



**SUPREME COURT
STATE OF NEW MEXICO**

No. S-1-SC-40815

DENNIS P. MURPHY, AS GUARDIAN AD LITEM FOR DILON BARBERO, A MINOR,;

Plaintiff-Petitioner,

v.

**PEDIATRIX CARDIOLOGY OF NEW MEXICO, P.C. D/B/A PEDIATRIX CARDIOLOGY
ASSOCIATES OF NEW MEXICO; AND, PRESBYTERIAN HEALTHCARE SERVICES,**

Defendants;

and

NEW MEXICO SUPERINTENDENT OF INSURANCE,

Intervenor-Respondent.

On Appeal from the First Judicial District, Santa Fe County
Hon. Kathleen McGarry Ellenwood, No. D-101-CV-2019-00081

ANSWER BRIEF OF THE NEW MEXICO SUPERINTENDENT OF INSURANCE

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SUPERINTENDENT OF INSURANCE**

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Citations to the transcripts herein are to the unofficial written transcripts, which were filed in the appellate record according to the Court of Appeals' Order dated June 7, 2024.

Statement of Compliance

Pursuant to Rule 12-318(A)(1)(c) and (G) NMRA, the undersigned states that this Answer of the New Mexico Superintendent of Insurance complies with the length limitations of Rule 12-318(F)(3) NMRA. The brief uses a proportionally spaced font (Century Schoolbook), has a typeface of 14 points, and contains 9,588 words. The word count was obtained using Microsoft Word for Microsoft 365 MSO (Version 2511).

/s/ Placido D. Gonzales
Placido D. Gonzales

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INTRODUCTION

This matter comes before this Supreme Court after the court of appeals carefully reached a conclusion based upon the actual record of what transpired, giving due deference to the factual determinations and discretionary judgment of the district court.

While the court of appeals' decision was mixed as to whether the Medical Malpractice Act ("MMA") strictly required payment of future claims as they are incurred, the controlling issue of whether the Superintendent of Insurance (the "Superintendent") may object to settlement terms, raise her concerns to the district court, and submit such issues to the court's reasoned judgment was unanimous. In declining to entertain the Plaintiff's recasting of the relatively narrow issues presented, the court of appeals upheld the inherent authority of the district court, and of the Superintendent of Insurance.

Throughout the Brief in Chief, Plaintiff attempts to characterize this case as a dispute over whether the Superintendent possessed unilateral authority to "object to—and refuse to pay—a court approved settlement." But the underlying case paints a much more nuanced picture. The Superintendent never claimed entitlement to, nor did she attempt to

exercise, anything remotely resembling such authority. To the contrary, when the Superintendent was presented with a settlement that conflicted with a statutory requirement that future medical care be paid “as incurred” and that threatened the stability PCF, the Superintendent promptly sought leave to intervene so that the *district court* could be informed of the error and so that the *district court* could decide the matter. Due regard for the court’s authority has always been maintained.

Intervention is expressly allowed by the Rules of Procedure; the court permitting such was not an abuse of discretion. *See* Rule 1-024 NMRA. Perhaps most striking in the present appeal, as the court of appeals noted in the unanimous portion of its opinion, “Plaintiff did not object to the Superintendent’s initial participation at the time, nor to the Superintendent’s later motion to intervene in the underlying case.” *Murphy v. Pediatrix Cardiology of New Mexico, P.C.*, 2025 WL 830422, ¶ 18 (N.M. Ct. App. Mar. 10, 2025).

Concerning the revocation of the district court’s previous approval of the settlement, to do so was well within the court’s discretion. The court did not rely upon the administrative regulation which Plaintiff’s briefing

fundamentally distorts. Rather, the court acknowledged the MMA's prohibition on lump sum payments for future medical care *and* the court's decision was *also* supported by numerous other findings that would each independently support the court's discretionary decision concerning whether or not to approve the settlement. As Judge Wray noted in her opinion concurring in part and dissenting in part, joined by Judge Ives, "[t]he district court revoked approval of the settlement, based in part on a conclusion that lump sum payments violated the MMA, but also based on the district court's view of the parties' representations and disregard for the Superintendent's duties. The record supports the district court's view of events." *Murphy*, ¶ 31 (N.M. Ct. App. Mar. 10, 2025) (Wray, J., joined by Ives, J., concurring in part and dissenting in part).

The MMA designates the Superintendent as the Custodian of the Patient's Compensation Fund (the "PCF" or the "Fund") and charges her with overseeing the Fund's administration and with the protection of the Fund. Throughout the MMA, the statute contemplates substantial oversight by the Superintendent, including by requiring health care providers to submit proof of an underlying insurance policy, that

providers pay annual surcharges in an amount determined by the Superintendent, permitting the prorating of the payment of claims to patients if the Fund would be exhausted, and requiring that the Superintendent be notified of any complaint asserting a malpractice claim against a qualified health care provider within thirty days of service. NMSA 1978, § 41-5-25(C) (2021).

As the Superintendent noted to both the district court and the court of appeals, the PCF has begun to encounter what appears to be a deliberate strategy designed to keep the Superintendent out of settlement discussions, and more concerning, to force the payment of settlements from the PCF that contain terms which are opposed by the Superintendent, contrary to the sound administration of the Fund, and in the case below, contrary to the requirements of the MMA. Prior counsel informed both courts that the strategy was discussed in a CLE presented by the New Mexico Trial Lawyer's Association **[6-7-24 Tr. 36:10-21]**, and that trial counsel in this case and the mediator even discussed the case during the CLE, the latter asking Plaintiff's counsel how the strategy would work out during this case specifically. **[Id. 36:22-37:10]**

This strategy has led to instances where the parties agree to a settlement amount, often at the statutory limits and without any check on the reasonableness and relatedness of medical expenses. Defendants have no incentive to challenge or object to the amounts, because once the statutory maximum for their share has been reached—\$200,000 under the statute at issue in this case—any additional money is paid by the PCF, so long as it can be called past or future medical expenses. Plaintiffs have a particularly strong incentive to push for such a settlement, as unlike the punitive damages they may receive at trial or any settlement funds that are characterized as payment for punitive damages, payments from the PCF for medical expenses and compensatory damages are not subject to federal income tax. The district courts then review the settlements to ensure they are fair and reasonable for the parties, but there is no party to present positions on whether all amounts are allowed under the MMA and what impact they might have on the PCF. All the Superintendent has requested of the district court in this case is that her position, on behalf of the PCF and the patients and providers that it serves, be considered when the court decides whether or not to approve the specific terms of the settlement.

