IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ORAL ARGUMENT CALENDAR

THURSDAY, JULY 14, 2011

10:00 A.M.

No. 27,992

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 Others Similarly Situated,	**Charles R. Peifer** **Robert E. Hanson** **Lauren Keefe** **Elizabeth Radosevich** **Sealy H. Cavin, Jr.** **Stephen D. Ingram**
Plaintiffs-Appellants/Cross-Appellees,	
vs.	
NEW MEXICO HUMAN SERVICES DEPARTMENT, et al.,	
Defendants,	
PRESBYTERIAN HEALTH PLAN, INC., a New Mexico Corporation, d/b/a PRESBYTERIAN SALUD,	**John B. Pound** **Edward Ricco**
Defendant-Appellee,	
and	
CIMARRON HEALTH PLAN, INC., a New Mexico Corporation, d/b/a CIMARRON HEALTH MAINTENANCE ORGANIZATION a/k/a CIMARRON HMO,	**Lisa Mann** **Jennifer A. Noya**
Defendant-Appellee/Cross-Appellant.	

***PANEL: JUDGES BUSTAMANTE, SUTIN AND KENNEDY**

*Court of Appeals' panel members are listed in seniority order.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 27,992

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 others similarly situated,

Plaintiffs-Appellants,

vs.

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.

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

APPELLANTS' BRIEF IN CHIEF

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TABLE OF CONTENTS

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(A), (F) & (G), Plaintiffs-Appellants state that the total word count contained in the body of the brief is 10,936 words, using Microsoft Office Word 2003.

5-8-08
Dated

Robert E. Hanson

TABLE OF AUTHORITIES

New Mexico Cases

Federal Cases

Other State Cases

Statutes and Rules

Other Authorities

INTRODUCTION

This case confronts the limits of the state executive branch's power. The state executive branch cannot override specific legislative enactments guaranteeing minimum reimbursement to pharmacists serving the state's Medicaid recipients by either refusing to enforce those legislative mandates or by trying to contract away its responsibilities to private managed-care organizations. Yet, that is precisely what the Human Services Department ("HSD" or "the State") did when it implemented its Medicaid managed care program, Salud!, in 1997. NMSA 1978, §27-2-16(B) guarantees that Medicaid pharmacists filling prescriptions for the State's Medicaid population will be paid a dispensing fee of "at least $3.65" and ingredient cost reimbursement equal to "wholesale cost." The State did so after it entered into written contracts with three Managed Care Organizations ("MCOs") -- Presbyterian Health Plan ("Presbyterian"), Cimarron Health Plan ("Cimarron"), and Lovelace Health Plan[1] -- to serve Medicaid enrollees previously served by HSD. Then, despite the MCOs' explicit promises in their contracts with HSD to comply with the state statutes governing the Medicaid program[2], and the State's uncontradicted testimony that it intended and expected the managed care

[1] Lovelace Health Plan settled with Plaintiffs.

[2] "All services purchased under this [MMCS] Agreement are subject to the following provisions for administration of the Medicaid program which are incorporated herein by reference: . . . 1.2.6 All applicable statutes, regulations and rules implemented by the Federal Government, the state of New Mexico ('State'), and HSD, concerning Medicaid services . . . ." (SR 11800, 11905).

organizations (MCOs) to comply with §27-2-16(B), the State did nothing when the MCOs did not pay the Medicaid pharmacists a dispensing fee or ingredient cost reimbursement as §27-2-16(B) requires. This suit seeks to hold both the State and the MCOs liable for failing to comply with §27-2-16(B).

The district court, however, prevented Plaintiffs/Appellants ("Plaintiffs") from holding the MCOs accountable. It held Plaintiffs could not bring a claim to enforce §27-2-16(B) because that statute did not allow for a private right of action and because as a matter of law, Plaintiffs were not third-party beneficiaries of the MCOs' contracts with the State. As explained below, the district court's orders should be reversed. Section 27-2-16(B) creates a specific monetary entitlement which is an enforceable property right under state law. Plaintiffs also have the right to enforce the contracts between the State and MCOs as intended third-party beneficiaries because the MCOs promised to comply with state law, including §27-2-16(B), and the reimbursement provisions of that statue were enacted for Plaintiffs' benefit.

STATEMENT OF PROCEEDINGS

Plaintiffs are those New Mexico pharmacists who dispense prescriptions to the State's Medicaid recipients, appeal from an order and final judgment dismissing Cimarron and Presbyterian from a Rule 1-023 NMRA class action. Plaintiffs contend that, pursuant to §27-2-16(B), they are entitled to receive a

dispensing fee of at least $3.65 per prescription plus ingredient cost reimbursement equivalent to "wholesale cost," as that term has been interpreted and applied by the State. The State acknowledges that it is required to comply with §27-2-16(B).[3]

Plaintiffs brought a variety of claims against HSD, and the three MCOs, all of which arise from the State and MCOs' failure to enforce and follow the reimbursement requirements of §27-2-16(B) after New Mexico moved to a managed care Medicaid system. Those claims include violation of §27-2-16(B) (Count II), breach of contract (Count III), reformation of contract (Count IV), breach of the covenant of good faith and fair dealing (Count V), unjust enrichment (Count VI), declaratory judgment (Count VIII), injunctive relief (Count IX), unfair trade practices (Count X) and conspiracy to violate civil rights (Count XI). *See* Fourth Amended Complaint (RP 5775-86).

On October 27, 2005, Presbyterian filed a motion for judgment on the pleadings seeking to dismiss Plaintiffs' claims for violation of state law (Count II), breach of the covenant of good faith and fair dealing (Count V), unjust enrichment (Count VI) and violation of the unfair practices act (Count X). (SRP 9116). A hearing on Presbyterian's motion took place on July 24, 2006. On September 20, 2006, the district issued a letter ruling granting Presbyterian's motion and

[3] *See* HSD Secretary Duke Rodriguez Depo. at 140 (SR 12230) ("Q. Did you have a duty to follow 27-2-16B when you were HSD Secretary? A. I would assume, yes."). *See also See* HSD Secretary Pamela Hyde Depo. at 16 (SR 12116) ("Q. Is it your intention that, through the contracts with the MCOs, that they will discharge whatever duty the Department has in the managed care organization to comply with 27-2-16(B)? A. Yes. ").

dismissing the claims for violation of §27-2-16(B), unjust enrichment and violation of the unfair practices act, but denying the motion to dismiss the claim for breach of the covenant of good faith and fair dealing. (SR 10598-606). In its ruling, the district court reasoned that the State had a non-delegable duty to comply with §27-2-16(B) and "there is only one right of action, running against the State. It is up to the State to enforce any claim it may have against the contractor." (SR 10600). The district court further reasoned that Plaintiffs did not have a private remedy against the MCOs to enforce §27-2-16(B) and that they had no remedy under 42 U.S.C. § 1983. (SR 10601-2).

The district court also dismissed the unjust enrichment claim, reasoning that the claim was pled as an alternative to the contractual claims, but was unnecessary because contracts existed between the parties. (SR 10604).

The district court denied Presbyterian's motion as to the claim for breach of the covenant of good faith and fair dealing. The district court reasoned that Plaintiffs were third-party beneficiaries of the written contracts between the State and the MCOs ("the MMCS agreements").

> [I] find that based on the requirements set forth in §302 of the Restatement, i.e., that the beneficiary's performance will effectuate the intention of the parties and that performance will satisfy an obligation of the promise to pay the third-party beneficiary, ***Plaintiffs are "intended" beneficiaries. Therefore, Plaintiffs can maintain their claim for breach of the covenant of good faith and fair dealing.***

(SR 10604) (emphasis added). The district court's letter ruling was incorporated in

the October 6, 2006 Order (SR 10595-97).

