

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

21226

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
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 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.*

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

FISCAL NOTE
Requested by Legislative Council
01/02/2007

Bill/Resolution No.: SB 2126

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	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
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Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

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

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Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
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Name:	Debra A. McDermott	Agency:	Dept. Human Services
Phone Number:	328-3695	Date Prepared:	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

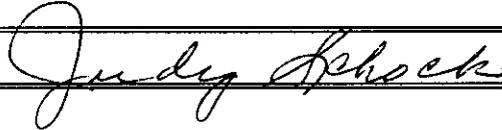
House Human Services Committee

Check here for Conference Committee

Hearing Date: March 14, 2007

Recorder Job Number: 5066

Committee Clerk Signature



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 there 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 series 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

submits the bill and submits the claim. It also applies to those who have caused a false claim to be submitted. My theory is that it is kind of interesting that they brought me in here today and that they I like me today is one of the theories that I established for the Dept. of justice. It says that pharmaceutical manufacturers can be held liable for false claims submitted by someone else if they cause those claims to be submitted. There are a bunch of schemes that have been alleged that would get you there.

Rep. Conrad: What is the most popular?

Jonathan Disenhaus: Acts like bribing a doctor to write you a prescription which then gets into the system that isn't a prescription that you wanted to use or pay for. There are 180 international pharmaceutical cases under investigation.

Rep. Conrad: 180?

Jonathan Disenhaus: They are all brought by whistle blowers. We don't know how many of those are merit. I would submit based on my experience that probably 18 of the 180 are true. There were multiple whistleblowers that came forward on the same thing. The truth is the quickest way to criminal immunity is if you are a whistleblower who is trying to get money. There are 180 cases that are reported to be in the case. The problem for the pharmaceutical manufacturers is a lot like the problem my job dealt with as a federal prosecutor. When they get into cases they are nation wide allegations. They have to worry about what the 50 states are going to do and they have to face litigations. What they have asked me to do in helping them understand the statutes is to find ways to protect that. Having a rational way to pursue and prosecute it, instead of increasing the 38 months to the finish line, it decreases it and lets the state make decisions. Those are the things we are working on. The rationality is in the interest of the pharmacy. The concerns are for having the whistleblowers have only the same rights that they have under the federal statute and not more rights that would cause the actions

to slow down and hold the whole settlement hostage. We have looked through some of those issues and that is what our amendments rank.

Rep. Porter: In your experience, when I look at the way these bills are drawn up, is it good to be a whistleblower because now you have immunity? It is even better to be the whistleblower if you are causing the problem in the first place. Now you still get immunity. It seems bad to be the employer. No matter how hard you try you are held to a higher standard than that your employees are for some reason. I guess as you work for the federal government in the private sector, has there been any talk inside of the federal plan to reward the companies that truly are trying to prevent fraud and abuse inside of this huge monster by having compliance plans and sending the money to do the training. And also by having this huge investment in their place to make sure they are doing the right thing in this ever changing world of reimbursements.

Jonathan Disenhaus: Can I answer it both ways? First I will bring the old me. What I would have said is that the statute does have certain rewards and incentives in it. They are inside the statute. I am not aware of the Medicare provision that you are talking about there is no immunity in the system that comes from having a compliance program. You can reduce your exposure. The provision that I think is tripping people off is at the bottom of page 3 section 2. That is one of the rewards and incentives. IF you have a compliance plan and you discover that someone is submitting false claims to the state, you are liable. If you have a mistake you don't know about you are not liable. If you have a mistake you learn about but keep doing anyway, you are liable. If you discover such a thing and within 30 or 60 days you can reduce your exposure from trouble to double advantage. There will be no fines. On the Medicare side of that, it is all that is offered. The Inspector General advertises a plan for voluntary disclosure of healthcare fraud. They Medicare or Medicaid and distinguish that. They won't promise but they suggest that the most that can happen to you is double. You are still looking at double. If

the whistleblower comes forward in the meantime there is still going to be a double damages cap. The whistleblower is going to get a piece of it and there will be attorney fees and cost that you will have to pay for the attorney. The judge can knock down the penalty from \$10,000 to \$5,000. There is a history in a federal case law of judges counting fewer claims that were actually submitted as a way to mitigate. They say it is a \$100 million fraud but that was our one claim. That is really not provided for.

Rep. Porter: Inside of that section 2 when you talk about that \$5-10,000 amount for violations, is there a way to make sure that it doesn't happen twice as you had said with the state and the federal. And that you would get dinged on both statutes then?

Jonathan Disenhaus: One of the amendments we originally opposed would have said that. It would have prevented a ND count from being added on top of a federal count. The IG office said that it wasn't effective as the federal statute and went to nullify that.

Rep. Porter: So I guess the big question that I have in my mind is if we do nothing as a state and we don't adopt any kind of plan like this, everything is still covered one time in federal court because they are federal claims. What we are missing as a state is the big carrot that the feds are hanging out there.

Jonathan Disenhaus: That is exactly right. You don't have a multiplier and a penalty in the state law. You aren't as scary at the negotiating table with the defendant. Because the way things work, everyone attaches times two to their damages. That is scary when you are dealing with the federal government. I made a note to myself about a question that you had asked that didn't quite get answered. The relationship between the two, I'm not going to claim to be an expert. There is a federal case law that the whistleblower protection provision of that which gives positive action to an employee who feels that they have been retaliated against for whistle blowing activities applies and establishes that right to the employee, regardless of

whether or not the employee blows the whistle. There are a number of public cases and opinions under the federal statute where employees sue without having filed an action. They sue their employers on the allegation that they were looking into something they thought was a fraud. They told their boss about a coworker. They told their boss that they needed to do something about this and for whatever reason they decide not to report to the federal government. Maybe in fact it wasn't a fraud. That is actionable all by itself under this statute. Under the federal law, most of the state statutes that I have been looking at have in it a provision that says the statutes are the same as the federal case law which will be relied upon as precedent. It does have the penalties on the employer for retaliating. What happens in the cases where the government declines to intervene and doesn't prosecute those cases is that the whistleblowers bring that retaliation claim along with the state claim. When they negotiate their settlements they are getting less from the state. The employer comes and says that they have \$100,000 to settle this lawsuit. The employer doesn't care who gets the money they just want the lawsuit to go away. The whistleblower says that I was hurt more than I thought and I should get \$70,000. The federal government has to run in and challenge that settlement. The employee wasn't that injured and the program was so that 70% should go to the state. This is a scheme. It is very complex litigation that results from this. It is very expensive especially to the ones who are innocently accused. It causes people to come forward when they are innocent. In some cases the FBI comes in and turns the place upside down and takes the records. It can take up to 3 years to sort up the whistleblowers allegations. At the end of the day the federal government steps aside and a small auditing problem is resolved with the state that wasn't a case. The whistle was blown for no reason. People's lives were turned upside down. A million dollars that should have been spent by the hospital went to the attorneys and such. There are consequences. From my perspective and what makes me think about it is that

