

1999 SENATE JUDICIARY

SB 2419

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2419

Senate Judiciary Committee

Conference Committee

Hearing Date February 15, 1999

| Tape Number                                     | Side A | Side B | Meter #     |
|---|--------|--------|-------------|
| 1   | x      |        | 0 - 5600    |
| 2   | x      |        | 1670 - 2880 |
|   |        |        |             |
| Committee Clerk Signature <i>Jackie Tollman</i> |        |        |             |

Minutes:

SB2419 relates to funds recovered by the attorney general and relating to the attorney general refund fund.

SENATOR STENEHJEM opened the hearing on SB2419 at 9:00 A.M.

All were present.

SENATOR STENEHJEM testified in support of SB2419. The reason for this bill is that in 1989 the Attorney General had negotiated a settlement and allocation without the authorization of the legislative assembly. I feel the legislature should set the policy and the executive branch should carry the policy out. I have talked to Mr. Huey and am trying to make any amendments that are needed.



SENATOR GARY NELSON, District 22, testified in support of SB2419. I echo what Senator Stenehjem has stated. This is not a partisan issue, it is between the legislative and executive branch. The Legislature is responsible for allocating the money for the state and it should stay that way.

SENATOR TRAYNOR asked if his discussion with Senator Musich, was that relevant to a recovery.

SENATOR NELSON stated that they dealt with a number of things. One is how the legislature has given away responsibilities and we feel the legislature needs to regain these responsibilities.

HEIDI HEITKAMP, Attorney General, testified in opposition to SB2419. I believe the Attorney General's Office which was given responsibilities by the Constitution should retain these responsibilities. What will happen if this bill passes? I believe the answer is that the state of North Dakota will participate in fewer multi-state lawsuits. North Dakota consumers will not be protected in these anti-trust cases. I have letters from the insurance companies in the pesticide-herbicide cases that were settled and how the dollars came to North Dakota. Letters attached. What is the evil you seek to correct with this bill?

SENATOR STENEHJEM stated that his reasoning is with the pulltab case. The Legislature told the Attorney General not to allot money to addiction counseling from this money and a few weeks later, he allotted the money anyway.

HEIDI HEITKAMP stated that she couldn't respond to what a previous Attorney General has done. I find it interesting that the pulltab case was over 12 years ago and we are standing here today talking about it. Congress and a Judge decides where the settlement dollars go. I believe you have set up an impossible situation and will lead to nonparticipation.

SENATOR STENEHJEM stated that just for the record the money for the pulltab that is used for accounting was in 1992.

DAVE HUEY, Attorney General's Office, testified in opposition of SB2419. There are four categories that will be affected by this legislation. The anti-trust, consumer protection, gaming and all the other litigation. The anti-trust in 1975 the Congress gives the Attorney General authority to bring an action in the name of the State. If it is impossible to give to a specific consumer, then allocate it to benefit the class. Congress has given this authority to the Attorney General and the Federal District Court gives its approval. The consumer protection is settling by means of discontinuance and approval by State District Court. It may be multi-state. The gaming may be a serious offense with the gaming. Some of these use negotiating as allocating money in a certain way to make a settlement. This bill may hamper our participation in making these settlements.

HEIDI HEITKAMP stated that we may not have been able to make the Tobacco Settlement if this language was in place. Some settlements have more flexibility.

SENATOR STENEHJEM stated that the Judges will look at the State Statute. I don't have a problem with taking the second line out.

HEIDI HEITKAMP stated that if by law means by Court Order, I may not have a problem with the first line.

SENATOR STENEHJEM CLOSED the hearing on SB2419.

SENATOR WATNE made a motion on Amendments, SENATOR LYSON seconded. Motion carried. 5 - 1 - 0

Page 4

Senate Judiciary Committee

Bill/Resolution Number SB2419

Hearing Date February 15, 1999

SENATOR WATNE made a motion for DO PASS AS AMENDED, SENATOR TRAYNOR

seconded. Motion carried. 4 - 2 - 0

SENATOR WATNE will carry this bill.

# FISCAL NOTE

(Return original and 14 copies)

Resolution No.: SB 2419 Amendment to: \_\_\_\_\_  
 Requested by Legislative Council Date of Request: 1/27/99

1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts. Please provide breakdowns, if appropriate, showing salaries and wages, operating expenses, equipment, or other details to assist in the budget process. In a word processing format, add lines or space as needed or attach a supplemental sheet to adequately address the fiscal impact of the measure.

**Narrative:** The fiscal impact, which is unpredictable, will be on the consumers of the state. We can not identify a fiscal impact on the state.

2. **State** fiscal effect in dollar amounts:

|              | 1997-99<br>Biennium |             | 1999-2001<br>Biennium |             | 2001-03<br>Biennium |             |
|--------------|---------------------|-------------|-----------------------|-------------|---------------------|-------------|
|              | General Fund        | Other Funds | General Fund          | Other Funds | General Fund        | Other Funds |
| Revenues     |                     |             |                       |             |                     |             |
| Expenditures |                     |             |                       |             |                     |             |

3. What, if any, is the effect of this measure on the budget for your agency or department:

a. For rest of 1997-99 biennium: \_\_\_\_\_  
 (Indicate the portion of this amount included in the 1999-2001 executive budget:)

For the 1999-2001 biennium: \_\_\_\_\_  
 (Indicate the portion of this amount included in the 1999-2001 executive budget:)

c. For the 2001-03 biennium: \_\_\_\_\_

4. **County, city, and school district** fiscal effect in dollar amounts:

| 1997-99<br>Biennium |        |                  | 1999-2001<br>Biennium |        |                  | 2001-03<br>Biennium |        |                  |
|---------------------|--------|------------------|-----------------------|--------|------------------|---------------------|--------|------------------|
| Counties            | Cities | School Districts | Counties              | Cities | School Districts | Counties            | Cities | School Districts |
|                     |        |                  |                       |        |                  |                     |        |                  |

