

# MICROFILM DIVIDER

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



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DESCRIPTION

2132

2007 SENATE HUMAN SERVICES

SB 2132

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2132

Senate Human Services Committee

Check here for Conference Committee

Hearing Date: 1-10-07

Recorder Job Number: 863

Committee Clerk Signature

*Mary K. Manson*

Minutes:

Senator Judy Lee, Chairman, opened the hearing on SB 2132 relating to responsibilities of third parties liable for payments on behalf of medical assistance recipients.

Senator Lee stated that there was a fiscal note that indicated that the fiscal impact could not be determined.

Melissa Hauer: (attorney with the Department of Human Services) Testified in support of SB 2132. (Attachment #1)

Senator Judy Lee requested a summary of the bill.

Melissa Hauer stated that the bill would require the department to join in any relief or satisfaction of a claim. The third party would be released from further liability. It requires Medicaid recipients to cooperate in the recovery of third party benefits, including providing information about the liable third party. It allows the department to recover the full extent of Medicaid benefits paid from the third party or from the recipient or legal representative if they have received a payment from the third party. It also requires the recipient and the department to give notice to each other if either one files a law suit. It also provides that any uncompensated transfer with an intent to defeat the state's right to recovery would be void. It also says that if a Medicaid recipient receives payment from a third party, the recipient must

repay the department for its claim within 60 days after receiving those funds or that they would be paid into a trust fund. It also provides that the department can decide whether it would be best to reduce its claim.

Senator Warner asked if the recipient dies, does the department still have the right to go to estate and recover anything that hasn't been recovered previously?

Melissa Hauer stated that they would have that right to file a claim. May consider going to the liable third party.

Senator Dever asked if someone is awarded damages for medical expenses, is that money given to that person or is it held and paid out as medical expenses occur?

Melissa Hauer stated that it can depend on the specific case. There is a lot of flexibility about how a settlement or a judgment can be paid.

There was no opposing testimony.

Dave Peske (ND Medical Association) asked if the department can go back to the provider for a portion of payment if they have received payment.

Melissa Hauer stated that if the provider has received payment from the Medicaid agency and from the liable third party as well--

Senator Judy Lee: So you're saying if they have been paid twice for the same service?

Melissa Hauer: Correct. Federal Medicaid regulations allow a state agency to off set future payments to a provider. We haven't done that in North Dakota. If the provider gets payment from two sources, we could ask the provider to repay the Medicaid department.

Senator Judy Lee asked if Melissa Hauer would help clarify so that it would be satisfactory to everyone.

Senator Warner asked if this has something to do with the differential between the filled rate and the negotiated rate?

Melissa Hauer stated that they would only seek to recover what they paid.

Senator Judy Lee asked how many situations like this they run into in a year.

Melissa Hauer stated quite a lot, more since the Allborn decision. It's become more work since that case came down. Stated that she works on about one per month, but there are others that she does not get.

The hearing on SB 2132 was closed.

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2132

Senate Human Services Committee

Check here for Conference Committee

Hearing Date: 1-17-07

Recorder Job Number: 1270, 1272, 1299, 1302

Committee Clerk Signature

*Mary K. Mossor*

Minutes:

JOB #1270

Senator Judy Lee, Chairman, opened the discussion on SB 2132 concerning third parties liable for payment on behalf of medical assistance. Stated that Dave Peske had requested an amendment and had a question regarding whether or not the department could collect from a provider.

JOB #1272

Dave Peske (ND Medical Association) stated that he had spoken with Melissa Hauer (Department of Human Services) and they indicated that they would send an amendment to the Chairman, taking out the last phrase about recovery from a provider who has received payment. Also stated that NDMA is fine with that and would like to see that happen.

JOB #1299

Senator Dever (?) stated that he was unsure what the problem was.

Senator Judy Lee stated that they want to take out the fact that you can recapture from a provider if it's up to the amount of medical assistance provided the recipient. It would just say that they can recover directly from a third party, from the recipient or legal rep if they've received third party benefits up to the amount of medical assistance.

Senator Warner: It has to do with the department being the provider of last resort, doesn't it?

Senator Lee: The doc didn't feel they should have to give back money that they received if there wasn't another payer. Did I misunderstand that?

