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BILL ANALYSIS

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House Bill 4577 (Substitute H-2 as passed by the House)
Sponsor: Representative David Law
House Committee: Judiciary
Senate Committee: Judiciary

Date Completed: 11-8-05

CONTENT

The bill would amend the Medicaid False Claim Act to do all of the following:

- Allow any person to bring a civil action in the name of the State to recover the State's losses from a violation of the Act.
- Allow the Attorney General to intervene in an action filed by someone else, and require that the complaint be sealed and service on the defendant be withheld until the time for the Attorney General to intervene expired.
- Prohibit a person other than the Attorney General from filing an action that was based on ongoing proceedings or investigations or public disclosure of allegations.
- Prohibit a person other than the Attorney General from intervening in an action filed under the bill.
- Allow the court to limit the participation of the person who initiated an action, if the Attorney General intervened.
- Allow the Attorney General to monitor, and intervene in, an action initiated by another person, who proceeded with the action.
- Allow the court to stay discovery upon a showing that activities of the person initiating an action would interfere with the Attorney General's investigation or prosecution of a criminal or civil matter.
- Provide for a monetary award to a person other than the Attorney General who prevailed in an action.
- Provide for the recovery of costs by the Attorney General and for the

Attorney General to retain certain amounts recovered.

- Allow the Attorney General to pursue a violation of the Act through an alternative remedy.
- Prohibit employers from penalizing employees who initiated, assisted, or participated in proceedings or court actions under the Act or who cooperated with or assisted in an investigation under the Act.

Filing A Civil Action

The bill would allow any person to bring a civil action in the name of the State to recover losses that the State suffered from a violation of the Act. A suit filed under this provision could not be dismissed unless the Attorney General was notified and had an opportunity to appear and oppose the dismissal.

If a person other than the Attorney General initiated an action, the complaint would have to remain under seal and the clerk could not issue the summons for service on the defendant until after the time for the Attorney General's election to intervene expired. At the time of filing the complaint, the person would have to serve a copy of it on the Attorney General and disclose to him or her, in writing, substantially all material evidence and information in the person's possession that supported the complaint.

A person other than the Attorney General could not bring an action that was based on allegations or transactions that already were the subject of a civil suit, a criminal investigation or prosecution, or an administrative investigation or proceeding to

which the State or the Federal government already was a party. The court would have to dismiss an action brought in violation of this provision.

Unless the person were the original source of the information, a person other than the Attorney General could not initiate an action based upon 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 media. A person would be the original source if he or she had direct and independent knowledge of the information on which the allegations were based and voluntarily provided the information to the Attorney General before filing an action based on that information.

If an action were filed by a person other than the Attorney General, another person could not intervene in the action or bring another action on behalf of the State based on the facts underlying the action.

Attorney General's Election to Intervene

The Attorney General could elect to intervene in an action filed by another person to recover losses the State suffered from a violation of the Act. Within 90 days after service of the complaint and related materials or any extension of that period requested by the Attorney General and granted by the court, the Attorney General would have to notify the court and the person initiating the action either that the Attorney General would proceed with the action for the State and have primary responsibility for proceeding with it or that the Attorney General declined to take over the action and the person initiating the action would have the right to proceed with it.

If the Attorney General elected to proceed with an action filed by another person, the Attorney General would have primary responsibility for prosecuting the action and could do all of the following:

- Agree to dismiss the action, notwithstanding the objection of the person initiating it, but only if that person had been notified of and offered the opportunity to participate in a hearing on the motion to dismiss.

- Settle the action, notwithstanding the objection of the person initiating it, but only if that person had been notified of and offered the opportunity to participate in a hearing on the settlement and if the court determined the settlement to be fair, adequate, and reasonable under the circumstances.
- Request the court to limit the participation of the person initiating the action.

Upon a showing of good cause, a settlement hearing could be held in camera (in the judge's chamber or in the courtroom without spectators).

If the Attorney General requested the court to limit the participation of the person initiating the action, and demonstrated that unrestricted participation by that person during the litigation would interfere with or unduly delay the Attorney General's prosecution of the case or would be repetitious, irrelevant, or unduly harassing, the court could do any of the following:

- Limit the number of the person's witnesses.
- Limit the length of the testimony of the person's witnesses.
- Limit the person's cross-examination of witnesses.
- Otherwise limit the person's participation in the litigation.

If the Attorney General notified the court that he or she declined to take over the action, the person who initiated it could proceed with the action.

Other Attorney General Actions

If the Attorney General declined to take over an action initiated by another person, the Attorney General would have to be given copies of all pleadings filed in the action and copies of all deposition transcripts, at the Attorney General's request and expense. The court could permit the Attorney General to intervene in the action at any time upon a showing of good cause and without affecting the rights or status of the person who initiated it.

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 the discovery for up to 90 days. The court could extend the stay upon a further showing that the Attorney General was pursuing the investigation or proceeding with reasonable diligence and the discovery would interfere with the ongoing investigation or proceeding.

