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2012 CLE Awards

**CLE Pinnacle Award**
(General Credit)

**Nell Graham Sale**
27th Annual Family Law Institute
October 14-15, 2011

**CLE Summit Award**
(Ethics Professionalism Credit)

**The Honorable M. Monica Zamora**
Back to Basics: A Collaborative Approach to Positive Youth Development
March 22, 2012

**CLE Crest Award**
(Young Lawyer)

**Keya Koul**
Alternatives to Foreclosure

**National Speaker**
(Honorable Mention)

**Janice L. Green**
27th Annual Family Law Institute
October 14-15, 2011
The real estate market is heating up. Time to make your move!

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Platinum Properties & Investment 505-332-1133 | Prudential New Mexico Properties 505-797-5555 | Remax Elite 505-798-1000

FOR FURTHER INFO CALL: Susan Jameson @ Wells Fargo Private Mortgage Banking 766-7205 or Terris Zambrano @ Fidelity National Title 967-9408


Jan Demay 450-7635 | Robin Riegor 263-2903 | Mark Puckett 269-6997 | Connie Johnson 948-0001


Contact Information:
Susan Jameson 766-7205 | Terris Zambrano 967-9408
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July 4, 2012, Vol. 51, No. 27

Cover Artist: Born in the foothills of the Ozarks, Ted Blaylock held a variety of tough jobs, all far removed from the art world. Regardless of the job, his leisure time was spent developing his love of art and his talent to draw and paint. As a boy he would walk the tracks and railyards, absorbing the scenes of the last days of steam and filling his memory with subjects to be painted. His art has been published worldwide in limited edition prints, calendars, and greeting card lines. (http://www.blaylockoriginals.com).
**Upcoming Judicial Vacancy**

A vacancy on the 2nd Judicial District Court will exist in Albuquerque as of Aug. 1 upon the retirement of Judge Theresa Baca. Interested parties from the private bar and the public are welcome to attend. Attendees are urged to stay until 5 p.m., when Jared Kallunki will be receiving the Robert H. La Follette Pro Bono Award. Further information about the Commission is available on the State Bar’s website, www.nmbar.org.


The Supreme Court is considering whether to approve proposed amendments that would conform the warrant rules for courts of limited jurisdiction to the recently adopted amendments to the Rules of Criminal Procedure for the District Courts regarding electronic warrants. See Rules 5-208 and 5-211 NMRA (approved May 7, 2012, effective June 2, 2012). To comment on the proposed amendments before they are submitted to the Court for final consideration, either submit a comment electronically through the Supreme Court’s website at http://nmsupremecourt.nmcourts.gov/ or send written comments to: Joey D. Moya, Clerk New Mexico Supreme Court PO Box 848 Santa Fe, NM 87504-0848 Comments must be received by the clerk on or before July 18 to be considered by the Court. Note that any submitted comments may be posted on the Supreme Court’s website for public viewing.

**Second Judicial District Court**

**Judicial Vacancy**

A vacancy on the 2nd Judicial District Court will exist in Albuquerque as of Aug. 1 upon the retirement of Judge Theresa Baca. Inquiries regarding the details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. The dean of the UNM School of Law, designated by the New Mexico Constitution to chair the nominating committee, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14, of the New Mexico Constitution. Applications as well as information related to qualifications for the position may be obtained from the Judicial Selection website at http://lawschool.unm.edu/judsel/application.php or via email by calling Sandra Bauman, 505-277-4700. The deadline for applications is 5 p.m., July 20. Applications received after that date will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Commission will meet Aug. 9 at the Bernalillo County Courthouse, Albuquerque, to evaluate the applicants for this position. The meeting is open to the public, and anyone wishing to be heard about any of the candidates will have an opportunity to speak.

**Reception for Judge Baca**

The legal community is invited to attend a retirement “farewell and best wishes” reception in honor of Judge Theresa Baca from 2-4 p.m., July 13, at the 2nd Judicial District Court, Courtroom 402. Refreshments will be served.

**Thirteenth Judicial District Court**

**Clerks’ Offices Resume Friday Afternoon Hours**

The clerks’ offices in Cibola, Sandoval and Valencia counties will resume Friday afternoon business hours beginning July 6. The new Friday hours will be from 9 a.m.—noon and 1–5 p.m., the same hours as Monday–Thursday.

**US District Court for the District of New Mexico**

**Upcoming Judicial Vacancy**

United States District Court Chief Judge Bruce D. Black has announced his intention to retire from active service in October. Senators Jeff Bingaman and Tom Udall will submit recommendations to the President regarding qualified candidates for the soon-to-be vacant position in Las Cruces. To apply, go to http://www.bingaman.senate.gov/judicial_applicants/application.doc. The application must be completed and returned no later than July 9. For further information, email Sunalei Stewart, sunalei_stewart@bingaman.senate.gov, or Matt Nelson, matt_nelson@tomudall.senate.gov.

**PropFESSIONALISM TIP**

With respect to parties, lawyers, jurors and witnesses:
Within practical time limits, I will allow lawyers to present proper arguments and to make a complete and accurate record.

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**STATE BAR NEWS**

**Attorney Support Group**

- **July 16, 7:30 a.m.** Morning groups meet on the third Monday of the month.
- **Aug. 6, 5:30 p.m.** Afternoon groups meet on the first Monday of the month.

Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, 505-242-6845.

**Support Group for Legal Professionals**

- **July 11, 5:30 p.m.** The group meets regularly on the second Wednesday of the month at the Unitarian Universalist Church, 107 West Barcelona Rd., Santa Fe. For information, call Diego Zamora, 505-629-7343.

**Committee on Women and the Legal Profession**

**Accepting Nominations**

Reminder: Nominations are now being accepted for the 2012 Justice Pamela B. Minzner Outstanding Advocacy for Women Award. The award recognizes attorneys who have distinguished themselves during the
prior year by providing legal assistance to women who are underrepresented or under-served or by advocating for causes that will ultimately benefit and/or further the rights of women. Submit a letter of nomination summarizing the work and efforts of the individual you are recommending to Jennifer Anderson, 201 Third St. NW, Suite 1950, Albuquerque, NM 87102-4388; fax to (505) 764-5486; or email jmanderson@lrlaw.com. The nomination deadline is July 6.

Paralegal Division Luncheon CLE Series
The Paralegal Division invites members of the legal community to bring a lunch and attend Understanding Employment Insurance (1.0 general CLE credit) presented by Richard L. Branch. The program will be held from noon–1 p.m., July 11, at the State Bar Center (registration fee for attorneys–$16, members of the Paralegal Division–$10, non-members–$15). Registration begins at the door at 11:45 a.m. For more information, contact Cheryl Passalaqua, 505-247-0411, or Krista Gianes, 505-222-9356. Webcasts:
• Santa Fe: Montgomery & Andrews, 325 Paseo de Peralta. Contact Donna Ormerod, 505-986-2520.
• Roswell: Hinkle, Hensley, Shanor & Martin LLP, 400 N. Pennsylvania, Ste. 700. Contact Dora Paz, 575-622-6510.
• Farmington: Titus & Murphy, 2021 E. 20th Street. Contact Heather Parmley, 505-326-6503.

Young Lawyers Division San Juan County Luncheon With Justice Chávez
The Young Lawyers Division will host a luncheon with Justice Edward Chávez of the New Mexico Supreme Court from noon–1:30 p.m., July 27, at the 11th Judicial District Court, 103 South Aztec, Aztec. Join YLD for this ongoing series of informal discussions with Justice Chávez about the practice of law. Space is limited to the first 14 YLD members who respond. Lunch will be provided and preference will be given to those who have not previously attended. R.S.V.P. by July 18 to Ken Stalter, kstalter@da.state.nm.us, or Martha Chicoski, martha@chicoskilaw.com.

OTHER BARS Albuquerque Bar Association June Luncheon
The Albuquerque Bar Association’s Member Luncheon will be held at noon, July 10, at the Embassy Suites Hotel, 1000 Woodward Place NE, Albuquerque. Luncheon speakers are Past Presidents Bill Carpenter, Roberta Cooper Ramo, and Art and Terri Beach. Immediately following lunch, Tom Popejoy will present Trusts for the General Lawyer (2.0 general CLE credits), from 1:15 p.m. to 3:15 p.m. Lunch only: $30 members/$40 non-members, $5 walk-up fee; Lunch/CLE: $50 members/$70 non-members, $5 walk-up fee; CLE only: $60 members/$80 non-members. Register for lunch by noon, July 6. To register:
1. log on to www.abqbar.org;
2. email abqbar@abqbar.org;
3. call (505) 842-1151 or (505) 243-2615; or
4. mail to PO Box 40, Albuquerque, NM 87103.

OTHER NEWS University of Colorado Law School Bench and Bar Conference
Sept. 19–21
University of Colorado Law School and St. Julien Hotel, Boulder, Colorado 10.0 CLE Credits
By Dorma Seago

What is your new position?
I am going to be the director of development for the Albuquerque Museum Foundation, the private foundation which provides community support to our Albuquerque Museum of Art and History. While the Albuquerque Museum is a municipal museum run by the city of Albuquerque, the work of the Foundation provides approximately one third of direct and indirect support through fundraising for educational programs, exhibitions, publications and community outreach.

Tell me a little about yourself.
I was born in Cudahy, Wisconsin, a hairball of a town, from humble beginnings. I was the only one to go to college and the only one to get advanced degrees. I started as a high school English and theater teacher. Then I worked in HR for many years and had my own consulting company for 15 years. I was trying to make organizations better for employees.

Why did you go into fundraising?
About six years ago, I had just finished my doctorate and I was feeling burned out. I was tired of travel and feeling like I was sticking my thumb into a dike since I couldn't really fix an organization's systemic problems. I also felt like I wasn't doing anything to give back to the world—just making rich corporations richer. I wasn't doing anything that was going to make people's lives easier or contribute to the greater good or alleviate one person's misery or worry about something. When I got the opportunity at the State Bar, I thought I could take a shot and be successful at it. It was important work and I wanted to do it. I have been grateful for the opportunity the State Bar gave me. I have learned so much here.

How much money do you think you raised?
Maybe just short of $1 million.

What is your overall impression of the response to your fundraising efforts?
It's still a work in progress. A lot more is being done now at every level to help access the court system. The courts are doing more; lawyers are doing more; the State Bar is doing more. But I think that it's a huge problem, and it's going to require more concerted effort until anybody who needs to use the court system to solve a problem is able to do it within their ability to pay.

In your view, what is the future of fundraising for legal services?
A lot of money has been cut from legal services, and New Mexico is wrestling with the question, “Is providing legal services to needy people a core function of state government?” I think it should be. If you are a criminal, you get a lawyer whether you can pay for it or not. There has to be a way for average people to access the court system when they are involved in domestic violence, landlord-tenant disputes, or in trying to get government services they are entitled to. Take the average person like me. Unless I want to go into significant debt, I can't afford to hire a lawyer for even a simple transaction, like a divorce. Or say my landlord was treating me badly or I got into consumer debt problems. I wouldn't be able to afford a lawyer to get the protection provided by law. To me there is just something wrong with a system wherein people who work every day, who pay taxes, can't afford to access the court system.

Do you have one thing you learned that you are going to carry forward?
That people give their time and money to people they know. Fundraising is all about building relationships and opening yourself up to people. I tell them that I feel passionate about this cause and I tell them why. I have made so many deep relationships that I feel like I can call so many people and say, “Would you be willing to help?” And they would. What other job could give you that?

Where have you gotten all your ideas?
Mostly I think, “Would that be fun for me?” If the answer is “yes,” I go for it. Lawyers work so hard and do such serious work, I don't think they have enough fun in general. I just think, “Let's try to do something that's fun and that makes people laugh, that engages people.” And I've always been lucky getting other people at the State Bar to hook into my vision and help me.

continued on next page
You facilitated some incredible events. What was your favorite? The talent show. So many people came from all different parts of the state and it was their talent that really made that evening fun. The Young Lawyers and I organized it, but it was the talent that made the show. And it takes courage to do that—to perform in front of your peers and do your thing. Another one is planned for March 2013 and I will miss not doing that.

Does anything about the State Bar stand out to you? Two things stand out to me. The State Bar gave me the opportunity to help create awareness among lawyers about the cause of those who can’t afford a lawyer’s fees but still have a deep and often urgent need. The other outstanding thing is the people. I have met so many fabulous people who have big hearts, who care, who go beyond themselves and have compassion for people and for one another, both the employees at the State Bar and the lawyers. I will always think of those people with fondness in my heart.

Do you care to name any? Jerry Dixon, Vickie Wilcox, Martha Chicoski, Keya Koul, Stuart Butzier at Modrall, and Chuck Vigil at Rodey—to name just a few of the many—go above and beyond all the time. Just people who in every endeavor always rise to the top and do it without calling attention to themselves, without saying, “Hey, look at me; I’m so great.” They are just humble, compassionate people who also happen to be lawyers. You know, lawyers get a terrible rap in society. Every profession has bad eggs and people who are miserable but by and large, lawyers are so big hearted. They got into law because they wanted to help people. It has been my privilege to work here and be able to tap into that—their desire to want to help people. That’s why I think the TLC Cares* program will be successful because lawyers are so connected and they want to help.

You’re an avid bicyclist. Are you going to be able to continue to ride to work? I hope to be able to ride my bike to my new position. I set a goal of exercising five days a week, but how can you do it all? Since my commute to work took an hour each day, I realized I could combine the commute and exercise and get them both done in the same chunk of time.

What thought or message do you want to leave us with? One message I would like to leave is that it seems like the same people are always getting involved in activities and causes. I know that all of us are really busy, but when you get involved, you get more than you end up giving. That is always the case. Generous people are happier, healthier, more connected to the universe. I guess you could call it “spirituality.” There are so many benefits that come with being generous with your time, talent, and money. I just hope people do it in some way—if not with the State Bar, then with their church or community. The other message is that lawyers are the only people who can improve the law, who can make the court system better, who can open up the courts for other people. It’s a need that’s got to be taken care of and only lawyers can make a difference in how accessible the courts are to people who have no money. Lawyers are the only ones who have the key to make the difference. They bear a big responsibility; a big weight is on their shoulders. I wish them success in carrying it out. A lot has to be done.

*This Legal Community Cares (TLC Cares) is a network that offers help and support when needed. Sign up by simply sending an email to TLC Cares@nmbar.org and you will be added to the list serve. Look for more information in future issues of the Bar Bulletin.
LEGAL EDUCATION

JULY

6  Arbitration: Basics and Procedure  
   2.0 G  
   Teleconference  
   TRT, Inc.  
   800-672-6253  
   www.trtcle.com

8  Implications and Ethics of Social Media and Your Law Practice  
   1.0 G, 2.0 EP  
   Albuquerque  
   New Mexico Women’s Bar Association  
   www.nmbar.org

10 Fiduciary Standards in Business Transactions: Understanding Sources of Liability in Transaction Negotiations and Drafting  
   1.0 G  
   National Teleseminar  
   Center for Legal Education of NMSBF  
   505-797-6020  
   www.nmbarcle.org

11 Compatibility of Legal and Judicial Ethics  
   2.0 EP  
   Teleconference  
   TRT, Inc.  
   800-672-6253  
   www.trtcle.com

12 Admissible Evidence: Computer Forensics Investigation  
   2.0 G  
   Teleconference  
   TRT, Inc.  
   800-672-6253  
   www.trtcle.com

12 Ethics and Dishonest Clients  
   1.0 EP  
   National Teleseminar  
   Center for Legal Education of NMSBF  
   505-797-6020  
   www.nmbarcle.org

12–14 2012 Annual Meeting–Bench and Bar Conference  
   10.2 G, 2.0 EP  
   Hyatt Regency Tamaya Resort and Spa  
   Santa Ana Pueblo, New Mexico

16 Mediation: Basics and Procedure  
   2.0 G  
   Teleconference  
   TRT, Inc.  
   800-672-6253  
   www.trtcle.com

17 2012 Ethics Professionalism: The Disciplinary Process  
   2.0 EP  
   Video Replay  
   Center for Legal Education of NMSBF  
   505-797-6020  
   www.nmbarcle.org

17 9th Annual Spring Elder Law  
   3.5 G  
   Video Replay  
   Center for Legal Education of NMSBF  
   505-797-6020  
   www.nmbarcle.org

17 Practical Issues in Trust Administration  
   1.0 G  
   National Teleseminar  
   Center for Legal Education of NMSBF  
   505-797-6020  
   www.nmbarcle.org

17 The Relevance and Risks of Evidence and e-Discovery for Everyday Practice  
   4.7 G, 2.0 EP  
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   www.nmbarcle.org

19 Employee Separation Agreement: Reducing Risk and Liability When Employees Are Discharged or Leave  
   1.0 G  
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   505-797-6020  
   www.nmbarcle.org

23 Recusal: A Hot New Legal Ethics Topic  
   2.0 EP  
   Teleconference  
   TRT, Inc.  
   800-672-6253  
   www.trtcle.com

24–25 Commercial Real Estate Workouts: Making Broken Deals Work Again, Parts 1 and 2  
   2.0 G  
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   Center for Legal Education of NMSBF  
   505-797-6020  
   www.nmbarcle.org

25 Bench and Bar Substance Abuse and Other Misjudgments  
   2.0 EP  
   Teleconference  
   TRT, Inc.  
   800-672-6253  
   www.trtcle.com

30 Electronically Stored Information: What’s Under Lock and Key  
   2.0 G  
   Teleconference  
   TRT, Inc.  
   800-672-6253  
   www.trtcle.com

31 Special Needs Trust  
   1.0 G  
   National Teleseminar  
   Center for Legal Education of NMSBF  
   505-797-6020  
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## WRITS OF CERTIORARI

### Petitions for Writ of CertiorariFiled and Pending:

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### Certiorari Granted but not yet Submitted to the Court:

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<td>33,454</td>
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### Parties preparing briefs:

- Palenick
- Rohde
- Romero
- Resource Lighting
- Rohde
- Hardy
- Moongate Water Co.
- City of Las Cruces
- Convisser v. Ecoverity
- Flemma v. Halliburton Energy
- Gutierrez
- Schulz v. Pojoaque Tribal
- Nettles v. Ticonderoga
- City of Rio Rancho v. Palenick
- N.M. Human Services v. Starko, Inc.
- State v. Cobrera
- State v. Gonzalez
- State v. Torres
- State v. Puliti
- State v. Consaul
- State ex rel. Soldsbury Hill v. Liberty Mutual Ins.
- Presbyterian Health Plan v. Starko, Inc.
- Cimarron Health Plan v. Starko, Inc.
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No. 33,487 State v. Martinez COA 30,580 04/13/12
No. 33,548 State v. Marquez COA 30,565 05/02/12
No. 33,565 State v. Ballard COA 30,187 05/02/12
No. 33,571 State v. Miller COA 29,244 05/11/12
No. 33,568 State v. Chung COA 30,384 05/11/12
No. 33,567 State v. Leticia T. COA 30,664 05/11/12
No. 33,566 State v. Leticia T. COA 30,664 05/11/12
No. 33,594 Fallick v. Montoya COA 30,172 05/23/12
No. 33,589 Zhao v. Montoya COA 30,172 05/23/12
No. 33,579 Avalos v. N.M. Counseling COA 30,611 05/23/12
No. 33,592 State v. Montoya COA 30,470 05/24/12
No. 33,611 Bank of America v. Quintana COA 30,354 06/05/12
No. 33,604 State v. Ramirez COA 30,205 06/05/12
No. 33,632 First Baptist Church of Roswell v. Yates Petroleum COA 30,359 06/13/12
No. 33,627 N.M. Taxation and Revenue Rev Dept. v. BarnesandNoble.com COA 31,231 06/22/12

CERTIORARI GRANTED AND SUBMITTED TO THE COURT:

(Submission Date = date of oral argument or briefs-only submission) Submission Date
No. 32,524 Republican Party v. Taxation and Revenue Dept. COA 28,292 03/14/11
No. 32,695 Diamond v. Diamond COA 30,009/30,135 05/10/11
No. 32,690 Joey P. v. Alderman-Cave Milling and Grain Co. COA 29,120 05/11/11
No. 32,589 State v. Ordunez COA 28,297 08/31/11
No. 32,707 Smith LLC v. Synergy Operating LLC COA 28,248/28,263 09/12/11
No. 32,696 Herbison v. Chase Bank COA 30,630 09/13/11
No. 32,483 State v. Jackson COA 28,657 09/28/11
No. 32,697 State v. Amaya COA 28,347 09/28/11
No. 32,868 Nunez v. Armstrong General Contractors COA 29,522 10/11/11
No. 32,844 Gonzalez v. Performance Paint, Inc. COA 29,629 10/11/11
No. 32,713 Bounds v. D’Antonio COA 28,860 10/13/11
No. 32,717 N.M. Farm and Livestock Bureau v. D’Antonio COA 28,860 10/13/11
No. 32,942 Schuster v. Taxation and Revenue Dept. COA 30,023 11/14/11
No. 32,704 Tri-State v. State Engineer COA 27,802 11/14/11
No. 32,915 State v. Collier COA 29,805 11/15/11
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No. 32,968 Sunnyland Farms, Inc. v. Central N.M. Electric COA 28,807 12/12/11
No. 32,985 Helena Chemical Co. v. Uribe COA 29,567 12/13/11
No. 32,987 Helena Chemical Co. v. Uribe COA 29,567 12/13/11
No. 32,937 SF Pacific Trust v. City of Albuquerque COA 30,930 12/14/11
No. 32,876 Gonzales v. State 12-501 01/09/12
No. 32,860 State v. Stevens COA 29,357 01/10/12
No. 32,939 United Nuclear Corp. v. Allstate Insurance Co. COA 29,092 01/30/12
No. 33,070 Monroya v. City of Albuquerque COA 29,838 01/30/12
No. 33,023 State v. Gurule COA 29,734 01/30/12
No. 33,135 Horne v. Los Alamos National Security COA 29,822 03/13/12
No. 32,943 State v. Hall COA 29,138 03/26/12
No. 32,605 State v. Franco COA 30,028 03/28/12
No. 33,083 Martinez v. Dept. of Transportation COA 28,661 04/09/12
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No. 33,331 Strausberg v. Laurel Healthcare COA 29,238 05/14/12
No. 33,136 State v. Bent COA 29,227 05/16/12
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No. 33,257 State v. Boyse COA 30,656/30,657 07/30/12
No. 33,147 Prather v. Lyons COA 29,812 07/30/12

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No. 33,643 State v. Flores COA 31,205 06/19/12
No. 33,619 Serna v. Romero COA 31,745 06/19/12
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### Slip Opinions for Published Opinions may be read on the Court's website:

http://coa.nmcourts.gov/documents/index.htm
RECENT RULE-MAKING ACTIVITY

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

Joey D. Moya, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

EFFECTIVE JULY 4, 2012

PENDING PROPOSED RULE CHANGES
OPEN FOR COMMENT:

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SINCE RELEASE OF 2012 NMRA:

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RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

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12-405 Opinions 03/01/12
12-309 Motions effective 04/20/12

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RULES GOVERNING DISCIPLINE
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17-210 Reciprocal discipline 04/05/12
17-212 Resigned, disbarred or suspended attorneys 04/05/12
17-213 Appointment of counsel 04/05/12
17-214 Reinstatement 04/05/12
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17-307 Investigation of complaints 04/05/12
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27-401 Disposition 03/05/12

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court’s website at http://nmsupremecourt.nmcourts.gov.
To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompmu.us.
Advance Opinions
From the New Mexico Supreme Court and Court of Appeals

Certiorari Granted, February 13, 2012, No. 33,382
Certiorari Granted, March 30, 2012, No. 33,383
Certiorari Granted, March 30, 2012, No. 33,384

From the New Mexico Court of Appeals

Opinion Number: 2012-NMCA-053

Topic Index:
Appeal and Error: Standard of Review
Civil Procedure: Class Actions; Injunctions; Summary Judgment; and Waiver
Contracts: Beneficiaries; Breach; Third Party Beneficiary; and Waiver of Rights
Insurance: Health Insurance; and Health Maintenance Organizations
Judgment: Declaratory Judgment
Public Assistance: Medicare and Medicaid
Remedies: Unjust Enrichment
Statutes: Interpretation; and Legislative Intent

STARKO, INC., d/b/a MEDICINE CHEST #1, and JERRY JACOBS, d/b/a PILL BOX PHARMACY #4, for and on behalf of themselves and all others similarly situated, Plaintiffs-Appellants/Cross-Appellees, versus PRESBYTERIAN HEALTH PLAN, INC., a New Mexico corporation, d/b/a PRESBYTERIAN SALUD, Defendant-Appellee, and CIMARRON HEALTH PLAN, INC., a New Mexico corporation, d/b/a CIMARRON HEALTH MAINTENANCE ORGANIZATION, a/k/a CIMARRON HMO, Defendant-Appellee/Cross-Appellant,

Consolidated with STARKO, INC., d/b/a MEDICINE CHEST #1, and JERRY JACOBS, d/b/a PILL BOX PHARMACY #4, for and on behalf of themselves and all others similarly situated, Plaintiffs-Appellants, versus NEW MEXICO HUMAN SERVICES DEPARTMENT, Defendant-Appellee.