In February 2007, Presbyterian brought a second motion for judgment on the pleadings seeking to dismiss Plaintiffs' remaining contractual claims. (SR 11210-12). Presbyterian argued that because the district court ruled that Plaintiffs had no statutory right of action against the MCOs, they could not maintain contractual claims that incorporate a violation of a statute. That motion was heard on July 5, 2007. The district court issued a letter ruling on July 10, 2007 granting Presbyterian's motion and concluding that Plaintiffs could not bring claims as third-party beneficiaries of the MMCS agreements. (SR 12376). ("To allow an action against the MCOs on a third-party beneficiary theory would be inconsistent with the Court's previous ruling that Plaintiffs have no private right of action. Therefore, based on the foregoing, Plaintiffs cannot base a third-party beneficiary claim against the MCOs under §27-2-16(B)."). The district court dismissed the breach of the covenant of good faith and fair dealing claim on similar grounds. (SR 12379-80). That letter ruling was incorporated into the Order and Judgment entered on August 17, 2007 (SR 12608-20).

Cimarron also filed a motion seeking summary judgment on the contractual claims. Cimarron first argued that Plaintiffs were not third-party beneficiaries of the MMCS agreements. Second, Cimarron argued that the Plaintiffs had waived their rights despite the fact that the district court had previously ruled on January

13, 2003 that §27-2-16(B)'s protections cannot be waived. (RP 6818a-19). Third, Cimarron sought summary judgment on the claims for injunctive relief and declaratory relief. Cimarron also moved to dismiss Plaintiffs' evidence on the legislative history of §27-2-16(B). (SR 12360-66). Such legislative history included the bills and amendments associated with the passage of §27-2-16(B), statements made by the participants in the legislative process promoting the legislation, and the deposition testimony of the state's own witnesses concerning the history of the legislation. (RP 3401-6, 3408-10, 3412, 3414-16, 3418-30, 3432-33, 3435-36, 3477-78, 3492-93, 5019-21; SR 12272-73). Plaintiffs filed a cross-motion, seeking an order declaring that they are third-party beneficiaries of the MMCS agreements. At a hearing held on August 15, 2007, the district court granted each of Cimarron's motions and denied Plaintiffs' motion. (SR 12606, 12608-9).

SUMMARY OF FACTS[4]

This case involves the failure of the State, and the three private entities who have contracted to provide Medicaid services for the State, to comply with statutes requiring a minimum level of reimbursement to pharmacists who participate in New Mexico's Medicaid program.

The Medicaid program, enacted in 1965 as Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, is a cooperative federal-state venture designed to

[4]These facts are supported by evidence submitted in support or opposition to the motions for summary judgment. (SR 12152-69).

afford medical assistance to persons whose income and resources are insufficient to meet the financial demands of necessary care and services. *See Atkins v. Rivera*, 477 U.S. 154, 156 (1986). The federal government shares the cost so long as the state's plan complies with the requirements of the Act and implementing regulations. States retain the primary authority to develop provider payment methods and reimbursement rates, provided they meet federal requirements. *See* 42 C.F.R. § 447.201(a) (1978). Reimbursement to Medicaid providers must be sufficient to ensure that services are as available to Medicaid recipients as to the general population. *See* 42 U.S.C. § 1396a(a)(30)(A).

Provider participation in Medicaid is voluntary. The problem of securing provider participation is well known. *See Pharmaceutical Society of the State of New York, Inc. v. Department of Social Services*, 50 F.3d 1168, 1175 (2d Cir. 1995) ("To the extent that pharmacies do not receive full compensation, some are likely to drop out of the Medicaid program and reduce the number of providers of health care to poor individuals."). Participation in Medicaid is economically irrational if reimbursement is too low.

Pharmacists are essential to meeting the needs of the Medicaid population. Without pharmacists, no drugs can be dispensed. Having a diverse network of pharmaceutical providers statewide is important to New Mexico's Medicaid program. *See* Corazza Aff., ¶ 11 at 3-4 (RP 2054-55); Salud! Waiver Request (RP

3438-43); Milligan Dep. at 195:3-5; 340:19 to 341:5; 341:19 to 342:2 (SR 12199, 12202). The federal government requires states to have a sufficient network of providers. *See* Milligan Dep. at 340:19 to 341:5 (SR 12202).

Since 1975, pharmacy reimbursement under Medicaid has been marked by a tension between the government's desire to contain costs of prescription drugs, and ensuring that reimbursement is sufficient to maintain an adequate number of providers. The federal government sets broad guidelines limiting ingredient costs, leaving the states responsible for setting "reasonable" dispensing fees. *See, i.e.*, 42 C.F.R. §§ 447.331 and 447.322 (2007) (repealed).[5]

1. New Mexico adopts procedures for reimbursing Medicaid pharmacists.

In 1982, the New Mexico Legislature passed the following law:

> B. If drug product selection is permitted by Section 26-3-3 NMSA 1978, reimbursement by 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.

Laws of 1982, chapter 26, Section 2 (emphasis added). When §27-2-16(B) was adopted in 1982, federal regulations required that pharmacists be paid a "reasonable dispensing fee." *See* 42 C.F.R. § 447.331 (1986).

The 1984 amendment to § 27-2-16(B) was part of House Bill 70, which

[5] The current federal reimbursement regulations give the state responsibility to fix reasonable dispensing fees. *See e.g.*, 42 CFR §447.514(b) ("a reasonable dispensing fee established by the State agency.").

provided, with emphasis added:

> B. If drug product selection is permitted by Section 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).

The Legislature also appropriated more money. Any Medicaid pharmacist who dispensed a prescription to a Medicaid recipient was guaranteed a specific monetary entitlement -- a dispensing fee of at least $3.65.[6] Since 1984, the law has guaranteed a mandatory minimum dispensing fee of $3.65. The Legislature has never amended or repealed §27-2-16(B).

When the Legislature authorized the State to develop a Medicaid managed care program in 1994, it did not amend, alter or repeal §27-2-16(B) or exempt managed care from the mandatory reimbursement provisions of §27-2-16(B). *See* NMSA 1978, §27-2-12.6. In 2002 and 2004, there were attempts to amend or repeal §27-2-16(B). (RP 3478 and SR 12272-73). Each time the legislation failed. Section 27-2-16(B) remains on the books.

For thirteen years, from July 1984 until July 1997, the State's regulations and payment practices followed §27-2-16(B) and the State reimbursed New Mexico pharmacists a dispensing fee of at least $3.65 per prescription (for a time

[6] The issue of *when* §27-2-16(B) applies is not before the Court in this appeal. That issue was determined in Plaintiffs' favor on cross-motions for summary judgment after the appellees were dismissed from the case.

$4.00) for all prescriptions filled for Medicaid recipients other than those reimbursed at customary rates. That changed, however, in 1997, when the Salud! MCOs cut reimbursement rates for pharmacy services in violation of §27-2-16(B).

2. The MCOs assume the obligation to comply with §27-2-16(B).

In 1997, the State entered into written contracts with the three MCOs to serve Medicaid enrollees previously served by HSD. *See i.e.*, MMCS Agreements (SR 11799-903; RP 1386-87, 1388-89). One of the goals of Salud! was to ensure Medicaid recipient access to pharmacy services.[7] In order to participate in the Salud! program the MCOs are required to offer pharmacy services. *See* Milligan Depo. 7/9/02 at 89:18-20 (SR 12192); 30(B)(6) (Reeves) Depo. at 18:12-15 (SR 12241); Secretary Flores-Lopez Depo. at 292:17-23 (SR 12268). HSD evaluated the MCO responses to the Request for Proposals (RFP) to ensure that there was adequate access to pharmacy services. *See* 30(B)(6) (Ingram) Depo. 10/25/06 at 266-268 (SR 12222).

In adopting Salud!, the State ensured that the MCOs would comply with §27-2-16(B). First, the MMCS agreements also require the MCOs to comply with and be subject to all applicable state and federal laws and regulations. *See* 1997 Contract §§ 1.2.6, 2.F.1 and 17.2 (SR 11800, 11854, 11884); 2001 Contract §§ 1.2(6) and 16.2 (SR 11905, 12017). This requirement was also in the RFPs

[7] *See* Milligan Depo. 7/9/02 at 184 (SR 0012198); Milligan Depo. 7/10/02 at 477-478 (SR 12207).

soliciting bids for Salud! *See* 1997 Contract §1.2.3 (SR 11799); 2001 Contract §1.2(3) (SR 11905); October 9, 1996 RFP at 26 (SR 12235).

