COURT OF APPEALS
STATE OF NEW MEXICO

No. 27,992

STARKO, INC., ET AL.,

Plaintiffs-Appellants,

vs.

PRESBYTERIAN HEALTH PLAN, INC. AND CIMARRON HEALTH PLAN, INC.,

Defendants-Appellees.

On Conditional Cross-Appeal from the Second Judicial District Court, County of Bernalillo, Hon. Linda Vanzi, No. CV-97-06599

BRIEF IN CHIEF IN SUPPORT OF CONDITIONAL CROSS-APPEAL OF CIMARRON HEALTH PLAN, INC.

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Appellee/Cross-Appellant Cimarron Health Plan, Inc. ("Cimarron") respectfully requests that if this Court reverses any part of the judgment entered in its favor by the district court below, it should also reverse (a) the district court's Order filed September 24, 2003, in which the court refused to decertify a class previously certified against other defendants, even though neither Cimarron, nor any of the other managed care organizations (the "MCOs") were parties to the litigation when the class was originally certified, and the claims that had been the subject of the prior class certification order had been substantially altered through amendment (RP 7850); and (b) the court's grant of Plaintiffs' motion for partial summary judgment declaring that statutory provisions could not be waived or contracted away even when the named Plaintiffs were fully aware of the statutory provisions at the time they entered into contracts accepting lower fees than those provided in the statute. (RP 6818-6819). Long after those class certification and waiver rulings, the court granted dispositive motions filed by Cimarron and Presbyterian Health Plan, Inc. and entered final judgment in favor of Cimarron and Presbyterian and against Plaintiffs. The Plaintiffs have appealed that final judgment. Cimarron's cross-appeal raises issues for determination only if this Court should reverse, in whole or in part, the judgment entered in favor of Cimarron and against the class.

SUMMARY OF PROCEEDINGS

Summary of Facts

New Mexico's Human Services Department (HSD) oversees Medicaid, a voluntary federal-state program providing medical services to the needy. *Starko, Inc. v. Gallegos*, 2006-NMCA-85, ¶2, 140 P.3d 1085, 1088, *cert. denied,* 142 P.3d 360 (2006). To effectuate that program, the New Mexico Legislature created a managed care system (SALUD!) "to provide cost-efficient, preventive, primary and acute care" within the parameters of the New Mexico Public Assistance Act. §27-2-12.6 NMSA 1978. SALUD! was intended to be cost-effective, offer quality service, and provide access to medical recipients. (RP 3553).

Beginning in 1997, HSD and the MCOs entered into Medicaid Managed Care Services Agreements ("MMCS Agreements"), in order to administer SALUD! and thereby benefit SALUD! enrollees. (SR 12061). The State neither provides nor directly reimburses services under SALUD!; "rather, HSD contracts with private managed care organizations (MCOs) which in turn provide health care to Medicaid recipients" in exchange for monthly payment on a capitated basis. *Starko, Inc. v. Gallegos*, 2006-NMCA-85, ¶2, 140 P.3d at 1088.

In order to fulfill its obligations to provide pharmacy services as required under the MMCS Agreements, Cimarron entered into agreements with Pharmacy Benefits Managers (PBMs). (RP 3573-3592). Those contracts evidenced the

parties' intention that the PBM would enter into agreements with the pharmacies that would actually fill prescriptions for SALUD! members. (RP 3573, ¶B). Cimarron paid the first PBM, Regent Services, on a "capitated" (per-member, per-month) basis. (RP 3587).

Then, in turn, the PBM entered into "Participating Pharmacy Agreement[s]" with pharmacies chosen to provide pharmacy services to Cimarron SALUD! enrollees. The Agreement signed by Plaintiff Starko, dated after Plaintiff filed this lawsuit against the State, provided for a dispensing fee of $2.50. (RP 3594, 3600). Other contracts signed by other pharmacies specified different dispensing fees. (SR 12059). Those contracts were negotiated between the PBM and the Plaintiff pharmacies and, since 1997, Plaintiffs have accepted payment at the reimbursement rates negotiated under those contracts. (SR 12058-12059).

Course of Proceedings

The procedural history of the case is unique. The plaintiff pharmacies filed this lawsuit as a class action in 1997 against HSD, challenging reimbursement under pre-SALUD![1] fee-for-service Medicaid pharmacy claims from 1988 forward. The original lawsuit did not reference managed care programs or the MCOs, even though the SALUD! managed care program had been inaugurated one

[1] Even after initiating SALUD!, New Mexico has also continued to provide Medicaid services under a traditional fee-for-service program.

month earlier. The gist of Plaintiffs' complaint was that pharmacies were not being properly reimbursed for filling Medicaid recipients' prescriptions under §27-2-16(B) NMSA. That statute provides, in pertinent part:

> If drug product selection is permitted by Section 26-3-3 NMSA 1978,[2] 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).

In rapid succession in the early stages of the litigation, the court granted class certification and granted Plaintiffs' motion for partial summary judgment, finding that §27-2-16(B) NMSA was unambiguous, despite the statute's use of key phraseology undefined in the law. In a separate order, the court ruled that class members would not be subject to the defense of waiver of statutory benefits if, in the future, they entered into contracts with non-party MCOs with pricing mechanisms at variance with the statute. (RP 305-306).

Only after having achieved these critical victories, and more than three full years after they filed this case, did Plaintiffs add the MCOs to this lawsuit. Thus, the MCOs were brought into a certified class action, without an opportunity to resist class certification, or to be heard on already-decided issues concerning the nature of the statute, or to defend themselves by proving that individual class

[2] §26-3-3 NMSA 1978, the Drug Product Selection Act, allows pharmacists to substitute generic drugs ("therapeutically equivalent" drugs) for the specified prescribed drug, where multiple sources for that drug exist.

members continued to voluntarily execute contracts at variance with their own avowed interpretation of the statute.

In August, 2002, the MCOs filed motions, requesting the Court to decertify the class or strike the class action allegations, on the grounds that the requirements of Rule 1-023 NMRA were not satisfied. (RP 3280-3314, 3612-3666, 4013-4041). In response to this first opportunity to speak to the question, Plaintiffs contended that while the MCOs' predicament was unfortunate for them, the earlier judicial rulings had closed the book on class certification. (RP 4122-4125). Plaintiffs argued that because the trial court's earlier rulings had, among other things, insulated them against the waiver defense, the fact that waiver is an individualized defense and would logically destroy the class requirements of commonality and typicality, had become irrelevant.

By letter decision dated June 5, 2003, the court denied these motions (RP 7389), and formalized that ruling in an order entered September 24, 2003: "The Court's denial of these motions may be construed as a new certification as it involves the new defendants and new claims discussed in Finding Nos. 5 and 7 above." (RP 7852, ¶1). The MCOs then filed an appeal of the Order pursuant to Rule 1-023(F) NMRA. This Court determined that the MCOs could not invoke Rule 1-023(F) because it was not in existence at the time the case was filed in

1997. *Starko, Inc. v. Cimarron Health Plan, Inc.*, 2005-NMCA-40, 110 P.3d 526, *cert. denied*, 112 P.3d 1111 (2005).

