

Legislative Analysis



ALLOW CIVIL ACTIONS FOR MEDICAID FRAUD

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House Bill 4577 (Substitute H-2)

Sponsor: Rep. David Law

Committee: Judiciary

First Analysis (9-22-05)

BRIEF SUMMARY: The bill would add a new section to the Medicaid False Claim Act to allow any person to bring a civil action on the state's behalf to recover losses due to Medicaid fraud. The Attorney General could later decide to take primary responsibility for the action. It also would provide "whistleblower" protections and allow successful plaintiffs to retain a percentage of monetary proceeds resulting from the action. Legal specialists refer to this as a "qui tam" provision.

FISCAL IMPACT: A fiscal analysis is in process.

THE APPARENT PROBLEM:

According to information provided to the House Committee on Judiciary, estimates of Medicaid fraud range from 3 percent to 10 percent. In Michigan, that amounts to \$240 million to \$800 million annually out of an \$8 billion budget. According to committee testimony, states that allow individuals to initiate civil actions alleging Medicaid fraud are more successful in recovering fraudulently spent Medicaid dollars from health care providers. For example, while Michigan's fraud investigations produced about \$7 million in recoveries Fiscal Year 2003, Virginia recovered \$16 million, Florida \$21 million, Texas \$31 million, and California \$39 million. These other states have laws that allow individuals—sometimes with insider "whistleblower" information—to bring actions in the name of the state against fraudulent Medicaid providers and retain a percentage of the money recovered. Reportedly, the state Attorney General typically intervenes in this kind of action and pursues the cases.

Legislation that would allow these private actions and provide "whistleblower" protections has been proposed for Michigan.

THE CONTENT OF THE BILL:

The bill would add a new section to the Medicaid False Claim Act to allow any person to bring a civil action on the state's behalf to recover losses due to Medicaid fraud. The Attorney General could later decide to take primary responsibility for the action. It also would provide "whistleblower" protections and allow successful plaintiffs to retain a percentage of monetary proceeds resulting from the action. Legal specialists refer to this as a "qui tam" provision.

The bill contains the following provisions.

** Any person could bring a civil action in the name of the state to recover losses the state suffers from a violation of the Medicaid False Claim Act. Such a suit could not be dismissed until the Attorney General had been notified and had an opportunity to appear to oppose the dismissal.

** The complaint would have to remain under seal and the court clerk could not issue the summons for service on the defendant until after the time granted for the Attorney General to decide whether to intervene. At the time of filing, the person filing the complaint would have to serve a copy of the complaint on the Attorney General and disclose in writing all material evidence and information supporting the complaint.

** The Attorney General could elect to intervene in an action. Within 90 days after service of the complaint and related materials (or any extension granted by a court), the AG would notify the court and the person initiating the action that the AG had decided to proceed with the action and take primary responsibility or had declined to take over the action, leaving the person initiating the action to proceed.

** No one other than the AG could intervene in the action or bring another action on behalf of the state based on the facts underlying the action.

** If the AG elected to proceed, the AG could 1) agree to dismiss the action; 2) settle the action; or 3) request the court to limit the participation of the person initiating the action, in which case the court could limit the number of the person's witnesses and the length of their testimony, and could limit the person's cross-examination of witnesses. The AG could dismiss or settle the case notwithstanding the objection of the person initiating the action but only if the person had been notified and offered the opportunity to participate in a hearing. In the case of a settlement, a court would have to find the settlement fair, adequate, and reasonable. The settlement hearing could be held in camera.

** If the AG declined to take over the action, the person who initiated the action could proceed with the action. At the AG's request and expense, the AG would be provided with copies of all pleadings filed in the action and copies of all deposition transcripts. Even if the AG declined to take over the action initially, the court could permit the AG to intervene in the action at any time upon a showing of good cause and without affecting the rights or status of the person initiating the action.

** Upon a showing, conducted in camera, that actions of the person initiating the action during discovery would interfere with the Attorney General's investigation or prosecution of a criminal or civil matter, the court could stay discovery for up to 90 days. The court could subsequently extend the stay.

Alternative Remedies

** The Attorney General could pursue a violation of the act through any alternate remedy available, including an administrative proceeding (as an alternative to an action permitted by the bill). If an alternative remedy is pursued, the person who initiated the action

would have the equivalent rights in that proceeding to those the person would have had if the action had continued.

