with the oversight and administrative functions that the legislature conferred on HSD. *Cf. State ex rel. Educational Assessments Systems, Inc. v. Cooperative Education Services of New Mexico*, 115 N.M. 196, 848 P.2d 1123 (Ct. App. 1993). Section 27-2-16(B) contains no express right of action by providers against MCOs, and none should be implied.

Plaintiffs seemingly do not apprehend the sense in which the District Court referred to a non-delegable duty. They cite to case law in other fields where courts have addressed the liability consequences of duties that are considered "non-

delegable." These authorities, none of which addresses whether a statute should be read to imply a right of action, are entirely off point.

Saiz v. Belen School District, 113 N.M. 387, 827 P.2d 102 (1992), for instance, holds that in circumstances presenting a "peculiar risk" of physical harm, one who employs a contractor cannot avoid liability for the contractor's failure to exercise ordinary care in performing the work. The decision is based on public policy considerations that are absent in the present case. *Dellaira v. Farmers Insurance Exchange*, 2004-NMCA-132, 136 N.M. 552, 102 P.3d 111, holds that when an insurer delegates its claims handling function to a related agent, the agent may be liable for insurance bad faith. *Dellaira* is founded on the special fiduciary relationship between insurer and insured. *Clear v. Patterson*, 80 N.M. 654, 459 P.2d 358 (Ct. App. 1969), stands for the proposition that a general building contractor is liable for faulty work done by a subcontractor. And in *Gallegos v. State Board of Education*, 1997-NMCA-040, 123 N.M. 362, 940 P.2d 468, this Court affirmed the liability of a state agency for breach of a statutory duty that the agency had attempted to delegate – a result wholly consistent with the District Court rulings here.

Other cases cited by Plaintiffs are equally unhelpful. *Nelson v. Grayhawk Properties, L.L.C.*, 104 P.3d 168 (Ariz. App. 2004), like *Saiz*, involves non-delegable duties in tort and is similarly distinguishable. In *United States v. Oak*

Manor Apts., 11 F. Supp. 2d 1047 (W.D. Ark. 1998), several defendants joined in violating the Fair Housing Act, a statute which imposed duties on each of them. The same is true of *Saunders v. General Services Corporation*, 659 F. Supp. 1042 (E.D. Va. 1987). Finally, Plaintiffs' reference to the contract rule that a legal duty cannot be evaded by assignment of the required performance, while also off point, again reinforces the District Court's rationale.

When Plaintiffs turn to the issue at hand and actually address the question of implied rights of action, they fare no better in mustering a persuasive argument. The seminal case in the evaluation of the law dealing with private rights of action in statutes is *Gonzaga University v. Doe*, 536 U.S. 273 (2002). The *Gonzaga* Court employed an analytical approach suggested by Chief Justice Rehnquist in his dissenting opinion in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990), which the Supreme Court subsequently applied in *Blessing v. Freestone*, 520 U.S. 329 (1997). In *Blessing*, the Court explained that it had

> traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by that statute was not so 'vague and amorphous' that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.

Id. at 340-341.

The rule in *Blessing* was applied, but tightened, in *Gonzaga*. The court in *Gonzaga* held that the Family Educational Rights and Privacy Act of 1974 did not confer any personal rights enforceable under § 1983, rejecting "the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." 536 U.S. at 283. The Court focused on statutory language: "[W]hether Congress . . . intended to create a private right of action is definitively answered in the negative where a statute by its terms grants no private rights to an identifiable class." *Id.* at 283-84 (internal quotation marks, citation and brackets omitted). To create a private right, the statute "must be phrased in terms of the persons benefited." *Id.* at 284 (internal quotation marks and citation omitted). As examples, the Court pointed to the Civil Rights Act of 1964 and the Education Amendments of 1972, both of which created individual rights because those statutes were "phrased with an unmistakable focus on the benefited class." *Id.* (internal quotation marks, citation and footnote omitted).

The Supreme Court of New Mexico has independently adopted the same analytical approach. Without making reference to *Blessing* or *Gonzaga*, the Court in *Hovet v. Allstate Insurance Co.*, 2004-NMSC-010, 135 N.M. 397, 89 P.3d 69, addressed the question whether third party claimants of automobile liability insurance policies have a statutory cause of action under the state Insurance Code when the liability insurer fails to make a good faith effort to settle the underlying

claim. The *Hovet* Court examined the full text of the Trade Practices and Fraud article, NMSA 1978, § 59A-16-20, in its effort to determine legislative intent. It looked "not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied." *Hovet*, 135 N.M. at 400.

In the instant case, the District Court went through the same exercise. After noting that § 27-2-16(B) does not contain a provision for damages, the Court, citing *Patterson v. Globe American Casualty Co.*, observed that "there is no doubt that the legislature knows how to provide a damage remedy when it so chooses." (R Vol. 29, 10541 (citing examples)) As is evident from the court's rationale, the court concluded that the system of administrative oversight by HSD over the Medicaid program established by the Public Assistance Act would be impeded rather than promoted by implying a private right of action by providers against MCOs.

Following the approach in *Gonzaga*, an examination of the Public Assistance Act reveals that the only intended beneficiaries of the Act are Medicaid patients. This makes sense, of course. It would be odd, to say the least, to contend that the purpose of the Act is to find a way to funnel taxpayer monies to the sellers of goods or services. Plaintiffs made such a contention in the district court but have abandoned it on appeal. (R Vol. 34, 12151)

As one reads through the Public Assistance Act, there is a recurrent message from the legislature that the intended beneficiaries are Medicaid patients. *See, e.g.*, § 27-2-7 ("Subject to the availability of State funds, public assistance shall be provided under a general assistance program to or on behalf of eligible persons . . . ."); § 27-2-12 (". . . the Medical Assistance Division of the Human Services Department may by regulation provide medical assistance . . . to persons eligible for public assistance programs under the Federal Act."); § 27-2-12.6 ("The Department shall provide for a statewide managed care system to provide cost-efficient, preventive, primary and acute care for Medicaid recipients . . . ."); § 27-2-12.6(B) ("The managed care system shall ensure . . . access [for patients] to medically necessary services . . . ."); § 27-2-12.13 ("HSD shall 'give preference to those initiatives that provide significant cost savings while protecting the quality and access of medical recipients' health care services' and 'work toward the development of a prescription drug purchasing cooperative . . . to obtain the best price for prescription drugs.'").