Senator Warner inquired about what would happen if the third payer paid that required a co-payment and the recipient refused to pay the co-payment so they were going to take that share of the Medicaid money as the co-payment?

Senator Judy Lee: I don't think they would get to do that.

Senator Warner gave examples of the situation he suggested and stated that he understood this to mean that they could not use the Medicaid dollars to make up the difference.

Senator Judy Lee: "Dollars from the third party" is what we are deleting, right?

Senator Warner asked further questions to clarify.

Senator Judy Lee suggested that they listen to the bill again and have Melissa Hauer clear up the confusion regarding whether or not DHS can collect from the provider.

JOB #1302

Melissa Hauer from the Department of Human Services was present to answer further questions regarding the amendment.

Senator Judy Lee asked about if the sub-section had anything to do with recapturing dollars from an insurance company to make up for the money that Medicaid didn't pay.

Senator Warner gave an example. Discussion followed to clarify the question.

Melissa Hauer stated that there can be both insurance and Medicaid. Medicaid could be picking up costs that the insurer couldn't pay for (?)

Senator Judy Lee gave an example, asking if car insurance was not adequate to cover costs of the injured person, would these changes have an effect on that?

Melissa Hauer stated that in that case Medicaid could pay for the charges above the medical coverage of the insurance policy. Under subsection five, the department could look to the third party if we think they still owe something. We could look to the recipient or the legal representative to pay the money back if they received a settlement or a judgment. With the amendment, we would not be looking to the provider under this law.

Senator Warner asked if the department had any problem with the amendment.

Melissa Hauer: No.

Senator Warner moved the Hauer amendment to SB 2132. Senator Heckaman seconded.

Motion passed 6-0-0.

Senator Erbele moved a Do Pass as amended on SB 2132. Seconded by Senator Pomeroy.

Roll call vote 6-0-0. Passed. Carrier is Senator Erbele.

## 2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2132

Senate Human Services Committee

Check here for Conference Committee

Hearing Date: 1-31-07

Recorder Job Number: 2366, 2450

Committee Clerk Signature *Mary K Monson*

Minutes:

Senator J. Lee opened Engrossed SB 2132 for discussion on concerns as it was passed out of committee earlier and for consideration of additional amendments.

Senator J. Lee asked if the committee would like to have Melissa Hauer from the dept. appear to explain the additional amendments. A call was put in to Melissa and she agreed to appear before the committee later in the day.

### **Job #2450**

Senator J. Lee asked Melissa Hauer to help the committee understand the further amendments she worked on.

Melissa Hauer reported that she worked with the attorneys who practice in the Fargo area who were concerned with the bill. She said on the first page the amendments would just modify what would be subsection 2 to say that the dept. shall seek recovery of reimbursement from a third party up to the full amount of medical assistance paid.

It was noted that the amendments were drafted from the engrossed bill.

She then addressed page 2, subsection 5. The first line was amended to say the dept. shall recover the full amount of all medical assistance provided on behalf of recipients for full extent of third party benefits received by the recipient or the dept. for medical expenses.

On page 2, line 12, filing was changed to commencing because in ND a lawsuit can be commenced without filing it in court.

In 7b the language was reworked a little to be more consistent with what happens in settlements.

Subsection 8, the language about fraudulent conveyance was removed. (Meter 5:20)

A concern of the attorneys was – would an attorney be guilty of fraud if they got a settlement on behalf of a Medicaid recipient not knowing the person is a Medicaid recipient and gave the client their share of that money.

Senator J. Lee asked if, as a result of that, the attorney doesn't have any liability in there.

Ms. Hauer replied that the attorney would not be considered to have committed fraud. The attorney might be required to give back the money, just held liable like the client would be.

The changes on page 3, lines 3-4, -- they either pay the dept. or, if they can't agree how it should be divided up, they pay into a trust account pending a court determination on how it should be split up. In subsection 10 there is an addition to make it clear that they can agree to reduce payment for the claim in order to get the claim settled.

Senator J. Lee asked for quick review of highlights of this bill to refresh their memories.

Ms. Hauer answered that this has to do with the US Supreme Court decision, the Ahlborn Case. This is to help clarify that Medicaid is the payer of last resort. It talks about how they recruit funds from third parties who might be responsible for paying for medical care for Medicaid recipients.

Senator Warner asked if that money gets re-appropriated.