No. 27,992 Consolidated with No. 29,016 (December 15, 2011)

Appeal from the District Court of Bernalillo County
LINDA M. VANZI, District Judge

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for Appellee

Presbyterian Health Plan, Inc.
OPINION

RODERICK T. KENNEDY, JUDGE

[1] Today, we update a continuing saga of Medicaid-related litigation spanning more than eleven years.1 Starko, Inc. and Jerry Jacobs are representatives of a certified class of pharmacists (collectively, Plaintiffs), who contend they were not properly reimbursed for their services under Medicaid. They argue that the New Mexico Human Services Department (HSD) and managed care organizations, namely, Presbyterian Health Plan, Inc. and Cimarron Health Maintenance Corporation (collectively, the MCOs), which administered Medicaid for the State of New Mexico, were required to pay Plaintiffs in accordance with NMSA 1978, Section 27-2-16(B) (1984), but refused to do so. In two consolidated appeals, Plaintiffs appeal four district court orders dismissing their claims against the MCOs and HSD for violation of Section 27-2-16(B), breach of contract, breach of contract on a third-party beneficiary theory, unjust enrichment, declaratory relief, and injunctive relief.

[2] We hold that Section 27-2-16(B) confers upon participating Medicaid pharmacists an implied cause of action to enforce the statute directly against the MCOs. Furthermore, (1) the district court properly dismissed Plaintiffs’ claim concerning HSD’s reduction of reimbursement without federal approval for a six-month period; (2) Plaintiffs’ breach of contract claim, third-party beneficiary contract, and unjust enrichment claims may proceed; (3) the district court properly concluded that Section 27-2-16(B) conferred non-waivable rights; (4) the district court did not abuse its discretion in denying Plaintiffs’ demands for injunctive and declaratory relief; and (5) the district court properly certified Plaintiffs’ class in these cases.

[3] Consequently, we affirm in part, reverse in part, and remand to the district court for proceedings consistent with this Opinion.

I. BACKGROUND

[4] Congress created the Medicaid program in 1965 to supplement the Social Security Act. Atkins v. Rivera, 477 U.S. 154, 156 (1986); see 42 U.S.C. § 1396w-2 (2009). The program provides “medical assistance to persons whose income and resources are insufficient to meet the costs of necessary care” and compels participating states to share the costs of administering the program with the federal government. Atkins, 477 U.S. at 156–57.

[5] New Mexico’s Medicaid program pays participating pharmacists. It was modified to its current form in 1984 and remains unchanged to the present day. Section 27-2-16(B) thus bridges New Mexico’s transition from the original fee-for-service model to today’s managed care and provides as follows:

If drug product selection is permitted by [NMSA 1978, Section 26-3-3 (2005)], reimbursement by the Medicaid program shall be limited to the wholesale cost of the lesser expensive[,] therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars and sixty-five cents ($3.65).3

Section 26-3-3, referenced in Section 27-2-16(B), allows Medicaid pharmacists in their professional discretion to substitute any “therapeutically equivalent” drug for the drug actually prescribed as long as the substitution conforms with federal guidelines. Section 26-3-3. Under fee-for-service Medicaid, HSD followed this requirement and paid pharmacists the wholesale cost of the equivalent drug.

1This appeal is the third and fourth we have decided in this case since 2005. See Starko, Inc. v. Cimarron Health Plan, Inc. (Starko I), 2005-NMCA-040, 137 N.M. 310, 110 P.3d 526 (holding that Rule 1-023(F) NMRA was inapplicable to the issue of class certification); Starko, Inc. v. Gallego (Starko II), 2006-NMCA-085, 140 N.M. 136, 140 P.3d 1085 (granting qualified immunity under 42 U.S.C § 1983 (1996) to individual defendants who were state executives during the transition from a fee-for-service model to a managed care model).

2Under managed care, Presbyterian has chosen to contract with pharmacists directly, while Cimarron uses PBMs as intermediaries. In Cimarron’s case, it contracts with PBMs and requires PBMs to subcontract with pharmacists, who then provide services to Medicaid recipients on behalf of Cimarron. Though pharmacists do not contract directly with Cimarron, it is somewhat unclear from the record whether Cimarron, the PBMs, or both, truly exercise control over pharmacists. For instance, the contracts between Cimarron and PBMs impose a variety of conditions on pharmacists, while the contracts between PBMs and pharmacists provide that pharmacists will be paid by PBMs.

3Since the advent of managed care, Section 27-2-16(B) has been challenged twice in both the House and the Senate without success, once in 2002 and again in 2004. Both bills sought to restrict payments to pharmacists. See H.B. 400, 45th Leg., 2d Sess. (N.M. 2002) (not passed) (seeking to revise Section 27-2-16(B) by replacing the phrase “wholesale cost” with “lowest price available” and deleting the phrase “of at least three dollars sixty-five cents ($3.65)” (emphasis omitted)); see also S.B. 183, 46th Leg., 2d Sess. (N.M. 2004) (not passed) (seeking to declare “an emergency[,]” rewriting Section 27-2-16(B) to allow pharmaceutical payments to be set “by negotiation,” and by “regulations adopted by the [HSD]” (emphasis omitted)).
the lesser expensive drug plus an additional $3.65 for each transaction.

That began to change in 1994. At that time, the Legislature authorized HSD to transition from a fee-for-service to a managed care program and, in 1997, HSD implemented SALUD!, a managed care program, in which it entered into competitively bid contracts with the MCOs to provide care to Medicaid recipients. The contracts, known as Medicaid Managed Care Service (MMCS) Agreements required the MCOs to provide medical care and pharmacy services to all qualified Medicaid recipients. These contracts explicitly incorporated “[a]ll applicable statutes, regulations and rules implemented by the [f]ederal [g]overnment, the State of New Mexico . . . , and [HSD], concerning Medicaid services[.]” Shortly after the adoption of SALUD!, HSD notified pharmacists that, in order to continue to provide services under Medicaid, pharmacists would be required to contract with the MCOs instead of HSD. Under the new MCO-pharmacist contracts, pharmacists would be reimbursed by the MCOs at the “current and applicable Medicaid reimbursement rates” which, Plaintiffs alleged, had the potential to be significantly lower than the statutory reimbursement rates guaranteed by Section 27-2-16(B).

Yet, pharmacists wishing to participate in the program had no choice. Anyone who refused the new contracts would be “terminated from the active provider list” by HSD.

Under SALUD!, pharmaceutical costs were negotiated directly between HSD and the MCOs, and Plaintiffs allege that, under the new regime, the MCOs were sufficiently paid by HSD to comply with Section 27-2-16(B). Fearing that their rights under Section 27-2-16(B) would be waived by agreeing to contracts with the MCOs, Plaintiffs sued HSD and obtained a temporary restraining order from the district court. In essence, the district court gave HSD an ultimatum: either withdraw the requirement that pharmacists contract with the MCOs, or agree that the new contracts would not waive pharmacists’ right to sue pursuant to Section 27-2-16(B).

HSD chose the latter and, with other aspects of the litigation still pending against HSD, pharmacists entered into new contracts, either with the MCOs themselves or with the MCOs’ intermediary, the PBMs. Plaintiffs claim that the reimbursable amounts ultimately paid under these contracts were often substantially lower than the amounts required by Section 27-2-16(B). Likewise, they claim that HSD, by instituting this new regime, circumvented its obligations under the statute by using the MCOs as intermediaries.

Over HSD’s protests, Plaintiffs were certified as a class in October 1999. At that time, the MCOs had not yet been added as Defendants. In 2000, Plaintiffs moved for summary judgment, and the district court ruled that HSD was affirmatively required to comply with Section 27-2-16(B). It found that HSD could not “delegate or contract away” its responsibilities under the statute. Then, after winning on their summary judgment motion against HSD, Plaintiffs argued that the MCOs were indispensable parties. In October 2000, the district court allowed them to be added and held that, like HSD, the MCOs were required to comply with Section 27-2-16(B).

The MCOs attacked the class certification. They filed briefs asking the court to decertify the class and included a number of supporting exhibits. As a result, the district court allowed discovery into “whether the class should be decertified.” The MCOs never requested an evidentiary hearing on their motions, but oral arguments were heard in September 2002. After this second consideration of the class certification issue, the district court denied the MCOs’ motions to decertify the class and found that the requirements of Rule 1-023 NMRA continued to be met. The MCOs appealed to this Court pursuant to Rule 1-023(F). We refused to consider the merits of their claim and held that an appeal under Rule 1-023(F) was unavailable. See Starko I, 2005-NMCA-040, ¶¶ 2, 18 (discussing the applicability of Rule 1-023(F)).

It appears that such wrangling through the years has directly influenced the language of contracts between the parties. Most notably, contracts between HSD and the MCOs have taken several forms. The first contracts in 1997 simply required the MCOs to pay pharmacists in a manner consistent with “current and applicable . . . reimbursement rates.” Then, in 2001, following the district court’s order that HSD and the MCOs comply with Section 27-2-16(B), the contracts were changed to include what the parties now refer to as “the Starko Clause.” That language provides that “[i]f the subcontract for pharmacy providers shall include a payment provision consistent with [Section 27-2-16(B)] unless the subcontractor provides a voluntary waiver to any rights under” the statute. The contracts were again revised in 2005 when they took their current form. Those contracts alter the Starko Clause to require that “subcontracts for pharmacy providers shall include a payment provision consistent with [Section 27-2-16(B)] unless there is a change in law or regulation.” (Emphasis added.) We emphasize that Section 27-2-16(B) has not changed since 1984.

As these cases have progressed since the last appeal, three separate district court judges have issued a variety of orders. We review four.

First, in 2006, Presbyterian filed a motion for judgment on the pleadings. Following the hearing, the district court affirmed its earlier ruling that HSD’s affirmative duty to Plaintiffs under Section 27-2-16(B) was non-delegable. As such, any right of action under the statute would be most properly pursued against HSD, not the MCOs. Thus, the court held that any private right of action against the MCOs under the statute must fail. Likewise, the court held in favor of the MCOs on the issue of unjust enrichment. It found that Plaintiffs’ contracts with the MCOs provided an “adequate remedy at law” against the MCOs, which precluded a cause of action in equity.

Second, in 2007, Presbyterian filed a second motion for judgment on the pleadings, which CIMarron joined. Together, the MCOs sought rulings on Plaintiffs’ claim for breach of the contracts between the MCOs and HSD. Following argument, the district court held that the claims were unfounded because Plaintiffs were not intended third-party beneficiaries of the contracts between the MCOs and HSD. Further, the court found that a third-party beneficiary claim would not lie against the MCOs even if Plaintiffs had been intended beneficiaries. The district court reasoned that “[i]f [Plaintiffs] could show a cause of action against the MCOs on a third-party beneficiary theory, such a cause of action would be inconsistent with this Court’s previous ruling that Plaintiffs have no private right of action.”

Third, in 2008, Plaintiffs filed a motion for summary judgment on the issue of when Section 27-2-16(B) applies. The court entered partial summary judgment, stating that the statute only applies when a pharmacist actually substitutes a lower cost, therapeutic equivalent drug for the prescribed drug.

Fourth, in 2008, Plaintiffs submitted a motion for partial summary judgment on several issues with regard to their case against HSD. HSD responded with its own motion for summary judgment on the issues. The district court issued a

*The present appeal does not deal with any claims by Plaintiffs against the MCOs on breach of the contracts between Plaintiffs and the MCOs.*
memorandum opinion and order on the cross-motions for summary judgment. In it, the court held that (1) HSD had no obligation to pay Plaintiffs for the alleged shortfall, (2) HSD could not be held liable for past non-compliance with Section 27-2-16(B), (3) Plaintiffs did not have a breach of contract claim concerning HSD’s reduction of reimbursement without federal approval for a six-month period, and (4) the $3.65 dispensing fee was reasonable.

16 On appeal from these orders, Plaintiffs argue several points of error. First, they assert that Section 27-2-16(B) creates a private right of action enforceable against the MCOs and HSD. Furthermore, they argue the district court erroneously dismissed their claims for breach of contract, third-party beneficiary breach of contract theory, unjust enrichment, declaratory relief, and injunctive relief.

Against any extent to which we reverse any portion of the district court’s rulings in this matter, Cimarron asks us to consider its conditional cross-appeal. In it, Cimarron argues, first, that the district court’s class certification in this case was both constitutionally and statutorily defective and, second, presuming Section 27-2-16(B) confers any rights at all, those rights have been waived. II. STANDARD OF REVIEW

When reviewing judgments on the pleadings, we “accept as true all facts well pleaded and question only whether the plaintiffs might prevail under any state of facts provable under the claim.” Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A., 106 N.M. 757, 760, 750 P.2d 118, 121 (1988). All interpretations of law made by the district court are reviewed de novo. Klinkiesk v. Klinkiesk, 2005-NMCA-008, ¶ 4, 136 N.M. 693, 104 P.3d 559.

We review orders granting or denying summary judgment de novo. Romero v. Philip Morris Inc., 2010-NMSC-035, ¶ 7, 148 N.M. 713, 242 P.3d 280. “Summary judgment is proper when the material facts are undisputed and the only remaining issues are questions of law.” Farmers Ins. Co. of Ariz. v. Sandoval, 2011-NMCA-051, ¶ 6, 149 N.M. 654, 253 P.3d 944 (internal quotation marks and citation omitted).

We likewise apply a de novo standard when engaging in statutory interpretation. State v. Smith, 2009-NMCA-028, ¶ 8, 145 N.M. 757, 204 P.3d 1267; see Sedillo v. N.M. Dept. of Pub. Safety, 2007-NMCA-002, ¶ 7, 140 N.M. 858, 149 P.3d 955 (“The question of whether statutes create or imply a private right of action is a question of law . . . reviewed de novo.”). In doing so, we strive to effectuate the intent and policies of the Legislature, looking “first to the words chosen . . . and the plain meaning of the . . . language.” Smith, 2009-NMCA-028, ¶ 8 (internal quotation marks and citation omitted). When a statute’s language “is clear and unambiguous, we give effect to that language and refrain from further statutory interpretation.” Id. (internal quotation marks and citation omitted). Where ambiguity arises, we go outside the plain language and engage in further statutory interpretation. N.M. Bd. of Veterinary Med. v. Riegger, 2007-NMSC-044, ¶ 11, 142 N.M. 248, 164 P.3d 947. We “construe the entire statute . . . so that all . . . provisions [are] considered in relation to one another.” Id. (internal quotation marks and citation omitted). “In ascertaining legislative intent, we look not only to the language used in the statute, but also to the object sought to be accomplished and the wrong to be remedied.” Patterson v. Globe Am. Cas. Co., 101 N.M. 541, 543, 685 P.2d 396, 398 (Ct. App. 1984), superseded by statute on other grounds as stated in journal Publ’g Co. v. Am. Home Assurance Co., 771 F. Supp. 632, 635 (S.D.N.Y. 1991).

III. DISCUSSION

A. Plaintiffs Have Not Waived Claims Regarding Section 27-2-16(B)

21 As a threshold issue, Defendants assert that Plaintiffs waived any claim they had regarding Section 27-2-16(B). Specifically, the MCOs argue that because Plaintiffs have entered into contracts for an amount less than the requirement in Section 27-2-16(B), Plaintiffs have waived any cause of action based upon Section 27-2-16(B). The MCOs contend that the district court, when it concluded that no waiver occurred, violated the principle of freedom of contract. Citing United Wholesale Liquor Co. v. Brown-Forman Distillers Corp., 108 N.M. 467, 471, 775 P.2d 233, 237 (1989), Presbyterian supports its waiver argument with the principle that “[i]n the voluntary relinquishment of a statutory protection is consistent with our policy favoring the right to contract.” For reasons explained in this Opinion, we conclude that any semblance of a relinquishment was not voluntary in this case.

22 In addition, HSD argues that, in the provider agreements it made with Plaintiffs, Plaintiffs agreed “[t]o accept as payment in full the amounts paid in accordance with the reimbursement structure in effect for the period during which such services were provided as per 42 [C.F.R. §] 447.15.” The Medicaid Payment for Services Rule, 42 C.F.R. § 447.15, provides that participation in the Medicaid program is limited to providers that “accept, as payment in full, the amounts paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual.” Thus, HSD contends that Plaintiffs cannot seek additional payments from HSD under the fee-for-service program because “by agreeing to become Medicaid providers[, Plaintiffs] have agreed not to seek reimbursement from HSD beyond what is paid to them by HSD pursuant to its drug reimbursement regulations as then in effect.” HSD further argues that as to SALUD!, “HSD included a provision in the MMCS Agreements[ , stating that Plaintiffs] must accept payment from the MCO[s] as payment for any services included in the benefit package, and cannot request payment from HSD or from Medicaid members . . . for services performed under the subcontract.” (Internal quotation marks omitted.)

23 We disagree with the contentions of both the MCOs and HSD that Plaintiffs’ claims have been waived. In 1997, as stated above, Plaintiffs sought a temporary restraining order from the court to determine the effect of entering into new contracts with the MCOs. The court issued the order and required HSD to either allow Plaintiffs to refuse the new contracts, or agree that such contracts would not waive any rights under Section 27-2-16(B). HSD chose the latter, and Plaintiffs signed with the MCOs.

24 This Court has explained in the past, a valid waiver requires a known legal right, relinquished for consideration, where such legal right is intended for the waiver’s sole benefit and does not infringe on the rights of others. . . . In no case will a waiver be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby, unless, by his conduct, the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. Absent proof of an express agreement, in order to establish waiver[,] there must be a showing of unequivocal acts or conduct on the part of the person against whom waiver is asserted showing an intent to waive. McCurry v. McCurry, 117 N.M. 564, 567, 874 P.2d 25, 28 (Ct. App. 1994) (internal quotation marks and citations omitted). When we consider the actions taken by Plaintiffs to preserve their statutory rights through a court order and the change in
position chosen at the time by HSD, we do not see these contracts they entered into with Defendants as unequivocal acts showing an intent to waive statutory rights. [25] HSD’s argument that Plaintiffs contractually waived their right to seek further compensation from HSD is inconsistent with HSD’s agreement that Plaintiffs would not waive their statutory rights by engaging in contracts with the MCOs. Furthermore, entering into contracts with the MCOs can hardly be said to constitute an unequivocal intent to waive rights under Section 27-2-16(B), especially given Plaintiffs’ refusal to enter the contracts without HSD’s agreement and a court order that their rights would be preserved. Moreover, the contracts, which we discuss in further detail below, continue to require compliance with the Section 27-2-16(B) absent waiver or change of law.

[26] In addition, we will not imply waiver unless Defendants were misled by Plaintiffs’ conduct to their prejudice, while honestly believing that Plaintiffs actually intended to waive their rights. Brown v. Jimerson, 95 N.M. 191, 192-93, 619 P.2d 1235, 1236-37 (1980); see Ed Black’s Chevrolet Ctr., Inc. v. Melichar, 81 N.M. 602, 604, 471 P.2d 172, 174 (1970) (“In no case will a waiver be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby, unless, by his conduct, the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.”); see also Brown v. Taylor, 120 N.M. 302, 305, 901 P.2d 720, 723 (1995) (holding that a theory of implied waiver must be supported by evidence that the aggrieved party acted in reliance on the waiver to his detriment). Here, the MCOs have presented no evidence that they were misled by Plaintiffs or that they entered into these contracts in reliance on Plaintiffs’ alleged waiver. Neither has HSD demonstrated such reliance, and Plaintiffs have certainly demonstrated no such intent.