Section 27-2-16 is designed to assure accessibility to health care services for Medicaid patients. The statute is a response to 42 U.S.C. § 1396a(a)(30)(A) (the "equal access provision"), the section in the federal Medicaid statute that requires the states to find a balance between paying providers enough to assure patient accessibility and keeping Medicaid expenditures as low as possible. Subparagraph

B of the statute addresses what is universally considered to be an important aspect of Medicaid – the provision of pharmaceutical drugs to the aged, blind, and disabled.

Medicaid providers in other states have attempted to persuade the courts that the Federal Medicaid law impliedly provides them with a private right of action, which they usually seek to implement as a civil rights claim under 42 U.S.C. § 1983. Since § 1983 does not create rights in and of itself, the courts have had to examine the Medicaid statute to determine whether the provision at issue in a given case creates a private right of action for Medicaid providers. It was recognized by most courts pre-*Gonzaga*, and it has been the strong majority view since announcement of the *Gonzaga* decision, that there is no such private right of action in the "equal access provision" of the Medicaid Act. *See, e.g., Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908, 928-29 (5th Cir. 2000); *Walgreen Co. v. Hood*, 275 F.3d 475 (5th Cir. 2001); *Pennsylvania Pharmacists Assosciation v. Houstoun*, 283 F.3d 531 (3rd Cir. 2002); *Long Term Care Pharmaceutical Alliance v. Ferguson*, 362 F.3d 50, 59 (1st Cir. 2004); *Sanchez v. Johnson*, 416 F.3d 1051 (9th Cir. 2005); *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006); *Mandy R. v. Owens*, 464 F.3d 1139 (10th Cir. 2006). *See also Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 682-683 (Thomas, J., concurring). The federal cases relied on by Plaintiffs adopt a

distinctly minority view, *see Association of Residential Resources in Minnesota v. Minnesota Commissioner of Human Services*, 2003 U.S. Dist. LEXIS 15056 (D. Minn. 2003), or address aspects of the Medicaid statute other than the equal access provision, *see Rio Grande Community Health Center v. Rullan*, 397 F.3d 56 (1st Cir. 2005); *National Medical Care, Inc. v. Rullan*, 2005 U.S. Dist. LEXIS 27994, *50-55 (D.P.R. 2005).

The New Mexico case law cited by Plaintiffs does not support their position either. In *National Trust for Historic Preservation v. City of Albuquerque*, 117 N.M. 590, 874 P.2d 798 (Ct. App. 1994), this Court held that environmental associations had standing to pursue an action for declaratory and injunctive relief that was expressly authorized by the Prehistoric and Historic Sites Preservation Act. In a remark that resonates in the case at bar, the Court noted that "it may be appropriate to deny standing when recognition of a private cause of action would undermine the effective functioning of a statutory scheme for enforcement of legislation." 117 N.M. at 594. *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841, addresses the plaintiffs' standing to assert a claim arising under the New Mexico Constitution. It does not address implied statutory rights of action.

Plaintiffs offer, and PHP has found, no case law standing for the proposition that when a statute, such as § 27-2-16(B), imposes non-delegable duties on a

particularly identified government agency, any right of action on the part of an aggrieved party against that agency also includes a right to sue others with whom the agency has a contractual or regulatory relationship. And that result surely does not follow from the language of the statute at issue here. *See Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. at 675 [Scalia, J. concurring]; *Clayworth v. Bonta*, 140 Fed. Appx. 677 (9th Cir. 2005) (holding, consistent with *Sanchez v. Johnson*, that neither Medicaid recipients nor providers have a private right to challenge California's compliance with the equal access provision in the Medicaid Act); *Ball v. Rodgers*, 492 F.3d 1094, 1103-04 (9th Cir. 2007). The court's dismissal of Plaintiffs' claim against PHP under § 27-2-16(B) should be affirmed.

II. The District Court Correctly Concluded That the Plaintiff Class Does Not Have a Contract Claim Against PHP.

As an alternative to their statutory claim, in Count III of the Fourth Amended Complaint (R Vol. 16, 5759), Plaintiffs sought to assert contract rights as alleged third party beneficiaries of the MMCSA between HSD and PHP. The claim on its face is counter-intuitive: rather than rely on the contracts they executed individually with PHP (which, of course, embody the exact terms and conditions that Plaintiffs seek to avoid), Plaintiffs attempted to rely on a contract to which they are not parties. The District Court rightly rejected this claim.

To succeed on their third party beneficiary claim, Plaintiffs have multiple hurdles to overcome. First, they must establish that the contract in question actually includes an obligation on PHP's part to comply with § 27-2-16(B). Next, they must establish that a breach of contract claim would lie for violation of the statute, even though no direct action under the statute is available. Finally, they must demonstrate that they are third party beneficiaries entitled to enforce the contract to the same extent HSD could enforce it. Plaintiffs fail at each step.

A. Section 27-2-16(B) does not apply to Managed Care and therefore is not included in PHP's agreement with HSD.

PHP's initial MMCSA required it to comply with applicable state and federal laws and reimbursement rates and, in later versions, required PHP to include in its provider agreements with pharmacists a "payment provision consistent with § 27-2-16(B), unless the subcontractor provides a voluntary waiver to any rights under 1978 NMSA § 27-2-16(B). . . ." (R Vol. 33, 12022) At the beginning, PHP operated under the assumption, shared by HSD, that § 27-2-16(B) did not apply to Medicaid managed care (R. Vol. 34, 12403) and that therefore any negotiated reimbursement term in a pharmacy provider agreement would be compliant and consistent with the statute as required by the MMCSA.

