

**1999 DRAFTING REQUEST**

**Bill**

Received: **09/22/98**

Received By: **yacketa**

Wanted: **As time permits**

Identical to LRB:

For: **Administration-Budget**

By/Representing: **Geisler**

This file may be shown to any legislator: **NO**

Drafter: **yacketa**

May Contact: **Richard Chao, DHFS**

Alt. Drafters: **nelsorp1**

Subject: **Public Assistance - med. assist.  
Courts - miscellaneous**

Extra Copies: **DAK**

**Topic:**

DOA:.....Geisler - MA subrogation

**Instructions:**

See Attached

**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	yacketa 10/26/98	ptellez 10/27/98		_____			
/1			lpaasch 10/28/98	_____	lrb_docadmin 10/28/98		

FE Sent For:

<END>

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*priority: high*

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1?	yacketa		D-28 L.P.	<del>10-28 L.P. KM</del>			

FE Sent For:

<END>

# DHFS

**Department of Health and Family Services**  
**1999-2001 Biennial Budget Statutory Language Request**  
September 11, 1998

## MA Subrogation Cases

### Current Language

Under sec. 49.65(2) and sec. 803.03(2), DHFS is required to be made a party in any personal injury lawsuit when the injured party received Medical Assistance (MA) for related medical costs. In other words, the Department is subrogated to the rights of the recipient. As a co-plaintiff, DHFS does not normally directly participate in these actions, but is named so that if the defendant is ordered to pay the plaintiff damages, DHFS will receive reimbursement for all or a portion of the MA costs provided. For certain MA recipients, the counties represent the MA program and therefore might be joined as a party.

Wis. Stat. 814.03(3) provides that neither the Department or a county may be assessed the costs of a prevailing defendant if the Department or county is joined and represented by the plaintiff in these matters.

### Proposed Change

Resurrect the language proposed for revised 803.03(2)(b) and a new 803.02(2)(bm), which relieves the department from active prosecution of its claim, except that the prior bill language should cover any time that the Department is joined as a party, not just when it is joined as a plaintiff as originally drafted

✓ Modify <sup>814</sup>813.03(03) so that the counties and department are relieved from liability for costs even if not represented by another party under 803.03(2)(b) or if (bm) is resurrected, then simply add that reference into the current provision

✓ Add that the 49.89 subrogation right creates a lien: language should indicate that (1) the department shall have a lien upon any recovery by or on behalf of the recipient, (2) that the lien shall be upon any claim or cause of action and shall attach to any verdict, judgment or award, as well as the proceeds of any settlement and (3) that the lien continues until it is released and discharged by the department.

✓ Add to the notice requirement in 49.89(3m) that any person, including the person's insurer, against whom a claim is asserted must provide notice before any settlement is paid if the person, or person's insurer knows, or reasonably could determine, that the claimant is a current or former recipient or estate of a current or former recipient.

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## **Effect of the Change**

The combined changes would assure that the MA program recovers its payments without expending unnecessary effort, that settlements cannot be made without repayment of the MA benefits and that the Department and counties are not assessed costs in any situation if the Department's or counties' only role was as a named plaintiff.

## **Rationale for the Change**

Although the statute related to assessment of defendant's costs was recently changed with the purpose of newly shielding the counties from paying those costs, the Department was also added to the language. The language prevents an assessment if the Department or county was represented by the person causing the joinder (most often, the plaintiff). This arguably limits the protection the Department and counties have, because in most cases there is not a formal representation of these interests by the plaintiff. While the language is better for the counties than before the recent change, it is not total protection. There are some county corporation counsel that are hesitant to represent the MA interest if the county could be at risk of paying defendants' costs. Also, the current language may cause some to argue the Department is less protected now than historically when the statutes were silent and sovereign immunity therefore fully protected the state against an assessment of costs under any circumstances.

In addition, if a statutory lien is created that cannot be extinguished until the MA program is satisfied then the program is assured repayment. There have been some past settlements of damages of which the MA program was either unaware or unprotected and therefore plaintiffs recovered money without MA recovering its payments. This could not occur if a lien attached to any proceeds.