Maggie Anderson answered that money would come back to them and if it was paid out on a service they had already covered, they would have to return the federal share to the federal govt. and they would retain the state dollars. It becomes recycled money.

Senator Dever moved to accept the amendment presented by Melissa Hauer.

Second by Senator Erbele. Roll call vote 6-0-0.

Senator Dever made a motion for a Do Pass as amended on Engrossed SB 2132.

Second by Senator Warner.

Roll call vote 6-0-0.

Carrier is Senator Erbele.

# FISCAL NOTE

Requested by Legislative Council

01/02/2007

Bill/Resolution No.: SB 2132

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

|                       | 2005-2007 Biennium |             | 2007-2009 Biennium |             | 2009-2011 Biennium |             |
|-----------------------|--------------------|-------------|--------------------|-------------|--------------------|-------------|
|                       | General Fund       | Other Funds | General Fund       | Other Funds | General Fund       | Other Funds |
| <b>Revenues</b>       | \$0                | \$0         | \$0                | \$0         | \$0                | \$0         |
| <b>Expenditures</b>   | \$0                | \$0         | \$0                | \$0         | \$0                | \$0         |
| <b>Appropriations</b> | \$0                | \$0         | \$0                | \$0         | \$0                | \$0         |

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

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

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

This bill creates a section in the NDCC relating to responsibilities of third parties liable for payments on behalf of medical assistance recipients. The Department is unable to determine the number of recipients that might be affected by this bill, therefore the fiscal impact can't be determined.

**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.*

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

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

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

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

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

*JEB*  
1-18-07

PROPOSED AMENDMENTS TO SENATE BILL NO. 2132

Page 2, line 3, replace the underscored semicolon with "or"

Page 2, line 5, replace "; or from the provider of a recipient's medical services if third-party benefits" with an underscored comma

Page 2, line 6, remove "have been received by the provider"

Renumber accordingly

Date: 1-17-07

Roll Call Vote #: 1

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. SB 2132

Senate HUMAN SERVICES Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Accept Hauer Amendment

Motion Made By Sen. Warner Seconded By Sen. Heckaman

| Senators                        | Yes | No | Senators               | Yes | No |
|---------------------------------|-----|----|------------------------|-----|----|
| Senator Judy Lee, Chairman      | ✓   |    | Senator Joan Heckaman  | ✓   |    |
| Senator Robert Erbele, V. Chair | ✓   |    | Senator Jim Pomeroy    | ✓   |    |
| Senator Dick Dever              | ✓   |    | Senator John M. Warner | ✓   |    |
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Total (Yes) 6 No 0

Absent 0

Floor Assignment \_\_\_\_\_

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



**REPORT OF STANDING COMMITTEE**

**SB 2132: Human Services Committee (Sen. J. Lee, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2132 was placed on the Sixth order on the calendar.

Page 2, line 3, replace the underscored semicolon with "or"

Page 2, line 5, replace "or from the provider of a recipient's medical services if third-party benefits" with an underscored comma

Page 2, line 6, remove "have been received by the provider"

Renumber accordingly

## PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2132

- Page 1, line 13, after "party" insert "up" and replace "limit" with "full amount"
- Page 1, line 14, remove "legal liability and for the full amount of third party benefits but not in excess of"
- Page 1, line 15, remove "the amount of"
- Page 2, line 2, after "benefits" insert "received by the recipient or the department for medical expenses"
- Page 2, line 12, replace "filing" with "commencing"
- Page 2, line 17, after "settlement" insert "of a claim"
- Page 2, line 19, after "satisfied" insert "or released"
- Page 2, line 25, remove "is a fraudulent conveyance and the transfer or"
- Page 2, line 26, remove "encumbrance" and remove "unless"
- Page 2, line 27, remove "the transfer was for adequate consideration and the proceeds of the transfer are"
- Page 2, line 28, remove "reimbursed in full to the department up to the amount of medical assistance"
- Page 2, line 29, remove "provided"
- Page 3, line 3, after "place" insert "a sum equal to" and replace "third party" with "the total medical assistance provided"
- Page 3, line 4, remove "benefits" and remove "for the benefit of the department"
- Page 3, line 7, after "from" insert ", or may reduce or compromise its claim against,"
- Re-number accordingly