Signed: *Kathy Roll*  
 Typed Name: Kathy Roll  
 Department: Office of Attorney General  
 Phone Number: 328-3622  
 Date Prepared: 2/2/99

Date: 2-15-99  
Roll Call Vote #: 1

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB2419

Senate Judiciary \_\_\_\_\_ Committee

Subcommittee on \_\_\_\_\_  
or

Conference Committee

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

Action Taken Motion on  
Amendments

Motion Made By Watne Seconded  
By Lyson

| Senators                | Yes | No | Senators | Yes | No |
|-------------------------|-----|----|----------|-----|----|
| Senator Wayne Stenehjem | X   |    |          |     |    |
| Senator Darlene Watne   | X   |    |          |     |    |
| Senator Stanley Lyson   | X   |    |          |     |    |
| Senator John Traynor    | X   |    |          |     |    |
| Senator Dennis Bercier  |     | X  |          |     |    |
| Senator Carolynn Nelson | X   |    |          |     |    |
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Total (Yes) 5 No 1

Absent 0

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

Date: 2-15-99  
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB2419

Senate Judiciary Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

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

Action Taken Do Pass As Amended

Motion Made By Watne Seconded By Traynor

| Senators                | Yes | No | Senators | Yes | No |
|-------------------------|-----|----|----------|-----|----|
| Senator Wayne Stenehjem | X   |    |          |     |    |
| Senator Darlene Watne   | X   |    |          |     |    |
| Senator Stanley Lyson   | X   |    |          |     |    |
| Senator John Traynor    | X   |    |          |     |    |
| Senator Dennis Bercier  |     | X  |          |     |    |
| SenatorCarolyn Nelson   |     | X  |          |     |    |
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Total (Yes) 4 No 2

Absent 0

Floor Assignment Senator Watne

**REPORT OF STANDING COMMITTEE**

SB 2419: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (4 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2419 was placed on the Sixth order on the calendar.

Page 1, line 11, remove "The attorney general may not, as a part of court proceedings"

Page 1, remove lines 12 and 13

Renumber accordingly

1999 HOUSE FINANCE AND TAXATION

SB 2419



1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2419

House Finance and Taxation Committee

Conference Committee

Hearing Date March 9, 1999

| Tape Number                                  | Side A | Side B | Meter # |
|--|--------|--------|---------|
| 1  |        | x      | 5.9     |
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|  |        |        |         |
| Committee Clerk Signature <i>Jamie Stein</i> |        |        |         |

Minutes:

REP. BELTER Opened the hearing.

SEN. WAYNE STENHJEM, DIST. 42, GRAND FORKS, Introduced the bill. Explained the history of the bill. Submitted letters from the Legislative Council. See attached copies.

What the bill does, is to state that, except when a specific fund is otherwise designated by law, all funds covered by the Attorney General as a result of negotiated settlements for court proceedings, must be deposited in a special fund, the general fund, and may be appropriated only by the legislative assembly. On page 2 of the bill, you will see the refund fund would be used for consumer protection and antitrust groups on behalf of specific individuals. Checked to see why we have a refund fund, the legislative history reflects that the purpose of adopting that fund, was simply, so that when there is a consumer protection type action that is brought, that they have a

place to put the money so they can give it back to the consumer who may have been defrauded of money. It was never intended as a purpose for adopting policies for social policies.

SEN. GARY NELSON, DIST. 22, Co-sponsor of the bill. Testified in support of the bill.

I think this bill is very definitely legislative prerogative and the constitutional responsibility of the legislature to appropriate all of the revenues that come to the state of North Dakota. Related to the American Cyanamid case settlement where a one hundred thousand dollar check was written to the Farmers Union, for them to hold as the development of the Commission on the Future of Agriculture. I am not here to debate the merits of the Commission on the Future of Agriculture, but the inappropriate appropriation of state funds by the Attorney General. There is one change I would suggest, and that would be the inclusion of the Securities Commissioner along with this, it talks specifically about the Attorney General. We run into the same types of situations when there are recoveries by the Securities Commissioner and when they cannot find the individual citizen of the state to give the settlements back to, that becomes a part of the state's revenue to be appropriated by the state legislature.

REP. JOHN DORSO, DIST. 46, FARGO, Testified in support of the bill. Gave an oversight of the relation to legislature and the federal government in issues such as this. Especially in regard to the relationship of legislators to the executive branch of government when it comes to judicial and law matters. Over the last decade or more, there has been a number of suits that the state of North Dakota has either had the Attorney General themselves prosecute or they had council which assisted the Attorney General prosecute, either for the state or for parties that have been injured by someone. Gave an example of the asbestos case. If we don't get a handle on this, we will find more erosion of the power of the legislature, which is the executive branch, it will start

outside of the legislature, start funding things outside of the legislature. Right now, we are in the middle of this tobacco settlement money, I think our attorney general approached that one pretty well. But on the Cyanamid case, I don't think that was handled properly. That discretion should be clear in the statute as to what is appropriate.

REP. BILL DEVLIN, DIST. 23, Testified in support of the bill. Stated he was astounded to be here. He did not ever dream that a member of the executive branch of government would have the power to spend money from settlements in any manner they choose. I was shocked that an elected official would have the power to appropriate that money without going through the legislature. Whether we agree or disagree with the present Attorney General or any past Attorney General is had with this process. I don't know why the Attorney General would want that kind of power. It leaves outlets open to questions and criticism. I assume farmers from my legislative district were overcharged for farm chemicals, should not the money go back to those who were overcharged. If there is no way the money can be sent back to those farmers, should they not have at least some input in the way the dollars are spent. That is a vital part of protecting the citizens' interest.

DAVID W. HUEY, ASSISTANT ATTORNEY GENERAL, Testified in opposition of the bill.