Finally, the same reasons exist now as when the changes to 803.03(2) were previously proposed: MA should be able to recover its payments without expending time and resources to nominally participate in a lawsuit by filing responsive pleadings, discovery matters and other documents and letters which most often are necessary only as a matter of procedure, and not because of substantive disputes over MA's claim.

<b>Desired Effective Date:</b>	Upon Passage
<b>Agency:</b>	DHFS
<b>Agency Contact:</b>	Richard T. Chao
<b>Phone:</b>	267-0356

(Soon)

1997-1998 LEGISLATURE

1999-2001

LRB-029921

TAY/...

02651,

KSH

RPW

RM Not ...

DOA:.....Geisler - Liability in MA subrogation cases

FOR 1997-99 BUDGET - NOT READY FOR INTRODUCTION

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The governmental unit

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1 AN ACT relating to: the budget.

Analysis by the Legislative Reference Bureau

COURTS AND PROCEDURE

OTHER COURTS AND PROCEDURE

Under current law, the department of health and family services (DHFS), the department of industry, labor and job development (DILJD), a county or an elected tribal governing body that provides certain public assistance benefits as a result of an injury, sickness or death that creates a claim or cause of action on the part of the public assistance recipient or beneficiary, or the estate of the recipient or beneficiary against a 3rd party must be joined by the plaintiff as a party to the claim or action. This is known as subrogation and, as a subrogated party, DHFS, DILJD, a county or an elected tribal governing body may make a claim or maintain an action or intervene in a claim or action by the recipient, beneficiary or estate against the 3rd party.

Currently, a party that is joined based on subrogation may do one of the following

- 1. Participate in the prosecution of the action.
- 2. Agree to have his or her interests represented by the party who caused the joinder. If this option is selected, the party must sign a written waiver of the right to participate in the action.
- 3. Move for dismissal, with or without prejudice.

Current law also provides that a prevailing defendant is entitled to costs from the plaintiffs, including subrogated plaintiffs who neither participated in the prosecution of the action nor moved for dismissal.

That governmental unit has the right to recover the amount provided from the person's claim.

*this*  
~~This bill excludes DHFS and counties from liability for costs to prevailing defendants in actions in which DHFS or a county is subrogated because of the implication of medical assistance (MA) payments if DHFS or the county does not participate in the prosecution of the action.~~

*no* Under ~~the~~ bill, DHFS need not take any affirmative action in order to have its interests represented by the party causing the joinder. ~~Regardless of whether DHFS participates in prosecuting the claim, the portion of the proceeds of the claim that represents benefits paid under MA as a result of the occurrence of injury, sickness or death for which the claim arose must be paid to DHFS.~~

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill

ASERT  
ANAL

**The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:**

ASERT  
2-1A  
2-1B

**SECTION 1.** 803.03 (2) (b) of the statutes is amended to read:

2 803.03 (2) (b) *Options after joinder.* Any party joined pursuant to par. (a) may  
3 1. participate in the prosecution of the action, 2. agree to have his or her interest  
4 represented by the party who caused the joinder, or 3. move for dismissal with or  
5 without prejudice. If the party joined chooses to participate in the prosecution of the  
6 action, the party joined shall have an equal voice with other claimants in such  
7 prosecution. If Except as provided in par. (bm), if the party joined chooses to have  
8 his or her interest represented by the party who caused the joinder, the party joined  
9 shall sign a written waiver of the right to participate which shall express consent to  
10 be bound by the judgment in the action. Such waiver shall become binding when filed  
11 with the court, but a party may withdraw the waiver upon timely motion to the judge  
12 to whom the case has been assigned with notice to the other parties. A party who  
13 represents the interest of another party and who obtains a judgment favorable to  
14 such other party may be awarded reasonable attorneys fees by the court. If the party  
15 joined moves for dismissal without prejudice as to his or her claim, the party shall  
16 demonstrate to the court that it would be unjust to require the party to prosecute the

1 claim with the principal claim. In determining whether to grant the motion to  
2 dismiss, the court shall weigh the possible prejudice to the movant against the state's  
3 interest in economy of judicial effort.

