

Bill as Introduced

HB 577-FN - AS INTRODUCED

2009 SESSION

09-0999
05/03

HOUSE

577-FN

AN ACT relative to recovery of public assistance and third party liability.

SPONSORS: Rep. DiFruscia, Rock 4

COMMITTEE: Health, Human Services and Elderly Affairs

ANALYSIS

This bill establishes criteria for the apportionment and recovery of medical assistance from Medicaid recipients who receive damages or other financial settlements from third party liability claims.

This bill is a request of the department of health and human services.

.....

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nine

AN ACT relative to recovery of public assistance and third party liability.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Recovery of Assistance. Amend RSA 167:14-a to read as follows:

2 167:14-a Recovery of Assistance.

3 I. Any person who is a recipient of financial assistance, medical assistance, old age
4 assistance, aid to the needy blind, Medicaid for employed adults with disabilities, or aid to the
5 permanently and totally disabled shall, by ~~his~~ acceptance of such assistance, be deemed to have
6 assigned any claim or right of action against any person or party to the commissioner of health and
7 human services, to the extent that such assistance is furnished. ***Upon assignment, the recipient***
8 ***has a duty to cooperate with the commissioner of health and human services to enable the***
9 ***commissioner to obtain payment. Cooperation includes, but is not limited to, identifying***
10 ***and providing information to assist in pursuing third parties who may be liable to pay for***
11 ***care and services in accordance with 42 C.F.R. section 433.145. Any information provided***
12 ***to the commissioner by the recipient shall be subject to a Medicaid assignment privilege,***
13 ***such that the material shall remain subject to the attorney-client privilege and work***
14 ***product privilege, notwithstanding the fact that it has been shared with the commissioner.***
15 ***The Medicaid assignment privilege shall not prevent the commissioner from using the***
16 ***information in a petition for equitable apportionment, with an accompanying motion to***
17 ***seal if applicable and desired by the recipient.***

18 II. Whenever a recipient of financial assistance, medical assistance, old age assistance, aid
19 to the needy blind, Medicaid for employed adults with disabilities, or aid to the permanently and
20 totally disabled shall have a legally cognizable claim against any person or party for expenses or
21 support and the department of health and human services has already furnished assistance to such
22 recipient, the amount of assistance furnished may be recovered in an action brought in the name of
23 the state from such person or party against whom the recipient has a legally cognizable claim for
24 expenses or support. ***The commissioner of health and human services may intervene in any***
25 ***pending suit brought by the recipient against any person or party against whom the***
26 ***recipient has a legally cognizable claim for expenses or support. Whether the***
27 ***commissioner of health and human services decides to file suit independently, to intervene,***
28 ***or to file a petition of equitable apportionment shall be solely within the commissioner's***
29 ***discretion.***

30 II-a. The commissioner ***of health and human services*** may recover the amount of medical
31 assistance furnished to a dependent child from the child's responsible parents to the extent

1 authorized under *Tile XIX and* Title XXI of the Social Security Act. In such cases, the amount of
2 assistance furnished and subject to reimbursement shall include, but not be limited to, expenditures
3 for medical care and health insurance premiums and other expenditures paid by the state for
4 enrollment or other fees for participation in the program. *Any third-party payment for future*
5 *medical expenses for the care of a dependent child through age 21 shall be paid to the*
6 *responsible parents, subject to the commissioner's lien.*

7 *II-b.(a) Any action brought by the commissioner of health and human services*
8 *under this section shall be commenced within 7 years of the date the cause of action arises.*

9 *(b) Notwithstanding subparagraph (a), if a recipient has commenced an action*
10 *to recover damages for an injury for which benefits are provided and has not provided*
11 *notice of the action to the commissioner, or if medical services were provided to a minor,*
12 *the commissioner may commence an action under this section within the later of 7 years of*
13 *the date the cause of action arises or 2 years from the date the commissioner discovers the*
14 *settlement or judgment, or 2 years from the date the minor obtains the age of 21, whichever*
15 *is later.*

16 *(c) If the underlying claim could have been commenced outside the state,*
17 *jurisdiction shall also lie in Merrimack county superior court.*

18 III. The state medical assistance program is the payor of last resort and shall provide
19 medical coverage only when there are no other available resources. Whenever a recipient of medical
20 assistance shall receive a settlement or an award from a liable third person or party, such recipient
21 shall repay the amount of medical assistance furnished by the state to the extent that the amount of
22 the recovery makes repayment possible. If a recipient of medical assistance receives a settlement or
23 an award from a third party, the settlement or award is subject to disbursement as provided in
24 paragraphs III-a and IV.

25 III-a. The commissioner of health and human services may recover the full amount of
26 medical assistance furnished by the state if there are proceeds available for such recovery after the
27 deduction of reasonable ~~[attorneys']~~ *attorney's fees[;]* *and* litigation costs~~[, claims by other creditors,~~
28 ~~and 10 percent of the remaining net settlement amount for the recipient of medical assistance. Any~~
29 ~~balance remaining after the state has recovered the full amount due shall be available to the~~
30 ~~recipient of medical assistance].~~ *The Medicaid lien shall be discharged from settlement funds*
31 *reasonably attributed to payment of medical expenses based on the commercial value of the*
32 *services provided.* No ~~[attorneys']~~ *attorney's fees* shall be deducted from the amount due the state
33 from such award or settlement. The commissioner may waive or reduce the amount due the state for
34 good cause upon written request from a recipient or recipient's attorney. The acceptance of any
35 waiver or the payment of any reduced amount due shall create a rebuttable presumption that the
36 apportionment was equitable in any action brought pursuant to paragraph IV. *If there are other*
37 *medical service creditors stemming from the same incident or accident, the commissioner*

1 *shall not receive less than a pro rata share of the amount due based on the commercial*
2 *value of the services provided.*

3 *III-b. Prior to settlement or trial, a liable third party shall verify with the plaintiff*
4 *that arrangements have been made for payment of any Medicaid liens. If the third party*
5 *fails to make such verification, the commissioner may continue to hold the third party*
6 *liable for payment of the lien. Jurisdiction for such proceeding shall lie in Merrimack*
7 *county superior court.*

8 *IV.(a) A disbursement of any award, judgment, or settlement shall not be made to a*
9 *recipient without the recipient or the recipient's attorney first providing at least [30] 60-days but no*
10 *more than 120-days written notice of any scheduled trial, alternative dispute resolution hearing, or*
11 *settlement to the commissioner of health and human services that the recipient has a claim which*
12 *could result in a recovery from a third party or obtaining from the commissioner a written release of*
13 *any obligation owed to the state for medical assistance provided to the recipient. The written*
14 *notice shall identify the date, time, location, case caption, and the name of the judge or*
15 *other decision maker or facilitator, sufficient to provide the commissioner with a*
16 *meaningful opportunity to participate. The commissioner shall notify the recipient or the*
17 *recipient's attorney of the amount of the commissioner's claim within 21 days of the commissioner's*
18 *receipt of the notice. If a dispute arises between the recipient and the commissioner of health and*
19 *human services as to the settlement of any claim that arises under this section, the third party or*
20 *the recipient's attorney shall withhold from disbursement to the recipient or to any legal instrument*
21 *created for the benefit of the recipient, an amount equal to the commissioner's claim. Either party*
22 *may apply to the superior court or the district court in which an action based upon the recipient's*
23 *claim could have been commenced for an order to determine an equitable apportionment between the*
24 *commissioner and the recipient of the amount withheld. An order of apportionment has the effect of*
25 *a judgment. The obligation of a third party under this paragraph to withhold all or part of a*
26 *disbursement is conditional upon the receipt by the third party of written notice from the*
27 *commissioner, the recipient, or the recipient's attorney that the commissioner is asserting a claim.*

