Approved: January 19, 2006
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on Tuesday, January 10, 2006 in Room 123-S of the Capitol.

All members were present except:
Donald Betts- excused

Committee staff present:
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Helen Pedigo, Office of Revisor of Statutes
Karen Clowers, Committee Secretary

Conferees appearing before the committee:
Kathleen Olson, Kansas Bankers Association
Rep. Sydney Carlin
Rex Beasley, Deputy Attorney General, Director of Medicaid, Fraud Control Unit
Robert Collins, Kansas Tax payers Against Fraud (KTAF), KTAF Policy Research Group

Others attending:
See attached list.

Chairman Vratil welcomed everyone and distributed guidelines for Conferees who wish to appear before the committee. Regular meetings are scheduled Monday through Thursday at 9:30 A.M. in Room 123-S, additional meetings may be scheduled on Fridays later in the session.

Bill Introductions

Senator D. Schmidt introduced a bill relating to driving under the influence of alcohol or drugs; concerning excessive blood or alcohol concentration. Senator Schmidt made the motion to have the request introduced as a committee bill. Senator Donovan seconded the motion. Motion carried.

Senator D. Schmidt introduced a bill concerning firearms and persons authorized to carry concealed firearms. Senator Schmidt made the motion to have the request introduced as a committee bill. Senator O'Connor seconded the motion. Motion carried.

Kathleen Olson requested a bill to amend the Uniform Commercial Code, Article 9. Senator Bruce made the motion to have the request introduced as a committee bill, Senator Goodwin seconded the motion. Motion carried. (Attachment 1)

The hearing on **SB 326 - Concerning civil actions and civil penalties; relating to false and fraudulent claims** was opened.

Senator Derek Schmidt explained the background of the bill and indicated that it would allow the Attorney General an additional tool to attempt to recover monies that were inappropriately paid by the medicaid program. (Attachment 2)

Senator Vratil indicated language (page 2, line 2-4) had been omitted and would be corrected before final action is taken.

Representative Sydney Carlin appeared as a proponent of the bill and requested the bill be expanded to include items to strengthen the bill (Attachment 3). These were:

- all transactions of the state and local governments and not limited to Medicaid/Medicare claims
- add a clause to allow local, county or district attorneys, or any individual and his attorney to bring an action on behalf of the state or local government
- add a protection clause for whistle blowers

MINUTES OF THE Senate Judiciary Committee at 9:30 A.M. on January 10, 2006 in Room 123-S of the Capitol.

Rex Beasley spoke in favor of the bill and suggested several additions to the bill that would strengthen the ability of the Medicaid Fraud Unit to prosecute and penalize offenders (Attachment 4). He offered to put the suggestions in the form of a balloon amendment for the Committee's consideration. Items proposed were:

- sanctions against those who would ignore an administrative subpoena
- define conduct that is inconsistent with sound fiscal, business or medical practice and results in an unnecessary cost to the Medicaid program
- provisions to require all persons, firms, or entities to report inconsistencies and to be protected from adverse action for such reporting
- provisions to prohibit any person, firm, or entity from obstructing the Surveillance and Utilization Systems

Robert Collins appeared as a proponent of the bill and requested the addition of four provisions required under federal legislation which would incur financial incentives for the State of Kansas enacting a false claims law (Attachment 5). These include:

- prohibit the restocking and resale of medicines paid for by a government healthcare plan
- provisions to reward and facilitate *qui tam* (whistle blowers)
- requirement for filing an action under seal for 60 days with review by the Attorney General
- mandatory training of employees of a Medicaid contractors with over $1 million in business

The following conferees did not appear before the committee but requested that their written testimony in support of the bill be distributed and placed in the committee minutes:

Jerry Slaughter, Executive Director, Kansas Medical Society (Attachment 6).
Thomas L. Bell, Kansas Hospital Society (Attachment 7).

There being no further conferees to come before the committee, the Chairman closed the public hearing on **SB 326**.