people you don't know, as soon as this statute passes and goes on the books, who live in other states can allege right now that national frauds are happening. You can have complaints filed in the east coast the day after this passes. They are going to amend this in and bring ND in to the actions when they shouldn't be. Right now you work cooperatively with the national association. After the statute passes you will be in the 180 cases. You will be in them a far different way. I think it's a relatively complicating scheme that I live in every day. You have to think about it very carefully. The amendments deal with the IG's office where he has said yes we can adjust the statute in that way. We have made some fixes that match the scheme in the new statute to the federal statute with respect to the relationship of the whistleblower and the government. There is one provision that comes out that is not about that. It would have established a brand new theory of liability under the false claims act. It is on page 3 subsection 8 on line 22. What that provision would have done is established the false claims liability for any provider. If anyone spills or receives money by mistake and discovers that, and doesn't reimburse the state. There is a reasonable time element. That provision is particularly problematic when you think about the employee dynamic here. The contractors that pay claims make mistakes all the time. There is a lot of money going out the door that shouldn't have that the providers didn't ask for. Most good providers pay it back. They rely on some employees to identify that overpayment to them. This provision creates an incentive for the employee to shut up and watch the money come in and go tell the government first because they will get a piece of that money back. We asked that the provision be stricken. It doesn't exist in law. The only provision in federal law that applies here is if you fraudulently fail to disclose the intent to deceive and cover up the overpayment. That is not what this provision would do. There is an additional amendment that we have been talking back and forth about. There are complications with the IG's office review of this. They suggested on what is on page 3 of our

amendment as a vehicle for dealing with the IG's office problems. What you see there in section 6 would prevent the whistleblower from jumping in if a whistleblower knows that there is already an investigation going on. Among the other problems that we have is witnesses and the employees who get interviewed in the course of an investigation get wind of the fact that there may be a bounty. They then file their complaints. They have become the bounty hunter. That is not really fair. As a government lawyer I don't like it. Section 6 would preclude people who know there is an investigation already. MA has that provision in its false claims act. The MA statutes are one of 3 that the IG said was entitled to that. Since the IG approved it in MA we suggested it for you. They are now reconsidering that. The suggestion was to try and go forward with it. The one provision won't keep you away from the 10% if you want the 10%. It also comes into play. Of the 13 that were on the books, 10 were ejected. A couple states are working to amend the statute. Texas is the most successful state under this statute. It gives more control to the state and less to the whistleblower. I think there are 5 or 6 other states working now. In Missouri they are working on their own fraud legislation and they aren't interested in getting into the whistleblower action.

Rep. Conrad: On page 2 of your amendment I don't understand number 6.

Jonathan Disenhaus: This would near the federal statute. The version you have in front of you would have changed the way the federal statute works in such a way that the whistleblowers that wouldn't be entitled to a share under the federal statute could be entitled to a share. No whistleblower can bring a statute under the action. Unless that whistleblower is an original source. It is a very narrow category of who can still be a whistleblower. The way the engrossed bill works, only the AG can raise the issue and throw that person out in public disclosure. It's not in the government's interest.

Rep. Weisz: If we don't do anything, it will stay the same other than deal with the issues that were raised?

Jonathan Disenhaus: I'm not sure I'm understanding.

Rep. Weisz: Like the Medicaid and getting the percentages. Will that only affect the federal courts?

Jonathan Disenhaus: Two things happen in the way it works. If it's a national case a coordinating team is put in place. They make sure the states cover their share. The states get two times their damages any way. There is still litigation. In my experience 80% of the time it is not a fraud, just a misperception. The other thing that can happen is that the AG can approach a US Attorney in your state and ask him to prosecute a case. The state lawyer comes the lawyer for prosecution. If it is a civil case he can wear two hats and get it that way.

Rep. Price: Is there any more testimony on SB 2126? If not we will close the hearing on SB 2126.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2126

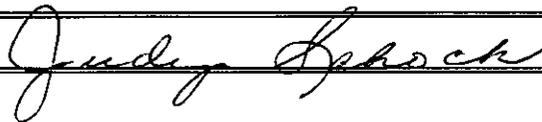
House Human Services Committee

Check here for Conference Committee

Hearing Date: March 14, 2007

Recorder Job Number: 5097

Committee Clerk Signature



Minutes:

Rep. Price: We have a proposed set of amendments that have been agreed to by the department and the Industry.

Rep. Porter: This is definitely a rework of the bill that we saw last session that isn't sitting very well with the legislator. Everything that is in the bill is already available at the federal level in federal court. We are definitely selling something for that 10%. We most definitely set up situations where we are given an incentive to a whistle blower that would also definitely be the individual responsible for the fraud in the first place. We are setting ourselves up by having a law that the penalty section, regardless of passing the amendments, the penalty section of the bill could be invoked twice under section 2. Under the state and federal government the fine would cause the health care facility to go out of business or to go bankrupt or shut the doors. One of the things that when it talks about each occurrence that you are billing for a syringe, that you aren't supposed to be billing for. For some reason the Medicaid system is reimbursing you because the computer didn't catch it. You do your compliance and you don't catch it and then someone turns you in. Each time that the syringe is billed for it would cost you up to \$10,000 if you were found guilty of this act. If it was a lawsuit and it was both federal and state, then you would be found up to \$10,000 on the state side and up to \$10,000 on the federal

side. The other part of this that bothers me is that the immunity section gives immunity to the whistle blower who may just be the person causing the problems in the first place. The corporation is always and ultimately responsible for their individual employees. I would think that if we wanted to do something as a state to say we want to incur fraud and abuse which we haven't gotten any numbers from the department. I guess if I was coming in to present a bill to curb fraud and abuse I would at least come in with number saying that we have a huge problem in this state with fraud and abuse, which we don't. The other thing that I would come in and say is that rather than the federal whistle blower plan, why don't we put incentive out there to the hospitals and healthcare providers and say you know what, if you put a compliance plan in place that meets our standards like doing chart reviews and you are auditing payments. If they are reporting back to us voluntarily that they did their quarterly audit and found some glitches. If they do that and set that plan up in place we will reimburse you more. We will give them an extra dollar to help pay for the training and help pay for the cost of having our compliance plan in place. We would then be taking a real proactive position into the medical community to say that we understand they are going to make mistakes. We want you to pay the money back when you make a mistake. We are also going to reward you for having a compliance plan in place that we know you are doing to be the best of the best. If you're a provider that doesn't want to accept that responsibility and that compliance plan than you are going to get reimbursed less. Then you are also going to be the provider that we are going to be watching closer. Our top of the line providers all have compliance plans in place. I would much rather see offices of state then to narrow a piece of federal legislation that rewards and gives immunity to the whistle blower for 10% of the recovery. I would much rather see us take a position in saying that there is a system in place and it is in the federal courts. If you want to do that go do it. We are going to do something different in ND because we think that we would

rather have a comprehensive compliance system in place to reward our providers than to put one more thing looming over them.

Rep. Schneider: This bill will only apply to the fraudulent activities. For example Rep. Porter's syringe hypothetical. If the hospital simply bills for the syringe and they overlook it, there is nothing fraudulent about it. This statute doesn't apply. For example an employee that made a mistake, the hospital isn't necessarily liable either. If the employee is doing it for his or her own benefit, and they have stepped outside the scope of their employment, the hospital still won't be liable. But if in fact the hospital knew they were billing for the syringe and acting in fraudulent matter, and ripping off the state, they should be held accountable. I don't disagree with the compliance and so forth; I think we need to realize that this only applies to fraudulent activity like people that are ripping off the state.