See written testimony. Also submitted letters from the North Dakota Farm Bureau and the North Dakota Farmers Union.

REP. BELTER In the testimony you gave, I don't recall that anybody felt that the Attorney General was abusing her power, did I miss something?

DAVID HUEY I said no one is accusing us of any abuse, but I see this as a solution in search of a problem. What I am pointing out is that the cases where we are directing, under the

supervision of the court, the expenditure of a portion of settlement funds, are cases that fall within the traditional authority of our office, representing not the state, as a proprietary interest but the citizens of the public interest of the state, and most of the time, under federal law and not state law. It is entirely appropriate that we do what we have done. There is no reason to criticize, and that is why I say, there is no reason to change. All that this change can accomplish, I fear, is to burden our ability to participate in those multi-state actions, by not allowing us to comply with the dictates of the settlement or the dictates of the federal court.

REP. BELTER You have these two letters with your testimony, approving the way the money was spent, as was stated earlier, that is not the issue here. My question would be if the legislature had said, no, we do not approve this for the commission of agriculture, but we want to use this for operation safe send, or for environmental study on the use of chemicals, might those not also been accepted by the courts?

DAVID HUEY Yes, possibly they would have been. But what that answer points to is a timing problem. This legislature meets every two years, I doubt whether most federal courts will allow us to say, we would like to tell you how the settlements will be spent, but we have to wait a year and a half until the legislature meets, then we will get our direction. When these settlements come up, we have thirty, sixty or ninety days, unless such as the tobacco settlement, when we have been involved in structuring them all along.

ROGER JOHNSON, STATE COMMISSIONER OF AGRICULTURE, Gave remarks about how the money was spent.

REP. BELTER Stated the issue was not how the money was spent, the issue was whether the legislature should have authority on how to spend the settlement.

ROGER JOHNSON The proponents of the bill talked about the fact that the proceeds went directly to Farmers Union and there seems to be some question whether that was appropriate or not. I can tell you how that happened. I would like to tell you that I had a number of conversations with the Attorney General, well in advance of these dollars being directed to the Commission on the Future of Agriculture. I think that testimony is appropriate, giving some of the things that were said here this morning. When this was first broached to me by the Attorney General, I think she went to other farm groups as well, we are in this settlement, and it looks like it is telling us that we have to spend these dollars for the benefit of agriculture, but not for government programs, necessarily. We put forth a number of different potential places where she might consider spending the money. In the end, it was decided that it go for the Commission For The Future of Agriculture. We talked about using these dollars for disposing of dead animal carcasses, her concern was that might not hit the class as well as other things. We talked about the needs for funding in mediation, ag in the classroom programs, a number of different areas. In the end, this decision was made.

REP. BELTER We are not debating COFA, it upsets me that your testimony continues to work from that angle. My question would be, can you give me a reason why the legislature should not be a part of how settlements will be distributed? That is the issue.

ROGER JOHNSON Perhaps, the best response is, cause I had that same question of the Attorney General when we first began this discussion, it was because it was not the time for the legislature to be involved.

REP. BELTER We are not talking about that, why shouldn't the legislature have control over these spending issues?

ROGER JOHNSON In most cases, the legislature should have control. I understood there was a very limited amount of time to make that decision. I think that is the only reason why the legislature was not consulted.

REP. BELTER We believe, the sponsors of this bill believe, that we do have a problem. We may not necessarily have a problem with the way this particular situation was handled, but legislation has been introduced so that if we have future settlements, that the legislature can be part of determining where that settlement should be made. This time thing is brought up, maybe it needs to be a decision of the budget section, but I think somewhere or another, we need to have an avenue where the legislature has some oversight to the way these funds are to be handled. My question again is, give me a reason why the legislature shouldn't have some type of oversight.

ROGER JOHNSON I can't think of a reason why the legislature shouldn't be involved in many cases. There may very well be specific cases where it is simply not possible to involve them.

REP. WARNER Rep. Devlin raised very specific issues involving COFA, he raised the issue.

RICHARD SCHLOSSER, NORTH DAKOTA FARMERS UNION, Testified in opposition of the bill. Asked if there were any questions since the Farmers Union was mentioned several times in prior testimony. You do have copies of the two letters from the North Dakota Farmers Union and the North Dakota Farm Bureau, designating us as the single fiscal agent. Originally, the steering committee wanted to designate a co-agency between the two farm organizations, but that was quite cumbersome and eventually it was designated that the North Dakota Farmers Union was designated as the single fiscal agent for dispensing of the funds.

REP. GRANDE TO DAVID HUEY There was a time frame brought up, is there something in the settlement stating that the money had to be designated and sent by a certain time?

DAVID HUEY I don't recall that there was any specific time frame outlined within the settlement. My point was that settlements generally, and this settlement in particular, come to fruition once the settlement is reached then there is a tremendous rush to get it all down on paper and everything signed, sealed and delivered. That would have been the time factor.

REP. GRANDE Would they have allowed for that time frame to be designated?

DAVID HUEY I don't know the answer in that particular case. Generally speaking, that is not a workable remedy. Congress created our authority, Congress set forth the participants, it is the state Attorneys General, the defendant and the federal court. Congress, for whatever reason, chose not to involve state legislatures in those settlements. These are funds that are resulted in injuries to natural persons, Congress has set up that mechanism for good or ill. Your complaint here is not with the Attorney General but with the procedure the Congress has set up.

REP. GRANDE The designation of the money was set forth for the betterment for those people who had been harmed, would not the legislative body represent those people.

DAVID HUEY That is an argument you can make to Congress. Congress decided it, and I think it was a wise decision, personally, to say the Attorneys General represent those people and the Attorney General is elected by all of the people of the state of North Dakota. It could have said, let's entrust it to the legislature, I don't say it would have been wrong, but they didn't.

