

LETTER OPINION
98-L-85

July 10, 1998

The Honorable David O'Connell
State Senator
2531 County Road 30
Lansford, ND 58750

Dear Senator O'Connell:

Thank you for your letter concerning N.D.C.C. § 51-07-24, which prohibits certain actions pertaining to insurance claims for physical damage to automobiles.

N.D.C.C. § 51-07-24 provides:

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

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promptly notifies the insurer of the excessive charges.

3. A violation of this section is a class B misdemeanor.

This office recently issued an opinion regarding this statute. 1998 N.D. Op. Att'y Gen. L-__ (April 22 letter to Rick Berg). After receiving a copy of this opinion, you have asked several further questions about the conduct prohibited by N.D.C.C. § 51-07-24.

Before responding specifically to your questions, I want to add a caveat to the opinions expressed in this letter. Several of your questions are phrased in terms of "[w]hat actions constitute" I cannot give you a complete, exhaustive answer to these questions because there are an indefinite number of factual situations that could be prohibited by N.D.C.C. § 51-07-24. By attempting to describe all the specific actions that would be prohibited by this statute, I might leave out other actions that could also violate the statute and give the impression that any action not listed in this letter is not a violation of N.D.C.C. § 51-07-24. Instead, I will respond to your questions with some general criteria that can be applied to a set of facts to determine if a violation of N.D.C.C. § 51-07-24 has occurred.

In addition, as explained in my earlier opinion on this statute and in the Texas Attorney General's opinion cited in the opinion, criminal statutes are construed strictly in favor of the defendant and against the government, and due process requires that criminal statutes give fair notice of the activity that is prohibited. Thus, any vagueness in the language of N.D.C.C. § 51-07-24 would be resolved in favor of the person submitting the insurance claim or providing the good or service.

You first ask who falls within the class of persons who sell goods or services under this section. As generally used throughout the North Dakota Century Code, the term "person" means "an individual, organization, government, political subdivision, or government agency or instrumentality." N.D.C.C. § 1-01-49. "'Organization' includes a foreign or domestic association, business trust, corporation, enterprise, estate, joint venture, limited liability company, limited liability partnership, limited partnership, partnership, trust, or any legal or commercial entity." *Id.* Thus, N.D.C.C. § 51-07-24 applies equally to individuals and business organizations.

The phrase "sells goods or services" is not limited to sales in the normal course of a person's business. When viewed in context, the

phrase is limited to sales of goods or services that are paid for from proceeds of an insurance policy covering physical damage to an automobile.

You next ask what type of activity would constitute advertising or promising to provide a good or service and to pay a deductible or a rebate of a deductible. These terms are not defined in N.D.C.C. § 51-07-24 and must be given their plain and ordinary meaning. N.D.C.C. § 1-02-02. An advertisement is "[a] notice designed to attract public attention or patronage." The American Heritage Dictionary 82 (2d coll. ed. 1991). "Promise" is a broader term, and simply means a commitment assuring that the person selling the goods or services will do something. Id. at 991. "Deductible" is defined as the "portion of an insured loss to be borne by the insured before [the insured] is entitled to recovery from the insurer." Black's Law Dictionary 413 (6th ed. 1990).¹ Thus, N.D.C.C. § 51-07-24 refers to a commitment expressed by the seller, whether or not it is publicized, to provide a good or service and to pay 1) all or part of the portion of an insured loss for which an insured is responsible or 2) a rebate of any portion of a insured loss paid by an insured.

