

2011 WL 9191914 (N.M.) (Appellate Petition, Motion and Filing)
Supreme Court of New Mexico.

STATE OF NEW MEXICO, ex rel., Gary K. King, Attorney General of the State of New Mexico, Petitioner,

v.

Honorable Judge C. SHANNON BACON, Second Judicial District
Court Judge, Bernalillo County, Division XXIII, Respondent,

and

BEHAVIORAL HOME CARE, INC., Defendant and Real Party in Interest.

No. 11/33258.

October 14, 2011.

**State of New Mexico's Verified Petition for Writ of Mandamus or Writ of Superintending
Control or Writ of Prohibition and Request for Emergency Stay ([Rule 12-504 NMRA](#))**

[Gary King](#), Attorney General.

[Amy Landau](#), Assistant Attorney General, 111 Lomas NW, #300, Albuquerque, NM 87102, 505-222-9000, Attorneys for Petitioner.

*1 Gary King, Attorney General, and the federally funded Medicaid Fraud Control Unit (MFCU or unit) on behalf of the State of New Mexico petitions the Court for a Writ of Mandamus, or Writ of Superintending Control, or Writ of Prohibition to: 1) prohibit judicial disregard of Medicaid provider statutory, regulatory, and contractual violations; and, 2) require judicial enforcement of civil remedies, penalties, and contract damages under the New Mexico MFA, [NMSA 1978, Sections 30-44-1 et seq.](#) (1989, and as amended) and the Caregivers Criminal History Screening Act, [NMSA 1978, Sections 29-17-2 et seq.](#) (1997, and as amended) arising out of, and relating to Judge Bacon's January 28, 2011 and September 16, 2011 orders. [Rule 12-504 NMRA](#).

Petitioner also requests an emergency stay, effective immediately until the Court has clarified the application of the MFA's civil remedies and civil penalties for statutory, regulatory, and contractual violations by Medicaid providers. [Rule 12-504](#).

As grounds for the granting of this petition for a writ and issuance of an emergency stay, the State respectfully states:

JURISDICTION

1. Jurisdiction of this Court is established by Rule 12-504, [State ex rel. Clark v. Johnson](#), 120 N.M. 562, 904 P.2d 11 (1995), and [State ex rel. Schwartz v. Kennedy](#), 120 N.M. 619, 904 P.2d 1044 (1995).

*2 2. Gary King is the elected Attorney General and has the authority and duty to file this petition. [NMSA 1978, § 8-5-2 \(1975\)](#).

3. Petitioner seeks to invoke the power and authority of this Court to resolve a significant statewide dispute regarding the statutory interpretation of the New Mexico Medicaid Fraud Act (MFA), [NMSA 1978, Sections 30-44-1 et seq.](#) (1989, and as amended) and the Caregivers Criminal History Screening Act (CCHSA), [NMSA 1978, Sections 29-17-2 et seq.](#) (1997, and as amended).

4. The New Mexico Medicaid program paid providers approximately 3.2 billion dollars in the fiscal year ending June 2011 and is administered pursuant to regulations promulgated by the federal department of health and human services under Title XIX

of the Social Security Act, as amended, and by the State Human Services Department (HSD) pursuant to state statute. [NMSA 1978, §§ 27-2-12 et seq.](#) (1973, and as amended).

5. The New Mexico Medicaid fraud control unit (MFCU) was established by sections 1903(a)(6), 1903(b)(3) and 1903(q) of the Social Security Act, as amended by the Medicare-Medicaid Anti-Fraud and **Abuse** Amendments ([Pub. L. 95-142](#)), and is ninety percent funded by the federal government, and is charged with conducting a Statewide program for investigating and prosecuting violations of all applicable State laws pertaining to fraud in the administration of the Medicaid program or activities of providers under the State Medicaid program, including the *3 collection of overpayments. [42 U.S.C. § 1396b\(a\)\(6\)](#), [§ 1396b\(b\)\(3\)](#) and [§ 1396b\(q\)](#); [42 CFR §§ 1007.1 et seq.](#)

6. Attorney General King brought the underlying civil action against Defendant, a Medicaid provider, through the federally certified MFCU, based upon his power and authority to investigate violations of the MFA and bring actions to enforce the civil remedies established in the MFA. [NMSA 1978, Sections 30-44-3\(A\)\(1989\) & 30-44-8 \(2004\)](#).