Also in August, 2002, all the parties briefed the waiver issue; the MCOs argued that the named Plaintiffs and class members had waived any protection accorded them under §27-2-16(B) by voluntarily contracting for reimbursement rates that they knew were lower than the statutory rate. (RP 3315-3396, 3529-3600, 3984-4009). The MCOs also argued that Plaintiffs should be estopped from controverting the waiver defense, because they had negotiated and entered into their contracts without disclosing that, at the same time, they had commenced litigation with the State in which they argued that §27-2-16(B) was applicable to Medicaid managed care and that those very same contract rates were unlawful. (*Id.*).

After hearing oral argument on the waiver question, the district court issued a letter decision on January 13, 2003, and then a supplemental letter on January 27, 2003, granting partial summary judgment in favor of Plaintiffs, holding that §27-2-16(B) could not be waived, and denying the MCOs' cross-motions for summary judgment. (RP 6822-6828). On February 17, 2003, the court entered its Order embodying its ruling, and incorporating its letter decisions. (RP 6818-6819). The Order included language certifying the ruling for interlocutory appeal. The MCOs

filed an application for interlocutory appeal on March 4, 2003, and this Court denied the application on April 1, 2003.

Thus, the MCOs had been sued for millions of dollars in a case where, by their exclusion as parties for the first four years, the deck had been stacked against them. When the MCOs attempted to revisit the pivotal legal rulings made before their entry into the case, rulings directly affecting their defenses, they ran head-on into the doctrine of law of the case.

To say it plainly, the MCOs found themselves in a class action case which has been played out backwards. Whether the result of a pre-ordained strategy or remarkable happenstance, the MCOs were placed on a rail which was liberally greased before they even knew about this litigation. Under these rare, and perhaps unprecedented circumstances, the pragmatic lessons taught in the case law governing class actions have been manipulated and distorted so as to deprive the MCOs of their due process rights.

Standard of Review

The Order Granting Class Certification filed October 20, 1999 and the Order Denying Defendants' Motions to De-Certify Class filed September 24, 2003 are reviewed by this Court for an abuse of discretion. *Berry v. Federal Kemper Life Assurance Co.*, 2004-NMCA-116, ¶25, 99 P.3d 1166, 1176, *cert. denied*, 2004-NMCERT-9, 100 P.3d 672. Cimarron preserved these issues in its Motion to

Declare Class Certification Void, filed August 5, 2002 (RP 3612-3666); its Reply in support of that Motion, filed September 20, 2002 (RP 6031-6032); and Defendants' Memorandum in Opposition to Plaintiffs' Proposed Form of Order Denying Motions to Decertify, filed July 7, 2003. (RP 7433-7451).

Even under an abuse of discretion standard, this Court has plenary authority and responsibility to correct errors of law. *See, e.g., Enfield v. Old Line Ins. Co. of Am.*, 2004-NMCA-115, ¶28, 98 P.3d 1048, 1053, *cert. denied*, 2004-NMCERT-9, 100 P.3d 672. In New Mexico, even when this Court reviews for abuse of discretion, its "review of the application of the law to the facts is conducted *de novo*." *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 986 P.2d 450, 452. Therefore, this Court may regard as an abuse of discretion any discretionary decision that is "premised on a misapprehension of the law." *Id.* These standards apply to each of the issues regarding the impropriety of class certification.

The standard of review of the Order dated February 17, 2003, granting Plaintiffs' summary judgment on waiver is *de novo. Ponder v. State Farm Mut. Auto. Ins. Co.,* 2000-NMSC-033, ¶7, 12 P.3d 960, 963. Similarly, the interpretation of a statute is a question of law that this Court reviews *de novo. Rosette, Inc. v. United States Department of Interior*, 2007-NMCA-136, ¶60, 169 P.3d 704, 733, *cert. granted*, 141 N.M. 401, 156 P.3d 39 (2007). Cimarron

preserved the issue by raising it in its Response in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed March 14, 2002 (RP 1951-1963); its Memorandum in Support of its Motion for Partial Summary Judgment on Counts I, III, and IX of Plaintiffs' Third Amended and Supplemental Complaint on the Issue of Whether Section 27-2-16(B) NMSA Can be Waived, and brief in support, filed August 5, 2002 (RP 3529-3600); its Response to Plaintiffs' Motion for Partial Summary Judgment Declaring that the Protections of NMSA 1978, §27-2-16(B) Cannot be Waived or Contracted Away, filed August 26, 2002 (RP 5182-5222); Cimarron Health Plan, Inc.'s Reply in Support of its Motion for Partial Summary Judgment on Counts I, III, and IX Plaintiffs' Third Amended and Supplemental Complaint on the Issue of Whether Section 27-2-16(B) Can Be Waived, filed September 11, 2002 (RP 5509-5520).

ARGUMENT

The MCOs' due process rights were violated when the court held them to a class certification order entered: prior to their entry into the lawsuit, prior to the addition of substantively different claims, and following entry of partial summary judgment in Plaintiffs' favor. Furthermore, a class should never have been certified in this case, because Plaintiffs could never satisfy the requirements for class certification under Rule 1-023(B) NMRA. The court also erred in holding that §27-2-16(B) could not be waived. Accordingly, in the event this Court

reverses any part of the judgment entered in Cimarron's favor, it should also reverse (a) the certification of a class under Rule 1-023 NMRA, and (b) the order declaring that statutory provisions could not be waived or contracted away despite Plaintiffs' awareness of the statutory provision when they entered into contracts for amounts less than they claim are due under the statute.

I. THE DISTRICT COURT'S CLASS CERTIFICATION ORDER WAS CONSTITUTIONALLY DEFECTIVE.

The district court's Class Certification Order, applying its previously-certified class certification to subsequently-added Defendants and subsequently-added claims, was manifestly erroneous. As discussed more fully below, the MCOs were unfairly required to demonstrate why class certification was improper. The court should have required Plaintiffs to prove that class certification continued to be proper, notwithstanding the complete change in direction occasioned by Plaintiffs' decision to amend twice following the original class certification order. Moreover, the application of a previously certified class was particularly egregious here, because Plaintiffs had already chosen to submit a portion of their case for decision on the merits. The grant of that partial summary judgment motion made the court's refusal to decertify completely improper, because it allowed "one way intervention" that has been uniformly criticized and rejected by the courts. These and other errors discussed more fully below demonstrate the court's abuse of its discretion in entering the Class Certification Order against the MCOs.

Plaintiffs have never disputed that the MCOs never had notice of the original class certification hearing, had no opportunity to undertake class discovery prior to class certification, and had no opportunity to challenge the appropriateness of class certification at any class certification hearing. Plaintiffs' tactic[3] of amending their complaint, rather than seeking new certification, thus violated Cimarron's constitutional due process rights:

> When a plaintiff chooses to amend its class action complaint, such amendment destroys the vitality of a prior adjudication of a class which was based on a different lawsuit, since to permit a prior determination under Fed. R. Civ. P. 23 to act as an umbrella under which new causes of action or additional theories of relief can gather by means of the application of Fed. R. Civ. P. 15 on amended pleadings would sabotage the function of a Fed. R. Civ. P. determination.

Federal Procedure, Lawyers Edition, § 12:295 (2008). *See also Zenith Laboratories, Inc. v. Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir.) (amendment of pleadings, asserting new claims, requires reconsideration of prior certification), *cert. denied*, 429 U.S. 828 (1976); *Walker v. World Tire Corp.*, 563 F.2d 918, 921 (8th Cir. 1977) ("where ... the pleadings themselves do not conclusively show whether the Rule 23 requirements are met, the parties must be afforded the opportunity to discover and present documentary evidence on the issue").

