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

**SPONSOR** Rodriguez **ORIGINAL DATE** 2/21/17 **LAST UPDATED** **HB**

**SHORT TITLE** Third-Party Medical Payment Recovery **SB** 363

**ANALYST** Boerner

## ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY17 | FY18 | FY19 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|---|---|---|---|---|---|---|
| **Total** | | NFI | NFI | NFI | | |

(Parenthesis ( ) Indicate Expenditure Decreases)

## SOURCES OF INFORMATION

LFC Files

Responses Received From
Human Services Department (HSD)
Office of the Attorney General (OAG)

## SUMMARY

Synopsis of Bill

Senate Bill 363 (SB363) would amend the Public Assistance Act to add a new section.

Subsection A of the bill proposes new language that would require the Secretary HSD to ensure the Medical Assistance Program:

1. Receives assignment from each recipient of any payment by a third party to cover the costs of that medical care; and

2. Seeks to collect each third-party payment owed to HSD.

Subsection B of the bill would require the Secretary of HSD to provide a report by November 1, 2017 on the department's efforts to enforce HSD's right to recover medical assistance costs through assignment of recipients' third party payments.

Subsection C of the bill would extend to any resident of the state the necessary standing to bring a suit to compel compliance with the provisions of Subsection A.

## SIGNIFICANT ISSUES

HSD points out federal Medicaid statute, Title XIX of the Social Security Act, currently requires state medical assistance plans to provide for mandatory assignment of rights of payment for medical support and other medical care owed to recipients.

See TITLE XIX—Grants to States for Medical Assistance Programs, Section 1912 Assignment of rights of payment https://www.ssa.gov/OP_Home/ssact/title19/1912.htm

Consequently, the department argues it would not have to specifically seek assignment from each recipient as the bill seems to imply and Subsection A of the bill appears to be duplicative of existing federal and state law. HSD provided the following specific citations as clarification:

- §1902(a)(45) of the Social Security Act already provides for mandatory assignment of rights to payments for medical support and other medical care.
- 42 U.S.C. § 1396a(a)(25)(A): to "seek reimbursement for [medical] assistance to the extent of such legal liability,"
- § 1396a(a)(25)(B): to enact "laws under which, to the extent that payment has been made ... for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services."
- § 1396a(a)(25)(H): to "provide that, as a condition of [Medicaid] eligibility ..., the individual is required ... (A) to assign the State any rights ... to payment for medical care from any third party; ... (B) to cooperate with the State ... in obtaining [such] payments ... and ... (C) ... in identifying, and providing information to assist the State in pursuing, any third party who may be liable."
- § 1396k(a)(1): finally, "any amount collected by the State under an assignment made" as described above "shall be retained by the State ... to reimburse it for [Medicaid] payments made on behalf of" the recipient.
- § 1396k(b): "[T]he remainder of such amount collected shall be paid" to the recipient.
- NMSA 27-2-23 subrogates the HSD Medicaid recipient's rights to any medical expense recovery paid by HSD and NMSA 27-2-28 (G) makes assignment of recipient's rights of medical care payments.

**Regarding Subsection B pertaining to recovery efforts:**

The department is concerned the wording in the bill fails to recognize the complexity of recoveries covered by federal law. State laws regarding recovery of medical payments from tort settlements and casualty cases often require negotiated settlements for amounts. In some instances, the amount to be recovered is less than the cost of recovery, and so under federal law, a practical limit can be established by HSD to be cost effective. Such flexibility is not included in this bill.

HSD points out several mechanisms in place that are recovering payments due to the state, with the most significant examples below:

- Under federal requirements, state Medicaid programs are required to deny claims when the recipient has an insurance resource that would cover the claim and yet no insurance claim was filed;

- When an insurance or other payer resource is added to the recipient's records after a claim has been paid, HSD seeks insurance payment for all previously paid claims within the dates of the insurance policies. This method is also used for claims for which federal law prohibits an "up-front" denial until insurance has paid, as described above;
- When Medicare eligibility is established, HSD recoups any previously paid claims and instructs the provider to bill Medicare for eligible claims;
- For claims that may have been missed during the initial automated processes described above, HSD works with a contractor for identification and review of claims for which insurance or Medicare could have paid, but did not. This is done by the federally-required Recovery Audit Contractor (RAC) which has access to insurance information through sources that HSD may not have. The RAC also notifies a member or the member's legal counsel when the department has a claim against a legal settlement or judgment so HSD can recoup a portion of its costs from the settlement or judgment amount.

Finally, on a related issue the department points out that under recent federal law, a provider that keeps an entire Medicaid payment and an insurance payment and does not refund the money to Medicaid within 60 days of receipt of money, is subject to a credible allegation for fraud.

**Regarding Subsection C pertaining to HSD noncompliance with recovery requirements and the right of any resident to bring suit:**

The department points out the bill could open HSD to unnecessary and confusing litigation given the inconsistencies between the bills's requirements and requirements under current federal law; HSD argues that if standing is granted under this bill it would still be difficult for any private attorneys to allege damages unless they are already a party in an underlying action.

Finally, HSD cites Armstrong v. Exceptional Child Center Inc., noting the U.S. Supreme Court held that the Supremacy Clause denies a private right of action. Since the bill would deny damages, the case would be limited to outright barratry or injunctive matters which are precluded in matters falling outside cases of equity but within the discretion of the agency. The agency, in administrative matters is granted deference. Even with such a provision as the bill proposes, "any resident" would still not actually have a private right of action or standing to sue under current case law. Such private right of action that the bill would create would clash with federal law pre-emption and not be allowed.

**TECHNICAL ISSUES**

The OAG pointed out SB 363 does not specify how an "assignment" would work, whether it is to happen automatically or if there is a process that is to be undertaken. Additionally, both OAG and HSD noted the bill requires the Secretary to provide a report on department efforts to enforce the agency's right to recover medical assistance costs through assignment of recipients' third party payments; however, the bill does not make clear to whom a report would be sent.

CB/jle