

# MICROFILM DIVIDER

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2007 SENATE JUDICIARY

SB 2126

# 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2126

## Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: January 10, 2007

Recorder Job Number: 906

Committee Clerk Signature

*Mona L. Salberg*

**Minutes:** Relating to investigation into alleged fraud in Medicaid claims

**Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

### Testimony In Support of Bill:

**Millissa Hauer**, Attorney, Dept. of H.S. (meter 0:23) Gave Testimony – Att. #1

**Sen. Nething** asked if this legislation is patterned after the Federal Law? Correct.

**Sen. Nelson** stated that this is all new law and what have you done in the past? We have used the fraud enforcement provision under the Federal Medicaid Law under Federal Medicaid Regulations. What we do not have in our current state law are the private persons provision.

This allows the private individual to bring an action on behalf of the state. We also do not have the penalties that you see in this law

**Sen. Fiebiger** question the Attorney Generals time frame (meter 13:00). Discussion of why the process is set up the way it is. Providing the private plaintiff will still/can be awarded for his work in the end. This is at the Attorney General total discretion and is patterned after the Federal False Claims Act. This is because if something came up during the discovery it would allow the A.G. to get involved. The position is an elected position

**Sen. Olafson** questioned on page 7, line 16 – should the word be “but” not “by”? yes this is a typo.

**Sen. Nelson** asked for a (meter 16:44) definition to page 6 line 28 “camera”.

**Sen Fiebiger** questioned section 3, line 22 regarding written disclosure does this mirror federal law? I do not know that, I will check on it for you.

**Testimony in Opposition of the Bill:**

None

**Testimony Neutral to the Bill:**

None

**Senator David Nething**, Chairman closed the hearing.

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2126

### Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: January 17, 2007

Recorder Job Number: 1288

Committee Clerk Signature

*Maria L. Solberg*

**Minutes:** Relating to investigation into alleged fraud in Medicaid claims.

**Senator David Nething**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

**Sen. Olafson** reviewed the amendment the Ms. Hauer and the Dept. of Human Services during there sub-committee meeting. Att. #1a and Att. #1b (meter 1:05) Discussion of the word "retaliation". Discussion of the word "Discrimination" **Sen. Nething** asked for a legal description of Discrimination – Att. 2

**Sen. Olafson** made the motion to Do Pass the amendment and **Sen. Fiebiger** seconded the motion. All members were in favor and motion passes.

**Sen. Olafson** made the motion to DO Pass as Amended SB 2126 and **Sen. Fiebiger** seconded the motion. All members were in favor and motion passes.

Carrier: **Sen. Fiebiger**

**Senator David Nething**, Chairman closed the hearing.

**FISCAL NOTE**  
**Requested by Legislative Council**  
03/23/2007

Amendment to:           Engrossed  
                                  SB 2126

**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
<b>Revenues</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Expenditures</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Appropriations</b>	\$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 provides for investigations into alleged fraud, qui tam actions in cases of alleged fraud in Medicaid claims and protection for persons presenting qui tam actions in cases of alleged fraud in Medicaid claims, and provides a penalty.

**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 the Department is unable to estimate the increased detection of fraud in Medicaid claims as a result of this bill the fiscal impact cannot be determined.

**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.*

<b>Name:</b>	Debra A. McDermott	<b>Agency:</b>	Depart. Human Services
<b>Phone Number:</b>	328-3695	<b>Date Prepared:</b>	03/23/2007

**FISCAL NOTE**  
**Requested by Legislative Council**  
01/02/2007

Bill/Resolution No.: SB 2126

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<b>Name:</b>	Debra A. McDermott	<b>Agency:</b>	Dept. Human Services
<b>Phone Number:</b>	328-3695	<b>Date Prepared:</b>	01/04/2007





**REPORT OF STANDING COMMITTEE**

**SB 2126: Judiciary Committee (Sen. Nething, Chairman) recommends AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2126 was placed on the Sixth order on the calendar.