7. A criminal action need not be brought as a condition precedent to enforcement of civil liability under the MFA and civil penalties are separate from and cumulative to any other administrative and civil remedies available under federal or state law or regulation. See [Sections 30-44-8\(D\) & \(E\) \(1989\)](#).

8. In 2001 Defendant BHC executed a New Mexico Human Services Department (HSD) Medical Assistance Division (MAD) 335 Provider Participation Agreement (PPA) (1/23/2001) contract with HSD in order to function as a Medicaid service provider. In 2006 Defendant executed another HSD MAD 335 PPA (9/9/03) contract as a Medicaid service provider.

9. In 2002 Defendant executed an Electronic Claims Submission Agreement (ECA) which specified the terms under which Defendant could electronically submit its claims for Medicaid payment.

*4 10. In 2006, Defendant executed an Aging & Long Term Services Division (ALTSD) **Elderly** and Disability Services Division, Contractor Provider Agreement to provide Medicaid reimbursed services through the Disabled and **Elderly** (D&E) Waiver program.

11. On July 12, 2010, Attorney General King on his relation to the State, filed a civil complaint against Defendant for: 1) recovery of overpayments shown on Complaint Ex. A (Summary for \$395,323) under [Section 30-44-8](#) relating to Defendant's failure to comply with the CCCHSA under [Section 30-44-8](#); 2) assessment of civil penalties under [Sections 30-44-8\(A\)\(1\), \(2\), \(3\) and \(4\)](#) "in addition to" the overpayments; and, 3) an alternate recovery of the same \$395,323 in overpayments as contract damages for violations of applicable state and federal laws and regulations of the Medicaid program under Defendant's Medicaid provider agreements.

12. On January 28, 2011, Judge Bacon entered an order granting Defendant's [Rule 1-012\(B\)\(6\) NMRA](#) motion dismissing the State's First Cause of Action (Recovery of Medicaid Overpayments) holding that under [Section 30-44-8](#), the State may not recover the overpayments **in addition** [emphasis in original] to recovering under the Second Cause of Action - Civil Penalties under [Sections 30-44-8\(A\)\(1\), \(2\), \(3\) and \(4\)](#). Judge Bacon's order allowed the State to prove the *5 overpayments under [Section 30-44-8\(A\)](#) for the sole purpose of calculating the [Section 30-44-8\(A\)\(1\), \(2\), \(3\) and \(4\)](#) civil penalties and contract damages.

13. On September 16, 2011, Judge Bacon entered an order granting Defendant's Second [Rule 1-012\(B\)\(6\)](#) motion, dismissing the State's First Amended Cause of Action (Proof of Medicaid Overpayments), finding that [Section 30-44-7\(A\)\(3\)](#) was the only possible applicable liability provision requiring Defendant to comply with the CCHSA prior to billing Medicaid for in home caregiver services and that submission of criminal history screening applications for Medicaid paid caregivers is a "condition of participation," not a condition of payment, and holding that under the MFA the State's *First Amended Cause of Action* did not state a claim for which relief may be granted as a matter of law.

14. Judge Bacon's September 16, 2011 order does not explicitly dismiss the State's Second Cause of Action (Civil Penalties - §§ 30-4-8(A)(1), (2), (3) and (4)). However the State assumes Judge Bacon dismissed all of its claims for civil penalties under Sections 30-44-8(A)(1), (2), (3) and (4) for failure to state a claim for which relief may be granted under Rule 1-012(B)(6) based upon her dismissal of the State's First Amended Cause of Action under Section 30-44-8.

15. Judge Bacon's September 16, 2011 order also dismissed the State's Third Cause of Action for recovery of the \$395,323 overpayments as contract damages under Defendant's Medicaid contracts arising out of, and relating to the *6 same in home caregiver services rendered by caregivers whose criminal history screening applications had not been submitted and/or cleared in compliance with CCHSA prior to billing, for failure to state a claim for which relief may be granted as a matter of law.

16. The New Mexico Constitution confers upon the New Mexico Supreme Court "superintending control over all inferior courts." N.M. Const. art. VI, § 3. This power includes "the inherent power to regulate all pleading, practice and procedure affecting the judicial branch of government." *Ammerman v. Hubbard Broadcasting*, 89 N.M. 307, 310, 551 P.2d 1354, 1357 (1976).

17. The power of superintending control granted to this Court includes the power to regulate the general activity of all New Mexico courts as well as supervisory control over actual cases. The power of superintending control is to "be exercised sparingly, and only where the remedy of appeal is wholly inadequate, or where it is necessary to prevent irreparable mischief, great, extraordinary or exceptional hardship, costly delays and unusual burdens of expense." *State ex rel. Anaya v. Scarborough*, 75 N.M. 702, 706, 410 P.2d 732, 736 (1966).