In a letter ruling of January 13, 2002, dealing with the question whether a pharmacy provider could waive any rights provided by § 27-2-16(B), Judge Nelson expressly ruled that § 27-2-16(B) applies to managed care. (R Vol. 20, 6818) This

conclusion was erroneous. Section 27-2-16(B) is inapplicable to the Medicaid managed care program, and compliance with the statute consequently is not required by the terms of the MMCSA. Dismissal of Plaintiffs' contract-based claim for violation of the statute may be upheld on this basis. *See Westland Development Company v. Romero*, 117 N.M. 292, 293, 871 P.2d 388, 389 (Ct. App. 1994) ("An appellate court will affirm a lower court's ruling if right for any reason.").

Section 27-2-16(B) was enacted when Medicaid operated exclusively under a fee-for-service regime. To the extent the legislature could have contemplated the statute's operation, therefore, it affected only fee-for-service reimbursement of Medicaid providers by HSD. The legislature did not repeal or amend § 27-2-16(B) when it required HSD to adopt the Medicaid managed care concept in 1994. But the State did not abandon the fee-for-service aspects of Medicaid at that time. (R Vol. 11, 3402) The question for the District Court was whether it was consistent with legislative intent to apply the statute to all pharmacy provider reimbursement once managed care was put in place, or whether the statute should be construed as continuing to apply only to fee-for-service arrangements.

Managed care is premised on the idea that economies can be achieved by having the State's contractors, the MCOs, negotiate provider agreements based on market-driven pricing. *See* 42 C.F.R. § 447.361, 362; 42 U.S.C. § 1396r-8(j)(1).

(R Vol. 14, 4526-29) Section 27-2-16(B) fits in conceptually with the fee-for-service approach but is incompatible with the managed care concept. For this reason, HSD personnel concluded that § 27-2-16(B) was not intended to be a part of *SALUD!*. (R Vol. 11, 3355-3359; 3424; Vo. 14, 4590; Vol. 15, 4953-4961; Vol. 16, 5826-27) This is why HSD did not discuss § 27-2-16(B) with the MCOs when the 1997 MMCSAs were being negotiated. (R Vol. 13, 4174)

HSD's interpretation of the statute's application is entitled to deference. *Morningstar Water Users Association v. New Mexico Public Utilities Commission*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995). Even if the question were to be addressed *de novo*, HSD's view of the statute is the correct one and should be adopted. When interpreting a statute, a court construes the statute as a whole, so that all of its provisions are considered in relation to one another. *New Mexico Board of Veterinary Med. v. Riegger*, 2007-NMSC-044, 142 N.M. 248, 164 P.3d 947. The court will consider the structure, context, history and background of the statute, as well as the likely policy implications of various constructions. *State v. Burke*, 2007-NMCA-093, 142 N.M. 218, 164 P.3d 99. The central objective is to harmonize all parts of a statute. *State v. Padilla*, 2006-NMCA-107, 140 N.M. 333, 142 P.3d 921. If, in light of the overall objective of a statute, a particular interpretation would render the statute's application unreasonable, that interpretation will be avoided. *United Water New Mexico v. New Mexico Public*

Utilities Commission, 1996-NMSC-007, 121 N.M. 272, 910 P.2d 906. Even where statutory language appears perfectly clear, a literal application of the language will be rejected where the result would be contrary to legislative intent made apparent by other parts of the legislation, the history and background of the statute, and the overall legislative purpose. *State ex rel. Helman v. Gallegos*, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994).

Section 27-2-16(B), insofar as the dispensing fee element of pharmaceutical reimbursement is concerned, forecloses unconstrained negotiation by fixing an inflexible minimum fee – one that, as the facts of this case demonstrate, is higher than the market rate. The statute, if applicable to managed care, would prevent an MCO from freely negotiating market-driven dispensing fees with its network providers and achieving the resultant economies and efficiencies that are the aim of managed care. Section 27-2-16(B), in short, is simply antithetical to the managed care philosophy. It is unreasonable to assume that the legislature at once intended to adopt managed care in New Mexico's Medicaid program and to apply to that program a measure that would undercut its goals.

In analogous circumstances, where a statute left over from a prior regime conflicts with a new one, courts have been careful to respect the legislature's intent by narrowly construing the legacy statute to avoid conflict with the new regime. *See, e.g., Baltimore Gas & Elec. Co. v. United States*, 133 F. Supp. 2d 721, 740-41

(D. Md. 2001) ("When faced with potentially conflicting statutes, settled rules of statutory construction teach that the proper course is to interpret them harmoniously to eliminate any conflict."), *appeal dism'd*, 290 F.3d 734 (4th Cir. 2002). A narrow construction of § 27-2-16(B) is called for here – one that would continue to apply the statute as it had always been applied, *i.e.*, solely to provider reimbursement governed by the Medicaid fee-for-service model.

Interpreting § 27-2-16(B) to apply to *SALUD!* creates an unnecessary conflict between that statute and the subsequently adopted Medicaid managed care scheme. The District Court should not have adopted such an interpretation. The only rational way to harmonize § 27-2-16(B) with the managed care system that was put in place thirteen years later is to interpret the statute as applying to that portion of the fee-for-service program that remained in place after the advent of managed care, but as not applicable to *SALUD!*. That interpretation preserves the original intent of § 27-2-16(B) as a directive regarding State payments in the fee-for-service program while also respecting the legislature's subsequent intent to adopt a comprehensive managed care regime based on market-driven negotiations. *Cf. State ex rel. Quintana v. Schnedar*, 115 N.M. 573, 578, 855 P.2d 562 (1993) (recently enacted statutes construed to modify rather than supplant existing scheme; all could be read harmoniously).

