

# GENERAL ASSEMBLY OF NORTH CAROLINA



Session 2007

## Legislative Fiscal Note

**BILL NUMBER:** Senate Bill 179 (Second Edition)

**SHORT TITLE:** Actions to Address Medicaid Fraud.

**SPONSOR(S):** Senator Rand

	FISCAL IMPACT				
	Yes (X)	No ( )	No Estimate Available ( )		
	<u>FY 2007-08</u>	<u>FY 2008-09</u>	<u>FY 2009-10</u>	<u>FY 2010-11</u>	<u>FY 2011-12</u>
<b>EXPENDITURES:</b>					
<b>Justice</b>					
Receipts	\$461,614	\$424,742	\$424,742	\$424,742	\$424,742
Requirements	\$615,485	\$566,322	\$583,311	\$600,810	618,834
<b>Total</b>	<b>\$153,871</b>	<b>\$141,580</b>	<b>\$158,569</b>	<b>\$176,068</b>	<b>\$194,092</b>
<b>Judicial</b>	<b>Small increase in costs expected; amount cannot be determined.</b>				
<b>TOTAL EXPENDITURES:</b>	<b>\$153,871</b>	<b>\$141,580</b>	<b>\$158,569</b>	<b>\$176,068</b>	<b>\$194,092</b>
<b>POSITIONS:</b>					
<b>(cumulative)</b>					
<b>Justice</b>	5	5	5	5	5
<b>PRINCIPAL DEPARTMENT(S) &amp; PROGRAM(S) AFFECTED:</b> Department of Justice; Judicial Branch.					
<b>EFFECTIVE DATE:</b> December 1, 2007.					

**BILL SUMMARY:** The first edition of S.B. 179 increases the criminal and civil penalties for medical assistance provider fraud; authorizes private civil action concerning false provider claims; authorizes certain investigative demand procedures; and appropriates funds to the Department of Justice to implement the act.

**Section 1(a).** Rewrites G.S. 108A-70.11 to provide that the “Medical Assistance Program” means the “Medical Assistance Program established pursuant to G.S. 108A-54 and includes the North Carolina Division of Medical Assistance or its fiscal agent.”

**Section 1(b).** Amends G.S. 108A-70.12 (a) to also make it unlawful for medical assistance providers under the Medical Assistance Program to: 1) conspire to defraud the Medical Assistance Program by getting a false claim allowed or paid; and, 2) knowingly make or use, or cause to make or use, a false record to conceal, avoid, or decrease an obligation to pay/transmit money or property to the Medical Assistance Program.

**Section 1(c).** Amends G.S. 108A-70.12 (b) (1) to increase the floor and ceiling for civil penalties assessed against violators of G.S. 108A-70.12; from \$5,000 to \$5,500, and from \$10,000 to \$11,000, respectively.

**Section 2.** Enacts new Part 7A (Civil Action by Private Persons for Provider False Claims) of Article 2 of G.S. Chapter 108A to allow a person to bring a civil action for a violation of G.S. 108A-70.12 on behalf of the person and the State, in the name of the State (G.S. 108A-70.17).

G.S. 108A-70.17A. If the State proceeds with the action, it assumes primary responsibility to prosecute the action and is not bound by the person who initiates it. Provides for state dismissal of the action; for state settlement of the action; for the imposition of limitations on the person initiating the action; for the person initiating the action to continue if the state elects not to proceed; for a staying of the discovery period; and, for the state to pursue the claim through alternative remedies.

G.S. 108A-70.17B. Provides for the award of penalties and damages to a qui tam plaintiff, whether the State proceeds with the action or the person bringing the action proceeds. If the state proceeds, the qui tam plaintiff may be awarded between 15 and 25 percent of the action proceeds or claim settlement, depending upon the extent of substantial contribution. Such award may not exceed 10 percent of the proceeds/settlement if the action brought is found to be based primarily on information *other* than that proved by the plaintiff. If the state does not proceed and the qui tam plaintiff continues the action, the court may award 25 to 30 percent of the proceeds/settlement. The qui tam plaintiff's share of the proceeds/settlement may be reduced if he is found to have planned or initiated the violation, accounting for that person's role in advancing the case to litigation (i.e. dismissal without proceeds, upon conviction of criminal conduct). Also provides for the award of reasonable attorney's fees and expenses to the defendant if the action is frivolous.

G.S. 108A-70.17C. Bars the following actions: 1) an action based on information from a present or former State employee, unless that employee exhausted existing internal procedures and unless the State failed to act on the information within a reasonable time; 2) actions based upon allegations that are the subject of a civil suit or administrative proceeding the State is already party to; and, 3) actions based upon public disclosure in several settings, unless the action is brought by the Attorney General or the person bringing the action is an "original source" of the information.