After years of running large deficits, the PCF is in good financial shape. The Superintendent wants to keep it that way. Part of that effort requires her to speak up when settlement terms are either unreasonable or unallowable under the PCF or, as here, when equally reasonable settlement terms are available, but one makes more fiscal sense to the PCF than the other. The power to do so is not an overstep or an affront to the powers of coequal branches of government, and it is not contrary to the MMA. It is merely an attempt to ensure that the district court's decision is made with the benefit of all the relevant facts and positions at issue. That objective is supported by the MMA itself, and by sound public policy.

SUMMARY OF PROCEEDINGS

Nature of the case and course of proceedings.

The Superintendent does not disagree with Plaintiff's description of the nature of the case and course of proceedings.

Statement of facts.

The Superintendent does not disagree with Plaintiff's statement of facts, except as discussed below.

Mediation was originally held on October 19, 2021. Neither then PCF counsel Barry Berenberg nor the assigned PCF representative Chris DeWald attended the mediation, because neither worked for Integrion or the PCF at the time. Notes from the previous claim adjuster show that the mediation was unsuccessful. Defense counsel contacted the PCF representatives in March, May, and June of 2022 about continuing mediation and settlement talks, but specific terms were not discussed. Mr. DeWald notified defense counsel on July 5, 2022 that future medical expenses will only be paid as incurred. In July, defense counsel passed along a demand from Plaintiff that included a lump sum for future medical expenses. Mr. DeWald responded again that the future medical expenses would only be paid as they are incurred. Defense counsel notified the adjuster that Defendant would be retaining coverage counsel.

[12 RP 2938-39]¹

Defense counsel asked Mr. DeWald on July 14 (Thursday) if he would be available by telephone for a mediation conference on July 18 (Monday). Mr. DeWald responded on July 14 that he would be traveling on Monday and would not be available. Subsequent emails from defense counsel

¹ Applies to the entire paragraph.

include a bracket offer from Plaintiff on July 18, a statement on the evening of July 18 that the *co-defendant* had settled with Plaintiff, a request on the afternoon of July 19 that the mediator would like to talk to everyone to “briefly give Plaintiff’s thoughts and position,” and a settlement demand from Plaintiff (through defense counsel) on the evening of July 19. Mr. DeWald did not respond to any communications until after July 18, consistent with his position that he was unavailable, even by telephone, for the mediation. **[13 RP 3194-95]**²

On July 20, 2022, the parties notified the district court that they had reached a settlement agreement *and* that they were working with the PCF. **[13 RP 3214]** However, the parties were not working with the PCF, or, if they were, it did not extend to telling the PCF that a settlement agreement had actually been reached and that it included a lump sum payment for future medical expenses.

The PCF was notified on September 19, 2022, by counsel for Defendant Pediatrix, that the Parties were considering a settlement that included a lump sum payment for future medical expenses. The PCF responded on October 5, 2022, notifying Defendant Pediatrix that such

² Applies to the entire paragraph.

lump sum payments violate the MMA and objecting to the term. The issue was discussed in a phone call on October 26, 2022, which ended with no resolution. The PCF heard nothing else until Thursday, January 26, 2023, when defense counsel emailed the Court's order approving the settlement to the claim handler at the PCF. The PCF did not learn that a lump sum payment for future medical expenses was included in the settlement agreement until Friday, January 27, 2023, when defense counsel emailed the agreement to Mr. DeWald and to counsel for the PCF. **[12 RP 2939]**³

The very same day the PCF received a copy of the settlement containing the provision for lump sum payment of future medical expenses, the Superintendent filed a notice of her intent to intervene with the court. **[12 RP 2913]** Three days later, the Superintendent filed her Application to Intervene. **[12 RP 2915]** Both Plaintiff and Defendant stipulated to the Superintendent's intervention. **[12 RP 2934]**

The Superintendent did not intervene in order to be unfair to any of the parties, and she is not saying that the settlement is not fair or reasonable. The issues she raised in intervention were whether paying

³ Applies to the entire paragraph.

future medical expenses as a lump sum were allowed under the MMA and whether paying them as incurred would also be a fair and reasonable settlement. The Superintendent's only objection has been to that term. The parties could accept it at any time and end this dispute. The district court recognized that "[t]he Parties have created the situation that the Court now finds itself in." **[13 RP 3218; 14 RP 3250]**

But the parties won't even discuss options with the Superintendent. **[13 RP 3218]** The Superintendent has always been ready to pay medical expenses as they are incurred. **[6-7-24 Tr. 9:10-13]** Former Superintendent Toal agreed to pay a lump sum for medical expenses in one other case where the plaintiff's attorneys agreed not to take a fee out of the payment, so that one hundred percent of it would go to the patient for medical expenses. **[Id. 8:26-9:1]** The Superintendent has not been given access to the trust documents in this case, but based on other cases, she has concerns that the money the PCF would pay for medical expenses could be spent on other types of expenses not covered by the PCF. **[Id. 9:1-10]** The Superintendent even raised the possibility of paying medical expenses while the litigation continues and subtracting that amount from the lump sum payment, should one be ordered. **[6-7-24 Tr. 13:8-22]**

Plaintiff's only response was to level a personal attack against the Superintendent's counsel. [*Id.* 51:10-14]

ARGUMENT

I. The Medical Malpractice Act establishes a state fund that pays for future medical expenses as they are incurred.

A. The Patient's Compensation Fund is a trust fund, not insurance.

The PCF is a state fund that is appropriately characterized as a trust fund; it is not insurance. NMSA 1978, § 41-5-25(A) (2021) (“The fund shall be held in trust”); § 41-5-25(A) (1997, amended 2021) “The fund and any income from it shall be held in trust”). More specifically, the PCF is a charitable trust. *See Forest Guardians v. Powell*, 2001-NMCA-028, ¶¶ 8-9, 130 N.M. 368 (describing the elements of a charitable trust and holding that the Enabling Act meets those elements) (citing *Restatement (Second) of Trusts* §§ 364-65 (1959)). The funds in the PCF are deposited in the State Treasury, invested by the State Investment Council, subject to annual appropriation by the Legislature, and are used by the Superintendent of Insurance for the purposes outlined in the MMA. NMSA 1978, § 41-5-25(A) (1997, amended 2021); § 41-5-25(A)

(2021); *See e.g.* General Appropriation Act of 2024 at 57.⁴ Payments from the PCF are made under the statutory conditions set by the Legislature. NMSA 1978, §§ 41-5-25(A), (G), (H) (2021), 41-5-7 (2021); 41-5-7 (1992, amended 2021). In contrast, “[i]nsurance’ is a *contract* whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils, or to pay or grant a specified amount or determinable benefit in connection with ascertainable risk contingencies, or to act as surety.” NMSA 1978, § 59A-1-5 (1984) (emphasis added).