Since § 27-2-16(B) does not apply to *SALUD!*, the judgment below is subject to affirmance for that reason alone. It was only because the court below held otherwise that it became necessary to address the remaining issues.

B. Section 27-2-16(B) cannot be made to support a private cause of action by incorporating the statute into a contract.

In almost all the cases where the attempt has been made, the courts have held that a party seeking to enforce a statute that does not include a private right of action cannot create such a right of action by injecting the statute into a contract and claiming third party beneficiary status. *See, e.g., Carson v. Pierce*, 546 F. Supp. 80 (E.D. Mo. 1982); *Wogan v. Kunze*, 623 S.E.2d 107 (S.C. App. 2005); *Hodges v. Atchison, Topeka & Santa Fe Railroad Company*, 728 F.2d 414, 416 (10th Cir. 1984) (third party beneficiary argument "is but another aspect of the implied right of action argument"). The court below correctly reached the same conclusion. (R Vol. 34, 12372)

The basis for this rule is well expressed in *Grochowski v. Phoenix Construction*, 318 F.3d 80 (2nd Cir. 2003). In that case, the plaintiffs were employed under contracts that specifically invoked a federal statute which in turn required that certain wage schedules be observed. After rejecting the plaintiffs' statutory claims on the ground that that the statute did not provide plaintiffs with a private right of action, the court went on to reject plaintiffs' breach of contract claims as well. The court recognized that, "[a]t bottom," the contract claims were

"indirect attempts at privately enforcing the prevailing wage schedules contained in" the federal statute and, as such, amounted to "an impermissible 'end run' around" the statute's limitation on private actions. *Id.* at 86.

> To allow a third-party private contract action aimed at enforcing those wage schedules would be inconsistent with the underlying purpose of the legislative scheme and would interfere with the implementation of that scheme to the same extent as would a cause of action directly under the statute.

Id. (internal quotation marks & citation omitted). *See also Buck v. American Airlines, Inc.*, 2007 U.S. App. Lexis 2618 (1st Cir. 2007) ("[T]he plaintiffs would have us believe that the implied right of action doctrine contains a gaping aperture that allows federal regulations, promulgated pursuant to a statute that creates no right of private enforcement, to be privately enforced through state-law mechanisms. . . . We hold instead that, because no implied right of action exists under the [statute and regulation] at issue here, the regulation cannot be read as an implied contract provision."); *Council Oaks Learning Campus, Inc. v. Farmington Casualty Co.*, 2000 U.S. App. Lexis 6771 (10th Cir. 2000) ("We reject . . . [the] argument that incorporating [a state statute] into the . . . contract somehow creates the private right of action that does not exist in the unincorporated statute."); *Keehn v. Carolina Casualty Insurance Co.*, 758 F.2d 1522 (11th Cir. 1985); *Murphy v. Villanova University*, 547 F. Supp. 512, 521 (D. Pa. 1982) (plaintiff's third-party beneficiary claim "merely reclothed in a common law outfit his federal

implied cause of action claim" which court had held did not exist); *Davis v. United Air Lines Inc.*, 575 F. Supp. 677, 680 (E.D.N.Y. 1983); *New York Stock Exchange Inc. v. Sloan*, 394 F. Supp. 1303, 1316 (D.N.Y. 1975) ("It would be anomalous to hold that the statute provides greater relief indirectly than it provides directly, and we decline to do so.").

New Mexico law is not to the contrary. Plaintiffs rely on *Cockrell v. Board of Regents of New Mexico State Univiversity*, 2002-NMSC-009, 132 N.M. 156, 45 P.3d 876. *Cockrell*, however, addresses a scenario that is materially different from the present case. In *Cockrell* the plaintiff's federal statutory wage claim could not be brought against his employer because the claim was barred by the state's sovereign immunity. The statute otherwise would have supported a private remedy. *Cockrell* therefore did not involve a situation where allowing a contract-based claim would have circumvented a legislative restriction on private enforcement of a statutory scheme. The reason for prohibiting would-be litigants from creating a private remedy by recourse to contract law did not exist in *Cockrell*. The case simply recognizes that a state entity may subject itself to a state law claim for breach of a written contract, which is not barred by sovereign immunity, should it choose to do so.

The other cases cited by the Plaintiffs are not on point. Some of them arise in different legal or factual contexts. In *Foundation Health Inc. v. Westside EKG*

Associates, 944 So.2d 188 (Fla. 2006), for instance, while the state HMO statute did not include an express provision allowing private enforcement actions, the very same statute specifically authorized civil actions to enforce HMO contracts. The court was strongly influenced by this indication that a private action on the contract would not conflict with legislative design. *See id.* at 196; *see also Raetsch v. Lucent Technologies, Inc.*, 2006 U.S. Dist. LEXIS 78422 (D.N.J. 2006) (plaintiffs pursuing contract claim were not attempting to enforce statute, which related to taxation of certain transfers of employee benefit plan assets; court noted that "nothing in this opinion . . . infringes upon the IRS's right to review tax issues surrounding the . . . transfers"); *Zigas v. Superior Court*, 120 Cal. App. 3d 827, 839-40 (Cal. Ct. App. 1981) (court was convinced that allowing contract claim was consistent with legislative intent in adopting program and would not frustrate goals of agency administering program). *Electrostim Medical Services Inc. v. Aetna Life Insurance Co.*, 2007 U.S. Dist. LEXIS 9857 (D. Fla. 2007), follows *Foundation Health* in a similarly distinguishable setting.