REP. GRANDE When the Attorneys General were given that for the betterment of those people, the closest in representation of those people, that sit on the legislature, would be the best to designate those funds.

DAVID HUEY That is the argument you can make to Congress. I think there are problems with that, and that is the delay. I suspect that is what Congress considered when it chose not to

involve state legislatures in those processes. These are not taxation cases, these are cases involving the negotiation of settlements of lawsuits, and traditionally, that is the activity of lawyers representing the private parties and the lawyers representing the public interests, and in this case it is the Attorney General.

REP. RENNERFELDT In your testimony, you referred to traditional authority, is that a legal term?

DAVID HUEY Actually, I chose the term traditional authority, because it is not a legal term, it is a colloquial term, by that I meant, to suggest that we are not doing something brand new. We are working in an area that the Attorney General has always had primary authority. Going back to when the office was first created, and that is, to settle lawsuits. I think the founders of the state of North Dakota, the enactors of our constitution, when they called this office of the Attorney General, they understood that that meant there was a areas of common law authority, case law out there that the Attorney General had responsibility for.

With no further testimony, the hearing was closed.

3-16-99, Tape #1, Side A, Meter #0.9

REP. BELTER Re-opened the hearing.

HEIDI HEITKAMP, ATTORNEY GENERAL, Testified in support of the bill. She stated that this bill in its original form was much more damaging to the work of the office of the Attorney General. She gave information regarding the two different kinds of roles the Attorney General takes in litigation. Most importantly, is the litigation done on behalf of the people of North Dakota. In the tobacco settlement, we represented the interest of the state of North Dakota. As a



result those tobacco dollars are coming to you all unencumbered by any determination that we have made, with the exception of some enforcement dollars which have been negotiated to go to the National Association of Attorneys General and some money going into the foundation that we consider as part of the recovery on behalf of the state of North Dakota. We also play an important part in anti-trust and state anti-trust litigation. When we do consumer protection, anti-trust litigation, frequently, our representation is not of the state. It is of individual members of the state. Gave an example of the Hazen Gun Manufacturing case.

Gave a report regarding the pesticide settlement. There were two options, one, for the benefit of the Attorney General, or, for the benefit of North Dakota farmers. We had an obligation as officers of the court, under the settlement agreement that we signed, to benefit these farmers.

Somebody said we should have spent that money for education, if we would have spent that for education, we would have been in contempt of court. Because these chemicals were used all over the state of North Dakota, we felt it needed to benefit farmers throughout the state. The two large farm groups sent letters stating that the ideal place to benefit farmers would be on the Commission for the Future of Agriculture. That is what was decided.

She went on to explain what this bill can accomplish and what the net outcome can be.

Related to the letters written to Sen. Nelson and Sen. Stenehjem. She stated, if you impose this requirement on the Attorney General and on the citizens of North Dakota, and other states don't, it is not likely they will negotiate their entire agreement to represent our interests.

REP. GRANDE Related to Microsoft scenerio, would that not fall under line 8, - 11, on page 1.

HEIDI HEITKAMP She stated, if this went on to public record and said "designated by Law",

we don't have a disagreement. If it is the legislative intent, that "designated by law" includes a court order, we have resolved our complaint.

REP. WINRICH Would it be appropriate in your opinion, to make that explicit, and perhaps, add to that sentence, except when a specific fund is otherwise designated by law or by court order.

HEIDI HEITKAMP That would be agreeable, from our standpoint.

REP. BELTER Even though it was a court order to spend the money on agriculture, why can it not be a decision of the legislature on how that money will be spent for agriculture?

HEIDI HEITKAMP The court order in the chemical case was basically set as designated by the Attorney General. I think the court order would have been contrary to this legislature. My recollection is that there were a list of options and the one benefitting farmers was to be designated by the Attorney General. She stated she would check it out, and let the committee know. If the case were an open precedent, she stated her advice for future Attorneys General, would be that they may want to rethink if they want to designate or give that authority to the legislature. The concern she has, is not who gets to decide, it is about whether we participate. You may write this so narrowly, that it prohibits us from participating. If there is a way to avoid that, we should work on it.

REP. KROEBER Related back to Mr. Huey's testimony, he mentioned something about, that there is sometimes, a time frame attached to it. Line 11, where it says, only appropriated by the legislative assembly, would that not limit us to every two years?

HEIDI HEITKAMP Yes, that is one of the concerns. The court order designates the process in which that decision gets made.

REP. KROEBER Even if we were to put in, "by court order", wouldn't we also have to further amend by saying Legislative Assembly or Budget Section?

HEIDI HEITKAMP I don't think so, if you include in your definition, "as designated by law", that would take you out of the restriction. My concern first and foremost, is the participation by the consumers of the state of North Dakota.

REP. RENNERFELDT Related to the gun settlement in her testimony, that was taxpayer money spent trying to recover that money, in these cases, who determines that you should take those cases on?

HEIDI HEITKAMP I do. In consumer protection, the first thing I did when I took over the agency, was, what are we good at and what aren't we good at. We did charts, looking at cases which we were able to mediate recovery. Cases we are not good at are automobile cases, we don't do a lot of those. We will always do cases where people take money and never deliver product.

REP. RENNERFELDT Doesn't that discriminate against certain people?

HEIDI HEITKAMP No, it is kind of the same choices you make every day as an administrator, trying to decide what your priorities are going to be. You are accountable to the people. That is why we don't do a lot of cases where we don't recover money.

With no further testimony, the hearing was closed.

COMMITTEE ACTION 3-22-99, Tape #1, Side A, Meter #0.4

REP. BELTER presented amendments prepared by the Legislative Council for Sen. Stenehjem. The amendments would stipulate for a specific fund or otherwise it would be designated by law,

in the case of recovering funds for a settlement. Rep. Grosz questioned the amendments, thinking it was too broad.