The PCF’s obligations are set by the MMA, which is a statute, not a contract. Statutes are presumed to *not* create contractual relationships. “[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.” *Nat’l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985) (quoted authority omitted). “This well-established presumption is grounded in the elementary proposition that the principal function of

⁴ Available at <https://www.nmlegis.gov/Sessions/24%20Regular/final/HB0002.pdf>

a legislature is not to make contract, but to make laws that establish the policy of the state.” *Id.* at 466. “Thus, the party asserting the creation of a contract must overcome this well-founded presumption.” *Id.* New Mexico follows this principle, with the court of appeals recently holding that supporting authority is required before a statute will be interpreted as creating a contract. *See Ayala v. N.M. Corr. Dep’t*, No. A-1-CA-37846, 2020 WL 7311958, ¶ 4 (N.M. Ct. App. Dec. 7, 2020) (non-precedential) (“Without any supporting authority we decline to interpret the language of a statute as constituting a written contract with a specific prisoner.”).

While the appellate courts have sometimes used the word “insurance” when discussing the PCF, those cases did not *call* the PCF insurance. They did not say the PCF *is* insurance. Instead, they all refer to a since-repealed provision of the MMA that says the “purpose of the Act is to ‘promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico.” *Roberts v. Sw. Cmty. Health Servs.*, 1992-NMSC-042, ¶ 13, 114 N.M. 248; *Christus St. Vincent Reg’l Med. Ctr. v. Duarte-Afara*, 2011-NMCA-112 (citing *Roberts*, ¶ 13); *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 17 (citing *Christus St. Vincent*, ¶ 17). This purpose is achieved because

the provisions of the MMA “will decrease losses [to medical providers] and therefore make the writing of professional liability insurance more attractive to the insurance industry.” Ruth L. Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M.L. Rev. 5, 26 (1977). In fact, one of the key prerequisites for a health care provider to avail themselves of the MMA is that they must demonstrate professional liability insurance coverage. *See e.g.* § 41-5-5 (A)(1) (1992, amended 2023). Thus, the MMA makes professional liability insurance available through *indirect* means, i.e. by establishing conditions that make the offering of such policies more attractive to the insurance industry. The MMA, by itself, does not provide insurance.

Furthermore, none of those cases considered whether the PCF is insurance. *See generally Baker*, 2013-NMSC-043; *Roberts*, 1992-NMSC-042; *Christus St. Vincent*, 2011-NMCA-112. “[C]ases are not authority for propositions they do not consider.” *Ramirez v. Dawson Prod. Partners, Inc.*, 2000-NMCA-011, ¶ 10, 128 N.M. 601. Thus, no appellate court has decided that the PCF is insurance.

B. The MMA does not allow parties to avoid having future medical expenses paid as incurred by agreeing to limits on future medical expenses.

The MMA states that “[p]ayment for [future] medical care and related benefits shall be made as expenses are incurred.” NMSA 1978, § 41-5-7(D) (1992, amended 2021).⁵ The statute does not distinguish between payments required as the result of a trial verdict or those required as the result of a settlement agreement.

The MMA also allows the parties to “enter[] into a settlement agreement whereby medical care and related benefits shall be provided for a limited period of time only or to a limited degree.” NMSA 1978, § 41-5-7(F) (1992, amended 2021). But this provision does not require, as Plaintiff claims, that expenses not be paid as incurred when an agreement contains a limiting provision. **[BIC 45]** Rather than reading subsection F to abrogate subsection D’s mandate that future medical expenses be paid as incurred, the two provisions can be read in harmony by construing Paragraph F as putting limits on expenses that will be paid

⁵ The pre-2021 version of the MMA applies to Plaintiff’s claim in the case on appeal. In portions of this brief concerning the PCF generally, or concerning newly enacted provisions of the MMA, citation to the current version of the act is utilized, and where appropriate, both versions are cited.

as incurred. In other words, expenses will be paid as incurred only up to a certain amount or only until the patient reaches a certain age. “[W]henever possible [...] we must read different legislative enactments as harmonious instead of as contradicting one another.” *State v. Rivera*, 2004-NMSC-001, ¶ 13, 134 N.M. 768 (internal quotation marks and citation omitted).

II. Careful management of the Patient’s Compensation Fund is in the public’s interest because it is one mechanism by which the Legislature ensures the availability of health care and remedies for medical malpractice.

The public has a significant interest in allowing the Superintendent to participate in the settlement process under the MMA. The Superintendent should be allowed to meaningfully participate in settlement discussions, including mediations, and to have some say in the terms of settlement agreements when those agreements seek to require payment from the PCF. The Superintendent does not ask for final approval authority over settlements—that power should belong to the district courts. However, when the Superintendent objects to a settlement term, and that objection cannot be resolved among the Superintendent and the parties, then the Superintendent should be

allowed to participate in any motion to approve the settlement and to present the facts and reasons behind her objections.⁶

As Judge Wray correctly noted, “The Superintendent [...] is a trustee, with duties not to the Patient’s Compensation Fund itself, but to the intended beneficiaries of the funds held in trust...” *Murphy* ¶ 7 (N.M. Ct. App. Mar. 10, 2025) (Wray, J., joined by Ives, J., concurring in part and dissenting in part). Thus, the Superintendent must necessarily exercise some degree of oversight concerning the disbursement of the PCF’s funds on behalf of the Fund’s beneficiaries. However, more broadly, and by extension, the Superintendent also represents the interests of the State of New Mexico and its citizens at large, as both the PCF and the MMA are means by which health care for all New Mexicans is preserved.

“The Legislature’s stated purpose for enacting the MMA was ‘to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico.’” *Baker*, 2013-NMSC-043, ¶ 16. Likewise, the Legislature

⁶ This provides the answer to the district court’s question of “what’s the role of the Court?” [BIC 30] (citing [8-7-23 Tr. 34:5-7]). Contrary to Plaintiff’s assertion that this was a rhetorical question by the district court, the transcript shows that the question was answered in detail by the Superintendent. [8-7-23 Tr. 34:11-35:5]

continues to utilize the PCF as one means by which health care for all New Mexicans is protected, and it devotes significant public funds to that purpose. One example of this can be seen in the FY 2025 Legislative appropriations to the PCF, where part of the Legislature's appropriation from the General Fund included 8.1 million dollars for the reduction of surcharges for rural hospitals to promote health care availability for rural New Mexicans. H.B. 2, 56th Leg., 2nd Sess. (N.M. 2024) at 195, 196.⁷ As the public servant charged with overseeing the PCF and administering many of the MMA's provisions on behalf of the State, it is imperative that when the Superintendent is made aware of situations such as that which occurred in the underlying matter, she be permitted to inform the district court and seek the court's intervention, clarification, or guidance.