The meeting adjourned at 9:33 a.m. The next meeting is scheduled for January 11, 2006.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-10-2006

NAME	REPRESENTING
Robert Collins	Self
Daniel R Morin	Kansas Medical Society
Chip Wheelen	Asn of Osteopathic Med.
Kevin Graham	AGO
Doug Henkle	AG Office
Lindsey Douglas	Hein Law Firm
Chad Austin	KS Hosp Assoc
Fred Lucky	Ks Hosp Assoc.
Tom Bell	Ks. Hosp. Assn.
Luke Thompson	DHPF
[illegible]	[illegible]
Jim Clark	KBA
Callie [illegible] Denton	KTLA
Sandy Jacquot	LKM
Whitney Damron	KS Bar Association
Jeff Bottenberg	KS Sheriffs Ass'n
John Peterson	Capitol Strategies
Natalie Gibson	Sentencing Commission

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-10-06

NAME	REPRESENTING
P Biggs	KS Sent Comm
B Harmon	KS Sent Comm
Mike Peterson	SENATE
Gary Robbins	Rs Off 955N
Brent Haden	KLA
~~Kathy~~ Olsen	
Dick Carter	Manhattan Chamber
Mike Huttles	HGR, Inc.
Tom Bruno	EDS
Lane Wilb	OJA
Kathy Damron	Damron Assoc.
Chris Shepard	Damron & Assoc.
Reg Beasley	AG Office
Eric Rucker	AG OFFICE
Lynne Carlin	Rep 66th Dist.

Kansas Bankers Association

January 10, 2006

To: Senate Judiciary Committee

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: Introduction of Bill: Uniform Commercial Code – Article 9

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today to request introduction of the attached amendment to the Uniform Commercial Code, Article 9. The proposed amendment is the result of a joint effort between the Kansas Bankers Association and the Office of the Secretary of State to address a "glitch" in the transition rule found in K.S.A. 84-9-705(c).

As some of you will recall, the National Conference on Uniform State Laws (NCUSL) promoted a virtual re-write of Article 9 of the UCC several years ago, and Kansas adopted that recommendation in the 2001 legislative session. As a part of the orderly transition from "old" Article 9 to "revised" Article 9, the law granted the filers of financing statements (a/k/a UCCs) a period of five years within which all UCCs on file must be in compliance with "revised" Article 9 rules. That deadline is now fast approaching – June 30, 2006.

Sometime this summer, the Secretary of State's office shared with us, that the drafters of "revised" Article 9 became concerned that some UCC filers would have a shortened period of time by which to correct their financing statements by the June 30th deadline. The attached amendment addresses this concern in two ways: it narrows those filings that could be negatively affected by this deadline; and it clarifies that those filings needing to be corrected can be corrected at any time.

You will note that we have requested that the bill become effective upon publication in the *Kansas Register*, so as to bring clarification to this matter for all lenders as soon as possible.

Thank you, once again, for allowing the introduction of this bill and I look forward to providing further explanation at the time of the hearing.

610 S.W. Corporate View 66615 | P.O. Box 4407, Topeka, KS 66604-0407 | 785-232-3444 | Fax 785-
kbaoffice@ksbankers.com | www.ksbankers.com

Senate Judiciary
1-10-06
Attachment 1

Proposed Amendment - Kansas Bankers Assn.

Section 1. K.S.A. 84-9-705. If action, other than the filing of a financing statement, is taken before this act takes effect and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable before this act takes effect, the action is effective to perfect a security interest that attaches under this act within one year after this act takes effect. An attached security interest becomes unperfected one year after this act takes effect unless the security interest becomes a perfected security interest under this act before the expiration of that period.

(b) Pre-effective date filing. The filing of a financing statement before this act takes effect is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under this act.

(c) Pre-effective date filing in jurisdiction formerly governing perfection. This act does not render ineffective an effective financing statement that, before this act takes effect, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in K.S.A. 84-9-103 prior to the effective date of this act. However, except as otherwise provided in subsections (d) and (e) and K.S.A. 2004 Supp. 84-9-706 and amendments thereto, ~~the~~ *a* financing *statement that requires an amendment to be filed to satisfy the applicable requirements for perfection under the uniform commercial code, secured transactions, article 9 of chapter 84 of the Kansas Statutes Annotated, and amendments thereto* ceases to be effective at the earlier of:

(1) The time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed; or

(2) June 30, 2006, unless *such amendment is filed on or before June 30, 2006.*

(d) Continuation statement. The filing of a continuation statement after this act takes effect does not continue the effectiveness of the financing statement filed before this act takes effect. However, upon the timely filing of a continuation statement after this act takes effect and in accordance with the law of the jurisdiction governing perfection as provided in part 3, the effectiveness of a financing statement filed in the same office in that jurisdiction before this act takes effect continues for the period provided by the law of that jurisdiction.