Next, the State required every Medicaid pharmacist to contract with the MCOs and to agree be paid by the MCOs at the "then current and applicable Medicaid reimbursement rates for each provider type." *See* Amendments (RP 3451-52, RP 3454-56). The State's fee-for-service rates at the time guaranteed a minimum dispensing fee of $3.65. The failure of a pharmacy provider to sign the amendment would result in automatic termination from Medicaid fee-for-service. *See id.* In turn, the MMCS agreements obligated the State to require fee-for-service providers to subcontract with the MCOs at the "then-current and applicable Medicaid reimbursement rate for that provider." *See* 1997 Contract, §4.20. (SR 11867) and Article 36 (SR 11900); 2001 Contract, §4.1(18) (SR 11997) and Article 35. (SR 12034).

Third, the MCOs were paid to comply with §27-2-16(B). In negotiating the MMCS agreements, the State assumed that dispensing fees or ingredient cost reimbursement would not be reduced for pharmacy providers. *See* Secretary Flores-Lopez Depo. at 99:14-23 (SR 12267). In calculating the per member per month rates paid to the MCOs for Salud!, the State based reimbursement on the fee-for-service rates, including the rates paid for pharmacy services. *See* 30(B)(6) (Ingram) Depo. at 235:4-42:11 (SR 12217-19). The State considered pharmacy to

be a "major subcontractor" for Salud! and specifically contemplated the need to increase reimbursement for such contractors in July 1998. *See* Memo from CaraLyn Banks and Cathi Valdes (SR 12261).

At the time the MMCS agreements were adopted, the State intended to delegate to the MCOs its obligation to comply with state statutes. *See* Milligan Depo. 7/10/02 at 365:13-17 (SR 12203). The State also intended to discharge the State's obligation to comply with §27-2-16(B) by contracting with the MCOs, *see* HSD Secretary Pamela Hyde Depo. at 16:10-22 (SR 12239), and expected that the MCOs would comply with §27-2-16(B). *See* 30(B)(6) (Ingram) Depo. 9/21/06 at 191:15-192:1 (SR 12214). The State never told the MCOs that §27-2-16(B) did not apply to Salud!. *See* Milligan Depo. 7/10/02 at 449:2-11 (SR 12206); 30(B)(6) (Ingram) Depo. 9/21/06 at 102:5-21 (SR 12212).

Despite turning over the responsibility for delivering care to the MCOs, the State remained responsible to provide and pay for services. If it terminated an MCO, HSD required that the MCO "promptly notify HSD of any outstanding claims for which HSD may owe, or be liable for fee-for-service payment, which are known to the CONTRACTOR at the time of termination." *See* 1997 Contract §§ 12.3 and 12.4 (SR 11880-81); 2001 Contract §§ 11.3 and 11.4 (SR 12013). The State also retained the right to hire others to fulfill its service obligations if the MCOs were unable to do so. *See* 1997 Contract § 20.3 (SR 11885); 2001 Contract

§19.3 (SR 12018).

HSD retained control over subcontractors and the subcontracting process. It retained authority to approve all subcontracts. *See* 1997 Contract § 20.4 (SR 11885-88); 2001 Contract § 19.4 (SR 12018-22). The MMCS agreements require that the subcontractors comply with "State and Federal statutes." 1997 Contract §§ 20.4.c.i. and 20.4.c.xii (SR 11886-87); 2001 Contract §§ 19.4(9)C.i and C.ii (SR 12020). The State expected that any subcontracts for pharmacy services would comply with state law. *See* Milligan Depo. 7/10/02 at 428:12-16 (SR 12205).

3. The Medicaid pharmacists move to protect their rights.

In July 1997, HSD notified all Medicaid fee-for-service pharmaceutical providers that they were required to contract with the MCOs if they wanted to continue to serve as fee-for-service providers. *See* Amendments (RP 3451-52, 3454-56). To protect their rights, Plaintiffs filed this lawsuit on August 1, 1997. (RP 1). The State did not back down. In September 1997, it sent the providers another letter requiring them to agree to contract with the MCOs if they wanted to continue to serve as Medicaid pharmaceutical providers. (RP 3454-56).

To prevent any arguable waiver of the pharmacists' rights under §27-2-16(B), Plaintiffs sought a temporary restraining order. (RP 168-75). In November 1997, the district court entered a TRO requiring HSD either to withdraw the requirement that pharmacies contract with the MCOs to continue as Medicaid

providers or to confirm in writing that execution of the amendment -- which conditions participation in the Medicaid program upon the pharmacies' willingness to contract with the MCOs -- would not waive any rights under §27-2-16(B) (RP 305-7).

The State chose the second option and issued a letter saying no waiver of §27-2-16(B) would occur by executing amendments to their fee-for-service provider agreements with HSD, under which they agreed to contract with the MCOs and participate in the Medicaid managed care system. (RP 1893-94; RP 1911). Pharmacies had no choice but to contract with the MCOs to participate in the managed care portion of the Medicaid programs in New Mexico, which constitutes the majority of the Medicaid program.

In 2000, Plaintiffs filed a summary judgment motion against the State. On June 14, 2000, Judge Susan Conway entered Partial Summary Judgment as follows:

> 1. The Defendants must comply with the terms and provisions of NMSA 1978, § 27-2-16(B) in administering the provisions of the New Mexico Public Assistance Act, NMSA 1978, §§ 27-2-1 through 27-2-47.
>
> 2. The Defendants may not delegate or contract away their responsibilities under NMSA 1978, § 27-2-16(B) by entering into contracts with managed care organizations ("MCO's") under NMSA 1978, § 27-2-12.6;

> 3. The Defendants must set up the managed care system under NMSA 1978, § 27-2-12.6 so that the MCO's comply with and the Department must make the MCO's comply with the provisions of NMSA 1978, § 27-2-16(B);

(RP 782). The State informed the MCOs that they were required to comply with the terms of Judge Conway's Order. *See* 30(B)(6) (Ingram) Depo. 9/21/06 at 70:18-19 (SR 12210) ("[W]e told the managed care companies that they had to comply with the order.").

In 2001, all parties, including the MCOs, agreed that the issue of whether §27-2-16(B) could be waived should be determined as a matter of law. The district court ruled that it could not, reasoning that, if the State is barred from waiving §27-2-16(B), then so are the MCOs because they "are under an obligation to abide by all state and federal laws applicable to Medicaid." (RP 6825-26).

4. The State fails to ensure that the MCOs comply with §27-2-16(B).

The district court's order made clear that the State had to make the MCOs comply with §27-2-16(B). The RFP for the 2001 contracts states: "Offeror must comply with the provisions of NMSA 1978, Section 27-2-16B. Please refer to the court order in Starko v. NMHSD, et al. found in the procurement library." (RP 3466-68). Despite this and Judge Conway's Order, the 2001 MMCS Agreement states that the MCOs must comply with § 27-2-16B unless the pharmaceutical providers waive the protections of that statute:

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

(RP 3470-76). *See also* December 7, 2001 letter from HSD (SR 12269). The purpose of the *Starko* clause is to require MCO subcontracts to comply with §27-2-16B. *See* 30(B)(6) (Ingram) Depo. 9/21/06 at 105:14-16 (SR 12212) ("I believe it means what it says there, that a subcontract for the pharmacy providers shall include a payment provision consistent with that statute.").

In response to the *Starko* clause, in June 2001, Presbyterian informed its Salud! pharmacy providers that it would be paying reimbursement "in accordance with the provisions of §27-2-16(B) of the New Mexico Public Assistance Act" including ingredient cost at average wholesale price (AWP) plus a dispensing fee of $3.65. (SR 12274-75). In February 2002, however, Presbyterian discontinued its payment of $3.65 and AWP for Salud! pharmacy services. (SR 12276).

The 2005 Contracts include a provision which requires that: "subcontracts for pharmacy providers shall include a payment provision consistent with 1978 NMSA §27-2-16B unless there is a change in law or regulation." (SR 12279).

Despite the explicit requirements in the MMCS agreements that the MCOs comply with state law, the MCOs have <u>not</u> paid the Medicaid pharmacists a dispensing fee of at least $3.65 or ingredient cost reimbursement consistent with

27-2-16(B). The State and MCOs have largely ignored the district court's judgment. More than nine years later, the State still has not required the MCOs to pay the minimum mandatory dispensing fee set forth in §27-2-16(B).

