HOUSE BILL REPORT
SHB 1067

As Passed House:
June 28, 2015

Title: An act relating to the medicaid fraud false claims act.

Brief Description: Reauthorizing the medicaid fraud false claims act.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Jinkins, Holy, Magendanz, Nealey, Goodman, Muri, Gregerson, Cody, Kilduff and Pollet; by request of Attorney General).

Brief History:
Committee Activity:
Judiciary: 1/14/15, 1/15/15, 1/22/15 [DPS];
Appropriations: 2/18/15, 2/25/15 [DPS(JUDI)].
Second Special Session
Floor Activity:
Passed House: 6/24/15, 58-39.
Third Special Session
Floor Activity:
Passed House: 6/28/15, 56-41.

Brief Summary of Substitute Bill

- Limits the sunset review and termination of the Medicaid Fraud False Claims Act (MFFCA) to the qui tam provisions of the MFFCA, and extends the sunset review and termination of the qui tam provisions to 2020.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 13 members: Representatives Jinkins, Chair; Kilduff, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Goodman, Haler, Hansen, Kirby, Klippert, Muri, Orwall, Stokesbary and Walkinshaw.

Staff: Edie Adams (786-7180).

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.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Judiciary be substituted therefor and the substitute bill do pass. Signed by 20 members: Representatives Hunter, Chair; Ormsby, Vice Chair; Carlyle, Cody, Dunshee, Hansen, Hudgins, S. Hunt, Jinkins, Kagi, Lytton, Magendanz, Pettigrew, Sawyer, Senn, Springer, Stokesbary, Sullivan, Tharinger and Walkinshaw.

Minority Report: Do not pass. Signed by 11 members: Representatives Chandler, Ranking Minority Member; Wilcox, Assistant Ranking Minority Member; Buys, Condotta, Dent, Haler, G. Hunt, MacEwen, Schmick, Taylor and Van Werven.

Minority Report: Without recommendation. Signed by 2 members: Representatives Parker, Assistant Ranking Minority Member; Fagan.

Staff: Erik Cornellier (786-7116).

Background:

Medicaid Fraud False Claims Act.
Legislation enacted in 2012 established the Medicaid Fraud False Claims Act (MFFCA). The MFFCA establishes civil liability for a number of false or fraudulent activities involving claims for payment to the state Medicaid program. Civil liability for presenting a false or fraudulent claim includes a civil penalty between $5,500 and $11,000 plus three times the amount of damages incurred by the state.

The MFFCA also authorizes qui tam actions that allow private parties, called qui tam relators, to bring a civil action in the name of the state for violations of the MFFCA. 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, and the Attorney General has at least 60 days following the receipt of the complaint to decide whether or not to intervene in the action. If the Attorney General intervenes in the action, the relator continues as a party but his or her participation may be limited. If the Attorney General does not intervene in the suit, the relator may proceed with the case. A relator is entitled to share in the proceeds of any settlements or judgments.

The Attorney General's Medicaid Fraud Control Unit civil section (Civil Section) is responsible for investigating and pursuing actions relating to Medicaid fraud under the MFFCA. The Civil Section is funded through a federal matching grant. The state provides 25 percent of the funding, which comes from Medicaid fraud recoveries deposited in the Medicaid Fraud Penalty Account. The federal government provides a grant funding the remaining 75 percent of the Civil Section.

Sunset Review of the Medicaid Fraud False Claims Act.
The MFFCA is scheduled to terminate on June 30, 2016, under the Washington Sunset Act. The Sunset Act requires the Joint Legislative Audit and Review Committee (JLARC) to conduct a sunset review of the program and provide a report with recommendations

regarding whether the program should be retained, modified, or allowed to terminate. The sunset review of the MFFCA must be completed in 2015.

Summary of Substitute Bill:

The sunset review and termination of the MFFCA are limited to the qui tam provisions of the MFFCA and extended to June 30, 2020.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony (Judiciary):

(In support) This is an excellent consumer protection bill. The MFFCA is a highly effective tool that provides the Attorney General with the investigative resources, causes of action, and remedies that we need to deter Medicaid fraud and recover funds on behalf of the Medicaid program. Approximately 3 to 10 percent of government services in the Medicaid area are lost to fraud. The MFFCA allows our state to maintain a Civil Section funded through federal matching grants to aggressively investigate Medicaid fraud. The costs of the program are covered 100 percent by federal dollars and recoveries. This program is revenue generating for the state. Since the effective date of the MFFCA, the Attorney General's Office has recovered over $72 million for the state and the MFFCA has directly resulted in $2 million in recoveries at a cost of $700,000.

The qui tam provisions of the MFFCA are critical because recoveries are directly impacted by the quality and quantity of claims we receive. Twenty-nine states and the District of Columbia have a state false claims act. We need a false claims act that mirrors the federal act in order to receive an extra 10 percent of recoveries. In addition, if the qui tam provisions are eliminated, Washington's ability to pursue Medicaid fraud cases will be impaired. The state will not be able to learn about and participate in the big national cases affecting Washington since those cases are filed under seal. Since passage of the MFFCA, Washington has assumed a major role at the national level.