28 *(b) When settlement funds are apportioned between the recipient and the*
29 *commissioner, Medicaid shall be treated as a collateral source. The portion of the gross*
30 *settlement reasonably attributed to medical expenses shall include that portion of the*
31 *settlement reasonably attributed to past medical costs and anticipated future medical*
32 *expenses. There shall be a rebuttable presumption that the portion of the gross settlement*
33 *reasonably attributed to payment of the Medicaid lien is 1/3 of the gross settlement. In no*
34 *event shall the commissioner's claim exceed 1/2 of the recipient's recovery, after deducting*
35 *attorney's fees, litigation costs, and medical expenses paid by the recipient. If the portion*
36 *of the gross settlement reasonably attributed to medical expenses exceeds the*

1 *commissioner's lien, the balance shall be available to other medical service lien holders*
2 *and the recipient.*

3 *(c) Third party payment of past medical expenses, from the third party or from*
4 *gross settlement funds, shall discharge the lien from the date of the incident or accident*
5 *through the settlement of the underlying civil action.*

6 *(d) If a recipient pursues a civil action against a third party and chooses not to*
7 *include as damages services the Medicaid program has provided, the recipient, or the*
8 *recipient's attorney, shall explicitly and prominently notify the commissioner that the*
9 *recipient has elected not to seek compensation for services the Medicaid program has*
10 *provided.*

11 *V. After notice and a hearing, the commissioner may impose an administrative*
12 *penalty of up to \$5,000 per violation upon any person who willfully fails to comply with the*
13 *obligations of this section.*

14 ~~[V.]~~ VI. All property, real or personal, in a revocable trust is subject to recovery by the
15 department for recovery for any medical assistance provided the decedent. Upon the death of the
16 grantor, the department shall provide the trustee with a statement containing the amount of medical
17 assistance which was provided to the decedent.

18 ~~[VI.]~~ VII.(a) For purposes of recovering the costs of medical assistance, the estate of a
19 recipient shall include all property, real or personal, which at the time of a recipient's death was held
20 by the recipient in joint tenancy with rights of survivorship, tenancy in common, or life estate for all
21 such title or interest established on or after July 1, 2005. Recovery shall be limited to the value of
22 the recipient's ownership interest and in no case shall such amount exceed the total amount of
23 medical assistance provided to the deceased recipient, nor shall recovery extend to any interest in
24 property, real or personal, for which a non-recipient owner paid fair market value at the time said
25 ownership interest was acquired.

26 (b) No sooner than 45 days from the death of the recipient, the department shall provide
27 the other joint owner or owners notice of the department's claim. Written notice shall include a
28 description of all categories of individuals exempt from recovery by reason of familial status as
29 allowed under 42 U.S.C. section 1396p(b)(2) and RSA 167:16-a, IV, as well as the availability and
30 method of requesting a hardship waiver. Within 30 days of the receipt of notification of the
31 department's claim, the joint owner or owners shall acknowledge receipt of the department's claim
32 and, provided that there shall not be undue hardship imposed upon the surviving joint owner or
33 owners, either tender an amount equal to the deceased recipient's interest in the identified property
34 and/or financial instrument to the state of New Hampshire toward the deceased's medical assistance
35 bill, but such amount shall not exceed the total amount of medical assistance provided to the
36 deceased recipient, or enter into a binding agreement to make such payment as soon as is
37 practicable. If the joint owner or owners refuse to acknowledge receipt of the department's claim or

1 to tender payment or fail to fulfill the agreement to pay without good cause, as required by this
2 paragraph, the commissioner may bring an action in superior court or probate court, as the case may
3 be, to compel such payment. Nothing in this paragraph shall be interpreted or applied so as to
4 violate RSA 167:16-a or 42 U.S.C. section 1396p(b)(2)(A) and (B) prohibiting recovery when the
5 recipient is survived by a spouse, minor children, or disabled children or when the recipient is
6 survived by either siblings or children under certain circumstances.

7 2 Reference Change; Confidentiality of Department of Revenue Administration Records. Amend
8 RSA 21-J:14, V(d)(8) to read as follows:

9 (8) An officer or employee of the department of health and human services in the
10 performance of duties under RSA 167:14-a, [V] VI, which disclosure shall be limited to the report of
11 the trust and a copy of the trust document, including any list of beneficiaries, filed in accordance
12 with RSA 87:20.

13 3 Effective Date. This act shall take effect January 1, 2010.

LBAO
09-0999
01/21/09

HB 577-FN - FISCAL NOTE

AN ACT relative to recovery of public assistance and third party liability.

FISCAL IMPACT:

The Department of Health and Human Services states this bill would increase state general fund revenue by \$520,050 in FY 2010 and each year thereafter. This bill would have no fiscal impact on state, county, and local expenditures, or county and local revenue.

METHODOLOGY:

The Department of Health and Human Services (DHHS) states this bill would modify the Recovery of Assistance statute, which among other things would set a rebuttable presumption that it is reasonable to allocate one-third of the recipient's recovery from liable third persons to the re-payment of Medicaid expenditures on behalf of that recipient for injuries due to the tortuous acts of another. The bill would also statutorily clarify that DHHS is entitled to base its recovery on the reasonable cost of the services provided to the recipient, though DHHS would never recover more than its lien. The Department states medical lien amounts in FY 2008 totaled \$1,548,804, of which \$508,703 was recovered. As a result, the presumed additional funds recovered by this bill is estimated at \$1,040,101. Recoveries are split 50/50 with the federal government, which would result in an increase in state general fund revenue of approximately \$520,050.

HB 577-FN – AS AMENDED BY THE HOUSE

06Jan2010... 2009-2376h

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05/03

HOUSE

577-FN

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SPONSORS: Rep. DiFruscia, Rock 4

COMMITTEE: Health, Human Services and Elderly Affairs

AMENDED ANALYSIS

This bill permits the department of health and human services to recover medical assistance costs from the portion of settlements or judgments reasonably attributed to medical expenses. The bill also clarifies the court's discretion to apportion the amount withheld from such awards.

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1 Recovery of Assistance. Amend RSA 167:14-a, III-a and IV to read as follows:

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9 ***medical expenses.*** The commissioner may waive or reduce the amount due the state for good cause
10 upon written request from a recipient or recipient's attorney. The acceptance of any waiver or the
11 payment of any reduced amount due shall create a rebuttable presumption that the apportionment
12 was equitable in any action brought pursuant to paragraph IV.

13 IV. A disbursement of any award, judgment, or settlement shall not be made to a recipient
14 without the recipient or the recipient's attorney first providing at least 30-days written notice of any
15 scheduled trial, alternative dispute resolution hearing, or settlement to the commissioner of health
16 and human services that the recipient has a claim which could result in a recovery from a third party
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23 an amount equal to the commissioner's claim. Either party may apply to the superior court or the
24 district court in which an action based upon the recipient's claim could have been commenced for an
25 order to determine an equitable apportionment between the commissioner and the recipient of the
26 amount withheld. ***The court shall have broad discretion to apportion the amount withheld***
27 ***as justice may require.*** An order of apportionment has the effect of a judgment. The obligation of
28 a third party under this paragraph to withhold all or part of a disbursement is conditional upon the
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HB 577-FN - AS AMENDED BY THE HOUSE

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CHAPTER 15
HB 577-FN - FINAL VERSION

06Jan2010... 2009-2376h

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CHAPTER 15
HB 577-FN – FINAL VERSION
- Page 2 -

1 attorney that the commissioner is asserting a claim.

