

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2124

2007 SENATE HUMAN SERVICES

SB 2124

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2124

Senate Human Services Committee

Check here for Conference Committee

Hearing Date: January 15, 2007

Recorder Job Number: 1079

Committee Clerk Signature

Mary K. Monson

Minutes:

Senator Judy Lee opened the hearing on SB 2124 relating to implementing federal medical assistance provisions; to repeal sections 50-24.1-02.9 and 50-24.1.1-21 of the North Dakota Century Code, relating to long-term care insurance and medical assistance waiver provisions inconsistent with federal law; and to declare an emergency.

Maggie Anderson, Department of Human Services read **Melissa Hauer's** testimony in support of SB 2124. Hauer is an attorney with the Department of Human Services. The bill is designed to accomplish goals in three areas. First, it updates the law in the area of the Medicaid long-term care Partnership Program as allowed by the Deficit Reduction Act of 2005. Second, it provides for estate recovery of payments made by the state for the Medicare Part D clawback. Third, it clarifies the assets that will be subject to Medicaid estate recovery. (See enclosed testimony.)

Senator Warner asked if divorce played a role in this versus incapacitated and receiving Medicaid benefits and if the spouse chooses to divorce, how that settlement affects the ability of the state to recover.

Blaine Nordwall, Director of Economic Assistance Policy responsible for Estate Recovery in the Medicaid Program of the Human Services Dept., answered that if the couple is not married the first to die passes away there is no recovery from the surviving former spouse's estate.

Senator Warner asked if it has become an issue of divorce as a means of circumventing the law.

Mr. Nordwall said that in his experience in ND it really doesn't happen. He said he had been doing this job for twenty five years and he couldn't think of a case where someone divorced shortly before the death of a spouse for the purpose of avoiding estate tax. It could happen but it seemed to him unlikely.

Senator Lee referred to a situation that she knew of where a young person was seriously injured and disabled and remained that way for a long time. The couple stayed married for a long time and then they divorced because of the financial burden. **Senator Lee** asked if there was any time component in this. And asked if what he said previously, applied to this situation since it is not just an elderly person who has gone in to use these services.

Mr. Nordwall replied that federal law and state law only permit recovery of estates from deceased recipient who receive benefits after age 55. Only the benefits furnished after age 55 would be recovered from that individual estate and if they had divorced before that time there wouldn't be any recovery from the former spouse's estate.

Michael Fix, Director of the Life and Health Division in the actuary for the Insurance Department appeared in support of SB 2124.

No testimony in opposition of SB 2124.

Senator Lee called for neutral testimony on Senate Bill 2124.

Terry Weisz, NAFA stated that they had been working on this issue for a long time and were somewhat dismayed over the 1995 bill not being able to be put into law and put into place

because many of them did work very hard on that bill. After these comments he expressed their support of SB 2124.

Senator Lee asked Mr. Weisz to explain what the look back is.

Mr. Weisz gave this example: if you make a gift of your assets to anyone, it used to be a three year look back, so they would go back three years to see what assets you gave away. When you filed for Medicaid assistance if it was passed the three years you didn't have any obligation. If it was within the three years, those particular assets would come back into view. Now that has been changed to five years and the date of the application is when the assets would start to be used as far as the credit that you gave away.

Senator Lee clarified that now the date you are asking for services is the date that is looked at now and Mr. Weisz agreed.

Senator Warner was not clear on what we are doing with Long Term Care Insurance.

Mr. Weisz explained that Long Term Care Insurance is a particular piece of estate planning tool that one would use into the nursing home or assisted living facility or if you were to be at home to receive benefits so you didn't have to go to an assisted living facility (being able to be taken care of at home.) Currently, under the partnership bill, if you have a farm, and the farm is worth \$200,000. you purchase a policy worth \$200,000 because you gave your farm to your son and you don't have to use the farm to take care of mom in the nursing home as long as the partnership passes and the policy is in place. The asset limit on your policy can be used for the long term care on mom. If mom or dad go to the nursing home and have a plan in place (partnership plan) they are o-kay. If not someone has to pay the bill.

Senator Lee asked for any further discussion, having none, Senator Lee closed the public hearing on SB 2124.