4 **SECTION 2.** 803.03 (2) (bm) of the statutes is created to read:

5 803.03 (2) (bm) *Joinders because of implication of medical assistance.* If the  
6 department of health and family services is joined as a ~~plaintiff~~<sup>party</sup> pursuant to par. (a)  
7 and s. 49.89 (2) because of the provision of benefits under subch. IV of ch. 49, the  
8 department of health and family services need not sign a waiver of the right to  
9 participate in order to have its interests represented by the party that caused the  
10 joinder. If the department of health and family services makes no selection under  
11 par. (b), the party causing the joinder shall represent the interests of the department  
12 of health and family services and the department of health and family services shall  
13 be bound by the judgment in the action. Regardless of whether the department of  
14 health and family services joins in prosecuting the claim, the portion of the proceeds  
15 of the claim that represents benefits paid under subch. IV of ch. 49 as a result of the  
16 occurrence of injury, sickness or death for which the claim arose shall be paid to the  
17 department of health and family services pursuant to s. 49.89 (5).

18 **SECTION 3.** 814.03 (3) of the statutes is created to read:

19 814.03 (3) Notwithstanding subs. (1) and (2), where the department of health  
20 and family services or a county is joined as a ~~plaintiff~~<sup>party</sup> pursuant to ss. 49.89 (2) and  
21 803.03 (2) (a) because of the provision of benefits under subch. IV of ch. 49 and where  
22 the interests of the department of health and family services or of the county are  
23 represented under s. 803.03 (2) (b) or (bm) by the party who caused the joinder, the  
24 department of health and family services or the county shall not be liable for costs  
25 to any prevailing defendant.

INSERT  
3-17





INSERT 2-1 A

Section #. 49.89 (2) of the statutes is amended to read:

49.89 (2) SUBROGATION. The department of health and family services, the department of work-force development, a county or an elected tribal governing body that provides any public assistance under this chapter or under s. 253.05 as a result of the occurrence of an injury, sickness or death that creates a claim or cause of action, whether in tort or contract, on the part of a public assistance recipient or beneficiary or the estate of a recipient or beneficiary against a 3rd party, including an insurer, is subrogated to the rights of the recipient, beneficiary or estate and may make a claim or maintain an action or intervene in a claim or action by the recipient, beneficiary or estate against the 3rd party.

History: 1977 c. 29; 1979 c. 221; 1981 c. 20; 1983 a. 27, 465; 1985 a. 29 ss. 1051, 1052, 3200 (23); 1987 a. 27 s. 3202 (24); 1989 a. 31; 1995 a. 27 ss. 3152 to 3177, 3214, 3215, 9126 (19), 9130 (4); Stats. 1995 s. 49.89; 1995 a. 407; 1997 a. 3.

Subrogation under this subsection because of the provision  
of medical assistance under subch. IV constitutes a  
lien, equal to the amount of <sup>the</sup> medical assistance provided  
as a result of the injury, sickness or death that gave  
rise to the claim. The lien <sup>is</sup> on any lump sum  
payment resulting from a judgement or settlement that may  
be due the obligor. A lien under this subsection continues  
until it is released and discharged by the department  
of health and family services.

1999-2000 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-0265/lins  
TAY.....

**Insert Anal**

Currently, an attorney retained to represent a current or former recipient of public assistance benefits, or the recipient's estate, in asserting a claim that is subrogated, must provide notice of the claim, and of any award or settlement, to the governmental unit that provided the benefits. If ~~an~~ attorney is ~~retained to represent~~ <sup>not</sup> a current or former recipient of public assistance ~~on the recipient's estate~~ <sup>the</sup> in asserting a claim that is subrogated, the current or former recipient or his or her guardian ~~or~~ if the recipient is deceased, the personal representative of the recipient's estate, must provide the notice. <sup>if an attorney is not representing the estate</sup>

just provide the notice.