G.S. 108A-70.17D. Sets the statute of limitations at: 1) six years after a violation is committed; or, 2) more than three years after the date when facts material to the right of action should have been known, but in that event, not more than 10 years after the date the violation is committed, whichever is later.

**Section 3.** Rewrites G.S. 108A-70.15 to exempt from civil liability any person who provides information, in the absence of fraud or malice, for the investigation of false claim violations under Part 7A of Article 2. Makes conforming changes to also provide relief to provider employees for lawful acts in the furtherance of actions pursuant to Part 7A.

**Section 4.** Enacts new G.S. 108A-63.1 (Authorized investigative demand procedures) allowing the Attorney General to issue a subpoena for records, and/or testimony related to violations of G.S. 108A-64 (Medical assistance recipient fraud), 108A-60 (Protection of patient property), 14-32.1 (Assaults on handicapped persons; punishments), or 14-32.2 (Patient neglect and abuse; punishments). Specifies the objects and actions required, and provides for witness fees and the enforcement of subpoenas. Limits the instances in which an individual's health information may be disclosed.

**Section 5.** Amends G.S. 108A-63 to create the following new criminal offenses:

Proposed subsection (e) makes it illegal for a medical assistance provider to, or attempt to: 1) execute a "scheme or artifice" to defraud the Medical Assistance Program; or, 2) use false/fraudulent pretenses to obtain money or property owned by, or in the custody of, the Medical Assistance Program. *If the*

value of the health care benefits, items, or services received is \$100,000 or more, violation is a Class C felony; if the value is less than \$100,000, violation is a Class H felony.

Proposed subsections (f) and (g) make it illegal for any person to knowingly and willfully solicit, receive, offer, or pay any remuneration: 1) for referring an individual to a person for the furnishing/arranging of services for which payment is made under the Medical Assistance Program; or, 2) for purchasing, leasing, ordering, or arranging therefore an item for which payment is made under the Medical Assistance Program. Contracts between the State and a public or private agency responsible for provider referrals are exempt. *Violation of either subsection is a Class I felony, pursuant to amended G.S. 108A-63(c).*

**Section 6.** Appropriates, from the General Fund to the Department of Justice, unspecified amounts for FY 2007-08 and FY 2008-09 for additional investigative legal and support positions and for other purposes to carry out the act.

**Section 7.** Provides that Section 1 through 4 of the act become effective December 1, 2007. The remainder of the act becomes effective July 1, 2007.

***The second edition (Senate committee substitute) makes the following changes to the first edition:***

- Modifies G.S. 108A-70.12 to clarify that it is unlawful for a medical assistance provider to engage in any of the listed activities.
- Modifies proposed new G.S. 108A-70.17 as follows:
  1. Clarifies that a civil action initiated under G.S. 108A-70.12 (liability for certain acts) may be dismissed prior to service of the complaint on the defendant if specified conditions are met
  2. Clarifies that the time period to file a response to a complaint filed under the section begins 21 days after the complaint is unsealed and served on the defendant.
  3. Permits the court to consolidate or dismiss subsequent actions filed based on the facts underlying a pending action while the complaint in that action is sealed.
- Modifies proposed new G.S. 108A-70.17A to provide that the court may delay a discovery request from the person initiating the action for a period of not more than 60 days if the state makes a showing that any proposed discovery in the civil action would interfere with the state's ongoing criminal or civil prosecution. Deletes provision that provided that a person initiating the action has the same rights in an alternate proceeding as the person would have had if the action continued under the part.
- Modifies proposed new G.S. 108A-70.17B to direct that a person who has received or may receive a share of the proceeds or settlement based on the same facts in an action brought in federal court may not receive a share of proceeds awarded on the same facts in a state court.
- Makes additional changes in provisions regarding awards to *whistleblower* plaintiffs.
- Modifies proposed new G.S. 108A-70.17C to direct that a court does not have jurisdiction over an action brought under the part based on information discovered by a present or former employee of a political subdivision of the state.
- ***Deletes proposed new G.S. 108A-63.1 (authorized investigative demand procedures) and proposed amendments to G.S. 108A-63 (Medical assistance provider fraud). Removal of G.S. 108A-63 eliminates the new criminal offenses proposed in the first edition.***
- Deletes proposed appropriation from the General Fund to the Department of Justice.
- The act becomes effective December 1, 2007, and applies to offenses (for civil penalty purposes) committed on or after that date and actions filed on or after that date.

*Source: Adapted from Bill Digest S.B. 179 (02/14/0200)*

## **ASSUMPTIONS AND METHODOLOGY:**

### **Department of Justice**

DOJ assumes the need for a five person civil team to implement S.B. 179 including one Attorney III, two Attorney IIs, one paralegal, and one auditor.