Page 2, line 24, after "costs" insert ", including attorney's fees."

Page 7, line 16, replace "by" with "but"

Page 8, line 4, remove "or other person settling the claim"

Page 9, line 11, replace "discriminated" with "retaliated"

Renumber accordingly

2007 HOUSE HUMAN SERVICES

SB 2126

# 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2126

House Human Services Committee

Check here for Conference Committee

Hearing Date: March 14, 2007

Recorder Job Number: 5066

Committee Clerk Signature

*Judy Schock*

Minutes:

**Melissa Hauer: Attorney for Department of Human Services.** Testimony attached.

**Rep. Conrad:** The whistleblower may be rewarded 15-20% of the funds recovered?

**Melissa Hauer:** Yes. To provide an incentive for these people to come forward, the federal law provides that the whistleblower gets a share from the recovery which can be anywhere between 15-30% depending on if the state is going to intervene with the case. If they intervene then the whistleblower will not collect. It also depends on the amount of information that the whistleblower brings forward and whether or not they were involved or not.

**Rep. Conrad:** Does that come out of the states share or the federal governments share?

**Melissa Hauer:** It comes out of both.

**Rep. Porter:** On page 9 subsection 7, does this subsection preempt that right to work status in ND? Can the person be discharged at any time without cause? Now you are saying in here that they can't. Are we preempting our existing right to work status as a state?

**Melissa Hauer:** If you have a whistleblower that you employ and they come forward for alleged fraud, you could not fire that person strictly for the reason that they came forward. If they aren't performing in some other way you can have that employment at will.

**Rep. Porter:** If I walk in and tell someone that they are fired because I just don't like them anymore, that is currently legal in this state? I would have to pay them unemployment benefits for firing them without cause but I can do that? How would this stop me from continuing to do that even though you are saying I really can't? You aren't changing the existing right to work laws so I can fire someone without cause anyway.

**Melissa Hauer:** This provides a prohibition against firing someone because of that or retaliation. It doesn't provide a penalty. It doesn't justify for what happens. What it would do is create a right to that employee to assume that they were fired for being a whistleblower. They would have to show that being a whistleblower had nothing to do with them being discharged. They would have to comply with federal law.

**Rep. Weisz:** Section 2 on page 3 where it talks about the language how is that formulated?

**Melissa Hauer:** My understanding is that we have to send back what we recover to the federal government. Whether we pay it back, we recruit a penalty whether any part of that penalty is drafted into federal law. I'm not sure to the answer but I will check and get back to you.

**Rep. Porter:** In that same section on line 22, where it says three times the amount of damages that are identical to the federal standards that the individual is liable to the state for three times that amount. Is that identical to the language in the federal act?

**Melissa Hauer:** Yes that is my understanding.

**Rep. Weisz:** So you are saying that a person is liable for two times the damage but liable for 3 times the conflict? Which one are we talking about?

**Melissa Hauer:** Subsection 2 is setting the floor that it can't be anything less than that but it can be above that?

**Rep. Weisz:** Is that the language of the federal law? They are liable to the state for three times the amount of damage.

**Melissa Hauer:** Right. We see it several places in the bill. There are floors that the courts can't leave that the federal law has as well. There has to be minimum penalties.

**Rep. Weisz:** I understand that.

**Melissa Hauer:** Can I check the language of the federal law and get back to you?

**Rep. Porter:** Is there a provision in here for the department to settle out of court if the provider admits that they had an infraction that was making erroneous claims and they just wanted to settle? Does that exist inside of this provision?

**Melissa Hauer:** Yes. Any of these claims can be settled. The majority of the fraud cases that I have seen are settled.

**Rep. Porter:** Is it specifically listed in here that it can be?

**Melissa Hauer:** No it's not. With any law the parties just need to agree to it.

**Rep. Porter:** Inside of the penalty provisions in the settlement then the way this is worded do you have to stay with the three times damage pay?