(e) Application of subsection (c)(2) to transmitting utility financing statement. Subsection (c)(2) applies to a financing statement that, before this act takes effect, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in K.S.A. 84-9-103 prior to the effective date of this act only to the extent that part 3 provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(f) Application of Part 5. A financing statement that includes a financing statement filed before this act takes effect and a continuation statement filed after this act takes effect is effective only to the extent that it satisfies the requirements of part 5 for an initial financing statement.

Section 2. This act shall take effect and be in force from and after its publication in the *Kansas register*.

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Senator Derek Schmidt
Majority Leader

Committee Assignments
Chair: Confirmation Oversight
Vice Chair: Assessment & Taxation
Organization Calendar & Rules
Member: Judiciary
Agriculture
Legislative Post Audit

Message Only (800) 432-3924
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Testimony in Support of Senate Bill 326 and Senate Bill 342
Presented to the Senate Judiciary Committee
by Senator Derek Schmidt

January 10 and 11, 2006

Mr. Chairman, members of the committee, thank you for the opportunity to testify today.

These two bills arose from the interim Special Committee on Medicaid Reform, which I chaired this past summer. They are part of a broader package of bills aimed at reducing the rate of erroneous payments within the program, including but not limited to fraudulent payments.

Senate Bill 326 is modeled on legislation that was introduced several years ago but did not advance. It would create a civil false claims act in Kansas, which would allow the attorney general an additional tool to attempt to recover moneys that were inappropriately paid by the Medicaid program. As drafted, this bill applies across state government and is not limited to Medicaid payments.

Senate Bill 342 is modeled on legislation the attorney general requested of the House of Representatives last year. It would give the attorney general authority to seek forfeiture of property held by a person convicted of Medicaid fraud in order to recover for the state the proceeds of the fraud. It is similar to the authority prosecutors have in many drug prosecutions to track the money and recover it wherever it is held.

The interim committee heard testimony on the rate of Medicaid erroneous payments that ranged from 25 percent of all payments to as little as 5 percent of all payments. The data is not well-developed. Unfortunately, rather than working to get good data, many have spent time and effort trying to discredit the data that does exist and to imply that this problem is insignificant.

But even assuming a conservative 5 percent error rate, in a $2.2 billion program such as Medicaid, that is $110 million each year paid inappropriately. The state's share of that is $44 million. That's $44 million per year that is unavailable to provide legitimate Medicaid services to legitimate recipients. That's a problem worth trying to solve.

Thank you for considering these two measures as part of that solution. I would be happy to stand for questions.

Senate Judiciary
1-10-06
Attachment 2

STATE OF KANSAS

Sydney Carlin
REPRESENTATIVE, 66TH DISTRICT
1650 Sunny Slope Lane
Manhattan, Kansas 66502

State Capitol, 284-W
Topeka, KS 66612-1504
785-296-7665

HOUSE OF
REPRESENTATIVES

Committee Assignments:
Ranking Minority Member: Higher Education
Economic Development
Taxation

January 10, 2006

To: The Honorable Senator John Vratil
And Members of the Senate Judiciary Committee

From: Representative Sydney Carlin, Dist 66.

Re: SB326

What is the problem? Hardworking taxpayers give their money to support the projects and programs that we put in place here in the legislature. Most people that contract with the state are honest and upright citizens. Unfortunately, people sometimes steal from the state. (Examples are in your packet.) During the interim we talked about Medicaid and Medicare fraud and ways to provide legal remedies for the state --civil punishments for those who steal from us. SB 326 does this.

When I was in Florida in 1993 for a League of Cities Conference, I heard advertisement after advertisement about how to report fraud against the state's Medicaid/Medicare system. That is when I became aware of the very large-scale problem we face in this country that threatens our excellent health care system and contributes to the escalating costs of its delivery.

We all get magazines and articles nearly every day that try to describe the health care cost problem and ways to protect this excellent health care system. Just this week we got the *CSG statenews for January 2006* . On pages A20-A21 is a short piece, with blue highlight, called "Bleeding Dollars Stanching the flow of misuse and abuse confronts a hard reality." It briefly describes fraud, waste and abuse in the Medicaid program in states such as New York, California, Tennessee, South Carolina, Ohio and Maine. It opens the door to the difficult questions we need to continue to ask. It will take time to unlock the answers; it is not a simple thing.

Kansas is not alone in this kind of legislation, several other states (approximately 19) have come up with legislation that brings a lot of money to their states – and we are missing out on revenue that could be available to the state to help breathe life back into important state programs. The Federal Government is also working on a bill that would give incentives to states that pass *this* legislation. Take a look at the laws passed by Michigan, Indiana, Tennessee, New Hampshire, or others.

