



THE STATE  
of **ALASKA**  
GOVERNOR MIKE DUNLEAVY

Department of Law

CIVIL DIVISION

P.O. Box 110300  
Juneau, AK 99811-0300  
Main: 907-465-3600  
Fax: 907-465-2520

March 7, 2023

The Honorable DeLena Johnson, Co-Chair  
House Finance Committee  
House District 25  
State Capitol Room 505  
Juneau AK, 99801

Re: *Department of Law House Finance Presentation on February 24, 2023*

Dear Representative Johnson:

Thank you for the opportunity on February 24, 2023, for the Department of Law to provide a departmental budget overview to the House Finance Committee. During discussion of the department's state fiscal preservation measures, Representative Stapp requested information relating to the department's efforts and available resources devoted to reimbursements and recoveries in Medicaid cases, as well as state procurement contract maintenance. The purpose of this correspondence is to provide additional details regarding these subjects.

**I. Medicaid**

Representative Stapp asked about three areas of Medicaid recovery: Medicaid Trust and Estate Recovery, Medicaid Third-Party Liability/Subrogation, and Medicaid Audits. Also enclosed herewith are additional statistics related to subrogation, for the Committee's reference. It is worth noting in this regard if positions were allocated to this work, costs associated with those positions would be eligible for a reimbursement of at least 50% from Centers for Medicaid and Medicare Services (CMS). Conversely, the State would be required to return a percentage of the recoveries that represent federal funds to CMS; the state does not retain all that we collect under these programs.

**A. Medicaid Trust and Estate Recovery (AS 47.07.055)**

The State has the right to recover long-term care Medicaid expenditures, for some but not all, Medicaid eligible individuals after their death. This area of the law is very complex and without simplifying this too much, estate recovery is possible after an estate is opened for an individual who was a Medicaid recipient, trust recovery occurs when a Medicaid recipient who has a qualifying trust dies and there is residual money left in the trust.<sup>1</sup> In fiscal year 2022,

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<sup>1</sup> Since this letter is in response to increase recoveries; a full explanation of the complexity of estate and trust recovery is not provided; if that level of detail would be helpful we are happy to provide that to the committee.

Alaska recovered about \$518,000. Average annual recoveries are between \$300,000 and \$600,000 per year, with some anomalies.

This work is handled by one Assistant Attorney General (AAG) and one paralegal, currently comprising roughly 10-15% of their respective workloads. This allocation is based upon other work that AAG and paralegal do, and which limits the time they can devote to estate recovery. The AAG, on behalf of the State files approximately 40 demands for notice per month. Around six to eight cases each year result in a recovery and about the same number involve an entry of appearance in a case and negotiations, but no actual recovery.

Looking at the potential for additional recoveries, it does appear that there are amounts that are not being pursued due to staffing constraints. The department would also be able to begin work on seeking recovery from transfer-on-death deeds. In such instances, an individual who passed away was a Medicaid recipient, but there is no probate. Recoveries in this context are not currently being pursued. While we are not certain at this point how successful such efforts will be, these cases represent an opportunity to capture additional funds.

It is challenging to quantify the potential additional savings in advance, but it is reasonable to expect that applying additional AAG support could result in several hundred thousand dollars of additional recovery per year. Paralegal support is needed to facilitate this work.

#### **B. Third-Party Liability/Subrogation (TPL) (AS 47.05.070 - AS 47.05.075)**

The State is required, as a condition of its participation in the Medicaid program to recover Medicaid expenses that are paid on behalf of Medicaid recipients who have Medicaid care that arise from torts, workers compensation, and similar liability-related injury matters. In this system the State identifies individuals who may have such claims and then files a lien for the amount the State believes it is owed. The State collects when attorneys file lawsuits on behalf of clients; once paid the Medicaid lien is extinguished. The State does not initiate recovery. We obtain all our recovery through settlement; not litigating these cases.

In fiscal year 2022, the State recovered \$2,073,000. This is consistent with previous years when we have recovered between \$2 million and \$3 million. The number of open TPL matters—matters where a recovery may be possible, has increased significantly starting after calendar year (CY) 2016, and is likely due to Medicaid expansion which increased the number of individuals who are covered by Medicaid. In CY 2022, the department opened 651 cases and received approximately 33.25 checks per month in recovery. The size of checks varies dramatically depending on the amount of the Medicaid lien, the amount of the plaintiff's total recovery, and the percentage of the recovery that was related to medical costs.