[27] Thus, we hold that the district court was correct when it concluded that Plaintiffs did not waive their rights under Section 27-2-16(B). We also note that the case before us involves a unique set of facts and, as the district court stated, “[n]one of the cases cited by [the MCOs] . . . deals with this unique situation in which a [s]rate program and [s]rate actors, who themselves must comply with the statute, can, by their own contracts with third parties, allow the statute to be ignored or violated.” Having determined that Plaintiffs did not waive their right to sue under the statute itself or under contracts that incorporated the statute, we now discuss Section 27-2-16(B)’s role in the Medicaid program.

B. Section 27-2-16(B)

[28] New Mexico’s Medicaid program falls under the Public Assistance Act. See NMSA 1978, §§ 27-2-1 to -34 (1972, as amended through 2007). Under the Act, the HSD is charged with administering Medicaid and maintaining a “statewide, managed care system to provide cost-efficient, preventive, primary and acute care for [M]edicaid recipients.” Section 27-2-12.6(A). In administering the Medicaid program, HSD must ensure that recipients are provided prescription medication. Section 27-2-12.11. Section 27-2-16(B) provides that “[i]f drug product selection is permitted by Section 26-3-3 . . . , reimbursement by the [M]edicaid program shall be limited to the wholesale cost of the less expensive[,] therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars sixty-five cents ($3.65).” Titled “Compliance with federal law[,]” Section 27-2-16(B) most clearly effectuates the federal requirement that state medical assistance plans provide such methods and procedures . . . as may be necessary to . . . assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area[,]” 42 U.S.C. § 1396a(a)(30)(A) (1999, as amended through 2010) (emphasis added).

Indeed, as Presbyterian recognizes in its answer brief, the statute is a response to Section 1396a(a)(30)(A) and seeks “a balance between paying providers enough to assure patient accessibility and keeping Medicaid expenditures as low as possible.”

1. Section 27-2-16(B) Survived the Transition to Managed Care

[29] The MCOs argue that Section 27-2-16(B) did not survive New Mexico’s transition to managed care. Even if it did, they claim the statute does not provide a remedy and is therefore unenforceable. As to whether Section 27-2-16(B) survived the transition to managed care, the most apparent manifestation of our Legislature’s intent to pay Plaintiffs for their stock and labor is the inescapable fact that the statute, setting the requirements for doing so, remains on the statute books despite the 2002 and 2004 attempts to change it. The requirement was first enacted in 1974 and has existed in its current form since 1984, predating the advent of managed care in New Mexico by more than a decade and surviving more than a decade past. See § 27-2-16(B); § 27-2-12.6(A). Yet, the MCOs argue that the requirement is inconsistent with managed care as implemented in 1997 because it sets an absolute amount for payment; whereas, managed care is premised upon periodic renegotiations between the MCOs and their subcontractors.

[30] The MCOs fail to demonstrate that the Legislature intended for Section 27-2-16(B) to be superseded by managed care. The Legislature twice rejected amendments that specifically would have either lowered payments or required periodic renegotiation. See H.B. 400, 45th Leg., 2d Sess. (N.M. 2002) (not passed); S.B. 183, 46th Leg., 2d Sess. (N.M. 2004) (not passed). It seems that the evidence is clearly contrary to the MCOs’ argument.

[31] Nor are we persuaded by Cimarron’s argument that the statute’s very language demonstrates its inapplicability to managed care. Essentially, Cimarron claims that because Section 27-2-16(B) requires “reimbursement by the [M]edicaid program[,]” it cannot apply to them because they are not the Medicaid program. Cimarron’s brief assumes that the Medicaid program is another way of saying “New Mexico Human Services Department.” In conjunction with this argument, Presbyterian contends that nowhere do Plaintiffs cite case law standing for the proposition that when a statute imposes a non-delegable duty on a government agency, any implied right of action by the aggrieved party against that agency includes a right to sue other entities with which the agency has a contractual or regulatory relationship.

[32] These arguments are misplaced. We agree with the district court’s holding that the MCOs “are not [health plans], and they are not third[-]party insurers. Rather, they are part of the Medicaid program.” The Medicaid program begins at the government level, upstream of the MCOs, and continues through the provision of care and services to recipients downstream of the MCOs. Had our Legislature intended reimbursements to come directly and only from HSD, it could have easily used the term “department” in Section 27-2-16(B). See § 27-2-2(A) (defining “department” as the “[H]uman [S]ervices [D]epartment”). Rather, the Legislature chose a broader term, “Medicaid program,” which we interpret to encompass the entire Medicaid apparatus by which patients are served by Medicaid funds through
HSD’s agents. In other words, the statute tells pharmacists that, under a certain set of circumstances by legislative enactment, the money appropriated by the state and federal government and passed through several layers of bureaucracy, agents, and contractors will be paid to them in a predetermined manner on which they may rely. This is true regardless of whether the program operates under fee-for-service, managed care, or some other method. Under managed care, the MCOs were contracted by HSD to be the conduits for Medicaid funds, succeeding HSD itself. We hold that the statute applies to the MCOs and the managed care program regardless of additional layers of bureaucracy and administrative control.

2. Section 27-2-16(B) Creates a Private Right of Enforcement

[33] Plaintiffs contend that the district court erred in finding that there was no implied private cause of action under Section 27-2-16(B). When a party seeks to enforce a statute that provides no express mechanism for its enforcement, we examine whether a cause of action may be implied through the common law based on an interpretation of legislative intent or public policy. Nat’l Trust for Historic Pres. v. City of Albuquerque, 117 N.M. 590, 874 P.2d 798, 802 (Ct. App. 1994); see Hovet v. Allstate Ins. Co., 2004-NMSC-010, ¶ 9-10, 135 N.M. 397, 89 P.3d 69 (holding that legislative intent and public policy supported the conclusion that third parties may bring a cause of action against insurers for unfair practices where the statute at issue provided a cause of action generally). “[A] state court, because it possesses common-law authority, has significantly greater power than a federal court to recognize a cause of action not explicitly expressed in a statute.” Nat’l Trust, 117 N.M. at 593, 874 P.2d at 801. In determining whether to recognize whether there is a cause of action, we examine three non-exclusive factors: “(1) Was the statute enacted for the special benefit of a class of which the plaintiff is a member?; (2) Is there any indication of legislative intent, explicit or implicit, to create or deny a private remedy; and (3) Would a private remedy either frustrate or assist the underlying purpose of the legislative scheme?” Nat’l Trust, 117 N.M. at 593, 874 P.2d at 801. In addition, “[a] state’s public policy, independent of [these] factors, may be determinative in deciding whether to recognize a cause of action.” Id. at 594, 874 P.2d at 802.

a. Implied Cause of Action Based Upon Legislative Intent

[34] First, we address the three factors that may contribute to the recognition of a private cause of action based upon legislative intent. We first analyze whether the statute was enacted for the special benefit of a class of which Plaintiffs are members. Section 27-2-16(B) states that, “[i]f drug product selection is permitted . . . , reimbursement by the Medicaid program shall be limited to the wholesale cost of the lesser expensive[,] therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars sixty-five cents ($3.65).” Section 27-2-16(B) benefits individuals or entities that dispense drugs to Medicaid participants, ensuring that each receives a reasonable dispensing fee and payment for the drug dispensed. Plaintiffs, being pharmacists, clearly fall within a class sought to be benefited by the statute.

[35] Next, we examine whether there is any indication in the statute of legislative intent, explicit or implicit, to create or deny a private remedy. “The guiding principle of statutory construction is that a statute should be interpreted in a manner consistent with legislative intent. . . . [W]e look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied.” Hovet, 2004-NMSC-010, ¶ 10. Here, we utilize factors developed by the United States Supreme Court in evaluating legislative intent, including (1) whether the statute contains “rights-creating language”; (2) whether it has an “aggregate, not individual, focus”; and (3) the purpose of the statute. Gonzaga Univ. v. Doe, 536 U.S. 273, 284, 290 (2002); see Blessing v. Freestone, 520 U.S. 329, 340-41 (1997); Nat’l Trust, 117 N.M. at 593, 874 P.2d at 801. The Supreme Court typically applies these questions regarding legislative intent within the context of a § 1983 action. However, this particular legislative intent inquiry is the same in our context because, in both situations, a court has the task of analyzing whether the Legislature intended to create or deny a private remedy.

[36] In Gonzaga University, the Supreme Court held that the Family Educational Rights and Privacy Act’s (FERPA) nondisclosure provisions failed to confer enforceable rights as the provisions “entirely lack the sort of ‘rights-creating’ language critical to showing the requisite congressional intent to create new rights.” 536 U.S. at 287. There, a student sought to sue the university by bringing a § 1983 action for violating non-disclosure provisions of FERPA that prohibited federal funding of educational institutions that had a policy or practice of releasing education records to unauthorized persons. Gonzaga Univ., 536 U.S. at 276-77. The Supreme Court concluded that the provisions were only addressed to the Secretary of Education to direct the expenditure of funds and that the statute did not address “the interests of individual students and parents.” Id at 287. The Supreme Court also determined that “FERPA’s non[-]disclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure. Therefore, . . . they have an ‘aggregate’ focus, they are not concerned with whether the needs of any particular person have been satisfied, and they cannot give rise to individual rights[,]” Id. at 288 (internal quotation marks and citations omitted). Thus, the Gonzaga University Court held that the student did not have a private cause of action under FERPA. Id. at 290.

[37] In contrast, the United States Supreme Court held that there was legislative intent to create a private cause of action under the Boren Amendment. Wilder v. Va. Hosp. Ass’n, 496 U.S. 498, 512 (1990). There, an association of hospitals brought a § 1983 action, challenging the administration of the state’s Medicaid program on the ground that it violated the Boren Amendment. Wilder, 496 U.S. at 501-02. The Boren Amendment required states to reimburse Medicaid providers in an amount that was “reasonable and adequate” to meet the costs “incurred by efficiently and economically operated facilities.” Id. (internal quotation marks and citation omitted). The Supreme Court concluded that the Boren Amendment created a substantive right for health care providers in reasonable and adequate reimbursement rates. Id. at 509-10. The Supreme Court explained:

There can be little doubt that health care providers are the intended beneficiaries of the Boren Amendment. The provision establishes a system for reimbursement of providers and is phrased in terms benefiting health care providers: It requires a state plan...
to provide for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan.

Id. at 510 (internal quotation marks and citation omitted). The Supreme Court concluded that this right was enforceable because the Boren Amendment was cast in mandatory, rather than preemptory, terms since it required the state to "provide for payment . . . of hospital[s] according to rates the [s]tate finds are reasonable and adequate." Id. at 512 (first alteration in original). The Court described this language as a "congressional command, . . . wholly uncharacteristic of a mere suggestion or nudge" and held that the hospital association had a right to bring the action. Id. (internal quotation marks and citation omitted).

The case at bar more resembles Wilder rather than Gonzaga University, and the facts here, as in Wilder, weigh in favor of finding legislative intent to create a private cause of action under Section 27-2-16(B). The present case and Wilder deal with mandatory reasonable reimbursement of Medicaid providers. Like the statute in Wilder, Section 27-2-16(B)'s language is mandatory, stating that "[i]f drug product selection is permitted by the Medicaid program it shall be removed except for cause." (internal quotation marks and citation omitted).

The purpose of Section 27-2-16(B) is to set a reasonable rate of reimbursement for Medicaid providers as part of a larger legislative scheme dealing with the administration of Medicaid in New Mexico. This statute requires the appropriate reimbursement of Medicaid providers and also confers a protected property right. Unlike other statutes within this legislative scheme dealing with payments to providers, the Legislature never repealed or exempted the MCOs from Section 27-2-16(B) following the Medicaid program's transition into managed care. Thus, we conclude that providing a private remedy would assist and further the underlying purpose of the legislative scheme.

For the reasons we have discussed, we hold that the Legislature intended to provide an implied cause of action under the statute.

b. Application of the Private Cause of Action to the Parties

As explained above, Section 27-2-16(B) creates an implied private cause of action. Plaintiffs may seek their remedy directly from the MCOs because the MCOs are part and parcel with the Medicaid program and a conduit for all of the state's Medicaid managed care funding.

In addition, Plaintiffs argue on appeal that "the district court erred in concluding that [Section] 27-2-16(B) [did] not create a private right of action against [HSD]." Yet, the district court never made a ruling in its memorandum opinion on the issue of whether HSD can be subject to the private cause of action derived from Section 27-2-16(B). After reviewing Plaintiffs’ motion for summary judgment on the pleadings as to HSD, we are unable to locate any argument regarding an implied cause of action against HSD. Moreover, Plaintiffs fail to provide citation to an argument in the motions regarding the implied cause of action. Instead, they argue that the issue was preserved because "the district court explicitly relied on its prior rulings [that Section 27-2-16(B) did not create a private cause of action] in granting [HSD]'s motions for summary judgment." We are unpersuaded.

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We agree with Plaintiffs that the plain language requires that the dispensing fee apply whenever a substitution of a lesser expensive, therapeutic equivalent drug can be made, not only when it is actually made. In analyzing how to apply Section 27-2-16(B), we give effect to the statute's clear and unambiguous language. Smith, 2009-NMCA-028, ¶ 8. We will not read into a statute "language which is not there, especially when it makes sense as it is written." Reule San Corp. v. Valles, 2010-NMSC-004, ¶ 15, 147 N.M. 512, 226 P.3d 611 (internal quotation marks and citation omitted). In addition, "the practical implications, as well as the statute's object and purpose are considered." Id.

Before we begin our analysis, we reiterate that Section 27-2-16(B) states that "[i]f drug product selection is permitted by Section 26-3-3 . . . , reimbursement by the Medicaid program shall be limited to the wholesale cost of the lesser expensive[,] therapeutic equivalent drug generally available in New Mexico plus a reasonable dispensing fee of at least three dollars sixty-five cents ($3.65)." Section 27-2-16(B). As explained previously, reimbursement according to this statute is mandatory because of the Legislature's use of "shall." We now address when and how Section 27-2-16(B) would be applicable.

The crucial phrase of the statute is "[i]f drug product selection is permitted by Section 26-3-3." Section 27-2-16(B) (emphasis added). Here, the plain language conditions the applicability of the statute on whether drug product selection is allowed. This precondition must be fulfilled before the Medicaid program is required to pay the reasonable dispensing fee and AWP of the lesser expensive drug. The statute specifies that it applies when the substitution is "permitted" and does not require the substitution to actually occur. If the Legislature wanted to condition the applicability of this payment scheme on the dispensing of the lesser expensive, therapeutic equivalent drug, it would have included those terms within the statute.

Furthermore, this reading of the statute is consistent with the practical implications, objective, and purpose of Section 27-2-16(B). As HSD asserts, "[t]he Legislature intended this section to save money to the purchaser of prescription drugs regardless of whether the purchaser is an individual or the Medicaid program." This statute seems to proceed from the federal mandate that New Mexico's Medicaid system should spend its money as wisely as possible. Thus, when a lesser expensive, therapeutic equivalent drug is available, the government should not pay for a more expensive one. The program seeks to save money by limiting reimbursement to the wholesale cost of the lesser expensive drug, while paying pharmacists a predetermined "reasonable dispensing fee." Section 27-2-16(B). This reading promotes consistency and predictability. It also gives an incentive to pharmacists to save the Medicaid program money by refusing to dispense name brand drugs when lesser expensive, therapeutic equivalent drugs are available. Our reading also comports best with the statute's title, "Compliance with federal law[,]" by ensuring that payments to Medicaid pharmacists are "consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available." 42 U.S.C. § 1396a(a)(30)(A).

In contrast, the district court's interpretation of Section 27-2-16(B) limits the statute's application to those instances where there is actual proof that the drug dispensed differed from the original prescription. HSD supports the district court's conclusion with an argument based upon Section 26-3-3, which provides the circumstances under which a prescription can be filled with a lesser expensive, therapeutic equivalent drug. HSD argues that the district court's interpretation is correct because "[t]hat is precisely what [Section] 26-3-3 requires[,]" HSD goes on to discuss the requirements of Section 26-3-3, not just the types of permissible substitution, but also what a pharmacist must do when dispensing the lesser expensive, therapeutic equivalent drug under Subsection (D) of Section 26-3-3. HSD contends that because "[t]he Legislature required that the proof of product selection appear on the label of the drug dispensed [under Subsection D]," there must be proof that the substitution occurred for Section 27-2-16(B) to apply.

HSD places too much emphasis on the role of Section 26-3-3 in interpreting Section 27-2-16(B), essentially contending that every aspect of Section 26-3-3 must be fulfilled and a lesser expensive, therapeutic equivalent drug issued in accordance with it for Section 27-2-16(B) to apply. This is not the case. Section 27-2-16(B) only requires that "drug product selection [be] permitted by Section 26-3-3" for the statute to apply. Section 26-3-3(A) and (B) set forth the two instances where a pharmacist may dispense a lesser expensive, therapeutic equivalent drug: (1) when "the drug[ . . . ] satisfies the conditions set forth in subsection B . . . ." Section 26-3-3(B) and (2) when the drug "is . . . otherwise prescribed by the patient's physician." Section 26-3-3(A).
when the “drug . . . appears on the [F]ederal [F]ood and [D]rug [A]dministra-
tion’s approved prescription drug products with therapeutic equivalence evaluation list as supplemented[.]” Section 26-3-3(C) explicitly states that “[d]rug product selection shall be permitted only under circumstances and conditions set forth in Subsections A and B of this section[.]” Therefore, if the prescribed drug falls under one of the two categories stated in Section 26-3-3(A) and (B), then the drug product selection is permissible and the pharmacists must be reimbursed with the AWP of the equivalent drug plus a reasonable dispensing fee. Whether the drug label includes the fact that a substitution has occurred is not relevant to the criteria for determining whether a substitution is permissible.  

Furthermore, Plaintiffs assert that “the district court's decision does not adequately take into account that drug product selection occurs not only in the case of brand[] name/generic substitution, but also in the case of choosing among non-pioneer versions of multiple source drugs.” Plaintiffs contend that there are three reasons for which this distinction must be accounted, all of which are related to the FDA distinguishing between multiple source drugs as separate and unique drugs with or without the same active ingredients. We do not see that the district court ruled that Section 27-2-16(B) only applied when generic drugs were substituted for brand name drugs. As stated above, the district court held that the statute “applies whenever a pharmacist dispenses a multiple source drug to a Medicaid recipient at a lower cost than the drug listed in the prescription; and . . . whenever a pharmacist dispenses a [therapeutic] equivalent drug to a Medicaid recipient which is lower in cost than the drug listed in the prescription.”  

The district court appears to draw no distinction between substitutions where the prescribed drug is a brand name drug and substitutions where the prescribed drug is a multiple source generic version. Based upon the plain language of the statute, we hold that the statute requires no distinction between prescribed drugs that are generic and those that are brand name, as long as the pharmacist is authorized to use his or her discretion to dispense a lesser expensive drug than the prescribed drug, and the substitution meets the requirements set out in Section 26-3-3(A) and (B).  

Thus, we reverse the district court’s determination that Section 27-2-16(B) applies only when a substitution actually occurs. Moreover, Section 27-2-16(B) applies to both brand name and generic prescribed drugs, so long as a substitution of a lesser expensive, therapeutic equivalent drug would be permissible. We therefore hold that Section 27-2-16(B) applies whenever a pharmacist may use his or her discretion to issue a lesser expensive drug that is the therapeutic equivalent to the prescribed drug even if that substitution does not occur.

4. Amount of Payment Required by Section 27-2-16(B)—The District Court Failed to Determine Whether $3.65 Was a Reasonable Dispensing Fee

Plaintiffs appeal the district court’s finding that a base dispensing fee of $3.65 is reasonable, arguing that there are contested issues of material fact with regard to the reasonableness of the dispensing fee. Reasonableness is a question of fact when the court is required to weigh evidence. Rio Grande Kennel Club v. City of Albuquerque, 2008-NMCA-093, ¶ 18, 144 N.M. 636, 190 P.3d 1131 (“The issue regarding the reasonableness of [a statute's license and permit] fees presented a question of fact requiring the district court to weigh evidence. . . . Facts may exist to prove that the fee provisions in [the statute] are excessive or unreasonable with respect to the cost of regulation.”).  

In granting HSD’s motion for summary judgment, the district court based its holding that $3.65 was a reasonable dispensing fee on two grounds. First, it gave deference to HSD’s interpretation of Section 27-2-16(B). Second, the court stated that Plaintiffs did not provide the court with “any information that would cast doubt on [HSD’s] assertion . . . that the amount New Mexico pays its providers is higher than that paid by private insurers in the private sector [to pharmacists] in New Mexico.”  

Plaintiffs contend that they presented evidence below that created a dispute regarding the reasonableness of the $3.65 dispensing fee, a material fact. First, Plaintiffs argue that the numerous studies they presented about dispensing costs demonstrated that those costs exceeded $3.65. Second, Plaintiffs assert that the reasonableness of the $3.65 fee is questionable because there is evidence that HSD paid Medicaid pharmacists a dispensing fee of $4.00 between 1991 and 2002. Third, Plaintiffs contend that the reasonableness of the dispensing fee is put into question by the former Director of the Medical Assistance Division’s admission that the $3.65 dispensing fee was well below the average pharmacy’s dispensing cost. We agree with Plaintiffs and conclude that this information bears on the reasonableness of the fee as it would inform and influence the fact finder’s decision.  