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Attachment 3

I came across some things that I would like to see added – because I think we can do even better.

People who have contracts with the state should be held to the highest possible standard because they are being paid with the dollars earned by our hard working taxpayers!

1) I think this bill should be expanded to include all transactions of the state and local governments. (Not be limited to Medicaid/Medicare)

For example, we can look at the legislation that was just passed by the state of Michigan to strengthen their existing False Claims Against the State Act.

Michigan added a civil cause of action if the state does not decide to prosecute. We should allow local, county or district attorneys, or any individual and his attorney, to bring an action on behalf of the state or local government.

Many times it is the citizen who is in a position to know about the cheating that is going on in the billing process. And when they can't live with the information they have, they come forward, often at great personal cost.

3) We need to add a piece similar to the Consumer Protection Act, to protect the "relaters" – "whistleblowers" – who relate important information to the state, it could be called a "Taxpayer Protection Clause."

I come here today to ask you to do the work on this issue and get ready to begin an interesting journey into the subject. The bill before us is a positive beginning of a solution to all the "stuff" you have been seeing in the press. We need to get started, because it is a good thing for Kansas.

January 10, 2006

To: The Honorable Senator John Vratl
And Members of the Senate Judiciary Committee

From: Representative Sydney Carlin, Dist 66.

In Fiscal Year 2004 the U.S. Justice Department recovered more than $1.609 billion from legal actions brought under the Federal False Claims Act. $309 million of that was recovered by the Justice Department alone and the other $1.3 billion came as a result of private causes of action initiated by whistleblowers.

Since January 2001 the federal govt. has recovered more than $3.46 billion from pharmaceutical manufacturers alone for illegal drug marketing and pricing practices in cases initiated only by whistleblowers under the Federal False Claims Act.

Just since the interim committees began meeting in September 2005, there has been:

A $150 million dollar settlement on September 20th against British drug maker Glaxo Smith Kline, in part for reselling partially used anti-nausea medications used for cancer patients, sold a second time back to Medicaid for nursing home patients.

A $37.5 million dollar settlement on September 23rd with Gambro Healthcare—a dialysis and medical services provider for kickbacks, unnecessary tests, and billing fraud—a case in which states like Massachusetts under their False Claims Act received $538,000.

A $704 million settlement on October 17th with Swiss drug maker Serono Labs for illegal marketing an pricing schemes related to the anti-wasting drug Serostim, used in cancer and Aids patients to prevent rapid weight-loss at a full treatment price of more than $21,000 per patient. States such as Florida recovered roughly $54 million in this settlement under their False Claims Act.

A $1.35 million settlement on October 25th with a Nevada Pharmacy—payable to the State of Nevada—when three nurses brought a private cause of action against the pharmacy under their False Claims Act for improperly diluting the drug Synagis, before administering it to premature infants. This allowed the dose to go twice as far and be double-billed to Medicaid.

A $40 million settlement on October 25th with Erlanger Medical Center in Tennessee in connection with kickbacks and the false billing practice of "upcoding". Ten million dollars of this will go to the State of Tennessee under their False Claims Act.

A $124 million settlement on November 1st with King Pharmaceuticals for conspiring with Pharmacy Benefits Management companies ("PBMs") to conceal discounts given to its best customers and avoid having to reimburse Medicaid the difference under Medicaid

STATE OF KANSAS
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January 10, 2006

Senate Judiciary Committee

Dear Chairman Vratil , Vice-Chair Bruce, and Members of the Committee:

Thank you for allowing me to appear today on behalf of Attorney General Phill Kline to discuss Senate Bill No 326. My name is Rex Beasley. I am a Deputy Attorney General and the head of Attorney General Phill Kline's Medicaid Fraud and Abuse Division. Our Division is the Medicaid Fraud Control Unit (MFCU) required of the states by the Medicare-Medicaid Anti-Fraud and Abuse Amendments (P.L. 95-142), enacted by Congress in 1977. Along with establishing the state Medicaid Fraud Control Units, Congress provided the states with incentive funding to investigate and prosecute Medicaid provider fraud, and to investigate fraud in the administration of the Medicaid program. The Kansas Medicaid Fraud Control Unit needs more legislative tools to fulfill the mission envisioned for it by Congress - tools that Medicaid Fraud Control Units in other states already have and are using to their advantage in protecting their states' Medicaid dollars.