2 15:2 Effective Date. This act shall take effect upon its passage.

3

4 Approved: May 7, 2010

5 Effective Date: May 7, 2010

Committee Minutes

AMENDED
SENATE CALENDAR NOTICE
HEALTH AND HUMAN SERVICES

Printed: 03/11/2010 at 12:28 pm

✓ Senator Kathleen Sgambati Chairman
✓ Senator Peggy Gilmour V Chairman 9:09 AM
Senator Molly Kelly
- Senator John Gallus OUT 9:15 AM in 9:22 A
✓ Senator Michael Downing

For Use by Senate Clerk's Office ONLY	
<input type="checkbox"/>	Bill Status
<input type="checkbox"/>	Docket
<input type="checkbox"/>	Calendar
Proof: <input type="checkbox"/>	Calendar <input type="checkbox"/>
	Bill Status

Date: March 11, 2010

HEARINGS

Tuesday

3/16/2010

HEALTH AND HUMAN SERVICES

SH 103

8:30 AM

(Name of Committee)

(Place)

(Time)

EXECUTIVE SESSION MAY FOLLOW

Comments: PLEASE NOTE: ADDITION OF SB 518 AT 9:35 A.M.

8:30 AM	HB1214	relative to the grounds for suspending or revoking a foster home license.
8:45 AM	HB1193	relative to the definition of allowable child care expenses for purposes of determining child support and establishing a legislative oversight committee relative to implementation of the 2009 New Hampshire Support Guidelines Review and Recommendations.
9:00 AM	HB577-FN	relative to recovery of public assistance and third party liability.
9:20 AM	SB510	establishing a commission to evaluate the parity between oral and intravenous chemotherapy.
9:35 AM	SB518	establishing a committee to study the scope, content, and duration of youth alcohol and drug prevention programs.

Sponsors:

HB1214

Rep. Mary Gile
Rep. Franklin Gould

Rep. Carolyn Gargasz

Rep. Susan Ford

Rep. Beth Arsenault

HB1193

Rep. Mary Gile

HB577-FN

Rep. Anthony DiFruscia

SB510

Sen. Matthew Houde
Rep. Jill Hammond

Sen. Amanda Merrill
Rep. Susi Nord

Sen. Kathleen Sgambati

Rep. Charlotte Houde-Quimby

SB518

Sen. Deborah Reynolds

Rep. Carolyn Gargasz

Deborah Chroniak 271-3096

Sen. Kathleen Sgambati

Chairman

Health and Human Services Committee

Hearing Report

TO: Members of the Senate

FROM: Heidi Mitchell, *Legislative Aide*

RE: Hearing report on **HB 577** – *AN ACT* relative to recovery of public assistance and third party liability.

HEARING DATE: March 16, 2010

MEMBERS OF THE COMMITTEE PRESENT: Senators Sgambati, Downing, Gallus, Gilmour and Kelly.

MEMBERS OF THE COMMITTEE ABSENT: No one.

Sponsor: Rep. DiFruscia, Rock 4.

What the bill does: This bill permits the department of health and human services to recover medical assistance costs from the portion of settlements or judgments reasonably attributed to medical expenses. The bill also clarifies the court's discretion to apportion the amount withheld from such awards.

Who supports the bill: Rep. DiFruscia; Ellen Shemitz, NH Association for Justice; Jennifer Jones, DHHS.

Who opposes the bill: No One.

Summary of testimony received: Rep. DiFruscia introduced the bill.

Rep. DiFruscia

- In support of the bill, Rep. DiFruscia stated that he found a few inequities in the current Recovery of Assistance statute regarding the court's discretion to apportion the amount of money withheld from settlements regarding medical expenses owed to DHHS.
- He stated that it is reasonable for medical expenses to be recouped by DHHS for services provided - the new language gives the court wide discretion in order to balance equities so that the injured party (patient who received services, in this example) is able to recoup some of the costs. In Rep. DiFruscia's opinion, adding "as justice may require" (lines 26-27) balances equity.
- Regarding the Fiscal Note, Rep. DiFruscia stated that DHHS would receive more money with this change, at an increase of over \$500,000.

- Rep. DiFruscia spoke to the great extent that the bill has been worked on in the NH House of Representatives.
- The House passed the bill Ought to Pass with Amendment without debate.
- The bill leaves the final decision to the courts, while clarifying 3rd party recoveries.

Jennifer Jones, General Council, DHHS Division of Family Assistance

- Ms. Jones testified in favor of the bill, citing a 2005 supreme court case where DHHS can only recover on the portion attributable to medical expenses.
- Ms. Jones proposed an amendment, stating that the current bill is too widdled down, though she thought the language was good.
- Ms. Jones believes that what Rep. DiFruscia refers to in the "what justice may require" clause only applies to a small amount of cases.
- Most settlements are done directly with the plaintiff and attorney.
- The amendment proposed by Ms. Jones restores the 1/3 presumption in the original statute – this means that 1/3 of the portion of any settlement is attributable to medical expenses.
- Ms. Jones brought forth this amendment in the House as well, the House chose not to include it.
- She stated that NC, PA, OH, and MN have similar presumptions regarding recovery.
- She also stated that the current FN is based on the 1/3 presumption, not the amended language that passed through the House. DHHS believes that the money they will received will be less without the 1/3 presumption.
- In regards to questions from the committee, Ms. Jones responded that DHHS would still recover more money with the version that passed the House, but that it would be lower than the FN predicts. She also stated that in a settlement, it isn't always easy to see what is attributable to medical care – there are lost wages due to injury, pain and suffering, and in many cases more money received for medical bills than was actually spent. (i.e. when a person settles with the responsible party they rely on the community value, so if the community value of the care received was \$50,000, but Medicare only paid \$20,000, the person would still received the extra \$30,000 after the \$20,000 was recouped by DHHS.)

Ellen Shemits, NH Association for Justice

- In favor of the bill, Ms. Shemits had not planned on speaking, but wanted to speak to why the DHHS amendment has been rejected by the House.
 - Certain parameters were set forth, are clear, and can be applied by the court.
 - With the 1/3 presumption, there is not standard of proof, an it's unclear who bear the burden of proof.
 - This will increase the number of cases that need intervention.
- Ms. Shemits brought forth several letters by attorneys who all raise concern regarding when the department can recoup windfall money and leave the defendant penniless.
- In response to questions from the committee, Ms. Shemits stated that the House considered the DHHS language and rejected it, because of rebuttable

presumption. She also stated that the committee worked extremely hard on what is equitable.

Funding: See Fiscal Note.

Action: Senator Downing moved Ought to Pass, Senator Sgambati seconded the motion. The committee voted 3-0, in favor of the motion. Sen. Gallus will report the bill out of committee.

hmm

(file: HB577-FN_report]

Date: March 19, 2006

Date: March 16, 2010
Time: 9:05 A.M.
Room: SH RM 103

The Senate Committee on Health and Human Services held a hearing on the following:

HB 577-FN relative to recovery of public assistance and third party liability.

Members of Committee present: Senator Sgambati
Senator Gilmour
Senator Kelly
Senator Gallus
Senator Downing

The Chair, Senator Kathleen G. Sgambati, opened the hearing on HB 577-FN and invited the prime sponsor, Representative Anthony DiFruscia, to introduce the legislation.

Representative Anthony DiFruscia: Good morning.

Senator Kathleen G. Sgambati, D. 4: Good morning.