In *Favel v. American Renovation & Construction Co.*, 59 P.3d 412, 426-27 (Mont. 2002), the court allowed a contract action where the statute in question generally provided administrative remedies but those remedies were not available in the circumstances. The court limited the decision to its facts, *id.*, which – because § 27-2-16(B) does not provide administrative relief to providers any more

than it provides a private cause of action – are not the facts of the case at bar. And in *Dierkes v. Blue Cross & Blue Shield of Missouri*, 991 S.W.2d 662 (Mo. 1999), the court held that the existence of a regulatory scheme for the enforcement of certain statutes, which precluded private actions to enforce them, did not bar claims for breach of contract, unjust enrichment, bad faith, misrepresentation, and fraud arising out of an insurer's representations that its policy met "all state and federal guidelines." Plaintiffs could pursue these common law claims, the court held, "so long as plaintiffs' claims assert more than mere violations of" the statutes. *Id.* at 669. But Plaintiffs here claim only a statutory violation and thus are not aided by *Dierkes*.

The value of *Brogdon v. National Health Care Corp.*, 103 F. Supp. 2d 1322 (N.D. Ga. 2000), and of *Brown v. Sun Healthcare Group, Inc.*, 476 F. Supp. 2d 848 (E.D. Tenn. 2007), which follows *Brogdon*, is undermined by the fact that neither of these courts considered the important question whether allowing private litigants to assert contract claims to enforce otherwise non-actionable statutes would undesirably interfere with a legislative plan for administrative regulation of the subject matter. At best, perhaps the courts implicitly determined that there would be no such interference. In the present case, however, HSD – which is in the best position to know whether its administration of the Medicaid program would be aided or impaired by private enforcement efforts – has taken the position that no

private right to enforce § 27-2-16(B) should be recognized. (R Vol. 24, 8123 (Sixth Affirmative Defense))

The district court correctly followed the weight of authority in holding that Plaintiffs could not ground a breach of contract claim on the alleged violation of § 27-2-16(B).

C. Plaintiffs are not third party beneficiaries of the agreement between PHP and HSD.

1. *The contracting parties, HSD and PHP, did not intend to make Medicaid providers third party beneficiaries of the MMCSAs.*

The paramount indicator of third party beneficiary status is a showing that the parties to the contract intended to benefit the third party, either individually or as a member of a class of beneficiaries. *Valdez v. Cillessen & Son*, 105 N.M. 575, 734 P.2d 1258 (1987); *McKinney v. Davis*, 84 N.M. 352, 503 P.2d 332 (1972); *Callahan v. New Mexico Federation of Teachers-TVI*, 2006-NMSC-010, 139 N.M. 201, 131 P.3d 51. The party claiming third party beneficiary status has the burden of showing that the parties to the contract intended to benefit him. *Vigil v. State Auditor's Office*, 2005-NMCA-096, 138 N.M. 63, 116 P.3d 854.

The parties to the MMCSAs were HSD and PHP. Neither intended that the MMCSAs benefit Medicaid providers. At all times relevant, both HSD and PHP intended and believed that the only beneficiaries of the MMCSAs were Medicaid patients. (R Vol. 11, 3354-59; Vol. 34, 12434) The record is devoid of any

evidence of intent on the part of HSD or PHP – or, for that matter, the New Mexico legislature that established the Medicaid program – to make the members of the plaintiff class third party beneficiaries of the MMCSAs.

PHP has individual provider contracts with many of the members of the plaintiff class. (Members of the class having provider agreements only with Cimarron or Lovelace are not providers to PHP and, therefore, make no claim against PHP.) These contracts deal directly and exclusively with the provision of pharmaceuticals and pharmacy services to *SALUD!* patients. At all times relevant, *i.e.,* from 1997 to the present, these provider agreements were in effect at the same time that PHP's MMCSAs were in effect. If PHP had not had an MMCSA with HSD, there would have been no reason for PHP to have *SALUD!* provider agreements with anyone. Indeed, it could not have entered into such agreements. The provider agreements are reimbursement-specific; the MMCSAs are not. On the face of it, then, it is illogical to conclude that PHP, which had direct contracts with the Plaintiffs, intended to create contractual rights for them in its separate contract with HSD.

2. *Incorporation of § 27-2-16(B) into the MMCSAs does not demonstrate an intent to make Medicaid providers third party beneficiaries to the MMCSAs.*

Despite the logical flaw in their position, Plaintiffs argue that § 27-2-16(B) resides in the MMCSAs and supplies the requisite intent. To make this argument,

Plaintiffs must first persuade the Court that the legislature intended § 27-2-16(B) to apply to Medicaid managed care rather than limiting its applicability only to fee-for-service arrangements. This proposition seems dubious at best. *See* Point II(A), *supra*. But even if the statute is viewed as being included within the MMCSAs, inclusion of the statute as part of the contract between HSD and the MCOs does not demonstrate an intent to benefit Plaintiffs. Neither the statue nor the Medicaid program of which it is a part is intended to benefit health care providers.

The Medicaid program has only one type of intended beneficiary – the human beings who, due to poverty or disability, are eligible to obtain health care services through the program. *See, e.g., Sanchez v. Johnson*; *Long Term Care Pharmaceutical Alliance v. Ferguson*; *Evergreen Presbyterian Ministries, Inc. v. Hood*; *Pennsylvania Pharmacists Association v. Houstoun*; *Westside Mothers v. Olszewski*; *Pharmaceutical Research & Manufacturers of America v. Walsh*. Others benefit from the existence of Medicaid, to be sure. PHP benefits because it is paid money pursuant to its contract with the State. Plaintiffs benefit in the same way. This is because they have something that Medicaid wants and will pay for – the ability to dispense pharmaceutical drugs to patients who need them. The design of Medicaid managed care calls for reimbursement of providers at a rate that will induce sufficient provider participation to provide adequate access for the needs of Medicaid patients while realizing cost economy. An approach that aims

for the lowest achievable reimbursement rate for providers hardly displays a focus on providers as intended beneficiaries. Like PHP, like the trucking company that delivers supplies to behavioral health organizations, like the physician who agrees to treat Medicaid patients, Plaintiffs indisputably "benefit" from Medicaid. They receive payments for goods and services. The providers and intermediaries who participate in the Medicaid program, including PHP itself, all benefit in an incidental way. That does not make them intended beneficiaries of the Medicaid program. *See Tarin's, Inc. v. Tinley*, 2000-NMCA-048, 129 N.M. 185, 3 P.3d 680 (incidental beneficiaries are not third party beneficiaries). They are a means to achieve the program's end: the delivery of health care services to the individuals who are the program's true intended beneficiaries.