[3] That this is, in fact, a tactic is evidenced by the fact that prior Complaints had mentioned the MCOs, but Plaintiffs delayed joining the MCOs as defendants until after they had obtained class certification.

The Sixth Circuit Court of Appeals issued a writ of mandamus directing the district court to vacate a class certification order where, as here, a defendant was added after an original class certification order, and the district court issued a second class certification order including that defendant, without providing the newly-added defendant an opportunity to present evidence or participate in a hearing. *In re American Medical Systems, Inc.*, 75 F.3d 1069 (6th Cir. 1996). The court noted that "mere repetition of the language of Rule 23(a) is not sufficient. ... The parties should be afforded an opportunity to present evidence on the maintainability of the class action." 75 F.3d at 1079.

In this case, the court did not even quote the language of Rule 1-023 in its Class Certification Order. Similarly troubling is the lack of any analysis concerning the required elements of Rule 1-023.[4] Thus, as in this case, "The amended order does not identify allegedly common issues, does not explain why they predominate over individual issues and makes no finding of superiority. Certification was therefore improper." *In re American Medical Systems,* 75 F.3d at 1085-86 (finding newly-added defendant's due process rights violated by "precipitous certification of the class").

[4] The original class certification order merely recited, in conclusory terms, that the elements of Rule 1-023 were met. (RP 0609-610). Insofar as it "simply mimicked the language of the rule," "This was error." *In re American Medical Systems,* 75 F.3d at 1082. Thus, neither Order substantiated that class certification was proper.

These authorities' analysis demonstrates the impropriety of class certification. Each defendant as to whom a class is certified must have the opportunity to present evidence at a proper hearing, because "We cannot assume that parties who attend a [class certification] hearing will have the opportunity and motive to defend absent parties." *Warner v. Waste Management, Inc.*, 521 N.E.2d 1091, 1098-99 & n. 9 (Ohio 1988) (excluding defendants that had never received notice of a class certification hearing from class certification order until a proper hearing could be held as to those defendants). Here, too, the court never made evidentiary findings that the requirements of Rule 1-023 were met as to the MCOs. And the court could not assume that the State defendants who were then joined were adequately representing the MCOs' interests. *See generally In re American Medical Systems, supra.* Thus, the Class Certification Order violated Cimarron's due process rights, and cannot stand.

These constitutional problems are exacerbated by the peculiar procedural posture of the sequence of critical rulings in this case. As noted above, when the class was originally certified, the MCOs were not parties, and many of the claims subsequently asserted were nowhere raised. Then, after the MCOs were joined as defendants and the new claims added, the MCOs filed motions to decertify and/or to declare the original certification void as to them. (RP 3280-3314, 3612-3666, 4013-4041). In opposing those motions, Plaintiffs ignored the fact that the district

court had certified the original class as to one set of claims brought only against State defendants; after that time Plaintiffs amended their complaint to add new parties (the MCOs) *and* new substantive claims. Indeed, the entire focus of this case shifted after the original class certification order.

This problem was further aggravated by Plaintiffs' decision to submit their motion for partial summary judgment for resolution *after* the original certification decision, but *before* adding the MCOs and new claims. As a general rule, courts disfavor pre-class certification rulings on the merits or "one-way intervention" because, while they bind only the individual parties, they may have precedential effect on the putative class members. *See, e.g., Bowling v. Pfizer, Inc.*, 142 F.R.D. 302, 303 (S.D. Ohio 1991) ("one reason for early certification is to identify the stakes of the case so that the parties may choose their litigation strategies accordingly. After even a tentative decision on the merits, incentives are different. ... It is therefore difficult to imagine cases in which it is appropriate to defer class certification until after [a] decision on the merits") (*quoting Bieneman v. City of Chicago*, 838 F.2d 962, 964 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989)).

That is precisely the problem with what Plaintiffs did in this case. By obtaining a partial decision on the merits (that §27-2-16(B) NMSA applied to the pharmacy contracts at issue) *before* adding parties and adding new claims related to those contracts, Plaintiffs got an impermissible preview of the merits before

obtaining class certification binding all the true parties in the case. *See, e.g., Phillip Morris Cos. v. National Asbestos Workers Medical Fund,* 214 F.3d 132, 135 (2d Cir. 2000) (trial court required to decide whether to certify class before making merits determination to prevent "the specter of a risk-free intervention decision by thousands of putative plaintiffs").

Indeed, the New Mexico Supreme Court has specifically recognized the considerable inequities posed by the one-way intervention problem. *See Valley Utilities, Inc. v. O'Hare*, 89 N.M. 262, 265, 550 P.2d 274, 278 (1976) ("we will not in the name of 'efficiency' approve of a procedure which invites nonparticipating parties to share in the spoils of a judgment obtained by others even though those absent parties will not be bound by the judgment if they decide to bring another action rather than intervene"); *see also Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 353-54 (7th Cir. 1975) ("Rule 23 requires class certification prior to a determination on the merits.... Section 23(c)(3), by providing that the judgment shall bind all class members, was specifically intended to confront the one-way intervention problem"). The Rule specifically says as much; Rule 1-023(C) NMRA states that any class certification order is interlocutory and subject to being "altered or amended *before* a decision on the merits." (emphasis added).

As applied to this case, Plaintiffs' prior motion for partial summary judgment could not operate to bind the later-added MCOs. Therefore, Plaintiffs'

tactic in obtaining an early ruling on the merits of their claim, while then insisting on retaining their right to amend their complaint to add parties and claims based on that early favorable ruling cannot be countenanced.

Indeed, Plaintiffs repeatedly invited the district court to commit error, and the court repeatedly accepted the invitation. First, Plaintiffs urged the court to impose an unreasonably high burden of proof on the MCOs, claiming that the burden was on the *MCOs* to defeat a prior class certification order, instead of on Plaintiffs to demonstrate the propriety of class certification as to these newly-added defendants and as to the newly-added claims. Indeed, Plaintiffs claimed that the MCOs had a "heavy burden of proving the need for the drastic step of decertification," and urged the court to require "a showing of compelling reasons to reexamine the question." (RP 4447, 4450).

This shift of the burden to the MCOs to demonstrate the impropriety of class certification was error. Instead, Plaintiffs were required to prove the propriety of class certification as to the new defendants and new claims. This was always *Plaintiffs'* burden. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) (party seeking class certification bears the burden of proof). Indeed, in *In re American Medical Systems,* the court specifically disapproved of attempts, like Plaintiffs' here, to shift the burden to the defendants to *disprove* plaintiffs' "entitlement" to class certification. 75 F.3d at 1086.

Put simply, Plaintiffs urged the court to adopt "drive-by certification" by depriving the MCOs of *any* opportunity to oppose certification as to them. Since the court gave no reasons at all for the Class Certification Order, Plaintiffs cannot demonstrate that the court rejected their reasoning. Thus, the MCOs were deprived of their due process rights, because they never had any meaningful opportunity to challenge class certification, and Plaintiffs were never required to demonstrate that they could satisfy the requirements of Rule 1-023 as to the MCOs and new claims. *See In re American Medical Systems,* 75 F.3d at 1086 (finding due process violation in class certification order where defendant had not conducted discovery or obtained a hearing addressing class certification issues before the class was certified).