18. The New Mexico Constitution confers upon the district court "appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same." N.M. Const., art. VI, § 13.

*7 19. The scope of supervisory control is to "a) compel inferior tribunals to act within their jurisdiction; b) to prohibit them from acting outside their jurisdiction; and c) to reverse their extra-jurisdictional acts." *State ex rel. Smith Co. v. Superior Court of Dane County*, 170 Wis. 385, 386, 175 N.W. 927, 928 (1920).

20. Under Judge Bacon's orders, the State and the MFCU have no adequate remedy to maintain their federal and state mandated mission of recovering overpayments and civil monetary sanctions and penalties from Medicaid providers for statutory, regulatory, and contractual violations of the CCHSA. Judge Bacon's orders leave Medicaid providers with no incentive to comply with the CCHSA, and Medicaid consumers, including over 3,600 severely disabled care recipients who cannot speak for themselves, exposed to the **abuse**, neglect and/or financial exploitation which the CCHSA was enacted to prevent. NMSA 1978, Section 29-17-3 (1998).

21. The only available remedy at this time where as here, there is a "necessity of an early decision on [a] question of great public importance," is the filing of this petition and request for an emergency stay of Judge Bacon's two orders in the New Mexico Supreme Court. *State ex rel. Clark v. Jackson*, 120 N.M. 562, 569, 904 P.2d 11, 18 (1995); Rule 12-504.

CIRCUMSTANCES JUSTIFYING A WRIT

I. Judge Bacon's orders impact the health, safety and welfare of a significant number of New Mexico citizens.

*8 22. The state Medicaid program served 408,628 recipients and involved more than 15,000 providers with expenditures of \$2,747,377,000 for fiscal year ending June 30, 2007. Centers for Medicare & Medicaid Services, Medicaid Integrity Program, New Mexico Comprehensive Program Integrity Review, Final Report, March 2009. www.cms.gov.

23. Medicaid expenditures for fiscal year ending June 30, 2011 are approximately \$3,200,000,000 involving over 17,000 providers.

24. Medicaid payments for long term services and community based services including adult day care, residential assisted living, transportation, and in home direct care services including assistance with the activities of daily living, such as bathing, [dressing](#), and meal preparation provided by unlicensed direct access caregivers are frequent and common in New Mexico.

25. Of the over 3,600 developmentally disabled individuals whose services are reimbursed with Medicaid funds, most if not all, have some contact with direct access unlicensed caregivers subject to the CCHSA criminal history screening requirements.

II. Holding that the State has no MFA enforcement power to recover overpayments, civil penalties, and contract damages for Medicaid providers' CCHSA violations when billing Medicaid, impacts all New Mexico Medicaid recipients who receive direct access caregiver services and justifies this Court's exercise of original mandamus jurisdiction.

*9 26. The New Mexico Constitution grants original jurisdiction to this Court to issue writs of mandamus against all state officers, boards, and commissions. [N.M. Const. art. VI, § 3](#); see [State ex rel. Sego v. Kirkpatrick](#), 89 N.M. 359, 363, 524 P.2d 975, 979 (1974).

27. This Court exercises its original jurisdiction in mandamus when the petitioner presents purely legal issues concerning the non-discretionary duty of a governmental official that (1) implicates fundamental constitutional questions of great public importance (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as direct appeal. [State ex rel. Sandel v. New Mexico Pub. Util. Comm'n](#), 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55.

28. Mandamus may be issued to compel the performance of an act that the law specifically establishes as a duty resulting from an office, trust, or station. [NMSA 1978, Sections 44-2-1 et seq.](#)

29. The duty must be ministerial insofar as it is compelled by law and is not subject to the actor's discretion. [State ex rel Reynolds](#), 71 N.M. 194, 198-199, 376 P.2d 976, 979 (1962).

30. Here, the Supreme Court must exercise its authority to impose a ministerial duty upon inferior court judges to enforce the MFA civil remedies and *10 penalties for statutory, regulatory and contract violations, unless and until, this Court declares and/or renders the MFA's civil remedies and penalties *void ab initio*.

III. Judge Bacon's orders significantly undermine the Medicaid program's ability to enforce the CCHSA provisions for the benefit of Medicaid recipients whose direct access caregivers are paid with Medicaid funds.