REP. WINRICH Also submitted an amendment on page 1, line 9, would include the words, "including a court order".

REP. RENNERFELDT Made a motion to adopt the Stenehjem amendments.

REP. GRANDE Second the motion. MOTION CARRIED BY VOICE VOTE.

REP. WINRICH Made a motion to adopt his amendment.

REP. WARNER Second the motion. MOTION FAILED. Committee members felt the amendment was covered in the adopted Stenehjem amendments.

REP. MICKELSON Made a motion for a DO PASS AS AMENDED.

REP. RENNERFELDT Second the motion. MOTION CARRIED.

13 Yes 1 No 1 Absent

REP. MICKELSON Was given the floor assignment.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2419

Page 1, line 9, after the comma insert "including a court order,"

Renumber accordingly. goes into <sup>pg. 1</sup> line 11 after the word "how" -

"including a court order"

Failed

VRC  
3/23/99

HOUSE AMENDMENTS TO ENGROSSED SENATE BILL NO. 2419

HOUSE F & T  
3-23-99

Page 1, line 8, replace "Except when a specific fund is otherwise" with "All"

Page 1, line 9, remove "designated by law, all"

Page 1, line 10, replace "general fund" with "state treasury"

Page 1, line 11, after "assembly" insert ", except when:

1. A specific fund or special account is otherwise designated by law; or
2. The options open to the attorney general leave no choice as to the disposition of the proceeds if the state is to recover funds in a multistate settlement"

Renumber accordingly

Please type or use black pen to complete

Date 3-22-99  
Roll call vote # 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2419

House HOUSE FINANCE & TAX Committee

- Subcommittee on \_\_\_\_\_
  - Conference Committee
- } Identify or check where appropriate

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

Action Taken Do Pass as amended

Motion Made By Rep. Mickelson Seconded By Rep. Rennerfeldt

| Representatives | Yes | No | Representatives | Yes | No |
|-----------------|-----|----|-----------------|-----|----|
| BELTER          | ✓   |    | WINRICH         | ✓   |    |
| RENNERFELDT     | ✓   |    |                 |     |    |
| CLARK           | ✓   |    |                 |     |    |
| FROELICH        | ✓   |    |                 |     |    |
| GRANDE          | ✓   |    |                 |     |    |
| GROSZ           |     | ✓  |                 |     |    |
| HERBEL          | ✓   |    |                 |     |    |
| KROEBER         | ✓   |    |                 |     |    |
| MICKELSON       | ✓   |    |                 |     |    |
| NICHOLAS        | ✓   |    |                 |     |    |
| RENNER          | ✓   |    |                 |     |    |
| SCHMIDT         | ✓   |    |                 |     |    |
| WARNER          | ✓   |    |                 |     |    |
| WIKENHEISER     | ✓   |    |                 |     |    |

Total 13 1  
(Yes) (No)

Absent 1

Floor Assignment Rep. Mickelson

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

DO NOT USE HIGHLIGHTER ON ANY FORMS

REPORT OF STANDING COMMITTEE

SB 2419, as engrossed: Finance and Taxation Committee (Rep. Belter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). Engrossed SB 2419 was placed on the Sixth order on the calendar.

Page 1, line 8, replace "Except when a specific fund is otherwise" with "All"

Page 1, line 9, remove "designated by law, all"

Page 1, line 10, replace "general fund" with "state treasury"

Page 1, line 11, after "assembly" insert ", except when:

1. A specific fund or special account is otherwise designated by law; or
2. The options open to the attorney general leave no choice as to the disposition of the proceeds if the state is to recover funds in a multistate settlement"

Renumber accordingly



1999 TESTIMONY  
SB 2419



# North Dakota Legislative Council

STATE CAPITOL, 600 EAST BOULEVARD, BISMARCK, ND 58505-0360 (701) 328-2916 TTY: 1-800-366-6888

GARY J. NELSON  
State Senator  
Chairman

JOHN D. OLSRUD  
Director

JAY E. BURINGRUD  
Assistant Director

CHESTER E. NELSON, Jr.  
Legislative Budget  
Analyst & Auditor

JOHN WALSTAD  
Code Revisor

October 29, 1998

Honorable Gary J. Nelson  
State Senator  
P.O. Box 945  
Casselton, ND 58012-0945

Dear Senator Nelson:

This is in response to your request for information regarding how other states handle moneys recovered through lawsuits initiated by their attorneys general. We contacted the National Conference of State Legislatures and the National Association of Attorneys General to seek any surveys or research that has been done in this area. Although neither organization was able to provide any information, we contacted various states by telephone to determine how those states handle settlement funds. The general rule among those states appears to be that the settlement language or the type of settlement will determine how the settlement funds are used.

North Dakota Century Code Section 54-12-18 provides for a special fund designated as the attorney general refund fund. Several other states, including Minnesota and South Dakota, have similar funds to provide refunds in cases in which the attorney general recovers money on behalf of residents of the state. However, our survey of other states also indicated that in situations where an attorney general receives a settlement that is not recovering money for state residents who have sustained damages and the settlement does not specify that the funds be used in a particular manner, the money is generally deposited in the general fund.

An example of a settlement agreement in which the use of funds was established in the agreement and in which funds have also been placed in the general fund is the Minnesota tobacco settlement case. In Minnesota, tobacco settlement funds will be placed in an endowment and will be used by a nonprofit foundation. The initial funds will be used to reduce teen smoking and the social and economic impact resulting from smoking. In addition, another \$650 million will be placed in the endowment subject to the approval by the Minnesota Legislature. The foundation will be administered by an appointed board.

Florida and Texas also received tobacco settlement moneys recently. The Florida settlement agreement generally specified the use of the settlement moneys to cover the health-related costs sustained by the state as a result of smoking. The Texas settlement also specified the uses of a portion of the moneys and provided that another portion would be deposited in the general fund.