Representative DeFruscia: Good morning, Senators. I thought I was going to be late today, but I guess I made it.

Senator Kathleen G. Sgambati, D. 4: You're right on time.

Representative DeFruscia: This bill is kind of an interesting bill. It came to my attention by the Department of Human Services, and when they initially filed the bill, and after reading it over and over again, I found a few inequities, which we worked very hard with the House Committee; in fact, we had about four working sessions. I pulled the docket on HB 577, and myself and Representative Gary Richardson combined our efforts with the Committee, which resulted in this amended bill.

Senator Kathleen G. Sgambati, D. 4: Okay.

Representative DeFruscia: And, what it does do is it's an equitable bill in which, when you have a third party settlement, and let's explain that. Hypothetically, if you get in a, let's say an auto accident. And, the person got hurt; didn't have any insurance, or did have limited insurance, and went on welfare, so to speak, the Department had an automatic statutory lien on the proceeds. So, let's assume for example, that there were \$20,000 in medical bills, takes place.

So, what this amended bill does do is that it segregates. In the first part of the bill itself, you'll see strikeouts and it says, from the portion of any settlement or judgment reasonably attributable to medical expenses. So, if the medical expenses, while that person is disabled as a result of someone else causing the injury, the Department certainly should be entitled to reimbursement at least for medical expenses.

The initial bill would leave the whole amount open to dispute, so to speak. So, what we did do in the Roman Numeral IV, added the words, "The court shall have broad discretion to a portion of the amount withheld as justice may require". That language is mirrored, specifically from third party settlements in workmen's compensation cases. And, what that does do is it gives the court wide discretion. So, if the jurisdiction of the court in a particular case falls within the Superior Court, or the District Court, the Court now can balance the equities, and basically say, well the Department should get whatever they're entitled to, or make accommodations so that the injured party is able to have some recovery. So, the words "as justice may require" have been longstanding in our statutes; it's been consistent, and the Superior Court has handled that problem, at least in workmen's compensation cases.

I might point out that we've done a similar thing in other legislation in the House this year, adding that language, the specific language dealing with "as justice may require". So, all it does is it balances now the equity. And, I noticed from the fiscal note that it appears as if we'll get more money because you're going to get more recovery. It noted that the Department states medical liens amounted in 2008 to a \$1.5 million; \$500,000 was recovered. As a result, the presumed additional funding, that may jump up to \$1.40 million, as estimated by the fiscal note. So, it also brings in the federal government with 50/50 splits that comes into play.

So, I'm suggesting to the Committee, most respectfully, that the bill has been worked on, in fact, I counted over fifteen, at least 5 subcommittees, work sessions in the House, with an Executive Session, and then on to the House. The House had passed it as amended without debate.

So, it's a pretty...it's kind of an interesting area, so to speak, but it certainly mirrors through, not only third party liability in any kind of a case situation. The House, as a matter of fact, last week passed a bill dealing with third party recoveries and the language again came through saying that the courts would ultimately make the final decision.

And, I'd be happy to take any questions you have.

Senator Kathleen G. Sgambati, D. 4: Thank you. Any questions for Representative? If not, thank you very much for coming.

Representative DiFruscia: Thank you. Now I can move my car because it's about to get towed.

Senator Kathleen G. Sgambati, D. 4: Oop, go do that.

Jennifer Jones?

Attorney Jennifer Jones: Good morning. My name is Jennifer Jones and I am General Counsel to the Department of Health and Human Services, Division of Family Assistance. In my short tenure with the Department, I've also been involved directly in what is called the Third Party Liability Unit. Third Party Liability collects, as Representative DiFruscia had mentioned, collects from any settlement or recovery made by a person who was injured due to the fault of a third person, when that person has received Medicaid to pay for their health care.

Our old statute that this seeks to modify was, in essence, struck down by a Supreme Court case in 2005. And, that Supreme Court case stated that any Department of Health and Human Services that has a lien is only able to recover from the portion of a settlement or recovery that is attributable to medical expenses. And, that language is exactly mirrored in this statute. So, this brings us into compliance with the Supreme Court ruling from 2005.

I have a proposed amendment however, today. The bill, as initially submitted to the House, needs some more sweeping, though primarily technical changes to the statute. Through hard work, this was whittled down, so to speak, to a much simpler bill that struck the now unconstitutional part of the statute, and expanded it to include the "as justice may require". And, I think that's good language, quite frankly, that when the recipient and the Department are not able to reach an agreement as to what the Department should be repaid, that the courts would have that discretion to do that, "as justice may require". That, however, is the vast minority of cases. I believe there are only two cases right now where the courts are

JAC

involved in apportioning the Department's recovery. Most of them are done directly between the Department and the plaintiff, or the plaintiff's attorney if he or she has one.

The language that I am suggesting today, and I've got copies here, restores to the statute a portion that had been stricken before, that set forth a one-third presumption in the statute, presuming that approximately one-third of the recovery would be attributable to medical expenses. That is a rebuttable presumption; there was great discussion in the House about this presumption, whether or not it was appropriate, and ultimately, the House voted to not include that. However, the Department still considers this to be a significant portion of the statute, as it was initially submitted.

And, I would represent to the Committee that the Department took its language from several other states that have similar statutes. For instance, North Carolina, Pennsylvania, Ohio, and Minnesota all had similar presumptions regarding recovery. In addition to that, there was a federal court case involving product litigation that set forth the one-third presumption as well, and we think that's important.

The other thing that that relates to, as Attorney DiFruscia was saying, is the fiscal note. We were not asked for a revised fiscal note once the one-third presumption was stricken, and that fiscal note that you have is based on the one-third presumption. I do believe that our recoveries would go down if the one-third presumption were not in place.

Senator Kathleen G. Sgambati, D. 4: Okay, thank you. Questions?
Senator Downing?

Senator Michael W. Downing, D. 22: I thank you, Madam Chair. Your recovery would go down below what it is now?

Attorney Jones: I believe so. Not what it is, well...No, I believe it would increase from our recoveries now, to the levels that are reflected in the fiscal note.

Senator Michael W. Downing, D. 22: Thank you.

Senator Kathleen G. Sgambati, D. 4: I want to follow up on that because I'm confused. So, the \$520,000 is related to the one-third and not the reasonable attributed?

Attorney Jones: Correct.

JAC

Senator Kathleen G. Sgambati, D. 4: And, so, you believe that the amount reasonably attributed would be less than the \$520,000.

Attorney Jones: Potentially so, yes.

Senator Kathleen G. Sgambati, D. 4: And, I guess, further question on, are you not able to see in a settlement for the most part, what is related to medical expenses?

Attorney Jones: Not necessarily. Usually a settlement or a jury verdict is simply a number. That number may include past wages, future wages, medical, future medical, pain and suffering, all sorts of non-pecuniary damages. So, it is not always easy to determine what is attributable to the medical expenses.

I would point out, just so that the Committee is aware, due to the reduced Medicaid reimbursement rates, oftentimes a recipient will receive what we call commercial value of the medical, which is far more than the lien that we would ultimately recover. To give you an example, somebody's hurt in an accident; they are a Medicaid recipient. Their medical bills, if they were to have no insurance, the medical bills as they come from the hospital and the providers, maybe totals \$50,000. What Medicaid has paid out is significantly less than that; let's say \$20,000. When that person goes to settle with the insurance company or the responsible party, they don't rely on the \$20,000 that is the lien amount, they rely on the commercial value of those payments; so, the \$50,000. They're taking the benefit, rightfully so, because it's a good way to gauge the level of injury, but their settlement is based on a number that it sometimes far exceeds what our lien is, and that's one of the reasons, an additional reason why we think the one-third presumption is appropriate.