Rep. Kaldor: If I had the hospital and had the employee. The employee had the knowledge that there was wrongful billing going on but didn't report it to their employer because they knew the longer it went on, the more money they could get on the whistleblower situation. There is nothing that protects that hospital from knowing that things are going wrong. Then the employee quits and it is your word against the employees inside of this web of problems that this creates. It has created them in the federal system. This law in the federal system is not a law without a bunch of problems. Out of 180 cases, maybe 18 are worth of going forward. That means that 90% of the cases are brought as retaliation. To me this just gears another way to retaliate back at your employer. If it truly is something that is fraudulent and needs to happen, it can already happen in the federal system. We don't need it in the state system. We can already do everything that is in here by taking it to federal court.

Rep. Conrad: Then I don't see why we should be putting in that incentive. I don't know why we shouldn't get that.

Rep. Weisz: Depending on where you fit at under the whistleblower part, depends on where they get the money from. It's not necessarily a free ride that you are on.

Rep. Price: Well it comes out of the state.

Rep. Schneider: What is the current law for whistleblower cases in Medicaid? Is there any provision or incentive?

Rep. Price: They do have a Medicaid fraud group and I haven't really dealt into that.

Rep. Schneider: Is there any incentive that can help with blowing the whistle?

Rep. Price: There was incentive for the county back at that point.

Rep. Schneider: I was just wondering what the current law is on Medicaid whistle blowers with incentives.

Melissa Murray: There aren't provisions in the current law about something like this.

Rep. Price: There are no incentives to make any sort of fraud?

Melissa Murray: That is correct. A whistleblower today can file under the federal law and get an incentive that way. It wouldn't be under the state law.

Rep. Pietsch: There are no protections for whistleblowers?

Melissa Murray: There would be under the federal law but not under the state.

Rep. Pietsch: Under the federal but not under the state?

Rep. Price: Is the state going to gain from this?

Melissa Murray: There are not a lot of fraud cases in ND the way it is. It's not bringing in a whole lot of money. If you are wondering how much they can gain on it, I'm not sure.

Rep. Price: If it is a national case, the state will still get its share? We would still get the 10%?

Melissa Murray: The federal government would get it because they have the federal law. We wouldn't be entitled to it unless we had a state law that provides for it. What we have been getting is multi state cases which we feel are damages.

Rep. Weisz: I'm curious to see how you are using numbers in the fraud. You are going to have revenue in that from the budget.

Melissa Murray: I think that would do. I think the numbers have been small. I think the numbers have come through relatively small.

Rep. Hofstad: If this legislation was passed, would we find ourselves litigating a great deal more cases? Would the cause to that litigation be much more substantial?

Melissa Murray: That is a really good question. We came to the conclusion that we really can't answer that with accuracy what it is going to do. It has the potential to increase. I talked to a few others today that are going through the same thing we are. Alaska is one of them. They took the same approach that we did involving the fiscal note. They don't know what it would do. Oklahoma took the same approach also.

Rep. Schneider: I also think that on cases they do voluntarily get into that it would resolve in a net gain.

Melissa Murray: We would hope that it would pay for itself.

Rep. Price: Rep. Weisz had a question earlier on what we would have to provide.

Melissa Murray: The multi state cases to me are the best examples of what would happen and what would continue to happen if this legislation passed. In those cases one state usually takes the lead. It is usually the state with the Medicaid fraud control. They ask for information that we usually draft from the data base. They handle it basically and let us know what is going on. They give us updates. At one point there is a settlement offer usually. I'm assuming that in these cases it would be the same. If the state declines to get involved we wouldn't be going to the definitions. There may be some monitoring.

Rep. Weisz: Clearly we speak on the open records laws and forth. Is that possible here?

Melissa Murray: Yes. We don't really know that but it has the potential.

Rep. Price: How much can you unfraud with the individuals on welfare? How do we go after that? Is that done by the state's attorneys? Fraud is fraud.

Melissa Murray: We do have to look at the applicants for recipient fraud as well. Sometimes it is referred to as a states attorney. The Attorney General would have the authority if he chose.

Rep. Price: I am really uncomfortable with that.

Rep. Porter: The Attorney General can also go after a provider for fraud at the current point right now.

Melissa Murray: We are required also to monitor provider fraud.

Rep. Porter: So the only thing this law does is reward the whistleblower.

Melissa Murray: And it would give the state an incentive.

Rep. Porter: So all of the other fraud provisions inside the law are already there. We have the ability to go after a provider that fraudulently bills now. We also have ability to go after a recipient that fraudulently receives benefits. This adds the whistleblower and the 10%.

Rep. Conrad: It may be the congress is giving us that 10% to cover our costs associated with that. The more people that are involved with this, the less fraud we are going to have. We are talking about huge dollars.

Rep. Potter: I understood that we don't have a fraud unit in ND. I understand that we don't have much in the way of fraud going on. I'm wondering how we know that. How are we out checking to see if there is fraud if there is not a fraud unit? What is the process at this point?

Melissa Murray: We do not have a fraud unit set up for that. We do have a person who is in charge of fraud control. He monitors our holding system which is set up to alert us to different things. We are trying to monitor that. From what I understand we really don't know. We have a part time person for an entire state. We get notified because of the multi state factor. We rely on the other states.

Rep. Price: The last time we talked to the department about the fraud unit is they did not feel the questions would justify. Now you are talking national and local providers. Under the current MMIS system you are going to be able to get only potential situations?

Melissa Murray: I can't answer that. I don't think we have any problems so far in getting information to these other states.

Rep. Price: Currently right now we are talking drug companies. So clearly it is the name of the drug. The whole business would be on that.

Melissa Murray: They have the potential to do that.

Rep. Porter: Just to comment on the MMIS discussions that we have had. One of the areas of concern from the old to new system was the fact that there is a lot of things that can't be tracked right now that the department could be paying twice for. They have no way of tracking it now. The new MMIS system is going to elevate some of those or all of those concerns and problems of the existing system. Whether it is going to a provider or not. Hopefully that will come into play and tighten things up as we go there. There is a huge gap that exists right now because of the system that we are under.

Rep. Price: What do we want to do?

Rep. Porter: I am still not convinced that opening up this door is the way to go just so they can join more national law suits and get the bigger piece of the pie off some settlement. If some other state found that it is going to the system. I think a lot of the information that is being presented to us is just so that the department has an easier way into class action lawsuits across the nation. I don't think the fiscal note fully reflects what our costs as a state are going to be to go after and do more of these things where it is now. We join them now and have very little expense and get a check for \$100,000. Or we get 10% more and have the expenses of \$150,000 and now we get \$110,000 back. I don't see that what we are doing right now is the

wrong way to go. Just because the feds hang a carrot out every time they want the other states to join doesn't mean that it is the right thing to do.

Rep. Schneider: If fraud is going on it is the state's money that we are losing. All this bill does is providing an avenue for private individuals to bring suits and allow the whistleblower to collect. We have to recognize that. More times than none when someone blows the whistle and brings the interest to light. I don't see harm in this. I think all this does is allow an avenue for the state to get back money that they are entitled to. Literally there is no cost to the state if they choose to opt into the lawsuit. Right now there are about five attorneys and private individuals that it takes to bring forward a lawsuit the state can collect on.

Rep. Price: Last session we had some recommendations. Some of them were specifically directed toward Medicaid fraud. They required two of the recommendations that were put into place. They couldn't do more than two. To my knowledge the ones that we thought were really potential cases for Medicaid fraud, I don't think went about.

Rep. Schneider: There is no fiscal not to this bill either. There is no cost to the state. The state can only benefit. I don't see what the harm is.