Plaintiffs attempted to justify the after-the-fact certification by arguing that every argument made by the MCOs against certification had already been made by the State, and rejected by the district court in the original class certification order. (RP 4125-26). In so doing, Plaintiffs simply ignored, and asked the court to ignore as well, the fact that the State had not made (and could not have made) *any* argument that class certification as to the MCOs was improper. And the State had not previously made (and could not have made) *any* argument that class certification of Plaintiffs' later-added theories of relief was improper. Thus, Plaintiffs were simply wrong when they asserted that the prior class certification

order could legitimately be extended to encompass later-added parties and later-added claims.

Finally, Plaintiffs repeatedly represented to the court that the prior class certification order was the "law of the case." (RP 4279). Addressing the same argument, the Third Circuit Court of Appeals stated:

> Zenith's contention that Judge Whipple's certification of the class constituted the "rule of the case" and should not have been overturned is answered by Fed. R. Civ. P. 23(c)(1), which provides: "An order under this subdivision may be conditional, and may be altered or amended before a decision on the merits."

Zenith Laboratories, 530 F.2d at 512. Thus, if Judge Nelson considered the prior certification order to be the "law of the case," this would be contrary to law. Instead, Plaintiffs' position was legally incorrect, and to the extent the court believed Plaintiffs' claim that the prior certification order was the "law of the case," the court abused its discretion in entering the second class certification order.

II. PLAINTIFFS FAILED TO MEET THE REQUIREMENTS OF RULE 1-023.

Cimarron never had the opportunity to challenge Plaintiffs' original class certification evidence, yet found itself bound by the Order filed prior to its entry into the case. If Cimarron had been able to challenge Plaintiffs' original request for class certification, it would have shown that class certification was

inappropriate under Rule 1-023, because Plaintiffs lacked standing to bring their claims against it, and, even if they had standing, could not have satisfied the required elements to maintain this class action against Cimarron. The Plaintiffs bore the strict burden of proof as to each of these elements. *K.J. ex rel. Dixon v. Valdez*, 167 F.R.D. 688, 690 (D.N.M. 1996), *aff'd,* 186 F.3d 1280 (10th Cir. 1999).

Mere invocation of the language of Rule 1-023 is not sufficient to satisfy this burden; rather, the movant must set forth specific facts to indicate that each requirement has been fulfilled. *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 239 (E.D.N.Y. 1998). The court was not required to accept Plaintiffs' allegations at face value. A class "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Falcon*, 457 U.S. at 161. Since Plaintiffs never satisfied their strict burden of proving the propriety of class certification as to Cimarron, the Class Certification Order cannot stand.

A. Plaintiffs Lacked Standing to Bring This Class Action.

First, Plaintiffs could not have satisfied the fundamental requirement of standing, a basic prerequisite to maintaining *any* case, much less a class action. *Key v. Chrysler Motors, Inc.*, 1996-NMSC-038, ¶ 11, 918 P.2d 350, 354. Standing is a "threshold legal issue" to class certification. *Andrews v. AT&T,* 95 F.3d 1014, 1022 (11th Cir. 1996).

To establish standing, each named plaintiff must demonstrate a personal stake in the outcome against each defendant, a cognizable injury, and a causal connection between the injury and the alleged conduct of each defendant. *Revak v. SEC Realty Corp.*, 18 F.3d 81, 90 (2d Cir. 1994). *See also, De Vargas Savings & Loan Assoc. v. Campbell*, 87 N.M. 469, 473, 535 P.2d 1320, 1324 (1975) ("New Mexico has always required allegations of direct injury to the complainant to confer standing," relying on federal law); *Johnson by Johnson v. Gross*, 125 F.R.D. 169, 170 (W.D. Okla. 1989) ("Each class member must have standing to bring the suit in his own right"), *judg. aff'd*, 971 F.2d 1487 (10th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993).

Plaintiffs never demonstrated their ability to satisfy those jurisdictional requirements as to Cimarron, because the MCOs were not in the case when their class was originally certified. And Plaintiffs could not have satisfied those requirements, because Plaintiffs lacked standing as to Cimarron. The named Plaintiffs have no contracts with Cimarron; Cimarron contracts with a Pharmacy Benefits Manager who in turn contracts with pharmacies. (RP 3560). Yet Plaintiffs have never sued the PBMs. Therefore, none of the named Plaintiffs have standing to sue Cimarron, and class certification as to their claims against Cimarron should have failed on that basis alone.

B. Plaintiffs Never Satisfied Rule 1-023's Requirements of Commonality, Numerosity, Typicality or Adequacy of Representation.

Plaintiffs also could not have satisfied their burden of proving common issues of law and fact with respect to Cimarron, as required under Rule 1-023(A)(2) NMRA. Plaintiffs' own description of the supposedly common issues of law and fact proves that point. For example, Plaintiffs list as a common question "Whether Defendants acted knowingly and/or recklessly in reimbursing Plaintiffs at rates less than permitted by law and their own contracts." (RP 5768, ¶ 28(e)). Yet, whether a particular MCO acted knowingly and/or recklessly in allegedly violating the law or its own contract would require a case-by-case determination, and could not be based on any common set of facts. The necessity for individual trials to establish liability defeats commonality. *See, e.g., Windham v. Am. Brands, Inc.*, 565 F.2d 59, 66-67 (4th Cir. 1977) (affirming denial of certification where liability could only be established through thousands of individual trials), *cert. denied*, 435 U.S. 968 (1978).

Plaintiffs also alleged that they acted under economic coercion or duress. (RP 5771-72, ¶¶ 39-45). To establish economic coercion or duress requires each plaintiff to prove its specific financial condition, its individual dealings with each MCO or PBM, and its reasons for entering into its particular contracts. *First Nat'l Bank of Albuquerque v. Sanchez*, 112 N.M. 317, 321, 815 P.2d 613, 617 (1991).

Those are individual inquiries. *See, e.g., Pecos Construction Co. v. Mortgage Investment Co. of El Paso*, 80 N.M. 680, 683, 459 P.2d 842, 845 (1969). Moreover, establishing that a particular pharmacy was, or was not, coerced, would not establish any other pharmacy's entitlement to relief, which would still depend on a set of facts and circumstances unique to that pharmacy. *See Scott v. Ambassador Ins. Co.*, 426 N.E.2d 952, 954-55 (Ill. App. 1981) (dismissing class action claims, because "adjudication of the named plaintiff's claim would not establish a right to recovery in any of the other purported class members," and individualized determinations would entail the resolution of a number of questions which, in turn, would depend on the facts of each case). *See also Polich v. Burlington Northern,* 116 F.R.D. 258, 262 (D. Mont. 1987) ("The factual variances [among class members] preclude this court from ruling that the typicality requirement has been met herein. ... the success or failure of such class members' claims would depend on individual facts peculiar to his or her own situation. The class members would not necessarily benefit from any success enjoyed by plaintiffs ... with respect to their own individual claims and circumstances").

Plaintiffs also could not have satisfied the numerosity requirement for class certification. The original class was based upon the original complaint, challenging payments under the fee-for-service Medicaid program. That program, unlike SALUD!, involved payments made directly to the pharmacies. In contrast,

under the SALUD! managed care model, Cimarron had one PBM that negotiated on its behalf contracts with a select group of pharmacies, who had the opportunity to, and did, negotiate prescription reimbursement rates. Thus, Plaintiffs could never satisfy the numerosity requirement of Rule 1-023 as to Cimarron.