You also ask what a "rebate" is as used in N.D.C.C. § 51-07-24. "Rebate" is defined as "[a] deduction from an amount to be paid or a return of part of an amount given in payment." The American Heritage Dictionary 1031. This definition would appear to cover both a seller's payment of money and a seller's waiver of an amount owed to the seller by the insured. However, statutory terms must also be interpreted in context. N.D.C.C. § 1-02-03. "Rebate" is used in two places in N.D.C.C. § 51-07-24: an advertisement or promise to "pay a rebate" and an amount "remitted to an insured . . . as a rebate." It is my opinion that the use of these underlined terms, in conjunction with the plain meaning of "rebate," indicates that N.D.C.C. § 51-07-24 applies to actual payments of money and does not include a "waiver" of an amount owed by an insured to a seller. This conclusion is consistent with comments in the recent opinion to Representative Berg and the Texas Attorney General's opinion indicating that the "rebate" language in N.D.C.C. § 51-07-24 does not

¹ Whether a seller's advertisement or promise to "waive" a deductible is inaccurate, because a deductible is actually an obligation of an insured person to an insurance company which cannot be waived by a seller, raises legal issues independent of the provisions of N.D.C.C. § 51-07-24. 1998 N.D. Op. Att'y Gen. at L-__ (April 22 letter to Rick Berg at pp. 2-3).

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include waiving or declining to seek payment of all or part of an amount owed to a seller.

You next ask what type of activity would constitute knowingly charging an amount that exceeds the seller's usual and customary charge. This question was answered in the recent opinion to Representative Berg, which stated:

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

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

1998 N.D. Op. Att'y Gen. at L___ (April 22 letter to Rick Berg at p. 2).

Your next two questions pertain to the actions of an insured that are prohibited in subsection 2 of N.D.C.C. § 51-07-24:

A person who is insured under an insurance policy that provides coverage for physical damage to automobiles may not submit a claim under the policy based on charges that are in violation of subsection 1 or may not knowingly allow a claim in violation of subsection 1 to be submitted, unless the person promptly notifies the insurer of the excessive charges.

This subsection describes two alternate offenses: an insured who submits a claim based on charges prohibited in subsection one, and an insured who knowingly allows a claim to be submitted based on charges prohibited in subsection one.

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There is no culpability requirement specified in N.D.C.C. § 51-07-24 for an insured who files a claim based on excessive charges. A criminal offense that is not included in N.D.C.C. title 12.1, and for which a culpability requirement is not specified, is a strict liability offense. State v. Nygaard, 447 N.W.2d 267, 270 (N.D. 1989). Thus, it is my opinion that a violation of N.D.C.C. § 51-07-24 has occurred if an insured submits a claim which is later determined to be based on charges that violate subsection one.

The second offense in subsection two requires that an insured "knowingly" allow a claim based on excessive charges to be submitted on the insured's behalf. A person acts "knowingly," for purposes of a criminal offense, when the person knows or has a firm belief, unaccompanied by substantial doubt, that the person is performing the act. N.D.C.C. § 12.1-02-02(1)(b). Thus, for there to be a violation of subsection two when a claim containing excessive charges has been submitted to an insurer by a person other than the insured, the insured must know or have a firm belief that 1) the claim has been submitted and 2) the amount of the claim exceeds the seller's usual and customary charge for the good or service.

Whether a person has notified an insurer "promptly" is a question of fact which I cannot answer in this opinion. Subsection two distinguishes between claim and charges: "claim" refers to a request submitted to an insurer for payment of a seller's charges; "charges" refers to the amounts charged by a seller that are in violation of subsection one. Therefore, whether an insured has promptly notified his or her insurer is based on when the insured knew of the excessive charges and not when the insured knew that a claim had been submitted to the insurer. Accordingly, it is my opinion that an insured must notify the insurer promptly if the insured knows a seller's charges are excessive under N.D.C.C. § 51-07-24, even if a claim based on those charges has not yet been submitted to the insurer.

Your last question asks whether any North Dakota prosecutors have filed charges under N.D.C.C. § 51-07-24. This office has not prosecuted any charges under N.D.C.C. § 51-07-24, and we are not aware of any prosecutions by county state's attorneys or assistant state's attorneys under that section. However, this office is not notified of all criminal prosecutions in this state, so it is possible (although unlikely) that criminal charges have been filed for violation of N.D.C.C. § 51-07-24.

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I have attempted to respond as specifically as I can to the questions you have raised. Feel free to contact my office again if you have further questions.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

jcf/vkk