31. In 1998, the New Mexico Legislature enacted the CCHSA to ensure to the highest degree possible the prevention of [abuse](#), neglect or financial exploitation of care recipients, including Medicaid recipients, by caregivers who provided “direct care or routine and unsupervised physical or financial access to any care recipient served by that provider.” [Sections 29-17-3 and 29-17-4](#) (1999).

32. Under [Section 29-17-4\(C\)](#), Defendant is, and was, a “care provider,” subject to [Section 29-17-5\(C\)](#), Criminal history screening requirements.

33. Defendant's twenty (20) caregivers were “caregivers” under [Section 7.1.9 NMAC \[08/15/02\]](#); Health, General Provisions, CCHS requirements.

34. Defendant is defined as a “care provider” subject to Section 7.1.9.8.F NMAC, Timely Submission.

35. As a Medicaid care provider, Defendant was required to submit all fees and pertinent application information for all individuals who met the definition of caregiver, no later than thirty (30) calendar days from the caregivers' first day of employment or effective date of a contractual relationship with the provider. Section 7.1.9.7.D NMAC [08/15/02].

***11** 36. On January 1, 2006, Defendant's duty to submit all fees and pertinent application information for all individual caregivers was amended to require timely submission no later than twenty (20) calendar days from the first day of employment or effective date of a contractual relationship with the care provider. Section 7.1.9.8.F, NMAC [01/01/06].

37. CCHSA compliance by Medicaid providers employing and/or contracting with direct access caregivers requires timely submission of fees and applications for caregivers measured from the first date of employment or effective date of contractual relationship. CCHSA does not require receipt of a criminal background clearance for the caregiver from the DOH CHSP, prior to employment and/or billing by the provider only timely submission. However under the MFA and Medicaid contracts, CCHSA compliance is mandatory, not discretionary, and the MFA civil remedies and penalties provide the enforcement consequences for CCHSA violations. Nonetheless providers such as Defendant, continue to ignore and/or violate CCHSA mandatory provisions when billing Medicaid for direct access unlicensed caregiver services.

38. Upon information and belief, Section 29-17-5(L) is the only CCHSA statutory and/or regulatory remedy for a care provider's failure to comply with criminal history screening requirements; and simply provides that failure to comply with the CCHSA is grounds for the state agency having enforcement authority with ***12** respect to the care provider to impose appropriate administrative sanctions and penalties. However [Section 30-44-8\(E\)](#) provides that the MFA civil remedies and penalties are separate from and cumulative to any other administrative and civil remedies available under federal or state law or regulations.

39. Many states like New Mexico have statutes or regulations that govern criminal background checks (CBC) for in home and/or direct care services but do not make any distinction for violations relating specifically to Medicaid funding for those services. See www.ncsl.org/documents/health/CBCnarrative.pdf.

40. Because different states have different CBC statutes and regulations and different methods of integrating CBC requirements for direct access unlicensed caregivers into state criminal and civil statutes, and into Medicaid statutes, regulations, and contracts, utilizing varied and different enforcement methodologies, the State has not found any other state cases that would provide clear guidance for interpretation of the MFA and CCHSA for Medicaid paid direct access caregivers. See Montana state survey at www.ncsl.org.

41. However upon information and belief, no other state has enacted the same MFA and CCHSA statutory wording at issue here or utilizes the same civil enforcement methodology for statutory and regulatory violations relating to Medicaid paid direct access caregivers which the State seeks to enforce here.

***13** 42. Judge Bacon's orders allow Defendant and other providers to circumvent and/or ignore the law and still receive Medicaid payments. Through the MFA and Medicaid contract remedies, CCHSA compliance is mandatory, not discretionary. Defendant and Judge Bacon have effectively permitted and condoned ongoing violations of the CCHSA and MFA.

43. Without the MFA “hammer” of potential recovery of overpayments, civil penalties, and contract damages, Medicaid care providers have no incentive to comply with CCHSA and/or submit criminal history screening applications before billing Medicaid for direct unlicensed caregiver services. Without the Supreme Court's judicial enforcement of the MFA and CCHSA under these circumstances, the legislative intent underlying both the CCHSA and the MFA is negated.

REAL PARTY IN INTEREST

44. The real party in interest is Defendant Behavioral Home Care, Inc., a New Mexico corporation, and a Medicaid provider who has executed at least three Medicaid contracts, is still currently providing in home and direct access caregivers to Medicaid recipients, and is still being paid by Medicaid for those services.