Nor could Plaintiffs satisfy Rule 1-023's typicality requirement. The purpose of the typicality requirement is to assure that the interests of the named plaintiff aligns with those of the class. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). In ascertaining whether the named plaintiff's claims are typical, the focus is not on the defendant's conduct, but on the named plaintiff's position with respect to that conduct. *Kas v. Financial General Bankshares, Inc.*, 105 F.R.D. 453, 461 (D.D.C. 1985).

As discussed above, Plaintiffs have claimed that they entered into pharmacy provider contracts under economic coercion or duress. Yet, even if that were true, a contract obtained by economic coercion can be ratified. *Dunn v. Hite*, 27 N.M. 53, 195 P.2d 1078 (1921); *Terry v. Humphreys*, 27 N.M. 564, 203 P.2d 539 (1922). Cimarron asserted affirmative defenses of waiver and estoppel. A determination of whether a particular plaintiff should be estopped from claiming economic coercion by its acts (or failure to act) and should be held to have ratified the agreement is an individualized inquiry into a defense unique to each plaintiff, defeating typicality. But Plaintiffs urged the court *not* to consider the presence of unique affirmative

defenses at the class certification stage, rather than demonstrate (as they were required to do) that their claims could, in fact, satisfy the commonality and typicality requirements. (RP 4132, 4136). Thus, Plaintiffs again invited the district court to make an erroneous ruling, and it did so.

Indeed, Plaintiffs recognized that their economic duress claims required individual inquiry. Thus, they urged the Court to grant their partial summary judgment motion, arguing that if the Court agreed that §27-2-16(B) could not be waived, they no longer needed their claims of economic coercion or duress. (RP 4470). And the court complied. (RP 6818a). Nevertheless, that grant of partial summary judgment, before notice had been given to class members as to the new class certified against the MCOs, is further proof that the Class Certification Order cannot stand. And, in any event, Plaintiffs' reliance on a subsequent ruling to justify the prior order is misplaced. The district court was *required* to consider unique defenses applicable to the named Plaintiffs in determining whether a class could be certified at all. It is completely irrelevant whether those defenses are later determined to be inapplicable. *Shiring v. Tier Techs., Inc.*, 244 F.R.D. 307, 313 (E.D. Va. 2007). And, as discussed more fully below, that partial summary judgment ruling was erroneous.

Finally, even if the unique circumstances presented by Plaintiffs' claims of economic coercion and duress did not operate to defeat commonality or typicality,

other unique defenses would have defeated Plaintiffs' claims. At the same time that this lawsuit was being filed on behalf of Jerry Jacobs and Starko, Inc., the president of Starko, Kenneth Corazza, who was also a shareholder and officer of Regent Drugs of New Mexico, Inc. (Cimarron's PBM) was actively negotiating the contracts he now attempts to avoid. (RP 2053-54, ¶¶4, 7-9). Regent Drugs represented that its pharmacy network, including the pharmacies purporting to act as named Plaintiffs in this case, agreed to accept the terms of those contracts. (RP 2985-2986, ¶11). And every time the pharmacies Plaintiffs purport to represent accepted payments pursuant to their contracts, they accepted such payments as payment in full. (RP 3595, 3600). "Where it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative." *Koos v. First Nat'l Bank*, 496 F.2d 1162, 1164 (7th Cir. 1974). Thus, if this Court reverses the judgment entered below, a major focus of this case may well be on defenses unique to the named Plaintiffs. Any of those unique defenses could operate to defeat typicality, and the court below erred in refusing to consider those defenses.

Plaintiffs' claims for breach of contract and breach of the duty of good faith also required an individualized inquiry. Even assuming those claims are predicated entirely on a third-party beneficiary theory, such determinations can only be made on the basis of how each pharmacy was actually treated in light of

the specific and almost infinitely variable combination of facts and circumstances of its own contractual negotiations.

Moreover, the contracts to supply pharmacy benefits are not uniform. (RP 3594-3600, 3376-3381). Thus, the claims here arise neither from a single transaction or event (like an airplane accident) nor from a series of identical transactions (like uniform bank charges). Every one of the claims of contract and breach of duty of good faith must be analyzed separately for each class member, and no presumption can be made that every member of the class was injured in precisely the same way by the conduct that may be proved with respect to either of the individual Plaintiffs. Justice simply cannot be done to individual class members and to Cimarron in a trial based upon the experience of the named Plaintiffs alone.

Furthermore, the very same conduct that may form the basis of those defenses also demonstrates that Plaintiffs are inadequate class representatives under Rule 1-023(A)(4) NMRA. To maintain a class action, Plaintiffs must also "make an affirmative showing that they would assure adequate representation of all the members constituting the class." *Ridley v. First National Bank in Albuquerque*, 87 N.M. 184, 187, 531 P.2d 607, 610 (Ct. App. 1974), *cert. denied*, 87 N.M. 179, 531 P.2d 602 (1975). However, where counterclaims or defenses will vary among the class members, "there is no common approach by which the plaintiffs could

adequately represent all the members of the class." *Id.* Under these circumstances, to allow a suit "to proceed as a class action would be unjust to the other members of the alleged class and would deny them their day in court." *Id.*

Adequacy of both the named representatives and their counsel is the touchstone of all class action requirements, and is essential to protect the interests and due process rights of the absent class members. *See, e.g., Am. Employers' Ins. Co. v. King Resources Co.*, 556 F. 2d 471, 478 (10th Cir. 1977). "A class representative must be a part of the class and 'possess the same interests and suffer the same injury' as the class members." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997).

Plaintiffs could not satisfy that burden of proof. The president of Plaintiff Starko, Kenneth Corazza, is an officer of both Regents entities that contracted with many of the plaintiff class pharmacies as Pharmacy Benefits Managers. (RP 2053, ¶¶4, 8). Yet, the Regents Pharmacy contracts contain indemnification provisions that create a clear conflict of interest between named Plaintiff Starko and the Regents Pharmacy Benefits Managers. (RP 3596). Such a conflict of interest precludes a finding of adequacy of representation. *Malchmam v. Davis*, 761 F.2d 893, 898 (2d Cir. 1985), *cert. denied*, 475 U.S. 1143 (1986). Similarly, the same estoppel defenses that preclude a finding of typicality operate to defeat adequacy of representation here; if Plaintiff Starko's President was fully aware of the

provisions of §27-2-16(B), but proceeded to enter into contracts at rates below those specified in that statute, that conduct may preclude a finding of adequacy of representation.

C. Individualized Issues Defeat Predominance and Superiority.

The original Class Certification Order purported to certify the class pursuant to Rule 1-023(B)(3). A class can only be certified under that subsection of the Rule if the court finds that "questions of law or fact common to the members of the class predominate" and that a class action "is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 1-023(B)(3) NMRA. The court never made such findings in the Class Certification Order, never made such findings as to the MCOs, and could never have done so.

Just as individual issues should have precluded a finding of commonality or typicality, those same individual issues should have precluded a finding that common issues "predominate", as required to certify the class under Rule 1-023(B)(3). As the United States Supreme Court explained, "the predominance criterion [of Rule 23(b)(3)] is far more demanding" than a "shared experience" among class members. *Amchem Products,* 521 U.S. at 623-24.