Attorney General Phill Kline and I support the concept of a Civil False Claims Act for the State of Kansas. Such legislation would fill one of the gaps in our ability to recover over-payments of our Medicaid dollars from those who have obtained them improperly. Currently the Medicaid Fraud and Abuse Division has statutory authority to bring criminal actions for Medicaid fraud but has no specific state statutory authority to independently bring a state civil action for damages for filing a false claim or statement with the Kansas Medicaid program. While we seek orders of restitution in the criminal cases we file, specific statutory authority to file civil false claims actions in those cases where fraud is apparent but the available proof does not rise to the level of beyond a reasonable doubt, would greatly strengthen our ability to protect the integrity of the Kansas Medicaid program and Kansas Medicaid dollars.

Currently the federal government and approximately 29 states have some form of Civil False Claims Act which they use successfully as part of their anti-fraud activities. Of those states, approximately 14 have *qui tam* - whistle blower provisions. *Qui tam* is a Latin phrase meaning "Who sues on behalf of the King as well as for himself." Such actions are brought by private informers, under statutes which establish penalties for the commission or omission of certain acts and provide that the same shall be recoverable in a civil action. Generally under most *qui tam* statutes, part of the recovery goes to the person who brings the action and the remainder goes to

Senate Judiciary
1-10-06
Attachment 4

the government. Said statutes also generally provide that the private plaintiff must give the government notice of the action before it is made public and the government then has the right to take over the case. On June 28, 2005 during a hearing of the U. S. Senate Committee on Finance on Medicaid Waste, Fraud and Abuse: *Threatening the Health Care Safety Net*, Senator Baucus noted that false claims acts have proved to be very effective in prosecuting Medicaid fraud and commented about requiring states to have false claims acts with whistle blower provisions as a condition for receiving federal Medicaid funds.

We have noted what we believe to be a couple of errors in the wording of Senate Bill 326 and would offer the following corrections:

a. In defining "Claim" in Section 1, the language ".....reimbursable **to** the state of Kansas...." in line 5 should probably be changed to read ".....reimbursable **by** the state of Kansas...."

b. In Section 1 (b) (2) there seems to be something missing from part © thereof. The words "pursuant to this act had commenced" inserted between the phrase "no criminal prosecution, civil action, or administrative action" and the phrase "with respect to such violation" would clarify the situation where the potential damages could be mitigated.

There is no question that fraud exists within the Kansas Medicaid program and to reiterate the quote attributed to Senate President Steve Morris printed in the Kansas City Star on December 18, 2005: "But no matter how much [fraud] there is, we need to go after it. Medicaid dollars are to precious to waste." The concept of Senate Bill 326 is a good idea supported by Kansas Attorney General Phill Kline. However, more than just the language in the current bill is needed to strengthen our efforts of "going after" Medicaid fraud and in the fulfillment of the mission of the Medicaid Fraud Control Unit, to investigate and prosecute provider fraud, and fraud in the administration of the Medicaid program, as envisioned by Congress in passing the Medicare-Medicaid Anti-Fraud and Abuse Amendments (P.L. 95-142), in 1977. Therefore we would like to offer the following enhancements to Senate Bill 326.

A. The enforcement of administrative subpoenas provisions in Section 1 (k) of Senate Bill 326 needs to have sanctions against those who would ignore an administrative subpoena. The Kansas Consumer Protection act in K.S.A 50-631 contains sanctions that would be appropriate in Medicaid fraud investigations.

B. Conduct that is inconsistent with sound fiscal, business or medical practice and results in an unnecessary cost to the Medicaid program constitutes abuse of the Medicaid program under the Code of Federal Regulations. We need to recognize that the following conduct in the administration of the Kansas Medicaid program is also inconsistent with sound fiscal, business or medical practice and results in an unnecessary cost to the Medicaid program. The following conduct should be expressly identified as fraud and abuse and included in an amendment to K.S.A 21-3910 which prohibits misuse of public funds.

1. Knowingly attempting to obtain, or knowingly authorizing, attempting to authorize, or allowing any payment for Medicaid services that exceed the limitations of federal laws, rules, or regulations, Kansas laws, rules, or regulations, or the terms of the Kansas Medicaid plan or the provider manual.

2. The failure of any Medicaid program to have a clear, written, published provider manual.

3. Altering or amending or attempting to alter or amend the terms, conditions, and limitations of the Kansas Medicaid plan or the provider manual without considering the fiscal impact of such alterations or amendments.