45. Because of the serious and unprecedented nature of the consequences of Judge Bacon's two orders and the fact there is no other plain, speedy and adequate remedy at law, the State is filing this Verified Petition as well as a Notice of Appeal to preserve its rights. [Rule 12-202 NMRA](#).

*14 RESPONDENT

46. The named respondent is the Honorable Judge C. Shannon Bacon, Second Judicial District, District XXIII, Bernalillo County, New Mexico. Judge Bacon's orders are being challenged here.

47. In State ex rel. King v. Advantageous Community Services, LLC, D-202-CV-200911396, a similar case involving a Medicaid provider's failure to comply with CCHSA for Medicaid paid direct access caregivers prior to billing, the Honorable Judge Valerie A. Huling, Second Judicial District, District XIII, Bernalillo County, New Mexico has orally indicated, though her orders have not been filed as of the date of this Petition, that she intends to grant Defendant's [Rule 1-056 NMRA](#) Motion for Summary Judgment against the State because Defendant is not liable for any overpayments, civil penalties and/or breach of contract damages as a matter of law under the MFA and/or Medicaid provider agreements relating to CCHSA violations.

THE STATE'S GROUNDS FOR THIS PETITION

I. The MFA's civil remedies and civil penalties and the Medicaid provider contract damage provisions, which incorporate the MFA by reference, have not been interpreted by any New Mexico appellate court.

48. The Medicaid provider program functions by allowing providers the right to file claims for treatment, services and/or goods and be paid for those treatments, services and/or goods for the benefit of qualified Medicaid recipients *15 using a limited number of data fields and procedure codes that are supposed to identify what the provider represents as having been provided in compliance with applicable federal and state Medicaid statutes and regulations.

49. The provider does not need to document, prior to, and/or when billing and being paid with federal and state health care funds, "full" compliance with all applicable federal and state Medicaid statutes, regulations, and contract provisions applicable to the delivery of the "item" for which it is paid.

50. The provider is required to retain all medical and business records for at least five years from the date payment is received relating to the treatment, services or goods for which payment on a particular claim was made by the Medicaid program. Section 30-44-5.

51. Typically the State and the MFCU must review and investigate a Medicaid provider's records some time after the Medicaid provider has filed its claims and been paid with Medicaid funds to determine whether the Medicaid provider falsified claims, failed to retain records, committed criminal Medicaid fraud, committed civil Medicaid fraud, overbilled, committed statutory and/or regulatory violations, and/or breached its Medicaid contracts, when the provider submitted its claims and was paid. [Sections 30-44-4, 30-44-5, 30-44-7, and 30-44-8](#). See April 18, 2011 *State's Response to Defendant's Motion to Dismiss*, Exhibit D, *16 April 8, 2011 Marc Workman Affidavit which describes the process used to arrive at the Medicaid overpayment amounts relating to Defendant's CCHSA violations.

52. As a result of this statutory and regulatory scheme, the State relies upon the terms of the Medicaid provider agreements and the provider claim certifications which [42 CFR § 455.18](#) & [455.19](#) require the State to obtain from Medicaid providers each time they submit an electronic and/or paper claim form. See April 18, 2011 *State's Response to Defendant's Motion to Dismiss*, at pg. 2, for certification wording which Defendant was required to comply with when submitting each of Defendant's 1,692 claims at issue for payment.

53. Because of the “look back nature” of the Medicaid payment program, the State's ability to rely upon and enforce Defendant's contractual agreements in: 1) its HSD MAD 335 PPA, *inter alia*, “[T]o assume responsibility for any and all claims submitted on behalf of the provider and under provider's number;” 2) its Electronic Claim Submission Agreement (ECA), *inter alia*, that all claims submitted electronically “...shall contain true, accurate, and complete information;” and, 3) its ALTSD contract's CCHSA compliance requirement, is critical to preventing fraud, waste and **abuse** in the Medicaid program. See MAD 335 PPA (1/23/2001) ¶ 1.11 and ECA §II.A. Admitted, 3-8-11 Answer.

54. As a condition of receiving public monies, Medicaid provider agreements require the provider to abide by all federal, state and local laws, rules, ***17** and regulations, including but not limited to, those laws, regulations, and policies applicable to providers of medical services under Title XIX (Medicaid) and Title XXI (SCHIP) of the Social Security Act and other health care programs administered by HSD. MAD 335 PPA (1/23/2001 & 9/9/03) ¶1.1.