⁷ Available at:

<https://www.nmlegis.gov/Sessions/24%20Regular/final/HB0002.pdf>

A. The Superintendent’s authority arises from her statutory duties as Custodian and trustee of the Patient’s Compensation Fund. The Fund is comprised of public funds and utilized for a public purpose, which requires suitable oversight.

The Superintendent is the Custodian of the Patient’s Compensation Fund. NMSA 1978, §§ 41-5-25(A) (1997); 41-5-25(C) (2021). As Custodian, the Superintendent has a statutory duty to “protect[] and administer[] the fund.” Section 41-5-25(A) (2021). Also included in the Superintendent’s duties are the assessment of annual surcharges, with the aid of an advisory board and independent actuary. Section 41-5-25(D)-(F) (2021). Since 2021, the Legislature has further commanded that the Superintendent ensure that the Fund be brought to solvency with no projected deficit by December 31, 2026. Section 41-5-25(F) (2021). Rate setting and surcharge collection requires substantial oversight, an intimate understanding of potential future liability and risk, and technical expertise from the Superintendent; her involvement is part and parcel to the sound administration of the PCF and the MMA.

Furthermore, because the funds are held in trust, the Superintendent’s duties are “subject to the same fiduciary obligations as any private trustee.” *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶¶ 101-

03 (Chavez, J., joined by Daniels, J., dissenting) (construing duties of the Land Commissioner in managing lands held in trust under the Enabling Act). As Judge Wray observed in her concurrence below, “[t]he Superintendent [...] is a trustee, with duties [...] to the intended beneficiaries of the funds held in trust...” *Murphy* ¶ 7 (N.M. Ct. App. Mar. 10, 2025) (Wray, J., joined by Ives, J., concurring in part and dissenting in part). In general, money acquired by the state is state money, even if held in trust for a specific purpose. “The fact that the government has taken possession of moneys pursuant to law is sufficient to constitute them government funds, even though they are held for a special purpose.” 63C *Am. Jur.* Public Funds § 1 (2022) (footnote omitted). The U.S. Treasury, for example, has a number of trust funds. *State of Ariz. v. Bowsher*, 935 F.2d 332, 333 (D.C. Cir. 1991). Although set aside “for the payment of specific debts,” the United States does not “lose its property interest in that money.” *Id.* at 334. In short, “[t]he money . . . is federal money.” *Id.*

Specifically concerning the PCF: the PCF’s funds are primarily made up of what the Legislature has designated to be “Other State Funds,” as defined by the General Appropriation Act’s appropriation of PCF funds

annually.⁸ Those funds, like those utilized by self-funded departments such as the New Mexico Department of Game and Fish and the Board of Nursing, are sourced from surcharges collected by the Superintendent from participating health care providers and from investment income from the State Investment Council's investment of the Fund's balance.⁹

⁸ "Other State Funds" is defined by the General Appropriation Act of 2024 as:

"(1) nonreverting balances in agency accounts, other than in internal service funds accounts, appropriated by the General Appropriation Act of 2024;

(2) all revenue available to agencies from sources other than the general fund, internal service funds, interagency transfers and federal funds; and

(3) all revenue, the use of which is restricted by statute or agreement[.]"

⁹ See e.g. General Appropriation Act of 2024 at 57, available at <https://www.nmlegis.gov/Sessions/24%20Regular/final/HB0002.pdf> (listing the annual appropriation for the PCF program, to the extent not otherwise funded by special appropriation from the General Fund, as coming from "Other State Funds." *See also* Id. at 58-59 (appropriations to the Board of Nursing of approximately \$3.7 million to pay for its "licensing and certification program" from "Other State Funds" (presumably, the Board of Nursing Fund created by NMSA 1978, Section 61-3-27 (2017)); NM Legislative Finance Committee, Program Evaluation: Performance of the Department of Game and Fish (Oct. 28, 2020), at 1, 4, 6, available at:

https://www.nmlegis.gov/Entity/LFC/Documents/Program_Evaluation_Reports/Program%20Evaluation%20-%20Performance%20of%20the%20Department%20of%20Game%20and

In addition to Other State Funds, the PCF is also comprised of millions of dollars that have been intermittently appropriated from the General Fund to the PCF. Since FY23 for example, the Legislature has appropriated \$106.5 million dollars to the PCF from the General Fund.¹⁰ Those amounts were largely appropriated as part of a deliberate agenda: to ensure that the PCF remains financially sound for the benefit of all New Mexicans.¹¹

All funds held in the PCF are subject to annual appropriation by the Legislature for the use of the Superintendent in the administration of the PCF program. The MMA confers on the Superintendent the authority to approve disbursements from the PCF, but “only for the purposes of and to the extent provided in the Medical Malpractice Act.” Section 41-5-25(A) (2021). Absent the mere ability to oversee the expenditure of such funds and ensure that they are utilized for the purposes of the Medical

[%20Fish.pdf](#) (concerning funding sources for the Department of Game and Fish.

¹⁰ Legislative appropriations from the General Fund to the PCF include \$30 million dollars appropriated in 2022, 32.5 million dollars in 2023, and 44 million dollars in 2024.

¹¹ General Appropriation Act of 2023, H.B. 2, 56th Leg., 1st Sess. (N.M. 2023), available at:

<https://www.nmlegis.gov/Sessions/23%20Regular/final/HB0002.pdf>

Malpractice Act, the MMA and PCF program are fundamentally at risk of abuse and financial instability. That is exactly why the MMA designates the Fund's Custodian and requires that she oversee the Fund's administration and protection. *Id.* .

B. The Superintendent is often the only check on whether settlement terms are reasonable and comply with the Medical Malpractice Act.

In order to protect the PCF funds, the Superintendent must be involved in the settlement process and have some level of authority to approve settlement agreements as they relate to amounts expended from the Fund. The parties themselves have no incentive to protect PCF funds or even to ensure that settlement terms comply with the MMA. Instead, the parties have an incentive to agree to a settlement that pays out the maximum allowed for nonmedical damages. In addition, there is no check on whether past and future medical expenses are reasonable or related to the alleged malpractice. Only the Superintendent provides these checks.