Awards to Plaintiffs

** If the person who initiates an action under the bill prevails in an action, the court would award the person necessary expenses, costs, reasonable attorney fees, and, based on the amount of effort involved, the following percentage of the monetary proceeds: 15 to 25 percent, if the Attorney General intervened; or 25 to 30 percent, if the AG did not intervene.

** However, if the court found that the action was based primarily on the disclosure of specific information not provided by the person bringing the action, and the AG proceeded with the action, the court would award the person bringing the action no more than 10 percent of the monetary recovery. The bill cites such outside information as information from a criminal, civil, or administrative hearing in a state or federal department or agency; a legislative report, hearing, audit, or investigation; or the news media.

** If the court found that the person bringing an action planned or initiated the conduct upon which the action was brought, then the court could reduce or eliminate the share of proceeds the person would otherwise be entitled to receive. A person convicted of criminal conduct arising from a violation of the act could not initiate or remain a party to an action under the bill and would not be entitled to share in the monetary proceeds.

** The state and the AG would not be liable for any expenses, costs, or attorney fees that a person incurs in bringing an action. Any amount awarded to a person initiating an action would be payable solely from the proceeds of the action or settlement.

Recovery of Costs by Attorney General

** The Attorney General would be authorized to recover all costs the state incurred in the litigation and recovery of Medicaid restitution under the bill, including the cost of investigation and attorney fees. The AG would retain the amount received for activities under the bill, (excluding amounts for restitution, court costs, and fines) not to exceed the amount of the state's funding match for the Medicaid Fraud Control Unit. The AG could not retain amounts until all the restitution awarded had been paid. Costs recovered in excess of the funding match would be deposited in the Michigan Medicaid Benefits Trust Fund.

Actions Based on Ongoing Proceedings

**No one other than the Attorney General could bring an action under the bill based on allegations or transactions already the subject of a civil suit, a criminal investigation or prosecution or an administrative investigation or proceeding to which the state or federal government was already a party. The court would dismiss any action in violation of this provision.

** No one other than the Attorney General could initiate an action based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing; in a state or federal legislative, investigative or administrative report, hearing, audit, or investigation; or from the news media. This would not apply if the person bringing the action was the original source of the information.

Frivolous Cases

** If a person proceeds with an action after having been notified that the AG has declined to intervene and the court finds the claim to be frivolous, the court would award the prevailing defendant reasonable attorney fees and expenses, and the court could award punitive damages of up to \$10,000.

Whistleblower Protections

** An employer would be prohibited from discharging, demoting, suspending, threatening, harassing, or otherwise discriminating against an employee in the terms and conditions of employment because the employee initiated, assisted in, or participated in a proceeding or court action under the act or because the employee cooperated with or assisted in an investigation under the act. An employer who committed a violation would be liable to the employee for reinstatement to his or her position without loss of seniority; two times the amount of lost back pay; interest on the back pay; compensation for any special damages; and any other relief necessary to make the employee whole.

Venue

** A person could bring a civil action under the bill in any county in which venue was proper. However, if the Attorney General elects to intervene and the courts grant the request, the court would transfer the action to the Ingham County Circuit Court, upon a motion by the AG.

ARGUMENTS:

For:

One way to fight the rising costs of health care in the Medicaid program is to reduce the amount of fraud. Allowing private citizens to bring actions in the name of the state against fraudulent claims by Medicaid providers is considered an effective way of fighting fraud and recovering money for the state. Reportedly, other states have had success with this legal alternative. This legislation increases access to insider information by providing a financial incentive to bring legal actions. This will make it easier to detect fraud and should deter providers from committing fraud.

Against:

Some have expressed concern that allowing private citizens to bring lawsuits alleging Medicaid fraud could have the effect of reducing provider participation in the program, since it makes providers vulnerable to harassment and prosecution.

POSITIONS:

The Department of Attorney General supports the bill. (9-14-05)

The Center for Civil Justice supports the bill. (9-14-05)

The Michigan State Medical Society and the Michigan Osteopathic Association both indicated opposition to the bill as written but say they are continuing to work with the sponsor. (9-14-05)

The Michigan Chiropractic Society indicated opposition to the Substitute H-2. (9-14-05)

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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.