Senator Dever moved a **Do Pass** on SB 2124. Seconded by **Senator Warner**.

Roll call vote 6-0-0. Floor Carrier is **Senator J. Lee**.

FISCAL NOTE
 Requested by Legislative Council
 01/02/2007

Bill/Resolution No.: SB 2124

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill amends and reenacts sections 50-24.1-02.5 and 50-24.1-07 of NDCC relating to implementing federal medical assistance provisions: to repeal sections 50-24.1-02.9 and 50-24.1-21 of NDCC, relating to LTC insurance and medical assistance waiver provisions inconsistent with federal law.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Because of the unknowns of implementation of the estate recovery portion along with other variables that cannot be determined the Department is unable to determine a fiscal impact.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

Name:	Debra A. McDermott	Agency:	Dept. of Human Services
Phone Number:	328-3695	Date Prepared:	01/08/2007

REPORT OF STANDING COMMITTEE

SB 2124: Human Services Committee (Sen. J. Lee, Chairman) recommends DO PASS
(6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2124 was placed on the
Eleventh order on the calendar.

2007 HOUSE HUMAN SERVICES

SB 2124

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2124

House Human Services Committee

Check here for Conference Committee

Hearing Date: February 6, 2007

Recorder Job Number: No minutes recorded

Committee Clerk Signature



Minutes:

Chairman Price: We will open the hearing on SB 2124.

Melissa Hauer, attorney with the Department of Human Services: See attached testimony.

Representative Weisz: In sub section 5, the spouse would have to go to court with the partnership program.

Ms Hauer: Only when we file a claim in Estate or probate

Maggie Anderson, with Division of Human Services: (Nothing on the recorder)

Terry Weisz, with the National Association of Insurance: They are in support of the bill.
(Nothing on the recorder)

Michael Fix, with the ND Insurance Department: I am here to show support for the 2124.

We support the partnership policies and programs. (Nothing on the recorder)

Vice Chair Pietsch: Anyone else in favor of SB 2124? Anyone in opposition of SB 2124? If not we will close the hearing on SB 2124

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2124

House Human Services Committee

Check here for Conference Committee

Hearing Date: February 7, 2007

Recorder Job Number: no minutes recorded

Committee Clerk Signature	<i>Judy Schock</i>
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Minutes:

Chairman Price: take out SB 2124, and we will take action on the bill.

Representative Porter: I feel this is a huge step backwards from the last session.

Representative Weisz: I agree.

Representative Porter: moves a do pass, seconded by **Representative Conrad**.

Representative Price: asks for discussion, hearing none the vote was taken. The vote was

12 yeas, 0 nays, 0 absent.

Date: 2/7
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. "Click here to type Bill/Resolution No."

House HUMAN SERVICES SB 2124 Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken No pass

Motion Made By Rep. Porter Seconded By Rep. Conrad

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price – Chairman	✓		Kari L Conrad	✓	
Vonnie Pietsch – Vice Chairman	✓		Lee Kaldor	✓	
Chuck Damschen	✓		Louise Potter	✓	
Patrick R. Hatlestad	✓		Jasper Schneider	✓	
Curt Hofstad	✓				
Todd Porter	✓				
Gerry Uglen	✓				
Robin Weisz	✓				

Total (Yes) 12 "Click here to type Yes Vote" No 0 "Click here to type No Vote"

Absent 0

Floor Assignment Rep. Weisz

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2124: Human Services Committee (Rep. Price, Chairman) recommends DO PASS
(12 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2124 was placed on the
Fourteenth order on the calendar.

2007 TESTIMONY

SB 2124

Testimony
Senate Bill Number 2124 - Department Of Human Services
Senate Human Services Committee
Senator Judy Lee, Chairman
January 15, 2007

Chairman Lee, members of the Senate Human Services Committee, I am Melissa Hauer, an attorney with the Department of Human Services. I am here today to testify in support of Senate Bill number 2124.

The fiscal note indicates we are unable to determine the fiscal impact of the bill. I will address the potential for fiscal impact as I describe the bill. The bill is designed to accomplish goals in three areas. First, it updates the law in the area of the Medicaid long-term care Partnership Program as allowed by the Deficit Reduction Act of 2005.¹ Second, it provides for estate recovery of payments made by the state for the Medicare Part D clawback. Third, it clarifies the assets that will be subject to Medicaid estate recovery.

