

Testimony on HB 1467
House Human Services Committee
January 23, 2007

Chairman Price and members of the House Human Services Committee, thank you for the opportunity to testify on HB 1467. My name is Shelly Peterson, I'm President of the North Dakota Long Term Care Association. I am here to provide information regarding provider taxes and help explain HB 1467. Our Association took a position in December of 2006 to not actively pursue provider taxes. However, should legislators believe it is the path to pursue to assure adequate funding for care and services of nursing facility residents, we will support you in your decision.

Background of Bill Drafting:

When the Legislative Council received the request to draft a nursing facility provider assessment bill they quickly found out how technical and difficult this area of law is. Facing a deadline we recommended they review and follow other state statutes who had approved provider assessment laws. It was decided to follow the Oregon State Law on provider assessments. After the legislation was drafted we had it review by Joseph M. Lubarsky, the leading national expert on nursing home provider assessment programs. We felt if North Dakota was going to implement such a program it needed to be done right. Mr. Lubarsky has been involved in the design and/or implementation of every provider tax program implemented in the last three years except for the District of Columbia. This involved working with providers and state agencies in California, Connecticut, Georgia, Indiana, Kentucky, Michigan, Mississippi, Nevada, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, Utah, and Washington.

His work entailed making sure the programs were developed and operated in accordance with federal regulations, reviewed tax models to assure uniformity and broad-based ness, and he designed reimbursement methodologies which utilized the tax dollars and federal matching funds in conformity with federal rules. Mr. Lubarsky confers with CMS on a regular basis regarding provider assessment issues. Most importantly, Mr. Lubarsky reviews and drafts statutory language to assure compliance with CMS rules and interpretation guidelines on provider assessment. I have attached to my testimony amendments Mr. Lubarsky recommends to assure federal compliance and provider acceptance of the program. Because the amendments are complex and difficult to follow, I've attached a copy of the bill, incorporating the proposed amendments in "yellow."

I requested Mr. Lubarsky to provide some basic background information and cite statutory authority for provider assessment to help you better understand this funding mechanism.

State Medicaid Funding Mechanisms: Provider Taxes by Joseph Lubarsky.

Historically, state Medicaid programs have relied upon a variety of mechanisms, including health care provider taxes, provider donations, and intergovernmental transfers, as a means of increasing state Medicaid revenues and thereby enhancing and enlarging their federal financial participation ("FFP") payments. The Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, P.L. No. 102-234, were designed to limit the use of provider donations and taxes as sources for funding of state Medicaid programs.

These restrictions are embodied in 42 U.S.C. §1396b(w) and 42 C.F.R. Part 433 Subpart B. Relative to provider taxes, the tax must:

1. Be broad-based;
2. Be imposed at a uniform rate; and
3. Not include any direct or indirect "hold harmless" provision.

Broad-based means that all non-public providers in the same class (in this case, nursing facilities ["NFs"]) in the state are taxed regardless of Medicaid participation. Uniformity requires that the tax be imposed at the same rate on all providers in the class.

Waivers of either the broad-based or uniformity requirements are possible and the rules governing these waivers are found at 42 C.F.R. §433.68(e). A waiver of the uniformity or broad-based requirements or both is approved if the mathematical and/or statistical tests in that section are met and the tax program does not fall within the direct or indirect hold harmless provisions specified in 42 C.F.R. §433.68(f).

If the tax is uniform and broad-based, and provider taxes and federal matching funds are used to fund or enhance the Medicaid rate reimbursement system, the direct hold harmless tests are non-applicable. CMS has indicated that as part of the rate enhancement process, the portion of the tax related to Medicaid patients can be a direct rate pass-through to providers. The only hold-harmless test applied then is the "indirect hold harmless test" requiring that taxes not exceed 6% of revenue (5.5% effective October 01, 2007).

There is no CMS pre-approval requirement for a broad-based and uniform tax program, only quarterly reporting requirements on the sources and uses of taxes collected. However, a waiver of either the broad-based or uniformity requirements requires advance approval from CMS before implementation.

Based upon the North Dakota Department of Human Services estimates in the 2005 session a 3% provider tax would have netted another \$15 million a biennium. The impact on nursing facility residents was estimated to increase their daily rate \$4.32 per resident, per day (at a 3% tax).