ARGUMENT

Unless the district court's rulings are reversed, the MCOs will have gotten away with violating their promises to comply with the Medicaid statutes, including §27-2-16(B), and will have subverted the will of the Legislature, which guaranteed Medicaid pharmacists minimum reimbursement for their services. The district court's orders dismissing all claims against the MCOs deprive Plaintiffs of their ability to hold the MCOs accountable for their violations of the law and the breaking the contracts they made.

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIM FOR VIOLATION OF §27-2-16(B).

Section 27-2-16(B) guarantees a specific monetary entitlement -- pharmacists filling prescriptions for the State's Medicaid population will be paid a dispensing fee of "at least $3.65" and ingredient cost reimbursement equal to "wholesale cost." The district court, however, concluded that the Plaintiffs could not bring suit against the MCOs for failing to provide this specific entitlement. This ruling was wrong as a matter of law. While the Public Assistance Act (§§27-2-1 *et seq.*) does not specifically provide enforcement remedies, the district court erred in concluding that the Plaintiffs had no right to recover from the MCOs for

their violation of this specific payment directive.

A. The Standard of Review and Preservation of Issues.

This is an appeal of the district court's grant of Presbyterian's motion for judgment on the pleadings. (SRP 9116). The motion attacked the sufficiency of the pleadings only and argued no factual inquiry was necessary. (SRP 9119). Plaintiffs opposed the motion. (SRP 9285). For purposes of the motion, the Court accepts all facts pled by Plaintiffs as true and tests only the legal sufficiency of the claims. *See GCM, Inc. v. Kentucky Cent. Life Ins. Co.*, 1997-NMSC-052, ¶ 13, 124 N.M. 186, 190. Judgment on the pleadings, like summary judgment is considered a "drastic" remedy whose use should be "strictly limited." *North v. Public Serv. Co.,* 97 N.M. 406, 408, 640 P.2d 512, 514 (Ct. App. 1982); *see also United Nuclear Corp. v. State*, 117 N.M. 232, 234, 870 P.2d 1390, 1392 (Ct. App. 1994). The district court's decision is reviewed de novo. *See Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 8, 127 P.3d 548.

B. The State's Non-Delegable Duty To Comply With §27-2-16(B) Does Not Immunize The MCOs From Liability For Their Failure To Comply With The Statute.

Presbyterian first argued, and the district court agreed, that because the State had a non-delegable duty to comply with §27-2-16(B), only the State, not the MCOs, would be liable for violating that law. *See* Order (SR 10600). A non-delegable duty does not immunize the delegated contractor from liability; it merely

means that the delegating party and the contractor can *both* be held liable. *See* 9 Arthur L. Corbin, *Corbin On Contracts*, § 866, at 404 (Interim ed. 1979) ("[T]he legal duty is not escaped by an assignment or delegation of performance."). Corbin explains that where A owes a legal duty to B, and A assigns (through valid contract) the performance of that duty to C, the assignment does not extinguish the duty in A. Corbin, §866, at 402. As Corbin explains, if C fails to perform the duty, then in nearly every jurisdiction "B can sue C as an obligee-beneficiary of [C's] contract with A." *Id.* "[T]he assumption of the assignor's duty by the assignee merely gives to the other party a new and added security." *Id.*

Neither Presbyterian nor the district court cited to any case which holds that a non-delegable duty precludes a right of action against one to whom the duty was delegated. New Mexico law says just the opposite. "[T]he finding of a non-delegable duty dictates the imposition of joint and several liability" on both the party upon whom the duty is originally imposed and the party to whom the duty is entrusted. *See Saiz v. Belen School Dist.*, 113 N.M. 387, 400, 827 P.2d 102, 115 (1992); *Dellaria v. Farmer's Ins. Co.*, 2004-NMCA-132, ¶ 27, 102 P.3d 111 (special concurrence); *Gallegos v. State Bd. of Educ.*, 1997-NMCA-040, ¶¶ 22-23, 123 N.M. 362; *Clear v. Patterson*, 80 N.M. 654, 657, 459 P.2d 358, 361 (Ct. App. 1969).

The district court and Presbyterian tried to distinguish these authorities on

the ground that they were restricted to cases involving an unreasonable risk of physical harm or involved the special nature of insurance contracts. (SR 10599-600, SRP 9497-98). Those are not valid distinctions. In *Dellaria*, the court relied on the *Restatement (Second) Contracts* § 318 and cited general contract principles in concluding that an insured may assert a bad faith claim against either entity that has undertaken an obligation pursuant to a delegation agreement. 2004-NMCA-132, ¶ 27. That a non-delegable duty allows for the aggrieved party to proceed against *both* the delegating and delegated party is found in *Restatement (Second) Contracts* § 318: "(3) Unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor." The import of this rule is that one charged with a non-delegable duty may not avoid responsibility by delegating the obligation to someone else.

That rule in no way prevents the delegated contractor from also being held liable. *See Nelson v. Grayhawk Props. L.L.C.*, 104 P.3d 168, 171-72 (Ariz. Ct. App. 2004) ("Any non-delegable duty on the part of [the municipality] does not immunize or negate the alleged liability of [the independent contractor]."); *United States v. Oak Manor Apts.*, 11 F. Supp. 2d 1047, 1053 (W.D. Ark. 1998); *Saunders v. General Serv. Corp.*, 659 F. Supp. 1042, 1059 (E.D. Va. 1987).

Here, it was undisputed that HSD had a non-delegable duty to comply with

§27-2-16(B). Plaintiffs both pled and proved that the MCOs accepted responsibility to comply with all state Medicaid laws, including §27-2-16(B). Contrary to the decision of the district court, the imposition of the non-delegable duty on HSD under §27-2-16(B) means that both HSD and the MCOs are liable. The non-delegable duty rule certainly does not prevent Plaintiffs from asserting claims against the MCOs. Judgment in favor of the MCOs on this ground was inappropriate.

C. Plaintiffs Have An Implied Right Of Action To Enforce The Specific Reimbursement Provisions Of §27-2-16(B).

The district court also concluded that the Plaintiffs could not sue the MCOs for violating §27-2-16(B) because the Public Assistance Act does not expressly provide for a private right of action. The failure of the Act to denote a remedy does not prevent Plaintiffs from suing the MCOs to make them pay the specific monetary entitlement conferred by the Legislature.

Where a statute creates a specific right but does not express a remedy, then the courts may imply a remedy. *See National Trust for Historic Preservation v. City of Albuquerque,* 117 N.M. 590, 874 P.2d 798 (Ct. App. 1994). As the court explained in *National Trust*, "[a] state court . . . may look beyond legislative intent in exercising common-law authority to recognize a private cause of action." 117 N.M. at 593, 874 P.2d at 801. The issue there was whether private citizens could

enforce the New Mexico Prehistoric and Historic Sites Preservation Act despite the fact that NMSA 1978, §18-8-7 did not specify who could maintain an action. The court concluded that the citizens could seek declaratory and injunctive relief because they would be injured by the failure of the state to comply with the statute, despite the absence of any mention of a private right of action under the Act. *See id.* at 594, 874 P.2d at 802.[8] That rule is consistent with this Court's affirmation that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Montoya v. Mentor Corp.*, 1996-NMCA-067, ¶ 35, 919 P.2d 410 (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

The critical question is where, as here, a statute creates defined property rights in a fixed rate of reimbursement, can the person holding those rights seek to recover the earned, but unpaid, funds? Clearly, the failure to reimburse Medicaid pharmacists consistent with §27-2-16(B) injures the pharmacists who filled the prescriptions but were underpaid. *See New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-5, ¶ 14, 126 N.M. 788, 975P.2d 841 (1988) (recognizing that providers of abortion services had a direct financial interest in obtaining state reimbursement for their services, and had standing to challenge the State's refusal

[8] *See also Gandy v. Wal-Mart Stores*, 117 N.M. 441, 444, 872 P.2d 859, 862 (1994); *Michaels v. Anglo Am. Auto Auctions*, 117 N.M. 91, 92, 869 P.2d 279, 280 (1994).

to fund these services). Plaintiffs have a property interest in receiving full reimbursement and should be allowed to protect and sue for recovery of any underpayment, even without express statutory language addressing such rights.