4. Altering or amending or attempting to alter or amend the terms, conditions, and limitations of the Kansas Medicaid plan or the provider manual without express written authority of the head of the Kansas Single State Medicaid Agency.

5. Knowingly by-passing or overriding an edit, attempting to by-pass or override an edit or allowing an edit to be by-passed or overridden, including but not limited to deactivation of any edit, in any claims submission or processing system used by the Kansas Medicaid program or any of its contractors, unless such conduct is consistent with existing written exceptions established by, or with the express written approval of, the head of the Kansas Single State Medicaid Agency.

6. Failing to report to the Kansas Medicaid Fraud Control Unit any potential violation of sub-paragraphs 1-5 above.

7. Taking or attempting to take any adverse action of any kind, because of such report, against any person firm or organization who, in good faith reports any potential violation of sub-paragraphs 1-5 above and paragraph C. below.

C. Provisions should be included to require all persons, firms, or entities having knowledge of conduct that is inconsistent with sound fiscal, business or medical practice and which result or could potentially result in an unnecessary cost to the Medicaid program to report that conduct to the Kansas Medicaid Fraud Control Unit. Any person, firm, or entity that, in good faith reports such conduct to the Kansas Medicaid Fraud Control Unit should be protected from any adverse action of any kind because of making such report.

D. Provisions should be included to prohibit any person, firm, or entity from obstructing or attempting to obstruct the performance of the Surveillance and Utilization Systems (SURS units) or any person, firm, or entity contracting with the Kansas Medicaid program to perform or assist with the performance of the SURS function.

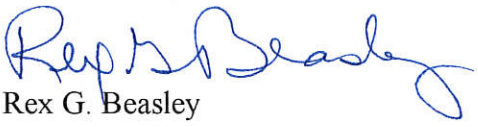
Finally it should be noted that K.S.A 21-3910 prohibits the misuse of public funds. Misuse of public funds is using, lending or permitting another to use, public money in a manner not authorized by law, by a custodian or other person having control of public money by virtue of such person's official position. "Public money," is defined as any money or negotiable instrument which belongs to the state of Kansas or any political subdivision thereof. Certainly our Medicaid dollars are public money in the custody and control of those who administer the Kansas Medicaid program. While K.S.A. 21-3910 is currently broad enough to cover many of the items mentioned above, it should be amended to make it clear that conduct that is inconsistent with sound fiscal, business or medical practice and results in an unnecessary cost to the Medicaid program also constitutes abuse of the Medicaid program and misuse of public funds and will not be tolerated. Currently misuse of public funds under K.S.A 21-3910 is a severity level 8, nonperson felony. In addition to the other penalties for a severity level 8 non-person felony a person convicted under K.S.A 21-3910 must also forfeit his or her official position. K.S.A 21-3910 should also be amended to have tiered severity levels which mirror our theft statutes.

I will be glad to put the above suggestions to the Committee on the form of balloon amendments to the bill for the Committee's consideration.

Again, on behalf of Kansas Attorney General Phill Kline, I wish to thank you for the opportunity to present this testimony to you and urge you to take all necessary actions to strengthen the ability of the Medicaid Fraud Control Units to investigate and prosecute Medicaid Fraud and Abuse in both criminal as well as civil actions in this state.

Respectfully,

OFFICE OF THE ATTORNEY GENERAL
PHILL KLINE



Rex G. Beasley
Deputy Attorney General
Director, Kansas Medicaid Fraud Control Unit

Senate Judiciary Committee

Mr. Chairman and Committee Members:

I wish to express my thanks for the opportunity to address you very briefly today.

My name is Robert Collins and, while I am the Director of Kansas Taxpayers Against Fraud and their all-volunteer policy research group, I come before you today merely as a private citizen concerned about increasing taxes which hurt our state's economic growth and the waste and fraud of government funds that is robbing the State of it's ability to provide essential services for our most vulnerable citizens.

There is a law, which has its origins in 13th Century England that was adopted by the First Congress of the United States, and which was later broadly enhanced by President Lincoln during the Civil War to curb fraud against the Government, and which was yet later still revised further during President Reagan's administration to bring an end to the $600 coffee makers and $400 hammers we were always hearing about in the 1980s. This law is known as a False Claims Act. And, thankfully, during the interim session, the Medicaid Reform Committee voted to support a false claims bill that addressed not only Medicaid fraud, but fraud against *any* state budget. This was the Schmidt-Carlin hybrid bill that you have before you today as SB 326.