The MMA sets limits on nonmedical damages for medical providers that qualify under the statute. NMSA 1978, § 41-5-5 (1992, amended

2023).¹² These providers are called “qualified health care providers,” or “QHPs” for short. Before the 2021 amendments, nonmedical damages were capped at \$600,000 per provider per occurrence, with the first \$200,000 paid by the provider and the remaining \$400,000 paid by the PCF (\$200K/\$400K). NMSA 1978, § 41-5-6 (1992). After the amendments, the caps were set at \$250K/\$500K for individual providers, \$500K/\$500K for independent outpatient health care facilities (IOHCFs), and \$250K/\$500K/\$3.25M¹³ for hospitals. NMSA 1978, § 41-5-6 (2023). The caps for the hospitals are stepped up every year to a maximum of \$6M per occurrence, but the PCF’s share remains constant. For the other two categories of providers, the caps are indexed by inflation. The provider’s share remains constant, with all of the inflationary increase being applied to the PCF’s share of the payment. For occurrences in 2023, the individual provider cap is \$854,991, which means the PCF’s share rose from \$500,000 to \$604,991—an increase of \$104,991 in just

¹² The MMA was amended in 2021, 2022, and 2023. The pre-2021 statute applies to this case, but the analysis in this brief generally applies to the amended statute as well, unless otherwise noted.

¹³ The first \$250K is paid by the hospital, the next \$500K is paid by the PCF, and the remainder up to the cap is paid by the hospital. Whether the PCF should pay the first \$750K is currently being argued before the court of appeals.

two years. Pinnacle Actuarial Resources, *New Mexico Patient’s Compensation Fund: Actuarial Analysis as of December 31, 2022* (Aug. 2023).¹⁴ This number has continued to increase, with the 2025 Actuarial Report noting the per-occurrence limit now at \$908,779, making the PCF’s portion up to \$658,779 per occurrence. Pinnacle Actuarial Resources, *New Mexico Patient’s Compensation Fund: Actuarial Analysis as of December 31, 2024*, at 15 (June 2025) [hereinafter “2025 Actuarial Report”].¹⁵

In contrast to the cap on nonmedical damages, the MMA requires the PCF to pay past and future medical expenses without any limit. NMSA 1978, §§ 41-5-6 (B) (1992) (past), 41-5-7(C) (1992) (future). This “unlimited medical feature of the New Mexico PCF presents significant risk for the PCF” 2025 Actuarial Report at 7. Before the amendments to the MMA, future medical expenses were to be paid as incurred, Section 41-5-7(D) (1992), although some district courts allowed

¹⁴ Available at:

<https://pcf.osi.state.nm.us/wp-content/uploads/2023/08/NM-PCF-Report-2022-FINAL.pdf>.

¹⁵ Available at:

<https://pcf.osi.state.nm.us/wp-content/uploads/2025/10/NM-PCF-REPORT-2024.pdf>

settlement agreements to include a lump sum payment for future medical expenses.¹⁶ With the amendments, the Legislature removed the requirement that future medical expenses be paid as incurred. *See* NMSA 1978, § 41-5-7 (2021).

These payment provisions show why the Superintendent must have some authority over the settlement process. The Court should recognize that plaintiffs want to obtain as much money as possible from a settlement, while defendants want to pay as little as possible. If settlement talks fail, damage awards at trial are unpredictable, but both parties will have large expenses, especially for experts, and defendants face the risk of significant punitive damages, which are not covered by the PCF or limited by the MMA. Thus, there is an incentive for defendants to pay something at settlement even if they think they have a winnable case.

For nonmedical damages, all defendants are liable for at most \$200K under the pre-amendment statutes. Under the post-amendment

¹⁶ This was the case most recently in *Hernandez v. Kane*, No. D-101-CV-2023-01234, where the district court issued a peremptory writ of mandamus requiring the PCF to pay a \$4.5M lump sum for future medical expenses. *Hernandez*, Order Granting Peremptory Writ of Mandamus (Feb. 20, 2024).

statutes, individual liability is capped at \$250K (with an additional layer of liability beyond \$750,000 for hospitals) and IOHCF liability at \$500K. These are modest amounts compared to the expenses of trial and the possibility for uncapped damages. Thus, there is an incentive for providers to pay these initial amounts and for the parties to then agree that the PCF shall pay the full amount of the cap, regardless of the nature of the malpractice or the type or severity of the injury.

These caps are calculated per occurrence, as “occurrence” is defined under the MMA. NMSA 1978, §§ 41-5-6(A) (1992), 41-5-6 (2023), 41-5-3(K) (2023). Plaintiffs frequently seek damages for multiple occurrences in order to increase the number of caps. Defendants are increasingly likely to agree with these requests, especially when there are significant damages that might fall outside the caps of the MMA (hence exposing them to large damages at trial), including potential punitive damages, or when there are multiple defendants, each with a different underlying malpractice carrier (hence no one carrier paying more than a single \$200K/\$250K threshold amount). Removing the Superintendent’s check

on the number of occurrences would provide further incentives for the parties to raise the total cap by agreeing on multiple occurrences.¹⁷

This perverse incentive to agree to multiple occurrences, at the expense of the PCF, can also be illustrated in the case of hospitals who have an upper layer of liability beyond the PCF amounts. If, for example, a case involved a single occurrence with nonmedical damages of 1.5 million dollars, the hospital would pay \$1,000,000 (an initial \$250,000, as well as the excess of \$750,000), and the PCF would pay \$500,000 (not considering unlimited medical costs). If, however, the parties agree amongst themselves to two occurrences (regardless of what the evidence may show) without the PCF's involvement, and the court noting no objection from any party before it approves the settlement, then the hospital's liability halves to a mere \$500,000 (one underlying layer of

¹⁷ Although not at issue in this case, parties in other cases have become increasingly creative in avoiding the legislative caps on damages. Parties are more frequently agreeing that a case involves multiple occurrences, allowing plaintiffs to collect more than one "cap" for nonmedical damages. Parties are also construing the MMA in a way that allows separate occurrences for each type of health care provider (independent practitioners, independent outpatient healthcare facilities (IOHCF), and hospitals). Although the specific situation has not yet arisen, this latter interpretation would potentially require separate occurrences for *each* hospital and IOHCF named as a defendant.

\$250,000 per occurrence) while the PCF's portion balloons to \$1,000,000 plus whatever past medical costs the parties can rationalize and unlimited future medical costs.

For medical expenses, the lack of any cap greatly increases the incentives for the parties to agree on high amounts. For past medical expenses, there is no reason for defendants to question whether expenses are reasonable or related to the injury. For example, some malpractice arises out of non-elective surgeries. That means the cost of the original surgery would have been incurred regardless of any malpractice. The cost of the original surgery is therefore not a result of the malpractice and should not be reimbursed. But it is common for plaintiffs to include these expenses in their demands. Likewise, a settlement without sufficient oversight may purport to require that the PCF pay for amounts that were never actually incurred, or for non-medical expenses. When the PCF pays, there is no incentive for defendants to challenge these expenses.