Plaintiffs suggest that they are "creditor beneficiaries" of HSD and therefore should be seen as intended beneficiaries of the MMCSAs, citing an example from the Restatement (Second) of Contracts § 302. (Br. in Chief at 35-37.) Under the Restatement provision on which Plaintiffs rely, a non-party beneficiary of a promisor's contractual performance has a right of enforcement if recognition of such a right "is appropriate to effectuate the intention of the parties" and performance "will satisfy an obligation of the promisee to pay money to the beneficiary." *Id.* § 302(1)(a). Allowing third parties to enforce MMCSAs is inappropriate under the Medicaid regulatory scheme and not within the parties'

intent. Further, the performance called for by the MMCSAs is not the kind described in the Restatement. The Restatement illustrates that what is contemplated by this provision is a suretyship relation or a close equivalent; the promisor must assume or promise to pay a debt or similar obligation of the promisee to the third party. *See id.*, cmt. b. The relationship between HSD and the MCOs established by the MMCSAs, however, is not one of suretyship; the MCOs' promise to comply with applicable Medicaid statutes and regulations is not an undertaking to fulfill HSD's responsibilities. Indeed, the District Court ruled at Plaintiffs' insistence that HSD cannot delegate – and an MCO therefore cannot assume – HSD's statutory duty by contract. (R Vol. 3, 781) Plaintiffs' reliance on Restatement § 302(1)(a) is unavailing.

D. Public policy, as expressed in the Federal Medicaid Act and the New Mexico Public Assistance Act, forecloses the third party beneficiary claim.

In a conventional setting, in order to determine whether a given person is a third party beneficiary to a contract executed by others, the court will examine the specific intent of the actual contracting parties. *Tarin's, Inc. v. Tinley*; *Callahan v. New Mexico Federation of Teachers-TVI.* But in this case, the contracts are not conventional. They implement New Mexico's portion of a nationwide governmental program which is designed to afford medical benefits to the aged, blind and disabled. Accordingly, there is an overriding governmental policy to

consider. That policy is independent of the question of who HSD and PHP intended to benefit.

In *Yuchnitz v. PCA Health Plan of Texas, Inc.*, 2000 Westlaw 12960 (Tx. App.), an optician alleged that he was a third party beneficiary of a contractual provision between the state Medicaid agency and an HMO. The contract required the HMO to maintain a network with a class of providers to which the plaintiff belonged. The court rejected the third party beneficiary theory, finding that the network requirement was consistent with the contract's stated goal of providing adequate health services to Medicaid patients. The court concluded that, in context, the provisions relied upon by plaintiff "do not establish that [the HMO] and the Department contracted directly and primarily for the benefit of the [providers]."

In *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985), the court rejected an attempt by a handicapped worker to assert a third party beneficiary claim arising out of affirmative action clauses required by law to be contained in contracts between the government and the worker's employer. The court observed that the government and the contractor "did not intend to make the handicapped direct beneficiaries of their contracts." *Id.* at 1479. It contrasted legitimate third party beneficiary claims that arose where "the needs of the third party motivated

the government to enter into the contract in the first place." *Id.* at 1480. The contracts on which the worker relied, however, were

> not designed to serve the interests of the handicapped. They merely require the [c]ompany to take affirmative action as a promise incidental to a contract to provide goods and services. That the main purpose is unrelated to the affirmative action clauses indicates that the handicapped may not sue as third party beneficiaries.

D'Amato, 760 F.2d at 1480.

The *D'Amato* court made the logical inquiry when it asked what "motivated the government to enter into the contract in the first place." Congress has expressed its motivation in creating the Medicaid program:

> For the purpose of enabling each state, as far as practical under the conditions in such states, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services and (2) rehabilitation and other services to help such families or individuals obtain or retain capacity for independence or self care, it is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. . . .

42 U.S.C. § 1396.

The New Mexico legislature expressed the same motivation at NMSA 1978, § 27-2-16(A).

Section 313 of the Restatement (Second) of Contracts, is devoted exclusively to government contracts. That section provides that the general Restatement rules governing third party beneficiary claims apply to a government

contract "except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach." Section 313 continues:

> 2. In particular, a promissor who contracts with a government or governmental agency to do an act for or render service to the public is not subject to contractual liability to a member of the public for consequential damages arising from performance or failure to perform unless:
>
> a. The terms of the promise provide for such liability; or
>
> b. The promissee is subject to liability to the member of the public for the damages and a direct action against the promissor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

The case law explains that this provision protects government contractors, such as PHP, from being exposed to unwarranted liability to the public at large through the utilization of third party beneficiary claims. *See, e.g., Allstate Transportation Co. v. Southeastern Pennsylvania Transportation Authority*, 2000 WL 329015 at **15, 16 (E.D. Pa.); *Jama v. United States Immigration and Naturalization Service*, 334 F. Supp. 2d 662, 686-87 (D.N.J. 2004); *Nguyen v. United States Catholic Conference*, 548 F. Supp. 1333 (W.D. Pa. 1982), *affirmed* 719 F.2d 52 (3d Cir. 1983); *Angleton v. Pierce*, 574 F. Supp. 719, 735-36 (D.N.J. 1983), *affirmed* 734 F.2d 3 (3rd Cir. 1984), *cert. denied* 469 U.S. 880 (1984); *Debolt v. Espy*, 832 F. Supp. 209 (S.D. Ohio 1993), *affirmed* 47 F.3d 777 (6th Cir.

1995); *Kroekel v. United States Marshal's Service*, 1999 WL 33919792 at **17, 18 (D. Colo.) (security officer not a third party beneficiary of contract between his employer and government even though contract incorporated specific termination procedures for his position).