In order to determine that common issues of fact or law predominated, the court was required to analyze the legal issues presented and the proofs needed to sustain the causes of action asserted in the Complaint. *Rutstein v. Avis Rent-A-Car*

Systems, Inc., 211 F.3d 1228 (11th Cir. 2000), *cert. denied*, 532 U.S. 919 (2001). "Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action." *Id.* at 1234. Thus, federal courts have recognized that it is "critically important" to examine the elements of the claims plaintiffs have asserted in order to determine whether common issues predominate over individual issues under Rule 23(b)(3). *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 186-87 (3d Cir. 2001). This requirement makes sense in the context of a class certification motion, because "[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001). The court ignored that principle in its Class Certification Order because the vast number of individual factual and legal claims completely swamps any common questions identifiable for class-wide resolution.

The court also could not properly have found that the class action is a superior method for resolving Plaintiffs' claims. A class action here "suffers serious problems in both efficiency and fairness. In terms of efficiency, a class of this magnitude and complexity could not be tried. There are simply too many uncommon issues, and the number of possible class members is surely too large." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 632 (3d Cir. 1996), *aff'd*, 521 U.S.

591 (1997). The class action procedure "must represent the best 'available method [] for the fair and efficient adjudication of the controversy.'" *Johnston,* 265 F.3d at 194 (class certification was properly denied where "case would involve essentially countless mini-trials to determine [liability] and the applicability of defenses," thereby presenting "severe manageability problems for the court"). Here, the court should have recognized that the individual issues implicated by Plaintiffs' claims would inevitably entail serious manageability problems and should have denied class certification on that basis.

The purpose of Rule 1-023 was to provide "small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968). But a class action is simply unnecessary when the financial stakes at issue in the litigation are sufficiently large to provide incentive for individual lawsuits. "Rule 23 is 'not intended to permit a private litigant to enhance his own bargaining power by a claim that he is acting for a class of litigants,' nor is the purpose of the Rule to reap 'a golden harvest of fees' for lawyers who bring class actions." *Steinmetz v. Bache & Co.*, 71 F.R.D. 202, 206 (S.D.N.Y. 1976).

In short, "[w]hen the size of each claim is significant, and each proposed class member therefore possesses the ability to assert an individual claim, the goal of obtaining redress can be accomplished without the use of the class action

device." *Stoudt v. E. F. Hutton & Co.*, 121 F.R.D. 36, 38 (S.D.N.Y. 1988). Here, where each pharmacy has filled thousands, if not tens of thousands, of prescriptions, the amount at stake for each pharmacy is significant. Thus, the purpose of the class action device is not implicated here.

Furthermore, a class should not have been certified where, as here, Plaintiffs presented novel theories of recovery based on a statute never before interpreted to provide for private recovery. As the Fifth Circuit Court of Appeals explained in reversing an order certifying a class of all nicotine-dependent people who had smoked and purchased cigarettes manufactured by various tobacco companies,

> Our specific concern is that a mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by rule 23. This is because certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication.

Castano v. American Tobacco Co., 84 F.3d 734, 747 (5th Cir. 1996). While this is not a mass tort case, the *Castano* Court's concerns are equally valid here, since Plaintiffs submitted for certification a class presenting claims which have never been accepted as cognizable by any court. Thus here, as in *Castano*, the court simply could not determine, through prior experience, whether the common issues would be a "significant" portion of individual trials. *Id.*, at 745.

Thus, in addition to that specific concern about class certification of novel claims, the *Castano* Court also voiced general concerns about class certification that apply with equal force here:

> Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards. ...
>
> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.

84 F.3d at 746 (citations omitted). For the same reason, the court should have recognized that a class action is not a superior method to resolve the claims presented here.

The class action procedure "must represent *the best* 'available method [] for the fair and efficient adjudication of the controversy.'" *Johnston,* 265 F.3d at 194 (emphasis added). Here, the individual issues implicated by Plaintiffs' claims would inevitably entail serious and insurmountable case management problems. Because there is no way to adjudicate such questions as causation and damages through class-wide proof, separate mini-trials would be necessary for each Plaintiff. This undermines any notion of the purported efficiency of class action in this context. Thus, if this Court reverses the district court's entry of judgment in

Cimarron's favor, it should also reverse the Class Certification Order and remand for trial of the individual Plaintiffs' claims only.

III. THE DISTRICT COURT ALSO ERRED IN HOLDING THAT §27-2-16(B) CONFERRED NON-WAIVABLE RIGHTS.

The district court also erred in granting Plaintiffs' motion for partial summary judgment, holding that §27-2-16(B) could not be waived.[5] First, there is no dispute that beginning in 1997, Plaintiffs began filling prescriptions for Cimarron SALUD! members, and have done so ever since, at reimbursement rates generally lower than those specified in §27-2-16(B). Those rates were negotiated by the pharmacies and set out in contracts between the pharmacies and Pharmacy Benefits Managers. (RP 3587). None of the pharmacies ever contracted with Cimarron; instead, Cimarron entered into contracts with the PBMs.

That series of relationships began prior to the effective date of the first MMCS Agreement in July, 1997, when Robert Ghattas, the owner of Duran Pharmacy, proposed to Cimarron that his company Regent Services would serve as Cimarron SALUD!'s first PBM. Then, after negotiating a monthly capitated payment, he negotiated with each of the pharmacies that would actually fill the prescriptions for SALUD! members. In those negotiations, his goal was to pay the

[5] In its Response to Plaintiffs' Brief in Chief, Cimarron argues that §27-2-16(B) does not apply to the SALUD! managed care program. For purposes of this argument, Cimarron assumes, but does not concede, that §27-2-16(B) applies.

lowest possible dispensing fee. (SR 12059). Plaintiffs have never challenged those contracts.

Furthermore, the parties to those contracts, and the State in its separate agreements with the MCOs, at all times operated under the assumption that pharmacies were free to waive §27-2-16(B). The district court's contrary decision was erroneous.

A. The District Court's Grant of Partial Summary Judgment Ignored Important Principles of Freedom of Contract.

Plaintiffs have never disputed, nor could they, that in order to provide prescriptions to SALUD! members, they negotiated and executed contracts providing for dispensing fees that were, in the vast majority of cases,[6] substantially lower than the $3.65 specified in §27-2-16(B). The pharmacies, and the PBMs and Cimarron, have now been filling SALUD! prescriptions under those contracts for more than ten years.

New Mexico law has a long-standing tradition of upholding the principle of freedom of contract. *See, e.g., Berlangieri v. Running Elk Corp.*, 2003-NMSC-24, ¶23, 76 P.3d 1098, 1105 ("Freedom of contract serves public policies that are no less important to society as a whole and the common good than those policies that undergird the law of tort."). New Mexico appellate courts have repeatedly upheld

[6] In a few rare circumstances, rural pharmacies were able to negotiate for dispensing fees above $3.65. (SR 12060).

the public policy interest in giving legal effect to the parties' freedom of contract. *E.g.*, *General Electric Credit Corp. v. Tidenberg*, 78 N.M. 59, 62, 428 P.2d 33, 36 (1967) ("public policy encourages freedom between competent parties of the right to contract, and requires the enforcement of contracts, unless they clearly contravene some positive law or rule of public morals."); *J.R. Hale Contr. Co. v. Union Pac. R.R.*, 2008-NMCA-37, ¶59, 179 P.3d 579, 597 (upholding contractual indemnification clause based on principles of freedom of contract).