*JB*  
1-31-07

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2132

Page 1, line 13, after "party" insert "up" and replace "limit" with "full amount"

Page 1, remove line 14

Page 1, line 15, remove "the amount"

Page 2, line 2, after "benefits" insert "received by the recipient or the department for medical expenses"

Page 2, line 12, replace "filing" with "commencing"

Page 2, line 17, after "settlement" insert "of a claim"

Page 2, line 19, after "satisfied" insert "or released"

Page 2, line 25, remove "is a fraudulent conveyance and the transfer or"

Page 2, line 26, remove "encumbrance" and remove "unless"

Page 2, remove lines 27 and 28

Page 2, line 29, remove "provided"

Page 3, line 3, after "place" insert "a sum equal to" and replace "third-party" with "total medical assistance provided"

Page 3, line 4, remove "benefits" and remove "for the benefit of the department"

Page 3, line 7, after "from" insert ", or may reduce or compromise a claim against,"

Renumber accordingly



Date: 1-31-07

Roll Call Vote #: 2

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. SB 2132

Senate HUMAN SERVICES Committee

Check here for Conference Committee

Legislative Council Amendment Number 78145.0201 Title .0300

Action Taken DP/amended / engrossed SB 2132

Motion Made By Sen. Dever Seconded By Sen. Warner

| Senators                        | Yes | No | Senators               | Yes | No |
|---------------------------------|-----|----|------------------------|-----|----|
| Senator Judy Lee, Chairman      | ✓   |    | Senator Joan Heckaman  | ✓   |    |
| Senator Robert Erbele, V. Chair | ✓   |    | Senator Jim Pomeroy    | ✓   |    |
| Senator Dick Dever              | ✓   |    | Senator John M. Warner | ✓   |    |
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Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Erbele

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

REPORT OF STANDING COMMITTEE

SB 2132, as engrossed: Human Services Committee (Sen. J. Lee, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2132 was placed on the Sixth order on the calendar.

Page 1, line 13, after "party" insert "up" and replace "limit" with "full amount"

Page 1, remove line 14

Page 1, line 15, remove "the amount"

Page 2, line 2, after "benefits" insert "received by the recipient or the department for medical expenses"

Page 2, line 12, replace "filing" with "commencing"

Page 2, line 17, after "settlement" insert "of a claim"

Page 2, line 19, after "satisfied" insert "or released"

Page 2, line 25, remove "is a fraudulent conveyance and the transfer or"

Page 2, line 26, remove "encumbrance" and remove "unless"

Page 2, remove lines 27 and 28

Page 2, line 29, remove "provided"

Page 3, line 3, after "place" insert "a sum equal to" and replace "third-party" with "total medical assistance provided"

Page 3, line 4, remove "benefits" and remove "for the benefit of the department"

Page 3, line 7, after "from" insert ", or may reduce or compromise a claim against,"

Renumber accordingly

2007 HOUSE HUMAN SERVICES

SB 2132

## 2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2132

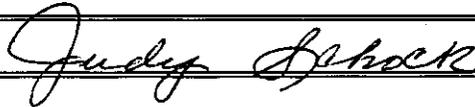
House Human Services Committee

Check here for Conference Committee

Hearing Date: February 21, 2007

Recorder Job Number: 3570 & 3577

Committee Clerk Signature



Minutes:

**Chairman Price:** We will open the hearing on SB 2132.

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

**Representative Porter:** Inside of this bill it is specific to benefits only it doesn't include when you are sitting at the table does it include the department's costs of collections at that point in time?

**Ms Hauer:** The way it usually works is the Medicaid recipient brings (could not hear) to us and we allow that attorney of that recipient to keep a portion for his costs. The travel we pay a portion of the costs. There is usually a 3<sup>rd</sup> party handle that issue.

**Representative Porter:** So it is more than just the benefits paid, or potentially more than benefits paid.

**Ms Hauer:** No, if we paid 100,000 dollars for medical costs that is all we would pay. We wouldn't have attorney fees costs onto that.

**Representative Porter:** In regards to the pecking order in a settlement. There is typically going to be a lot of people at the table or want to be at the table. If a hospital has 300,000 dollar claim that is part of the settlement, does a physician have part of this claim as part of the

settlement in unpaid bills. Where do they fit in, or what seat are you taking? Are you going above everyone else than or are you equal to everyone else and have negotiate reductions in all other providers or potential recipients of a pot of money.