There is no language in any of the MMCSAs purporting to give the members of the plaintiff class, or any other type of Medicaid provider, third party beneficiary status. Judicial policy pertaining to actions against government contractors independently forecloses the development of a third party beneficiary claim against PHP.

III. The Trial Court Did Not Err in Dismissing the Plaintiff Class's Claim for Unjust Enrichment.

The remedy of unjust enrichment is also known as "quasi contract." In the absence of an actual contract, where equity requires it, the court will imply a contractual relationship. *City of Las Cruces v. El Paso Elec. Co.*, 904 F. Supp. 1238 (D.N.M. 1995). In this case there is no absence of a contract, nor is there an equitable basis to invoke the doctrine of unjust enrichment.

PHP had direct contracts with the relevant members of the class. PHP performed in accordance with the terms of those contracts. It is that very contractual performance by PHP of which the class complains. One who has a contract with another cannot put the contract aside and sue for unjust enrichment.

City of Las Cruces v. El Paso Elec. Co. The District Court properly adhered to this fundamental concept. (R Vol. 10, 10544)

There is no evidence that would excite the interest of equity in the first place. The class members signed individual contracts with PHP. In those contracts, they agreed to be paid discounted AWP and dispensing fees less that $3.65. When PHP calculated the pharmacy part of a potential MMCSA, prior to July 1, 1997, it acted on the presumption that it would pay provider pharmacies AWP minus a negotiated discount for drug ingredients and dispensing fees less than $3.65. (R Vol. 8, 2161-83) Three years later, PHP was brought into the *Starko* litigation. PHP reacted by prophylactically increasing what it paid for Medicaid prescriptions while it awaited guidance from HSD. When it received HSD's instructions, PHP amended its contracts with the class members by returning to its original approach, as approved by HSD. (*Id.*)

The class members made sure they would be Medicaid providers by signing provider agreements with PHP. At the same time, they pushed forward with their lawsuit against HSD, to which they later added PHP and in which they now claim that PHP was unjustly enriched by the very contracts they executed. The unjust enrichment claim would be barred by the doctrine of equitable estoppel in any event. *See, generally, Gallegos v. Pueblo of Tesuque*, 2000-NMSC-012, 132 N.M. 207, 46 P.3d 668; *see also Van Zanen v. Qwest Wireless, L.L.C.*, 522 F.3d 1127

(10th Cir. 2008); and *Gary v. D. Agustini & Asociados, S.A.*, 865 F. Supp. 818 (S.D. Fla. 1994) (where the plaintiff receives value from the defendant, there is no claim for unjust enrichment; an unjust enrichment claim cannot be based on alleged violation of a statute).

IV. The District Court Properly Dismissed the Plaintiff Class's Declaratory and Injunction Claims.

By their nature, the declaratory and injunction claims mimic the substantive claims in the lawsuit. The plaintiff class has no substantive claim against PHP; *a fortiori*, the class is not entitled to declaratory or injunctive relief. *Gill v. Public Emplees Retirement Board*, 2003-NMCA-038, 133 N.M. 345, 62 P.3d 1227 (declaratory judgment act creates no substantive rights); *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250 (D.N.M. 2003) (no injunction unless underlying right to relief is clear and unequivocal).

V. The Court Below Erred in Ruling that § 27-2-16(B) Cannot Be Waived by Pharmacies that Enter into Provider Agreements with PHP for Reduced Reimbursement.

Shortly after PHP entered the lawsuit, the parties briefed the question whether any benefit that § 27-2-16(B) might accord pharmacists, assuming the statute was applicable to Medicaid managed care, could be waived if a pharmacy entered into a provider agreement with an MCO specifying a different level of reimbursement, as occurred here. (R Vol. 12, 3987) Judge Nelson ruled that the statute cannot be waived. (R Vol. 20, 6818) Although that ruling eliminated one

defense theory advanced by PHP, it was not immediately appealable. This Court declined an interlocutory appeal the MCOs sought at the time. (R Vol. 22, 7260)

The waiver issue is collateral to the issues now on appeal; the Court need not reach the issue in order to affirm the District Court's judgment. But if the Court should reverse any part of that judgment, the question of waiver will be relevant on remand and, in that event, the Court should address that question now and correct the lower court's error. *See* Rule 12-201(C) NMRA (appellee may raise issues for determination only if appellate court should reverse, in whole or in part, judgment appealed from).

Statutory rights can be contractually waived. "The voluntary relinquishment of a statutory protection is consistent with our policy favoring the right to contract." *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 108 N.M. 467, 471, 775 P.2d 233, 237 (1989). As this Court has recognized, the state's policy favoring freedom in making contracts is strong enough to permit a contracting party to waive statutory protections that the party otherwise would enjoy.

In *City of Artesia v. Carter*, 94 N.M. 311, 610 P.2d 198 (Ct. App. 1980), the defendant was a contractor of the city who agreed to indemnify the city against claims arising out of performance of the contracted work. An employee of the contractor was killed on the job and brought a claim against the city. The

contractor sought to avoid its obligation to indemnify the city by contending that the indemnity provision violated the public policy underlying the worker's compensation law. This Court recognized that the workers' compensation statute, which stated in mandatory terms that an employer who complied with the statute "shall not be subject to any other liability whatsoever" for injury to or death of an employee, reflected a public policy of limiting employer liability. *Id.* at 312, 610 P.2d at 199. Nevertheless, the statutory policy was outweighed by the policy favoring freedom of contract.

> Enforcing express contracts of indemnity is no more than enforcing the loss distribution agreed to by the contracting parties. . . . This arrangement does not depart from the policy of limiting the employer's liability; that policy remains intact. All that is involved is the employer's departure from the policy. *If the employer desires to voluntarily relinquish his statutory protection, he may do so.*

Id. (emphasis added).