Yet, since the end of the interim session the U.S. Congress has included, and voted to support, provisions within the Federal Deficit Reduction Omnibus Reconciliation Act of 2005—an Act for which VP Cheney himself returned to cast the deciding affirmative vote in the Senate—which provide financial incentives to states Kansas' size worth more than $100 million dollars over the next 7-10 years (beginning Jan. 1, 2007) for having enacted state false claims laws that contain just a little bit more than SB 326 alone does. Representative Carlin has a substitute Bill that virtually mirrors SB 326 yet which also contains these additional provisions and she and I have met with the staff at the Attorney General's Office to make sure that it was drafted in a form that would grant them sufficient control and oversight of the cases filed and would be in a form they could use and would desire.

Some of these additional provisions required under this new federal legislation include:

1) A provision specifically prohibiting the "restocking" and resale of previously purchased then returned medicines paid for by a government healthcare plan as a violation of the Act.

2) Provisions that are at least as effective in rewarding and facilitating qui tam (private cause of action by whistleblowers who possess and report otherwise unknown information to investigators) actions as those contained in the federal False Claims Act

3) Contain a requirement for filing an action under seal for 60 days with review by the state Attorney General

4) Provisions requiring mandatory training of employees of all Medicaid contractors doing at least $1 million worth of business with the state in any given year. This mandatory training would include instruction on the rights of employees to be protected as whistleblowers under federal and state law (and the requirement also that there be a state law protecting those whistleblowers) and the correct procedures for preventing, detecting and reporting fraud.

One of the arguments that you are bound to hear from lobbyists over the coming weeks is that a private cause of action somehow risks increasing providers' legal costs and harming them economically—potentially even causing them to leave the state. (Of course, if all states enacted false claims laws like Congress desires there would be no place to "flee" to anyway. So, thankfully the impact of these laws has actually proven to be positive in jurisdictions where enacted.)

Interestingly, all studies from the many jurisdictions that have enacted false claims laws over the last 13 years have actually shown positive experiences by honest providers—the bulk of all providers. Because of high evidentiary thresholds implemented by courts under rule 9(b) of the federal rules of civil procedure where false claims litigation is concerned, "frivolous" claims have been quickly weeded out at the outset of a filing and providers' legal costs have not increased in any noticeable way except for providers who actually had committed fraud. Further, according to published reports of the AMA and the federal Department of Health and Human Services there has been no "flight" of providers out of jurisdictions enacting such false claims laws, but in at least five jurisdictions the provider population actually increased. And, a recent study in Virginia found that honest providers actually enjoyed being in a state where laws like Representative Carlin's legislation existed because it helped them to level the playing field by ending the large scale ill-gotten profits of their few competitors who actually committed fraud and then tried to drive the honest providers out of business with their shear size—contractors and corporations that were primarily headquartered out-of-state whose size was enhanced by substantial profits garnered through fraud. But again, this is not about "frivolous" law suits, it is about white collar criminals defrauding our taxpayers and citizens of hundreds of millions of dollars.

Yet, one question remains: Why is the federal government so concerned that the false claims acts they are asking states to implement contain among their required provisions a private cause of action and whistleblower provisions? Because they've seen at the federal level the impact of such provisions in the federal false claims act over the last 20 years. And in the most recent fiscal year the U.S. Justice Department reported that of the $1.609 billion recovered in government healthcare fraud cases under the federal false claims act during the year, $300 million of it was recovered by the Justice Department alone and the other $1.309 billion was recovered from cases initiated by whistleblowers.

That's $1.309 billion they would have never recovered without a private cause of action and whistleblower protections and provisions.

The motivation for these financial incentives to states arose out of Medicaid Budget hearings held by the U.S. Senate Finance Committee on June 28th and 29th of 2005. The committee considered both carrot and stick options to get states to enact false claims legislation that would simultaneously recover, and deter fraud against, federal funds at the most local levels. The "carrot" option was to give states financial incentives to enact such legislation. The "stick" option was to make the enactment of a state false claims act a pre-requisite for receiving any future federal Medicaid dollars. The option was chosen to utilize the "carrot" option first and then if states failed to act over the next few years to enact such legislation with each of Congress' desired provisions the "stick" option could be utilized.

I am hopeful that Kansas will not need the "stick" option in order to act to protect its taxpayers and citizens, and I thank the committee for the opportunity to appear here today.