1. Long-Term Care Partnership Program

The long-term care partnership program was developed in the 1980s to encourage people who might otherwise turn to Medicaid to finance their long-term care to purchase long-term care insurance. At that time, only four states actually received approval for, and operated, a Medicaid Partnership Program. The window of opportunity to create such a program was then closed and States could no longer opt to create such programs. A state long-term care Partnership Program consists of two elements: (1) provisions in the state Medicaid plan to disregard assets to the extent of payments made under a long-term care insurance policy; and (2) insurance policies meeting certain requirements. If people who

¹ Public Law No. 109-171

purchase qualifying policies deplete their insurance benefits and have to apply for Medicaid benefits to pay for their long-term care, they are entitled to a one-dollar increase in the Medicaid asset limit for every one dollar of long-term care insurance coverage paid. The assets are also exempt from Medicaid estate recovery when the Medicaid recipient or his or her spouse dies.

The Fifty-ninth Legislative Assembly considered this issue and passed 2005 House Bill No. 1217, which would have created a Partnership Program in North Dakota, if allowed by the Federal government. At the time that law passed, there was no provision in the Federal law that allowed States to create Partnership Programs but it was passed in the hope that this option would again become available and the State would be able to participate at that time. Since that time, the Deficit Reduction Act of 2005 (DRA) was passed and it does allow States the option once again to create Partnership Programs. The State must submit, and have approved by the Federal government, a Medicaid State Plan amendment that allow the Partnership Program provisions to be implemented. However, the Partnership Program allowed by the DRA is different than what was described in 2005 House Bill No. 1217. Therefore, this bill repeals that law.

The bill provides that any assets disregarded because of a long-term care insurance Partnership Program policy are also protected from Medicaid estate recovery. It also updates another state law that was enacted in 1995 which provides that someone who buys long-term care insurance that covers that person for at least 36 months of long-term care may give away his assets without being subject to a penalty period for the gifts. The amendment to that section would provide that it only applies to

policies purchased before the effective date of an approved Partnership Program in the State.

To the extent those who would otherwise receive Medicaid benefits purchase more long-term care insurance, future cost to that program will be reduced. Future Medicaid estate recoveries would likely also be reduced to some extent. Because long-term care insurance is not currently available to individuals in poor health we cannot predict that any actual impact will be realized for perhaps five or more years.

2. Medicare Part D Clawback Estate Recovery

The bill also amends section 50-24.1-07 which deals with recovering Medicaid benefits from the estates of deceased Medicaid recipients or their spouses. Medicaid estate recovery is required by Federal Medicaid law. The State law provides a list of expenses that may be paid from the estate before repayments must be made to the Medicaid program. These include, for example, funeral expenses and expenses of last illness. The bill would add to the list a provision for repayment of funds paid on behalf of Medicaid recipients who are also Medicare recipients for prescription drug coverage under Medicare Part D.

All States that participate in the Medicaid program must pay to the Federal government what is called a "clawback" payment for individuals who are eligible for both Medicaid and Medicare (referred to as "dual eligibles"). These are the payments states are required to make under the Medicare Prescription Drug, Improvement, and Modernization Act to defray the cost of drug benefits formerly provided to low-income seniors and disabled persons through Medicaid that are now provided through Medicare Part D. These clawback payments to the Centers for Medicare &

Medicaid Services are calculated as a proportion of the funds states could be expected to spend for drugs for the individuals who are no longer covered through Medicaid.

Section two of the bill gives Medicare Part D clawback payments made on behalf of the Medicaid recipient priority over the Medicaid estate recovery claim. This will not increase the total estate recovery in the vast majority of cases in which there is a Medicaid claim, but the clawback reimbursement will be the one paid before the Medicaid claim because it will have a greater priority. Because the clawback payment is made entirely with general funds, any recovery of those payments will return funds that the State gets to keep in its entirety. A portion of all Medicaid estate recoveries must be paid back to the Federal government in proportion to the amount paid by the Federal government into that State's Medicaid program. This bill will merely have the effect of allowing the state to keep a greater proportion of estate recoveries. The net result is an increase in recoveries that can be used to offset general fund expenditures. However, we cannot make reliable revenue projections at this time.