In summary, we were unable to find any statutes or other information indicating legislative involvement in monetary settlements received by states. The general rule regarding the handling of settlement funds appears to be that the use of the funds depends upon the type of settlement and the specific language and requirements of the settlement agreement. If the funds are not recovered on behalf of state residents who sustained monetary damages and the settlement does not dictate specific uses for the funds, the funds usually go to the general fund.

We hope this information is of assistance. Please feel free to contact this office if you have additional questions. A copy of this letter is being sent to Senator Wayne Stenehjem, as you requested.

Sincerely,

John D. Bjornson  
Counsel

JDB/DS  
cc: ✓Senator Wayne Stenehjem



# North Dakota Legislative Council

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**CHESTER E. NELSON, Jr.**  
Legislative Budget  
Analyst & Auditor

**JOHN WALSTAD**  
Code Revisor

January 8, 1999

Honorable Wayne Stenehjem  
State Senator  
State Capitol  
Bismarck, ND 58505

Dear Senator Stenehjem:

This letter is in response to your request for information regarding the options the Attorney General is authorized to exercise with the funds received from the Cyanamid lawsuit settlement and which options would be prohibited.

As you suggested, we discussed the issues you raised with Mr. Chester E. Nelson, Jr., Legislative Council Legislative Budget Analyst and Auditor. According to Mr. Nelson, because the settlement funds would be considered public funds, it appears the funds should be deposited in the general fund, and any other use of the settlement funds would require either:

- Authorization from the Emergency Commission (North Dakota Century Code Section 54-16-04.2 authorizes the Emergency Commission, with the approval of the Budget Section, to authorize a state officer to receive moneys, not otherwise appropriated, for new or existing programs); or
- Legislative action.

Option 3 on the settlement document list provides for the deposit of settlement funds into a state antitrust/consumer protection revolving account for use in accordance with the state laws governing that account. North Dakota Century Code Section 54-12-18 authorizes the Attorney General to deposit moneys recovered by the Consumer Protection Division in the Attorney General refund fund. Whether this section would apply would depend upon the nature of the Cyanamid lawsuit. Enclosed is a copy of Section 54-12-18.

We hope this information will be helpful. Please contact this office if we can be of further assistance.

Sincerely,

Vonette J. Richter  
Counsel

VJR/LMM  
Enc.

HOUSE FINANCE AND TAXATION COMMITTEE  
MARCH 9, 1999

TESTIMONY OF  
DAVID W. HUEY  
ASSISTANT ATTORNEY GENERAL  
IN OPPOSITION TO  
S. B. 2419

Mr. Chairman, members of the committee, I am David W. Huey, assistant attorney general. For the past twelve years, I have served as litigation counsel for the Consumer Protection and Antitrust Division of the Attorney General's Office. Because the Attorney General could not be here today, she has asked me to appear on her behalf and testify in opposition to S. B. 2419, a bill which seeks to intrude upon the long-standing authority of the Attorney General's Office to litigate and settle lawsuits.

Frankly, this bill is a solution in search of a problem. The bill's proponents are apparently upset with the traditional role of the Attorney General in directing litigation brought by this office. Yet, they can not point to an instance where the Attorney General's Office has abused that role. Proponents cannot argue that, in settling lawsuits, the office has done anything wrong or improper, only that, had they been the Attorney General, they might have done it somewhat differently.

The arguments in support of this bill attempt to frame the issue as a policy dispute between the legislative and executive branches. But, as you will see, most of our settlements where substantial funds are distributed to persons other than the injured consumers are negotiated under authority granted this office, not by the Legislature but by the U.S. Congress. Moreover, the provisions of virtually all

negotiated settlements are subject to approval either by the federal district court or by state courts. Thus, if the legislative branch has a policy dispute, it is with the U.S. Congress and the state and federal judiciary.

The office of the Attorney General is an historic one in common law jurisdictions such as Great Britain, Canada, and the United States. The office pre-dates statehood and, in fact, traces its roots back to the mid-thirteenth century. Over time the office has evolved from that of the "king's lawyer" to one elected by the people and responsible to them for the general administration of justice. Nevertheless, most of the fundamental powers of the office can be traced back to its early roots.

One of the traditional and fundamental powers of the office is to "[i]nstitute and prosecute all actions and proceedings in favor of or for the use of the state which may be necessary in the execution of the duties of any state officer." North Dakota Century Code § 54-12-01(2). Implicit within this broad power is the power to settle actions and proceedings as well as to try them to a decision.

Attempts to settle cases have always been considered to be socially beneficial and have been generally encouraged by the courts. Settlements conserve judicial resources and the resources of the parties. They resolve disputes in a less acrimonious setting than adversarial proceedings. It is sometimes even said that a poor settlement is preferable to a successful result at trial.

While the precise effect of this bill is not entirely clear, its provisions may impact the multi-state consumer protection and antitrust lawsuits brought by the Attorney General under both state and federal law. By seeking to limit the office's

range of options in settlement negotiations, this bill could make it harder for us to participate in these suits. Indeed, though such a consequence is probably not intended by the bill's proponents, it might make our participation in many multi-state actions impossible.

Multi-state cases have been very beneficial to the state of North Dakota in that they permit us to pursue violations of law and to obtain restitution on behalf of North Dakota's consumers that we would otherwise not be able to do. By participating, we are able to tap the substantial investigative and legal resources of large states such as New York, Texas, California and others. With their assistance, we are able to hire expert witnesses to review and analyze the complex economic evidence that is a common part of modern antitrust litigation.

Combining with other states levels the playing field when we are required to take on large corporations, companies with in house legal staffs larger than our entire office. Working together, we gain the advantage of negotiating leverage we would never have on our own. We are able to maximize substantially the limited resources of our office.