Furthermore, the PCF cannot pay for medical expenses attributable to the malpractice of a provider not covered by the MMA. NMSA 1978, §§ 41-5-5(C) (1992); 41-5-5(D) (2023). In this case, Plaintiff settled with such a non-qualified provider for an unknown amount of money. **[12 RP**

2943] Despite allegations that this party contributed to Plaintiff's injuries through malpractice, no portion of past or future medical expenses were apportioned to this defendant. [*Id.*] Thus, there is a good chance a portion of the PCF's payments for both past and future medical expenses are being paid to cover a non-qualified provider, in violation of the MMA.

For future medical expenses, the parties have even less incentive to negotiate settlement amounts. Future medical expenses, when paid as a lump sum, are usually based upon expert estimates of the care that will be needed and a life care plan. These estimates and plans often, and not uncommonly, vary by millions or even tens of millions of dollars. If the PCF is paying for those expenses, and the Superintendent cannot have any say on those amounts or even examine the reasonableness of the reports and plans, then there is absolutely no incentive for the defendants to agree to anything but the amount determined by the plaintiff. In this case, the PCF was shown life care plans that varied in their magnitude by a factor of ten (meaning, for example, that the plans could be \$1M on the low end and \$10M on the high end). [**12 RP 2943]**

III. By remaining silent on the Superintendent’s authority to approve settlements, the Legislature gave her the implied powers needed to ensure the PCF is properly managed.

The MMA allows the Superintendent to have a role in the settlement process and settlement approvals. The MMA is silent on whether the Superintendent may participate in settlement discussions and approve or object to settlement terms and agreements. Thus, the MMA neither expressly prohibits nor expressly allows the Superintendent’s participation. Absent statutory guidance, the “conventional practice” in MMA cases has been for the PCF Custodian to “evaluat[e] and approv[e] all proposed settlements when the case implicates the PCF.” Russell Toal, Superintendent, Office of Superintendent of Insurance, “Medical Malpractice Act/Patient’s Compensation Fund Modification Report,” at 18-19 (Dec. 31, 2020) [hereinafter “Superintendent’s Report”].¹⁸ Until recently, this role “has not been challenged.” *Id.* at 19.

“Approval” in the context of this litigation however, would simply mean that the Superintendent agrees that the proposed agreement is not objectionable and will not oppose the settlement as it relates to the PCF.

¹⁸ Available at:
https://www.osi.state.nm.us/wp-content/uploads/2021/01/12-31-2020_MMA-Report_FINAL.pdf.

The ultimate resolution of any dispute lies with the courts, whose authority is not only respected by the Superintendent, but in the present case, was actively sought. The Superintendent's participation in settlement discussions on behalf of the Fund is a fulfillment of her role as Custodian. Her participation has never been an improper attempt to usurp the court's authority, rather, as demonstrated by the case below, it is a submission to it.

But the court's determination should be made with the benefit of the Superintendent's perspective as well. In the case below, the parties sought to invoke the district court's authority, but only while seeking to sidestep the court's consideration of the PCF's perspective. The court itself noted that it was led to believe that the Superintendent had agreed to the settlement terms when it approved the settlement **[13 RP 3214; 13 RP 3219]**, and it even included a finding in the order approving the settlement that "[a]ll parties responsible for participating in the funding of the settlement were permitted to, and did, participate in the mediation from which the settlement was reached." **[12 RP 2908]** But that conclusion was shown to be incorrect, as demonstrated by the Superintendent's intervention and subsequent affidavits. **[12 RP 2913;**

12 RP 2915; 13 RP 3114; 13 RP 3139] When the court was made aware of the Superintendent's opposition, it appropriately utilized its discretion to revoke the previous approval, inviting the parties to resubmit the settlement for consideration if the dispute were resolved. **[13 RP 3219]**

A. Statutory silence means that powers are implied to what is necessary, not limited to only what is expressly stated.

Public policy should not be inferred from the absence of statutory language. *K.R. Swerdfeger Constr. v. UNM Bd. of Regents*, 2006-NMCA-117, ¶ 23, 140 N.M. 374. Thus, the absence of language in the MMA covering the Superintendent's participation in settlement negotiations and approvals does not indicate that the Superintendent should not or cannot participate. The MMA does, however, contain language requiring the Superintendent to hold PCF money in trust and to protect the PCF. NMSA 1978, §§ 41-5-25(A), (E) (1997); 41-5-25(A) (2021). Participating in settlement negotiations and opining as to settlement terms that affect the PCF is an essential part of those protective duties, as shown above.

Statutory silence is not a limitation on the Superintendent's authority. Extensive case law recognizes that agency action does not automatically exceed the agency's authority when a statute is silent.

While agencies are limited by statute, that limitation includes the powers “necessarily implied by those statutes.” *State ex rel. Stapleton v. Skandera*, 2015-NMCA-044, ¶ 8 (quoting *Qwest Corp. v. N.M. Pub. Regulation Comm’n*, 2006-NMSC-042, ¶ 20, 140 N.M. 440). When a statute is silent, regulations fill in the gaps and are presumed to be “a proper implementation of the provisions of laws.” *Robison Med. Research Grp., LLC v. N.M. Taxation & Revenue Dep’t*, 2023-NMCA-065, ¶ 12.

The Plaintiff’s Brief in Chief discusses certain regulations governing the PCF, which Plaintiff argues improperly gives the Superintendent a role in the settlement process. That interpretation mischaracterizes the regulation and its purpose. The regulation is not an attempt to grant new authority to the Superintendent, rather, it is one distinguishing the TPA’s role. More importantly, however, the NMAC provision is not a matter of reversible error in the present case. The district court did not rely on the regulation or indicate any belief that it was bound in its decision due to the regulation. As Judge Wray noted in her concurrence, the district court decision was based on interpretation of the MMA itself and due to the conduct of the parties. *Murphy* ¶ 31 (N.M. Ct. App. Mar.

10, 2025) (Wray, J., joined by Ives, J., concurring in part and dissenting in part). **[13 RP 3213]**

Since 2021, the MMA now requires the Superintendent to contract with a third-party administrator (“TPA”). NMSA 1978, § 41-5-25(B) (2021). By regulation, the TPA has the responsibility to “negotiate reasonable and appropriate compromises and settlements of the fund’s liability respecting any claim against the fund and obtain approval from the superintendent or the superintendent’s designee before entering into an agreement involving PCF funds.” NMAC 13.21.1.8(I). That regulation simply seeks to outline which functions are delegated to the TPA. The MMA is silent in many respects as to the role of the mandated TPA, thus, the Superintendent has filled in the silence of the statute by enacting regulations.