Further, HSD directs this Court to other information that raises additional factual questions regarding the reasonableness of a $3.65 dispensing fee. HSD asserts that “the actual cost to dispense prescription drugs varies dramatically with the volume of the dispensing pharmacy. . . . [Some smaller pharmacies] count[] out pills by hand[,] while large pharmacies have machines that can do it faster [and] have non-pharmacist technicians to fill prescriptions who get paid less than a licensed pharmacist.” Thus, a base fee of $3.65 may be reasonable for larger pharmacies, where it may not be reasonable for smaller pharmacies.  

Moreover, HSD’s contention that the $3.65 dispensing fee is greater than that paid in the private health insurance sector is not determinative of reasonableness itself and raises further factual questions. We do not know how the private sector reimburses pharmacists for the ingredient cost of the drug, or whether they reimburse for more or less than the AWP. Thus, the Medicaid program does. HSD even admits in its reply brief regarding this motion for summary judgment that dispensing fees can vary greatly, depending upon how much the pharmacists are reimbursed for the drug ingredient costs. In that brief, HSD argued that “New Mexico’s dispensing fee is reasonable when compared with the fees paid under Medicaid by other [s]tates . . . Other [s]tates pay a dispensing fee ranging from $2.00 to more than $10.” HSD then explained that “some [s]tates with a higher dispensing fee pay a lower ingredient cost.” Thus, the standard insurance companies use to reimburse for the ingredient cost plays a significant role in how much the companies will then reimburse for the dispensing fee. We are not provided with information regarding how the private sector reimburses pharmacists for the ingredient cost. Without such information, we will not assume that the private sector’s ingredient cost reimbursement schemes are similar to Medicaid’s.  

Because the district court was required to weigh the evidence regarding this issue, we hold that reasonableness of the dispensing fee was a question of fact in this case. Facts exist in the record that may prove that the $3.65 fee was unreasonable. Thus, summary judgment on the reasonableness of the dispensing fee was inappropriate. We remand for a factual determination about what a reasonable dispensing fee is for each pharmacy.
C. The District Court Properly Dismissed Plaintiffs’ Claim Regarding HSD’s Reduction of Reimbursement Without Federal Approval During a Six-Month Gap Period

[62] Plaintiffs argue that the district court erred in denying their motion for summary judgment on HSD’s violation of Section 27-2-16(B) for failure to reimburse Plaintiffs in accordance with Medicaid legislation for the drug ingredient costs. From January 1, 1991 through June 30, 1997, HSD reimbursed fee-for-service Medicaid pharmacy providers for drug ingredient costs at the rate of the AWP, minus ten and one-half percent. HSD’s regulations were amended, effective and implemented on June 30, 1997, reducing the ingredient cost to the AWP, minus twelve and one-half percent. Federal approval of the reduction was given by the Federal Health Care Financing Agency in accordance with Medicaid legislation for the ingredient cost to the AWP, minus ten and one-half percent. Federal approval of the reduction was given by HSD due to the reduction during the six-month gap between when the reduction was implemented by HSD (July 1, 1997) and when federal approval was given (January 1, 1998).

[63] Although all parties agree that approval is necessary, they disagree about whether approval can be retroactive. Plaintiffs contend that “they are entitled to this amount because Defendants did not have approval for the rate change when they began to reimburse at the new amount.” HSD argues that retroactive approval is sufficient. The district court held that HSD was not liable for implementing an amendment to the state Medicaid program prior to approval by the federal government. We affirm the district court’s ruling and hold that retroactive approval is sufficient.

[64] Two federal statutes of the Social Security Act provide guidance in this matter. Under Title XIX of the Social Security Act, 42 U.S.C. § 1396-1 (1984), “[t]he sums made available under [Medicaid legislation] shall be used for making payments to [s]tate agencies for [s]tate plans for medical assistance.” Furthermore, under 42 U.S.C. § 1396c (1965), “[i]f the Secretary, after reasonable notice and opportunity for hearing to the [s]tate agency administering or supervising the administration of the [s]tate plan approved under this subchapter, finds—

(1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision; the Secretary shall notify such [s]tate agency that further payments will not be made to the [s]tate (or, in his discretion, that payments will be limited to categories under or parts of the [s]tate plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such [s]tate (or shall limit payments to categories under or parts of the [s]tate plan not affected by such failure).

[65] The statutes quoted above are the current versions of the Act. Prior to 1981, the Act contained different language that required preapproval of state plans before they were implemented. Specifically, 42 U.S.C. § 1396a(a)(13)(D) (1980) required that the state Medicaid program provide “for payment of the reasonable cost of inpatient hospital services provided under the plan, as determined in accordance with methods and standards . . . which shall be developed by the state and reviewed and approved by the Secretary, and (after notice of approval by the Secretary) included in the plan[].” Magee-Womens Hosp. v. Heckler, 562 F. Supp. 483, 485 (W.D. Pa. 1983) (citing 42 U.S.C. § 1396a(a)(13)(D) (internal quotation marks omitted)). This previous version of the Act required that the state obtain notice of approval from the Secretary before the changes were included in the state’s Medicaid program. The amended statutes in place today do not facially require prior approval. The absence of such language in the amended version of Title XIX is compelling evidence that Congress intended to abandon the requirement of prior approval.

[66] Furthermore, as the district court highlighted in its memorandum opinion, persuasive case law supports this position. In Charleston Mem’l Hosp. v. Conrad, 693 F.2d 324, 325-26 (4th Cir. 1982), the plaintiff argued that the state illegally implemented reductions in Medicaid coverage because implementation took place before the federal government approved the changes. After analyzing 42 U.S.C. § 1396 (1974), the court held for the defendants, stating that the Act does not require prior approval. The court reasoned that “[t]he Act does not expressly provide that a plan may not be modified without prior approval by the Secretary. Congress easily could have given the Secretary such approval authority. Instead, the Secretary is authorized only to impose sanctions when modifications do not comport with the Act.” Charleston Mem’l Hosp., 693 F.2d at 332-33. Similarly, in Jennings v. Alexander, 518 F. Supp. 877 (M.D. Tenn. 1981), Medicaid recipients sued to enjoin the state’s reduction of funding for inpatient hospital care. In addressing the plaintiffs’ argument that the reduction was invalid without prior approval of the Secretary, the court held that prior approval was unnecessary. Id. at 888. “Such a requirement [of prior approval] would effectively hamstring the ability of state administrators to respond to changing demands on the Medicaid program or to respond to fiscal crises such as the one currently facing the [s]tate.” Id.

The Jennings court also reasoned that the prior approval requirement would be inconsistent with 42 U.S.C. § 1396c, which, as explained above, requires the Secretary to review state Medicaid programs and changes to such plans and to cut off federal payments to the state when its plan fails to comply with federal law. Jennings, 518 F. Supp. at 888; see Ill. Council on Long Term Care v. Miller, 579 F. Supp. 1140, 1147 (N.D. Ill. 1983) (“This court holds . . . that implementation of the state’s amendment to its reimbursement plan before acceptance by the Secretary was not in violation of federal law.”). We agree with the above holdings. Statutory construction of the Act reveals that preapproval is not required, and such a requirement would weaken New Mexico’s ability to react to fiscal exigencies.

[67] Plaintiffs cite two cases in support of their appeal of this issue: AMISUB (PSL), Inc. v. Colorado Dept. of Soc. Servs., 879 F.2d 789 (10th Cir. 1989) and Oregon As’n. of Homes for Aging, Inc. v. Oregon, 5 F.3d 1239 (9th Cir. 1993). In AMISUB, the court held that when the state amended its Medicaid inpatient reimbursement rates, such an amendment was void because it violated procedural and substantive requirements of the Federal Medicaid Act. 879 F.2d at 801. However, the violations at issue had nothing to do with implementing reimbursement rates without prior authorization. Id. Likewise, Oregon As’n. does not deal with an amended plan submitted for HCFA approval. 5 F.3d at 1241. There, nursing homes challenged the state’s recategorization of nursing services into rate categories, causing the nursing homes to receive less reimbursement from the Medicaid program. Id. at 1240. The court found that “[a] law that effects
a change in payment methods or standards without HCFA approval is invalid.” Id. at 1241. Nonetheless, the state in that case never submitted an amendment to HCFA for approval even after the reclassification of nursing services was implemented. Because neither of these cases deals with the issue of implementing changes in reimbursement prior to HCFA approval, we do not find them persuasive.

[68] We agree with the district court that “[t]he cases cited by Defendants [in their motion], the fact that prior approval would hamstring [s]tate officials trying to anticipate . . . and react to changing demands on the Medicaid program, as well as the history of the statute[,] make a strong case against prior approval.” Thus, we affirm the district court’s holding that Plaintiffs do not have a cause of action against HSD for reimbursement during the period the amendment to the Medicaid payment structure was not yet approved.

D. Plaintiffs May Bring a Breach of Contract Claim Against HSD Under the Provider Agreements

[69] Before the Medicaid program in New Mexico transitioned to managed care, Plaintiffs signed provider agreements with HSD “in order to qualify for reimbursement from the Medicaid program.” Through the agreements, HSD required providers to agree to terms regarding record keeping, payment, compliance with state and federal law, reimbursement by third parties, and other issues. Plaintiffs argue that the district court improperly held that no obligation could arise from Plaintiffs’ provider contracts that incorporate the guarantees of Section 27-2-16(B). Plaintiffs contend that the provider agreements expressly and impliedly require [HSD] to pay any shortfall in pharmacist reimbursement and create an actionable claim against [HSD] for the shortfall arising out of the MCOs’ failure to abide by Section 27-2-16(B). Plaintiffs argue that, under this agreement, HSD should have ensured that Plaintiffs were paid in accordance with Section 27-2-16(B) and, by failing to do so, they breached the provider contracts.

[71] We reiterate here, applying the same reasoning as we did above, that the MCOs are part of the Medicaid program. They are not third-party insurers or health plans when they pay providers for the services and drugs provided to Medicaid participants. In this context, they are conduits for Medicaid funds. Thus, we hold that Plaintiffs’ contention that HSD is responsible for the difference under the “Third[-]Party Liability” section of the provider agreements lacks merit. Thus, the district court properly dismissed the contract claim on this ground.

[72] Second, Plaintiffs argue that the provider agreements incorporate Section 27-2-16(B) because all relevant statutes are incorporated into contracts. Plaintiffs argue that, under this agreement, HSD should have ensured that Plaintiffs were paid in accordance with Section 27-2-16(B) and, by failing to do so, they breached the provider contracts.

[73] “A contract incorporates the relevant law, whether or not it is referred to in the agreement.” State ex rel. Uddall v. Colonial Penn Ins. Co., 112 N.M. 123, 130, 812 P.2d 777, 784 (1991); Durham v. So. Developers Joint Venture, 2000-NMCA-010, ¶ 18, 128 N.M. 648, 996 P.2d 911 (“The provisions of applicable statutes are part of every contractual commitment.”). We agree that the provider agreements incorporated Section 27-2-16(B) as the statute is relevant and applicable to the contractual commitments involved in the provider agreements, namely, Plaintiffs’ commitment to provide services and HSD’s commitment to reimburse Plaintiffs. Moreover, the provider agreements specifically reference New Mexico’s Medicaid payment structure in the section titled “Payment in Full,” stating that the providers agree to “accept as payment in full the amounts paid in accordance with the reimbursement structure in effect for the period during which such services were provided as per 42 C.F.R. 447.15.” There is no doubt that Section 27-2-16(B), as an integral part of the state’s Medicaid payment structure for pharmacists, was incorporated into the contracts. Thus, Section 27-2-16(B)’s requirement that pharmacists be reimbursed with the AWP, plus a reasonable dispensing fee when the pharmacist dispenses a lesser expensive, therapeutic equivalent drug, is a term of the provider agreements with which HSD must abide.

[74] HSD argues that Plaintiffs do not have a right to sue for further reimbursement under this contract because of the above quoted section in the agreements titled, “Payment in Full.” HSD contends that this term of the contract waives any right to sue for further reimbursement because Plaintiffs promised to “accept as payment in full the amounts paid in accordance with the reimbursement structure in effect for the period during which such services were provided as per 42 C.F.R. 447.15.” HSD argues that, under 42 C.F.R. 447.15, the Medicaid program must be “limited to providers who agree to accept as payment in full the amounts paid by the agency.” HSD construes this to mean that providers may not seek further reimbursement or additional payments from the state even when HSD fails to pay providers for their services with the amount required by state statute.

[75] This is not the meaning of this clause of the contract. If it were, HSD could pay providers nominal fees for their services, and the providers would have no recourse. Plaintiffs entered into the provider agreements, agreeing to accept as payment in full “amounts paid in accordance with the reimbursement structure in effect.” They did not agree to accept amounts less than that provided by statute as payment in full. If Plaintiffs were paid in accordance with the reimbursement structure in effect—Section 27-2-16(B)—we would agree that they could not sue under this contract. As Plaintiffs contend that they were paid less than the minimum $3.65 dispensing fee for Section 27-2-16(B)’s applicable prescriptions, we conclude that Plaintiffs have a right to sue for the deficiency.

[76] HSD further argues the MMCS agreements between HSD and the MCOs included a provision that exempts the state from liability for shortfalls in payments made by the MCOs to Plaintiffs. This provision states that “[t]he subcontractor must accept payment from the MCO as payment for any services included in the benefit package, and cannot request payment from HSD or from Medicaid members . . . for services performed under the subcontract.” HSD argues that “[t]his provision was to be incorporated in all contracts between the MCOs and their subcontractors. . . . Thus, [Plaintiffs] have independently contracted away any claim they might have for additional reimbursement by HSD.” We disagree with HSD’s waiver argument. Pursuant to the district court’s order requiring
HSD to agree that Plaintiffs did not waive their rights by agreeing to participate in managed care. Plaintiffs have not waived their rights under provider agreements by contracting to participate and participating in managed care.

[77] Last, HSD opposes Plaintiffs’ argument on the ground that Plaintiffs admitted in their fourth amended complaint that the provider agreements only apply to fee-for-service transactions and not to managed care. The paragraph HSD references in Plaintiffs’ fourth amended complaint states that “HSD has entered into contracts with . . . Plaintiffs and the Class for the provision of Medicaid pharmaceutical services on behalf of . . . HSD in the fee-for-service portion of the Medicaid program that HSD administers.” We do not see how this historical explanation of the provider agreements’ purpose amounts to an admission that the contracts only apply to fee-for-service Medicaid reimbursements.

The provider agreements were signed during the period in which HSD only reimbursed providers in accordance with the fee-for-service reimbursement plan, prior to the implementation of managed care. Such information was relevant to their complaint. Furthermore, the provider agreements explicitly state that assent by providers is a precondition to any reimbursement by the Medicaid program whatsoever. The final clause of the contracts states the provider agreements must be signed as “a precondition to participation in the New Mexico Medical Assistance Program . . . that the provision of services, the billing of services, [and] the receiving of payment for services under the program cannot be accomplished without the proper completion and Department approval of [the provider agreement].” Thus, we conclude that these agreements govern Plaintiffs’ relationship with HSD with regard to any Medicaid reimbursement. We therefore reject HSD’s argument with regard to the admission.

[78] In sum, Plaintiffs may bring a breach of contract cause of action against HSD for the Medicaid program’s failure to reimburse Plaintiffs in accordance with Section 27-2-16(B). We remand to the district court to determine whether HSD, in its performance under the provider agreements, has “failed[ed] to perform a contractual obligation when that performance is called for.” UJI 13-822 NMRA.

E. Plaintiffs’ Contract Claim as Third-Party Beneficiaries

[79] Plaintiffs seek to enforce contracts between HSD and the MCOs on a third-party beneficiary theory. As we stated earlier, these contracts specifically incorporate Section 27-2-16(B). The contractual provisions are written in clear language, and there can be no doubt that the MCOs and HSD intended compliance with the statute to form part of their agreement. In their most current form, the contracts provide that subcontracts “for pharmacy providers shall include a payment provision consistent with [Section 27-2-16(B)] unless there is a change in law or regulation.” There have been no such changes.

[80] Plaintiffs argue that the district court erred when it held that “an action against [the] MCOs on a third-party beneficiary theory would be inconsistent with the [conclusion] that Plaintiffs have no private right of action.” HSD argues that Plaintiffs were not intended third-party beneficiaries as they are not referenced in the MMCS agreements and neither HSD nor any MCO intended or believed that the agreements had the purpose of benefitting Plaintiffs. In addition, the MCOs put forward a two-fold party to HSD’s argument that Plaintiffs are not intended third-party beneficiaries. First, they echo the order of the district court, arguing that because no private right of action is available under the statute, any attempt to enforce it through the contract must fail. Second, they argue that any analysis of such a claim must conclude that Plaintiffs were not intended third-party beneficiaries to the contracts between the MCOs and HSD and, therefore, the district court was correct. We consider each argument in turn.

[81] We are unpersuaded by HSD’s contention that Plaintiffs were not intended third-party beneficiaries because they were not referenced by name in the contract, and the contention that Defendants did not believe that the purpose of the contract was to benefit Plaintiffs. “A third-party is a beneficiary if the actual parties to the contract intended to benefit the third-party. The intent to benefit the third-party must appear either from the contract itself or from some evidence that the person claiming to be a third party beneficiary is an intended beneficiary.” Callahan v. N.M. Fed’n of Teachers-TVII, 2006-NMSC-010, ¶ 20, 139 N.M. 201, 131 P.3d 51 (internal quotation marks and citations omitted). Whether the parties had the requisite intent is a question of fact, appropriate for the trier-of-fact to decide. Mortarity v. Meyer, 21 N.M. 521, 529-30, 157 P. 652, 655 (1916). The fact that Plaintiffs were not referenced by name in the contract does not prove by itself that the contract was not intended to benefit them. Section 27-2-16(B), which is incorporated into the contract, specifically references Medicaid providers who dispense drugs to Medicaid participants. Plaintiffs fall within this class of Medicaid providers and, thus, could be found by a trier-of-fact to be intended third-party beneficiaries on that basis. Moreover, Defendants’ assertions that they did not intend to benefit Plaintiffs, as well as the fact they were not named in the contract, are evidence for the trier-of-fact to consider in determining whether Plaintiffs are intended third-party beneficiaries.

[82] Next, the MCOs’ first argument has been disposed of by our analysis above, indicating that there is an implied cause of action under Section 27-2-16(B). Even if there was not an implied cause of action under that statute, such a fact would not bar their third-party beneficiary claim. The cases cited by the MCOs and relied upon by the district court generally hold that a third-party beneficiary claim is just another way of getting a certain remedy from a statute that does not provide that remedy. Grochowski v. Phoenix Constr., 318 F.3d 80, 86 (2d Cir. 2003) (refusing to consider third-party beneficiary claim where the plaintiffs had not sought relief under the prescribed statutory remedy); Hodges v. Aichison, Topeta & Santa Fe Ry. Co., 728 F.2d 414, 415 (10th Cir. 1984) (disallowing the plaintiff’s claim under a third-party beneficiary theory because the plaintiff refused to participate in arbitration as provided by statute and, stating in dicta, that the claim was “but another aspect of the implied right of action argument”); Carson v. Pierce, 546 F. Supp. 80, 87 (E.D. Mo. 1982) (reaching the merits of the contract claim, but holding that the plaintiffs were not intended third-party beneficiaries on the basis that the statute created no implied right of action); Wogan v. Kaneze, 623 S.E.2d 107, 117, 120 (S.C. Ct. App. 2005) (holding that the non-existence of a private remedy under the statute prohibited the third-party beneficiary claim).

[83] Nonetheless, other courts have recognized such claims. See Brogdon ex rel. Cline v. Nat’l Healthcare Corp., 103 F. Supp. 2d 1322, 1330 (N.D. Ga. 2000) (allowing a third-party beneficiary claim despite a lack of Congressional intent to create a private remedy under the Medicare and Medicaid Acts); Found. Health v. Westside EKG Assocs., 944 So. 2d 188, 194-95 (Fla. 2006) (holding that the lack of a private right of action in a state statute did not foreclose the plaintiff’s third-party beneficiary claim); Dierkes v. Blue Cross & Blue Shield of Mo., 991 S.W.2d 662, 668 (Mo. 1999) (en banc) (allowing a third-party beneficiary claim to enforce the inclusion of a statute in a contract where the statute provided no private cause of action).
The first approach promoted by the MCOs is founded on the notion that allowing a third-party beneficiary claim is somehow identical to recognizing an implied right of action under the statute. For instance, in Hodges v. Kinder-Morgan CO2 Co., 2006-NMCA-127, ¶ 20, 140 N.M. 552, 144 P.3d 111. In order to state a claim for unjust enrichment against the MCOs, Plaintiffs are required to allege, first, that the MCOs knowingly benefitted at Plaintiffs' expense and, second, that allowing the MCOs to retain this benefit would be unjust.

Plaintiffs have adopted the reasoning of those jurisdictions as discussed above, which disallows third-party beneficiary claims of this type. We refuse to do so.

The court in Dierkes reasoned: ‘[t]he plaintiffs are not suing solely for [the defendant’s] violation of [the statute], although compliance with that section becomes an element of the claim to the extent it is part of [the defendant’s] promise. Instead, [the] plaintiffs are suing for . . . breach of contract . . . [a] claim[] existing independent of the foregoing statute. 991 S.W.2d at 668.

The contract specifically includes the statutory requirement for payment to Plaintiffs pursuant to law. Plaintiffs seek to enforce this contract on a third-party beneficiary theory. Plaintiffs are not foreclosed from asserting a third-party beneficiary contract claim just because they may not do so directly under Section 27-2-16(B) when operation of the statute appears to be written as a contractual requirement for their reimbursement.

In looking at Plaintiffs' third-party beneficiary claim in this case, the district court began by asking why HSD entered into contracts with the MCOs “in the first place.” It then found, based on an interpretation of Section 27-2-16(B) and by analogy to cases from other jurisdictions, that the statute expresses a motivation to serve “the medical needs of the aged, blind, and disabled. [This] motivation makes it apparent that the beneficiaries of these services are Medicaid enrollees, not providers.” Finally, though not completely clear from the record, the conclusion that the statute was intended to benefit Medicaid enrollees led the district court to reason that the contract term incorporating it could not have been intended to benefit Plaintiffs. The district court stated that “Plaintiffs are not third[-] party beneficiaries to the contracts between HSD and the MCOs[,]” We hold that this finding requires reversal.