Plaintiffs' right to specific reimbursements under §27-2-16(B) creates a protected property interest.[9] *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) ("[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."); *Lovato v. City of Albuquerque*, 106 N.M. 287, 290, 742 P.2d 499, 502 (1987). State entitlement statutes are a classic form of property interest. As the Supreme Court explained in *Logan v. Zimmerman Brush*, 455 U.S. 422, 430 (1982): "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *See also American Manufacturers Mutual Ins. v. Sullivan*, 526 U.S. 40, 60 (1999) (property interest was created by worker's compensation statutes providing "reasonable" and "necessary" medical benefits). Medical providers have standing to challenge state Medicaid laws. *See, e.g., New Mexico Right to Choose/NARAL*, 1999-NMSC-5, ¶ 14; *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 510 (1990) superseded by statute, as stated in *Roob v. Fisher,*

[9] This Court did not reach the question whether §27-2-16(B) creates a protected property interest in the prior appeal. *See Starko, Inc. v. Gallegos*, 2006-NMCA-085, ¶19, 140 P.3d 1085.

856 N.E. 2d 723, 732 (2006); *Arkansas Medical Soc'y v. Reynolds*, 6 F.3d 519, 528 (8th Cir. 1993).

New Mexico also recognizes that statutory benefits and entitlements are property interests that are entitled to protection. "The definition of property centers on the concept of entitlement; therefore, interests in government benefits will be recognized as constitutional 'property' if the person can be deemed 'entitled' to them." *Board of Ed. of Carlsbad Mun. Schools v. Harrell*, 118 N.M. 470, 477, 882 P.2d 511, 518 (1994)(citation omitted).[10]

Indeed, it is well recognized that where a party provides services in reliance on a statutorily mandated rate of reimbursement, that party has a property right in the amount that the statute says should be paid. *See Oberlander v. Perales*, 740 F.2d 116, 120 (2d Cir. 1984) ("New York acknowledges a property interest in money paid for services already performed in reliance on a duly promulgated reimbursement rate."); *Maynard v. Bonta*, 2003 U.S. Dist. LEXIS 16201 *52 (C.D. Cal. 2003) ("[A] person has a property interest in a benefit if they have 'a legitimate claim of entitlement to it' that derives from statute, regulation or contract."); *Texas Clinical Labs v. Shalala*, 1999 U.S. Dist. LEXIS 19701, *12 (N.D. Tex. 1999) ("[C]ourts have recognized a property interest in reimbursement

[10] *See also In re a Commission Investigation into the 1997 Earnings of US West Communications*, 1999-NMSC-016, ¶ 13, 980 P.2d 37; *Mills v. New Mexico State Bd of Psychologist Examiners*, 1997-NMSC-028, ¶ 15, 941 P.2d 502; *Scott d/b/a Rainbow Constr. Co. v. Board of Commissioners of the Cnty of Los Alamos*, 109 N.M. 310, 312, 785 P.2d 221, 223 (1989).

for Medicaid services already performed."); *Bradley v. Whalen*, 58 A.D.2d 664, 665 (N.Y. Super. Ct. 1977) ("[T]he operator of a nursing home has a property right in the moneys sought to be recouped which were paid for nursing services that it provided in reliance upon a previously certified reimbursement rate . . .").

The Supreme Court noted that where a statute grants an "individualized, concrete monetary entitlement," then the entitled person may enforce that statutory right even if there is not an express remedy provided for in the statute. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 288 n.6 (2002); *Cal. Alliance of Child & Family Servs. v. Allenby*, 459 F. Supp.2d 919, 924 (N.D. Cal. 2006).

Numerous post-*Gonzaga* cases recognize a provider's right to bring an action concerning Medicaid. *See, e.g., Rio Grande Cmty. Health Ctr. v. Rullan*, 397 F.3d 56, 75 (1st Cir. 2005); *Nat'l Med. Care v. Rullan*, 2005 U.S. Dist. LEXIS 27994, *36-37 (D.P.R. Nov. 1, 2005); *Ass'n of Residential Res. in Minn. v. Minn. Comm'r of Human Serv.*, 2003 U.S. Dist. LEXIS 15056, *27-28 (D. Minn. Aug. 29, 2003).

Section 27-2-16(B), like the federal Medicaid statute in *Wilder,* confers specific monetary entitlements on the pharmacists and demonstrates legislative intent to permit the pharmacists to enforce their rights in court. While the ultimate beneficiaries of the Medicaid statutes are the citizens who receive medical services, the Supreme Court in *Wilder* found that the hospitals had a right to be

paid according to the terms of the statute and could use 42 U.S.C §1983 to enforce that right. Similarly, the New Mexico legislature mandated that pharmacists receive "at least $3.65" as a dispensing fee and full ingredient cost reimbursement when they dispense prescriptions. Neither the State nor MCOs have an incentive to make sure that the pharmacists are paid consistent with §27-2-16(B), because a lack of enforcement means the State and MCOs pay less for pharmacy services. Plaintiffs are the only parties who have an interest in enforcing §27-2-16(B). Under both New Mexico and federal law, Plaintiffs have an implied right to sue to protect their property rights and to ensure the State and MCOs comply with the statute.

The district court was wrong in failing to recognize the property rights created by §27-2-16(B) and Plaintiffs' right to sue to secure those rights. Plaintiffs pled that §27-2-16(B) creates a property right that meets the standards for a "concrete monetary entitlement" under both state and federal law. The district court's dismissal of Count II should be reversed.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIM AGAINST THE MCOS FOR BREACH OF CONTRACT.

After concluding that Plaintiffs had no private right of action under §27-2-16(B), the district court dismissed Plaintiffs' breach of contract claims, concluding that 1) if there was no private right of action under §27-2-16(B), the MCOs did not create an enforceable agreement when they incorporated the statute into the

MMCS and (2) Plaintiffs were not third-party beneficiaries to those agreements, and thus could not sue to enforce the terms. Both conclusions are incorrect. By incorporating §27-2-16(B) into the MMCS agreements, the MCOs were contractually bound to abide by the statute, whether or not there is a statutory right of action. Plaintiffs have also properly brought suit as third party beneficiaries to the agreements.

A. Standard of Review and Preservation of Issue.

Presbyterian moved for judgment on the pleadings. (SRP 9116). The motion attacked whether Plaintiffs could pursue contractual claims given that the district court ruled §27-2-16(B) did not provide a private right of action. Plaintiffs opposed the motion. (SRP 9285). The district court's decision is reviewed de novo. *See Juneau*, 2006-NMSC-002, ¶ 8, 127 P.3d 548.

B. The MCOs' Agreement To Comply With §27-2-16(B) Is Binding, Whether Or Not That Statute Grants A Private Right Of Action.

Contractual promises come in a variety of forms. They can be oral or written. Parties can express their promises by incorporating sources external to the words of the written contract itself, or by referring to other documents, definitions or statutes. As part of the package of obligations assumed by the MCOs, they agreed to follow the same Medicaid statutes HSD was required to follow. The promise to comply with §27-2-16(B) is as binding as any other promise undertaken by the MCOs.

New Mexico recognizes that a party can agree to be bound in contract even if it is otherwise immune from suit. In *Cockrell v. Board of Regents of New Mexico State Univ.*, 2002-NMSC-009, 132 N.M. 156, the Supreme Court confronted whether an assistant basketball coach could sue the university for wrongful termination and overtime wages under the federal Fair Labor Standards Act of 1938 ("FLSA"). The employee also sought to assert claims for breach of contract, which sought compensation for overtime wages based on a theory of implied contract. *See id.* ¶ 2. The university moved to dismiss the claims on the grounds of sovereign immunity. *See id.* The trial court dismissed the direct FLSA claims and the Supreme Court affirmed. *See id.* ¶¶ 15, 24. The Supreme Court remanded the case to allow the employee to pursue his contract claims. The Court reasoned: "Although we conclude that the State has not waived sovereign immunity with respect to Cockrell's federal claims under the FLSA, we do not intend to dispose of Cockrell's separate cause of action for breach of contract under state law." *Id.* ¶ 25.

The analysis here is no different. The MCOs assumed the obligation to comply with state law, including §27-2-16(B). It is irrelevant whether Plaintiffs have a private right of action to enforce the statute. In *Cockrell*, the plaintiff was barred from pursuing a statutory claim against NMSU. The only issue, here, is whether Plaintiffs may pursue an "action for breach of contract under state law."