New Mexico appellate courts uphold the parties' contracts even in the context of the waiver or relinquishment of rights conferred by statute: "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, 470, 775 P.2d 233, 236 (1989). *See also City of Artesia v. Carter*, 94 N.M. 311, 314, 610 P.2d 198, 201 (Ct. App.) ("If the employer desires to voluntarily relinquish his statutory protection, he may do so. Such a relinquishment is not prohibited by §§52-1-8 and 52-1-9, *supra*; such a relinquishment is consistent with the policy favoring the right to contract"), *cert. denied*, 94 N.M. 628, 614 P.2d 545 (1980); *Anaya v. Santa Fe*, 80 N.M. 54, 58, 451 P.2d 303, 307 (1969) ("the limitation statute (§59-10-13.6, NMSA 1953) is for the sole benefit of the employer, and he certainly may waive it by failure to file the report required by §59-10-27."); *Hernandez v. S. I. C. Fin. Co.*, 79 N.M. 673, 674,

448 P.2d 474, 475 (1968) ("The exemption statute was adopted as a humane policy to prevent families from becoming destitute as the result of misfortune through common debts which generally are unforeseen, but leaves to the individual the right to waive his exemption either by mortgage or operation of law").[7]

As this Court recently noted, "In light of the strong public policy in favor of freedom of contract, we have held that 'agreements . . . are not to be held void as being contrary to public policy, unless they are clearly contrary to what the legislature or judicial decision has declared to be the public policy, or they manifestly tend to injure the public in some way'." *K.R. Swerdfeger Construction, Inc. v. Board of Regents,* 2006-NMCA-117, ¶23, 142 P.3d 962, 969, *cert. denied,* 144 P.3d 101, 2006 N.M. LEXIS 466 (2006).

Notwithstanding their contractual agreements to accept other amounts, Plaintiffs have consistently argued that §27-2-16(B) evidenced the New Mexico Legislature's declaration of public policy to compensate pharmacists with

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[7] In ruling that a party may waive rights conferred by statute, New Mexico is firmly in step with the rest of the country. *See, e.g., Shutte v. Thompson*, 82 U.S. 151, 159 (1872) ("A party may waive any provision, either of a contract or of a statute, intended for his benefit."); *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties."); *Arbogast v. Bryan*, 393 So. 2d 606, 608 (Fla. Ct. App. 4th Dist. 1981) ("A party may waive any rights to which he is legally entitled, whether guaranteed by the Constitution, conferred by statute, or secured by contract").

dispensing fees of $3.65. The district court erred in accepting this argument. First, Plaintiffs never had any competent evidence that the Legislature intended to enact §27-2-16(B) for their benefit. Plaintiffs offered only self-serving statements by non-legislators to support their interpretation. (*e.g.*, RP 3493-93, 5019-5021). Indeed, in subsequent summary judgment briefing, Plaintiffs relied on the very same "evidence" and the district court granted Cimarron's motion to strike that incompetent evidence of legislative intent. (SR 12360-12366, 12606). Plaintiffs have not appealed from that ruling.

Second, there is every reason to conclude that §27-2-16(B) was not intended as legislative cronyism designed to benefit one particular special-interest group. Such an interpretation would render the statute unconstitutional as an impermissible grant of a privilege to Medicaid-provider pharmacies that is not available to pharmacies that do not fill prescriptions for enrollees in Medicaid fee-for-service or SALUD!. N.M. Const. Art. IV, § 26. And, since statutes should be construed in a manner that renders them constitutional, *see, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-507 (1979), this Court should construe §27-2-16(B) in a manner that avoids an unconstitutional preference for a particular group of providers of services to recipients of State Medicaid benefits. *See, e.g., Rosette, Inc. v. United States Department of Interior*, 2007-NMCA-136, ¶71, 169

P.3d 704, 735 (refusing to interpret New Mexico statute in a manner that would violate the Supremacy Clause), *cert. granted*, 141 N.M. 401, 156 P.3d 39 (2007).

Here, too, the district court erred in construing §27-2-16(B) as intending to enrich one particular class of Medicaid providers – the pharmacies. That error was of constitutional dimensions. Nor can Plaintiffs avoid the constitutional problem by construing §27-2-16(B) as intended to ensure that pharmacy services will be available to Medicaid recipients, rather than as conferring a legislative windfall on a special interest group. That is because Plaintiffs never presented the court below with any evidence that a dispensing fee of $3.65 was ever necessary to ensure that pharmacies would participate in the SALUD! Medicaid program. Indeed, the evidence was to the contrary. When the pharmacies negotiated dispensing fees on the open market, they accepted dispensing fees far lower than the $3.65 set out in §27-2-16(B); Plaintiff Starko, for example, agreed to a fee of $2.50 for Cimarron SALUD! prescriptions. (RP 3594, 3599, 3600). The pharmacies have been filling SALUD! prescriptions for more than ten years at those freely-negotiated rates, and Plaintiffs never presented any evidence that higher rates were necessary to ensure access for SALUD! enrollees.

In the court below, Plaintiffs relied on *Self v. United Parcel Service, Inc.*, 1998-NMSC-46, 970 P.2d 582, to support their argument that statutorily-conferred rights could not be waived. Plaintiffs' reliance on this case was misplaced. In *Self*,

workers covered by a collective bargaining agreement claimed that their employer violated the New Mexico Minimum Wage Act by improperly deducting a one-hour meal period from hours worked, failing to credit them for "off-the-clock" work and by failing to pay them overtime for such work. The employer, UPS, argued that such claims were preempted by Section 301 of the federal Labor Management Relations Act, and the district court agreed and dismissed the case.

The New Mexico Supreme Court reversed. First, the court noted that the public policy set out in the Minimum Wage Act established "minimum standards that the legislature intended all state workers to enjoy, without regard to a worker's relationship with a union or her or his contract with the employer." 1998-NMSC-46, ¶14, 970 P.2d at 588, citing §50-4-19 NMSA 1978. For that reason, the Court found that the employees' rights under the Act were "non-negotiable, meaning that they cannot be waived by private law, including the worker's and the employer's mutual agreement." 1998-NMSC-46, ¶14, 970 P.2d at 588. The Court's holding was, however, firmly grounded on the particular nature of the Minimum Wage Act: "The statute itself conveys the right, imposes the obligation, and provides the remedy for its violation." *Id.*

The statute at issue in this case, the Public Assistance Act, does not satisfy any of these requirements. The generally accepted purpose of the Public Assistance Act, and the federal Medicaid Act from which it was born, is to benefit

the poor and disadvantaged individuals who qualify for Medicaid, not a particular group of vendors who provide services to those disadvantaged individuals. §27-2-16(A) NMSA 1978; 42 U.S.C. § 1396. Similarly, as discussed at length in Cimarron's Response to Plaintiffs' Brief in Chief and as recognized by the court below, the Public Assistance Act conveys no rights to pharmacies and, even if it imposes an obligation on the State, it provides no private right of action to service providers for its violation.

B. The Pharmacies, the MCOs, and the State All Believed That They Were Free To Negotiate Dispensing Fees Without Regard to §27-2-16(B).

