HOUSE BILL REPORT
HB 2246

As Reported by House Committee On:
Judiciary

Title: An act relating to medicaid fraud.

Brief Description: Concerning medicaid fraud.

Sponsors: Representatives Eddy, Jinkins, Dickerson and Roberts.

Brief History:
Committee Activity:
Judiciary: 1/25/12, 1/30/12 [DPS].

Brief Summary of Substitute Bill

- Establishes a state Medicaid Fraud False Claims Act that creates civil liability for false or fraudulent claims against the state Medicaid program and authorizes private parties to bring actions on behalf of the state.
- Establishes whistleblower protections for employees who report fraudulent practices by their employers.
- Creates a Medicaid Fraud Penalty Account to fund Medicaid services and Medicaid fraud prevention, detection, and enforcement activities.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Eddy, Hansen, Kirby, Orwall and Roberts.

Minority Report: Do not pass. Signed by 5 members: Representatives Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Klippert, Nealey and Rivers.

Staff: Edie Adams (786-7180).

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Medicaid.

Medicaid is a health care program for qualifying low-income and needy people, including children, the elderly, and persons with a disability. The program is a federal-state partnership established under the federal Social Security Act, and implemented at the state level with federal matching funds. Each state program must establish a plan that meets specified requirements mandated by the federal Centers for Medicare and Medicaid Services. The Washington Health Care Authority is responsible for administering the Medicaid program.

State Medicaid Fraud.

State law establishes civil and criminal penalties for fraudulent acts related to the Medicaid program. Medicaid service providers that obtain payments through willful false statements, willful misrepresentation or concealment of material facts, or other fraudulent schemes must repay any excess payments received and may be assessed civil penalties up to three times the amount of the excess payments. It is a class C felony for any person to knowingly make a false statement or conceal material facts in an application for payment, knowingly make a false statement regarding facts used to determine rights to payments, or have knowledge of the concealment of information with the intent to fraudulently receive unauthorized payments. Other criminal prohibitions relate to inappropriate rebating and referral practices and knowingly charging excessive rates for services to patients.

Federal False Claims Act.

The federal False Claims Act establishes liability for a variety of improper or fraudulent activities in all federal programs, including presenting a fraudulent claim or using false records pertaining to a fraudulent claim; failing to return money or property to the government; and using false records or concealing or improperly avoiding an obligation to pay money to the government.

A person may be found liable under the False Claims Act for up to three times the amount of the damages caused to the federal program, plus penalties of between $5,500 and $11,000 for each false claim. The False Claims Act contains "qui tam" provisions that allow citizens with evidence of fraud against the government to sue on behalf of the government. Qui tam suits are filed under seal for at least 60 days to allow the Department of Justice time to investigate and decide whether to intervene in the action. A person who files a qui tam action on behalf of the government is entitled to a portion of any recovery or settlement obtained in the action, ranging from 15 percent to 30 percent depending on whether the government intervenes and the extent of the qui tam plaintiff's participation in the case.

The Deficit Reduction Act of 2005 provides incentives to states to adopt their own versions of the False Claims Act that meet specific criteria and pertain to Medicaid programs. A state that enacts such a law is entitled to an increase of 10 percentage points in its share of Medicaid fraud amounts recovered under the state act. In order to qualify for this financial incentive, the Inspector General for the U.S. Department of Health and Human Services and the U.S. Attorney General must certify that the state law meets specified criteria, including state liability for false or fraudulent claims that is equivalent to the federal liability,

provisions that are at least as effective as federal standards for rewarding and facilitating qui tam actions, and civil penalties that are as much or more than the federal penalties.

Summary of Substitute Bill:

General Provisions Regarding Medicaid Fraud.

The Attorney General, in addition to the Health Care Authority, may assess civil penalties for activities involving false statements or misrepresentations. The Attorney General may contract with private attorneys and local governments to bring such actions.

Whistleblower protections are provided to employees who report to the Health Care Authority that their employer has fraudulently obtained or attempted to obtain Medicaid benefits or payments. These employees are entitled to remedies available under the Washington Law Against Discrimination for any workplace reprisal or retaliatory actions taken by an employer as a result of the report. An employer is not prohibited from terminating, suspending, or disciplining an employee whistleblower for lawful reasons.

Providers of durable medical equipment and medical supplies, and related services, must be Medicare providers in order to be paid under the Medicaid program.