Senator Kathleen G. Sgambati, D. 4: Thank you very much. Other questions? Okay.

Attorney Jones: Thank you.

Please see Attachment #1 – Proposed amendment on HB 577-FN – as amended by the House, January 6, 2010, 2009-2376h, 2009 Session.

Please see Attachment #2 – Miscellaneous State Laws in regards to Third Party Liability.

Senator Kathleen G. Sgambati, D. 4: If not, I'll call on Ellen Shemitz, New Hampshire Association of Justice.

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Attorney Ellen Shemitz: Thank you, Madam Chair and other Senators. I want to begin with an apology. I hadn't come in to testify, and I am badge less. So, I'm hoping that's okay if I sort of announced it, and hold my orange briefcase up high. But, my name is Ellen Shemitz and I'm the Executive Director of the Association for Justice.

Our organization, and particularly Jared Green, one of the attorneys who's a member of our organization and a partner at a law firm in Manchester, worked closely with both the Department and with the House Committee on this bill. And, the very amendment which you have before you was actually presented and discussed numerous times at the House level, and rejected for two primary reasons. One, that the Ahlborn decision did set out certain parameters that guide the court, the Department and attorneys, in terms of determining exactly what should be considered in these circumstances, and that those standards, or those issues that are set forth are clear and can be applied by the court through the as justice may require statement.

In terms of the one-third presumption, a major reason it didn't make sense is there are no standards. If there is a presumption, how do you rebut that presumption, what's the standard of proof, who bears the burden of proof, it creates many more questions than it solves, and as a result it's going to really cut down on the ability to have any sort of settlement, and it's going to increase the number of cases that require judicial intervention.

I do have in my file, and I'll make available to members of the Committee, a number of letters that were written by attorneys and provided to the House, although they may well be in the file from the record, but I'll certainly make them available, that raise concerns about a number of the issues that Attorney Jones set forth, including this issue of when the Department tries to look to the full value, how that can create a windfall for the Department and leave the injured victim with no money to move them forward.

So, as Jennifer Jones indicated, there has been extensive discussion of this. A number of attorneys have been involved, working with the House, and the sense was that, given the lack of clarity of the presumption language, how it would be applied, the fact that it would make it more difficult to settle cases because of the uncertainty that having the as justice may required language which, as Representative DiFruscia indicated, is consistent and parallel to what's done with workers' compensation context would make the most sense.

Senator Kathleen G. Sgambati, D. 4: Thank you.

Attorney Shemitz: Thank you.

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Senator Kathleen G. Sgambati, D. 4: Questions? Thank you very much.

Attorney Shemitz: Thank you.

Please see Attachment #3 – Letter from the New Hampshire Association for Justice, dated March 9, 2009.

Please see Attachment #4 – Letter from Nixon, Raiche, Vogelmann, Barry & Slawsky, dated May 1, 2009.

Senator Kathleen G. Sgambati, D. 4: Anyone else on HB 577? If not, I just have a question for Representative DiFruscia, if you wouldn't mind?

Representative DiFruscia: Yes, Senator.

Senator Kathleen G. Sgambati, D. 4: Did you consider...did the Committee actually consider this language in their deliberations about the bill?

Representative DiFruscia: Yes they did, Senator.

Senator Kathleen G. Sgambati, D. 4: And rejected it.

Representative DiFruscia: They rejected it...

Senator Kathleen G. Sgambati, D. 4: Okay.

Representative DiFruscia: ...for the same reasons that the Committee suggested. In fact, there was an overwhelming rejection of the rebuttable presumption, and that's difficult language. And, I think that the Committee worked extremely hard in putting together something that was equitable to all parties, including reimbursement.

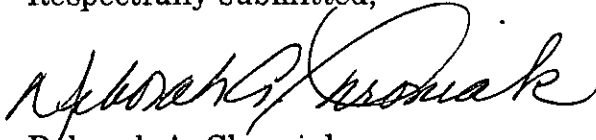
Senator Kathleen G. Sgambati, D. 4: Thank you very much. I just wanted to clarify that.

Representative DiFruscia: Thank you. Thank you.

Senator Kathleen G. Sgambati, D. 4: Okay. I'm going to close the hearing on HB 577.

Hearing concluded at 9:23 a.m.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Deborah A. Chroniak". The signature is written in a cursive style with a large, looping initial "D".

Deborah A. Chroniak
Committee Secretary
5-03-10

4 Attachments

HB 577-FN – AS AMENDED BY THE HOUSE

06Jan2010... 2009-2376h

2009 SESSION

09-0999

05/03

HOUSE *577-FN*

AN ACT relative to recovery of public assistance and third party liability.

SPONSORS: Rep. DiFruscia, Rock 4

COMMITTEE: Health, Human Services and Elderly Affairs

AMENDED ANALYSIS

This bill permits the department of health and human services to recover medical assistance costs from the portion of settlements or judgments reasonably attributed to medical expenses. The bill also clarifies the court's discretion to apportion the amount withheld from such awards.

Explanation: Matter added to current law appears in *bold italics*.

Matter removed from current law appears [~~in brackets and struck through.~~]

Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

06Jan2010... 2009-2376h

09-0999

05/03

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nine

AN ACT relative to recovery of public assistance and third party liability.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Recovery of Assistance. Amend RSA 167:14-a, III-a and IV to read as follows:

III-a. The commissioner of health and human services may recover the full amount of medical assistance furnished by the state [~~if there are proceeds available for such recovery after the deduction of reasonable attorneys' fees, litigation costs, claims by other creditors, and 10 percent of the remaining net settlement amount for the recipient of medical assistance. Any balance remaining after the state has recovered the full amount due shall be available to the recipient of medical assistance. No attorneys' fees shall be deducted from the amount due the state from such award or settlement~~] **from the portion of any settlement or judgment reasonably attributable to medical expenses. There shall be a rebuttable presumption that one-third (1/3) of the recipient's overall recovery is reasonably attributed to the recipient's medical expenses.** The commissioner may waive or reduce the amount due the state for good cause upon written request from a recipient or recipient's attorney. The acceptance of any waiver or the payment of any reduced amount due shall create a rebuttable presumption that the apportionment was equitable in any action brought pursuant to paragraph IV.

IV. A disbursement of any award, judgment, or settlement shall not be made to a recipient without the recipient or the recipient's attorney first providing at least 30-days written notice of any scheduled trial, alternative dispute resolution hearing, or settlement to the commissioner of health and human services that the recipient has a claim which could result in a recovery from a third party or obtaining from the commissioner a written release of any obligation owed to the state for medical assistance provided to the recipient. The commissioner shall notify the recipient or the recipient's attorney of the amount of the commissioner's claim within 21 days of the notice. If a dispute arises between the recipient and the commissioner of health and human services as to the settlement of any claim that arises under this section, the third party or the recipient's attorney shall withhold from disbursement to the recipient or to any legal instrument created for the benefit of the recipient, an amount equal to the commissioner's claim. Either party may apply to the superior court or the district court in which an action based upon the recipient's claim could have been commenced for an order to determine an equitable apportionment between the commissioner and the recipient of the amount withheld. **The court shall have broad discretion to apportion the amount withheld as justice may require.** An order of apportionment has the effect of a judgment. The obligation of a third party under this paragraph to withhold all or part of a disbursement is conditional upon the receipt by the third party of written notice from the commissioner, the recipient, or the recipient's attorney that the commissioner is asserting a claim.