However, because of our limited resources, North Dakota is not always able to assume a leadership role in multi-state cases. To participate on the negotiating team of a multi-state case, a state has to be prepared to assign one or more attorneys almost full time to a particular case. Those times when our office has played a lead role in a multi-state case, such as the recent tobacco settlement, have required an extraordinary commitment of staff time and energy.

In the majority of the cases where we do not participate in the leadership, the basic structure of the settlement is already in place by the time we become involved. For example:

Reebok vertical price-fixing settlement. The states alleged that Reebok had illegally attempted to impose a minimum resale price on shoe retailers. The settlement, which was negotiated without our active participation, provided that North Dakota's share of the settlement fund was to be \$20,827.00. This share, however, was not ours to spend anyway we wished but could only be distributed to a state or local government agency or to a private, non-profit corporation "to improve, refurbish, renovate and/or provide athletic facilities, equipment or services." The South Dakota Attorney General designated the Boy Scouts and the Girl Scouts to receive these funds. The North Dakota Attorney General designated the Prairie Rose Games and the Special Olympics.

Keds vertical price fixing settlement. This case involved similar allegations of resale price maintenance in the sale of women's athletic shoes. North Dakota's share under this settlement was \$15,055.00 and use of the funds was limited to programs by non-profit organizations designed to benefit women between the ages of 15-44. These proceeds were designated to the American Red Cross to fund a medical training program for day care providers and other caregivers.

American Cyanamid antitrust settlement. In this case, North Dakota's share of the settlement fund was \$131,113.00. At the request of the ND Farm



Bureau and the ND Farmer's Union, \$100,000 of this amount was used to fund the Commission on the Future of Agriculture (COFA). This use was approved by the federal district court because the unidentified victims of the antitrust violations were North Dakota farmers who had purchased American Cyanamid products from suppliers. The remaining funds were deposited into the consumer refund revolving fund and expended pursuant to legislative appropriation.

These three cases have one thing in common; they are all brought under legal authority granted the North Dakota Attorney General, not by the Legislature, not under any North Dakota law, but by the U.S. Congress under the Clayton Act. The Clayton Act, 15 U.S.C. §12, *et seq.*, was enacted in 1914 to provide for stronger civil antitrust enforcement. Among its provisions were enforcement power by the Federal Trade Commission and the trebling of damages in private actions.

The Act was amended in 1976 to give *parens patriae* authority to state attorney's general to bring civil damage actions in federal court in the name of the state and on behalf of "natural persons residing in" the state.

§ 15c. Actions by State attorneys general

(a) *Parens patriae*; monetary relief; damages; prejudgment interest

(1) Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in

this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title.

15 USC § 15c(a)(1)

Congress limited the authority of the state attorneys general to settle or compromise antitrust litigation brought under the Clayton Act by the provisions of subdivision (c) of this same section.

(c) Dismissal or compromise of action

An action under subsection (a)(1) of this section shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

15 USC § 15c(c).

As a result, any settlement negotiations undertaken by the states are done so with the necessity of federal court approval uppermost in our minds. Typically then, our first priority is consumer refunds. In all cases where we can identify the consumer victims and the individual loss is more than nominal, the settlements have provided for consumer refunds. The Mitsubishi and Panasonic settlements are good examples of this because company warranty records provided us with the names and addresses of the customers who had purchased the electronic equipment whose prices we alleged had been fixed. The only payments the states received in those cases were for actual attorneys fees and costs.

In cases like Reebok, Keds and American Cyanimid, however, it is often difficult or impossible to identify the specific consumers who have been injured by the alleged anti-competitive conduct. In addition, sometimes the individual

consumer loss is so small that the cost of administering a refund program would likely exceed the total amount of the losses.

In these cases, federal judges expect us to look to federal case law for a substitute for direct consumer refunds, the preferred method of relief. The answer can be found in the cy pres or fluid recovery doctrine developed in private class actions. Cy pres is an equitable doctrine that was originally applied to the administration of trusts. It has been adapted for use in these situations.

As a Seventh Circuit U.S. Court of Appeals explained in a recent case:

Cy pres, or fluid, recovery is a procedural device that distributes money damages either through a market system (e.g., by reducing charges that were previously excessive), or through project funding (the project being designed to benefit the members of the class). Simer v. Rios, 661 F.2d 655, 675 (7th Cir.1981). Cy pres recovery "is used where the individuals injured are not likely to come forward and prove their claims or cannot be given notice of the case." Id. at 675. Cy pres recovery is thus ideal for circumstances in which it is difficult or impossible to identify the persons to whom damages should be assigned or distributed. Here, damages, though small, would not be either difficult to assign or difficult to distribute. Further, there is no reason, when the injured parties can be identified, to deny them even a small recovery in favor of disbursement through some other means.

Mace v. Van Ru Credit Corp., 109 F.3d 338,345 (C.A.7 (Ill.) 1997).

In all cases where cy pres or fluid recovery distributions are made, the particular use of funds to benefit class members is approved by the federal court in the district where the case is filed. Similarly, if we were to negotiate a cy pres type settlement under the consumer fraud law, N.D.C.C. § 51-15-06.1 mandates that the settlement be approved by the district court in Burleigh County.

As I said earlier, this bill is a solution in search of a problem. There has been no abuse of the Attorney General's traditional settlement authority that warrants this correction. Existing requirements for judicial review of settlements is sufficient to prevent abuse from occurring. The unintended consequence of the bill is likely to discourage participation in multi-state cases that have been extremely beneficial to the residents of this state. Thus, it is on behalf of those residents that I urge committee members to vote do not pass on this bill.