The Medicaid Fraud Penalty Account (Account) is established. Civil penalties received from actions against Medicaid service providers must be deposited into the Account, rather than the State General Fund. In addition, receipts from judgments or settlements under either the state Medicaid Fraud False Claims Act or federal False Claims Act must be deposited into the Account. Moneys in the Account may be appropriated for Medicaid services and Medicaid fraud prevention, detection, and enforcement activities.

Medicaid Fraud False Claims Act.

The state Medicaid Fraud False Claims Act (Act) is established creating civil liability for false or fraudulent activities with respect to the state Medicaid program. The Attorney General must diligently investigate violations of the Act.

Civil liability. Civil liability is established for the following activities involving claims for payment to a state agency that administers Medicaid programs:

- knowingly presenting a false or fraudulent claim;
- knowingly using false records or statements pertaining to a false or fraudulent claim;
- knowingly failing to return money or property to the state;
- intending to defraud the government through a certification of receipt of property;
- knowingly purchasing public property from a government employee who is known not to be authorized to lawfully sell the property;
- knowingly making or using false records material to, or concealing or improperly avoiding, an obligation to pay money to the government; or
- conspiring to commit a violation of the Act.

Liability for presenting such a claim includes a civil penalty between $5,500 and $11,000 plus three times the amount of damages incurred by the state. The court may reduce the damage award to double damages if the person making the claim cooperates with the Attorney General's investigation. The Attorney General must annually adjust the civil penalty so that it remains equivalent to the penalty under the federal False Claims Act.

Qui Tam Actions. Qui tam actions are authorized, allowing a private citizen, known as a "qui tam relator," to bring a civil action in the name of the state for violations of the Act. Prior to commencing the action, the qui tam relator must serve the Attorney General with a copy of the complaint and all material evidence regarding the claim. The action must be filed in camera and remain under seal for at least 60 days, with extensions allowed. The Attorney General has at least 60 days following the receipt of the complaint and the evidence to decide whether or not to intervene in the action.

State Intervention. If the Attorney General intervenes in the action, he or she has the primary responsibility for prosecuting the action. The relator continues as a party but the court may impose restrictions on the relator's participation in the case. The state may seek to dismiss or settle the action over the objections of the qui tam relator. The relator is entitled to notice and an opportunity to contest the motion. The court may allow a settlement over the objections of the relator if the settlement is fair, adequate, and reasonable.

If the state does not intervene, the relator may proceed with the action. The state is entitled to receive copies of all pleadings and deposition transcripts in the action, and upon a showing of good cause, may intervene in the action at a later date.

Proceeds of Qui Tam Action. A relator is entitled to share in the proceeds of any judgment or settlement obtained in the action. In an action conducted by the state, the relator is entitled to receive at least 15 percent but not more than 25 percent of the proceeds, depending upon the relator's contribution to the prosecution of the action, plus costs and reasonable attorney's fees and expenses. The award to the relator is limited to no more than 10 percent of the proceeds if the action is based primarily on information from sources other than the relator.

If the state did not intervene in the action, the relator conducting the action is entitled to at least 25 percent but no more than 30 percent of the proceeds of the action or a settlement, plus costs and reasonable attorneys' fees and expenses.

In an action that is based on the relator's own wrongful conduct, the court may reduce the relator's share of the proceeds as it deems appropriate. A relator who is convicted of criminal conduct for his or her role in the violation must be dismissed from the action and may not receive any share of the proceeds.

If the Attorney General decides not to intervene in the action and the defendant prevails, the court may award the defendant reasonable attorneys' fees and expenses to be paid by the relator if the court finds the relator's claim was clearly frivolous, vexatious, or brought primarily for the purposes of harassment.

Qui Tam Bars. Qui tam actions may not be brought that are based on the subject of a civil suit or a civil proceeding in which the Attorney General is already a party. Qui tam actions

are barred also under the following circumstances, unless the action is brought by the Attorney General or the relator is an original source of the information: where substantially the same allegations were publicly disclosed in state proceedings or hearings in which the Attorney General is a party; in a state report, hearing, audit, or investigation; or by the news media.

Other Provisions. A person who is retaliated against by his or her employer because of the person's actions in initiating or aiding in the investigation of a false claim action may bring a civil action for reinstatement, damages, and reasonable attorneys' fees and costs.

An action under the Act is not subject to any time limitation for the commencement of actions. Jurisdiction, discovery rules, and other procedures are specified for false claims actions. Procedures are established authorizing the Attorney General to issue civil investigative demands, prior to commencing a civil action, for the discovery of material information relevant to a false claims Act investigation.