In summary we believe HB 1467 as amended would:

1. Meet all federal requirements of being broad-based and achieve a uniform rate.
2. Does not include any direct or indirect "hold harmless" provision
3. A waiver of broad-baseness or uniformity requirements are not requested so CMS doesn't need to pre-approve.
4. The state may need to submit a State Plan Amendment, outlining any changes in the nursing facility payment system.
5. The tax would be an allowable cost in the year end cost report.
6. Each quarter nursing facilities would be assessed a 3% fee beginning January 2008.
7. Private pay residents would see an increase in their daily rate by approximately \$4 or more per day beginning January 1, 2008.
8. The state would access additional federal funds under this funding mechanism and they would be deposited in the nursing facility quality assurance fund.
9. The nursing facility quality assurance fund would be used to fund nursing facility rebasing, which is already required in NDCC and annual inflationary adjustment, at a minimum of the CPI not to exceed 6%.

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

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Amendments to HB 1467

Page 1, Line 18, after “facility,” insert: “whose payer source is not Medicare Part A or Medicare managed care,”

Page 2, Line 13, after “electronically.” insert: “No payment is due until rates are adjusted in accordance with subsection 4 of section 8 of this Act.”

Page 2, Line 19, prior to “Before,” insert: “Beginning with state fiscal year 2009, b”

Page 2, Lines 24, 25 and 26, remove: “, excluding the annual gross revenue of nursing facilities that are exempt from the assessment imposed under section 2 of this Act” and after “reports” insert: “. For assessment quarters beginning after December 31, 2007 and before July 01, 2008, the assessment rate must be a rate estimated to collect an amount that does not exceed three percent of the annual gross revenue of all nursing facilities in this state for that time period as determined from the previous year’s cost reports, prorated for the number of days in the assessment period(s), or through other required revenue reports.”

Page 2, Lines 27, 28, 29, 30 and 31, remove: “2. Before June fifteenth of each year, the commissioner shall refund any overage in tax dollars collected under section 2 of this Act which exceeds the maximum percentage of the projected annual gross revenue of all nursing facilities in this state as described in subsection 1. The commissioner shall refund any overage described in this subsection by crediting the percentage of the overage attributable”

Page 3, Lines 1, 2, 3, and 4, remove: “to each nursing facility subject to the assessment described in section 2 of this Act against taxes owed by that facility in succeeding assessment periods. The commissioner may collect any delinquent assessments, but may not collect any underages in actual collections through an adjustment in assessment rates.”

Page 3, Line 18, remove “subject to assessment under section 2 of this Act”

Page 4, Line 8, remove “may” and after “Act” insert: “must”

Page 4, Line 10, after "4." insert: "If the rate increases prescribed in subsection 4 are funded through state appropriation, the funds in the nursing facility quality assurance fund can be carried over and used to increase rates in a subsequent year. If the assessment sunsets, the amounts in the nursing facility quality assurance fund will be refunded to nursing facilities proportionately based upon each facility's assessment as a percentage of the total assessment in the year prior to the termination of the assessment program."

Page 4, Line 12, after "includes" insert: “, at a minimum:”

Page 4, Line 15, after "percent" insert: “and; c. fully reimbursing the Medicaid portion of the assessment.”

Page 4, Lines 16, 17, 18, and 19, remove: “SECTION 9. Adjustments. An assessment in a calendar quarter may be adjusted as provided in subsection 2 of section 3 of this Act to take into account overages or underages raised under the assessment rate set under subsection 1 of section 3 of this Act. An adjustment under this subsection may be made at any time.”

Sixtieth
Legislative Assembly HOUSE BILL NO. 1467
of North Dakota
Introduced by

Representatives Kreidt, Ekstrom

1 A BILL for an Act to provide for nursing facility assessments; and to provide a continuing
2 appropriation.

3 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

4 **SECTION 1. Definitions.** As used in this Act, unless the context otherwise requires:

- 5 1. "Assessment rate" means the rate established by the commissioner under
6 section 3 of this Act.
- 7 2. "Commissioner" means the state tax commissioner.
- 8 3. "Gross revenue" means the revenue paid to a nursing facility for patient care,
9 Room, board, and services, less contractual adjustments. The term does not
10 include revenue derived from sources other than operations, including interest and
11 guest meals.
- 12 4. "Nursing facility" means an institution or a distinct part of an institution established
13 to provide health care under the supervision of a licensed health care practitioner
14 and continuous nursing care for twenty-four or more consecutive hours to two or
15 more residents who are not related to the licensee by marriage, blood, or adoption
16 and who do not require care in a hospital setting.
- 17 5. "Patient days" means the total number of patients occupying beds in a nursing
18 facility, whose payer source is not Medicare Part A or Medicare managed care,
19 determined as of 11:59 p.m. of each day, for all days in the calendar period
20 for which an assessment is being reported and paid. For purposes of this
21 subsection, if a nursing facility patient is admitted and discharged on the same day,
22 the patient is deemed to be present on 11:59 p.m. of that day.

22 **SECTION 2. Nursing facility assessment.**

- 23 1. A nursing facility assessment is imposed on each nursing facility in this state.

- 1 2. The amount of the assessment equals the assessment rate times the number of
2 patient days at the nursing facility for a calendar quarter. An assessment may be
3 imposed only in a calendar quarter beginning after December 31, 2007, for which
4 the nursing facility reimbursement rate is calculated according to the methodology
5 provided for in subsection 4 of section 8 of this Act and in accordance with the
6 payment rules of the department of human services.
- 7 3. The assessment must be reported on a form prescribed by the commissioner and
8 must contain the information required to be reported by the commissioner. The
9 assessment form must be filed with the commissioner before the thirtieth day of the
10 month following the end of the calendar quarter for which the assessment is being
11 reported. The nursing facility shall pay the assessment at the time the facility files
12 the assessment report. The payment must accompany the report unless the
13 payment is transmitted electronically. No payment is due until rates are adjusted
 in accordance with subsection 4 of section 8 of this Act.
- 14 4. A nursing facility is not guaranteed that any additional moneys paid to the facility in
15 the form of reimbursements calculated according to the methodology provided for
16 in subsection 4 of section 8 of this Act will equal or exceed the amount of the
17 nursing facility assessment paid by the facility.

18 **SECTION 3. Assessment rate.**

- 19 1. Beginning with state fiscal year 2009, before June fifteenth of each year, the
 commissioner shall establish an
20 assessment rate for nursing facilities that applies prospectively to the twelve-month
21 period beginning July first of that year. The assessment rate must be a rate
22 estimated to collect an amount that does not exceed three percent of the annual
23 gross revenue of all nursing facilities in this state, as determined from the previous
24 year's cost reports or other required revenue reports. ~~excluding the annual gross~~
25 revenue of nursing facilities that are exempt from the assessment imposed under
26 section 2 of this Act. For assessment quarters beginning after December 31, 2007
 and before July 01, 2008, the assessment rate must be a rate estimated to collect an
 amount that does not exceed three percent of the annual gross revenue of all nursing
 facilities in this state for that time period as determined from the previous year's cost
 reports, prorated for the number of days in the assessment period(s), or through other
 required revenue reports.
- 27 2. ~~Before June fifteenth of each year, the commissioner shall refund any overage in~~
28 tax dollars collected under section 2 of this Act which exceeds the maximum
29 percentage of the projected annual gross revenue of all nursing facilities in this
30 state as described in subsection 1. The commissioner shall refund any overage
31 described in this subsection by crediting the percentage of the overage attributable

Sixtieth
Legislative Assembly

1 ~~to each nursing facility subject to the assessment described in section 2 of this Act~~
2 ~~against taxes owed by that facility in succeeding assessment periods. The~~
3 ~~commissioner may collect any delinquent assessments, but may not collect any~~
4 ~~underages in actual collections through an adjustment in assessment rates.~~

5 **SECTION 4. Penalty for failure to pay assessment.**

- 6 1. A nursing facility that fails to file a report or pay an assessment under section 2 of
7 this Act by the date the report or payment is due is subject to a penalty of five
8 hundred dollars per day of delinquency. The total amount of penalties imposed
9 under this section for each reporting period may not exceed five percent of the
10 assessment for the reporting period for which penalties are being imposed.
11 2. Penalties imposed under this section must be collected by the commissioner and
12 deposited in the nursing facility quality assurance fund.
13 3. Penalties paid under this section are in addition to and not in lieu of the
14 assessment imposed under section 2 of this Act.

