SENATE BILL NO. 2375
HOUSE BUSINESS, INDUSTRY AND LABOR COMMITTEE
JONATHAN WARREY, CHAIR
TESTIMONY IN OPPOSITION TO ENGROSSED SENATE BILL 2375
MARCH 11, 2025

Chairman Warrey and members of the House Industry, Business and Labor Committee. I am Parrell Grossman, and I appear on behalf of the American Council of Life Insurers in opposition to Engrossed Senate Bill No. 2375.

For background purposes I was the former director of the Attorney General's Consumer Protection and Antitrust Division for 28 years, retiring in February, 2023.

In addition to my testimony, my client has filed its letter testimony. ACLI has objections to this Bill for many reasons, and I share those concerns. It is highly unusual legislation in terms of its occurrence, structure, enforcement, and legality.

No Other State Permits Dentists to Collectively Bargain Their Fees and Other Terms

Providing less competition in the marketplace or less protection for consumers has never been a purpose of state or federal antitrust law in this state. This legislation would make North Dakota an outlier. We are not aware of any state in the nation that allows competing dentists to jointly negotiate their fees and fee-related contract terms with insurance carriers. This is confirmed by the American Dental Association handout entitled "*Joint Negotiation by Dentists with Carriers*," which dental proponents distributed at the February 10, 2025 hearing of the Senate Human Services Committee. The ADA handout cites New Jersey and Texas, but those laws expired 17 years ago in New Jersey and 22 years ago in Texas, and the Texas law did not apply to dentists. This Bill would provide collective bargaining rights to competing dentists in North Dakota that are not available to dentists in other states and that are not available to physicians or other health care providers in North Dakota (or for that matter to other competing businesses in North Dakota).

SB 2375 Authorizes Joint Fee-Related Negotiations That Are Prohibited by Antitrust Laws

In our free market, competition-based economy, competitors are generally prohibited from collectively negotiating fees and fee-related contract terms. SB 2375 would authorize competing dentists to jointly negotiate their fees and fee-related contract terms with dental carriers in whose networks they choose to participate—leading to higher costs for policyholders.

Proponents of SB 2375 have suggested that the bill creates immunity for conduct that would otherwise violate the antitrust laws (called "state action antitrust immunity"). As the ADA handout recognizes, state action antitrust immunity requires the anticompetitive conduct to be clearly expressed as state policy and "actively supervised" by the State.

Because it authorizes conduct that would otherwise violate the antitrust laws, the state action immunity doctrine is narrowly construed and disfavored by the courts.

We are concerned that SB 2375 purports to authorize private parties to engage in conduct that is prohibited by state and federal antitrust laws and, if carried out, could embroil them in years of litigation that would do nothing other than raise costs for policyholders. Despite claiming otherwise, in Section 1 of the Bill, subsection (1) authorizes independent dental providers to engage in joint negotiations that directly impact provider fees, with no apparent state oversight (*see, e.g.,* subsection (1)(n) (dentists may jointly negotiate "formulation and application of reimbursement methodology"); Subsection (1)(o) (dentists may jointly negotiate "inclusion or alteration of a contractual term or condition").

Subsections (1), (2) and (3) authorize competing dentists to communicate among themselves and "engage in related joint activity relating to fees and fee-related matters" with no apparent state oversight. As for subsection (2), we have significant legal concerns that the bill does not provide sufficient state oversight to shield private parties' fee-related conduct from antitrust liability, and our members are concerned about being dragged into costly and unproductive litigation as a result of this legislation.

SB 2375 Confuses the Role of the Office of Administrative Hearings, or "OAH"

The role of OAH is unclear. During Senate Human Services testimony, proponents of the law alternatively stated that OAH would "arbitrate," "mediate," be the "arbiter," "negotiate," and hold "hearings."

The law as drafted puts OAH in an untenable and seemingly unprecedented position—and one that threatens to undermine its independence and impartiality.

Since 1991, OAH's panel of administrative law judges have presided over *adjudicative proceedings* on behalf of state agencies. In these cases, the state agencies first investigate matters within their subject matter expertise, after which OAH, as an impartial third party, adjudicates disputes in which the state agency is on one side the table and the individual or business is on the other side of the table. Unlike instances in which OAH handles adjudicative proceedings for state agencies, there will be no state agency here to gather the facts and conduct the underlying investigation necessary for OAH to render its decision—especially where "active state oversight" is required to create immunity for violations of the antitrust laws. That puts OAH in a seemingly unprecedented role of acting in a manner more akin to that of an *executive* agency, as opposed to an impartial *judicial* agency.

The statute also requires OAH to promulgate rules to implement the law, now placing it in a *quasi-legislative* role. Administrative rules are generally written by agencies with appropriate subject matter expertise.

Consistent with notions of due process and fair play, dental carriers would need to be afforded the opportunity to challenge OAH's decisions into such topics as whether a dental insurer has "*substantial market power*" or whether "any of the terms or conditions

of the contract with the dental insurer pose an actual *or potential* threat to the quality and availability of patient care," requirements set forth in the law as conditions to be met before joint negotiations would be authorized. Because it cannot adjudicate its own decisions, any challenges to OAH decisions on these topics would need to be appealed to state district court, which would be expensive for the parties and ultimately get passed on to policyholders in the form of higher premiums. OAH also would likely be a necessary party to these district court proceedings, just as other state agencies are parties to district court litigation when their decisions are appealed to district court.

SB 2375 Contains Unclear and Confusing Language

SB 2375 contains provisions that makes the bill unclear and confusing. For example, subsection 1(5) states, "Upon the joint negotiation representative and dental insurer determining an agreement has been reached on contractual terms or conditions that will be the subject matter of negotiations…." But presumably any negotiations would precede any contract being reached. And subsections (5)(a) and (6) contain largely redundant language.

We have had discussions with the Attorney General's Office regarding our concerns and believe that Office shares concerns with this legislation. However, we anticipate Ms. Elin Alm, the director of the Attorney General's Consumer Protection and Antitrust Division, will testify today and this Committee certainly may find that information helpful.

ACLI is reviewing amendments that may be proposed by the prime sponsor, Senator Castaneda, and we possibly will have further discussions. In addition, it is possible the Attorney General will have proposed amendments that overlay other proposed amendments, and our clients would review those amendments, too, if any.

In the meantime, ACLI is strongly opposed to this legislation. For these reasons, we respectfully ask the House Industry, Business, and Labor Committee to give Engrossed Senate Bill No. 2375 a "DO NOT PASS" recommendation.

Thank you and I will try to answer any questions.