Rep. Conrad: That is good enough. I don't need to add to that.

Rep. Potter: I am between the two. It just seems like what he was up there saying is warning, warning, warning. Maybe I got the wrong thing but that is kind of what I did. It was flashing lights to me.

Rep. Hofstad: Getting back to Rep. Schneider's comments, when Jonathon was up there this morning, he gave the example of how many cases were being tried and so forth. That is pretty concerning to me. I am concerned that we will get into this litigation process and we will pass it. That is my concern that as we go down the road and begin this process.

Rep. Schneider: There is nothing saying that they have to. That is why I asked the question I did. The whole idea would be to get back the money that they have been ripped off. When you make that decision at the front end you have no idea of the success of litigation. That is the discretion that is left up to the Attorney General. He is going to do what he thinks is best for the state. He's not going to take on a case he will lose. Most of these settle anyways.

Rep. Damschen: The average time for the suits was 38 months and the shortest was 4 months. We could be waiting a long time.

Rep. Price: If this is passed and our national lawsuit changes we can absolutely opt out on anyone that we want to?

Melissa Murray: Yes we wouldn't have to be involved in any of them if we don't want to.

Rep. Price: But if another state is doing it, they can acquire information from us?

Melissa Murray: They can ask for information from us.

Rep. Price: That isn't something that we have to provide?

Melissa Murray: If we aren't a part of it we don't have to. We may want to provide information so we can share in the recovery.

Rep. Porter: The discussion about the Attorney General looking at the case and dropping out of it is already something that exists now. If there is abuse whether the state wants to go back after the charges and settle them. That doesn't stop the individual side of this. It doesn't stop the lawyer from going after the business to get that settlement of what they are looking for. They have a place now where the state is protected. What we are adding to it is an individual who is granted immunity and is potentially the cause of the problem hiring a lawyer and getting a settlement. If you want to offer a reward for turning in someone on fraud, then offer the reward and let them go away. But when you allow them to file an action on behalf of the state

and have the state drop out, then move forward. You are setting yourself up for a whole lot of nothing. I don't think this is something the state of ND wants to get involved with.

Rep. Potter: Was Jonathan testifying in favor or not of this bill?

Rep. Price: In favor of the amendment but in opposition of the bill.

Rep. Potter: So working for the pharmaceutical company, with that why would he try and talk us out of doing that? What are the benefits for him? Who is all getting sued here? Why is it to his benefit?

Rep. Price: If they give a kickback to the doctor they can get sued.

Rep. Porter: I can bring up one relevant point to that discussion. There was a sister from the Catholic Health Facilities in the state of ND was just totally shocked that this passed and they didn't know anything about it. She was going back to inform all of the hospital administrators that we are even discussing it. They can't believe that we would allow something like this to happen in the state of ND. I don't know that the word is out on what the bill actually does. She was sure shocked.

Rep. Potter: That doesn't answer my question.

Rep. Price: But this is far beyond that. This could be your local clinic that could have 2 people working in the billing department. They could be working together to aspire to do false billing. One of them decided to be a whistleblower and turn in her partner and employer and grab the immunity.

Rep. Pietsch: Or it could be someone legitimately scared for their job. Without this legislation will not report it because they need the job because it is the only place in town they can work. I think in a rural area we have to be conscious of that. The whistleblower is no different.

Mr. Thomas: From the hospitals prospective there are a number of vehicles in place, external to the department that are agents of the department to insure that what we bill for is accurate.

It is also for fraud detection. There is a requirement to everything that we submit for billing that puts the institution at risk in terms of any fraudulent activity that is engaged in. It is a very keen business. There are errors that are made. I think Rep. Schneider's comments about fraud versus error are important for you to remember. There are many providers involved in the Medicaid program, hospitals are only one. There are existing fraud statutes in ND that have been used to address fraud as it has been identified. In the hospitals case for example, annually with the contract, Medicaid uses them as an outside reviewer of the financial activities and billings. There are two points, medical appropriateness and fiscally accurate to what we said. In either case we are at risk for a turn down. For further investigation has indicated that there was fraudulent activity then obviously it would get turned over to the Attorney General. A similar arrangement is all of our commercial carriers as well as with Medicare. I cannot say that those kinds of reviews are also in place for all of the providers. It is particular difficult with manufacturers. We have no manufacturing in the state of either devices or prescriptions. Those are usually of a multi state nature. I'm not sure how SB 2126 gets into that. I just thought I would get up and comment a little bit. There is perception that the behavior that is ongoing in the hospital community and with do respect I will report back to this. There is a lot of review that is in place with respect to major providers.

Rep. Conrad: I would like to hear what the Attorney General has to say about this, whether or not if he thinks it is necessary or not. It was indicated that they were involved in the bill. I would like to know from his office if he thinks we should pursue it. Can we contact him and ask him?

Maggie Anderson: I did check with Ray Fiest who is part of our fraud unit just as I was coming down here. We don't have a report per say that tracks it. He says over 5 years we have probably collected around \$140,000 in total funds and that involved about 2 or 3 cases. I understand that there was a question on how that gets figured in to on budgeting process. If

we find a provider that claims dollars that claims \$10,000, we get the money back and give the federal government their share back. They put those dollars in system to reading. We reverse the claim. We look at the leader in nine months. As we are building the budget of the biennium, we look at what the average has been for those positives and negatives in the service categories. We do account for it as you can tell. \$140,000 is not significant. That is pretty much the difference between the state cases and federal cases.

Rep. Price: Are there any questions? If not we will close SB 2126.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2126

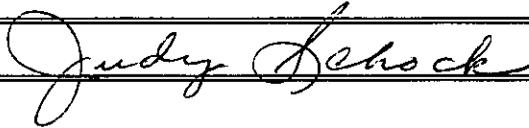
House Human Services Committee

Check here for Conference Committee

Hearing Date: March 19, 2007

Recorder Job Number: 5267

Committee Clerk Signature



Minutes:

Chairman Price: Take out SB 2126 for discussion. This is our Medicaid fraud bill. There don't seem to have been too many cases of fraud in the last 5 years, adding to 140,000 dollars. There could be more we don't know about yet.

Representative Conrad: The Medicaid budget is millions and millions of dollars, and we have gotten 150,000 in claims is next to impossible to me. That alone is a red flag because it is so low. I am not sure we are ready to look at it in the depth they are talking about.

Chairman Price: The is only put into the national pharmaceutical one. We still would be able to get the money as they have been getting.

Rep. Porter: Regardless of what we do with the bill we should put the amendment on that were agreed upon the department. I would move those amendments, seconded by

Representative Hatlestad. The verbal vote was unanimous.

Chairman Price: The other thing I was concerned about if someone from out of state could come in be the whistle blower in our state and than collect part of our settlement under this bill.

Rep. Conrad: What we do for other people who are in business with the state about fraud and than we don't do anything in this billion dollar business. I have been questioned by people

about it. Representative Schneider had some thoughts on this and I would like to hold this and wait to hear what he has to say.

Chairman Price: I will hold until he gets back.