New Mexico's policy of freedom of contract "requires enforcement of contracts unless they clearly contravene some law or rule of public morals." Section 27-2-16(B) does not express such an immutable principle. It is no more than an economic regulation touching on the commercial relationship between pharmacies participating in the Medicaid program and HSD or its intermediaries. *Cf. United Wholesale Liquor*, 108 N.M. at 471, 775 P.2d at 237 (economic policy underlying New Mexico Alcoholic Beverage Franchise Act "should not be allowed to override our strong public policy of freedom of contract"; contractual choice of

law provision that removed protections of Franchise Act from franchisee was enforceable). Section 27-2-16(B) does not expressly prohibit waiver of its terms or declare that non-conforming provider agreements are unenforceable. *Cf. Pina v. Gruy Petroleum Mgmt. Co.*, 2006-NMCA-063, ¶17, 139 N.M. 619, 136 P.3d 1029 (parties could not use contractual choice of law to avoid effect of statute that declared certain indemnity terms void; statute was "an example of an extraordinarily limited class of statutes whose very subject is the enforceability of contracts that contravene a specific public policy"). Moreover, allowing free negotiation of reimbursement rates between pharmacies and MCOs in the Medicaid managed care program advances the policy underlying managed care – achieving cost economies by allowing market forces to influence health care costs. There is no reason why pharmacies that elect to do so should not be permitted to contract with MCOs for freely negotiated reimbursement rates.

All sorts of rights, statutory and constitutional, can be waived. *See, e.g., Newton v. Rumery*, 480 U.S. 386 (1987) (rights under 42 U.S.C. § 1983 can be waived in a contract); *United States v. Mezzanatto*, 513 U.S. 196 (1994) (protections afforded by the Federal Rules of Evidence can be waived in a contract); *Venegas v. Mitchell*, 495 U.S. 82 (1990) (fee-limiting protections in 42 USC §1988 can be waived in a contract); *Walker v. Crow*, 2007 U.S. Dist. LEXIS 77841 (S.D. Cal. 2007) (statutory right to seek contribution for payment of

taxes can be waived in a contract); *Whitfield v. Public Housing Agency of St. Paul*, 2004 U.S. Dist. LEXIS 24714 (D. Minn. 2004) (statutory right to an administrative grievance hearing can be waived in a contract); *Williams v. Phillips Petroleum Co.*, 23 F.3d 930 (5th Cir. 1994) (worker protections contained in the Worker Adjustment and Retraining Notification Act can be waived in a contract); *Stroman v. West Coast Grocery Co.*, 884 F.2d 458 (9th Cir. 1989) (right to file Title VII discrimination claim can be waived in a contract); *McCall v. United States Postal Serv.*, 839 F.2d 664 (Fed. Cir. 1988) (statutory right of appeal can be waived in a contract).

The statute in question in this appeal lacks the inherent importance of constitutional rights or of statutes which create causes of action. If a person can waive constitutional rights or the right to vindicate constitutional or other grievances altogether, then, *a fortiorari*, the provisions of NMSA 1978, § 27-2-16(B) can be waived.

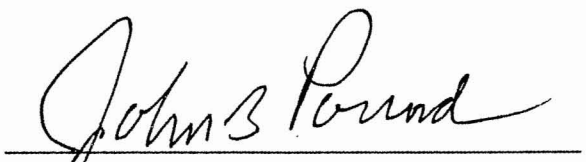
CONCLUSION

The District Court analyzed the law correctly on all the controlling issues. Section 27-2-16(B) does not provide Plaintiffs with a direct action against PHP, nor can Plaintiffs inject themselves into the relationship between HSD and its Medicaid managed care intermediaries through the mechanism of a third-party beneficiary contract theory. The relevant contracts are those between the members

of the plaintiff class and PHP and those contracts, it is conceded, have not been breached. Plaintiffs' claims against PHP were properly dismissed. Accordingly, the judgment entered by the District Court should be affirmed.

Respectfully submitted,

LONG, POUND & KOMER, P.A.
Attorneys for Appellee Presbyterian Health Plan, Inc.



JOHN B. POUND
2200 Brothers Road
P. O. Box 5098
Santa Fe, NM 87502-5098
505-982-8405
505-982-8513 (FAX)

EDWARD RICCO
Rodey, Dickason, Sloan,
Akin & Robb, PA
201 Third Street NW, #2200
P. O. Box 1888
Albuquerque, NM 87103-1888
505-765-5900
505-768-7395 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on this 9 day of July, 2008, a true and correct copy of the foregoing Answer Brief of Presbyterian Health Plan, Inc. was mailed first class, postage prepaid, to the following counsel of record:

Eric R. Miller, Esq.
Jerome Marshak, Esq.
NM Attorney General's Office
408 Galisteo Street
P. O. Drawer 1508
Santa Fe, NM 87504-1508

Paul Ritzma, Esq.
New Mexico Human Services Department
2009 S. Pacheco
P. O. Box 2348
Santa Fe, NM 87504-2348

Stephen D. Ingram, Esq.
Cavin & Ingram, P.A.
40 First Plaza, Suite 610
P. O. Box 1216
Albuquerque, NM 87102

William C. Madison, Esq.
Madison, Harbour & Mroz, PA
201 Third Street NW, #1600
P. O. Box 25467
Albuquerque, NM 87125-0467

Lisa Mann, Esq.
Jennifer Noya, Esq.
Modrall Sperling Roehl Harris & Sisk, PA
500 4th Street NW, #1000
P. O. Box 2168
Albuquerque, NM 87103-2168

Charles R. Peifer, Esq.
Robert E. Hanson, Esq.
Peifer, Hanson & Mullins, P. A.
20 First Plaza, Suite 725
P. O. Box 25245
Albuquerque, NM 87125-5245

Cody K. Kelley, Esq.
Kelley-Struebel , LLC
315 Fifth Street NW
Albuquerque, NM 87102-2105

John B. Pound

JOHN B. POUND