**Melissa Hauer:** No you don't. The two parties just have to agree to what happens as to the penalty.

**Rep. Porter:** One part of this particular bill that kind of scares me is that the employer isn't always necessarily knowing what their employees are doing 24/7. This puts a huge burden back on to the employer because of the employee that may be doing something wrong. He may never know that it has happened. Even if you wanted to take it to the level of a conspiracy theory that two employees could work out a deal and say that you keep billing them wrong and I'll be the whistleblower and split the money. The employer has no idea or concept in their compliance. They never find it. All of a sudden the whistleblower happens and a conspiracy takes place. What is in here to protect the employer?

**Melissa Hauer:** One provision is that the court can award the whistleblower nothing at all. We

have a big concern too that we have discussed and that is multi state fraud. There are manufacturers who provide equipment. If we hear about something in Massachusetts can you whistle blow in ND just because it is the same thing? If you go to page 7, subsection 4, on line 21, it talks about the courts can award the funds to the private person that the court find appropriate. The court has instruction that they can award nothing.

**Rep. Porter:** I'm just wondering what protects inside of the law like this. What protects the employer from the fraudulent acts of the employee?

**Melissa Hauer:** Nothing. The same situation has happened. The employer has had the compliance programs that you mentioned. It is really up to the employer to be aware of what the employee is doing.

**Rep. Porter:** There were provisions from CNS that dealt with employers that had compliance programs that met their standards that if their compliance program was in place and working and it slipped through the cracks, they couldn't be held liable for their actions and findings. They are truly trying through their compliance program and their due diligence to make sure that they are doing everything right. In side of this piece of legislation, is there any reward back to those companies that are trying their best through compliance programs to protect themselves from this type of action.

**Melissa Hauer:** There really isn't anything in this bill that would give special protection to the employers. One of the individuals that are here to speak did propose and amendment that had to do with protecting employers. I work with an attorney and was told that the sort of amendment would be problematic in qualifying the bill. They don't see the bill as effective of the other law.

**Rep. Weisz:** On page 8 in subsection 4 it talks about even if the state does not take action they can still be penalized because of the whistleblower. My understanding is that the

whistleblower would still get compensated. Am I reading that wrong?

**Melissa Hauer:** If the parties agreed, this wouldn't come into play. We wouldn't be rewarding anything. The parties would be agreeing among themselves. They would also decide what to do with the whistleblower.

**Rep. Weisz:** I assume that if this doesn't go to court the state does not proceed with that? Is it just dropped?

**Melissa Hauer:** What that means is if a whistleblower files an action the Attorney General's office gets 60 days to review that action and decide if the state wants to be involved in this case. If the Attorney General says no they don't want to be involved, they just step aside. The whistleblower steps forward. They may go to trial or they may settle.

**Rep. Porter:** How many fraud cases did ND have in the last couple of years?

**Melissa Hauer:** I don't have number off the top of my head.

**Rep. Porter:** Do you have the dollar amount?

**Melissa Hauer:** No not with me.

**Rep. Porter:** It would be interesting to know the type of providers and get the specifics.

Another thing that I would like a little more information on is that I know from the Medicare side there are compliance programs. It would be interesting to know why they wouldn't be on the Medicaid side.

**Rep. Price:** I spoke about proposed amendments that would have gotten that.

**Rep. Porter:** We should ask CNS instead. If it's working on the Medicare side which is strictly federal, the OIG is doing these now. Why would they have two different sets for Medicaid and Medicare?

**David Boak:** *Protection and Advocacy Project.* I wasn't planning to testify this morning but I was looking at the bill as the questions were going back and forth. One thing that Rep. Porter

asked about is how the employer gets protected from the employee. The provisions beginning on page 2 line 27 where it defines which conduct that is prohibited. It says the person may not. It says that every one of the following identifications of wrongful acts requires deliberate tasks. If you have an employee who is false billing and embezzling and you don't know about it, you're ok. In the final set on page 3 letter H that applies to if you find out about it and don't disclose that information. I think an employer is well protected along with anyone who is not acting deliberately. The other thing I was going to address is that their was a question if the court has to assess damages or not. On page 3 beginning on line 29 it talks about that. The agency says it needs to full cooperation and not wait until there is an investigation and then cooperate. If that happens there is no penalty.