Representative Potter: With thoughts about someone from another state I tne to agree although I was thinking in Grand Forks you could have a whistle blower from East Grand Forks, I would think would work just fine. I don't know that I think it is necessarily fraud, but we have questioned what was going on with medical care with my Mother. It is the state paying the money, but we did. Many may think it is not their money so why should they care. So I can see that would happen right here.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2126

House Human Services Committee

Check here for Conference Committee

Hearing Date: March 20, 2007

Recorder Job Number: 5332

Committee Clerk Signature

Spurlock Olmsted

Minutes:

Chairman Price asked the committee to consider SB 2126. She said they had passed the amendment yesterday that was agreed to by the department and Farnum (cannot understand what the Chairman is saying). We held the bill because we were missing committee members and we are still missing one of the committee members.

Representative Hatlestad made a motion for a do not pass on the amendments.

Representative Hofstad seconded the motion.

Chairman Price asked for discussion.

Representative Schneider said he did not understand the committee's opposition to this bill. The whistle blower's bill only addresses fraudulent situations where people are ripping off the state. There is no cost to the state and it is just an incentive to stop fraudulent activities. When they testified that \$140,000 was collected on this and 20% of our budget is Medicare this is a red flag that there is probably something wrong. What system do we have set up to define fraudulent activity? We do not have a fraud department. I just think this is alarming and it is a good bill. Maybe someone can enlighten me.

Representative Hatlestad said when Jonathan testified that by passing this bill we are going to be involved in a lot of legal activities that are going to cost us money and not benefit us in

the long run. We can get all the benefits right now and not have to assume the responsibility of legal costs.

Representative Schneider said the way he understood it is that the state would have to opt into this. Anything that they would jump into would be on their own decision. As far as the cost, it would be to get back the money that we are being ripped off. I would put a lot of faith in the Attorney General's discretion so that the ones that we jumped into we would prevail and get back their money and then some.

Chairman Price asked if someone came in from out of state, we wouldn't have a choice would we?

Representative Schneider asked as far as the Attorney General?

Chairman Price said yes. Wouldn't we be in the action regardless?

Representative Kaldor said what he would expect is that they would evaluate the whistle blower to see if the allegation was credible.

Representative Hatlestad said that he understood that once we signed on anybody could then get us involved and require us to provide information relative to the lawsuits going on in all these other states. Whether we want to be involved or not, we have to provide this information and that is going to cost us.

Representative Porter said line 14 on page 6 is the provision that the state has the ability to opt out if they so choose but the private person could file the action on behalf of the state and their lawyer and they can pursue to the point of settlement which with the information that we got from Jonathan is always going to happen because no one is going to risk the large amount of damages that exist inside of this. The individual can proceed with this action and still use those damage levels as a tool for settlement.

Representative Potter said Jonathan like a very nice guy but he was paid by the pharmaceutical industry to fly here from Washington, D.C. and spent a couple of days here to testify and to really scare us away from this bill. That is a huge red flag for me. He is probably charging \$400.00 per hour at Washington rates. To use him as our as our indicator when the Attorney General was involved in writing this bill. There was no one locally to corroborate this.

Representative Porter asked if he missed the testimony by the Attorney General. I don't remember them coming in to testify.

Representative Potter said that Melissa said this was done in conjunction with the Attorney General's Office.

Chairman Price said but they did not testify in favor of this bill.

Representative Damschen said he thought it kind of set the stage for the whistle blower to set up his employer and then collect.

Chairman Price said the longer they wait to blow the whistle the more they can collect and that is not what we want either.

Representative Schneider said the whole idea is to create some incentive and the Attorney General can go ahead and prosecute these cases. You can only prosecute cases that you have knowledge of. Without any resources in the Attorney General's Office to go investigate these things, and the only way they are going to find these cases is if someone blows the whistle. As an employee you are probably more concerned about saving you job than the state's interests. Again, I just don't see the opposition to the bill as it only relates to fraudulent activities. This is all to the state's benefit.

Representative Pietsch said she may have understood something but she thought that if we pass this, it has to be approved by the federal government too before it can be official. From

the conversations with Jonathan if he put on his other hat he wasn't sure if the government would approve it even with his amendments. Did I understand that right?

Chairman Price said that 10 bills have been passed.

Representative Pietsch said they had 10 claims or 10 whistle blowers or whatever you want to call them in the last 4 years.

Representative Hofstad said the thing that concerned him when Jonathan was talking about the number of cases that were litigated and the success in those cases, it seems to me that going down this road and we have a very small success ratio that it will cost us a lot of money to litigate these cases. As we get involved in these processes and I am afraid we will find ourselves immersed in litigation it will cost us a lot of money.

Chairman Price said we get a percentage from the national now and this gives us the potential for another 10%. It may or may not give us more money. I am probably going to say that I want to wait for another 2 years and see how it works out with the states that have it. Everyone else is on there own.

Representative Schneider asked if they could talk to the Attorney General for a comment.

Chairman Price said them not coming to the hearing was probably their statement.

Representative Conrad said she as going to check with them but didn't get a chance to do it. She said that 20% of the state budget is Medicaid. We have no way to track this money and we have no way to be able to tell us. I just don't understand the opposition.

Chairman Price said something was in place but it was not cost effective.

Representative Schneider said he wanted to make one final comment. If you are an employee say at a hospital in Fargo for example and you work in the billing department. You may know that your employer is ripping off the state. You have no incentive to come forward

because if you come forward you are probably going to get fired. There currently is no protection.

Representative Hatlestad said he was under the impression that that employee could already do that through federal law and would have protection. We do not have to provide protection because they have it already. When you are talking about the whistle blower incentives, I guess if we are going to encourage a whistle blower to come forward, I would like to see him punished if he is the one responsible for creating the situation in the beginning. Why should we reward his illegal activities? Unless that is written in the bill I don't agree.

Chairman Price asked for any further discussion.

Representative Hatlestad made a motion for a do not pass as amended.

Representative Hofstad seconded the motion.

Chairman Price asked for discussion. Hearing none, the clerk called the roll on a **do not pass as amended on SB 2126**. Let the record show 8 yes, 4 no with all present.

Representative Weisz will carry the bill to the floor.

Jonathan

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2126

Page 1, line 3, after the semicolon insert "to provide an effective date;"

Page 1, line 6, replace the underscored comma with "or"

Page 1, line 7, remove "or services" and remove "any employee, officer, or agent of the state, or to"

Page 1, line 9, replace the first underscored comma with "or" and remove the second underscored comma and remove "or services"

Page 2, line 28, replace the first underscored comma with "or", remove the second underscored comma and remove the second "or"

Page 2, line 29, remove "agent", and remove "or to any contractor, grantee, or other recipient of state"

Page 2, line 30, remove "funds,"

Page 3, line 4, replace "obtaining a false" with "getting a false or fraudulent claim allowed or paid;"

Page 3, remove lines 5 through 8

Page 3, line 10, replace "knowingly" with "intending to defraud the state or willfully to conceal the property"

Page 3, line 14, replace "knowingly" with "intending to defraud the state or"

Page 3, line 18, replace "any person" with "an officer or employee of the state" and after "property;" insert "or"

Page 3, line 21 replace "; or" with an underscored period

Page 3, remove lines 22 through 26

Page 4, line 23, remove "which supports the complaint"

Page 5, line 20, remove "for good cause"

Page 5, line 23 replace “to oppose” with “for a hearing on” and remove “and present evidence at a hearing”

Page 5, line 25, after “hearing” insert an underscored comma

Page 5, line 26, remove “providing the private person an opportunity to present evidence,”

Page 5, line 28, after the underscored period insert “If good cause is shown, the hearing may be held in camera.”