Cockrell answers that question in the affirmative.

The *Cockrell* ruling is consistent with New Mexico's recognition that common law rights -- i.e., contractual rights -- are not abrogated unless expressly repealed by statute. *See* NMSA 1978 § 38-1-3 ("In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision."). "The common law is only abrogated or repealed by statute when directly and irreconcilably opposed to the common law." *Southern Union Gas Co. v. Artesia*, 81 N.M. 654, 657, 472 P.2d 368, 371 (1970). A statute is not irreconcilably opposed to common-law remedies when it is silent as to such remedies. *See Gonzalez v. Whitaker*, 97 N.M. 710, 714, 643 P.2d 274, 278 (Ct. App. 1982). There is nothing in §27-2-16(B) that is irreconcilably opposed to a common-law right of a third-party beneficiary to bring an action for breach of a contract which incorporates the provisions of this statute.

The law is well-established that the absence of a statutory right of action does not foreclose enforcement of a contract which expressly incorporates it. In *Brogdon v. Nat'l Healthcare Corp.*, 103 F. Supp.2d 1322 (N.D. Ga. 2000), residents of a long-term health care facility brought suit against the owner of the facility, alleging that defendant violated the Medicaid and Medicare Acts, and that plaintiffs were third-party beneficiaries of a contract between the defendant and the state of Georgia. *Id.* at 1326. The *Brogdon* court dismissed the plaintiffs' claims

under the Medicare and Medicaid Acts, finding no Congressional intent to create a private cause of action. *Id.* at 1332. With respect to the third-party beneficiary claim, however, the court rejected the defendant's argument that the lack of a private cause of action precluded suit as third-party beneficiaries of the contract:

> [T]he absence of an implied cause of action under the Medicaid and Medicare Acts does not determine whether Plaintiffs may sue as third-party beneficiaries pursuant to the contract at issue. The question is whether Plaintiffs may sue as third-party beneficiaries under the contract [citing a Georgia case which set forth the general standard pertaining to third-party beneficiary contract claims], not whether Congress intended to create a private cause of action in a statute.

Id. at 1334 (citations omitted). The same reasoning applies here.

In *Found. Health v. Westside EKG Assocs.*, 944 So.2d 188, 191 (Fla. 2006), a medical service provider alleged that seven HMOs had breached his contract by violating Florida's Health Maintenance Organization Act. The applicable statute did not authorize a private right of action. *Id.* at 194. The Florida Supreme Court, however, allowed the plaintiff to bring a common-law action, as third-party beneficiary of the contract between the HMOs and their subscribers, to enforce the provisions of the statute which were incorporated into the contract. *Id.* at 194-96. The court stated that "when parties contract upon a matter which is the subject of statutory regulation, the parties are presumed to have entered into their agreement with reference to such statute, which becomes a part of the contract." *Id.* at 193. The court further held that incorporation of the HMO statute into the HMO

contracts manifested an intent to benefit medical providers who supplied services to the plan members, because the HMO Act required HMOs to compensate non-participating providers for emergency care. *See id.* at 197; *see also Electrostim Med. Servs. v. Aetna Life Ins.*, 2007 U.S. Dist. LEXIS 9857, *8 (M.D. Fla. Feb. 13, 2007).[11] The same reasoning applies here, where Plaintiffs seek to enforce contractual obligations which incorporate statutory standards.

Similarly, in *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662 (Mo. 1 999), plaintiff subscribers of Medigap insurance brought a class action against Blue Cross and a managed care organization. The *Dierkes* court recognized that the plaintiffs had no private right of action under the Missouri statute. *Id.* at 667-68. Blue Cross, however, had represented to the plaintiffs that the policies "met all 'state and federal requirements' and that any change in premiums was 'subject to all applicable laws and regulations.'" *Id.* at 667. The court held that representation created an enforceable contractual right. *Id.* The court noted, "'a statutory right of action shall not be deemed to supersede and displace remedies otherwise available at common law in the absence of language to that effect unless the statutory remedy fully comprehends and envelopes the remedies provided by common law.'" *Id.* at 668 (citations omitted). The court found that the Missouri statute did not fully comprehend and envelop remedies provided by common law

[11] *See Johnson v. Armstrong & Armstrong*, 41 N.M. 206, 210, 66 P.2d 992, 994-5 (1937) (physician was third-party beneficiary of settlement among widow, employer and workers compensation insurer for payment of services rendered to deceased employee).

and reversed the trial court's ruling that the plaintiffs' contract claims were preempted by the statute. *Id.* at 668-9.

Courts have come to similar results in other contexts. *See Brown v. Sun Healthcare Group*, 476 F. Supp. 2d 848, 851-3 (E.D. Tenn. 2007); *Raetsch v. Lucent Techs., Inc.*, 2006 U.S. Dist. LEXIS 78422 (D.N.J. Oct. 26, 2006); *Zigas v. Superior Court*, 120 Cal. App. 3d 827, 834 (Cal. Ct. App. 1981).

Contractual promises incorporating statutes are just as enforceable as any other promise. *See Dillard & Sons Constr. v. Burnup & Sims Comtec*, 51 F.3d 910, 915 (10th Cir. 1995) ("Pertinent provisions of state law--and acts of the state in a legitimate exercise of its police power--are just as enforceable in a suit based on a contract as any other contractual provision."). Plaintiffs have a common law contractual right to enforce the statutory obligations incorporated into the MMCS agreements, whether or not §27-2-16(B) affords a private right of action. The district court erred in not adopting this sound rule.

C. The District Court Erred In Finding As A Matter Of Law That Plaintiffs Are Not Third-Party Beneficiaries Of The MMCS Agreements.

Not only did the district court err in holding that Plaintiffs could not enforce §27-2-16(B) in contract without an express private right of action under the statute, but it also erred in concluding as a matter of law that Plaintiffs could not bring suit as third-party beneficiaries of the MMCS agreements. The district court's decision

was mistaken in two respects.

First, the district court concluded that Plaintiffs could not be third-party beneficiaries because Medicaid's beneficiaries, not providers, are the recipients. (SR 12634).[12] That conclusion is based on the mistaken premise that Medicaid's payment provisions cannot be for the benefit of providers as well. In *Wilder*, the Supreme Court of the United States had no difficulty concluding that the reimbursement requirements of the Boren Amendment were intended to benefit the plaintiff providers of Medicaid services.[13] 496 U.S. at 509-10.

Second, whether the Legislature intended to benefit the pharmacists is beside the point under *Gonzaga*. In determining if a party may bring a §1983 claim in the absence of an express private right of action, the *Gonzaga* court stated: "it is **rights**, not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." 536 U.S. at 283 (emphasis in original). Because §27-2-16(B) creates clearly defined rights to specific reimbursement rates, whether the purpose of Medicaid is to benefit the indigent is irrelevant to the question of whether Plaintiffs have enforceable claims against the State and MCOs. *See also Roob v. Fisher*, 856 N.E.2d 723, 730 (Ind. App. 2006). The

[12] The district court earlier found §27-2-16(B) was intended to benefit pharmacists. *See* Order (RP 8209) ("While Medicaid is clearly for the benefit of recipients, the statute also sets out certain payments to pharmaceutical providers, and those portions of the statutes are for the benefit of pharmacists and pharmacies -- for instance, to ensure a certain dispensing fee.").

[13] The language of §27-2-16(B) guaranteeing "at least $3.65," is a far more "concrete monetary entitlement," than the Boren Amendment. It required the states to set Medicaid reimbursement rates that a "State finds, and makes assurances satisfactory to the Secretary, are ***reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities.***" 42 U.S.C. § 1396a(a)(13)(A) [repealed](emphasis added).

Legislature's decision to guarantee specific minimum reimbursement rates for pharmacists under §27-2-16(B) manifests an intent to benefit the pharmacists. The district court's conclusion that Plaintiffs could not be intended beneficiaries of the reimbursement provisions of Medicaid does not square with either an "intent to benefit" or "rights" approach.