55. The Medicaid provider agreements incorporate by reference the MFA in Article VIII - Imposition of Sanctions for Fraud or Misconduct, Paragraph 8.1 which states that if the provider obtains an excess payment or benefit willfully, by means of false statement, representation, concealment of any material fact, or other fraudulent scheme or devise with the intent to defraud, criminal sentences and fines and/or civil monetary penalties shall be imposed pursuant to, but not limited to, the MFA, [NMSA 1978, §§ 30-44-1 et seq.](#), [42 U.S.C. § 1320a-7b](#), and [42 C.F.R. § 455.23](#). See MAD 335 PPA (1/23/2001 & 9/9/03) ¶8.1.

56. Commencing on or about January 1, 2002, Defendant agreed in its Medicaid contracts to provide, and submit claims for reimbursement for Medicaid funded services to the Medicaid eligible population in accordance with all applicable Medicaid state and federal laws, and the regulations and standards of the New Mexico Medicaid Program, including without limitation the CCHSA, Sections 27-19-2 *et seq.*, NMSA 1978 as amended, § 7.1.9 NMAC CCH Screening Requirements, and § 8.351.2 *et seq.* NMAC, Sanctions and Remedies. Admitted, 3-8-11 Answer.

***18** 57. Between March 2003 and July 2009, Defendant submitted the 1,692 electronic claims at issue to the State's fiscal intermediary for payment by the federal and state funded Medicaid program.

58. Between March 2003 and July 2009, the State paid Medicaid program funds to Defendant in reliance upon Defendant's Medicaid contract for Defendant's 1,692 Medicaid claims at issue.

59. The State maintains that Defendant knowingly submitted 1,692 Medicaid claims, containing misrepresentations of material facts to the Medicaid program by submitting claims for reimbursement for Personal Care Option (PCO) caregivers' services whose criminal history screening applications had not been submitted as required under CCHSA, Sections 27-19-2 *et seq.*, NMSA 1978 as amended, § 7.1.9 NMAC, CCH Screening Requirements, and §§ 8.351.2 *et seq.* NMAC, Sanctions and Remedies.

60. The State maintains that each of Defendant's 1,692 claims are not reimbursable by the Medicaid program under [Section 30-44-4](#) because they were knowingly submitted and contained misrepresentations of material facts required to be furnished under the program regulations.

61. The State maintains that Defendant's 1,692 claims constituted: 1) falsification of documents under [Section 30-44-4\(A\)](#) because Defendant's claims contained misrepresentations of material facts and false and/or incomplete ***19** information upon which the Medicaid program relied when paying Defendant; and/or, 2) Medicaid fraud under [Section 30-44-7\(A\)](#) because

Defendant's claims were for services not provided, for services in excess of amounts authorized under the program, for incomplete services, and/or for services not in compliance with applicable Medicaid regulations.

62. The State maintains that Defendant's presenting for payment and receiving Medicaid payments for the 1,692 false, fraudulent, and excessive claims resulting in the expenditure of public money, constitutes civil Medicaid fraud as defined under [Section 30-44-7\(A\), NMSA 1978](#) and violates the MFA, [Section 30-44-1 et seq.](#); and entitles the State to recover all overpayments relating to the CCHSA violations under [Section 30-44-8\(A\) NMSA 1978](#) and/or for breach of contract.

63. The State maintains that Defendant's claims at issue constitute civil Medicaid fraud under [Section 30-44-7\(A\)](#), a violation of the MFA, [§30-44-1 et seq.](#), and entitle the State to recover civil penalties under [Sections 30-44-8\(A\)\(1\)](#) interest at the maximum legal rate on the excess payments; 2) a civil penalty of up to three times the amount of the excess payments; 3) a civil penalty of up to ten thousand dollars (\$10,000) for each of the 1,692 false or fraudulent claims submitted; and, 4) attorneys fees and costs of investigation and enforcement of the civil remedies, in addition to recovering the overpayments.

*20 64. The State maintains that all of the Medicaid payments made based upon Defendant's claims at issue constitute excess payments and contract damages under Defendant's Medicaid contracts which Defendant is strictly liable to repay in full to the State, plus interest. HSD MAD contracts at Article VIII - Imposition of Sanctions for Fraud or Misconduct which references the MFA, [§30-44-1 et seq.](#), 42 U.S.C. § 1302a-7b, and [42 C.F.R. § 455.23](#).