Page 7, line 17, replace the second underscored comma with “and” and remove the third underscored comma and remove “payments for”

Page 7, line 18, remove “costs of compliance and any other economic benefit”

Page 7, line 23, remove “specifically”

Page 8, line 7, replace the second underscored comma with “and”

Page 8, line 8, remove the underscored comma and remove “payments for costs of compliance and any other economic”

Page 8, line 9, remove “benefit”

Page 8, line 11, after “fees” insert “and”

Page 8, line 30, remove “a.”

Page 9, remove lines 3 through 7

Page 9, after line 2, insert:

“6. A person may not bring an action under this section based on the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in an investigation, report, hearing or audit conducted by or at the request of the legislative assembly, the state auditor or any city, county or political subdivision of the state or from the news media, unless the action is brought by the attorney general or the person bringing the action is an original source of the information. For purposes of this subsection, “original source” means an individual who has direct and independent knowledge of the information on which the allegations

are based and has voluntarily provided the information to the government before filing an action under subsection 2 of this section which is based on the information.

Page 9, line 8, replace "6." with "7."

Page 9, line 10, replace "7." with "8."

Page 9, remove lines 24 through 27

Page 9, after line 23, insert:

"1. A civil action under section 3 of this Act must be brought no later than:

- a. Six years after the date on which the violation of section 2 of this Act is committed; or
- b. Three years after the date when facts material to the right of action are known or reasonably should have been known by the attorney general, but in no event more than ten years after the date on which the violation is committed.

Page 10, after line 9, insert:

SECTION 6. Limitations of actions already known. No court shall have jurisdiction over an action described in this Act brought by an individual who knew or had reason to know that the attorney general already had knowledge of the situation.

SECTION 7. EFFECTIVE DATE. Section 6 of this Act becomes effective on the date that the department of human services certifies to legislative council that the federal government has determined that section 6 of this Act meets the requirements of section 1909 of the Social Security Act [42 U.S.C. 1396h].

Renumber accordingly

Date: 3/19
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 2126 Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken move Amendment

Motion Made By Rep. Porter Seconded By Rep. Hallestad

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 Uglem					
Robin Weisz					

Total (Yes) 10 "Click here to type Yes Vote" No 0 "Click here to type No Vote"

Absent 2

Floor Assignment Rep. _____

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

Date: 3/20
Roll Call Vote #: 2

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

House HUMAN SERVICES SB. 2176 Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass As Amended

Motion Made By Rep. Hattestad Seconded By Rep. Hofstad

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price – Chairman	<input checked="" type="checkbox"/>		Kari L Conrad		<input checked="" type="checkbox"/>
Vonnie Pietsch – Vice Chairman	<input checked="" type="checkbox"/>		Lee Kaldor		<input checked="" type="checkbox"/>
Chuck Damschen	<input checked="" type="checkbox"/>		Louise Potter		<input checked="" type="checkbox"/>
Patrick R. Hattestad	<input checked="" type="checkbox"/>		Jasper Schneider		<input checked="" type="checkbox"/>
Curt Hofstad	<input checked="" type="checkbox"/>				
Todd Porter	<input checked="" type="checkbox"/>				
Gerry Uglen	<input checked="" type="checkbox"/>				
Robin Weisz	<input checked="" type="checkbox"/>				

Total (Yes) 8 "Click here to type Yes Vote" No 4 "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 2126, as engrossed: Human Services Committee (Rep. Price, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO NOT PASS (8 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2126 was placed on the Sixth order on the calendar.

Page 1, line 3, remove "and" and after "penalty" insert "; and to provide an effective date"

Page 1, line 6, replace the underscored comma with "or"

Page 1, line 7, remove ", or services" and remove "any employee, officer, or agent of the state, or to"

Page 1, line 9, replace the first underscored comma with "or" and remove ", or services"

Page 2, line 28, replace the first underscored comma with "or" and remove ", or"

Page 2, line 29, remove "agent" and remove ", or to any contractor, grantee, or other recipient of state"

Page 2, line 30, remove "funds,"

Page 3, line 4, replace "obtaining" with "getting" and after "false" insert "or fraudulent"

Page 3, line 5, replace "allowance" with "allowed" and replace "payment, or conspire to defraud the medical assistance" with "paid"

Page 3, remove lines 6 and 7

Page 3, line 8, remove "transmit money or property to the state"

Page 3, line 10, replace "knowingly" with ", with the intent to defraud the state or willfully to conceal the property,"

Page 3, line 14, replace "knowingly" with "intentionally defraud the state or"

Page 3, line 18, replace "any person" with "an officer or employee of the state" and after the underscored semicolon insert "or"

Page 3, line 21, replace "; or" with an underscored period

Page 3, remove lines 22 through 26

Page 4, line 23, remove "which supports the complaint"

Page 5, line 20, remove "for good cause"

Page 5, line 23, replace "to oppose" with "for a hearing on" and remove "and present evidence at a hearing"

Page 5, line 26, remove "providing the private person an opportunity to present evidence"

Page 5, line 28, after the underscored period insert "If good cause is shown, the hearing may be held in camera."

Page 7, line 17, replace the second underscored comma with "and" and remove ", payments for"

Page 7, line 18, remove "costs of compliance and any other economic benefit"

Page 7, line 23, remove "specifically"

Page 8, line 7, replace the second underscored comma with "and"

Page 8, line 8, remove ", payments for costs of compliance and any other economic"

Page 8, line 9, remove "benefit"

Page 8, line 11, after "fees" insert "and"

Page 8, line 30, remove "a."

Page 9, replace lines 3 through 7 with:

"6. a. Unless the action is brought by the attorney general or by the person that is the original source of the information, a person may not bring an action under this section based on the public disclosure of allegations or transactions:

(1) In a criminal, civil, or administrative hearing;

(2) In an investigation, report, hearing, or audit conducted by, or at the request of, the legislative assembly, the state auditor, or any city, county, or political subdivision of the state; or

(3) Of the news media.

b. For purposes of this subsection, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and who has voluntarily provided the information to the government before filing an action under subsection 2 which is based on that information."

Page 9, line 8, replace "6." with "7."

Page 9, line 10, replace "7." with "8."

Page 9, replace lines 24 through 27 with:

"1. A civil action under section 3 of this Act may not be brought later than:

a. Six years after the date on which a violation of section 2 of this Act is committed; or

b. Three years after the date when facts material to the right of action are known or reasonably should have been known by the attorney general, but in no event more than ten years after the date on which the violation is committed."

Page 10, after line 9, insert:

"SECTION 6. Limitations of actions. An individual may not bring an action under this Act if the individual knows or has reason to know that the attorney general already has knowledge of the allegations.

SECTION 7. EFFECTIVE DATE. Section 6 of this Act becomes effective on the date the department of human services certifies to the legislative council that the federal government has determined that section 6 of this Act meets the requirements of section 1909 of the Social Security Act [42 U.S.C. 1396d]."

Renumber accordingly

2007 TESTIMONY

SB 2126

AH #1
1-10-07

Testimony
Senate Bill Number 2126 – Department Of Human Services
Senate Judiciary Committee
Senator Dave Nething, Chairman
January 10, 2007

Chairman Nething, members of the Senate Judiciary 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 2126.

