

HOUSE BILL REPORT

ESSB 5978

As Passed House - Amended:
March 8, 2012

Title: An act relating to medicaid fraud.

Brief Description: Concerning medicaid fraud.

Sponsors: Senate Committee on Health & Long-Term Care (originally sponsored by Senators Pflug, Keiser, Frockt, Conway and Kohl-Welles).

Brief History:

Committee Activity:

Judiciary: 2/15/12, 2/21/12 [DP];

Ways & Means: 2/27/12, 3/7/12 [DPA].

Floor Activity:

Passed House - Amended: 3/8/12, 56-42.

Brief Summary of Engrossed Substitute Bill
(As Amended by House)

- 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.
- Terminates the Medicaid Fraud False Claims Act on June 30, 2016, and requires the Joint Legislative Audit and Review Committee to conduct a sunset review.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 7 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Eddy, Hansen, Kirby, Orwall and Roberts.

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.

Minority Report: Do not pass. Signed by 4 members: Representatives Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Nealey and Rivers.

Staff: Edie Adams (786-7180).

HOUSE COMMITTEE ON WAYS & MEANS

Majority Report: Do pass as amended. Signed by 14 members: Representatives Hunter, Chair; Darneille, Vice Chair; Hasegawa, Vice Chair; Carlyle, Cody, Dickerson, Haigh, Hudgins, Hunt, Kagi, Kenney, Ormsby, Pettigrew and Sullivan.

Minority Report: Do not pass. Signed by 13 members: Representatives Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Dammeier, Assistant Ranking Minority Member; Orcutt, Assistant Ranking Minority Member; Chandler, Haler, Hinkle, Parker, Ross, Schmick, Seaquist, Springer and Wilcox.

Staff: Erik Cornellier (786-7116).

Background:

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 Office of the Inspector General and the United States Attorney General must certify that the state law meets specified criteria, including provisions that are at least as effective as federal standards in facilitating and rewarding qui tam actions.

Summary of Amended 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.

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. 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 circumstances where substantially the same allegations were publicly disclosed, unless the action is brought by the Attorney General or the relator is an original source of the information.

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 an investigation under the Act.

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, the amount of the recoveries attributable to Medicaid false claims; and, if available, information on costs and expenses incurred by defendants in qui tam actions.

The Medicaid Fraud False Claims Act terminates on June 30, 2016, and is subject to a sunset review by the Joint Legislative Audit and Review Committee.

Appropriation: None.

Fiscal Note: Available.

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

Staff Summary of Public Testimony (Judiciary):

(In support) This is the most important health care reform measure you can enact. Washington spends around \$8 billion on the Medicaid program. Estimates on the amount of fraud in the program range from 3 to 10 percent of expenditures. The Medicaid program will expand by one-third and if we do not build the infrastructure now to capture fraud, we will be left behind. We must ensure that those who defraud the government repay their ill-gotten gains to deter future fraud and to make sure the state's dollars go to the health care needs of our citizens. The bill will provide an extra 10 percent recovery for the state and allow the state to be involved in national lawsuits. There are 140 national cases currently under seal that we cannot participate in because we do not have a qui tam statute. Defendants will agree to global settlements in these national cases only when it is to their advantage.

Qui tam statutes have a proven and strong bipartisan track record. The Department of Justice reports that in 2011, Medicaid fraud collections increased to \$4.2 billion, up 50 percent from the previous year. The vast majority of these successful recoveries are attributable to qui tam actions. Whistleblower incentives are one of the most important accountability tools we have. Whistleblowers take significant risks by coming forward, including retaliation, loss of income, and blacklisting. We need the relators because sometimes the government does not have the resources to pursue these highly complex and expensive cases. The bill will not result in frivolous or harassing claims because the unique pleading requirements for fraud cases ensure that claims brought forward are meritorious. The so-called Missouri model is not how we want to operate. Missouri is able to recover so much money because they have a Medicaid system riddled with fraud.

(Opposed) We support increased fraud penalties and strengthening of the fraud control unit, but we strongly oppose the qui tam provisions that allow a relator to pursue a case that the Attorney General has investigated and declined. A high percentage of these cases are meritless. There is a cost to investigating and defending these cases, even if they are ultimately dismissed. Relators do not see state qui tam statutes as an alternative to the federal statute. Instead, they file under both the federal and state acts, which creates procedural and practical difficulties of defending multiple actions in multiple courts. The bill is unbalanced in that it allows an award of fees and costs to a prevailing relator, but a prevailing defendant can obtain an award only if the claim was clearly frivolous, vexatious, or for harassment. This standard will be met only in rare cases.

Washington already has a successful state false claims act. Information from the Office of the Inspector General shows that only six states have more ongoing Medicaid fraud investigations than Washington. There is no evident relationship between qui tam statutes and successful Medicaid fraud units. States that have qui tam statutes do not necessarily recover more. The Missouri model has been very successful in obtaining fraud recoveries by providing a reward for whistleblowers without qui tam provisions. There are only two states that are receiving the extra 10 percent because the federal government keeps moving the goal posts on compliance. The Attorney General does have access in a timely manner to the national cases, which often result in global settlements. The fiscal note indicates there are no additional revenues from this bill in this biennium. The additional costs of this bill could be used more effectively for other programs.