As we discussed above, when a district court considers a motion for judgment on the pleadings, it must “accept as true all facts well pleaded and question only whether the plaintiffs might prevail under any state of facts provable under the facts.” Garcia v. Alamogordo, 106 N.M. at 760, 750 P.2d at 121. In their fourth amended complaint, Plaintiffs argue that “HSD has entered into valid written contracts with the MCOs for implementation of the managed care program.” Furthermore, Plaintiffs assert that they “are third[-]party beneficiaries under [those contracts] as the unambiguous language of such contracts governs the benefits received by Plaintiffs in dispensing prescription medicines to Medicaid recipients.”

By finding that the Medicaid program as a whole was intended to benefit only Medicaid enrollees, the district court decided the merits of the third-party beneficiary claim. Essentially, it ruled on the intent of HSD and the MCOs in bargaining for the inclusion of the term in the contract. We hold that such a finding was a factual determination inappropriate to decide in a judgment on the pleadings. We reverse the district court on this issue and remand for additional factual development. Though we do not reach the merits of the issue, at this point, we see no reason why the contract term could not have been intended to benefit both Medicaid recipients and Plaintiffs. Certainly, if Medicaid recipients are to receive prescription medication, the participation of Plaintiffs is essential to the proper functioning of the system, and it is for this reason that we are unpersuaded by Defendants’ arguments against the recognition of a third-party claim.

F. Plaintiffs May Bring the Unjust Enrichment Claim

Plaintiffs sued the MCOs for unjust enrichment, alleging that “the MCOs failed to pay Plaintiffs the reimbursement rates to which they were entitled under [Section] 27-2-16(B) and were [thus] unjustly enriched by the amount of Medicaid reimbursements they wrongfully withheld.” The district court dismissed Plaintiffs’ unjust enrichment claim on the ground that a contract existed between Plaintiffs and the MCOs and between the MCOs and HSD, barring equitable relief. The court subsequently dismissed Plaintiffs’ contractual claims.

Unjust enrichment allows recovery by an aggrieved party from another who has profited at the aggrieved party's expense. See Tom Growney Equip., Inc. v. Ansley, 119 N.M. 110, 112, 888 P.2d 992.
H. Class Certification Was Proper

[96] Because we reverse in part the orders of the district court, we now consider Cimarron’s conditional cross-appeal. Specifically, Cimarron makes two arguments that Plaintiffs’ class was improperly certified. First, Cimarron claims that allowing the MCOs to be added as Defendants after the original class certification results in a violation of its constitutional due process rights. Second, Cimarron claims the district court improperly applied the requirements for class certification under Rule 1-023 NMRA. We affirm the certification.

[97] Decisions to certify a class are reviewed for abuse of discretion. Abuse occurs when the district court “misapprehends the law or if [its] decision is not supported by substantial evidence.” Brooks v. Norwest Corp., 2004-NMCA-134, ¶ 7, 136 N.M. 599, 103 P.3d 39. “Within the confines of Rule 1-023, the district court has broad discretion whether or not to certify a class.” Id. The rule lists four prerequisites to certification of a class action:

1. Numerosity: the class is so numerous that joinder of all members is impracticable;
2. Commonality: there are questions of law or fact common to the class;
3. Typicality: the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. Adequacy of representation: the representative parties will fairly and adequately protect the interests of the class.

Ferrell v. Allstate Ins. Co., 2008-NMSC-042, ¶ 9, 144 N.M. 405, 188 P.3d 1156 (internal quotation marks and citation omitted). Litigants attempting to certify a class must also meet one of three requirements under Rule 1-023(B). In this case, the pertinent requirement is that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Rule 1-023(B)(3). In certifying the class, the district court “must engage in a rigorous analysis of whether the Rule’s requirements have actually been met.” Ferrell, 2008-NMSC-042, ¶ 8 (internal quotation marks and citation omitted).

[98] As we stated above, the court certified the class in this case before the MCOs were added as Defendants. Thereafter, Plaintiffs, unopposed by HSD, argued that the MCOs were indispensable parties by virtue of the changed Medicaid administrative and payment scheme. They persuaded the district court to allow amendment of their complaint. The MCOs attacked the class certification. They filed briefs asking the court to decertify the class and included a number of supporting exhibits. As a result, the district court allowed discovery into “whether the class should be decertified.” After hearing oral arguments on the issue, the district court concluded that the class certification was proper. The court stated that “[a]fter a review of the various motions to decertify the class, determine it to be void, to dismiss and to sever, I have determined that those motions will be denied.”

[99] Cimarron argues that this scenario gives rise to a due process violation. We disagree. As case law demonstrates, post-certification amendments to include additional defendants typically only violate due process where the subsequently added defendants do not receive an adequate opportunity to contest the certification and the allegations against them. See In re Am. Med. Sys., Inc., 75 F.3d 1069, 1075, 1086 (6th Cir. 1996) (holding that the additional defendants could not be added after original class certification without having time to contest the certification); Van Vels v. Premier Athletic Ctr. of Plainfield, Inc., 182 F.R.D. 500, 506-07 (W.D. Mich. 1998) (allowing post-certification amendment to include the additional defendants as long as they were given additional time for discovery and dispositive motions); see Walker v. World Tire Corp., 563 F.2d 918, 921 (8th Cir. 1977) (concluding that courts may not “rule on the class action question without affording the parties notice and an opportunity to make a record on the issue” and stating that “[t]he propriety of class action status can seldom be determined on the basis of the pleadings alone”).

[100] Both Plaintiffs and Cimarron cite In re Am. Med. Sys., Inc., 75 F.3d at 1086, and we too believe that case provides the appropriate analytical framework for these facts. There, the plaintiffs received class certification, and the next month they moved to amend their complaint to include an additional defendant. Id. at 1075. Then, “[w]ithout any further discovery, briefing, or argument, the district judge issued an amended order of class certification.” Id. The newly added defendant appealed, and the Sixth Circuit held that “[t]he district [court] failed in its duty to conduct a rigorous analysis . . . and clearly abused its discretion.” Id. at 1086 (internal quotation marks omitted). Such a defendant must receive a meaningful opportunity to respond to the
complaint, a chance to conduct discovery, time to brief the issues, and a hearing in which the issue may be argued. *Id.*

[101] Each of the above requirements were met in the present case. Once the district court granted Plaintiffs’ motion to amend their complaint, the MCOs almost immediately challenged the class certification. The district court granted discovery to the MCOs on the issue of “whether, under the [s]econd [a]mended [c]omplaint, Plaintiffs have abandoned the class certification against the [s]tate . . . and whether the MCOs, as new Defendants, are subject to the previous class certification[.]” Likewise, a hearing was held where the parties were given an opportunity to argue the issue and, on June 5, 2003, more than two years after Plaintiffs moved to add the MCOs as Defendants, the district court held that class certification was proper as to the MCOs. Under such conditions, where the MCOs had adequate notice and a chance to fully respond, we hold that no violation of their due process rights occurred.

[102] We are similarly unpersuaded by Cimarron’s argument that the burden of proof as to class certification was unlawfully shifted to their shoulders. Our Supreme Court held:

> We can properly consider only those facts which appear in the transcript on appeal, which in this case is identical with the record proper in the district court. Upon a doubtful or deficient record[,] we indulge every presumption in support of the correctness and regularity of the decision of the trial court. Every reasonable intendment and presumption are resolved in favor of the proceedings and judgment in that court.


[103] Given that Cimarron provides us with no citations to the record tending to prove its allegation, we must presume that the district court applied the correct burden of proof, requiring Plaintiffs to establish that class certification remained proper after the MCOs were added. *See Brooks*, 2004-NMCA-134, ¶ 10 (stating that the plaintiffs bore the burden of proof to demonstrate that the requirements of Rule 1-023 were met).

[104] We also hold that the district court did not abuse its discretion in its application of Rule 1-023. Plaintiffs clearly have standing to sue. They meet the requirements of numerosity, commonality, typicality, and adequacy of representation. Furthermore, it is clear to us that the Rule 1-023(B)(3) requirements of predominance and superiority were satisfied. Substantial evidence supports the district court’s conclusions on these matters.

[105] The requirements of standing have been met. In order to demonstrate standing, a plaintiff must demonstrate “(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.” *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 16, 130 N.M. 368, 24 P.3d 803 (internal quotation marks and citation omitted). Standing is a “threshold legal issue” to class certification. *Andrews v. Am. Tel. & Tel. Co.*, 95 F.3d 1014, 1022 (11th Cir. 1996). Cimarron alleges that because Plaintiffs contracted with the PBMs and not directly with the MCOs themselves, they lack standing to sue. This proposition is unsupported by precedent in Cimarron’s briefs. Indeed, Plaintiffs alleged direct economic injuries against HSD and the MCOs because they were paid less than the statutory requirement. Such injuries were allegedly attributable to actions of either HSD, the MCOs, or both, and would presumably be cured if those parties were required to pay. That some Plaintiffs were required to contract with a PBM who, in turn, contracted with an MCO, does not defeat standing. In such a situation, a causal connection between the injury and challenged conduct may still exist and because the MCOs provide no law to the contrary, we hold that standing is not defeated by the mere existence of contracts between Plaintiffs and the PBMs. By the same token, some Plaintiffs had a direct relationship with an MCO; all allege the same right to payment from either HSD, the MCOs, or both, and would presumably be cured if those parties were required to pay. Likewise, each seeks damages, though injured in a different sum, to recover the money that went unpaid under the statute. Fourth, Rule 1-023(A)(4) requires that “the representative parties [must] fairly and adequately protect the interests of the class.” No evidence was presented below establishing that the interests of any individual class members were contrary to those of the entire class. Furthermore, counsel for Plaintiffs demonstrated that they were qualified and experienced enough to conduct the representation. When the MCOs were added as Defendants, little changed. Plaintiffs again asserted claims based on a common statute and involving a common set of factual circumstances. Under those conditions, we hold that the district court did not abuse its discretion in finding that the requirements of Rule 1-023(A) were met.

[107] Nor did it abuse its discretion in finding that the requirements of predominance and superiority were met. Under Rule 1-023(B)(3), the district court is required to find “that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Cimarron asserts that because Plaintiffs in this case dealt with many different PBMs and because each suffered a different amount of economic injury, individual issues predominate over the larger issues of the class as a whole. This disregards the big picture of the issue at stake, and we disagree. “A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.” *Armijo v. Wal-Mart Stores, Inc.*, 2007-NMCA-120, ¶ 32, 142
N.M. 557, 168 P.3d 129 (internal quotation marks and citation omitted). Such is the case here, where the claims of each class member involve a statutory interpretation of Section 27-2-16(B), a determination of whether that statute survived the transition to managed care, and a conclusion as to the legal effect of that statute’s inclusion in contracts between HSD and the MCOs. Certainly, minor differences will exist among class members in this case, but the critical issues described above remain operative and predominate among all class members. Each can then demonstrate the extent of its injury. Those are considerations far removed from a judgment on the pleadings. We find nothing in the record to indicate the existence of any class member interested in maintaining a separate action. Judicial resources will be saved by certification, the number of class members is manageable, and the damages of each class member can be calculated in a similar manner.

In addition, Cimarron contends that the class certification resulted in “one-way intervention.” Cimarron argues that Plaintiffs’ decision to submit their motion for partial summary judgment for resolution after the original class certification, but before joining the MCOs, constituted impermissible “one-way intervention.” One-way intervention is the principle that potential members of a class may not wait until after the resolution of the case on the merits before joining the class. Valley Utils., Inc. v. O’Hare, 89 N.M. 262, 264-65, 550 P.2d 274, 276-77 (1976). To do so would be to “invite[,] non[-]participating parties to share in the spoils of a judgment obtained by others even though those absent parties will not be bound by the judgment if they [subsequently] decide to bring another action.” Id. at 265, 550 P.2d at 276.

Cimarron fails to explain how one-way intervention is applicable to this situation, citing case law that expressly applies the principle solely to intervening plaintiffs in class actions. See id. at 264, 550 P.2d at 276 (holding that “only those members of [the plaintiff] class who joined the suit prior to the verdict are either bound by it, or allowed to benefit from it”); see also Peritz v. Liberty Loan Corp., 523 F.2d 349, 353-54 (7th Cir. 1975) (describing one-way intervention as the problem created by potential class members waiting for a resolution of the merits before deciding to join the lawsuit). One-way intervention is inapplicable here as non-parties are not attempting to intervene and share in the spoils of a judgment already obtained by others in this case.

As part of this one-way intervention argument, Cimarron further contends that Plaintiffs received “an impermissible preview of the merits before obtaining class certification binding all . . . parties in the case” because Plaintiffs obtained a partial decision on the merits that “[Section] 27-2-16(B) . . . applied to the pharmacy contracts at issue[.]” Even though the court decided that the statute applied to pharmacy contracts, this decision about a threshold legal matter was outside the scope of prohibited one-way intervention. As stated above, our Supreme Court prohibits the practice of intervention after a final judgment has been rendered, so as to prevent non-participating prospective plaintiffs from sharing in the “spoils of a judgment.” Valley Utils., 89 N.M. at 265, 550 P.2d at 277. The judgment at issue here was about a threshold legal matter that did not result in a final judgment against HSD or the MCOs. Thus, Plaintiffs’ litigation of Section 27-2-16(B)’s applicability, prior to joining Cimarron, did not result in one-way intervention. One-way intervention is inapplicable to both the facts of this case and the decision at issue.

IV. CONCLUSION

Based on the foregoing analysis, we affirm in part, reverse in part, and remand this case for further proceedings.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge
JONATHAN B. SUTIN, Judge
Defendant's convictions. We further hold that counsel that Defendant received adequate repre-
district court's justifiable efforts to ensure that his counsel was ineffective and to the
was due to Defendant's repeated claims
 speedy trial rights were violated because
of counsel. We disagree that Defendant's
alternative, he claims ineffective assistance
his right to a speedy trial, and, in the al-
claims that the fifty-five-month period
a period of twelve years. On appeal, he
abusing his step-daughter, Vanessa, over
(CSC), and two counts of bribery of a wit-
criminal sexual penetration (CSP), CSC, and other criminal behavior re-
sexual abuse of Vanessa from the time she was six years old until she
He was arraigned on July 19,
and public defender Michael Rosen-
entered an appearance on his behalf
and made a speedy trial demand on August 13, 2004.
On December 16, 2004, the State filed
the first stipulated Rule 5-604 NMRA peti-
tion for a six-month rule extension because it was waiting for DNA results and because
Defendant was without counsel due to
Rosenfield's reassignment to a different divi-
no progress had been made in his case
were ongoing, and Kochersberger had
recently entered his appearance. In April
2005, because the DNA results were still
not available, preliminary plea negotiations were ongoing, and Kochersberger had
recently entered his appearance. In April
2005, the State received the DNA results
establishing that Defendant had fathered a
case with Vanessa, and the State provided
the results to Defendant.
On July 1, 2005, the State filed a third
opposed petition for a six-month rule ex-
tension outlining some discovery provided
to Defendant and stating that preliminary
plea negotiations were ongoing. Although
Defendant objected to the petition, he
agreed during pretrial conferences on July
7, 2005 and August 3, 2005, that the case
was not ready for trial.
On September 23, 2005, the State filed
a fourth opposed petition for a six-month rule extension followed by an addendum on
October 13, 2005. It noted that the parties
were working together on discovery issues
and they expected to begin witness inter-
views within a month, but the parties would
not be ready for trial before early 2006, and
court staff had yet to set a trial date due to a
family illness. Although Defendant objected
to the extension, he agreed that the parties
would not be ready for trial until early 2006.
Trial was set for March 27, 2006.
In December 2005, Eric Turner, Ko-
chersberger's law partner, took over Defen-
dant's representation, and on February 3,
2006, Turner filed a notice that he would
be unavailable for trial on March 27, 2006.
Despite his unavailability for trial, Turner
filed a motion to dismiss for violation of
Defendant's speedy trial rights on February
22, 2006.
On March 2, 2006, Defendant filed a pro
se motion to represent himself, stating
that no progress had been made in his case
and his efforts to participate in his defense
had been rebuffed by counsel. On March
13, 2006, Turner submitted a stipulated
motion to continue the trial. The following
day, Defendant personally asked the district
court to grant Turner more time to prepare
for trial, and he agreed to a six-month exten-

BACKGROUND

[2] Defendant was arrested on June 24,
2004, and indicted on multiple counts of
CSP, CSC, and other criminal behavior re-
lying to the alleged sexual abuse of Vanessa
from the time she was six years old until she
was eighteen. He was arraigned on July 19,
2004, and public defender Michael Rosen-

the first stipulated Rule 5-604 NMRA peti-
tion for a six-month rule extension because it was waiting for DNA results and because
Defendant was without counsel due to
Rosenfield's reassignment to a different divi-

[4] The State filed a second opposed peti-
tion for a six-month rule extension on April
tion to proceed pro se and a speedy trial motion. He accused Turner and Kochersberger of malpractice, failure to communicate, failure to investigate, and failure to assert what Defendant believed to be legitimate issues. Turner conceded that he had been unable to establish an attorney-client relationship with Defendant. The State agreed that Defendant should have different counsel if his relationship with Turner was irreparably damaged, but it expressed concerns because a new attorney would need time to get up to speed on the “massive amount of discovery” that had been produced, and speedy trial problems might arise if the July 10 setting could not be maintained. The court allowed Turner to withdraw due to the breakdown in the attorney-client relationship, but it stressed the urgency of having a new attorney immediately assigned to Defendant due to the upcoming trial date. After extensively investigating Defendant’s capacity to represent himself, the district court urged Defendant to consult with a new attorney, and it refused to consider Defendant’s speedy trial motion until he acquired new counsel, which the court hoped would happen within the next few days.

[11] Turner withdrew on April 19, 2006, and Defendant filed an addendum to his pro se speedy trial motion on May 9, 2006, indicating that a potential witness, Aaron Chavez, was shot and killed on April 17, 2006.

[12] On or around May 19, 2006, David Pottenger was appointed to represent Defendant, but he never entered an appearance or made any filings on Defendant’s behalf. Defendant filed a pro se “notice of appeal for interlocutory appeal for motion to dismiss for speedy trial” on June 28, 2006. In late June, the State inquired whether Pottenger would be ready for trial on July 10, 2006, and it was informed first that Pottenger was in the hospital and later that he had lost his contact with the public defender’s office.

[13] Troy Prichard appeared on behalf of Defendant on July 10, 2006, the date set for trial, and proceedings were continued to give Prichard an opportunity to prepare. Although Prichard was not ready for trial, he filed a speedy trial demand along with his appearance. On July 24, 2006, the district court set trial for December 4, 2006, and the State filed the sixth stipulated petition for a six-month rule extension due to the replacement of Defendant’s counsel.

[14] Although represented by Prichard, Defendant filed a pro se motion to amend his speedy trial motion on July 20, 2006, claiming that his counsel, both former and current, were ineffective. Appearing before the district court on September 26, 2006, Defendant claimed that Prichard was not keeping in contact with him and asked for dismissal on ineffective assistance grounds. The court instructed Defendant to file a motion stating these contentions.

[15] On November 17, 2006, approximately four months after Prichard had appeared on Defendant’s behalf and less than a month before trial, the court met with Defendant and Prichard to discuss some of Defendant’s pro se motions and his dissatisfaction with Prichard. Defendant accused Prichard of failing to communicate and rendering ineffective assistance by failing to seek dismissal on speedy trial grounds, failing to investigate, and having a conflict of interest. Defendant claimed that he had a problem with the public defender’s office and asked for Prichard to be dismissed so he could retain private counsel. He requested a six-month rule extension to retain other counsel or to prepare to defend himself.

[16] Prichard informed the district court of actions he had taken on behalf of Defendant, including reviewing the file, hiring a private investigator who had interviewed witnesses, speaking with Defendant and the district attorney, and explaining the State’s “comprehensive” plea offer to Defendant. He explained that he had counseled Defendant to stop filing pro se motions and that some of his issues were not worth pursuing, but Defendant refused his advice and was unhappy with Prichard for informing him that certain filings were not in his best interest.

[17] At the hearing, the district court noted that it would be the fifth time Defendant’s counsel would be replaced for issues that could not be attributed to the State, and, if the court allowed Prichard to withdraw, Defendant would be injecting additional delay which could not be attributed to the State for purposes of speedy trial. The court instructed Defendant that he needed to work with the counsel assigned to him, but Defendant insisted that he needed trustworthy replacement counsel outside of the public defender’s office, and he wanted to postpone trial an additional six months in order to obtain private counsel. The State objected due to speedy trial concerns and the numerous previous continuances. However, the court continued the trial to give Defendant an opportunity to obtain new counsel, while cautioning him that each request for an extension or continuance would weigh against him in terms of any speedy trial claims.

[18] On December 13, 2006, the State filed a seventh stipulated petition for a six-month rule extension so that Defendant could obtain new counsel even though the State opposed the extension. At the status conference the following day, Defendant had yet to obtain new counsel but continued to want to dismiss Prichard, claiming that he would not come to the jail to meet with Defendant. Defendant stated that his father was trying to obtain private counsel for him and wanted an additional week for him to do so.

[19] Prichard claimed he had done his best but was unable to satisfy Defendant and agreed his dismissal was warranted due to the severe breakdown in the attorney-client relationship. The district court permitted Prichard to withdraw over the State’s objection. The State then stressed the need for an immediate appointment of new counsel and a trial date, offered its assistance in contacting the chief public defender so that counsel could be appointed for Defendant, and urged the district court to schedule a conference in two weeks to check Defendant’s progress. The district court declined to hear any of Defendant’s motions until he was represented by counsel. Trial was set for May 14, 2007.

[20] Defendant filed a pro se petition for writ of mandamus on January 3, 2007, claiming his speedy trial motions had yet to be heard, he had received ineffective assistance of counsel, and he was entitled to dismissal. At a status conference on January 4, 2007, the State explained its efforts in assisting to obtain counsel for Defendant. Defendant asked why his various pro se filings had not been addressed, and the district court informed Defendant that he had not been authorized to proceed pro se because he was supposed to be obtaining a private attorney. The State wanted a firm deadline for Defendant to obtain private counsel, but the district court refused.