We have one AAG on this caseload. It is also a majority of the workload for one paralegal. Should additional resources be allocated to this work the department would likely increase the number of checks received each month. Additional resources could also be used to evaluate a substantial backlog of cases. Working these cases in a timelier fashion would increase the number of recoveries the State collects each month. Please note, for the department to add additional resources, the department would receive funding for these resources via a

reimbursable service agreement (RSA) with Department of Health which will fund the RSA with Medicaid recoveries and general fund match. In other words, any appropriation for the positions would need to be put into the Department of Health's budget, and the positions would be put into the Department of Law.

While it is hard to estimate, with additional resources we would anticipate an increase of 30%-50% in recoveries. With more resources, injured parties could likely settle their cases more quickly and obtain needed funds. In turn, our efficiency would increase by eliminating time spent answering repeated inquiries.

### **C. Medicaid Audits (AS 47.30.200)**

This work involves prosecuting appeals of Medicaid audit findings required by state law<sup>2</sup> whereby a Medicaid provider is required to repay overpayments. An overpayment may be due to a variety of factors and does not always include fraud. These appeals are of state audits done by our state contractor, Myers & Stauffer and federal audits. Appeals are frequently complex, with significant appellate records. Judgments and settlements from Medicaid audits last year amounted to approximately \$594,000. This was not an unusual recovery amount.

These cases comprise around 85% of the workload of one AAG. This is in of itself a full case load and there is currently no backlog. Additional attorney resources would not likely result in significant increases in the amount of funds recovered but could be helpful in coverage and for the work that is identified above.

## **II. Procurement Contracts**

Representative Stapp also inquired about the department's involvement in negotiating and monitoring performance of the State's numerous vendor contracts. Public procurement is an extremely involved and detail-oriented area of law. Added to which, the State is a party to a tremendous variety of vendor contracts spanning across every sector and activity of the State government.

Many of the State's contracts involve complex commercial and technical provisions offered by sophisticated market actors, with millions of dollars on the line. Negotiating fair terms under such circumstances requires not just mastery of the relevant legal frameworks, but also sufficient familiarity with the contract's subject matter to understand what is at stake. Information Technology contracts provide a particularly challenging and ubiquitous example.

Compared with the governments of more populous states in the lower 48, we lack the market power to dictate terms to vendors and are frequently left negotiating from their preferred contract language. In those circumstances, the State is on the defensive right out of the gate. It takes significant time, legal skill, and attention to detail to comb through pages of boilerplate and identify the gotchas buried in the fine print.

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<sup>2</sup> State law requires contract conduct 50 audits a year; that number was reduced in 2016 from 75, but the legislation that made that change (SB 74) also included a self-audit and reporting requirements. *See* AS 47.05.235.

Quantifying the benefits of increased attorney time on vendor contracts is difficult because much of the work is qualitative and the benefits indirect. Negotiating more flexible exit provisions, for example, allows the State to more easily terminate a contract that is not performing well. Similarly, striking a vendor's limitation of liability provision ensures that the State can be made whole in the event of the vendor's breach. Much of the work involves anticipating future contingencies, and the savings manifest in costs avoided.

Currently, the department has one full time attorney position devoted to procurement, divided between two attorneys. Additional attorney resources focused on the negotiation phase of procurement would likely provide cost savings down the line by ensuring better terms at the outset. Please also note that the Department of Health has included an appropriation request in its budget for an attorney and a paralegal to focus on IT related contracts specifically for the department. Question about this are better answered by the Department of Health and what they envision using that funding for.

I hope that the comments above have helped to provide additional context and information regarding our comments at the February 24, 2023, House Finance Committee hearing. If we may be of additional assistance, please contact one of our legislative liaisons:

Criminal  
Kaci Schroeder  
kaci.schroeder@alaska.gov  
907-465-3600

Civil  
Parker Patterson  
parker.patterson@alaska.gov  
907-465-3600

Sincerely,

TREG TAYLOR  
ATTORNEY GENERAL

By:   
Cori Mills  
Deputy Attorney General

cc: Governor's Legislative Office