

LETTER OPINION
98-L-47

April 22, 1998

The Honorable Rick Berg
District 45
House of Representatives
1112 Nodak Dr Ste 200
Fargo, ND 58103

RE: Enforcement of House Bill 1225

Dear Representative Berg:

Thank you for your letter concerning House Bill 1225, pertaining to insurance claims for excessive charges, which is now N.D.C.C. § 51-07-24.

This legislation was designed to prohibit glass companies from paying or waiving an insured's deductible and then passing the cost of that deductible along to the insurance company. The statute criminalizes certain conduct. N.D.C.C. § 51-07-24(1) reads:

1. A person who sells goods or services may not:
 - a. Advertise or promise to provide a good or service, paid for by the consumer from proceeds of an insurance policy that provides coverage for physical damage to automobiles, and to pay all or part of any applicable insurance deductible or to pay a rebate in an amount equal to all or part of any applicable insurance deductible; and
 - b. Knowingly charge an amount for the good or service that exceeds the usual and customary charge by that person for the good or service by an amount equal to or greater than all or part of the applicable insurance deductible paid by that person on behalf of an insured or remitted to an insured by that person as a rebate.

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Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. N.D.C.C. § 1-02-01. The word "and" separating subdivisions (1)(a) and (1)(b) has a common ordinary understanding. If the Legislature had intended to make it a class B misdemeanor to engage in the conduct in subdivision (1)(a) by itself, the Legislature would have used the word "or" instead of "and." Criminal statutes are construed strictly in favor of the defendant and against the government. State v. Plentychief, 464 N.W.2d 373 (N.D. 1990).

House Bill 1225 is based upon a virtually identical Texas statute enacted in 1989. See Tex. Code Ann. Bus. & Com. § 27.02. When a statute is taken and adopted from another state without significant change, it is presumed that the Legislature also adopted the construction of the statute in the state from which the statute was taken. State v. Dilger, 322 N.W.2d 461, 464 (N.D. 1982). As in the case of the Texas statute, to be convicted of the offense in N.D.C.C. § 51-07-24(1), evidence must prove beyond a reasonable doubt that the seller 1) advertises or promises to provide a good or service, paid for by insurance proceeds, pays all or part of any insurance deductible or pays a rebate of an amount equal to all or part of any insurance deductible; and 2) knowingly charges an amount for the good or service that exceeds the usual and customary charge by that person for the good or service which may be an amount equal to or greater than all or a part of the insurance deductible paid or the amount paid as a rebate. Therefore, to violate subsection 1 of N.D.C.C. § 51-07-24, it is my opinion that a person must violate both subdivision (a) and subdivision (b).

Under subsection 1(b) of N.D.C.C. § 51-07-24, it must be established that the person who is providing the good or service charges more than that person customarily and usually charges for the good or service. This is not an industry average or what other persons in the community may charge for the same good or service. The fact that another person in the community might charge less for the good or service is irrelevant to what that person who is providing the good and service is charging.

If the person who is selling a good or service usually and customarily charges \$200 or \$300 more for the good or service than other establishments and the charge to the customer does not exceed the business person's usual high charges, the fact that the payment of a deductible or rebate was advertised or promised will not result in a violation of the statute.

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Compounding the enforcement problems is that one individual may not offer to pay or rebate an insurance deductible but instead may offer to waive or reduce the deductible in some cases. On April 12, 1990, the Texas Attorney General issued an opinion concluding that the Texas statute, upon which N.D.C.C. § 51-07-24 is based, did not prohibit a person from waiving a deductible because declining to seek payment of a portion of the bill for which the insured is responsible is technically not the same as paying all or any part of the insurance deductible or giving a rebate although the "waiver" has a similar effect. (Opinion Number JM-1154, copy enclosed.) I agree with this conclusion. Whether a service business may "waive" an insurance deductible or advertise such a waiver raises legal issues independent of the provisions of this section.

As I concluded earlier in this opinion, the Texas Attorney General also stated that it would not be a violation of the Texas statute if the charge submitted to an insurer by a person providing a good or service is not in excess of that person's usual and customary charge for that good or service.

In response to your other question, if a criminal offense is alleged to have been committed, enforcement of N.D.C.C. § 51-07-24 would be the primary responsibility of the county state's attorney, as it is with all other misdemeanor criminal offenses. Because N.D.C.C. § 51-07-24(1) requires a sale of a good or service and the charging of an amount that exceeds the potential defendant's usual and customary charge for that good or service in addition to advertising a rebate or payment of an insurance deductible, more acts are required to establish a criminal violation under this section than just advertising a rebate or payment of an insurance deductible. Since the sale and the charging of the amount for the good and service would normally occur at the business person's place of business, the county in which that business is located would be the county in which the prosecution would occur.

An insured who submits a claim based on charges that are in violation of N.D.C.C. § 51-07-24(1) commits a criminal offense under N.D.C.C. § 51-07-24(2) and could be prosecuted in the county in which that person submitted the claim for the services. This county may be different than the county in which the business person prosecuted under N.D.C.C. § 51-07-24(1) would have committed his or her offense.

The state's attorneys who have contacted this office are more than willing to initiate prosecutions under this statute if the conduct complained of falls within the restrictive language of N.D.C.C. § 51-07-24 and if proof of the violation, including all the elements

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required by that statute, can be established beyond a reasonable doubt. At this time, these prosecutors have legitimate concerns about the enforceability of this statute and whether conduct of certain business persons violates the statute.

N.D.C.C. § 51-07-24 does not prohibit overcharging for a good or service. It only prohibits a business from offering to pay a deductible or rebate and charging more for a good or service than that business' usual and customary charge. If the business has only offered to waive a deductible, but has overcharged, there may be no violation of this statute. If the business has offered to pay a deductible or a rebate but charges only that business' usual and customary high charge for the good or service, there also is no violation of this statute.

N.D.C.C. § 51-07-24 presents significant and unique enforcement problems. Each alleged violation will be examined under its own facts and circumstances since the "usual and customary" charges and practices of other or similar businesses will have no relevance or importance in any decision on whether a prosecution may be initiated under N.D.C.C. § 51-07-24.

Staff members of this office have discussed this statute with several state's attorneys and have offered any necessary consultation to assist those state's attorneys in conducting a prosecution under this statute. We have also offered investigative assistance if the state's attorneys determine that sufficient grounds exist to initiate such a prosecution.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

vkk
Enclosure