B. Legislative action or inaction on bills gives no indication of legislative intent.

The Court of Appeals was correct to disregard Plaintiff’s invitation to infer legislative intent from proposed amendments that were never passed into law, or even subject of a vote of the Legislature. “We do not attempt to divine what legislators read and heard and thought at the time they enacted a particular item of legislation. If the intentions of the

Legislature cannot be determined from the actual language of a statute, then we resort to rules of statutory construction, not legislative history.” *Regents of Univ. of N.M. v. N.M. Fed’n of Tchrs.*, 1998-NMSC-020, ¶ 30, 125 N.M. 401.

Plaintiff once again attempts to argue before this Court however that the Legislature’s rejection of SB 239, which would have expressly authorized the Superintendent’s participation in and approval of settlements, is indicative of legislative intent on the question of the Superintendent’s authority. As the court of appeals recognized in rejecting that same argument, that assertion is contrary to the well-established jurisprudence of our state. There is no way of knowing with any certainty why the bill failed to make it out of committee. It may have been due to timing and allocation of legislative resources, or because the Legislature viewed the amendment as already encompassed by the law as it existed. To this latter point, since the Legislature was clearly aware that the “conventional practice” in MMA cases at the time was for the Superintendent to “evaluat[e] and approv[e] all proposed settlements when the case implicates the PCF,” and it did not act to expressly prohibit the practice through amendment, the Legislature’s silence may just as

equally be interpreted as an endorsement of the practice as one that is consistent with the Legislature’s intent. Superintendent’s Report at 18-19.

Put plainly, it is unclear whether the Legislature even considered the proposed amendment at all; it died in committee without any vote or other action.¹⁹ As this Court has previously noted, and the court of appeals observed below, “[our appellate courts] do not analyze the language of bills that died in committee and never became law or bills that were vetoed by the Governor.” *State v. Vest*, 2021-NMSC-020, ¶ 34.

Furthermore, this Court has “caution[ed] against relying on *draft* versions of bills or *proposed* statutory language in interpreting legislative intent,” because “[t]here are countless reasons why language may be added or deleted during the legislative drafting process.” *Id.* ¶ 33 (emphasis in original). Thus, nothing can be read into the failure of Senate Bill 239 to advance out of committee. The bill as a whole may have died in favor of House Bill 75, without any consideration of the contents

¹⁹ The text of Senate Bill 239, its committee history, and the fiscal impact report noting that it conflicted with House Bill 75, are available at: <https://www.nmlegis.gov/Legislation/Legislation?chamber=S&legType=B&legNo=239&year=21>.

of the Senate Bill. Or the committee may have determined that the amendment governing Superintendent approval of settlements was not needed because the conventional practice by which the Superintendent currently participates was working well. The existence of the Superintendent's recommendation and Senate Bill 239, therefore, cannot be used as evidence that the Legislature does not want the Superintendent to participate in negotiations and approve settlement agreements that implicate the PCF.

C. Allowing the Superintendent to have a role in the approval of settlements does not violate separation of powers; the Legislature is free to act if it does not agree with the Superintendent's implied role.

While Plaintiff has attempted to paint a picture resembling an overreaching power-grab, the issue before this Court is more accurately viewed as whether the district court erred in permitting the Superintendent to be heard on behalf of the PCF. The court of appeals recognized this reality in concluding unanimously that the Superintendent was justified in her actions, and that the district court did not err.

The Superintendent has never claimed to be the sole authority when it comes to approving settlements, she has merely sought fulfil her

statutory mandate to protect the PCF. What the Superintendent argued below is that when the parties and Superintendent cannot come to an agreement as to the terms of a settlement involving the PCF, that the district court consider the facts and arguments presented by the Superintendent on behalf of the PCF and its beneficiaries should the parties nonetheless seek the court's approval of the settlement. This is a concept that is already provided for in the Rules of Civil Procedure. *See* Rule 1-024 NMRA.

The MMA contemplates that the Superintendent, acting as Custodian of the Fund, will protect and administer the Fund. However, even statute it did not give the Superintendent the explicit role of Custodian, allowing the Superintendent to act where a statute is silent does not violate separation of powers. This Court has recognized that an agency may not alter, modify, or extend the reach of a law created by the Legislature. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶¶ 21-22, 125 N.M. 343. The Court, however, was talking about the *policy* set by the Legislature, not the way in which that policy is implemented. *See id.* ¶ 22 (“Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must

conform.”). That leaves room for the agency to implement policy when the statute is silent, and in fact the Court recognized that “absolute separation of powers is ‘neither desirable nor realistic.’” *Id.* ¶ 23 (quoting *State ex rel. Clark*, 1995-NMSC-051, ¶ 32, 120 N.M. 562).

The question, then, is how to determine when an agency oversteps its bounds. Fortunately, this Court has set out a standard: An infringement of the separation of powers occurs “when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions.” *Id.*; *Clark*, 1995-NMSC-051, ¶ 34. This standard is the same as that followed by the United States Supreme Court. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977). The standard is tested by asking whether the agency action is “an attempt to foreclose legislative action in areas where legislative authority is undisputed.” *Clark*, 1995-NMSC-051, ¶ 34. In *Taylor*, for example, the Governor’s actions were struck down because the Governor “refus[ed] to permit legislative participation in fashioning public assistance policy changes” *Taylor*, 1998-NMSC-015, ¶ 25. The Governor’s program also contradicted explicit provisions in existing statutes. *Id.* ¶¶ 27-30.

In this case, the Superintendent has done nothing to usurp legislative authority. The Superintendent has established regulations that merely dictate what role the relatively-new third party administrator would take over from the Office of Superintendent of Insurance. Concerning the mere concept of participation in the settlement process, the practice significantly predates both the NMAC provision cited by Plaintiff as well as the TPA's involvement. It is not a new role that was created by the regulation, nor did the district court base its revocation of the approval of the settlement on the regulation.

Participation in the settlement process where the MMA is silent on the issue is within the Superintendent's role of Custodian, and it is not contrary to any specific policy or other statutory mandates dictated by the Legislature. Furthermore, nothing the Superintendent has done would prevent the Legislature from amending the MMA to either prohibit her participation in the settlement process or explicitly allow it. The Superintendent has not infringed on the Legislature's powers, nor that of the Courts.

IV. Public policy favors giving the Superintendent a role in the settlement process under the MMA.

A. If past management practices were responsible for PCF deficits, those practices included paying lump sums for future medical expenses.