As an alternative to an action filed by a person other than the Attorney General, the Attorney General could pursue a violation of the Act through any alternate remedy available to the State, including an administrative proceeding. If the Attorney General pursued an alternate remedy, a person who initiated an action would have rights in that proceeding equivalent to the rights that he or she would have had if the action had continued, to the extent consistent with the law governing that proceeding. Findings of fact and conclusions of law that became final in alternative proceeding would be conclusive on the parties to an action under the bill. A finding or conclusion would be final if it had been finally determined on appeal to the appropriate court, if the time for filing an appeal had expired, or if the finding or conclusion were not subject to judicial review.

Monetary Awards

If a person other than the Attorney General prevailed in an action that he or she initiated under the bill, the court would have to award the person necessary expenses, costs, reasonable attorney fees, and, based on the amount of effort involved, a percentage of the monetary proceeds resulting from the action or any settlement of the claim. If the Attorney General intervened in the action, the court would have to award 15% to 25% to the person who initiated the action and, if the Attorney General did not intervene, the court would have to award 25% to 30% to the person.

If the court found an action to be based primarily on disclosure of specific information that was not provided by the person bringing the action, such 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, and the Attorney General proceeded with the action, the court could award the person bringing the action not more than 10% of the monetary recovery in addition to

reasonable attorney fees, necessary expenses, and costs.

If the court found that the person bringing an action planned or initiated the conduct upon which it was brought, then the court could reduce or eliminate the share of the proceeds of the action that the person otherwise would be entitled to receive, as the court considered appropriate. A person who was 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 resulting from the action or any settlement under the bill.

The State and the Attorney General would not be liable for any expenses, costs, or attorney fees that a person incurred in bringing an action under the bill. Any amount awarded to a person initiating an action to enforce the Act would be payable solely from the proceeds of the action or settlement.

If a person proceeded with an action under the bill after being notified that the Attorney General had declined to intervene and the court found that the claim was frivolous, as defined in Section 2591 of the Revised Judicature Act (RJA), the court would have to award the prevailing defendant actual and reasonable attorney fees and expenses, as well as impose a civil fine of up to \$10,000. The civil fine would have to be deposited into the Michigan Medicaid Benefits Trust Fund. (Under Section 2591 of the RJA, "frivolous" means that at least one of the following conditions is met: the party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party; the party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true; or that party's legal position was devoid of arguable legal merit.)

Attorney General's Recovery of Costs

The Attorney General could recover all costs the State incurred in the litigation and recovery of Medicaid restitution under the Act, including the cost of investigation and attorney fees. The Attorney General would retain the amount received for activities under the Act, excluding amounts for restitution, court costs, and fines, up to the amount of the State's funding match for the

Medicaid fraud control unit. The Attorney General could not retain amounts under these provisions until all the restitution awarded in the proceeding had been paid.

Costs that the Attorney General recovered in excess of the State's funding match for the Medicaid fraud control unit would have to be deposited in the Michigan Medicaid Benefits Trust Fund.

Whistleblower Protection

An employer could not discharge, demote, suspend, threaten, harass, or otherwise discriminate 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. This prohibition would not apply to an employment action against an employee who was convicted of criminal conduct arising from a violation of the Act.

An employer who violated this employee protection provision would be liable to the employee for all of the following:

- Reinstatement to the employee's position without loss of seniority.
- Two times the amount of lost back pay.
- Interest on the back pay.
- Compensation for any special damages.
- Any other relief necessary to make the employee whole.

Court Venue

Currently, an action brought in connection with a Medicaid matter under the Act may be filed and prosecuted in Ingham County. The bill, instead, would require that such an action be filed and prosecuted in Ingham County, although a person other than the Attorney General could bring a civil action allowed under the bill in any county in which venue was proper. If the Attorney General elected to intervene, however, and the court granted the request, the court would have to transfer the action to the Circuit Court in Ingham County, upon motion by the Attorney General.

MCL 400.611 et al.

Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The bill would have an indeterminate impact on Medicaid fraud litigations and recoveries. According to the Department of Attorney General, Medicaid fraud recoveries totaled \$4.1 million in FY 2002-03 and \$10.4 million in FY 2003-04.

Total Medicaid expenditures on services to Medicaid clients in Michigan are in the range of \$8 billion. The Federal government pays approximately 57% of this cost, with the remainder coming from various State sources.

There have been some estimates that anywhere from 3% to 10% of Medicaid expenditures are fraudulent, which would equate to \$240 million to \$800 million of gross Michigan Medicaid expenditures, or about \$100 million to \$340 million in State funding.

Approximately three-quarters of Medicaid expenditures in Michigan are fixed payments made to mental health and physical health managed care organizations as well as long-term care providers. Other than in cases of fraudulent eligibility, the risk of fraud is borne by these providers and not by the State. For instance, if a fraudulent claim is filed by a doctor who claims to have provided services to Medicaid managed care clients, it is the managed care organization, not the State, that loses money due to fraud.

Therefore, the 3% to 10% estimate should be applied to about \$2 billion of the Medicaid base. This would translate to maximum potential savings of \$25 million to \$85 million GF/GP, if all fraud unrelated to fraudulent eligibility were rooted out by this program. It should be noted that the statistical basis for the 3% to 10% estimate is unclear, and the actual percentage could be higher or lower. Eligibility fraud, to the extent that it occurs and would be detected due to this bill, would add to the maximum potential recoveries.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.