65. Conversely, Judge Bacon has found and held that pursuant to [Rule 1-012\(B\)\(6\)](#) under these facts and circumstances, assuming all of the State's facts supporting the State's claims are undisputed, the State is not entitled to judgment against Defendant for civil overpayments, civil penalties, and contract damages under the MFA as a matter of law.

II. Whether Defendant's CCHSA statutory and regulatory violations when submitting Medicaid claims and being paid for Medicaid services subject to CCHSA, constitute recoverable overpayments, civil Medicaid fraud and/or are subject to civil penalties under the Medicaid Fraud Act is an issue of statutory interpretation which the Supreme Court reviews de novo.

66. Judge Bacon's orders and Rule 1-12(B)(6) dismissals of the State's claims under the MFA as a matter of law require interpretation of New Mexico statutes and regulations and involve questions of law that the Supreme Court reviews de novo. [Truong v. Allstate Insurance Company, 2010-NMSC-009, ¶22, 147 N.M. 583, 227 P.3d 73.](#)

*21 67. The Supreme Court is most able to apply the recognized principles of statutory interpretation through established New Mexico principles of statutory construction to determine whether the MFA provides for recovery of civil overpayments, civil penalties and contract damages for statutory and regulatory violations of federal and state statutes and regulations. *Id.* at ¶¶25 and 29.

68. Defendant argues that providers' submission of Medicaid claims and the retention of related Medicaid payments for direct care caregiver services which do not comply with CCHSA do NOT constitute statutory and/or regulatory violations under the MFA preventing the State's recovery of overpayments, civil penalties and/or provider contract damages.

69. Various Medicaid provider civil defenses include but are not limited to:

A. The State has failed to show that the provider's CCHSA statutory violations resulted in any harm and/or death to Medicaid recipients and that therefore there has been no civil Medicaid fraud and/or damages and the State cannot recover overpayments.

B. The State cannot show that any of the direct access caregivers whose applications a provider failed to submit pursuant to CCHSA are convicted felons and therefore the provider did not violate the CCHSA and/or MFA.

C. The Medicaid payments were used to pay caregivers, and therefore no overpayment can be recovered as a MFA civil remedy.

***22** D. In order to recover MFA civil overpayments and civil penalties for civil Medicaid fraud, the State is required to prove that the Medicaid provider made “a misrepresentation of fact, known to be untrue by the maker, and made with the intent to deceive and to induce the other party to act upon it with the other party relying upon it to his injury or detriment.” *Wilde v. Westland Development Co., Inc.*, 2010-NMCA-085, ¶50, 148 N.M. 627, 241 P.3d 628, citing to *Unser v. Unser*, 86 N.M. 648, 653-54, 526 P.2d 790, 795-796 (1974).

E. To recover overpayments and civil penalties under [Section 30-44-8](#), the State must prove the provider's civil Medicaid fraud beyond a reasonable doubt.

F. If the State can't prove the provider didn't provide the services even if the provider violated CCHSA, the State cannot recover under the MFA for the statutory and/or regulatory violations.

G. CCHSA statutory and regulatory compliance is a condition of participation, not a condition of Medicaid billing or payment.

H. The CCHSP lost the caregivers' applications and therefore under the MFA, the State cannot recover civil overpayments, civil penalties and/or contract damages relating to CCHSA under the MFA.

***23** I. The State can only pursue administrative penalties against providers for CCHSA violations, not overpayments, civil penalties and/or contract damages under the MFA, despite [Section 30-44-8\(E\)](#).

J. Despite the State's listing of each and every claim it alleges Defendant made and was paid for in violation of the CCHSA in its complaint, the State has still failed to plead fraud with particularity under [Rule 1-009\(B\) NMRA](#).

K. The Medicaid program is too complicated and there are so many regulations, therefore a provider should not be required to comply with all statutes and regulations prior to submitting its claims for payment and should not be subject to MFA civil remedies and penalties for CCHSA violations.

L. Because the State has not alleged any facts that would support recoverable damages for breach of contract under UJI-843 NMRA relating to Defendant's CCHSA violations when submitting Medicaid claims, the State cannot recover any overpayments as contract damages from Defendant under the Medicaid contracts as a matter of law.

M. Despite the ALTSD contract's Section G, Policies and Regulations requiring the provider to comply with CCHSA, violation of this contract provision does not allow for any civil remedy under the MFA.

70. On December 20, 2010, Judge Bacon stated that she had not been presented with any law to tell her that the State is entitled to recoup both the ***24** overpayment, plus the potential (civil penalties) trebling of the overpayment under the MFA, [Section 30-44-8\(A\)](#). See December 20, 2010 hearing transcript Tr-34, lines 4-12; Tr-37, lines 5-12.