**Rep. Price:** Is there any opposition?

**Jonathan Disenhaus: Attorney.** I was a Justice Department employer for 7.5 years in Washington until August of 2005. I prosecuted the federal version of this statute and the cases under that statute for 7.5 years. I am now in private practice on the defense side of those cases. I have been asked by the pharmaceutical research and manufacturers of American to come talk to you about my experiences under the statute. I think I can answer several of the questions. We have been talking over the past couple of weeks about the version of the bill that she has been working on and places where it differs from the federal statute. We do have a serious of amendments that we have agreed to tower on. At least that would help to bring the new ND statute in line with the Federal statute so both statutes are in play. We had proposed some additional amendments that would deal with some of the compliance plan and other issues. Unfortunately the scheme that you are dealing with at this point is that the United States Congress has said they like the Federal False Claims act. They want states to have at least a strong statute as well. You don't have much room to negotiate to stray from the statute.

*If I could quickly answer some of the questions that came up. There is no protection for an employer from an employee in the statute. The statute specifically is not an intent to defraud statute. The liability for penalties and damages is imposed under the federal statute and the ND version in terms of this language. If the defendant is said to have knowledge that the fraud was going on and then the statute goes on to define a knowing violation. It defines knowledge as actual knowledge, or reckless disregard. Since those are vicarious liability which are legal concepts that make employers responsible for the actions of their employees, whether they are authorized or not but in the scope of that employees responsibility mean that the knowledge of the employee that they are doing something wrong. You can compute it to the employer and therefore he will be liable for that. In all the cases you hear about that is what happens. I enforced this statute rigorously. There is no way a corporate entity can say a person has its own knowledge of something. If it has knowledge of a corporation resides in the brains of its employees and the corporation is accountable for the knowledge and acts of its employees. Basically it does apply to this statute. With respect to compliance claims, what happens in the federal statute and what would happen under this form of the statute is that an employee who discovers a fraud or participates in that fraud has a choice to tell their boss and try to stop the action. You can run and file a sealed complaint in federal court alleging that your employer is committing fraud against the Medicaid program. You can do it in court today under the federal statute regardless of whether ND has a statute. The federal folks claim this applies to the federal portion of every Medicaid claim that is paid out of ND. Today the statute works in ND's favor and the federal government does the investigation. That employee is faced with the decision whether to follow that lawsuit or invoke the compliance one. Now that I am a defense attorney I think there is a cross incentive being set up particularly in federal law. Corporations are now by the SCC it is mandatory to have a compliance plan. You have to have training in*

*place that keeps people of all good ideas to have a hotline. A lot of the incentives have in place effective means that prevent fraud. It is particularly important in the healthcare contacts because Medicaid providers, pharmacies, sellers of goods, bill lots of small claims on a daily basis. If an employee reports a fraud internally on day 1 to the employer, the employer can stop the fraud and so all those other claims don't happen. There is less damage to the state then. If the employee takes the other path and files a sealed whistleblower complaint, there is a 60 day period in the statute during which there is a secret lawsuit filed. The defendant doesn't know about it. At some point the prosecutors and the investigators get around to investigate it. There were statistics published in 2006 that showed it. We didn't do our job as best we could because there were a whole lot of cases in the system. It took 38 months to investigate a case and bring it to resolution. That is the medium at this point. The quickest was four months. During that time period the investigation may or may not be brought to the attention of the defendant and the fraud may or may not stop. Compliance plans are better for everyone. The employee doesn't have a financial incentive to take the compliance plan. The employees who participate in these frauds have an incentive to participate in the fraud for awhile, watch the damages, and then blow the whistle. They can claim a share on what the state will cover. There is actually an incentive to be sort of involved. The federal statute and the parallel provisions of this ND bill allow for it to reduce the recovery by the whistleblower. That person planned or initiated the conduct, not simply participated. That is problematic. Very few federal cases get disposed of in that way. It is very hard to prove that someone was the planner or the initiator. That is a problem. If you try to address that problem we have been told that the IG won't give you the percent. We are stuck with that federal problem. The federal statute has the problems that you have identified. They are problems that the federal prosecutors are dealing with all the time. We aren't at liberty to improve it at 10%. If there is a*