[21] On January 8, 2007, Raul Lopez entered his appearance on behalf of Defendant and demanded a speedy trial. He withdrew and substitute private counsel, Houston Ross, entered his appearance on behalf of Defendant on March 29, 2007, and demanded a speedy trial. On the day set for trial, May 14, 2007, Ross moved for a continuance on the grounds that he needed more time to prepare. The State was ready for trial, but did not oppose the continuance, and it was granted. Despite his recent request for a continuance in order to prepare, Ross filed a motion to dismiss for violation of Defendant’s speedy trial rights on June 7, 2007.

[22] The State filed its eighth opposed petition for a six-month rule extension on
June 28, 2007. The petition stated that an extension was needed because there had been a large number of defense attorneys, Defendant was not ready to try the case at the May 14, 2007 setting, although the State was ready, and Defendant had filed a number of motions that were unlikely to be heard within the current six-month period, which expired on July 10, 2007.

On August 2, 2007, the district court conducted a hearing on Defendant's speedy trial motion and, as discussed in greater detail in the analysis of Defendant's speedy trial claims, denied the motion. At the same time, the State announced it was preparing an amended indictment to omit charges referring to time periods when Defendant and his family lived outside of Bernalillo County. On September 4, 2007, the case was reassigned from Judge J. Michael Kavanaugh to Judge Charles Brown, and trial was set for December 10, 2007.

On September 11, 2007, though represented by Ross, Defendant filed a pro se addendum to the June 7, 2007 speedy trial motion, claiming that there were systemic problems in the public defender's office and that he had criticisms and concerns regarding Ross's representation, including Ross's presentation of Defendant's speedy trial arguments during the August 2, 2007 hearing. On September 21, 2007, Defendant also filed a motion to be allowed to proceed pro se, contending that Ross had an undisclosed interest with the public defender's office and had failed to present all of Defendant's arguments at the speedy trial hearing. On November 13, 2007, Ross filed a motion to reconsider the denial of the speedy trial motion, arguing that the district court had improperly weighed the speedy trial factors at the August 2, 2007 hearing.

On December 7, 2007, Ross filed a motion to withdraw and to appoint a public defender to represent Defendant. Ross claimed that Defendant had created a conflict of interest and an adversarial relationship by claiming that Ross was ineffective, thus making it impossible for him to represent Defendant, that Defendant had stopped paying his fees, and that Defendant's father had filed a complaint against Ross with the State Bar of New Mexico. On December 10, 2007, the date set for trial, the State informed the district court that it was ready for trial, but the court continued the trial over the State's objection and permitted Ross to withdraw.

On December 12, 2007, the State filed a ninth petition for a six-month rule extension because Defendant was without counsel and not ready to proceed to trial. The district court then set trial for June 23, 2008. The Supreme Court granted the extension, but it admonished the parties that the “June 23, 2008 trial setting will NOT be continued, extended or otherwise changed without express concurrence of Justice [Richard] Bosson” and the public defender representing Defendant would not be changed without the concurrence of Justice Bosson.

On December 10, 2007, the date set for trial, the district court declared a mistrial on the speedy trial grounds. The district court denied the motion, and a jury convicted Defendant of the charges. Defendant raised his speedy trial contentions one final time in a motion for new trial, which the district court denied.

**SPEEDY TRIAL**

Defendant argues that the fifty-five-month delay between his arrest and second trial violated his right to a speedy trial. “The right to a speedy trial is a fundamental right of the accused.” State v. Garza, 2009-NMSC-038, ¶ 10, 146 N.M. 499, 212 P.3d 387. In considering a speedy trial claim, New Mexico has adopted the balancing test articulated by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514, 530 (1972), which sets forth four factors to be considered when determining whether a defendant’s speedy trial rights were violated:

1. The length of delay,
2. The reasons for the delay,
3. The defendant’s assertion of his right, and
4. The actual prejudice to the defendant.

These four factors are interrelated and must be evaluated in light of other relevant circumstances in the particular case. No one factor constitutes either a necessary or sufficient condition to finding a deprivation of the right to a speedy trial.” State v. Johnson, 2007-NMCA-107, ¶ 5, 142 N.M. 377, 165 P.3d 1153 (internal quotation marks and citation omitted).

On appeal, we defer to the district court’s factual findings, but then “independently evaluate the four Barker factors to ensure that the constitutional right has not been violated.” Id. In this case, although Defendant’s speedy trial claim was considered five times between August 2, 2007, and March 6, 2009, the district court’s most comprehensive analysis of Defendant’s speedy trial claims occurred during the August 2, 2007 hearing. Therefore, to the extent pertinent facts remained unchanged since August 2, 2007, we give deference to, and rely on, the district court’s findings at that hearing.

**Length of Delay**

On appeal, we consider the length of delay as both “a threshold inquiry that triggers the rest of the analysis” and “as part of the balancing test itself.” State v. Stock, 2006-NMCA-140, ¶ 13, 140 N.M. 676, 147 P.3d 885. We begin with the threshold inquiry.

The time between Defendant’s arrest on June 24, 2004, and the start of trial on January 12, 2009, was almost fifty-five months. The district court found
Defendant’s case to be of intermediate complexity, and a delay of fifteen months is presumptively prejudicial in intermediate cases, thus triggering a need to consider all of the Barker factors. See Garza, 2009-NMSC-038, ¶¶ 23, 48. In balancing a delay of almost forty months beyond the bare minimum, this factor weighs heavily in Defendant’s favor and against the State. See id. ¶ 24 (“[I]f the greater the delay the more heavily it will potentially weigh against the [s]tate.”).

Reasons for the Delay

[37] We next consider “[t]he reasons for a period of the delay [that] may either heighten or temper the prejudice to the defendant caused by the length of the delay.” Id. ¶ 25 (internal quotation marks and citation omitted). We allocate the reasons for the delay to each side and determine the weight attributable to each reason. See State v. Plouse, 2003-NMCA-048, ¶ 45, 133 N.M. 495, 64 P.3d 522.

[38] The State is responsible for the period from the arrest until the time the DNA results were available, which accounts for approximately ten to eleven months of the delay. In assigning weight to this period, Defendant claims it was “entirely wasted” because the DNA results concerned events occurring outside of Bernalillo County and were therefore inadmissible. We disagree because, at the time the State sought DNA testing, it had not been established that the results would be inadmissible. Moreover, the district court did not unconditionally exclude the DNA test results establishing that Defendant fathered Vanessa’s child, but it instead ruled that the evidence might be admissible to negate any claims by Defendant that he never had sex with Vanessa or to establish Vanessa’s credibility. Finally, the State was not solely responsible for this delay because during the same time period, Defendant changed counsel, and his new counsel needed time to prepare for trial. Thus, although the initial period from arrest to when the DNA results were provided weighs against the State, it does so minimally. See Garza, 2009-NMSC-038, ¶ 27 (recognizing that some pretrial delay is inevitable and justifiable); cf. State v. Parrish, 2011-NMCA-033, ¶ 25, 149 N.M. 506, 252 P.3d 730 (weighing a four-and-one-half-month period during which “judges were reassigned and the [s]tate produced discovery, identified witnesses, and requested discovery from [the d]efendant” neutrally after determining that “the case progressed with customary promptness during this period”).

[39] The period from receipt of the DNA results, approximately April or May 2005 to March 2006, weighs neutrally because the parties were apparently working on discovery and obtaining a possible sex offender evaluation of Defendant by Dr. Moss Aubrey, and Defendant agreed the case would not be ready for trial until early 2006. See Garza, 2009-NMSC-038, ¶ 27; cf. State v. Valencia, 2010-NMCA-005, ¶ 21, 147 N.M. 432, 224 P.3d 659 (stating that any delay occasioned by jointly requested continuances weighs neutrally).

[40] From March 2006 until the first trial on August 18, 2008, we attribute the delay to Defendant because the State was prepared for trial as of March 2006 and did everything it could to move the case toward trial. However, Defendant was allowed to change counsel at crucial times, which necessitated repeated continuances so defense counsel could adequately prepare a defense, which in turn resulted in Defendant being unprepared for trial until August 18, 2008. See Vermont v. Brillon, ___ U.S. ___, 129 S. Ct. 1283, 1290-92 (2009) (stating the general rule that delays sought or caused by defense counsel are ordinarily attributed to the defendant and applying that rule to hold that the delay caused by the failure of assigned counsel to move a case forward by requesting extensions and continuances should not be attributed to the state); cf. State v. Stefani, 2006-NMCA-073, ¶ 18, 139 N.M. 719, 137 P.3d 659 (noting that “when the constitutional right to a speedy trial is at issue, delays attributed to [the d]efendant weigh against the [d]efendant in later claims of violation”); State v. Mascareñas, 84 N.M. 153, 155, 500 P.2d 438, 440 (Ct. App. 1972) (recognizing that “where a defendant causes or contributes to the delay, or consents to the delay, he may not complain of a denial of the right” to a speedy trial).

[41] Primarily relying on Stock, Defendant argues that the delays caused by his changes in counsel should not be attributed to him but instead should weigh against the State, because it is the State’s responsibility to ensure that Defendant goes to trial in a timely manner and the State’s burden to provide counsel to an indigent defendant. In Stock, the district court held that the defendant weighed against the [s]tate and defense counsel.” 2006-NMCA-140, ¶ 20. That court had found that the public defenders were working under extreme and unworkable case load levels and weighed the delay caused by the inactions of the public defenders against the state. Id. ¶ 8, 10, 26. Furthermore, the district court questioned whether the defendant agreed to defense counsel’s continuances because, given that he had the intellectual capacity of a twelve year old, it was unclear whether the defendant was capable of acquiescing to the delays. Id. ¶ 11. Moreover, because the defendant was not present at the hearings, he was never given a chance to express his frustration with the delays. Id.

[42] On appeal, this Court agreed with the district court’s analysis. Id. ¶ 29. While recognizing the general rule that a defendant is held accountable for the actions of his or her attorney, this Court nonetheless also recognized that, in certain cases, attorney neglect could not be held against a defendant. Id. ¶ 21-22; see Brillon, 129 S. Ct. at 1292 (recognizing an exception to the general rule that delay caused by assigned counsel is attributed to the defendant if the delay results in a “systemic breakdown in the public defender system” (internal quotation marks and citation omitted)). Further, this Court concluded that Stock was such a case and affirmed the district court’s conclusion that the reasons for delay must weigh against the state. Stock, 2006-NMCA-140, ¶¶ 26, 29.

[43] We are not convinced that this case presents circumstances warranting the conclusion reached in Stock. In this case, the district court did not find that the delay was caused by the poor performance of Defendant’s attorneys, their neglect, or any institutional deficiencies of the public defender system. Cf. Brillon, 129 S. Ct. at 1292-93 (holding that the Vermont court improperly attributed delays caused by defense counsel to the state in the absence of information in the record suggesting that institutional problems caused part of the delay). Instead, the district court found that the numerous continuances and extensions were due to Defendant’s actions in changing counsel and questioning counsel’s strategies. Unlike in Stock, the district court specifically found that neither the State nor defense counsel sat on their hands, and even Defendant’s own counsel opined that there was no fundamental breakdown in the public defender system.
Defendant in this case was fully capable of asserting his rights and considering and acquiescing to the actions of his public defenders and private counsel, and the record is replete with examples of pro se pleadings and arguments made by Defendant on his own behalf, thus illustrating his capabilities. It was often at Defendant’s personal request or as a result of his own actions that proceedings were delayed.

[45] Defendant also contributed to the delay during this period because the district court was reluctant to allow Defendant to appear pro se or to decide important, potentially dispositive motions when Defendant was without the benefit of counsel. Our review of the proceedings below indicates that the district court and the State were trying to ensure that Defendant was provided with effective, prepared counsel in a response to Defendant’s repeated assertions that he should represent himself or that his counsel was failing to provide adequate representation. See Garza, 2009-NMSC-038, ¶ 11 (recognizing that, although “speed is an important attribute . . ., if either party is forced to trial without a fair opportunity for preparation, justice is sacrificed to speed [and] we cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate” (alteration, internal quotation marks, and citations omitted)). While we agree with Defendant that it is ultimately the State’s burden to bring a criminal defendant to trial in a timely manner, we are unpersuaded that the State failed to meet its burden of proof.

[46] We are also unpersuaded by the out-of-state authority cited by Defendant in support of his contention that this delay must be attributed to the State. In one case, the delay was not caused by the need for defense counsel to adequately prepare for trial. See Middlebrook v. State, 802 A.2d 268, 275 (Del. 2002) (characterizing the trial court’s failure to rule on the defendant’s motion to suppress for over a year as “inexcusable” and holding the state responsible for the court’s failure to rule on the motion and the nine-and-one-half-month delay resulting from the failure of the court or the state to oppose defense counsel’s vacation plans despite the long period during which charges had been pending). The other does not even concern a speedy trial matter. See People v. Brown, 235 N.E.2d 562, 564-65 (Ill. 1968) (reversing the trial court’s decision to dismiss the defendant’s appeal for want of prosecution when the defendant’s counsel was at fault).

[47] Moreover, we cannot agree with Defendant’s central contention that he should not be held accountable because the delay was caused by his attorneys and the “overburdened [p]ublic [d]efender system[,]” Nor was Defendant being forced to choose between his right to a speedy trial and his right to effective assistance of counsel. To the contrary, the district court was receptive to Defendant’s assertions of perceived deficiencies in his counsel, and it continued to grant continuances to assist Defendant even when the State expressed concerns about speedy trial problems and even when the State objected to additional continuances. The period of delay between March 2006 and trial in August 2008 weighs against Defendant. See Brillon, 129 S. Ct. at 1292-93.

[48] Turning to the time period between mistrial and retrial, we note that the State immediately sought retrial, but additional delay resulted from defense counsel’s inability to serve subpoenas. The district court found that trial was set as soon as possible due to Defendant’s need to subpoena witnesses and scheduling conflicts. Therefore, this period should weigh neutrally. See State v. O’Neal, 2009-NMCA-020, ¶¶ 20-21, 145 N.M. 604, 203 P.3d 135 (weighing period between declaration of mistrial due to possible juror misconduct and the rescheduled second trial neutrally); cf. Parrish, 2011-NMCA-033, ¶ 27 (weighing the two-month period after the appellate court issued mandate and the date of the defendant’s trial neutrally because the “case proceeded with customary promptness following the remand”).

[49] In sum, the reasons for the delay factor weighs against Defendant. Before concluding our analysis of the reasons for delay, we briefly address two procedural matters that Defendant contends resulted in a delay that should be imputed to the State. First, Defendant claims that the State is responsible for portions of the delay because it initially charged him with conduct occurring outside of Bernalillo County and persisted in this error even after Defendant brought it to the State’s attention.

[50] Defendant’s pro se filing denying all of the charges in the complaint did include a claim of improper venue, but such a general denial did not inform the State of any specific venue challenge. Once defense counsel moved to dismiss counts two through twenty-two for improper venue on June 7, 2007, the State filed a timely response on June 29, 2007, seeking to amend the indictment to dismiss count 14 and to narrow the range of dates charged in the remaining counts so as to exclude any time period when Defendant and his family lived outside of Bernalillo County. Given the State’s prompt action in seeking to amend the indictment, we decline to attribute any delay to the State based on the over-inclusive initial indictment.

[51] We are also not convinced that delay should be attributed to the State because it was “tardy” in recognizing that Defendant’s taped statement to detectives could not be used at trial, because the record indicates that the State had no intention of attempting to use Defendant’s confession at trial. Because Defendant has failed to show how either of these matters resulted in delay to trial, we decline to attribute any additional delay to the State based on these contentions.

Assertion of the Right

[52] In considering Defendant’s assertion of his right to a speedy trial, we assess the timing of the assertions “and the manner in which the right was asserted.” Garza, 2009-NMSC-038, ¶ 32. “Thus, we accord weight to the frequency and force of the defendant’s objections to the delay.” Id. (internal quotation marks and citation omitted). “We also analyze the defendant’s actions with regard to the delay.” Id. Defendant contends that this factor should weigh heavily in his favor because his assertion of his right to speedy trial was early, frequent, and forceful. See Zarla v. State, 109 N.M. 640, 644, 789 P.2d 588, 592 (1990).

[53] Each of Defendant’s attorneys who entered an appearance filed pro forma demands for speedy trial when they entered their appearances, but such “[e]arly pro forma assertions are generally afforded relatively little weight.” Valencia, 2010-NMCA-005, ¶ 27. Defendant also repeatedly asserted his speedy trial rights in motions filed by counsel and in various pro se filings he submitted. However, at the same time Defendant was filing speedy trial motions, he was challenging the representation provided by his counsel by filing motions to appoint substitute counsel or to represent himself, and he and counsel were asking for continuances claiming that he and/or his counsel needed additional time before trial.

[54] Defendant’s actions in contributing to the delay and being unreedy for trial while simultaneously asserting his speedy trial right led us to give little weight to Defendant’s assertions of his speedy trial rights. See State v. Coffin, 1999-NMSC-038, ¶ 67, 128 N.M. 192, 991 P.2d 477 (observing that the defendant’s assertion of his speedy trial right was not meaningful when he objected to the rule extension but also represented that he was not prepared for trial); cf. United States v. Loud Hawk, 474 U.S. 302, 314-15 (1986) (accordig little weight to the defendants’ repeated motions to dismiss on speedy trial grounds because...
Defendant's burden to demonstrate and second interests, "some degree of oppression and anxiety is inherent for every defendant who is jailed while awaiting pretrial incarceration; and [3] to limit the possibility that the defense will be impaired." Garza, 1999-NMSC-038, ¶ 67. Based upon the foregoing, this factor weighs in Defendant's favor, but only slightly. **Prejudice**

56 “The United States Supreme Court has identified three interests under which we analyze prejudice to the defendant: [1] to prevent oppressive pretrial incarceration; [2] to minimize anxiety and concern of the accused; and [3] to limit the possibility that the defense will be impaired.” Garza, 2009-NMSC-038, ¶ 35 (internal quotation marks and citation omitted). As to the first and second interests, “some degree of oppression and anxiety is inherent for every defendant who is jailed while awaiting trial.” *Id.* (alterations, internal quotation marks, and citation omitted). “Therefore, we weigh this factor in the defendant’s favor only where the pretrial incarceration or the anxiety suffered is undue.” *Id.* It is Defendant’s burden to demonstrate and substantiate any alleged “undue” oppressive pretrial incarceration and anxiety. *Id.* ¶¶ 35, 39-40.

57 Defendant argues that his incarceration was especially oppressive because he was housed in segregation for almost the entire fifty-five months of incarceration. He also claims he suffered “from the anxiety and concern one would expect from someone housed under such conditions while facing extremely serious charges[].” He cites to his testimony about the mental and physical toll the ordeal took on him and the medications he was prescribed to endure it. He then concludes that the prejudice prong “unquestionably weighs heavily in his favor.”

58 We first consider whether Defendant suffered undue prejudice because he was incarcerated in solitary confinement for the entire fifty-five-month period awaiting trial, noting that Defendant did not, or could not, post bond which led him to be incarcerated during the entire period. Bond was set at $250,000, cash only, due to allegations that Defendant had threatened Vanessa and her family and allegations that Defendant had tried to get Vanessa’s brother to kill her. Moreover, solitary confinement was necessary for Defendant’s own safety. Given these circumstances, we cannot conclude that Defendant has demonstrated any particularized or undue prejudice due to his incarceration. *Cf. State v. Wilson*, 2010-NMCA-018, ¶ 48, 147 N.M. 706, 228 P.3d 490 (“Some degree of oppression and anxiety is inherent for every defendant who is jailed while awaiting trial.”).

59 Defendant also argues that the pretrial delay impaired his defense, the most serious type of prejudice. *See Garza*, 2009-NMSC-038, ¶ 36 (stating that prejudice to a defendant’s ability to present a defense is the “most serious,” but the defendant must still substantiate this type of prejudice (internal quotation marks and citation omitted)). Defendant claims that his defense was prejudiced by the death of a potential witness, Aaron Chavez, on April 17, 2006. Chavez was allegedly having an affair with Defendant’s wife, and Defendant claims he would have testified that Vanessa and her mother fabricated the charges against him.

60 The district court found that Chavez’s potential testimony was wholly speculative, that despite its alleged importance, Defendant made no effort to interview Chavez or to memorialize his testimony, and that the State, not Defendant, might possibly have benefitted from the testimony. Thus, we agree with the district court’s conclusion that Defendant has failed to demonstrate that Chavez’s testimony would have assisted him. *See Coffin*, 1999-NMSC-038, ¶ 71 (observing that, in order to show prejudice resulting from the unavailability of a witness, the defendant must demonstrate that the witness’s testimony would have benefited the defense). Moreover, it is impossible to determine whether the lapse of time and the fading of memories of witnesses might have prejudiced the State as much as Defendant. *Cf. Garza*, 2009-NMSC-038, ¶ 36 (requiring a defendant to substantiate any prejudice to his defense caused by the delay).

Based on the foregoing, the prejudice factor weighs neutrally. **Balancing**

61 The length of delay weighs heavily in favor of Defendant. The reasons for the delay, on balance, weigh against Defendant. The assertion of the right weighs in Defendant’s favor, but minimally given his competing requests for continuances and delays. Finally, Defendant failed to demonstrate that he suffered any type of significant or individualized prejudice. Under these circumstances, we reject Defendant’s assertion that his right to a speedy trial was violated. *See id.* ¶ 40 (concluding that, because the defendant failed to show prejudice, and the remaining factors did not weigh heavily in his favor, the defendant’s right to a speedy trial was not violated).

