SENATE BILL REPORT
SB 5458

As Reported by Senate Committee On:
Health & Long-Term Care, February 10, 2011

Title: An act relating to medicaid fraud.

Brief Description: Concerning medicaid fraud.

Sponsors: Senators Keiser, Pflug, Kline, Becker, Conway, Pridemore, Rockefeller and Parlette.

Brief History:
Committee Activity: Health & Long-Term Care: 2/03/11, 2/10/11 [DPS-WM, w/oRec].

SENATE COMMITTEE ON HEALTH & LONG-TERM CARE

Majority Report: That Substitute Senate Bill No. 5458 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.
Signed by Senators Keiser, Chair; Conway, Vice Chair; Becker, Ranking Minority Member; Kline, Murray, Parlette, Pflug and Pridemore.

Minority Report: That it be referred without recommendation.
Signed by Senator Carrell.

Staff: Kathleen Buchli (786-7488)

Background: Medicaid is health insurance for qualifying low-income and needy people. Medicaid eligible recipients can include children, the elderly, and persons with a disability. Each state designs and administers its own Medicaid program. The federal government jointly funds the program as long as the program complies with the requirements mandated by the Center for Medicaid and Medicare Services. Medicaid funding and services are administered by the Department of Social and Health Services (DSHS) Medical Assistance Administration, except for the nursing home program, which is administered by the Aging and Adult Services Administration.

Medicaid fraud is generally defined as the billing of the Medicaid program for services, drugs, or supplies that are unnecessary; not performed or are of a lower quality; more costly than those actually performed; and purportedly covered items, which were not actually covered. The Medicaid Fraud Control Unit (MFCU) is located in the Office of the Attorney General (AG) and is responsible for policing both Medicaid providers and Medicaid program

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expenditures. MFCU has entered into a memorandum of understanding with DSHS to detect and prosecute fraud in the Medicaid program.

A private citizen is unable to initiate an action, on behalf of the state, against another party committing Medicaid fraud. However, a private citizen may do so on behalf of the federal government under the federal False Claims Act.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (Recommended Substitute): The statute of limitations for prosecuting Medicaid theft and Medicaid false statement cases is ten years. In addition to the Secretary of DSHS, the AG may assess civil penalties on a person or entity committing Medicaid fraud; these penalties may be up to three times the amount of excess benefits or payments received. Civil penalties must be deposited into the Medicaid Fraud Penalty Account which will also receive receipts received under settlements that originated under the federal False Claims Act. The AG may contract with private attorneys and local governments in bringing fraud actions.

Whistleblower protections are provided to employees who reports to DSHS that their employer has fraudulently obtained or attempted to obtain Medicaid benefits or payments. These employees may not be subject to workplace reprisal or retaliatory action; this does not prohibit an employer from terminating, suspending, or disciplining an employee whistleblower for lawful reasons.

DSHS may not pay a durable medical equipment provider for medical supplies unless that provider is a Medicare provider.

The crime of Medicaid theft is moved from the theft statutes to the section relating to Medicaid false statements. Medicaid theft occurs when a person, with intent to deprive wrongfully obtains, or exerts unauthorized control over, property or services, or when a person who by color or aid of deception, obtains control over property or services, which exceed $5,000 in value. Medicaid theft is a class B felony. Except as authorized by the restitution statute, if a fine is imposed it may not be more than $50,000.

A person who presents a false Medicaid claim for payment or approval is subject to a civil penalty of between $5,000 and $10,000, and treble damages received by the state. This penalty may be reduced to double damages if the person cooperates with the AG's investigation. The AG must make a good faith investigation of false Medicaid claims and may bring civil actions, subject to funds appropriated for this purpose.

Qui tam actions are permitted, in which a person, known as a relator, may bring a civil action for the person and the state. The AG may intervene in the qui tam action and the relator may continue as a party, and receive between 15 and 25 percent of the recoveries. If the action is based on disclosures other than those provided by the relator, the relator may receive no more than 10 percent of the recoveries. The relator may conduct the action if the Attorney General does not, and the relator may receive between 25 and 30 percent of the recoveries should this

occur. The relator must also be reimbursed for reasonable expenses and attorneys' fees by the defendant. The AG is also entitled to be reimbursed for reasonable expenses and attorneys' fees by the defendant.

Funds recovered and remaining after distributions to the relator must be returned to the agency administering the Medicaid program being defrauded and the remainder to the Medicaid Fraud Penalty Account. 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. Remedies are provided to employees who suffer workplace discrimination or reprisals because of participation in a false claims action. Jurisdiction, discovery rules, and other procedures are specified for false claims actions.

Appropriation: None.

Fiscal Note: Requested February 2, 2011.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: This bill meets the growing need of the state to fight Medicaid fraud. It will address provider fraud. The bill will bring in money to the state and could bring in more if the False Claims Act qualifies for the federal rebate. It gives the AG the tools to fight Medicaid theft. The longer statute of limitations will save the cases the AG already has. It will enable the AG to hire staff to fight Medicaid fraud and bring back recoveries to the state. DSHS does have an effective integrity program and a new fraud and abuse detection system. We are concerned about the rising costs of healthcare. Reducing waste and fraud will help to control costs.

CON: The bill will deter physician participation in the Medicaid program. Audit activities are already in existence and federal and state agencies already have activities to recover inappropriate payments. Instead of receiving more money, Washington will get less money due to the qui tam plaintiff. This will increase costs due to increased litigation. Seventy-five percent of qui tam cases are for non-meritorious claims. We support Medicaid auditor funding and the AG having the appropriate amount of resources to defend against fraud. The bill contains a bounty hunter provision. Regarding innocent parties, damages should go both ways.

OTHER: Medicaid was found to have the highest number of improper payments among 28 federal programs examined by the U.S. General Accountability Office in 2007. State Medicaid fraud control offices have seen a rapid increase in the number of fraudulent schemes targeting Medicaid dollars the the degree of sophistication with which they are perpetrated. Laws and actions targeting Medicaid fraud and abuse include state false claims acts, electronic fraud and abuse detection systems, establishing Medicaid Inspector General Offices, increasing prosecutorial authority, state whistleblower laws, state anti-kickback laws, state self-referral laws, prescription drug monitoring programs, and larger anti-fraud units. Washington ranks with 20 states in being in the lowest Medicaid fraud recovery range.

Persons Testifying: PRO: Senator Keiser, prime sponsor; Dawn Cortez, Attorney General's Office; Cathy Ott, DSHS; John Barnett, AARP.

CON: Barbara Shichich, Washington State Hospital Association; Tim Layton, Washington State Medical Association; Mel Sorensen, Washington Defense Trial Lawyers; Cliff Webster, Pharmaceutical Research and Manufacturers of America.

OTHER: Katie Mason, National Conference of State Legislatures.