clinic here in Bismarck and there is an employee who think it is doing everything inappropriately. Like up coding which is saying the service is more intensive than it otherwise it is, in order to get money. The employee first contacts an attorney because the individual can't file the lawsuit. They contact the attorney and the statute covers all the costs. An attorney will file a complaint. Today that complaint is filed in federal district court. It alleges that there is a fraud. The employee provides in secret, documents and other information taken from the employer. Or it doesn't have to be an employee, it can be anybody. It can be a patient who received the bill. It is filed and sealed. Today the attorney's office will investigate that matter. If it is a Medicaid matter they have to talk to people in the state agency. In my old job we worked all the time in state Medicaid fraud units and agencies to figure out what the fraud was. Federal government has a 65% interest in preventing this. It goes to investigation which can be 38 months. At the end of the day the Attorney General of the state and the US has to make a decision. Either they are going to settle the case, file complaints of their own, and litigate the case. Or they can decline and step aside and let the whistleblower decide whether to try to settle or litigate the claims. Most of these cases settle for double damages even if there is a dispute on what the damages was. There is an agreement on what was over billed and they are settled for doubles. When someone testifies in congress they claim they always get doubles. The doubles are divided up which would be 65-35. Even when our state doesn't have a false claim back, the states are recovering doubles from the theory that they are collecting some sort of interest. Most cases regardless of if they have the statute on getting those doubles back. If the case goes on to litigate and the court orders that penalties be imposed, 2 things happen. If y you loose in front of a jury the trebles are mandatory. Penalties of \$5,000 - \$10,000 per Medicaid bill are imposed. The minimum of \$5,000 is mandatory. The courts only discretion in terms of penalty is between 5 and 10. The way it works in the federal system is

*that there was a decision yesterday in Illinois where there is a state and federal statute next to each other, each gets \$5-10,000. Chicago lost \$46 million in damages. They gained \$331 million in damages and penalties. Even though the court imposed only the \$5,000 per claim. The penalty part of this if you go all the way to litigation is not split. You get your penalties and the federal government gets their penalties. The doubling of damages is split according to the ratio. I think that I try to enter each of the different questions that came up*

**Rep. Price:** In ND it's only the 60 day seal. Currently in federal court, how long is it?

**Jonathan Disenhaus:** It is a 60 day seal with an allowance for an extension for the cause shown. That is exactly what it is under the federal statute. There are 13 other states right now that have the statutes. They are all the same. Because it is a joint state, federal fraud and investigation, the enforcement community works real hard to make sure the expansions are consistent so that everyone has the same amount of time. The way most of these work today is that they are national fraud claims brought under the federal statute in federal court that state statute violations are alleged in add-ons, strapped on to the federal case. There are a lot of cases pending in Massachusetts where the prosecutors from Nevada are having to appear in federal district court in Massachusetts. It can also be the case that it could be pending in two different courthouses in separate parts of the country. As I describe it, after I left the Department of Justice, I was more traffic cop than prosecutor. Cases were popping up all over the country. You had multiple investigating agencies trying just to do their jobs.

**Rep. Conrad:** Welcome to ND. You work for the pharmaceutical industry?

**Jonathan Disenhaus:** I work for the trade association that is research and industry.

**Rep. Conrad:** How did pharmaceutical get into this?

**Jonathan Disenhaus:** The biggest purchase of pharmaceutical products is Medicaid. The reimburse pharmacists for prescriptions. The claims act doesn't just supply to the person that