**Ms Hauer:** I haven't experienced the situation where the provider wasn't paid, because Medicaid covers. So they have paid providers, and no fault insurance would pay a portion, and than Medicaid kicks in what ever they haven't paid.

**Chairman Price:** Anyone else in favor, is there any opposition? If not we will close the hearing on SB 2132

**Chairman Price:** Take out SB 2132 and we will take action on the bill.

**Representation Damschen:** What about supplemental insurance that someone might have? Would it cover non medical, medical incurred expenses? Is it still available?

**Representative Porter:** There is a possibility someone would have Aflac, and it would kick in and there would be a payment of dollars based on the accident. There was a settlement from that insurance company and that would be part of the third party money available back to the department that typically the policies are written up specific care. I would be only in the case of an accident.

**Representative Conrad** moves a do pass, seconded by **Representative Potter**. **Chairman Price** asks for further discussion, hearing none the roll was taken with 12 yeas, 0 nays, and 0 absent. **Representative Schneider** will carry the bill to the floor.

Date: 2/21  
 Roll Call Vote #: 1

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

House HUMAN SERVICES S.B. 2132 Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Defer

Motion Made By Rep. Conrad Seconded By Rep. Potter

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

Absent 0

Floor Assignment Rep. Schneider

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

**REPORT OF STANDING COMMITTEE (410)**  
February 21, 2007 5:10 p.m.

**Module No: HR-33-3643**  
**Carrier: Schneider**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2132, as reengrossed: Human Services Committee (Rep. Price, Chairman)**  
recommends **DO PASS** (12 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).  
Reengrossed SB 2132 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

SB 2132

**Testimony**  
**Senate Bill Number 2132 – Department Of Human Services**  
**Senate Human Services Committee**  
**Senator Judy Lee, Chairman**  
**January 10, 2007**

Chairman Lee, members of the Senate Human Services Committee, I am Melissa Hauer, an attorney with the Department of Human Services. I am here today to testify in support of Senate Bill number 2132.

This bill will clarify Medicaid third party liability recovery in the context of the U. S. Supreme Court's decision in *Arkansas Department of Human Services v. Ahlborn* ("Ahlborn")<sup>1</sup>. Third party liability (TPL) recovery is the process of identifying parties that might be liable to pay for medical care for Medicaid recipients and recovering from those parties payments made by Medicaid. All States that participate in the Medicaid program are required by federal law to engage in TPL recovery to ensure that Medicaid is the payer of last resort.<sup>2</sup> The Department of Human Services recoups some Medicaid expenditures in this way and these funds are recycled back into the Medicaid program.

An example of a common third party liability recovery scenario is when a Medicaid recipient is injured in a car accident due to the negligence of another driver. The Medicaid recipient needs medical care because of the accident and Medicaid pays for that care. The Medicaid recipient then attempts to recover his damages from the negligent driver. This may include the filing of a lawsuit against the driver or it may involve a settlement before any lawsuit is filed. In this situation, the Department must be repaid for the cost of any medical care that was provided to the

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<sup>1</sup> 126 S.Ct. 1752, 164 L.Ed.2d 459, 74 USLW 4214, Med & Med GD (CCH) P 301,841, 06 Cal. Daily Op. Serv. 3597, 2006 Daily Journal D.A.R. 5159.

<sup>2</sup> 42 U.S.C. § 1396a(a)(25)

Medicaid recipient due to the accident. As a condition of receiving Medicaid benefits, recipients must agree to assign to the state any right of recovery the recipient may have against these liable third parties.<sup>3</sup>

While it is clear that states have to recover Medicaid funds paid when some third party is liable for those medical costs, it was not clear what happened when the medical costs were greater than the amount available from the liable third party. This question arose, for example, when a negligent driver caused injuries that resulted in a Medicaid recipient needing medical care totaling \$200,000, but the driver only had insurance coverage of \$100,000 for the accident and was otherwise judgment-proof. In that case, does the Medicaid agency have the right to claim the entire \$100,000 in order to satisfy its claim? Or does the Medicaid recipient get a portion of the proceeds to compensate him for pain and suffering, lost wages, or future lost earnings? If so, how much does the recipient keep and how much must be used to repay Medicaid? That is the question addressed in the *Ahlborn* decision.