The court below also erred by disregarding the parties' consistent course of conduct as evidence of their uniform, collective belief that §27-2-16(B) did not require payment of a dispensing fee of $3.65 for prescriptions for the MCOs' SALUD! Medicaid enrollees. *Shaeffer v. Kelton*, 95 N.M. 182, 186, 619 P.2d 1226, 1230 (1980) ("it is an established rule that the waiver of an express contractual condition may be implied in the conduct of the parties"). Waiver is defined as the intentional relinquishment or abandonment of a known right. *J.R. Hale Contracting Co. v. United New Mexico Bank of Albuquerque*, 110 N.M. 712, 717, 799 P.2d 581, 586 (1990); UJI 13-842. The intent to waive contractual obligations or conditions may be implied from a party's representations that fall short of an express declaration of waiver, ***or from his conduct***. *See Elephant Butte*

Resort Marina, Inc. v. Wooldridge, 102 N.M. 286, 289, 694 P.2d 1351, 1354 (1985) (when party agreed to alternate financing plan, he waived enforcement of contrary provision in the contract); *Cooper v. Albuquerque City Commission*, 85 N.M. 786, 790, 518 P.2d 275, 279 (1974) (waiver can be implied from the conduct of the parties); UJI 13-842.

As noted above, beginning in 1997, HSD and the MCOs entered into MMCS Agreements to provide medical services for SALUD! The State's goals underlying the Medicaid managed care system were to be cost-effective, offer quality service, and access for medical recipients. (RP 3553). Those 1997 MMCS Agreements did not impose on the MCOs any particular payment requirements with respect to pharmacy benefits. Instead, the State contemplated that the MCOs would enter into contracts with the pharmacies or, in Cimarron's case, with pharmacy benefits managers who would, in turn, negotiate prescription reimbursement rates with pharmacies. (RP 767).

The State never discussed prescription dispensing fees with the MCOs. (SR 12045). Even after Judge Conway ruled that the State's obligation to adhere to §27-2-16(B) was non-delegable, the State never discussed the meaning of §27-2-16(B) with the MCOs. (SR 12047). Indeed the "Starko provision" in the 2001 MMCS Agreements, which Plaintiffs cite as demonstrating the parties' intent to

benefit pharmacies, evidences the parties' conclusion that §27-2-16(B) could be waived:

> The subcontract for pharmacy providers shall include a payment provision consistent with 1978 NMSA §27-2-16(B) ***unless the subcontractor provides a voluntary waiver to any rights*** under 1978 NMSA §27-2-16(B) or the CONTRACTOR is notified by HSD that the provisions of Section 27-2-16(B) do not apply to the CONTRACTOR'S subcontract with the Pharmacies.

(SR 12022 (emphasis added)).[8] Like the State, Cimarron had no intention of benefiting the pharmacies through the MMCS Agreements with the State. (SR 12061 ¶6).

Not only was there no intent by the State or the MCOs to require the pharmacies to be paid a dispensing fee of $3.65 for filling SALUD! prescriptions, the very first Pharmacy Benefits Manager evidenced no such intent either. At the very same time that Robert Ghattas, the owner of one of the Plaintiff class member pharmacies, Regent Drugs, was planning this litigation, he was selling his services to be Cimarron's PBM under the name Regent Services. (SR 12058). When Mr. Ghattas succeeded in that endeavor, he (as PBM Regent Services) then negotiated with member pharmacies and offered dispensing fees of considerably less than $3.65 because it "was the best he could do." (SR 12332). Although the contract

[8] This provision was not present in the 1997 Agreement, and was only added to the 2001 Agreement in response to Judge Conway's 2000 order.

prices he negotiated were different from those specified in §27-2-16(B), he did not think those below-$3.65 dispensing fees were unlawful. (SR 12059-12060).

On their part, in their freely-negotiated contracts with PBMs, Plaintiffs agreed to accept different rates than the rate they now claim was guaranteed to them in §27-2-16(B). (SR 12059). Some of the dispensing fees under those subsequent contracts were more than $3.65 and some were less than that amount. (*Id.*). Plaintiffs admittedly knew about §27-2-16(B) at the time they negotiated for the market price on each contractual rate. (*Id.*). Tellingly, Plaintiffs did not think that these subsequent, negotiated contracts were unlawful. (SR 12059-12060).

Then, after negotiating and voluntarily entering into those subsequent contracts for reimbursement rates different from those they argue were required under the MMCS Agreements, Plaintiffs then ratified those contracts by accepting payments under those negotiated contracts. *Morris Oil Co., Inc. v. Rainbow Oilfield Trucking, Inc.*, 106 N.M. 237, 242, 741 P.2d 840, 845 (1987) (even when a principal is unaware of the acts of its agents, a principal may be held liable for those acts, if the principal ratifies the transaction after acquiring knowledge of the material facts concerning the transaction). *See also* UJI 13-827 (course of dealing); UJI 13-828 (course of performance). Thus the parties' undisputed course of conduct demonstrated that the State, the MCOs, the PBMs and the Plaintiffs

themselves believed that the pharmacies could legally be paid the dispensing fees they negotiated, which differed from the $3.65 set out in §27-2-16(B).

It is, of course, well-established that that a court should defer to an agency's interpretation of a statute to resolve ambiguities if the agency is charged with administering the statute. *Atlixco Coalition v. Maggiore,* 1998-NMCA-134, ¶30, 925 P.2d 370, 381. It is undisputable that HSD is charged with administering the Medicaid program in New Mexico. NMSA 1978, §27-2-12 *et seq.* HSD initially did not believe that §27-2-16(B) had any application to the SALUD! managed care program, and even after Judge Conway ruled otherwise, HSD continued to believe that any protections conferred by §27-2-16(B) could be waived, as evidenced by the plain language to that effect that was inserted by HSD into the MMCS Agreements from 2001 forward. (SR 12022). Thus, HSD's interpretation of the statute, as evidenced by its course of performance under the MMCS Agreements, is entitled to deference.

Similarly, as noted above, New Mexico decisions recognize that parties' course of conduct can evidence intentional waiver even of express contractual provisions. *See also* UJI 13-842. The same analysis should apply to the "rights" claimed by Plaintiffs here; their own course of performance of contracts they freely negotiated demonstrates their waiver of any right to challenge the validity of such

contracts or to demand additional payments under §27-2-16(B). The district court erred in ruling that the provisions of §27-2-16(B) could not be waived.

CONCLUSION

For all of the foregoing reasons, Cimarron Health Plan, Inc. respectfully requests that in the event this Court reverses any part of the judgment entered in its favor by the District Court below, it also reverse (a) the district court's grant of class certification under Rule 1-023 NMRA along with the denial of motions to de-certify the class, and (b) the district court's grant of Plaintiffs' motion for partial summary judgment declaring that the Medicaid reimbursement rate specified in §27-2-16(B) NMSA 1978 could not be waived or contracted away even when the Plaintiffs were fully aware of the statutory provisions at the time they entered into contracts accepting lower fees than those provided in the statute and remanding for further proceedings concerning the named Plaintiffs' individual claims only.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing *Brief In Chief In Support of Conditional Cross-Appeal of Cimarron Health Plan, Inc.* was sent via first class mail this 9th day of July, 2008, to:

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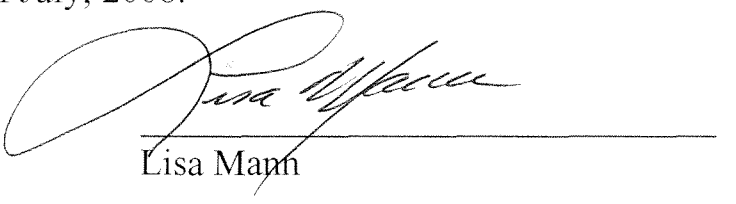
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 12-213(F)(3) NMRA, I certify that the attached brief uses proportionately spaced type of 14 points, is double-spaced using a roman font, and contains 10,514 words.

DATED this 9th day of July, 2008.



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