Staff Summary of Public Testimony (Ways & Means):

(In support) It is important to send a message loud and clear that Washington will not tolerate the waste of state funds. Washington is losing out significantly. According to the Kaiser Family Foundation, Washington spends billions on Medicaid, but 5 to 10 percent is lost to fraud. In the last four years state recoveries from the 11 to 12 biggest cases is over \$1 billion. Washington should have a share of that. While federal recoveries in 2011 went up over 50 percent and \$4.2 billion, Washington shares fell. By enacting this bill, Washington would immediately gain access to an additional 10 percent recovery from the federal share. Every dollar lost to fraud is one less dollar for long-term care services. This bill will return more than \$15 back for every dollar invested. This is large money and the state is not at the table to recover as much, or at all, unless defendants decide it is to their advantage to reach out and offer settlements.

These cases are going forward either way. They can be filed in federal court, but they are under seal, so the state does not participate and cannot provide input. Washington would have immediate access to over 140 ongoing cases and investigations that are under federal seal. If defendants decide to settle they may offer Washington money, but Washington will recover at a lower rate.

The doctors have not been able to provide one case from the 23 states with qui tam provisions for up to 11 years showing that this hurts doctors. These cases are expensive and they are not coding errors. They take three to five years to settle and cost at least \$10 to \$15 million. They are expensive to prosecute. The American Medical Association is not opposed to these provisions.

Qui tam does not mean "bounty hunter." It means "in the name of the king." Relators are bringing cases on behalf of the people of the State of Washington to prevent the state from being ripped off. Investigations are not costly for practices because there are no charges filed at that time. The suspects are not defendants yet. Whistleblowers are usually high-level executives. These people give up their careers, are blacklisted in their industries, and go through three to 12 years of misery trying to do the right thing on behalf of citizens. The money comes from an account created in the bill and is funded from recoveries so the bill does not cost anything.

The Columbia Law Review article was written by a student and it does not prove that the defendants were not guilty, just that it is hard to prove fraud under the pleading standards for fraud cases. Plaintiffs must plead facts and prove criminal intent.

This bill passed on a strong bipartisan vote in the Senate.

(Opposed) In the report from the Office of the Inspector General on the most recent recoveries there is no evidence that qui tam works. Two states jump out that are similar in size to Washington. Virginia has qui tam provisions and recoveries were less than half of Washington's. Missouri has no qui tam provisions and recoveries were twice Washington's. Washington could accomplish the same thing through Missouri's reward or finder's fee system. The state should implement this bill without the qui tam provisions, provide whistleblower protections, and provide 17 percent of the judgments to private citizens when the Attorney General pursues a case based on information from those citizens.

The need for revenue and big recoveries is understandable, and the bill is not intended to target small physician practices. However, the cost and burden of complying with each and every investigation falls hard on small practices even when cases are dismissed. Each case must be investigated, and doctors must comply. Those costs and burdens can shut down a practice. The 2007 Columbia Law Review found that the Attorney General decides to pursue judgment in most cases, but 73 percent of the cases that the Attorney General does not participate in are dismissed. Investigations still happen in those cases. Instead of spending up front, Washington should look nationally at state programs with and without these provisions to see which states do it best.

This bill provides no protection for defendants against frivolous lawsuits. Instead, the bill should refer to the existing state statute on frivolous lawsuits. There will be no net recovery to the state for four years after adding 25 full time equivalent employees. It is not until fiscal year 2016 that there is projected to be an uptick in recoveries. The ability to predict recoveries is low.

Persons Testifying (Judiciary): (In support) Senator Pflug, prime sponsor; Larry Shannon, Washington State Association of Justice; Nick Federici, Service Employees International Union 775 Northwest; Rebecca Johnson, Washington State Labor Council; Mary Clogston, Association of American Retired Persons of Washington; and Senator Keiser.

(Opposed) Tim Layton, Washington State Medical Association; Cliff Webster, Washington Liability Reform Coalition; Lisa Thatcher, Washington State Hospital Association; Jeff Gombosky, Pharmaceutical Research and Manufacturers of America; and Mel Sorensen, Washington Defense Trial Lawyers.

Persons Testifying (Ways & Means): (In support) Senator Pflug, prime sponsor; Larry Shannon, Washington State Association for Justice; and Steve Breaux, Service Employees International Union Healthcare 775 Northwest.

(Opposed) Katie Kolan, Washington State Medical Association; Jeff Gombosky, Pharmaceutical Research and Manufacturers of America; and Cliff Webster, Washington Liability Reform Coalition and Washington Academy of Eye Physicians and Surgeons.

Persons Signed In To Testify But Not Testifying (Judiciary): None.

Persons Signed In To Testify But Not Testifying (Ways & Means): Lisa Thatcher, Washington State Hospital Association; and Mel Sorensen, Washington Defense Trial Lawyers Association.