15 **SECTION 5. Claim for refund.** A nursing facility that has paid an amount that is not
16 required under this Act may file a claim for a refund with the commissioner.

17 **SECTION 6. Records - Audits.**

- 18 1. Each nursing facility subject to assessment under section 2 of this Act shall
19 maintain records sufficient to determine the amount of the assessment under
20 section 2 of this Act.
21 2. Unless otherwise exempt, a nursing facility shall report the payment of the
22 assessment as an allowable cost for medical assistance reimbursement purposes.
23 3. The commissioner may audit the records of any nursing facility in this state to
24 determine compliance with this Act. The commissioner may audit records at any
25 time for a period of three years following the date an assessment is due to be
26 reported and paid under section 2 of this Act.

27 **SECTION 7. Assessments - Deposits - Nursing facility quality assurance fund.**

28 The commissioner shall deposit amount collected by the commissioner from the
29 assessment
30 under section 2 in the nursing facility quality assurance fund.

30 **SECTION 8. Nursing facility quality assurance fund.**

- 1 1. The nursing facility quality assurance fund is established in the state treasury.
2 Interest earned by the nursing facility quality assurance fund must be credited to
3 the fund.
- 4 2. Amounts in the nursing facility quality assurance fund are continuously
5 appropriated to the commissioner for the purposes of paying refunds due under
6 section 5 of this Act and funding nursing facilities.
- 7 3. Funds in the nursing facility quality assurance fund and the matching federal
8 financial participation under title XIX of the Social Security Act may must be used to
9 fund
10 medicaid-certified nursing facilities using the reimbursement methodology
11 described in subsection 4. If the rate increases prescribed in subsection 4 are funded
12 through state appropriation, the funds in the nursing facility quality assurance fund
13 can be carried over and used to increase rates in a subsequent year. If the assessment
14 sunsets, the amounts in the nursing facility quality assurance fund will be refunded to
15 nursing facilities proportionately based upon each facility's assessment as a
16 percentage of the total assessment in the year prior to the termination of the
17 assessment program.
- 11 4. The reimbursement methodology used to make additional payments to
12 medicaid-certified nursing facilities includes, at a minimum:
- 13 a. Rebasing at least every four years; and
14 b. Adjusting for inflation annually, at a minimum of the consumer price index and
15 at a maximum of six percent and;
16 c. fully reimbursing the Medicaid portion of the assessment.
- 16 ~~SECTION 9. Adjustments. An assessment in a calendar quarter may be adjusted as~~
17 ~~provided in subsection 2 of section 3 of this Act to take into account overages or underages~~
18 ~~raised under the assessment rate set under subsection 1 of section 3 of this Act. An~~
19 ~~adjustment under this subsection may be made at any time.~~

Impact of a Reduction in the Nursing Facility Quality as Proposed in the FY 2007 Administration Budget

Preliminary Estimates (February 24, 2006)