3. Assets Subject to Medicaid Estate Recovery

As noted above, State Medicaid programs are required to engage in estate recovery. The State seeks to recover Medicaid benefits paid from the estate of the recipient or the estate of his or her spouse. The State may seek recovery from the spouse's estate for the amount of Medicaid paid out to the extent the recipient at the time of death had any title or interest in assets which were conveyed to his or her spouse through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement. In North Dakota, in order to recover from the

spouse's estate, the State must trace a recipient's assets and prove that the recipient had an interest in the assets of the spouse. This is often difficult because there is very little incentive to provide information about the nature of the Medicaid recipient's interest in the assets of the spouse's estate. The State is left with very little information which it can use to prove that the recipient had an interest in the assets of the spouse's estate.

The addition of subsection five on page three would shift that burden of proof to the individual who has the best information about the nature of the recipient's interest in the spouse's assets – the representative of the estate of that spouse. The addition of this subsection would create a presumption that all assets in the estate of the spouse are assets in which the Medicaid recipient had an interest at the time of the recipient's death. The estate of the spouse could rebut the presumption with proof that the recipient did not have an interest in those assets. The interest of the Medicaid recipient in his or her spouse's assets still has to be proven before the State may recovery anything from that spouse's estate. However, this would just shift the burden to party that has the best information about the nature of the recipient's interest in the estate's assets. We anticipate little additional estate recovery, but we expect a reduction in the cost of making those recoveries, again with no reliable projections available.

This concludes my testimony. I would be happy to try to answer any questions the committee may have. Thank you.

Testimony
Senate Bill Number 2124 – Department Of Human Services
House Human Services Committee
Representative Clara Sue Price, Chairman
February 6, 2007

Chairman Price, members of the House Human Services Committee, I am Melissa Hauer, an attorney with the Department of Human Services. I am here today to testify in support of Senate Bill number 2124.

The bill is designed to accomplish goals in three areas. First, it updates the law in the area of the Medicaid long-term care Partnership Program as allowed by the Deficit Reduction Act of 2005.¹ Second, it provides for estate recovery of payments made by the state for the Medicare Part D clawback. Third, it clarifies the assets that will be subject to Medicaid estate recovery.

1. Long-Term Care Partnership Program

The long-term care partnership program was developed in the 1980s to encourage people who might otherwise turn to Medicaid to finance their long-term care to purchase long-term care insurance. At that time, only four states actually received approval for, and operated, a Medicaid Partnership Program. The window of opportunity to create such a program was then closed and States could no longer opt to create such programs. A state long-term care Partnership Program consists of two elements: (1) provisions in the state Medicaid plan to disregard assets to the extent of payments made under a long-term care insurance policy; and (2) insurance policies meeting certain requirements. If people who purchase qualifying policies deplete their insurance benefits and have to apply for Medicaid benefits to pay for their long-term care, they are

¹ Public Law No. 109-171

entitled to a one-dollar increase in the Medicaid asset limit for every one dollar of long-term care insurance coverage paid. The assets are also exempt from Medicaid estate recovery when the Medicaid recipient or his or her spouse dies.

The Fifty-ninth Legislative Assembly considered this issue and passed 2005 House Bill No. 1217, which would have created a Partnership Program in North Dakota, if allowed by the Federal government. At the time that law passed, there was no provision in the Federal law that allowed States to create Partnership Programs but it was passed in the hope that this option would again become available and the State would be able to participate at that time. Since that time, the Deficit Reduction Act of 2005 (DRA) was passed and it does allow States the option once again to create Partnership Programs. The State must submit, and have approved by the Federal government, a Medicaid State Plan amendment that allow the Partnership Program provisions to be implemented. However, the Partnership Program allowed by the DRA is different than what was described in 2005 House Bill No. 1217. Therefore, this bill repeals that law.