62 We note that the delay in this case was significantly longer than what should be customary. We recognize that the district court may have been justified had it decided to deny some of Defendant’s requests to replace his attorney or some of the attorney’s requests for a continuance to enable additional trial preparation. *Cf. State v. Salazar*, 2006-NMCA-066, ¶¶ 26-27, 139 N.M. 603, 136 P.3d 1013 (holding that it was not an abuse of discretion for the district court to deny the fifth motion to continue a week before trial when four prior continuances had been granted resulting in eight months of delay before trial). However, we decline to hold that the district court violated Defendant’s speedy trial rights when, in the interest of ensuring that Defendant was given every opportunity to obtain the counsel of his choice and ensuring that his chosen counsel had adequate time to prepare for trial, the court granted Defendant significant leeway and every opportunity to prepare an adequate defense. **INEFFECTIVE ASSISTANCE OF COUNSEL**

63 Defendant contends that, if we do not conclude that his right to a speedy trial was violated, we should nonetheless conclude that his eight attorneys were “individually and cumulatively ineffective.” We disagree.

64 “To make a prima facie case [of ineffective assistance of counsel, the defendant has the burden of proving (1) that counsel’s performance fell below that of a reasonably competent attorney and (2) that [the defendant was prejudiced by the deficient performance.” *State v. Martinez*, 2007-NMCA-160, ¶ 19, 143 N.M. 96, 173 P.3d 18. “With respect to the showing that counsel’s deficient performance prejudiced the defense, the defendant must show that there is a reasonable probability that, but for
counsel’s unprofessional errors, the result of the proceeding would have been different.” *Lytle v. Jordan*, 2001-NMSC-016, ¶ 27, 130 N.M. 198, 22 P.3d 666 (alteration, internal quotation marks, and citation omitted).

[65] Defendant has failed to identify any deficiencies on the part of any of his attorneys that prejudiced his defense; he merely claims that the long delay to trial must be a product of his attorneys’ ineffectiveness. As discussed at length in analyzing Defendant’s speedy trial claim, Defendant questioned the performance of all of his attorneys who remained on his case for any significant portion of time. Despite Defendant’s questioning and criticism, the record indicates that, while the district court occasionally found that relations between counsel and Defendant had irretrievably broken down, it made no findings that any deficiencies of the attorneys were the cause of the conflict. Instead, it appears that the conflict was due to Defendant’s dissatisfaction with his attorneys’ strategic decisions to prepare for trial, instead of to continuously pursue Defendant’s speedy trial claims. We are not convinced that such defense tactics constitute ineffective assistance. See *id.* ¶ 43 (“On appeal, we will not second guess the trial strategy and tactics of the defense counsel.” (internal quotation marks and citation omitted)). Finally, Defendant has failed to make any showing, much less a showing to a reasonable probability, that, but for the alleged errors of his attorneys, the result of his trial would have been different. See *id.* ¶ 27.

CONCLUSION

[66] For the reasons stated above, we affirm Defendant’s convictions.

[67] IT IS SO ORDERED,

JAMES J. WECHSLER, Judge

WE CONCUR:

CElia FOY CASTILLO, Chief Judge

JONATHAN B. SUTIN, Judge
Certiorari Denied, April 20, 2012, No. 33,549

From the New Mexico Court of Appeals

Opinion Number: 2012-NMCA-055

Topic Index:
Administrative Law and Procedure: Exhaustion of Administrative Remedies
Appeal and Error: Standard of Review
Civil Procedure: Summary Judgment
Contracts: Breach
Employment Law: Disciplinary Action; Employment Contract; Employee Grievances; Employer's Policies; and Termination of Employment
Government: Public Employees

ARNOLD LUCERO,
Plaintiff-Appellee,
versus
BOARD OF REGENTS OF THE UNIVERSITY OF NEW MEXICO,
UNIVERSITY OF NEW MEXICO HEALTH SCIENCES CENTER,
Defendants-Appellants.

No. 30,535 (filed March 1, 2012)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
BEATRICE J. BRICKHOUSE, District Judge

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for Appellants

BACKGROUND
Defendants University of New Mexico Board of Regents and University of New Mexico Health Sciences Center (UNMHC) appeal after a bench trial resulted in a verdict in favor of Plaintiff Arnold Lucero. Defendants argue that the district court erred in denying its motion for summary judgment on Plaintiff’s breach of contract claim because Plaintiff did not exhaust the grievance procedures contained in UNMHC’s employee handbook. We hold that Plaintiff must substantially comply with the mandatory internal grievance procedures contained in the employee handbook before filing suit for breach of contract based on an alleged failure of Defendants to follow the employee handbook. Accordingly, we reverse the district court’s denial of Defendants’ motion for summary judgment.

OPINION
JAMES J. WECHSLER, Judge
[1] Defendants University of New Mexico Board of Regents and University of New Mexico Health Sciences Center (UNMHC) appeal after a bench trial resulted in a verdict in favor of Plaintiff Arnold Lucero. Defendants argue that the district court erred in denying its motion for summary judgment on Plaintiff’s breach of contract claim because Plaintiff did not exhaust the grievance procedures contained in UNMHC’s employee handbook. We hold that Plaintiff must substantially comply with the mandatory internal grievance procedures contained in the employee handbook before filing suit for breach of contract based on an alleged failure of Defendants to follow the employee handbook. Accordingly, we reverse the district court’s denial of Defendants’ motion for summary judgment.

[2] Defendants employed Plaintiff beginning in 2003 as an assistant director of environmental services, a management position. UNMHC’s employee handbook governed Plaintiff’s employment. The employee handbook contains a two-step grievance process for “those questions, issues or concerns which are not resolved through informal discussions with successive levels of supervisors.” Step one of the grievance process requires the employee to submit the grievance. Section 6.1.1 of the handbook states that “[i]f a manager/supervisor is unable to reach an understanding with an immediate supervisor through informal discussions, he/she may submit a grievance in writing to the immediate supervisor or Administrator within ten (10) work days of the occurrence of knowledge of the event causing the grievance.”

[3] On March 23, 2005, Defendants issued Plaintiff a notice of decision to suspend, imposing a thirty-day suspension. On March 31, 2005, Plaintiff’s attorney sent a letter to Melissa Chavez, a senior employee relations specialist for Defendants, advising her that Plaintiff intended to submit a grievance by April 6, 2005. However, Plaintiff did not submit a grievance, and Plaintiff’s attorney sent Chavez a letter on April 12, 2005, acknowledging missing the ten-day deadline to file a grievance.

[4] On September 9, 2005, Defendants issued Plaintiff a notice to terminate. Plaintiff did not submit a grievance and testified that he could not remember why he did not file a grievance challenging the termination. More than seven months after the termination, on April 4, 2006, Plaintiff filed a complaint in district court, alleging a breach of express and implied contracts of employment for the suspension and termination. On February 27, 2007, Plaintiff filed an amended complaint consisting of three claims: (1) breach of implied contract, (2) breach of express contract, and (3) wrongful termination. All three claims allege that UNMHC’s employee handbook created a contract and that Defendants breached the contract by failing to abide by the employee handbook’s policies and procedures governing workplace performance, disciplinary action, a harassment-free workplace, employer-employee relations, progressive discipline, and by disciplining Plaintiff without just cause. The employee handbook contains all of the contractual provisions and employment policies that Plaintiff alleges Defendants breached.

[5] Defendants filed a motion for summary judgment, arguing that Plaintiff’s claims were barred because he failed to exhaust the employee handbook’s internal grievance procedures. Plaintiff filed a response admitting all material facts in Defendants’ motion, but he argued that the grievance procedures are not mandatory and he therefore was not required to exhaust the procedures. The district court denied Defendants’ motion. The district court granted the motion to the extent that Plaintiff based his claims on an alleged failure of Defendants to follow grievance procedures but denied the motion as to the remaining claims. The district court also denied Defendants’ motion to reconsider the issue. In denying the motion to reconsider, the district court stated that “Defendant[s]’ grievance scheme is ambiguous, and by its own terms does not require Plaintiff to exhaust Defendant[s]’ grievance procedure prior to filing suit in court.” The district court stated that it “is of great significance to this court that within . . . Defendants’[s] grievance procedure both ‘may’ and ‘shall’ are used.

[6] We hold that Plaintiff must substantially comply with the mandatory internal grievance procedures contained in the employee handbook before filing suit for breach of contract based on an alleged failure of Defendants to follow the employee handbook. Accordingly, we reverse the district court’s denial of Defendants’ motion for summary judgment.
The section of the procedure that sets out the steps to be taken by an employee if he disagrees with the contemplated disciplinary action, uses ‘may’ when discussing the employee’s actions. Thus, the court will presume that the use of the term ‘may’ was purposeful, and that exhaustion of . . . Defendant[s]’ grievance procedure is not a condition precedent to Plaintiff filing suit in this court.”

[6] Subsequently, the district court held a four-day bench trial commencing December 8, 2009. On May 17, 2010, the district court entered a final judgment in Plaintiff’s favor, concluding that the employee handbook created an implied contract that Defendants violated by suspending and terminating Plaintiff without just cause and without appropriate progressive discipline.

[7] On appeal, Defendants argue that the district court erred in not granting its motion for summary judgment. Particularly, Defendants argue that (1) an employee cannot pursue a breach of contract claim based on policies in an employee handbook without first exhausting the grievance procedures in the employee handbook, and (2) the use of permissive language in the employee handbook’s grievance procedures did not allow Plaintiff to bypass the grievance process and file a breach of contract claim.

STANDARD OF REVIEW


EXHAUSTION OF REMEDIES

[9] New Mexico courts recognize the doctrine of exhaustion of administrative remedies. “Under the exhaustion of administrative remedies doctrine, where relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed.” Smith v. City of Santa Fe, 2007-NMSC-055, ¶ 26, 142 N.M. 786, 171 P.3d 300 (alteration, internal quotation marks, and citation omitted). The exhaustion doctrine rests on the principle that the interests of justice are served by allowing an agency with particular expertise to resolve issues before a claim is brought to court. Headen v. D’Antonio, 2011-NMCA-058, ¶ 13, 149 N.M. 667, 253 P.3d 957.

[10] Related to the exhaustion of administrative remedies doctrine, our Supreme Court has held that an employee must exhaust grievance procedures in an employee handbook or manual before filing claims against the employer for breach of contract or civil rights violations based on the policies governing employment. In Francis v. Men’s Gen. Hosp., 104 N.M. 698, 698-99, 726 P.2d 852, 852-53 (1986), a registered nurse sued his employing hospital for breach of contract, due process violations, and wrongful discharge after he voluntarily terminated his employment. The employer had suspended the plaintiff for two days for refusing to comply with hospital policy. Id. Pursuant to the hospital’s employee manual, the plaintiff submitted a grievance, and the hospital conducted a fact-finding hearing. Id. After the hospital informed the plaintiff, as provided in the employee manual, that his attorney could not attend the hearing, the plaintiff refused to proceed any further with the grievance and voluntarily terminated his employment. Id. Our Supreme Court held that the plaintiff was “estopped from asserting that he suffered a deprivation of either a contractual expectation or a constitutionally protected entitlement” because he failed to exhaust the grievance procedures in the employee manual. Id. at 700, 726 P.2d at 854. The Court reasoned that when an implied contract, in this case an employment manual, creates rights, the rights are “limited by the terms of the [employment manual] that gave them birth.” Id.

[11] Similarly, in McDowell v. Napolitano, 119 N.M. 696, 699, 895 P.2d 218, 221 (1995), the plaintiff, a university professor, sued his employer for breach of contract and civil rights violations after being denied tenure. The defendants argued that the district court did not have jurisdiction over the case because the plaintiff failed to exhaust administrative remedies contained in the faculty handbook. Id. at 700, 895 P.2d at 222. Our Supreme Court framed the issue as whether the plaintiff “substantially discharged his own contractual obligations so as to be able to complain of a breach by his employer.” Id. at 701, 895 P.2d at 223. The Court held that, because the plaintiff substantially complied with the terms of his employment contract by “properly follow[ing] the appeals process outlined in the Faculty Handbook [and pursuing] the appeals process to the highest authority within the University,” the exhaustion doctrine did not bar litigation of the plaintiff’s case. Id.

[12] From Francis and McDowell, we glean the general rule that an employee must substantially comply with mandatory internal grievance procedures contained in an employee manual or handbook before filing suit for breach of contract claims based on an alleged failure of an employer to follow its employment policies. In applying this general rule to this case, we note that neither Francis nor McDowell mention whether the employee handbook or manual containing the grievance procedures also contained the employment policies the defendants allegedly breached. In this case, Defendants’ argument for applying the exhaustion requirement rests on the strongest factual basis because the employee handbook contained both the grievance procedures that Defendants allege that Plaintiff did not exhaust and the employment policies and procedures that Plaintiff alleges that Defendants did not follow. Applying Francis and McDowell, the district court erred by denying Defendants’ motion for summary judgment because Plaintiff did not exhaust the grievance procedures in the employee handbook. Courts from other jurisdictions have uniformly applied the same rule, regardless of whether the employer is a public entity or a private entity. See, e.g., McGuire v. Court’l Airlines, Inc., 210 F.3d 1141, 1146-47 (10th Cir. 2000) (upholding summary judgment on exhaustion grounds in favor of employer on employee’s breach of contract claim because employee failed to complete the final two steps of the employee handbook’s four-step grievance process); Orr v. Westminster Vill. N., Inc., 689 N.E.2d 712, 721-22 (Ind. 1997) (stating that even if an employee’s handbook constituted a contract, summary judgment on employee’s breach of contract claim arising out of policies in the employee handbook was appropriate because employee failed to exhaust grievance procedures in the employee handbook); O’Brien v. New England Tel. & Tel. Co., 664 N.E.2d 843, 849 (Mass. 1996) (holding that an employee must exhaust grievance procedures in an employee manual before suing for breach of contract based on a failure of employer to follow rule requiring just cause to discipline an employee in the employee manual).

[13] In addition, policy reasons support our conclusion that an employee must exhaust internal grievance procedures contained in an employee handbook before filing suit for breach of contract based on an alleged failure of the employer to follow policies in the employee handbook. First, the grievance process allows an employer to redress wrongs without burdening the courts with unnecessary litigation. See Neiman v. Yale Univ., 851 A.2d 1165, 1172 (Conn. 2004) (stating that grievance procedures “merely ensure that the grievant and the school have an opportunity to resolve the
dispute before seeking redress in the courts, thereby conserving judicial resources"). Second, not requiring an employee to exhaust internal grievance procedures allows the employee to choose which employment policies are binding. See, e.g., McGuire, 210 F.3d at 1147 (“An employee must accept both the benefits and the responsibilities of an employee handbook which creates an implied contract.”). In this case, the employee handbook required that Plaintiff allow Defendants to redress the perceived violation of the right to be disciplined and terminated for “just cause” stemming from the employee handbook. Once Plaintiff exhausted the grievance procedure, he could have then instituted his lawsuit had he not been satisfied with the result. See McDowell, 119 N.M. at 701, 895 P.2d at 223 (holding that exhaustion requirement did not bar litigation of the plaintiff’s claim because he substantially complied with grievance process); see also Neiman, 851 A.2d at 1172 (“[I]nternal procedures do not preclude access to the courts should the grievant be dissatisfied with the ultimate result.”).

[14] Plaintiff argues that New Mexico courts “have not adopted a broad, general rule that a plaintiff cannot pursue a breach of contract claim founded in an employee handbook before first exhausting the grievance procedures and instead have take[n] a more measured and considered approach in deciding whether exhaustion... is a prerequisite to pursuing a breach of implied contract claim in the district courts.” Plaintiff argues that New Mexico courts “review the nature of the grievance procedure in deciding whether exhaustion of the procedure is required.” However, the cases cited by Plaintiff address different issues. Some of the cases address whether a legislative body intended an administrative scheme to be the exclusive remedy for a plaintiff’s cause of action. See Barreras, 2003-NMCA-027, ¶¶ 9, 21 (addressing whether the administrative adjudication in the state personnel act is the exclusive remedy for breach of contract claims arising under the state personnel act); Pan Am. Petroleum Corp. v. El Pico Natural Gas Co., 77 N.M. 481, 484, 424 P.2d 397, 399 (1966) (addressing whether a federal agency had exclusive jurisdiction to determine whether the state legislature could impose a tax); Chavez v. City of Albuquerque, 1998-NMCA-004, ¶¶ 14-18, 124 N.M. 479, 952 P.2d 474 (determining that a grievance procedure for municipal employees did not provide the exclusive remedy for claims arising from an alleged breach of the municipality’s ordinance governing employment). In cases addressing the exclusivity of an administrative setting, the nature of the proceedings is an important factor to consider because a plaintiff is either barred from court or may appeal to a court under a limited standard of review. In this case, Defendants do not argue that the grievance procedure provided Plaintiff’s exclusive remedy, only that the process must be exhausted before Plaintiff files an action in district court. See Chavez, 1998-NMCA-004, ¶ 14 (defining exclusive remedy as “one which provides for a plain, adequate, and complete means of resolution”). Further, one case cited by Plaintiff considers whether a collective bargaining agreement’s administrative proceeding covered the plaintiff’s claims against the labor union. See Callahan v. N.M. Fed’n of Teachers-TVI, 2005-NMCA-011, ¶ 21, 136 N.M. 731, 104 P.3d 1122, aff’d in part, rev’d in part by 2006-NMSC-010, 139 N.M. 201, 131 P.3d 51. The other case cited by Plaintiff addressed only whether policies and procedures governing the plaintiff’s employment created an implied contract, not whether exhaustion was required. See Whittington v. State Dep’t of Pub. Safety, 2004-NMCA-124, ¶ 1, 136 N.M. 503, 100 P.3d 209. Plaintiff fails to cite authority supporting his argument that New Mexico law is inconsistent with a broad, general rule requiring exhaustion of grievance proceedings in an employee handbook.

[15] Plaintiff next argues that the permissive language in the grievance procedure permits an employee to bypass the grievance process and pursue a direct court action. Plaintiff argues that the grievance policy in this case is permissive because it states that the employee “may,” not “shall,” file a grievance. However, we read the plain language of Section 6.1.1 of the employee handbook, using the term “may,” to be permissive only to the extent that it provides a potential grievant with two options: (1) file a grievance, thereby exhausting the remedies under the employee handbook and allowing the grievant to then file an action in district court for an alleged breach of the employee handbook, or (2) forego the grievance process and accept the disciplinary decision of Defendants. See Neiman, 851 A.2d at 1173 (rejecting argument that the use of “may” in an internal grievance process made the grievance procedure permissive); United Nuclear Corp. v. Allstate Ins. Co., 2011-NMCA-039, ¶ 11, 149 N.M. 574, 252 P.3d 798 (“We consider the plain language of the relevant provisions, giving meaning and significance to each word or phrase within the context of the entire contract, as objective evidence of the parties’ mutual expression of assent.” (internal quotation marks and citation omitted)), cert. granted, 2011-NMCERT-005, 150 N.M. 667, 265 P.3d 718. In other words, the word “may” relates to whether the employee wishes to challenge the proposed disciplinary action by Defendants, not whether the employee must do so. The grievance procedure in the employee handbook is mandatory if an employee wishes to challenge a disciplinary action.

CONCLUSION

[16] An employee must substantially comply with mandatory internal grievance procedures contained in an employee handbook before filing suit for breach of contract based on an alleged failure of the employer to follow the employee handbook. Because Plaintiff did not exhaust the grievance procedures in Defendants’ employee handbook, we reverse the district court’s denial of Defendants’ motion for summary judgment.

[17] IT IS SO ORDERED.

JAMES J. WECHSLER,
Judge

WE CONCUR:
RODERICK T. KENNEDY, Judge
J. MILES HANISEE, Judge
In this consolidated case, certified to us by the Bernalillo County District Court, Pinghua Zhao, Gregg Fallick, and Janet Fallick (Homeowners) appeal a significant increase in the value of their homes for tax assessment purposes than it had for the properties' previous owners. As a result, the property tax assessment for each home significantly increased. Homeowners appealed to the Bernalillo County Valuation Protests Board (Board), contending that the statute with which their properties were assessed was unconstitutional. The Board rejected the appeals and upheld the assessor's valuations. Homeowners then appealed to the district court, which, in light of what it believed to be a slew of similar cases, did not decide the case. Rather, the district court took judicial notice of two previous cases from the district with disparate results and certified the cases to this Court. See NMSA 1978, § 39-3-1.1(F) (1999); Rule 12-608 NMRA (setting forth the requirements and procedures for such certification to this Court). The question certified was whether Subsections (A)(3)(a), Subsection (B), and Subsection (E) of . . . [Section] 7-36-21.2 . . . violate the New Mexico Constitution, Article VIII, [Section] 1 (as amended 1998), because the Subsections create a classification based on residential property was acquired, not on the constitutionally permissible classifications of owner-occupancy, age, or income.

Because this question is one of broad and substantial public interest and likely to recur, we conclude that the district court properly certified the question to us, and we accept the certification. See Jicarilla Apache Nation v. Rio Arriba Cnty. Assessor, 2004-NMCA-055, ¶ 13, 135 N.M. 630, 92 P.3d 642, rev'd on other grounds by Jicarilla Apache Nation v. Rodarte, 2004-NMSC-035, 136 N.M. 630, 103 P.3d 554.

I. BACKGROUND

The facts in the case are not in dispute. Homeowners bought and occupied new homes and, in the year following their purchase, Bernalillo County valued their properties at significantly greater amounts for tax assessment purposes than it had for the properties' previous owners. As a result, the property tax assessment for each home significantly increased. Homeowners appealed to the Bernalillo County Valuation Protests Board (Board), contending that the statute with which their properties were assessed was unconstitutional. The Board rejected the appeals and upheld the assessor's valuations. Homeowners then appealed to the district court, which, in light of what it believed to be a slew of similar cases, did not decide the case. Rather, the district court took judicial notice of two previous cases from the district with disparate results and certified the cases to this Court. See NMSA 1978, § 39-3-1.1(F) (1999); Rule 12-608 NMRA (setting forth the requirements and procedures for such certification to this Court). The question certified was whether Subsections (A)(3)(a), Subsection (B), and Subsection (E) of . . . [Section] 7-36-21.2 . . . violate the New Mexico Constitution, Article VIII, [Section] 1 (as amended 1998), because the Subsections create a classification based on residential property was acquired, not on the constitutionally permissible classifications of owner-occupancy, age, or income.