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To: Senate Judiciary Committee

From: Jerry Slaughter
Executive Director

Date: January 10, 2005

Subject: SB 326; False Claim Act

The Kansas Medical Society appreciates the opportunity to appear today as you consider SB 326, which deals with fraudulent claims submitted for state payment. Our principal interest in this legislation is its application to claims submitted by physicians in conjunction with services provided to individuals covered by the Medicaid program.

SB 326 establishes a state-level false claims act that is for the most part consistent with the Federal False Claims Act (31 U.S.C. 3729(a) *et seq*.). There already exists ample statutory authority, both federal and state, to investigate and prosecute fraud in Medicaid. In addition to the criminal sanctions contained in the Kansas Medicaid Fraud Control Act found at K.S.A. 21-3844, *et seq*., the federal Office of Inspector General within the Department of Health and Human Services is empowered under Title XI of the Social Security Act (Section 1128A) to assess civil monetary penalties against entities found to have submitted false claims or committed fraud in the Medicare and Medicaid programs. Additionally, the Federal False Claims Act mentioned above authorizes civil monetary penalties and assessments against entities who make false statements or claims to any federal agency. The Anti-Fraud and Abuse Amendments of 1977 to Title XIX of the Social Security Act establishes state Medicaid Fraud Control Units (MFCUs), one of which also operates in Kansas. Additionally, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) also further authorizes OIG to conduct investigations, audits and evaluations related to health care fraud. In other words, there are numerous laws already on the books that contain both civil and criminal penalties for committing fraud in Medicaid.

While we believe there already exist ample tools to find and prosecute Medicaid fraud, as pointed out above, there are two points we would like to make regarding SB 326. First, we support the language not authorizing private causes of action contained in subsection (c) of section 1, found at lines 13-14 on page two of the bill. This issue was discussed by the interim committee, and it was felt that allowing private causes of action could encourage the filing of unmeritorious allegations of fraud by private individuals since they, and their attorneys, would stand to gain financially from any settlements or judgments arising from the action. We believe

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the approach contained in the bill as it is written is appropriate. It relies on the Attorney General to bring an action for violation of the Act, presumably after an investigation and a showing that there is a reasonable basis to suspect actual fraud.

Second, we encourage the Committee to consider placing a statement in the committee minutes which clarifies that the False Claims Act is not intended to punish honest mistakes or innocent claims submitted through mere negligence. When the Federal False Claims Act went through its revisions a number of years ago, Congress specifically included the "knowing" requirement to make it clear that honest mistakes would not constitute a violation of the law.

Thank you for the opportunity to comment on SB 326.

Thomas L. Bell
President

TO: Senate Judiciary Committee

FROM: Thomas L. Bell, President

DATE: January 10, 2006

RE: **Testimony Regarding SB 326, KANSAS FALSE CLAIMS ACT**

The Kansas Hospital Association appreciates the opportunity to provide written testimony regarding the provisions of SB 326. This bill creates a state-level "false claims act" targeting the submission of any false or fraudulent claim submitted to the state for payment. The intent of this legislation is to give the state of Kansas one more tool to deal with the issue of Medicaid fraud.

Kansas hospitals have no tolerance whatsoever for Medicaid fraud and abuse and feel strongly that it should be vigorously prosecuted to the fullest extent of the law. Currently, Kansas has the Medicaid Fraud Control Act found at K.S.A. 21-3844, *et seq.*, which provides for criminal penalties, recovery of monies and the imposition of civil monetary penalties. Additionally, existing regulations allow the agency to terminate a provider for civil or criminal fraud against Kansas Medicaid [K.A.R. 30-5-60(a)(12)]. Further, the Federal False Claims Act has been used specifically to target Medicaid fraud and authorizes the federal government to assess both criminal and civil monetary penalties against any offender. And lastly, a Medicaid Fraud Control Unit is located with the Attorney General's office that serves as the watch dog for Medicaid fraud committed in Kansas. To the extent that SB 326 might be duplicative of already existing state law, legislators should at least consider acknowledgement of these laws within the body of SB 326.

KHA is supportive of the language contained in subsection (c) of section 1, found at lines 13-14 on page two of the bill explaining that the legislation does not create a new private cause of action. We are in agreement with the feelings of the interim committee that there is no need to create additional private litigation in an attempt to deal with the issue of Medicaid fraud and abuse.

Thank you for your consideration of our comments.

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