(Opposed) This was a controversial law when enacted, but only with respect to the qui tam provisions. We support the other parts of the MFFCA that provide additional tools to the Attorney General to fight fraud. The qui tam provisions allow individuals to pursue cases that the Attorney General has declined to pursue. Evidence suggests that these relator cases are frivolous, rarely result in recoveries, and impose significant time and costs on defendants. Seventy-three percent of qui tam actions are ultimately dismissed. It is inappropriate to allow a case that has been rejected by the Attorney General to be pursued by a private individual.

Physicians in small private practice can face devastating financial consequences even from investigations alone. The qui tam law 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 is clearly frivolous, vexatious, or for harassment. This bar is so high it can never be met. This is an extremely high price to pay for the potential of an extra 10 percent in recoveries. The 10 percent bump in the recovery is not even beneficial since after the relator's share is taken out, the state nets less.

This bill is premature. The JLARC is doing a study of the MFFCA that will be available later this year. We should wait for the results of the JLARC study before moving forward with reauthorizing the MFFCA.

Staff Summary of Public Testimony (Appropriations):

(In support) The Legislature passed this bill before and this bill just removes the sunset. The sunset on the qui tam provisions brought bipartisan support.

Unfortunately, Medicaid fraud is a growth industry. The bill maintains the ability to detect and deter provider fraud, abuse, and neglect. The qui tam provisions are key to deterring fraud. After the significant expansion of Medicaid, more dollars means more opportunities for fraud. It is a bad time to weaken efforts to stop fraud.

There were some fears four years ago, and none of them have come to fruition in the last three years. There is no evidence of a single frivolous claim, but there is a lot of evidence that legitimate claims will not be brought if this sunsets.

This bill is good for taxpayers and the state budget. It generates revenue at a time when the Legislature is working hard to find all the revenue it can to meet the state's budget commitments. It would be a mistake to remove the tools that can bring in millions. This bill is self-sustaining. There have been good recoveries from the qui tam provisions. The state recovers money from people that steal from the system and deposits it into the Medicaid Fraud Penalty Account. Fifty percent of it goes to the federal government to restore their contribution to Medicaid. Approximately $5.7 million and growing was directly attributable to the Medicaid False Claims Act after a $900,000 state investment. Opportunities will grow as the state gets more referrals from in-state qui tam plaintiffs and larger national cases, and that means greater recoveries. This has been a good law for consumer protection.

The bill leverages federal dollars. There is a 75 percent match for fraud prevention activities. If the bill is weakened and does not match the federal False Claims Act the state would lose federal dollars. The Washington act must follow the federal act to keep the 75 percent match for administration and a 10 percent increase in the state share of recoveries. The qui tam provisions need to be retained exactly as they are to keep the state in compliance with the federal False Claims Act.

The bill is not premature. The False Claims Act would not expire until next year but the Legislature needs to write a budget this year and it has to write a four-year outlook.

The Legislature should certainly go ahead with the Joint Legislative Audit and Review Committee (JLARC) study.

(Opposed) The bill is a year premature. The provisions sunset next year. Without this bill there would be a JLARC study and cost-benefit analysis that the Legislature could benefit from seeing.

There are some additional impacts of the bill on physicians, hospitals, and small practices.

The bulk of the bill is not objectionable.

The qui tam provisions allow an individual to report suspected fraud to the Attorney General (AG), and the AG is obligated to investigate the reports. If the AG decides not to go forward, the individual can go forward separately. The prospects for high-quality cases are minimal after the AG has decided not to file a case, but the costs to providers are heavy both financially and on their reputations.

The bill is unbalanced. The attorney's fees and costs provisions are skewed in favor of relators to the detriment of defendants. Even when a defendant wins, the standard for attorney's fees and costs is unreachable. Plaintiffs get fees and costs and defendants never do.

Persons Testifying (Judiciary): (In support) Representative Jinkins, prime sponsor; and Mike Webb, Doug Walsh, and Carrie Bashaw, Office of the Attorney General

(Opposed) Cliff Webster, Washington Liability Reform Coalition; Jeff Gombosky, Pharmaceutical Research and Manufacturers of America; Mel Sorenson, Washington Defense Trial Lawyers; and Katie Kolan, Washington State Medical Association.

Persons Testifying (Appropriations): (In support) Representative Jinkins, prime sponsor; Michael Temple, Washington State Association for Justice; Mike Webb, Office of the Attorney General; and Doug Walsh, Medicaid Fraud Control Unit, Office of the Attorney General.

(Opposed) Cliff Webster, Liability Reform Coalition; and Mel Sorensen, Washington Defense Trial Lawyers.

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

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