2 Effective Date. This act shall take effect upon its passage.

LBAO

09-0999

01/21/09

HB 577-FN - FISCAL NOTE

AN ACT relative to recovery of public assistance and third party liability.

FISCAL IMPACT:

The Department of Health and Human Services states this bill would increase state general fund revenue by \$520,050 in FY 2010 and each year thereafter. This bill would have no fiscal impact on state, county, and local expenditures, or county and local revenue.

METHODOLOGY:

The Department of Health and Human Services (DHHS) states this bill would modify the Recovery of Assistance statute, which among other things would set a rebuttable presumption that it is reasonable to allocate one-third of the recipient's recovery from liable third persons to the re-payment of Medicaid expenditures on behalf of that recipient for injuries due to the tortuous acts of another. The bill would also statutorily clarify that DHHS is entitled to base its recovery on the reasonable cost of the services provided to the recipient, though DHHS would never recover more than its lien. The Department states medical lien amounts in FY 2008 totaled \$1,548,804, of which \$508,703 was recovered. As a result, the presumed additional funds recovered by this bill is estimated at \$1,040,101. Recoveries are split 50/50 with the federal government, which would result in an increase in state general fund revenue of approximately \$520,050.

North Carolina

North Carolina General Statutes

Chapter 44. Liens.

ARTICLE 9. Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§44-50 Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.

A lien as provided under G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the injuries, whether in litigation or otherwise. If an attorney represents the injured person, the lien is perfected as provided under G.S. 44-49. Before their disbursement, any person that receives those funds shall retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services, after having received notice of those claims. Evidence as to the amount of the charges shall be competent in the trial of the action. Nothing in this section or in G.S. 44-49 shall be construed so as to interfere with any amount due for attorney's services. **The lien provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of damages recovered.** Except as provided in G.S. 44-51, a client's instructions for the disbursement of settlement or judgment proceeds are not binding on the disbursing attorney to the extent that the instructions conflict with the requirements of this Article.

(1935, c. 121, s. 2; 1959, c. 800, s. 2; 1969, c. 450, s. 2; 1995, c. ~~538~~, s. 6(b); 1995 (Reg. Sess., 1996), c. ~~573~~, s. 3; ~~2001-377~~, s. 2.)

Pennsylvania Act No. 2008-44

SECTION 1409. THIRD PARTY LIABILITY.

B. 2. III. (C) WHERE THE ACTION OR CLAIM IS BROUGHT BY THE BENEFICIARY ALONE AND THE BENEFICIARY INCURS A PERSONAL LIABILITY TO PAY ATTORNEY'S FEES AND COSTS OF LITIGATION, THE DEPARTMENT'S CLAIM FOR REIMBURSEMENT OF THE BENEFITS PROVIDED TO THE BENEFICIARY SHALL BE LIMITED TO THE AMOUNT OF THE MEDICAL EXPENDITURES FOR THE SERVICES TO THE BENEFICIARY.

B. (11) EXCEPT AS OTHERWISE PROVIDED IN THIS ACT, NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE ENTIRE AMOUNT OF ANY SETTLEMENT OF THE INJURED BENEFICIARY'S ACTION OR CLAIM, WITH OR WITHOUT SUIT, IS SUBJECT TO THE DEPARTMENT'S CLAIM FOR REIMBURSEMENT OF THE BENEFITS PROVIDED ANY LIEN FILED PURSUANT THERETO, **BUT IN NO EVENT SHALL THE DEPARTMENT'S CLAIM EXCEED ONE-HALF OF THE BENEFICIARY'S RECOVERY AFTER DEDUCTING FOR ATTORNEY'S FEES, LITIGATION COSTS, AND MEDICAL EXPENSES RELATING TO THE INJURY PAID FOR BY THE BENEFICIARY.**

Ohio Revised Code
TITLE 51 PUBLIC WELFARE
CHAPTER 5101 DEPARTMENT OF JOB AND FAMILY SERVICES —
GENERAL PROVISIONS
THIRD PARTY LIABILITY FOR MEDICAID CLAIMS

§ 5101.58. (A) The acceptance of public assistance gives an automatic right of....
(G)(2) Reasonable attorneys' fees, not to exceed one-third of the total judgment, award, settlement, or compromise, plus costs and other expenses incurred by the recipient or participant in securing the judgment, award, settlement, or compromise, shall first be deducted from the total judgment, award, settlement, or compromise. **After fees, costs, and other expenses are deducted from the total judgment, award, settlement, or compromise, the department of job and family services or appropriate county department of job and family services shall receive no less than one-half of the remaining amount, or the actual amount of medical assistance paid, whichever is less.**

Minnesota Statutes
PUBLIC WELFARE AND RELATED ACTIVITIES
CHAPTER 256B MEDICAL ASSISTANCE FOR NEEDY PERSONS
256B.37 Private Insurance Policies, Causes of Action.
**Update Notice: This section has been amended by
CHAPTER 79 OF 2009

Subd. 4. Recovery. Upon any judgment, award, or settlement of a cause of action, or any part of it, upon which the state agency has a subrogation right, including compensation for liquidated, unliquidated, or other damages, reasonable costs of collection, including attorney fees, must be deducted first. The full amount of medical assistance paid to or on behalf of the person as a result of the injury must be deducted next and paid to the state agency. The rest must be paid to the medical assistance recipient or other plaintiff. **The plaintiff, however, must receive at least one-third of the net recovery after attorney fees and collection costs.**

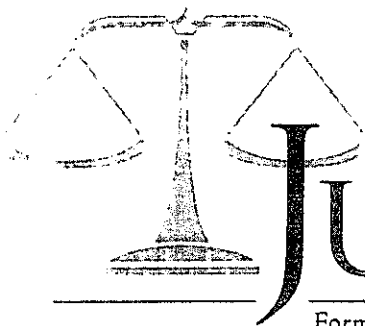
In re: Zyprexa Products Liability Litigation 451 F.Supp.2d 458 (E.D.N.Y. 2006)

This case involved the settlement of a mass tort litigation for personal injuries related to damages caused by the drug Zyprexa. The Court states that:

the settlement techniques utilized in the instant litigation may provide a model for the handling of Medicare and Medicaid liens in future mass action on a uniform, national basis. Although complete uniformity was not achieved, the parties, the federal government, and many of the states demonstrated that they can work together for the benefit of taxpayers, injured plaintiffs, and industry. The experience in this case suggests the

desirability of a more uniform statutory approach to lien resolution in the Medicaid program, either by uniform individual state legislation” *In re: Zyprexa Products Liability Litigation*, 451 F.Supp.2d 458, 461 (2006).

“In this case, the thirty-two states . . . have agreed to satisfy their Medicaid liens using a ‘traditional’ case-by-case approach to lien resolution that will not exceed 30% of the individual plaintiff’s gross recovery.” *Id.* at 472.



NEW HAMPSHIRE ASSOCIATION FOR JUSTICE

Formerly NH Trial Lawyers Association

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Delegate

Cristina Rousseau
Minority Delegate

March 9, 2009

Dear members of the subcommittee on HB 577,

I am writing on behalf of the injured victims that I currently represent and the ones that I have represented in the past. In cases where a person becomes the victim of negligence of another and is uninsured, the state Medicaid system often gets involved in paying for the necessary medical treatment.

Last year, I represented one such individual who was nearly killed when he was run over by a box truck. He underwent numerous life-saving procedures and was hospitalized for months. The man was only a temporary worker and had no health insurance. The state Medicaid office paid his bills, which totaled about \$500,000.00 at a rate of about 25 cents on the dollar. This left a Medicaid lien of about \$125,000.