Beginning November 15, 2012, the Attorney General must report annually on the results of implementing the Act, including the number of attorneys assigned to qui tam actions, the number of actions brought, the results of the actions brought, and the amount of the recoveries attributable to the Medicaid false claims.

Substitute Bill Compared to Original Bill:

The original bill created the specific crime of Medicaid Theft and increased the statute of limitations for Medicaid-related felonies to 10 years. The original bill did not provide that receipts from judgments obtained under the state or federal false claims acts are deposited into the Medicaid Fraud Penalty Account. The original bill stated that the Attorney General's duty to diligently investigate violations of the Act is subject to funds appropriated for this purpose. The substitute bill makes a number of technical and clarifying amendments to correct inaccurate cross-references and terms.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) The Federal False Claims Act (FCA) is the most powerful anti-fraud tool in the federal government's arsenal because of its whistleblower provisions. Without whistleblower provisions, the Attorney General will not be able to find out about a whole host of cases that are under seal. Washington has not been able to share in over $9 billion in recoveries for other states because we have no qui tam provisions. Over the past 25 years, Medicaid fraud recoveries have increased substantially due to the increase in the number of whistleblower-

initiated cases. In 2011 the federal government attributed a 40 percent increase in its recoveries for Medicaid fraud to whistleblowers and state-based qui tam actions.

There must be a financial incentive in order to encourage whistleblowers to come forward because of the terrible sacrifice they make. They risk losing their jobs, being blacklisted in the industry, having to relocate and start over, and enduring many years of fighting the case. The government does not have the resources to prosecute the big and complex cases. With a qui tam statute, dishonest providers have to fear that there is a person out there who will not look the other way and will report the fraud. The FCA does not apply to innocent errors, or even negligence; it requires reckless disregard or deliberate indifference. The facts do not support the speculative statement that the bill will result in an avalanche of frivolous cases.

What is at stake with this bill is the health and safety of the citizens of this state. Every dollar lost to fraud is one less dollar that can be invested in providing health care to our citizens. This is especially important now because cuts to Medicaid services have resulted in people going without needed medical care and home care. We should not ignore fraud just because we have an efficient health care system. Companies have access to information on how to create corporate compliance and responsibility programs so that they are not making mistakes. This bill will be good for companies that are operating legally because they are at a disadvantage if other companies gain an unfair advantage by violating the law.

(Opposed) We support increased penalties, whistleblower protections, and other measures to combat fraud. We have no objections to providing incentives for whistleblowers, even at the same levels provided in the qui tam provisions, to encourage them to come forward to report fraud. However, we do not support the qui tam provisions. These provisions allow private citizens to file actions against physicians, hospitals, and other medical providers. A private relator should not be able to advance a suit when the Attorney General, after an investigation, declines to proceed. This will result in frivolous suits that are costly for providers to investigate and defend. Missouri and Arkansas have successful whistleblower provisions without allowing qui tam suits.

This bill is unnecessary. Washington does not have a special or unique problem with health care fraud. States are already adequately covered by the federal law. In addition, Washington has considerable tools and penalties on the books to combat fraud, and the state is hiring new contractors to identify and help recover Medicaid fraud dollars.

This bill will target individual providers and small practices, not just pharmaceutical companies and large providers. There is concern this will cover simple billing errors not just fraud. The numbers in the fiscal note do not pencil out. The extra 10 percent in recoveries that is talked about is unlikely to become a reality because each time the federal law changes, the state will have to amend its statute or no longer be in compliance. There is only one state that is currently in compliance with the federal law. There is not strong data to support the contention that there will be additional recoveries because the expenses of investigating and prosecuting these cases has not been included.

Persons Testifying: (In support) Representative Eddy, prime sponsor; Jeff Sprung, Hagens Berman; Larry Shannon, Washington State Association of Justice; Jim Alderson; Steve

Breaux, Service Employees International Union; and Jesse Wing, Washington Employment Lawyers Association.

(Opposed) Mel Sorensen, Washington Defense Trial Lawyers; Jeff Gombosky, Pharmaceutical Research and Manufacturers of America; Cliff Webster, Washingtonn Liability Reform Coalition; Bob Cooper, Washington Defender Association and Washington Association of Criminal Defense Lawyers; and Denny Maher, Washington State Medical Association.

Persons Signed In To Testify But Not Testifying: None.