This bill requires a person against whom a subrogated claim is made, or that person's attorney or insurance company, to provide notice of the claim, and of any award or settlement, to DHFS if that person, or that person's attorney or insurer, knows or should know that the claim is subrogated because of the provision of MA benefits. Additionally, under this bill, if DHFS or a county is a subrogated party because of the provision of MA benefits, the subrogation creates a lien on the claimant's recovery, equal to the amount of the MA paid as a result of the injury, sickness or death that gave rise to the claim.

**Insert 2-1B**

**SECTION 1.** 49.89 (3m) (bm) of the statutes is created to read:

49.89 (3m) (bm) A person against whom a claim that is subrogated under sub. (2) or assigned under sub. (3) is made, or that person's attorney or insurer, shall provide notice under par. (c), if that person, attorney or insurer knows, or could reasonably determine, that the claimant is a recipient or former recipient of medical assistance under subch. IV, or is the estate of a former recipient of medical assistance under subch. IV.

Section #. 814.03 (3) of the statutes is amended to read:

814.03 (3) Notwithstanding subs. (1) and (2), where the department of health and family services or a county is joined as a plaintiff pursuant to ss. 49.89 (2) and 803.03 (2) (a) because of the provision of benefits under subch. IV of ch. 49, ~~and where the interests of the department of health and family services or of the county are represented under s. 803.03 (2) (b) by the party who caused the joinder,~~ *plain* the department of health and family services or the county shall not be liable for costs to any prevailing defendant.

History: Sup. Ct. Order, 67 W (2d) 585, 761, 780 (1975); Stats. 1975 s. 814.03; 1987 a. 345; 1993 a. 486, 496; 1997 a. 27.



State of Wisconsin  
1999 - 2000 LEGISLATURE

LRB-0265/1  
TAY&RPN:ksh:lp

DOA:.....Geisler - MA subrogation

FOR 1999-01 BUDGET — NOT READY FOR INTRODUCTION

1 AN ACT ...; relating to: the budget.

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*Analysis by the Legislative Reference Bureau*

**COURTS AND PROCEDURE**

**OTHER COURTS AND PROCEDURE**

Under current law, the governmental unit that provides certain public assistance benefits as a result of an injury, sickness or death that creates a claim or cause of action on the part of the public assistance recipient or beneficiary or his or her estate against a 3rd party must be joined by the plaintiff as a party to the claim or action. This is known as subrogation and, as a subrogated party, that governmental unit has the right to recover the amount provided in public assistance benefits from the person's claim. The governmental unit may make a claim or maintain an action or intervene in a claim or action by the recipient, beneficiary or estate against the 3rd party.

Currently, a party that is joined based on subrogation may, among other things, agree to have his or her interests represented by the party who caused the joinder. If this option is selected the subrogated party must sign a written waiver of the right to participate in the action. Under this bill, DHFS need not take any affirmative action in order to have its interests represented by the party causing the joinder.

Currently, an attorney retained to represent a current or former recipient of public assistance benefits, or the recipient's estate, in asserting a claim that is subrogated, must provide notice of the claim, and of any award or settlement, to the governmental unit that provided the benefits. If an attorney is not representing the

current or former recipient of public assistance in asserting a claim that is subrogated, the current or former recipient or his or her guardian must provide the notice. If the recipient is deceased, the personal representative of the recipient's estate, must provide the notice if an attorney is not representing the estate.

This bill requires a person against whom a subrogated claim is made, or that person's attorney or insurance company, to provide notice of the claim, and of any award or settlement, to DHFS if that person, or that person's attorney or insurer, knows or should know that the claim is subrogated because of the provision of MA benefits. Additionally, under this bill, if DHFS or a county is a subrogated party because of the provision of MA benefits, the subrogation creates a lien on the claimant's recovery, equal to the amount of the MA paid as a result of the injury, sickness or death that gave rise to the claim.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 49.89 (2) of the statutes is amended to read:

2           49.89 (2) SUBROGATION. The department of health and family services, the  
3 department of workforce development, a county or an elected tribal governing body  
4 that provides any public assistance under this chapter or under s. 253.05 as a result  
5 of the occurrence of an injury, sickness or death that creates a claim or cause of action,  
6 whether in tort or contract, on the part of a public assistance recipient or beneficiary  
7 or the estate of a recipient or beneficiary against a 3rd party, including an insurer,  
8 is subrogated to the rights of the recipient, beneficiary or estate and may make a  
9 claim or maintain an action or intervene in a claim or action by the recipient,  
10 beneficiary or estate against the 3rd party. Subrogation under this subsection  
11 because of the provision of medical assistance under subch. IV constitutes a lien,  
12 equal to the amount of the medical assistance provided as a result of the injury,  
13 sickness or death that gave rise to the claim. The lien is on any lump sum payment  
14 resulting from a judgment or settlement that may be due the obligor. A lien under

1 this subsection continues until it is released and discharged by the department of  
2 health and family services.

3 **SECTION 2.** 49.89 (3m) (bm) of the statutes is created to read:

4 49.89 **(3m)** (bm) A person against whom a claim that is subrogated under sub.  
5 (2) or assigned under sub. (3) is made, or that person's attorney or insurer, shall  
6 provide notice under par. (c), if that person, attorney or insurer knows, or could  
7 reasonably determine, that the claimant is a recipient or former recipient of medical  
8 assistance under subch. IV, or is the estate of a former recipient of medical assistance  
9 under subch. IV.

10 **SECTION 3.** 803.03 (2) (b) of the statutes is amended to read:

11 803.03 **(2)** (b) *Options after joinder.* Any party joined pursuant to par. (a) may  
12 1. participate in the prosecution of the action, 2. agree to have his or her interest  
13 represented by the party who caused the joinder, or 3. move for dismissal with or  
14 without prejudice. If the party joined chooses to participate in the prosecution of the  
15 action, the party joined shall have an equal voice with other claimants in such  
16 prosecution. If Except as provided in par. (bm), if the party joined chooses to have  
17 his or her interest represented by the party who caused the joinder, the party joined  
18 shall sign a written waiver of the right to participate which shall express consent to  
19 be bound by the judgment in the action. Such waiver shall become binding when filed  
20 with the court, but a party may withdraw the waiver upon timely motion to the judge  
21 to whom the case has been assigned with notice to the other parties. A party who  
22 represents the interest of another party and who obtains a judgment favorable to  
23 such other party may be awarded reasonable attorneys fees by the court. If the party  
24 joined moves for dismissal without prejudice as to his or her claim, the party shall  
25 demonstrate to the court that it would be unjust to require the party to prosecute the

1 claim with the principal claim. In determining whether to grant the motion to  
2 dismiss, the court shall weigh the possible prejudice to the movant against the state's  
3 interest in economy of judicial effort.

4 **SECTION 4.** 803.03 (2) (bm) of the statutes is created to read:

5 803.03 (2) (bm) *Joinders because of implication of medical assistance.* If the  
6 department of health and family services is joined as a party pursuant to par. (a) and  
7 s. 49.89 (2) because of the provision of benefits under subch. IV of ch. 49, the  
8 department of health and family services need not sign a waiver of the right to  
9 participate in order to have its interests represented by the party that caused the  
10 joinder. If the department of health and family services makes no selection under  
11 par. (b), the party causing the joinder shall represent the interests of the department  
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14 health and family services joins in prosecuting the claim, the portion of the proceeds  
15 of the claim that represents benefits paid under subch. IV of ch. 49 as a result of the  
16 occurrence of injury, sickness or death for which the claim arose shall be paid to the  
17 department of health and family services pursuant to s. 49.89 (5).

18 **SECTION 5.** 814.03 (3) of the statutes is amended to read:

19 814.03 (3) Notwithstanding subs. (1) and (2), where the department of health  
20 and family services or a county is joined as a plaintiff pursuant to ss. 49.89 (2) and  
21 803.03 (2) (a) because of the provision of benefits under subch. IV of ch. 49, ~~and where~~  
22 ~~the interests of the department of health and family services or of the county are~~  
23 ~~represented under s. 803.03 (2) (b) by the party who caused the joinder,~~ the  
24 department of health and family services or the county shall not be liable for costs  
25 to any prevailing defendant.