Medicaid is a matching program and improper payments to providers cause unnecessary state and federal expenditures. The federal government pays a share of each state's Medicaid program costs. That share, known as the Federal Medical Assistance Percentage (FMAP), is determined annually by the federal government. The federal government uses the FMAP rate to share in the cost of the state's outlays for covered items and services. When improper payments to a provider are recovered, the state must repay the federal government its percentage share as determined by the FMAP.

The Deficit Reduction Act of 2005 (Public Law No. 109-171) allows states that enact a false claims act to keep ten percent of the federal share of any fraudulent payments recovered under that state's false claims act. This incentive was created by Congress to encourage states to establish and maintain laws and standards for the prosecution of false or fraudulent Medicaid claims. The ten percent incentive is available to those states whose false claims acts meet the requirements of the Inspector General of the United States Department of Health and Human Services as set out in the federal False Claims Act.

Currently, the FMAP in North Dakota is 64.72 percent. As the law is today, in a recovery of improperly made Medicaid payments, 64.72 percent of the recovery would have to be returned to the federal government. This bill would allow the state to keep an additional ten percent of the recovery. In other words, instead of keeping only 35.28 percent, the state would be allowed to keep 45.28 percent of any fraud recovery made under this bill.

According to the U.S. Department of Justice, whistleblower actions brought under the federal False Claims Act for fraud against the federal government have returned more than \$8.4 billion to the government since Congress amended the False Claims Act in 1986. As you can see from the fiscal note, there is no exact estimate of the amount of improper payments or the percentage of improper payments that are likely fraudulent in North Dakota. The Department's sense is that the vast majority of providers serving North Dakota Medicaid recipients are honest in their billings for Medicaid reimbursement. However, even though we are lucky to have the kind of honest culture that we do, we are not completely immune from the fraudulent practices of a few. The responsibility for detecting, investigating, and prosecuting fraud and abuse in the Medicaid program is the shared responsibility of the federal government and state governments. This bill does not require any particular action to be taken. It merely establishes an additional tool to address suspected fraud in the Medicaid program and it would allow the state to keep more of that recovery.

State false claims legislation requirements. To receive the ten percent incentive share, a state's false claims act must:

1. establish liability to the state for false or fraudulent claims as described in the federal False Claims Act;
2. contain provisions that are at least as effective in rewarding and facilitating *qui tam* actions as those in the federal False Claims Act;
3. contain a requirement for filing an action under seal for 60 days during which time the attorney general for that state reviews the action; and
4. contain a civil penalty not less than the amount authorized by the Federal False Claims Act.

This bill contains all of these requirements. The bill provides that those who knowingly submit, or cause another person or entity to submit, false claims for payment of Medicaid funds are liable for three times the state's damages plus civil penalties of \$5,000 to \$10,000 per false claim (which are the amounts required by the federal False Claims Act found at 31 U.S.C. 3729 *et seq.*).

The bill also contains *qui tam*, or whistleblower, provisions. *Qui tam* is a unique mechanism in the law that allows citizens with evidence of fraud against government contractors and programs to sue on behalf of the government to recover the stolen funds. In compensation for the risk and effort of filing a *qui tam* case, the citizen plaintiff (referred to as "private person" in the bill) may be awarded between 15 and 30 percent of the funds recovered. A *qui tam* suit initially remains under seal for at least 60 days during which the Attorney General of the state can investigate the claim and decide whether to join the action. The Attorney General, after investigating the merits of the case, determines whether to

intervene and litigate the case on behalf of the state. If the state decides to intervene, the Attorney General may work cooperatively with the citizen plaintiff but maintains control over the case for the state. The citizen plaintiff is subject to certain limitations in his or her participation in the case. The Attorney General may seek civil penalties for the filing of false or fraudulent Medicaid claims regardless of whether a citizen plaintiff is involved.

This gives an overview of what the bill will accomplish. I will be happy to try to answer any questions you may have. Thank you.

AH # 1a
1-17-07

PROPOSED AMENDMENTS TO SENATE BILL NO. 2126

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

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

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

Page 9, line 11, after ~~discriminated~~ ^{eliminated} insert "or retaliated"

Renumber accordingly

AH #16.

NDLA, S JUD

From: Olafson, Curtis
Sent: Friday, January 12, 2007 1:03 PM
To: NDLA, S JUD
Subject: FW: SB 2126 - False Claims Act amendments

Attachments: SB 2126 Amendment 1.doc



SB 2126
Amendment 1.doc (19 kb)

These amendments have been reviewed and approved by Senators Fiebiger and Marcellais.
Senator Curtis Olafson
District 10
13041 84th St NE
Edinburg, ND 58227
1-888-NDLEGIS (635-3447) Legislature
701-993-8240 Home
colafson@nd.gov

-----Original Message-----

From: Melissa A. Hauer [mailto:sohaum@nd.gov]
Sent: Thursday, January 11, 2007 4:06 PM
To: Olafson, Curtis; Fiebiger, Tom D.; Marcellais, Richard
Cc: Anderson, Maggie D.; Feist, Raymond A.
Subject: SB 2126 - False Claims Act amendments

Senators Olafson, Fiebiger, and Marcellais,

I researched the Massachusetts state False Claims Act and found that it does provide for attorney fees and costs to be paid to the state. I understand that the federal government has approved Massachusetts state False Claims Act as qualifying for the 10 percent incentive share provided by the Deficit Reduction Act of 2005. The other two states' laws that have also been approved for the 10 percent incentive share, do not contain a provision for attorney fees for the state.

I spoke with Katie Arnholt, an attorney at the Office of Counsel to the Inspector General of the US Department of Health and Human Services (the entity that will decide if our state law qualifies for the 10 percent incentive share), and she said that adding a provision that would enable the state to seek its attorney fees would not impact whether the bill qualifies for the incentive share. I drafted the attached proposed amendments to SB 2126 that we discussed this afternoon, including a provision that would allow the state of North Dakota to seek attorney fees.

Please let me know if you feel the amendments should be revised in any way, or if you have any questions or concerns. Thank you for your time this afternoon.

(See attached file: SB 2126 Amendment 1.doc)

Melissa Hauer, Director
Legal Advisory Unit
ND Dept. of Human Services
State Capitol - Judicial Wing
600 E. Boulevard Ave.
Bismarck, ND 58505-0250
(701) 328-2311
(701) 328-2173 Fax

AA #2
1-17-07

FOR EDUCATIONAL USE ONLYBlack's Law Dictionary (8th ed. 2004), **discrimination****DISCRIMINATION**

discrimination, *n.* **1.** The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap. • Federal law, including Title VII of the Civil Rights Act, prohibits employment **discrimination** based on any one of those characteristics. Other federal statutes, supplemented by court decisions, prohibit **discrimination** in voting rights, housing, credit extension, public education, and access to public facilities. State laws provide further protections against **discrimination**. [Cases: Civil Rights ¶1001-1263. C.J.S. *Civil Rights* §§ 2-37, 39-67, 85-86, 88, 102-104, 107, 122, 144, 219-221.] **2.** Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored. [Cases: Civil Rights ¶1033, 1138. C.J.S. *Civil Rights* §§ 18, 20, 23-24, 34, 39-40.]