The state Medicaid office wrongfully tried to argue that they were entitled to repayment out of any tort settlement based on the full value of the medical services provided to my client. A repayment at this rate would amount to an unfair windfall to the State and an entirely unfair result in the recovery of funds for the severely, permanently disabled victim.

The system for recovery from the State as it exists today should remain as it is. At this time, repayment to the State is based on a case by case equitable analysis of the situation including liability issues and damages to the injured victim. The State, in the case that I referred to above, recovered a substantial amount of money when the case settled at mediation. Had the state been entitled to recover more than they paid, the case would not have settled and would have gone to trial with very uncertain results as to any one's recovery.

Please feel free to contact me with any questions or concerns.

Very truly yours,

Maureen Raiche Manning
Law Offices of Manning & Smith, PLLC
Manchester, NH

ATTACHMENT #4

NIXON, RAICHE, VOGELMAN,
BARRY & SLAWSKY

RECEIVED MAY - 4 2009

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May 1, 2009

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1819 Elm Street
Manchester, NH 03104

Re: Medicaid Liens

Gentlemen:

Following a suggestion from Ellen Schemitz, I enclose a copy of the Complaint I filed in federal court to challenge the position taken by the New Hampshire Department of Health and Human Services concerning a Medicaid lien. My view is that the Department is refusing to apply the *Ahlborn* decision properly. In my case, because the gross amount of the settlement (\$850,000) far exceeded the Medicaid payments made (\$75,000), the Department takes the position that it can recover the full amount of the lien. We had a hearing yesterday on the State's motion to dismiss (which challenged the federal court's subject matter jurisdiction). Judge Laplante denied the motion at the end of the hearing, and he appears to be moving in our direction.

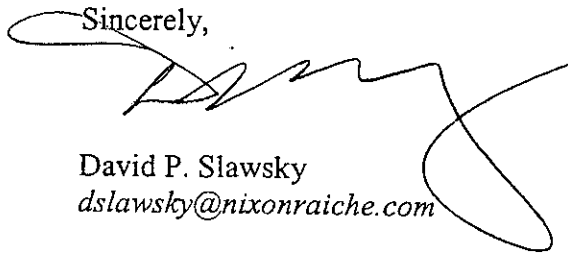
I have also asserted a claim under 42 USC §1983 which, if successful, may drive the recovery of attorneys' fees. As you know, this is cutting edge stuff. You may know of the favorable decision in *Tristani v. Richman*, 2009 U.S. Dist. LEXIS 24493 (W.D.P.a. March 25, 2009) which, if upheld, will provide additional support for our position.

The Attorney General's Office and Department of Health and Human Services is desperate to keep this dispute out of federal court. To the extent we can generate more favorable federal law on the issue, we will be in a good position to present supremacy clause and perhaps pre-emption arguments, and perhaps use these to persuade the State Legislature to stay away

Randolph J. Reis, Esq.
Jared R Green, Esq.
Francis G. Murphy, Esq.
May 1, 2009
Page 2

from those few injured, poverty-stricken Medicaid recipients who are able to obtain third-party recoveries.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Slawsky', with a large, sweeping flourish extending to the right.

David P. Slawsky
dslawsky@nixonraiche.com

DPS/jmj

cc: Ellen J. Schemitz, Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Jody Burtzell

Plaintiff

v.

Case No. _____

Nicholas A. Toumpas, Commissioner,
New Hampshire Department of
Health and Human Services, in his official
capacity

Defendant

COMPLAINT

Plaintiff Jody Burtzell brings this action for declaratory, injunctive and other appropriate relief (including costs and attorney's fees) to challenge the refusal of the State of New Hampshire, Department of Health and Human Services, to comply with federal Medicaid law.

I. PARTIES

1. Plaintiff Jody Burtzell is a citizen of New Hampshire with a residential address at 43 Kinsley Street, Nashua, New Hampshire 03060.

2. Defendant Nicholas A. Toumpas is the Commissioner of the New Hampshire Department of Health and Human Services with an office address of 129 Pleasant Street, Concord, New Hampshire 03301-3857.

II. JURISDICTION

3. Subject matter jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 as this action raises questions of federal law.

4. Jurisdiction is also authorized by 28 U.S.C. § 1343(3) and (4) as this action involves rights guaranteed by federal statute, thereby implicating 42 U.S.C. § 1983.

5. Mr. Burtzell seeks declaratory, injunctive, and other appropriate relief (including costs and attorney's fees) as authorized by 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983.

6. This Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to resolve all state law claims related to the federal claims asserted herein.

III. LEGAL BACKGROUND - MEDICAID

7. Congress established the federal Medicaid law in 1965 through Title IX to the Social Security Act, 42 U.S.C. §1396, "For the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301 (1980).

8. Under this system of "cooperative federalism" if a state agrees to establish a Medicaid plan, the federal government agrees to pay a specified percentage of the total amount the state plans spends on medical assistance. *Id.* at 308.

9. Federal law requires that Medicaid recipients, as a condition of eligibility, "assign the State any rights ... to payment for medical care from any third party." 42 U.S.C. §1396k(a)(1)(A).

10. The State's rights in this regard can only lawfully be asserted by the states against that portion of a third-party settlement that constitutes reimbursement for medical costs. *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006).

IV. FACTUAL BACKGROUND

12. In November 2004, Plaintiff Jody Burtzell underwent ulcer surgery in a New Hampshire hospital.¹

¹ Due to a confidentiality agreement in the underlying settlement, the identity of the defendants will not be disclosed in this Complaint.

13. As a result of what Mr. Burtzell claims to have been negligence on the part of the surgeon, his pancreatic duct and bile duct were both severed during the surgery. Mr. Burtzell nearly died. He underwent multiple surgeries at the original hospital as well as a tertiary care center where Mr. Burtzell remained until March 2005. Mr. Burtzell is severely and permanently disabled. He will never again be able to perform the construction work he previously performed. His ability to support and care for his family has been irreparably harmed.

14. Mr. Burtzell initiated a claim for medical malpractice in the Hillsborough County Superior Court. Special damages in the case included medical expenses of \$628,548.07. An economist offered the opinion that Mr. Burtzell's economic losses totalled \$1,327,000. In addition to these special losses, Mr. Burtzell suffered general damages that included compensatory damages, emotional damages, and loss of enjoyment of life (hedonic damages).

15. The case was aggressively defended. Experts retained by the defense contended that there was no negligence by the surgeon and that a significant part of Mr. Burtzell's injuries were caused by a pre-existing condition. The case was subsequently resolved by settlement in the amount of \$850,000.

16. Health care liens asserted by Blue Cross Blue Shield of Massachusetts (\$88,938.22), Medicare (\$201.12) and Dartmouth Hitchcock/Mary Hitchcock Hospitals (\$3,910.03) were all compromised and resolved. Counsel for Mr. Burtzell reduced the recoverable attorney's fee in recognition of the fact that the client is unlikely to be able to earn significant income in the future. Only the New Hampshire Department of Health and Human Services has taken the position that it is entitled to recover the entire balance due; that is, the amount of Medicaid benefits paid (\$75,892.30).

V. CLAIMS FOR RELIEF

First Claim for Relief

17. The State's failure and refusal to limit the recovery of Medicaid benefits to that part of the third-party settlement attributable to the recovery of medical costs violates the *Ahlborn* decision, 42 U.S.C. § 1396k(a)(1)(A), and the anti-lien provisions of the Medicaid statute, 42 U.S.C. § 1396p(a)(1).