In *Ahlborn*, the Court decided that the federal Medicaid law only permits a State to recover its payments for medical assistance from the portion of a settlement attributable to medical items and services. The Court further determined that the State may not attempt to recover from anything other than the portion allocated to medical items and services.

**What this means for Medicaid third party liability recovery programs.**

Prior to the Supreme Court's decision in *Ahlborn*, the Centers for Medicare and Medicaid Services (CMS) had interpreted the Medicaid third party

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<sup>3</sup> N.D.C.C. 50-24.1-02(2) and 50-24.1-02.1

liability provisions to authorize States to pass laws permitting full recovery of Medicaid payments from third party liability settlements, regardless of how the parties allocated a settlement. The Supreme Court has rejected this interpretation. It did note, however, that States should become involved in the case to influence the amount that is allocated in a settlement to medical items and services. Thus, a State's recovery rights could be protected and the adverse consequences of the decision mitigated by vigorous action on the part of a State to increase the amount of a settlement allocated to medical items and services.

**How This Bill Would Mitigate the Adverse Consequences of *Ahlborn*.**

To protect the Medicaid program's interest in the allocation of settlement monies to medical items and services, the State must be involved in the litigation and settlement process. This bill will accomplish that goal by:

- Requiring the Department to join in a release or satisfaction of a cause of action when a Medicaid claim is at issue. This will ensure that the Department is notified of any potential release of the recipient's claim against the third party. The failure to get the Department to join in the release renders the release invalid as to the Department's claim.
- Requiring Medicaid recipients to cooperate in the recovery of third party benefits, including providing information about the liable third party.
- Allowing the Department to recover the full extent of Medicaid benefits paid from the third party, or from the recipient or his legal

representative if they have actually received payment of third party benefits. It also allows the Department to recover third party benefits from the provider of medical services if third party benefits have been received by that provider.

- Requiring the recipient and the Department to give written notice to the other if either brings a lawsuit against the third party and to give information about the court in which the lawsuit was filed. Either one may then join in the other's action.
- Providing that a judgment, award, or settlement in an action by a recipient may not be satisfied without first giving the Department notice and a reasonable opportunity to file and satisfy its claim or proceed with any other action allowed by law to recover third party benefits due.
- Providing that any uncompensated transfer with an intent to defeat the Department's right to recovery is void.
- Providing that a Medicaid recipient who has received payment of any third-party benefits for which Medicaid has a claim, must pay the Department for its claim within 60 days after receiving those funds from the third party, or pay those funds into a trust account pending a decision by a judge as to how the third-party benefits should be allocated between the Department and the Medicaid recipient.

The bill also provides that the Department may determine that it is more cost-effective to accept payment of a lesser amount than the full cost of

Medicaid paid in order to avoid litigation. Cost-effectiveness will be determined on a case-by-case basis. Under this provision of the bill, the Department could reduce the amount of its claim when, for example, the legal liability of the third party is unclear or when an estimate of the cost to the Medicaid program of pursuing its claim would likely be greater than the amount available for recovery.

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

PROPOSED AMENDMENTS TO SENATE BILL NO. 2132

Page 2, line 5, remove "or from the provider of a recipient's medical services if third-party benefits"

Page 2, line 6, remove "have been received by the provider"

Renumber accordingly

**NDLA, S HMS**

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**From:** Lee, Judy E.  
**Sent:** Thursday, January 25, 2007 6:05 PM  
**To:** NDLA, S HMS (shms@nd.gov)  
**Subject:** FW: SB 2132 Additional Revisions

**Attachments:** Amendment SB 2132 3.doc; Amendment SB 2132 2Melissa.doc



Amendment SB 2132 3.doc (22 KB) .. Amendment SB 2132 2Melissa.doc...

Mary - Please make a copy of the first attachment, 2132 3.doc, for each book.