The bill provides that any assets disregarded because of a long-term care insurance Partnership Program policy are also protected from Medicaid estate recovery. It also updates another state law that was enacted in 1995 which provides that someone who buys long-term care insurance that covers that person for at least 36 months of long-term care may give away his assets without being subject to a penalty period for the gifts. The amendment to that section would provide that it only applies to policies purchased before the effective date of an approved Partnership Program in the State.

Regarding the fiscal impact of this provision of the bill, to the extent more long-term care insurance is purchased by those who would otherwise receive Medicaid benefits, future cost to that program will be reduced. Future Medicaid estate recoveries would likely also be reduced to some extent. The actual impact, however, will not be realized for perhaps five or more years as long-term care insurance is not currently available to individuals in poor health.

2. Medicare Part D Clawback Estate Recovery

The bill also amends section 50-24.1-07 which deals with recovering Medicaid benefits from the estates of deceased Medicaid recipients or their spouses. Medicaid estate recovery is required by Federal Medicaid law. The State law provides a list of expenses that may be paid from the estate before repayments must be made to the Medicaid program. These include, for example, funeral expenses and expenses of last illness. The bill would add to the list a provision for repayment of funds paid on behalf of Medicaid recipients who are also Medicare recipients for prescription drug coverage under Medicare Part D.

All States that participate in the Medicaid program must pay to the Federal government what is called a "clawback" payment for individuals who are eligible for both Medicaid and Medicare (referred to as "dual eligibles"). These are the payments states are required to make under the Medicare Prescription Drug, Improvement, and Modernization Act to defray the cost of drug benefits formerly provided to low-income seniors and disabled persons through Medicaid that are now provided through Medicare Part D. These clawback payments to the Centers for Medicare & Medicaid Services are calculated as a proportion of the funds states could

be expected to spend for drugs for the individuals who are no longer covered through Medicaid.

Section two of the bill gives Medicare Part D clawback payments made on behalf of the Medicaid recipient priority over the Medicaid estate recovery claim. This will not increase the total estate recovery in the vast majority of cases in which there is a Medicaid claim, but the clawback reimbursement will be the one paid before the Medicaid claim because it will have a greater priority. Because the clawback payment is made entirely with general funds, any recovery of those payments will return funds that the State gets to keep in its entirety. A portion of all Medicaid estate recoveries must be paid back to the Federal government in proportion to the amount paid by the Federal government into that State's Medicaid program. This section of the bill will merely have the effect of allowing the state to keep a greater proportion of estate recoveries. The net result in recoveries could be used to offset general fund expenditures. Regarding the fiscal impact of this area of the bill, some increase is anticipated in revenue to the general fund, but reliable projections cannot be made at this time.

3. Assets Subject to Medicaid Estate Recovery

As noted above, State Medicaid programs are required to engage in estate recovery. The State seeks to recover Medicaid benefits paid from the estate of the recipient or the estate of his or her spouse. The State may seek recovery from the spouse's estate for the amount of Medicaid paid out to the extent the recipient at the time of death had any title or interest in assets which were conveyed to his or her spouse through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement. In North Dakota, in order to recover from the

spouse's estate, the State must trace a recipient's assets and prove that the recipient had an interest in the assets of the spouse. This is often difficult because there is very little incentive to provide information about the nature of the Medicaid recipient's interest in the assets of the spouse's estate. The State is left with very little information which it can use to prove that the recipient had an interest in the assets of the spouse's estate.

The addition of subsection five on page three would shift that burden of proof to the individual who has the best information about the nature of the recipient's interest in the spouse's assets – the representative of the estate of that spouse. The addition of this subsection would create a presumption that all assets in the estate of the spouse are assets in which the Medicaid recipient had an interest at the time of the recipient's death. The estate of the spouse could rebut the presumption with proof that the recipient did not have an interest in those assets. The interest of the Medicaid recipient in his or her spouse's assets still has to be proven before the State may recover anything from that spouse's estate. However, this would just shift the burden to party that has the best information about the nature of the recipient's interest in the estate's assets. Regarding the fiscal impact of this provision of the bill, there will be little additional estate recoveries, but a reduction in the cost of making those recoveries, again with no reliable projections available.

This concludes my testimony. I would be happy to try to answer any questions the committee may have. Thank you.