D. Plaintiffs Are Intended Beneficiaries Of The MMCS agreements.

New Mexico law has long recognized that when two parties enter into a contract for the benefit of a third person, the promisor owes a duty to such third person to perform its obligation. *See Merchants' Nat'l Bank v. Otero*, 24 N.M. 598, 175 P. 781 (1918). The Court noted that "a majority of the courts of this country hold that the beneficiary, though not a party to the contract, may maintain an action thereon directly in his own name, where the contract was made for his benefit." *Id.* at 604-05, 175 P. at 783. This principle has been repeatedly applied.[14]

New Mexico recognizes that a third-party's rights to enforce a contract are governed by the scope and nature of the contractual obligations inuring to his or her benefit. If such obligations exist, then the third-party's legal remedies are "as broad as the contractual obligation." *Id.* at 604, 175 P. at 783. Here, the source of the Medicaid pharmacists' contractual right is §27-2-16(B), which was enacted for

[14] *See, e.g., Lawrence Coal Co. v. Shanklin*, 25 N.M. 404, 408, 183 P. 435, 437 (1919); *Key v. George E. Breece Lumber Co.*, 45 N.M. 397, 403, 115 P.2d 622, 625-626 (1941); *Fuqua v. Trego*, 47 N.M. 34, 39, 133 P.2d 344, 347 (1943).

their benefit and incorporated into the MMCS agreements. Plaintiffs' remedies encompass the full reimbursement afforded by §27-2-16(B).

More recently, New Mexico recognizes two classes of beneficiaries: intended beneficiaries and incidental beneficiaries. In *Tarin's, Inc. v. Tinley*, 2000-NMCA-048, 129 N.M. 185, the Court reversed the trial court's dismissal of a property owner's third-party beneficiary complaint, holding that the property owner could be a third-party beneficiary of a contract between a general contractor and a subcontractor for construction work on the owner's property. The Court emphasized that "[t]he 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." *Id.*, 2000-NMCA-048, ¶ 13 (quotations and citation omitted). Moreover, it noted that a third-party could present extrinsic evidence "if the contract does not unambiguously indicate an intent to benefit him." *Id.* The Court of Appeals explicitly adopted Section 302 of the Restatement (Second) of Contracts,[15] which provides

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

[15] *See also* UJI-13-821 Committee comment (citing Section 302(1)); *Dellaira*, 2004-NMCA-132, ¶ 27; 102 P.3d 111, 118 (specially concurring opinion).

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

See id. In order for one to qualify as an intended beneficiary, two requirements must be met: (1) one must show that recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties; and (2) either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary, or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. The comments to Section 302 make clear that the classification of "intended beneficiaries" under the Restatement (Second) includes creditor beneficiaries.

Comment b to Section 302 explains that a surety relationship "may exist even though the duty of the promisee is voidable or is unenforceable by reason of the statute of limitations, the Statute of Frauds, or a discharge in bankruptcy." This is particularly instructive. The Restatement provides the following illustration:

> 1. A owes C a debt of $100. The debt is barred by the statute of limitations or by a discharge in bankruptcy, or is unenforceable because of the Statute of Frauds. B promises A to pay the barred or unenforceable debt. C is an intended beneficiary under Subsection (1)(a).

Substituting the facts of this case into the illustration results in the following:

> 1. The State owes Plaintiffs a debt of $3.65 (for dispensing drugs to Medicaid recipients). The debt is barred by the absence of a private right of action contained in §27-2-16(B). MCOs promise the State to pay the barred and unenforceable debt. Plaintiffs are an intended beneficiary under Subsection (1)(a).

Even if Medicaid pharmacists have no direct private cause of action to enforce §27-2-16(B), they are intended beneficiaries and can enforce the contractual obligations assumed by the MCOs to comply with §27-2-16(B).

After the Court entered its June 14, 2000 Order directing the State to establish a managed care system that complies with §27-2-16(B) (RP 782), the MMCS agreements state that the MCOs must comply with §27-2-16(B). (RP 3470-75). That the MCOs knew of and promised that they would comply with §27-2-16(B) cannot be seriously contested. The State maintains the MCOs were required to comply with §27-2-16(B), and were paid sufficient money to comply with §27-2-16(B). (SR 12239, 12211, 12214, 12214-15, 12217, and 12218-19). Section 27-2-16(B) gives Plaintiffs status as intended party beneficiaries under the MMCS agreements. The district erred in finding to the contrary.

1. An intent to benefit may be inferred from statutes which are incorporated into a contract.

The law is well-settled that when contract terms incorporate a statute, then the contract must be read consistent with the terms of the statute. *See Gladden Motor Co. v. Eunice School Bd.*, 2007-NMCA-118 ¶ 11, 167 P.3d 931 ("We hold that the statutes control despite the language of the contract."); *Re ndleman v.*

Bowen, 860 F.2d 1537, 1541-2 (9th Cir. 1988), *rev'd on other grounds*, *Rendleman v. Shalala*, 21 F.3d 957 (9th Cir. 1994); *American Hosp. Ass'n. v. Schweiker,* 721 F.2d 170, 183 (7th Cir. 1983). Where a contract expressly incorporates a statute, it is appropriate to examine the governing statute and its purpose.

Intent to benefit for third-party beneficiary purposes can also be supplied by a statute that is read into the contract. *See* Restatement (Second) of Contracts, § 302, cmt. *d* ("In some cases an overriding policy, which may be embodied in a ***statute***, requires recognition of such a right without regard to the intention of the parties.")(emphasis added); *Foundation Health*, 944 So. 2d at 193; *Electrostim Med. Servs.*, 2007 U.S. Dist. LEXIS 9857 at *8; *Rogers v. Speros Construction Co.*, 580 P.2d 750, 753 (Ariz. 1978).[16] Federal courts uphold third-party beneficiary actions based on contracts that incorporate statutory requirements. *See Miree v. DeKalb County*, 433 U.S. 25, 28-9 (1977); *Flagstaff Medical Center, Inc. v. Sullivan*, 962 F.2d 879, 891 (9th Cir. 1992).

By incorporating §27-2-16(B) into the MMCS agreements, the MCOs and the State are deemed to have intended that the provisions of §27-2-16(B) be

[16] *See also Favel v. Am. Renovation & Constr. Co.*, 59 P.3d 412 (Mont. 2002); *Fasse v. Lower Heating & Air Conditioning, Inc.*, 736 P.2d 930, 934 (Kan. 1987); *Elephant Butte Irrig. Dist. v. Dept. of Interior*, 160 F.3d 602, 606-7 (10th Cir. 1998); *New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc.*, 651 F. Supp. 802, 816 (S.D.N.Y.1986); *Technicable Video Sys., Inc. v. Americable of Greater Miami, Ltd.*, 479 So. 2d 810, 812-13 (Fla. App.1985); *Owens v. Haas*, 601 F.2d 1242, 1250-51 (2d Cir. 1979); *Western Union Tel. Co. v. Massman Constr. Co.*, 402 A.2d 1275, 1277 (D.C. Ct. App. 1979); *COAC, Inc. v. Kennedy Engineers*, 67 Cal. App. 916, 922-3 (Cal.Ct.App. 1977); *Fuzie v. Manor Care, Inc.*, 461 F. Supp. 689, 698 (N.D. Ohio 1977); *Bush v. Upper Valley Telecable Co.*, 524 P.2d 1055, 1057-8 (Idaho 1973).

honored -- for the benefit of the Medicaid pharmacists. The district court erred in concluding as a matter of law that Plaintiffs could not be third-party beneficiaries of the MMCS agreements.

2. Plaintiffs Demonstrated That They Are Third-Party Beneficiaries of the MMCS Agreements.

Plaintiffs submitted compelling evidence to the district court demonstrating that they are third-party beneficiaries of the MMCS agreements. (SR 12152-55, 12183-12279, 12103-48). The State is required to provide pharmacy services to Medicaid recipients. In order to carry out those obligations, the State must have an adequate network of pharmacy providers. (RP 3438-43; SR 12185, 12198, 12199, 12202, 12207, 12213 and 12268). To guarantee there will be adequate pharmacist participation, the Legislature enacted 27-2-16(B). (SR 12195-96, 12230). The State is required to comply with the reimbursement parameters of §27-2-16(B). *See* (SR 12191). The same holds true for Salud!.

Pharmacy services are a mandatory benefit offered under Salud!. (SR 12241 and 12268). The State paid the MCOs enough money to comply with §27-2-16(B). (SR 12239, 12211, 12214, 12214-15, 12217, and 12218-19).