Second Claim for Relief

18. New Hampshire Revised Statutes Annotated 167:14-a, III, provides that recipients of Medicaid benefits are required to repay the amount of the assistance received "to the extent that the amount of the recovery makes repayment possible."

19. In this regard, RSA 167:14-a, IV, authorizes the courts to make an equitable determination of the proper allocation between recipient and State.

WHEREFORE, Plaintiff Jody Burtzell requests that this Honorable Court will:

- A. Issue a declaratory judgment that the assertion of a lien for the full amount of benefits paid by the State under the circumstances of this case violates federal law;
- B. Make an equitable apportionment of the medical costs component of the settlement in this case;
- C. Grant all injunctive relief necessary to implement the declaratory judgment as set forth above;
- D. Grant Plaintiff the attorneys' fees, costs and expenses authorized by 42 U.S.C. §1988; and
- E. Grant such further relief as this Court deems just and proper.

Respectfully submitted,

Joy Dutsch

By His Attorneys,

NIXON, RAICHE, VOGELMAN, BARRY &
SLAWSKY, P.A.

Date: _____

By:

David P. Slawsky (NH Bar #6591)
77 Central Street
Manchester, NH 03101
(603) 669-7070

Speakers

Voting Sheets

Senate Health and Human Services Committee

EXECUTIVE SESSION

Bill # HB 577-FN

Hearing date: 3-16-10

Executive session date: 3-16-10

Motion of: OTP

VOTE: 3-0

<u>Made by</u>	Sgambati <input type="checkbox"/>	<u>Seconded</u>	Sgambati <input checked="" type="checkbox"/>	<u>Reported</u>	Sgambati <input type="checkbox"/>
<u>Senator:</u>	Gilmour <input type="checkbox"/>	<u>by Senator:</u>	Gilmour <input type="checkbox"/>	<u>by Senator:</u>	Gilmour <input type="checkbox"/>
	Kelly <input type="checkbox"/>		Kelly <input type="checkbox"/>		Kelly <input type="checkbox"/>
	Gallus <input type="checkbox"/>		Gallus <input type="checkbox"/>		Gallus <input checked="" type="checkbox"/>
	Downing <input checked="" type="checkbox"/>		Downing <input type="checkbox"/>		Downing <input type="checkbox"/>

Motion of: _____

VOTE: _____

<u>Made by</u>	Sgambati <input type="checkbox"/>	<u>Seconded</u>	Sgambati <input type="checkbox"/>	<u>Reported</u>	Sgambati <input type="checkbox"/>
<u>Senator:</u>	Gilmour <input type="checkbox"/>	<u>by Senator:</u>	Gilmour <input type="checkbox"/>	<u>by Senator:</u>	Gilmour <input type="checkbox"/>
	Kelly <input type="checkbox"/>		Kelly <input type="checkbox"/>		Kelly <input type="checkbox"/>
	Gallus <input type="checkbox"/>		Gallus <input type="checkbox"/>		Gallus <input type="checkbox"/>
	Downing <input type="checkbox"/>		Downing <input type="checkbox"/>		Downing <input type="checkbox"/>

<u>Committee Member</u>	<u>Present</u>	<u>Yes</u>	<u>No</u>	<u>Reported out by</u>
Senator Sgambati, Chairman	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Gilmour, Vice-Chair	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Kelly	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Senator Gallus	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Senator Downing	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

*Amendments: _____

Notes: _____

Committee Report

STATE OF NEW HAMPSHIRE
SENATE
REPORT OF THE COMMITTEE

Date: March 16, 2010

THE COMMITTEE ON Health and Human Services

to which was referred House Bill 577-FN

AN ACT relative to recovery of public assistance and third party liability.

Having considered the same, the committee recommends that the Bill:

OUGHT TO PASS

BY A VOTE OF: 3-0

AMENDMENT # s

Senator John T. Gallus
For the Committee

Deb Chroniak 271-3096

New Hampshire General Court - Bill Status System

Docket of HB577

Docket Abbreviations

Bill Title: relative to recovery of public assistance and third party liability.**Official Docket of HB577:**

Date	Body	Description
01/08/2009	H	Introduced and Referred to Health, Human Services and Elderly Affairs; HJ 12 , PG.233
02/18/2009	H	Public Hearing: 3/3/2009 10:15 AM LOB 205
03/04/2009	H	Subcommittee Work Session: 3/9/2009 3:30 PM LOB 205
03/04/2009	H	Executive Session: 3/18/2009 9:30 AM LOB 205
03/18/2009	H	Retained In Committee
07/08/2009	H	Retained Bill - Subcommittee Work Session: 8/6/2009 1:00 PM LOB 205
08/06/2009	H	Retained Bill - Subcommittee Work Session: 9/9/2009 1:00 PM LOB 205
10/12/2009	H	Retained Bill - Subcommittee Work Session: 11/10/2009 12:30 PM LOB 205
10/13/2009	H	Retained Bill - Executive Session: 11/10/2009 1:00 PM LOB 205
11/12/2009	H	Committee Report: Ought to Pass with Amendment #2376h for Jan 6 CC (vote 15-0); HC 2 , PG.82-83
11/12/2009	H	Proposed Committee Amendment #2376h; HC 1 , PG.28
01/06/2010	H	Amendment #2376h Adopted, VV; HJ 6 , PG.262-263
01/06/2010	H	Ought to Pass with Amendment #2376h: MA VV; HJ 6 , PG.262-263
03/03/2010	S	Introduced and Referred to Health and Human Services
03/10/2010	S	Hearing: March 16, 2010, Room 103, State House, 9:00 a.m.; SC11
03/22/2010	S	Committee Report: Ought to Pass 3/31/10; SC13
03/31/2010	S	Ought to Pass, MA, VV; OT3rdg; SJ 12 , Pg.269
03/31/2010	S	Passed by Third Reading Resolution; SJ 12 , Pg.271
04/07/2010	S	Enrolled; SJ 13 , Pg.285
04/12/2010	H	Enrolled; HJ 32 , PG.1577
05/10/2010	H	Signed By the Governor 05/07/2010; Effective 05/07/2010; Chapter 0015

NH House

NH Senate

Contact Us

New Hampshire General Court Information Systems
 107 North Main Street - State House Room 31, Concord NH 03301

Other Referrals

COMMITTEE REPORT FILE INVENTORY

HB 577 FN ORIGINAL REFERRAL

RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE SECRETARY AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

- DOCKET (Submit only the latest docket found in Bill Status)
- COMMITTEE REPORT
- CALENDAR NOTICE on which you have taken attendance
- HEARING REPORT (written summary of hearing testimony)
- HEARING TRANSCRIPT (verbatim transcript of hearing)
List attachments (testimony and submissions which are part of the transcript) by number [1 thru 4 or 1, 2, 3, 4] here: _____
- SIGN-UP SHEET

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

____ - AMENDMENT # _____ - AMENDMENT # _____
____ - AMENDMENT # _____ - AMENDMENT # _____

ALL AVAILABLE VERSIONS OF THE BILL:

AS INTRODUCED AS AMENDED BY THE HOUSE
 FINAL VERSION AS AMENDED BY THE SENATE

PREPARED TESTIMONY AND OTHER SUBMISSIONS (Which are not part of the transcript)

List by letter [a thru g or a, b, c, d] here: _____

EXECUTIVE SESSION REPORT

____ OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):

IF YOU HAVE A RE-REFERRED BILL, YOU ARE GOING TO MAKE UP A DUPLICATE FILE FOLDER

DATE DELIVERED TO SENATE CLERK 8-5-10


COMMITTEE SECRETARY