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\*91425 15 U.S.C.A. § 15c

UNITED STATES CODE  
ANNOTATED  
TITLE 15. COMMERCE AND  
TRADE  
CHAPTER 1--MONOPOLIES AND  
COMBINATIONS IN RESTRAINT  
OF TRADE

*Current through P.L. 105-216, approved  
7-29-98*

**§ 15c. Actions by State attorneys general**

(a) ~~Parents patriae~~; monetary relief; damages;  
prejudgment interest

(1) Any attorney general of a State may bring a civil action in the name of such State, as *parents patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee. The court may award under this paragraph, pursuant to a motion by such State promptly made, simple interest on the total damage for the period beginning on the date of service of such State's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an

award of interest under this paragraph for any period is just in the circumstances, the court shall consider only--

(A) whether such State or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;

(B) whether, in the course of the action involved, such State or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

\*91426 (C) whether such State or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Notice; exclusion election; final judgment

(1) In any action brought under subsection (a)(1) of this section, the State attorney general shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case.

(2) Any person on whose behalf an action is brought under subsection (a)(1) of this section may elect to exclude from adjudication the portion of the State claim for monetary relief attributable to him by filing notice of such election with the court within such time as specified in the notice given pursuant to paragraph (1) of this subsection.

(3) The final judgment in an action under subsection (a)(1) of this section shall be res judicata as to any claim under section 15 of this title by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to paragraph (1) of this

subsection.

(c) Dismissal or compromise of action

An action under subsection (a)(1) of this section shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.

(d) Attorneys' fees

In any action under subsection (a) of this section--

(1) the amount of the plaintiffs' attorney's fee, if any, shall be determined by the court; and

(2) the court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the State attorney general has acted in bad faith,

vexatiously, wantonly, or for oppressive reasons.

**CREDIT(S)**

**1997 Main Volume**

*(Oct. 15, 1914, c. 323, § 4C, as added Sept. 30, 1976, Pub.L. 94-435, Title III, § 301, 90 Stat. 1394, and amended Sept. 12, 1980, Pub.L. 96-349, § 4(a)(3), 94 Stat. 1157.)*

<General Materials (GM) - References, Annotations, or Tables>

**HISTORICAL NOTES**

**HISTORICAL AND STATUTORY NOTES**

Revision Notes and Legislative Reports

1976 Acts. House Report Nos. 94-499, 94-1343, and 94-1373, see 1976 U.S. Code Cong. and Adm. News, p. 2572.



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## North Dakota Farm Bureau

December 5, 1997

The Honorable Heidi Heitkamp  
Attorney General  
600 East Boulevard  
Bismarck, ND 58505

Dear Attorney General Heitkamp:


The North Dakota Farm Bureau is pleased to be a member of the steering committee, which oversees the newly created Commission of the Future of Agriculture. This Commission seeks to build agreement among North Dakota's agricultural and rural interests regarding strategies for building our agricultural industry.

We have learned that you have funds from the settlement of a pesticide case available to you that need to be applied to assist agriculture in general in our state. We urge you to consider the activities of the Commission of the Future of Agriculture to be underwritten through these funds. The work of this Commission can be of long lasting benefit to all of agriculture in our state, if adequate funds are available for key needs such as baseline research, a professional facilitator, and operating expenses of the Commission.

If you agree with using the funds for this purpose, we recommend that a single organization be responsible to account for the expenditures of the money. The steering committee has agreed that North Dakota Farmers Union should accept and account for these funds, if they will be used for the activities of such a commission.

Again we are convinced that the Commission on the Future of Agriculture will be of broad benefit to our farmers and ranchers in North Dakota, and we urge your support of the initiative.

Sincerely,

  
Jim Harmon  
President

by 

NORTH DAKOTA



November 26, 1997

Heidi Heitkamp  
North Dakota Attorney General  
600 E Boulevard State Capitol  
Bismarck ND 58505

Dear Attorney General Heitkamp:

Thank you for your willingness to consider applying federal pesticide overcharge funds to underwrite the costs of the Commission on the Future of Agriculture. I believe that if we can successfully initiate a statewide discussion and strategy development process, the final product will be of lasting, meaningful consequence for rural North Dakota.

The Commission on the Future of Agriculture will be directed by a steering committee comprised of the following individuals: NDSU president Tom Plough, North Dakota Farm Bureau president Howard Schmid, North Dakota Association of Rural Electric Cooperatives executive director Dennis Hill, Commissioner of Agriculture Roger Johnson and me.

The steering committee has discussed how to best handle such funds, and we have agreed that designating a single fiscal agent is the preferred method of handling the funds. I have offered North Dakota Farmers Union to provide this service for the project, and the rest of the steering committee has agreed. We hope that this will meet your requirements.

The steering committee has agreed to an aggressive schedule for the project. I have enclosed a tentative timeline, which culminates about June 1, 1998 with the final report of the recommendations of the Commission.

The steering committee will designate about a dozen key agricultural "thinkers" to participate in a working group, which will spend a number of two or three day sessions developing a framework and proposal for recommendations to be incorporated into a strategic plan. We believe that we will need to contract with a capable facilitator to guide the process and assist the group to reach consensus regarding the final recommendations. We believe that the costs associated with this component may be somewhere between \$50,000 to \$60,000.

The steering committee will also appoint a Commission to provide broad-based analysis of and support for the recommended strategy. This group will conduct public hearings to gather recommendations and reactions from the public, and will ultimately develop the final recommendations of the project. We anticipate that the expenses of the Commission are likely to be about \$30,000.

Finally, we anticipate needing to contract with one of the research universities to develop baseline data regarding significant issues and trends affecting North Dakota agriculture and rural communities. We anticipate that the costs of this necessary research may be as much as \$50,000.

We are eager to begin this process. Rural North Dakota is at a crossroad. If successful, the Commission on the Future of Agriculture will play a crucial role in influencing the composition of the rural economy of our state into the next century. We appreciate your commitment to helping build that better future for our state.

Sincerely,

NORTH DAKOTA FARMERS UNION

  
Robert L. Carlson, President

977601

RLC:lb  
ORIGINAL ALSO SENT