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

**From:** Melissa A. Hauer [mailto:sohaum@nd.gov]  
**Sent:** Thursday, January 25, 2007 8:21 AM  
**To:** Duane A. Lillehaug; Lee, Judy E.  
**Cc:** mwilliams@maringlaw.com; Anderson, Maggie D.; Mandigo, Tove E.  
**Subject:** Re: SB 2132 Additional Revisions

Senator Lee,

After Duane Lillehaug sent his email below to me, I spoke by phone with attorney Mike Williams about the bill and proposed amendments that he had discussed with Mr. Lillehaug. Mr. Williams stated that he is also serving on State Bar Association and Trial Lawyers' Association legislative review committees and so he had reviewed the bill in those capacities. We came up with the following proposed additional amendments to the bill. These incorporate the new amendments that he and I discussed this afternoon (which I understand take care of Mr. Lillehaug's concerns described below), as well as the amendments I sent to you yesterday. So, all of the amendments are contained in the attached draft. I think these should take care of the concerns of Mr. Lillehaug and the committees on which Mr. Williams serves.

I would be happy to provide any additional information you or the Senate Human Services committee would like, or to answer any questions. Thank you.

(See attached file: Amendment SB 2132 3.doc)

Melissa Hauer, Director  
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ND Dept. of Human Services  
State Capitol - Judicial Wing  
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(701) 328-2311  
(701) 328-2173 Fax

Please note new email address: sohaum@nd.gov

sohaum@nd.gov>  
"Duane A. Lillehaug"  
<dlillehaug@maringlaw.com>  
To: "Melissa A. Hauer"  
cc: "Lee, Judy E." <jlee@nd.gov>  
Subject: SB 2132 Additional Revisions

01/24/2007 09:27  
AM

Melissa,

Thank you for your hard work and excellent drafting of the proposed amendments (in the memo attached) that you sent to Sen. Lee last night. I think they are well written. I really appreciate you working with me to clarify and simplify SB 2132.

There are still 3 areas I would like you to look at though. They are:

A. Paragraph 5. You and I have discussed the Department's intent with this paragraph, and I believe it is to have the Department recover it's MA payments from the medical expenses part of the claim, as the Ahlborn case requires. My concern is that the first sentence, however, doesn't really say that when it says "full extent of third-party benefits." This broad language could make the statute, in my view, not comply with the U. S.

Supreme Court's requirements in Ahlborn. I know that language I previously suggested also had problems, but what about an amendment as follows in order to clarify the scope of the Department's claim to third-party benefits and stay within the parameters of Ahlborn:

-On page 2, line 2, after the word "benefits," insert the following:

"recovered by the recipient or Department for medical expenses."

B. On Page 2, line 17 (paragraph 7b): remove the word "settlement."  
It seems to me that how settlements are to be handled are covered in paragraph 9, so perhaps settlements don't need to be in 7b.

C. On paragraph 10, it still seems to me that language should be inserted to make it clear that the Department has the authority not only to choose not to pursue a claim, but also to compromise or settle a claim for the reasons set forth in paragraph 10. Therefore, I propose an amendment as follows:

-Page 3, line 7, insert after the word "reimbursement" the following:

", or may reduce or compromise its claim,"

Please let me know what you think. Otherwise, I think the Bill is in good shape with the amendments you drafted and sent to Sen. Lee last night.

Thank you.

Duane A. Lillehaug  
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& Bismarck, ND(See attached file: Amendment SB 2132 2Melissa.doc)

**Testimony**  
**Reengrossed Senate Bill Number 2132 – Department Of Human**  
**Services**  
**House Human Services Committee**  
**Representative Clara Sue Price, Chairman**  
**February 21, 2007**

Chairman Price and 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 reengrossed Senate Bill number 2132.

This bill clarifies Medicaid third party liability recovery in the context of the U. S. Supreme Court's decision in *Arkansas Department of Human Services v. Ahlborn* ("Ahlborn")<sup>1</sup>. Third party liability (TPL) recovery is the process of identifying parties that might be liable to pay for medical care for Medicaid recipients and recovering from those parties payments made by Medicaid. All States that participate in the Medicaid program are required by federal law to engage in TPL recovery to ensure that Medicaid is the payer of last resort.<sup>2</sup> The Department of Human Services recoups some Medicaid expenditures in this way and these funds are recycled back into the Medicaid program.

