

Legislative Analysis



INCREASE CIVIL PENALTY FOR FRAUDULENT MEDICAID CLAIMS

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House Bill 5757 (Substitute H-1)
Sponsor: Rep. Marc Corriveau
Committee: Judiciary

First Analysis (3-13-08)

BRIEF SUMMARY: The bill would prohibit using a false record or statement to conceal, avoid, or decrease an obligation to remit money or property to the state pertaining to a Medicaid claim; create an additional civil penalty for a violation; and establish a statute of limitations regarding claims filed under the *qui tam*, or "whistleblower", provision that allows a private citizen to initiate a civil action for Medicaid fraud.

FISCAL IMPACT: The federal government created an incentive within the Deficit Reduction Act, Sec. 6031, for states to enact false claims acts that are comparable to the federal False Claims Act. Effective January 1, 2007, the federal government will give to a state 10 percent of any funds recovered as part of Medicaid enforcement actions brought under that state's law that should have otherwise gone to the federal government.

The Executive's proposed FY 2008-09 Department of Community Health budget includes \$100,000 GF/GP savings, recognizing increased collections on Medicaid False Claims Act recoveries if the state statute sufficiently resembles federal law.

THE APPARENT PROBLEM:

The Medicaid program is jointly funded by state and federal dollars, with the federal portion ranging between 50 and 83 percent depending on a state's per capita income. Under the Federal False Claims Act, the federal government shares any recovery of damages from false or fraudulent Medicaid claims with the state in the same proportion of that state's share of the cost of its program. Recently enacted federal legislation, the Deficit Reduction Act, allows an additional 10 percent of recovered money from false claims to be given to any state that has a law with similar civil liability provisions as the Federal False Claims Act.

Though Michigan's Medicaid False Claim Act provides similar penalties as the federal legislation, it was recently declared by federal officials as not complying with the federal act because it did not prohibit a particular conduct, nor did it set a minimum fine of at least \$5,000 for each false claim for a penalty. As a result, the state missed out on an additional 10 percent cut of the \$21.7 million recovered last year from Medicaid fraud cases by the Attorney General. Legislation is needed to revise the appropriate provisions to comply with federal requirements so that the state will be eligible for the extra 10 percent under the federal incentive.

In addition, the Medicaid False Claim Act was amended by Public Act 337 of 2005, which took effect in early 2006, to provide a whistleblower provision, known as a *qui tam* provision, that allows a private citizen to commence a civil action against any entity believed to have committed Medicaid fraud. The Attorney General may later take primary responsibility for the action. A successful plaintiff receives a percentage of any monetary proceeds resulting from the action. Some feel that this provision should have a statute of limitations that would provide a timeframe within which a civil action could be commenced.

THE CONTENT OF THE BILL:

The Medicaid False Claim Act provides the state with the means to prosecute those who make fraudulent claims under the Social Welfare Act against the Department of Community Health. House Bill 5757 would amend the Medicaid False Claims Act (MCL 400.607, 400.612, and 400.614) to specifically prohibit making or using a false record to avoid payment to the state regarding a claim for Medicaid benefits and to create a civil fine penalty for receiving benefits by reason of fraud.

Under the bill, a person would be prohibited from knowingly making, using, or causing to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state pertaining to a claim for Medicaid benefits.

The act currently defines “*knowingly*” to mean *that a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a Medicaid benefit. Knowing or knowingly does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present.*

Also currently, the act requires a person who receives a benefit that he or she is not entitled to receive to pay to the state a civil penalty equal to the full amount received plus triple the amount of damages suffered by the state as a result of the person's conduct. (This applies to improper amounts received by reason of fraud, making a fraudulent statement, or knowingly concealing a material fact.) House Bill 5757 would include – as prohibited conduct for which the civil penalty applies – engaging in any conduct prohibited by the Medicaid False Claims Act. The bill would also create an additional civil penalty of not less than \$5,000 or more than \$10,000 for each violation.

The bill would also establish a statute of limitations on when a private citizen could commence an action under the *qui tam* statute. Under the bill, a person could not bring a civil action if more than six years had passed since the date on which the violation against the state occurred or more than three years had passed since the date when facts material to the right of action were known or reasonably should have been known by the official of the prosecuting authority charged with responsibility to act in the circumstances, but in

no event more than 10 years after the date on which the violation had been committed, whichever occurred last.

A person could bring an action under the act for conduct occurring before the bill's effective date if the action were filed within the statute of limitations added by the bill.

ARGUMENTS:

For:

The recently enacted federal Deficit Reduction Act (DRA) requires that a state enact comparable penalties for certain fraudulent acts regarding Medicaid claims as the federal False Claims Act in order to qualify for an additional 10 percent share of money recovered from the successful prosecution of fraud cases in that state. Many would argue that the state's current provisions in the Medicaid False Claims Act, though not identical, are sufficiently comparable to qualify for the extra revenue. However, officials with the Department of Health and Human Services have determined that the state act does not meet the requirements of the DRA. The bill would add the elements identified as lacking so that the state can receive the extra 10 percent revenue promised by the DRA.

For:

The bill would add a statute of limitations for actions commenced under the whistleblower, or *qui tam*, provisions of the Medicaid False Claims Act. In general, civil actions, such as for medical malpractice and auto injuries, must be filed within a statutory time frame. The reasoning is that as time goes on, evidence is lost, witnesses' memories fade, and a defendant is disadvantaged in mounting a defense. The time periods allowed by the bill are generous compared to the typical statute of limitations of three years for most civil actions.

Against:

Medicaid fraud is not a typical cause of action. A single entity can be responsible for defrauding the government—and therefore taxpayers—of millions of dollars. It can take a long time for evidence to surface, or for a witness, such as a former employee, to feel safe enough in order to expose fraud on that magnitude. To some, this bill may represent an unacceptable watering down of the *qui tam* statute—good for the medical community or any person committing fraud against the Medicaid program, but bad for taxpayers and those dependent upon the services Medicaid provides.

POSITIONS:

The Department of Human Services indicated support for the bill. (3-12-08)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.