United States	Current Law				FY 2007 Budget Proposal				
	FY 2007 FMAP (%)	Approximate Current Tax Rate (%)	Estimated State Tax Revenue (\$ million)	Estimated Federal Matching Funds ** (\$ million)	Estimated Total Funds Generated (\$ million)	Estimated State Tax Revenue (\$ million)	Estimated Federal Matching Funds (\$ million)	Estimated Total Funds Generated (\$ million)	Lost Federal Funds (\$ million)
Alabama*	68.85%	4.5%	\$3,015.0	\$3,801.9	\$6,483.9	\$1,585.5	\$2,236.7	\$3,822.2	-\$1,571.8
Arkansas	73.37%	6.0%	\$49.4	\$109.2	\$158.6	\$32.9	\$72.8	\$105.7	-\$36.4
California	50.00%	6.0%	\$48.0	\$132.2	\$180.2	\$24.0	\$66.1	\$90.1	-\$66.1
Connecticut*	50.00%	6.0%	\$250.0	\$250.0	\$500.0	\$125.0	\$125.0	\$250.0	-\$125.0
District of Columbia	50.00%	6.0%	\$132.0	\$90.0	\$180.0	\$45.0	\$45.0	\$90.0	-\$45.0
Georgia	70.00%	6.0%	\$1.0	\$2.4	\$3.4	\$0.5	\$1.2	\$1.7	-\$1.2
Illinois	61.97%	4.0%	\$99.3	\$161.8	\$261.1	\$74.5	\$121.4	\$195.8	-\$40.5
Indiana	50.00%	1.4%	\$60.0	\$60.0	\$120.0	\$60.0	\$60.0	\$120.0	\$0.0
Kentucky	62.61%	6.0%	\$111.0	\$148.7	\$237.5	\$44.4	\$74.3	\$118.7	-\$74.3
Louisiana*	69.58%	6.0%	\$71.0	\$124.0	\$178.2	\$27.1	\$62.0	\$89.1	-\$62.0
Maine	69.69%	5.0%	\$76.3	\$175.5	\$251.8	\$45.8	\$105.3	\$151.1	-\$70.2
Massachusetts	63.27%	6.0%	\$29.0	\$25.0	\$39.5	\$7.3	\$12.5	\$19.7	-\$12.5
Michigan*	50.00%	6.0%	\$145.0	\$145.0	\$290.0	\$72.5	\$72.5	\$145.0	-\$72.5
Minnesota	56.38%	6.0%	\$214.0	\$225.0	\$399.1	\$87.1	\$112.5	\$199.6	-\$112.5
Mississippi*	50.00%	6.0%	\$104.2	\$34.3	\$68.6	\$17.2	\$17.2	\$34.3	-\$17.2
Missouri	75.89%	6.0%	\$55.9	\$175.9	\$231.8	\$27.9	\$88.0	\$115.9	-\$88.0
Montana	61.60%	6.0%	\$127.0	\$169.8	\$275.6	\$52.9	\$84.9	\$137.8	-\$84.9
Nevada	69.11%	4.0%	\$13.4	\$30.0	\$43.4	\$8.4	\$18.7	\$27.1	-\$11.2
New Hampshire*	53.93%	6.0%	\$14.5	\$17.0	\$31.5	\$7.3	\$8.5	\$15.7	-\$8.5
New Jersey	50.00%	6.0%	\$31.1	\$28.9	\$57.8	\$14.5	\$14.5	\$28.9	-\$14.5
New York	50.00%	6.0%	\$140.0	\$90.0	\$180.0	\$45.0	\$45.0	\$90.0	-\$45.0
North Carolina	50.00%	4.2%	\$391.3	\$391.3	\$782.5	\$276.8	\$276.8	\$553.5	-\$114.5
Ohio	64.52%	4.5%	\$85.0	\$154.6	\$239.6	\$56.7	\$103.0	\$159.7	-\$51.5
Oklahoma	59.66%	4.0%	\$150.0	\$168.6	\$282.6	\$85.5	\$126.4	\$211.9	-\$42.1
Oregon	68.14%	6.0%	\$58.0	\$124.0	\$182.0	\$29.0	\$62.0	\$91.0	-\$62.0
Pennsylvania	61.07%	6.0%	\$33.0	\$51.8	\$84.8	\$16.5	\$25.9	\$42.4	-\$25.9
Rhode Island*	54.39%	6.0%	\$280.0	\$333.9	\$613.9	\$140.0	\$167.0	\$307.0	-\$167.0
Tennessee	52.35%	6.0%	\$31.2	\$34.3	\$65.5	\$15.6	\$17.1	\$32.7	-\$17.1
Utah	63.65%	4.0%	\$85.0	\$148.8	\$233.8	\$63.8	\$111.6	\$175.4	-\$37.2
Vermont	70.14%	3.2%	\$10.0	\$23.5	\$33.5	\$9.4	\$22.0	\$31.4	-\$1.5
Washington	58.93%	6.0%	\$13.0	\$18.7	\$31.7	\$6.5	\$9.3	\$15.8	-\$9.3
West Virginia*	50.12%	4.0%	\$36.5	\$18.3	\$36.6	\$13.7	\$13.8	\$27.4	-\$4.6
Wisconsin*	72.82%	6.0%	\$33.9	\$90.9	\$124.8	\$17.1	\$45.8	\$62.9	-\$45.1
	57.47%	1.5%	\$36.0	\$48.6	\$84.6	\$36.0	\$48.6	\$84.6	\$0.0

Source: BDO Seidman. Estimated Nursing Facility Provider Tax Impact in FY 2007 Budget, February 24, 2006
 Note: * Preliminary; ** Reflects only the amount of state tax revenue used for Medicaid covered services.