The history of the MMCS agreement contracting since the filing of this lawsuit further demonstrates that the State and MCOs were both required to comply with §27-2-16(B) and contemplated as much. The district court entered a TRO requiring the State to inform Plaintiffs that they did not waive their rights

under §27-2-16(B) by signing the amendment to their fee-for-service agreements with the State. (RP 305-6; 1893-94). Moreover, the court ruled that the State and MCOs must comply with §27-2-16(B). (RP 782). The MCOs were advised by the State that they must comply with 27-2-16(B). (SR 12210 and RP 3466-68). Indeed, the 2001 and 2005 Contracts expressly provide that the MCOs must comply with §27-2-16(B) in their pharmacy subcontracts. (RP 3470-76; SR 12269, 12212 and 12279).

The MCOs have variously acknowledged their obligation to comply with §27-2-16(B) in Salud!. In 2001, Presbyterian began reimbursing pharmacists accordingly. (SR 12274-75 and 12276). Cimarron proposed that the State should pay additional funds to comply with §27-2-16(B). (SR 12277). Despite efforts to change §27-2-16(B), the statute remains unchanged. (RP 3478 and SR 12272-73). This demonstrates that the Legislature has no intention of abrogating the protections of the law.

Plaintiffs should have been granted partial summary judgment holding that they are third-party beneficiaries to the MCOs' promise to comply with §27-2-16(B). The district court's dismissal of Plaintiffs' breach of contract claims must be reversed.

III. THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT TO THE MCOS ON THE ISSUE OF THIRD-PARTY BENEFICIARY STATUS.

As the foregoing evidence and arguments demonstrate, Plaintiffs were entitled to summary judgment on the issue of Plaintiffs' third-party beneficiary status. The district court disagreed, but did not appear to base its ruling on the facts or arguments presented by the parties at the August 15, 2007 hearing. *See* TR (8/15/07) at 60. ("[I] think my letter decision is my ruling with my analysis as to why they are not intended beneficiaries of the contracts."). And yet, the parties argued there were contested issues of material fact bearing on the issue of Plaintiffs' status as third-party beneficiaries. (SR 12073-79, 12333-39). To the extent that the question of whether Plaintiffs are third-party beneficiaries depends on discerning the intent of the parties and the facts are disputed, then summary judgment was inappropriate under Rule 1-056 NMRA. "A summary judgment motion is not an opportunity to resolve factual issues, but should be employed to determine whether a factual dispute exists." *Gardner-Zemke Co. v. State*, 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990). The district court's ruling should be reversed on this basis alone.

IV. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIM AGAINST THE MCOS FOR UNJUST ENRICHMENT.

Plaintiffs brought claims against the MCOs for unjust enrichment based on the allegation that the MCOs failed to pay Plaintiffs the reimbursement rates to which they were entitled under §27-2-16(B) and were unjustly enriched by the

amount of Medicaid reimbursements they wrongfully withheld -- the difference between what §27-2-16(B) required and what they paid.[17] (RP 5778-79). The district court originally dismissed that claim on the grounds that because a contract existed between the MCOs and Plaintiffs as third-party beneficiaries, Plaintiffs could not bring an equitable claim for unjust enrichment. *See* Order (SR 10604). Yet, the Court denied Plaintiffs the right to pursue a claim for unjust enrichment *after* dismissing Plaintiffs' contractual claims. *See* TR (8/15/07) at 60-61; (SR 12455). The district court erred in two ways.

First, the district court should not have dismissed the unjust enrichment claim solely because Plaintiffs had (at the time) a valid contract claim. (SR 10604). Plaintiffs are entitled to plead alternative claims. Rule 1-008(E)(2) NMRA; *Platco Corp. v. Shaw*, 78 N.M. 36, 37, 428 P.2d 10, 11 (1967). A plaintiff who asserts a claim of breach of contract may also seek equitable relief. *See State ex rel. Gary Electric v. Fireman's Fund Indem. Co.*, 67 N.M. 360, 365, 355 P.2d 291, 294-95 (1960). Then, upon later dismissing the contract claims, the district court should have allowed Plaintiffs to reassert their equitable claims.

Second, under New Mexico law, Plaintiffs had a right to seek recovery of the amounts which the MCOs were retaining based on their failure to reimburse

[17] This issue was argued in the briefs submitted by Plaintiffs and Presbyterian in connection with the presentment hearing on the Court's letter ruling dated July 10, 2007 (SR 12372-80). *See* (SR 12455 and 12462-63).

Plaintiffs under §27-2-16(B). "New Mexico has long recognized actions for unjust enrichment, that is, in quantum meruit or assumpsit." *Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, ¶ 11, 3 P.3d 695. Two elements must be established in order to prevail on a claim of unjust enrichment: "(1) another has been knowingly benefited at one's expense (2) in a manner such that allowance of the other to retain the benefit would be unjust." *Id.* (citing *Restatement of the Law of Restitution* §§ 1, 40, 41 (1937, as supplemented through 1988)). Plaintiffs both pled and proved that each of these elements.

The evidence shows that the MCOs agreed to abide by all state Medicaid statutes (SR 11800, SR 11905), and that the MCOs were paid contract rates under the MMCS agreements which were sufficient to comply with §27-2-16(B) (SR 12214-15, 12217, 12218-19). Yet, the MCOs did not pay consistent with the statute and retained the difference between what the statute said should be paid and was actually paid. The MCOs' ability to pay the difference is illustrated by the fact that Presbyterian for a six-month period paid the pharmacists according to §27-2-16(B). (SR 12274-75). The MCOs unjustly enriched themselves by withholding from the Plaintiffs the full reimbursement required by §27-2-16(B).

Plaintiffs should have been permitted to pursue an equitable claim regardless of any contractual rights and regardless of whether the applicable statute does or does not provide a private right of action. *See Jamail, Inc. v. Carpenters Dist.*

Council, 954 F.2d 299, 305-6 (5th Cir. 1992); *Plucinski v. I.A.M. Nat'l Pension Fund*, 875 F.2d 1052, 1057-8 (3d Cir. 1989). As one commentator observed:

> When a link in the chain of distribution of new property rights -- a school board, a nursing home operator, or a landlord -- has received federal funds to be spent for the benefit of an identifiable group, there is a benefit conferred. When the promisor fails to distribute the promised benefits, he is unjustly enriched "by reason of an infringement of another person's interest."

Waters, A., "The Property In The Promise: A Study Of The Third Party Beneficiary Rule," 98 *Harv. L. Rev.* 1109, 1206 (1985). The MCOs should not be permitted to keep reimbursement money which the Legislature and HSD intended they pay to pharmacists. Plaintiffs should be permitted to pursue this claim.

V. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS FOR DECLARTORY AND INJUNCTIVE RELIEF.

Plaintiffs' claims for declaratory and injunctive relief requiring the MCOs to comply with §27-2-16(B) should not have been dismissed. (SR 12609). Declaratory relief may be available on a contract claim. *See Baca v. New Mexico State Highway Dep't*, 82 N.M. 689, 693, 486 P.2d 625, 629 (Ct. App. 1971). And, injunctive relief is appropriate to enforce rights under a statute and contract. *See Winrock Enters. v. House of Fabrics*, 91 N.M. 661, 664, 579 P.2d 787, 790 (1978); *City of Sunland Park v. Harris News, Inc.*, 2005-NMCA-128, ¶ 36, 124 P.3d 566, *cert. quashed*, 141 P.3d 1280 (affirming district court's entry of injunctive relief for specific performance based on breach of contract). The district

court erred in dismissing such claims.

CONCLUSION

The order and judgment of the district court dismissing Plaintiffs' claims against Presbyterian and Cimarron should be reversed and partial summary judgment should be entered in favor of the Plaintiffs declaring them to be third-party beneficiaries of the MMCS agreements.

Respectfully Submitted,

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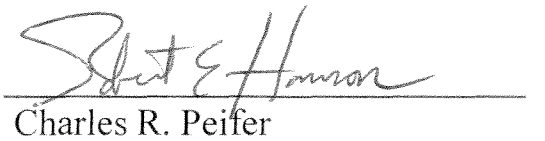
By: 
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