71. On August 15, 2011, in addition to ruling that the State's Complaint did not state a cause of action upon which relief may be granted as a matter of law, Judge Bacon stated that this case made her brain hurt and that the breach of contract claim --- make her head hurt as much, but that she thinks New Mexico needs case law on this [MFA]. See August 15, 2011 Transcript of Proceedings, Tr-46, line 9; Tr-51, lines 5-7; Tr-50, lines 14-24.

72. On August 15, 2011 in *State ex rel. v. Advantageous Community Services, LLC*, D-202-2009-11396, another case involving provider CCHSA violations prior to billing for direct caregiver serves for developmentally disabled (DD) Medicaid recipients, Judge Huling essentially agreed with Judge Bacon that overpayments, civil penalties, and contract damages are not recoverable by the State under the MFA for CCHSA statutory and regulatory violations. See August 15, 2011 Hearing Transcript attached.

73. Defendant relied upon *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008), a federal False Claims Act case involving Medicare hospital cost report certifications for the proposition that Defendant's statutory and regulatory CCHSA violations prior to billing are *25 conditions of participation in Medicaid, not conditions of payment. See also *United State ex rel. Blundell v. Dialysis Clinic, Inc.*, No. 5:09-CV-00710 NMA?DEP, 2011 WL 167246, at *3 (N.D.N.Y. Jan. 19, 2011).

74. However on July 22, 2011 in *New York v. Amgen, Inc.*, 652 F.3d 103 (1st Cir. 2011), a Federal False Claims Act action in which New Mexico is a plaintiff, the court heard an appeal of a Rule 12(b)(6) dismissal of New Mexico's False Claims Act (FCA) causes of action against Amgen relating to payments made by the New Mexico Medicaid program. The court reviewed HSD MAD's 335 PPA, Article VIII "Imposition of Sanctions for Fraud or Misconduct" which incorporates by reference the MFA and reversed the district court, holding that Plaintiffs had more than adequately alleged that providers submitted claims that misrepresented compliance with a precondition of Medicaid payment in New Mexico under New Mexico's Medicaid False Claims Act. *NMSA 1978, Sections 27-14-1 et seq.* (2004).

75. On February 2, 2011, federal regulations were enacted that prohibit payment of federal financial participation (FFP) monies to the New Mexico Medicaid program with respect to items or services furnished by an individual or entity with respect to which there is pending an investigation of a credible allegation of fraud except under specified circumstances. 42 C.F.R. §§ 447.90. [76 FR 5965, Feb. 2, 2011]. Therefore any limitation on the State's ability to enforce the MFA's civil remedies, civil penalties, and/or contract remedies such as Judge Bacon's *26 orders, may impact New Mexico's receipt of federal financial participation Medicaid funds.

REQUEST FOR EMERGENCY STAY

76. Due to the public importance of these issues and the State's need to continue enforcement activities under the MFA to recover Medicaid program overpayments, civil penalties, and Medicaid provider contract damages, the State respectfully requests the Court grant an emergency stay of Judge Bacon's January 28, 2011 and September 16, 2011 orders effective immediately until entry of this Court's determination on this Petition and related orders.

RELIEF SOUGHT

77. The State of New Mexico seeks the following remedies and relief:

A. The granting of an emergency stay, effective immediately to maintain the status quo and to avoid further **abuse**, neglect and/or financial exploitation of Medicaid direct care recipients, and,

B. The granting of this petition and issuance of an order to all inferior courts requiring enforcement of the State's authority under the MFA to recover overpayments, civil penalties, and contract damages for the purposes of allowing the MFA to remain in full force and effect, until entry of the Supreme Court's decision interpreting the MFA and the application of the State available civil remedies under *27 the MFA for Medicaid provider statutory and regulatory violations of the Caregivers Criminal History Screening Act; or,

C. The granting of this petition and issuance of an order to all inferior courts staying all pending unresolved civil case decisions and/or prohibiting entry of any civil case decisions in derogation of the State's authority under the MFA to recover overpayments, civil penalties, and contract damages, until entry of the Supreme Court's decision interpreting the MFA and the application of the State available civil remedies under the MFA for Medicaid provider statutory and regulatory violations of the CCHSA; and,

D. Any other and all additional relief this Court deems just and proper under the circumstances.

CONCLUSION

WHEREFORE Petitioner respectfully requests the Court grant this petition and issue an emergency stay.

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