The PCF is in good financial shape. Deficits were historically allocated between hospitals and independent providers, but as of 2024, the Fund was running a *surplus* for independent providers of around \$18 million. Pinnacle Actuarial Resources, *New Mexico Patient's Compensation Fund: Actuarial Analysis as of December 31, 2023*, at 20, 30 (August 2024) [hereinafter "2024 Actuarial Report"].²⁰ Hospitals are still running a deficit, but hospitals have been continually assessed an additional deficit surcharge designed to eliminate the hospital's deficit by 2027. 2025 Actuarial Report at 16. In the time this case has been pending, the hospital deficit has nearly halved, being reduced from to \$52.4 million in the 2024 actuarial study, to \$26.5 million in the 2025 study. *Compare*, 2024 Actuarial Report at 20 *with* 2025 Actuarial Report at 16. The actuary and Superintendent continue to diligently manage

²⁰ Available at:

https://pcf.osi.state.nm.us/wp-content/uploads/2024/09/NM-PCF-Report-2023-FINAL_opt.pdf

the Fund to ensure that the deficit for hospitals is eliminated as of January 1 , 2027. 2025 Actuarial Report at 16.

Plaintiff attributes previous deficits to a history of mismanagement during previous administrations. **[BIC 39]** While many factors contributed to the deficits, **[Id.]**, the deficits grew during the time that past Superintendents made some lump sum payments for future medical expenses. **[BIC 44]**²¹ And again, while many factors contributed to the reduction and elimination of the deficit (including legislative infusions), the deficits shrunk during the time the Superintendent insisted that future medical expenses be paid as incurred. How future medical expenses are paid is a part of the management of the Fund. If past management practices are to blame for deficits, Plaintiff cannot simply ignore the fact that one of those practices was paying future medical expenses as a lump sum rather than as incurred.

²¹ Plaintiff argues before the Court now and also argued at the court of appeals and district court level that responses to an IPRA request prove that the practice of paying future medical expenses as a lump sum was once widespread. **[BIC 48]** (citing **[13 RP 3007-08, 3075-96]**). As the Superintendent showed, the IPRA request did not ask for lump sum payments for future medical expenses, just payments by the PCF. **[14 RP 3253-54]** Furthermore, at least some of the large payments Plaintiff referred to demonstrably did not include future medical expenses. **[Id.]**

Weighing these factors falls within the Superintendent's purview. The PCF Advisory Board recognized this when it directed the Superintendent to "study the ways in which risk is evaluated for future surcharge rate setting." **[13 RP 3099]** Part of the risk is the manner in which claims are paid. This role is important, because anything that impacts the PCF can "risk compromising patients' access to quality health care or accountability and fair compensation in the case of malpractice." **[Id.]**

Plaintiff offered an affidavit of Dr. Allen Parkman to support an argument that paying future medical expenses as a lump sum benefits the PCF financially. **[BIC 47]** Dr. Parkman, however, offered no analysis, just conclusory statements about "managerial complexities," "transaction disputes," and the "associated financial costs of paying personnel to deal with both of these concerns." **[13 RP 3103]** He did not say what facts he used to support these conclusions, nor even whether he talked to OSI and PCF personnel to see how these issues are handled in real life. He did not even offer a CV showing how he is qualified to opine on the inner workings of the PCF.

B. The Superintendent provides a check on settlement terms that would violate the MMA's restrictions on allowable damages.

While New Mexico favors settlements as a matter of policy, the courts also recognize that “neither side has a duty to look out for the interest of the other.” *Guest v. Berardinelli*, 2008-NMCA-144, ¶ 28, 145 N.M. 186. When the PCF is involved, that means no side looks out for the interests of the PCF, which by extension includes the other beneficiaries of the PCF and the public at large. Furthermore, because medical benefits are almost always entirely paid from the PCF, in cases such as the one at hand where future medical expenses are involved, defendants can settle for an essentially unlimited amount of money at no cost to themselves.

The Superintendent has not taken the position that parties do or should have the ability to force the PCF to pay whatever they decide should be paid. **[BIC 35]** In the *Grant* case cited by Plaintiff, **[*id.*]**, the Superintendent was a party. Thus, the statement that “the parties may choose to settle the malpractice case in any way they see fit” included the Superintendent. In addition, whether the Superintendent must pay all that the parties agree to was not at issue in that case. Cases that have

been resolved since that time show why allowing the parties to settle “in any way they see fit” has unintended consequences.

As Plaintiff points out, one of the incentives for defendants to settle, both generally and in this case, is to avoid punitive damages. **[BIC 31]** Punitive damages are the personal responsibility of health care providers and cannot be paid out of the PCF. NMSA 1978 §§ 41-5-7(H) (1992); 41-5-7(E) 2021. In practice, defendants seek to maximize the payment from the PCF in order to reach high settlement values and avoid punitive damages. That outcome is equally beneficial to plaintiffs, as payment for medical care is not taxable like punitive damage awards are. Because of the wide range of estimates for future medical expenses, it is easy for the parties to settle on a number at the upper end of the range. That arrangement may likely, in effect, result in the PCF paying punitive damages under a different name.

The Superintendent has legitimate reasons for insisting on payment of future medical expenses as they are incurred. When expenses are paid as incurred, either under settlement terms or as the result of a trial verdict, they are not subject to attorney fees. With the standard contingency fee of 40%, patients see barely half of the payment set aside

for future medical expenses. If, as Plaintiff argues, the amount for future medical expenses is already a compromise, **[BIC 46]**, then the patient does not even get the full amount of that compromise. That means either the patient does not receive enough money to cover future medical expenses, or the amount of the expenses are being inflated to cover other expenses, like attorney fees, that the PCF is not allowed to pay.

The fact that the money goes into a trust does not mean that it will be spent on medical expenses. **[BIC 53]** While the Superintendent does not have access to the trust in this case, she has been given access to such documents in other cases. Generally, once the money is in the trust, it can be spent on anything that the trustee determines will benefit the patient, including nonmedical expenses. This allows parties to bypass the MMA's caps for nonmedical damages. *See* NMSA 1978, § 41-5-6 (A) (1992) (limiting nonmedical damages to \$600,000). This also increases the costs to the PCF, because it adds expenses the PCF ordinarily would not pay. *See* **[BIC 47]** (arguing that “a pay-as-you-go” arrangement actually increases costs to the PCF).

The lump sum agreement that the parties reached may be a fair and reasonable amount for future medical expenses. But that by itself does not mean that paying the expenses as they are incurred cannot also be a fair and reasonable approach. And if both options are fair and reasonable, and the parties and the Superintendent cannot agree on which should be adopted into the settlement agreement, then the Superintendent asks that the decision be made by the district court.

Respectfully submitted,

**NEW MEXICO OFFICE OF
SUPERINTENDENT OF INSURANCE**

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was electronically filed on February 13, 2026 pursuant to the New Mexico Rules of Civil Procedure, which provides electronic service to counsel of record if the email address of the attorney to be served is on file.

By: /s/ Placido D. Gonzales
Placido D. Gonzales