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II. DISCUSSION

[5] Enacted in 2000 and amended in 2001 and 2003, Section 7-36-21.2 is at issue in this case and provides in pertinent part:

A. Residential property shall be valued at its current and correct value in accordance with the provisions of the Property Tax Code . . . ; provided that for the 2001 and subsequent tax years, the value of a property in any tax year shall not exceed the higher of one hundred three percent of the value in the tax year prior to the tax year in which the property is being valued or one hundred six and one-tenth percent of the value in the tax year two years prior to the tax year in which the property is being valued. This limitation on increases in value does not apply to:

(3) valuation of a residential property in any tax year in which:

(a) a change of ownership of the property occurred in the year immediately prior to the tax year for which the value of the property for property taxation purposes is being determined[.]

. . .

B. If a change of ownership of residential property occurred in the year immediately prior to the tax year for which the value of the property for property taxation purposes is being determined, the value of the property shall be its current and correct value as determined pursuant to the general valuation provisions of the Property Tax Code.

. . .

E. As used in this section, “change of ownership” means a transfer to a transferee by a transferor of all or any part of the transferor’s legal or equitable ownership interest in residential property except for a transfer[.]

[6] The limitation on property value accorded by Section 7-36-21.2(A) is an exception to the general provisions of the Property Tax Code governing valuation of property for taxation purposes. See NMSA 1978, § 7-36-15(B) (1995) (amended 2008) (stating the general provisions for valuation of property); NMSA 1978, § 7-36-16(A) (2000) (noting the limitations on value imposed by Section 7-36-21.2 as an exception to the requirement that assessors regularly update the values of property for property taxation purposes to current and correct levels). Generally, all property is valued to reflect “current and correct” values, and current and correct values are updated and maintained regularly. See § 7-36-16; NMSA 1978, § 7-38-7 (1997). Section 7-36-21.2(A) creates an exception to that rule by limiting the increase in valuation to three percent a year after the residential property has changed ownership and been revalued according to “general valuation provisions of the Property Tax Code.” Section 7-36-21.2(B). Section 7-36-21.2 limits increases in this manner, so long as the property is not transferred to a new owner. The applicability of this exception begins anew in the year following the purchase of a home by a new owner.

[7] Homeowners argue that the limitation on taxation created by Section 7-36-21.2 violates Article VIII, Section 1 of the New Mexico Constitution by creating an unauthorized class of residential property taxpayers based upon the time of acquisition.1 Homeowners also argue that Section 7-36-21.2 is invalid on its face. For reasons explained in this Opinion, we hold that Section 7-36-21.2 does not violate the New Mexico Constitution.

A. Standard of Review

[8] Because the facts in this matter are not in dispute, and the issue certified is solely one of statutory and constitutional interpretation, we review the question presented to us de novo. Dell Catalog Sales L.P. v. Taxation & Revenue Dep’t, 2009-NMCA-001, ¶ 17, 145 N.M. 419, 199 P.3d 863. Likewise, we review de novo whether Section 7-36-21.2 conflicts with Article VIII, Section 1 of the New Mexico Constitution. See Georgia O’Keeffe Museum v. City of Santa Fe, 2003-NMCA-003, ¶ 27, 133 N.M. 297, 62 P.3d 754. “It is presumed that words appearing in [the C]onstitution have been used according to their plain, natural, and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of [the C]onstitution in order to search for some other conjectured intent.” State ex rel. Gomez v. Campbell, 75 N.M. 86, 101, 400 P.2d 956, 966 (1965) (alteration omitted) (internal quotation marks and citation omitted).

[9] Similarly, “plain language of a statute is the primary indicator of legislative intent.” High Ridge Hinkle Joint Venture v. City of Albuquerque, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599 (internal quotation marks and citation omitted). We “give the words used in the statute their ordinary meaning unless the [L]egislature indicates a different intent.” Id. (internal quotation marks and citation omitted). We do not read additional language into the statute, particularly when it makes sense as the Legislature wrote it. Id.

[10] In our review, we indulge in a strong presumption that the statute in question is constitutional, and we will uphold a statutory enactment unless we are satisfied beyond all reasonable doubt of its unconstitutionality. Bounds v. State, 2011-NMCA-011, ¶ 34, 149 N.M. 484, 252 P.3d 708, cert. granted sub nom. Bounds v. D’Antonio, 2011-NM-CERT-001, 150 N.M. 560, 263 P.3d 902. “[T]he party attacking the constitutionality of the statute has the burden of proving the statute is unconstitutional beyond all reasonable doubt.” Wachocki v. Bernalillo Cnty. Sheriff’s Dep’t, 2010-NMCA-021, ¶ 33, 147 N.M. 720, 228 P.3d 504 (internal quotation marks and citation omitted), aff’d, 2011-NMSC-039, 150 N.M. 650, 265 P.3d 701. “It is . . . a fundamental principle that courts will not declare a legislative act unconstitutional if there is any reasonable basis upon which it can be upheld.” Amador v. State Bd. of Educ., 80 N.M. 336, 337, 455 P.2d 840, 841 (1969). And where we adjudicate an attack on a statute’s constitutionality, “we look at whether there exists a set of circumstances in which the statute can be constitutionally applied.” Bounds, 2011-NMCA-011, ¶ 34.

B. Section 7-36-21.2 Does Not Violate Article VIII, Section 1 of the New Mexico Constitution

[11] Homeowners contend that Section 7-36-21.2(A)(3)(a), (B), and (E) violate Article VIII, Section 1 of the New Mexico Constitution by creating an unauthorized class of residential property taxpayers based upon the time owners acquire the property. Article VIII, Section 1 of the New Mexico Constitution is composed of two components, the latter of which mandates the Legislature to impose a limitation on annual increases in property valuation and states that the limitation may be applied to certain classes of taxpayers. Homeowners concede

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1In this case, Homeowners have eschewed any argument that the Property Tax Code’s distinction between residential properties owned more or less than a year implicates the equal protection clause of the United States and New Mexico Constitutions. See Nordlinger v. Hahn, 505 U.S. 1 (1992) (rejecting equal protection challenge to time-of-acquisition value system of valuing property for taxation as having rational basis).
that “[t]he dispositive issue is not whether [Section] 7-36-21.2 levies residential property taxes equally and uniformly within the same class of taxpayers; undoubtedly it does.” As a result, we will only discuss Article VIII, Section 1(B) of the New Mexico Constitution in our analysis.

[12] Specifically, Homeowners contend that Section 7-36-21.2 “creates two classes of taxpayers—older and newer homeowners—defined solely on the basis of whether a homeowner changed ownership in the year immediately prior to the assessment year at issue, or in earlier years.” They argue that this classification violates Article VIII, Section 1(B) of the New Mexico Constitution, which states: “The [L]egislature shall provide by law for the valuation of residential property for property taxation purposes in a manner that limits annual increases in valuation of residential property. The limitation may be applied to classes of residential property taxpayers based on owner-occupancy, age[,] or income.” Homeowners interpret the second sentence of Section 1(B) to restrict the Legislature to the classifications of owner-occupancy, age, or income when creating statutes limiting annual taxable value increases. Homeowners occupy the residences they own. Because Homeowners believe that Section 7-36-21.2 classifies residential property owners based on when they acquired their property, they argue that the statute violates the Constitution as the classification is not one of the permissible classes provided in Article VIII, Section 1(B) of the New Mexico Constitution.

[13] We disagree that a new classification of taxpayer is created based on the time of acquisition. Section 7-36-21.2 applies the limitation to increases based upon when a taxpayer acquires ownership of the property and, hence, taxpayer status relative to that property. An owner of residential property is “the person in whom is vested any title to property[,]” NMSA 1978, § 7-35-2(G) (1994). “Property taxes imposed are the personal obligation of the person owning the property on the date on which the property was subject to valuation for property taxation purposes.” NMSA 1978, § 7-38-47 (1973). All property subject to taxation is valued as of January 1 of each tax year, Section 7-38-7, at its “current and correct value[,]” Section 7-36-16(A). The class of owner-occupants, contained in Article VIII, Section 1, does not include anyone until they own property. What this means is the classification is based on the acquisition of taxpayer status. The value limitation in question only commences once a taxpayer owns the property.

[14] The limitation accrues to owners of property after the initial valuation of their home during their first year of ownership and limits increases in valuation thereafter to no more than three percent of the prior year’s value. See § 7-36-21.2(A). That exception to the general valuation statute conferred by Section 7-36-21.2(A) continues to benefit the homeowner every year until such time as the property is sold. Thus, Section 7-36-21.2 establishes a limitation predicated on the property being owned by the taxpayer, beginning anew with the current and correct value established by the market when the property was acquired by the new owner. See § 7-36-21.2(B). The limitation ceases with the end of the owner-occupant’s tenancy after the sale of the property.

[15] To the extent Homeowners seem to assert that the value limitation carries over from the previous owner, such a contention is unsupported by the property tax code. After an owner sells his or her property, he or she is neither the taxpayer for property tax purposes, nor the owner-occupant of the home who benefits from the limited valuation conferred by Section 7-36-21.2. The purchaser, not owning the property on the date it was last subject to valuation pursuant to the limitation, is not entitled to benefit from that lower taxable value. The statute therefore does not classify newer owners and older owners in violation of the Constitution. Rather, the difference in taxable value between the former owner’s tax bill and the new owner’s tax bill is based upon the fact that the new owner, at the relevant date from which the limited taxable value was calculated for the former owner, was not an owner of the property.

[16] In this case, Homeowners were not owners of the properties when they were subject to the previous owners’ entitlement to the value limitation. They consequently do not obtain the benefit of the limitations until their purchases of the properties are complete, at which time, they attain membership in the class of owner-occupants to whom the limitation applies.

C. Section 7-36-21.2 Is Not Invalid on Its Face

[17] Homeowners also contend that Section 7-36-21.2 is invalid on its face. Homeowners fail to provide us with authority to evaluate this argument, other than assertions that “[t]axpayers[‘] homes lying side-by-side and receiving identical governmental services, were assessed using different valuation methods . . . and [the taxable value of these homes] increased at substantially disparate levels” and that the statute defines “change of ownership” in an arbitrary way. Homeowners do not provide authority about how we are to evaluate their claim that this law is “invalid on its face.” We will not consider propositions that are unsupported by citation to authority. ITT Educ. Servs., Inc. v. Taxation & Revenue Dep’t, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969. And, where a party cites no authority to support an argument, we assume no such authority exists. In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). This Court has no duty to review an argument that is not adequately developed. See Headley v. Morgan Mgmt. Corp., 2005-NMCA-045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 (declining to entertain a cursory argument that relied on several factual assertions that were made without citation to the record).

[18] Homeowners urge that Article VII, Section 1(B) of the New Mexico Constitution permits the Legislature to favor owners who occupy their homes over residential property owners who do not occupy or who rent out the property. This might be so, but authority cited by Homeowners as to this proposition directs us to restrict our reading of the constitutional provision to limit its scope to its own words and to neither add nor subtract language or concepts from it. Homeowners insist that “ownership must be linked to ‘occupancy.’” First, we again note that Homeowners are “owner-occupants.” What they want is to receive the benefit of the statutory limitation on value as neighbors who became owners before they did. As discussed above, this constitutionally based benefit is limited by the fact that Section 7-36-21.2 only allows the limitation of assessed valuation increases to someone who has become an owner, beginning at the moment ownership commences, and the property is valued so as to establish the new owner’s obligation to pay taxes.

[19] To the extent Homeowners attempt to assert that revaluation at the time of a “change of ownership” in Section 7-36-21.2 operates to either create an impermissible temporal statutory exception to Article VIII, Section 1(B) of the New Mexico Constitution or creates a newly created class of taxpayers defined by the time of acquisition of their home who are excepted from this favorable scheme, their argument fails. This part of the statute is quite congruent with the constitutional class created in Article VIII, Section 1 of the New Mexico Constitution, and Homeowners are unequivocally members of that class of taxpayer as of the moment they purchased their homes. The argument that favoring older owners over newer owners is outside the constitutional classification is misplaced. The
The statute's application or non-application than they did is the basis for our decision. Became owner-occupiers at an earlier date where in this case is it asserted that persons to whom those provisions apply are parties in this case. Homeowners' complaint that they are not treated the same as persons who became owner-occupiers at an earlier date than they did is the basis for our decision. The statute's application or non-application to owners of residential property who do not occupy their premises is a matter we leave to the Legislature to evaluate.

Moreover, unless a statute violates the Constitution, “[w]e will not question the wisdom, policy, or justness of legislation enacted by our Legislature.” Madrid v. St. Joseph Hosp., 1996-NMSC-064, ¶ 10, 122 N.M. 524, 928 P.2d 250. As we have addressed the specific constitutional claims raised by Homeowners and have determined that the statute does not violate those parts of the Constitution, we review this argument no further.

III. CONCLUSION

We hold that Section 7-36-21.2 does not violate the New Mexico Constitution, as it limits revaluation for taxation purposes based upon owner-occupant status. According to this, we remand these cases to the district court for adjudication of Homeowners’ claims consistent with the law as determined in this Opinion.

SUTIN, Judge (Specially Concurring).

(24) I concur in the Majority Opinion. I hesitate signing on with no separate statement only because I have concern about what I consider some imprecise, inaccurate, or ambiguous wording that might cause problems down the line, particularly with regard to the propriety of valuation procedure employed under Section 7-36-21.2. I also hope it is clear that the Majority Opinion is to be narrowly read as limited to Homeowners’ claim that the valuation under Section 7-36-21.2 violated Article VIII, Section 1(B) in that a new class of taxpayer not specified in Section 1(B) was created.

(25) Thus, following the letter of the certified question, I concur in affirming the district court on the very limited ground that Subsections (A)(3)(a), (B), and (E) of Section 7-36-21.2 do not, as Homeowners contend, unconstitutionally go beyond owner-occupancy, age, and income by “creating a classification based on when residential property was acquired[,]” I am not persuaded by Homeowners’ “fourth taxpayer classification” theory.

(26) Although not at issue in the appeal before us, I think it useful to write separately to raise questions in regard to the valuation procedure employed under Section 7-36-21.2. The Majority Opinion analyzes the issue as follows. The seller has the benefit of the 3% increase limitation until such time as he sells, at which time he no longer needs or deserves the benefit of that limitation. The buyer gains the benefit of the 3% increase limitation until such time as he sells, at which time he, too, no longer needs or deserves the benefit of that limitation. A new valuation (from which the 3% increase limitation starts) based on the sale price of the property is properly imposed on the property purchased. The valuation based on the sale price reflects the current and correct value and thus the “market value” of the purchased property. Exclusion of purchased property from a 3% annual increase based on the last valuation of the property, and starting the 3% annual increase based on a new purchase price valuation, does not create an unconstitutional fourth taxpayer status classification, that is, a taxpayer classification in addition to the three allowed in Article VIII, Section 1(A), namely, “owner-occupancy, age[,] or income.” The Majority Opinion properly does not delve into whether this valuation and ultimately the taxation process violates or is a permissible exception to the equal and uniform clause in Article VIII, Section 1(A) of the New Mexico Constitution.

(27) Concern about the equality and uniformity of this purchase-price-valuation scheme is raised based on the following hypothetical example. Homeowners A and B live next door and live in virtually identical residences situated on the same amount of acreage. Their valuations in 2007 are $100,000. Homeowner A sells his home to Buyer B in 2007; a bubble housing economy, for $300,000. Buyer B’s 3% limitation increase starts at $300,000. Homeowner B continues to have a 3% limitation increase based on $100,000. Homeowner B sells his property to Buyer D in 2012 for $125,000, the market having sunk dramatically, Buyer D, sitting next door to Buyer C, has the protective 3% limitation benefit on a $125,000 value; whereas Buyer C has that benefit on a $300,000 value. One can suppose that, in 2012, Buyer C can attempt to get a reduction of the 2012 assessed value, but one should not count on it. Buyer C would have to protest the valuation and prove a lower value by comparable sales. Comparable sales are likely to be a mixture of low and high prices, depending on market fluctuations over the period considered for comparable sales. The foregoing example can be extended to residential homes in a neighborhood or larger area consisting of like homes.

(28) Article VIII, Section 1(B) gives no inklng of an intent that whatever annual increase limitation the Legislature might enact could carry the change-of-ownership exclusion enacted in Section 7-36-21.2(A).

(29) Section 1(A) deals with (1) value of classes of property and (2) methods of valuation of that property, with a percentage tax rate limitation. “[S]o long as the tax is equal and uniform on all subjects of a class and the classifications for taxation are reasonable, such legislation does not offend these provisions of the State or Federal [C] onstitutions.” Gruschus v. Bureau of Revenue, 74 N.M. 775, 777, 399 P.2d 105, 106-07 (1965); see NMSA 1978, § 7-36-2.1(A) (1995) (stating that property is classified as residential and non-residential). What are we to understand from Article VIII, Section 1(A)’s “Except as provided in Subsection [(B)] of this section” phrase? Are we to understand that Subsection 1(A) says that Subsection (B) controls even if taxes are not equal and uniform upon residential property? Do we construe Subsection (B) to permit use of valuation methods resulting in taxes upon residential property that are not...
equal and uniform? Did the Legislature intend such broad constitutional authority in order to enhance its own plenary authority in taxation? Were the people who approved the amendment sufficiently advised of the breadth of such authority, and did they understand what it could bring about?  

[30] Article VIII, Section 1(B) requires the Legislature to provide by law for the valuation of residential property for property taxation purposes “in a manner that limits annual increases in valuation of residential property.” Subsection (B) then states that the annual increase limitation “may be applied to classes of residential property taxpayers based on owner-occupancy, age[,] or income.” Article VIII, Section 1(A)’s equal and uniform clause relates to subjects of taxation of the same class. Property is the subject of taxation. Residential property is a subject of taxation of the same class. Article VIII, Section 1(B)’s mandate to limit increases relates to valuation of residential property.  

[31] Section 7-36-21.2 is the Legislature’s apparent attempt to come within the constitutional mandates of Article VIII, Sections 1(A) and 1(B). In that apparent attempt to come within the constitutional mandates, the Legislature created not only the 3% “manner” of annual valuation increase in Section 7-36-21.2(A), but at the same time created in Section 7-36-21.2(B) what appears to call for a re-valuation of the property purchased at the point of ownership change. That is how the valuation authorities have construed Section 7-36-21.2(B). Under Section 7-36-21.2(B), the valuation of the new purchaser’s property must be the “current and correct value as determined pursuant to the general valuation provisions of the Property Tax Code.”  

[32] Section 7-36-15(B) of the Property Tax Code sets out the methods of valuation for property taxation purposes for residential and other property not covered under other specific statutory provisions. Market value is to be “determined by application of the sales of comparable property, income or cost methods of valuation[,] or any combination of these methods.” Id. And the valuation authority must “apply generally accepted appraisal techniques.” Section 7-36-15(B) (1). Yet, when a residential property is sold, the valuation authorities are employing a valuation method that determines value based solely on the purchase price of the property. 

[33] This purchase-price method of valuation is not a valuation method based on comparable sales, although comparable sales appears to be the primary if not only method of valuation contained in the Property Tax Code for valuation of purely residential property. See § 7-36-15(B). Furthermore, it is not readily apparent that using the purchase price of the property being valued as the sole valuation determinant is a generally accepted appraisal technique. In addition, according to Property Tax Department Regulation 3.6.5.22(G)(6) NMAC, “[e]vidence of the sale price of the property being valued is not sufficient to establish a market value under Section 7-36-15 . . . if the evidence of the sales of comparable property indicates the sales price was not the market value.” Also, Department Regulation 3.6.5.23(C)(1) and (2) NMAC define “current and correct values of property” in terms of market value, and “market value” is determined based on the market value method of valuation set out in 3.6.5.22(G)(1) NMAC as “a process of analyzing sales of similar recently sold properties in order to derive an indication of the most probable sales price of the property being appraised.” Nothing in Article VIII, Section 1 indicates an intent that what should be an equal and uniform annual increase limitation gives rise to use of purchase price as the exclusive method of re-valuing a particular residential property that happens to be sold, where all similar properties remain undervalued.  

[34] In the attempt to construe Article VIII, Sections 1(A) and 1(B) and Section 7-36-21.2 in tandem and harmony, one must at least question whether the Constitution permits the Legislature to enact legislation that results in apparent non-uniform and unequal valuation and taxation of properties of the same class. Were Plaintiffs to have raised whether the manner in which valuation authorities have applied Section 7-36-21.2 violates the equal and uniform clause or constitutional equal protection, it is not all that clear that Nordlinger, 505 U.S. 1, would control rather than Allegheny Pittsburgh Coal Co. v. Cnty. Comm’n of Webster Cnty., 488 U.S. 336 (1989).  

[35] It would at least seem arguable that Section 7-36-21.2 violates Article VIII, Section 1. The argument would be that, as the statute reads, as well as in the manner in which it has been interpreted and applied by the valuation authorities, Section 7-36-21.2 goes beyond simply providing for valuation in a manner that uniformly limits annual increases in valuation of residential property during valuation cycles. This view may very well have been how the electorate saw the benefit of constitutional amendment when they voted in favor of its adoption. It would seem arguable that Section 7-36-21.2 has created an impermissible offspring through application of a method of valuation that results in what amounts to unequal and non-uniform checkerboard and patchwork valuation and taxation of the same class of property. The argument would be based on singling out one property for a currently higher valuation while leaving all unsold similar, comparable properties in perhaps lesser or under market value status. We have no evidence here of public benefit from long-term home ownership or even of a weighing of any such benefit against any detrimental effect resulting from discouragement and disincentive with regard to alienation of property when purchase of a new property is contemplated. How persuasive these arguments might be must be left for any future proceedings that may arise. Plaintiffs did not raise and argue any of this.  

[36] As I indicated earlier, what I have discussed here does not specifically reside within the letter of the limited question certified to this Court. But nothing I have discussed should, if legitimately arguable, be considered precluded by anything written in the Majority Opinion from contention and argument in any other pending or future case.  

JONATHAN B. SUTIN, Judge

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2The valuation authorities refer to this methodology for determining property value as an “acquisition value system.” See Dzur v. Bernalillo Cnty. Protests Bd., No. CV-2008-12410, ¶ 23 (2d Jud. Dist. Ct.).
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