

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

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

The bill is designed to accomplish goals in three areas. First, it updates the law in the area of the Medicaid long-term care Partnership Program as allowed by the Deficit Reduction Act of 2005.<sup>1</sup> Second, it provides for estate recovery of payments made by the state for the Medicare Part D clawback. Third, it clarifies the assets that will be subject to Medicaid estate recovery.

**1. Long-Term Care Partnership Program**

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

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<sup>1</sup> Public Law No. 109-171

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

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

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

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

## **2. Medicare Part D Clawback Estate Recovery**

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

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

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

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

### **3. Assets Subject to Medicaid Estate Recovery**

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

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

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

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