"The dictionary sense of 'discrimination' is neutral while the current political use of the term is frequently non-neutral, pejorative. With both a neutral and a non-neutral use of the word having currency, the opportunity for confusion in arguments about racial discrimination is enormously multiplied. For some, it may be enough that a practice is called discriminatory for them to judge it wrong. Others may be mystified that the first group condemns the practice without further argument or inquiry. Many may be led to the false sense that they have actually made a moral argument by showing that the practice **discriminates** (distinguishes in favor of or against). The temptation is to move from 'X distinguishes in favor of or against' to 'X **discriminates**' to 'X is wrong' without being aware of the equivocation involved." Robert K. Fullinwider, *The Reverse Discrimination Controversy* 11-12 (1980).

age discrimination. **Discrimination** based on age. • Federal law prohibits **discrimination** in employment against people who are age 40 or older. [Cases: Civil Rights ¶1014, 1199. C.J.S. *Civil Rights* §§ 2, 6-7, 9-10, 19, 21, 56-58.]

content-based discrimination. A state-imposed restriction on the content of speech, esp. when the speech concerns something of slight social value and is vastly outweighed by the public interest in morality and order. • Types of speech subject to content-based **discrimination** include obscenity, fighting words, and defamation. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84, 112 S.Ct. 2538, 2543 (1992).

gender discrimination. See sex **discrimination**.

invidious discrimination (in-vid-ee-<<schwa>>s). **Discrimination** that is offensive or objectionable, esp. because it involves prejudice or stereotyping.

racial discrimination. **Discrimination** based on race. [Cases: Civil Rights ¶1009, 1107. C.J.S. *Civil Rights* §§ 2-5, 7-9, 11-13, 18, 22, 26-27, 30-31, 33-34, 37, 41-42, 44, 67.]

reverse discrimination. Preferential treatment of minorities, usu. through affirmative-action programs, in a way that adversely affects members of a majority group. See AFFIRMATIVE ACTION. [Cases: Civil Rights ¶1033(3), 1232. C.J.S. *Civil Rights* §§ 18, 20, 23-24, 64-65.]

sex discrimination. **Discrimination** based on gender, esp. against women. • The Supreme Court has established an intermediate-scrutiny standard of review for gender-based classifications, which must serve an important governmental interest and be substantially related to the achievement of that objective. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451 (1976). -- Also termed **gender discrimination**. [Cases: Civil Rights ¶1011, 1164, 1236. C.J.S. *Civil Rights* §§ 2, 6-7, 9-10, 19, 21, 35, 64-65, 88.]

viewpoint discrimination. Content-based **discrimination** in which the government targets not a particular subject, but instead certain views that speakers might express on the subject; **discrimination** based on the content of a communication. • If restrictions on the content of speech are reasonable and not calculated to suppress a particular set of views or ideas, a governmental body may limit speech in a nonpublic forum to expressions that serve a specific purpose. For example, an agency holding a workshop to inform state employees of laws related to the agency's functions may reasonably prohibit the expression of opinions regarding the motives of the legislators. But if speech favorable to the legislators' intent is allowed and opponents are denied the opportunity to respond, the restriction would constitute viewpoint discrimination. -- Also termed **viewpoint-based discrimination**. [Cases: Constitutional Law ¶90(3), 90.1(1).]

3. The effect of state laws that favor local interests over out-of-state interests. • Such a discriminatory state law may still be upheld if it is narrowly tailored to achieve an important state interest. Cf. FAVORITISM. [Cases: Commerce ~~54~~54.1. C.J.S. *Commerce* § 51.] -- **discriminate, vb.** - **discriminatory, adj.**

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Bryan A. Garner, Editor in Chief

END OF DOCUMENT

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Testimony
Engrossed Senate Bill No. 2126 – Department Of Human Services
House Human Services Committee
Representative Clara Sue Price, Chairman
March 14, 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 engrossed Senate Bill number 2126.

Medicaid is a matching program and improper payments to providers cause unnecessary state and federal expenditures. The federal government pays a share of each state's Medicaid program costs. That share, known as the Federal Medical Assistance Percentage (FMAP), is determined annually by the federal government. The federal government uses the FMAP rate to share in the cost of the state's outlays for covered items and services. When improper payments to a provider are

recovered, the state must repay the federal government its percentage share as determined by the FMAP.

The Deficit Reduction Act of 2005 (DRA) [Public Law No. 109-171] allows states that enact a false claims act to keep ten percent of the federal share of any fraudulent payments recovered under that state's false claims act. This incentive was created by Congress to encourage states to establish and maintain laws and standards for the prosecution of false or fraudulent Medicaid claims. The ten percent incentive is available to those states whose false claims acts meet the requirements of the Inspector General of the United States Department of Health and Human Services as set out in the federal False Claims Act.

Currently, the FMAP in North Dakota is 64.72 percent. As the law is today, in a recovery of improperly made Medicaid payments, 64.72 percent of the recovery would have to be returned to the federal government. This bill would allow the state to keep an additional ten percent of the recovery. In other words, instead of keeping only 35.28 percent, the state would be allowed to keep 45.28 percent of any fraud recovery made under this bill.

According to the U.S. Department of Justice, whistleblower actions brought under the federal False Claims Act for fraud against the federal government have returned more than \$8.4 billion to the government since Congress amended the False Claims Act in 1986. As you can see from the fiscal note, there is no exact estimate of the amount of improper payments or the percentage of improper payments that are likely fraudulent in North Dakota. The Department's sense is that the vast majority of providers serving North Dakota Medicaid recipients are honest in their billings for Medicaid reimbursement. However, even though we are lucky to have the kind of honest culture that we do, we are not completely immune from the fraudulent practices of a few. The responsibility for detecting, investigating, and prosecuting fraud and abuse in the Medicaid program is the shared responsibility of the federal government and state governments. This bill does not require any particular action to be taken. It merely establishes an additional tool to address suspected fraud in the Medicaid program and it would allow the state to keep more of that recovery.

State false claims legislation requirements. To receive the ten percent incentive share, a state's false claims act must:

1. establish liability to the state for false or fraudulent claims as described in the federal False Claims Act;
2. contain provisions that are at least as effective in rewarding and facilitating *qui tam* actions as those in the federal False Claims Act;
3. contain a requirement for filing an action under seal for 60 days during which time the Attorney General for that state reviews the action; and
4. contain a civil penalty not less than the amount authorized by the Federal False Claims Act.

This bill contains all of these requirements. The bill provides that those who knowingly submit, or cause another person or entity to submit, false claims for payment of Medicaid funds are liable for three times the state's damages plus civil penalties of \$5,000 to \$10,000 per false claim (which are the amounts required by the federal False Claims Act found at 31 U.S.C. 3729 *et seq.*).

The bill also contains *qui tam*, or whistleblower, provisions. *Qui tam* is a unique mechanism in the law that allows citizens with evidence of fraud against government contractors and programs to sue on behalf of the government to recover the stolen funds. In compensation for the risk and effort of filing a *qui tam* case, the citizen plaintiff (referred to as "private person" in the bill) may be awarded between 15 and 30 percent of the funds recovered. A *qui tam* suit initially remains under seal for at least 60 days during which the Attorney General of the state can investigate the claim and decide whether to join the action. The Attorney General, after investigating the merits of the case, determines whether to

intervene and litigate the case on behalf of the state. If the state decides to intervene, the Attorney General may work cooperatively with the citizen plaintiff but maintains control over the case for the state. The citizen plaintiff is subject to certain limitations in his or her participation in the case. The Attorney General may seek civil penalties for the filing of false or fraudulent Medicaid claims regardless of whether a citizen plaintiff is involved.

If there are any questions, I would be happy to respond to them.

Thank you.