An example of a common third party liability recovery scenario is when a Medicaid recipient is injured in a car accident due to the negligence of another driver. The Medicaid recipient needs medical care because of the accident and Medicaid pays for that care. The Medicaid recipient then attempts to recover his damages from the negligent driver. This may include the filing of a lawsuit against the driver or it may involve a

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<sup>1</sup> 126 S.Ct. 1752, 164 L.Ed.2d 459, 74 USLW 4214, Med & Med GD (CCH) P 301,841, 06 Cal. Daily Op. Serv. 3597, 2006 Daily Journal D.A.R. 5159.

<sup>2</sup> 42 U.S.C. § 1396a(a)(25)

settlement before any lawsuit is filed. In this situation, the Department must be repaid for the cost of any medical care that was provided to the Medicaid recipient due to the accident. As a condition of receiving Medicaid benefits, recipients must agree to assign to the state any right of recovery the recipient may have against these liable third parties.<sup>3</sup>

While it is clear that states have to recover Medicaid funds paid when some third party is liable for those medical costs, it was not clear what happened when the medical costs were greater than the amount available from the liable third party. This question arose, for example, when a negligent driver caused injuries that resulted in a Medicaid recipient needing medical care totaling \$200,000, but the driver only had insurance coverage of \$100,000 for the accident and was otherwise judgment-proof. In that case, does the Medicaid agency have the right to claim the entire \$100,000 in order to satisfy its claim? Or does the Medicaid recipient get a portion of the proceeds to compensate him for pain and suffering, lost wages, or future lost earnings? If so, how much does the recipient keep and how much must be used to repay Medicaid? That is the question addressed in the *Ahlborn* decision.

In *Ahlborn*, the Court decided that the federal Medicaid law only permits a State to recover its payments for medical assistance from the portion of a settlement attributable to medical items and services. The Court further determined that the State may not attempt to recover from anything other than the portion allocated to medical items and services.

**What this means for Medicaid third party liability recovery programs.**

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<sup>3</sup> N.D.C.C. 50-24.1-02(2) and 50-24.1-02.1

Prior to the Supreme Court's decision in *Ahlborn*, the Centers for Medicare and Medicaid Services (CMS) had interpreted the Medicaid third party liability provisions to authorize States to pass laws permitting full recovery of Medicaid payments from third party liability settlements, regardless of how the parties allocated a settlement. The Supreme Court has rejected this interpretation. It did note, however, that States should become involved in the case to influence the amount that is allocated in a settlement to medical items and services. Thus, a State's recovery rights could be protected and the adverse consequences of the decision mitigated by vigorous action on the part of a State to increase the amount of a settlement allocated to medical items and services.

**How This Bill Would Mitigate the Adverse Consequences of *Ahlborn*.**

To protect the Medicaid program's interest in the allocation of settlement monies to medical items and services, the State must be involved in the litigation and settlement process. This bill will accomplish that goal by:

- Requiring the Department to join in a release or satisfaction of a cause of action when a Medicaid claim is at issue. This will ensure that the Department is notified of any potential release of the recipient's claim against the third party. The failure to get the Department to join in the release renders the release invalid as to the Department's claim.
- Requiring Medicaid recipients to cooperate in the recovery of third party benefits, including providing information about the liable third party.

- Allowing the Department to recover the full extent of Medicaid benefits paid from the third party, or from the recipient or his legal representative if they have actually received payment of third party benefits.
- Requiring the recipient and the Department to give written notice to the other if either brings a lawsuit against the third party and to give information about the court in which the lawsuit was filed. Either one may then join in the other's action.
- Providing that a judgment, award, or settlement in an action by a recipient may not be satisfied without first giving the Department notice and a reasonable opportunity to file and satisfy its claim or proceed with any other action allowed by law to recover third party benefits due.
- Providing that any transfer with an intent to defeat the Department's right to recovery is void.
- Providing that a Medicaid recipient who has received payment of any third-party benefits for which Medicaid has a claim, must pay the Department for its claim within 60 days after receiving those funds from the third party, or pay those funds into a trust account pending a decision by a judge as to how the third-party benefits should be allocated between the Department and the Medicaid recipient.
- Providing that the Department may determine that it is more cost-effective to accept payment of a lesser amount than the full cost of

Medicaid paid in order to avoid litigation. Cost-effectiveness will be determined on a case-by-case basis. The Department could reduce the amount of its claim when, for example, the legal liability of the third party is unclear or when an estimate of the cost to the Medicaid program of pursuing its claim would likely be greater than the amount available for recovery.

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