Costs are estimated at \$615,485 in Year 1, offset by federal receipts, reducing the cost to \$153,871. Total cost in 08/09 would be \$566,322. Receipts would reduce the state amount to \$141,580. The five year cost is shown in the Fiscal Impact Table on Page 1 of the Note.

The DOJ justification, which FRD believes is reasonable, is shown below:

#### **1. Mandated Duties**

The proposed North Carolina qui tam act would mandate that the Department of Justice engage in new duties including the following:

- a. Accept service of filed qui tam actions. G.S. § 108A-70.17(b)
- b. Review the action to determine whether or not to intervene. G.S. § 108A-70.17(b)
- c. Maintain information under seal. G.S. § 108A-70.17(b)
- d. Move the court for extensions of the seal as necessary. G.S. § 108A-70.17(c)
- e. Intervene or notify the court of its declination. G.S. § 108A-70.17(d)
- f. Upon intervention, have primary responsibility for prosecuting the action. G.S. § 108A-70.A(a)
- g. Appear in court and defend any motions to dismiss made over the objection of a realtor. G.S. § 108A-70.A(b)
- h. Settle the action and defend the settlement in court if the realtor objects to the settlement. G.S. § 108A-70.A(c)
- i. Determine the extent of participation of the realtor. G.S. § 108A-70.17A(d)
- j. Negotiate or litigate the percentage of the proceeds to which the realtor is entitled as an award. G.S. § 108A-70.17B

#### **2. Increased Workload**

Virginia's qui tam statute became effective in 2003, and they have already opened 60 cases. Tennessee's qui tam statute became effective in 2001, and they have opened over 100 qui tam cases. We anticipate that at least that many will be filed in North Carolina. These filings will require a sufficient number of staff to be able, at a minimum, to review the filings for merit in a timely manner in order to make the required determination of whether the state should intervene. They will need to track the progress of cases in which the state intervenes. They will also need to track the progress of cases in which the state does not intervene in order to reassess whether the state should intervene at a later date. The evidence in these cases is typically voluminous. The civil staff will have to have or develop expertise in the area of qui tam law and well has health care fraud, which can both be complex areas. This can better be done by someone who is dedicated full time to these cases.

#### **3. Increased Recoveries Seen by Other States with Civil Positions**

The establishment of a civil team will allow the Medicaid Fraud Control Unit to actively pursue qui tam cases and increase recoveries. This is generally shown by the experience of other states that have enacted qui tam provisions, which includes examples as follows.

Virginia created five civil positions in the Virginia Medicaid Fraud Control Unit. These five positions consist of a supervising attorney, two mid-level attorneys, an auditor, and a paralegal. Since 2005 Virginia's qui tam recoveries have totaled more than \$24 million.

Tennessee has two attorneys, one paralegal, and an auditor on contract working full time on qui tam cases. Tennessee's qui tam recoveries have totaled more than \$19 million.

California enacted a qui tam act in 1987 but only created one civil position. From 1987 until 1999, the California Medicaid Fraud Control Unit was not able to do more than minimal tracking to keep up with federal qui tam actions. They were not able to take any meaningful independent action. In 1999 their civil unit was increased to 40 positions. With those resources, California was able to establish itself as a national leader in qui tam cases. Their qui tam recoveries may well reach \$1 billion next year.

On the other hand, states that enacted qui tam provisions but did not fund civil positions or at most only allocated one or two positions to handle the qui tam cases have had lower recoveries. In two instances where no positions were allocated there have been no recoveries under their state false claims acts to date.

#### **4. Increased Likelihood of Intervention**

Having a staff that is dedicated to and expert in the area of qui tam and health care fraud law will increase the likelihood that they will recognize meritorious qui tam cases and have sufficient resources to intervene. Recoveries in federal qui tam cases are substantially higher in cases in which the government intervenes than in cases in which the government does not intervene. As of 2003, recoveries in federal qui tam actions in cases in which DOJ intervened totaled \$7.51 billion; whereas, recoveries in cases that were declined totaled \$362 million. Likewise, it should be expected in state qui tam cases that recoveries in cases in which the state intervenes will be substantially higher than in cases in which the state does not intervene. Therefore, providing adequate staffing should lead to more cases in which the state can intervene, which should in turn lead to more dollars recovered.

Further, if the MIU intervenes, the realtor's share is capped at 25% of the proceeds of the action. G.S. § 108A-70.17B (a). If the MIU does not intervene, it is unlikely that the case would go forward, but if the case did go forward and was successful, the realtor could recover up to 30% of the proceeds of the action. G.S. § 108A-70.17B (b). The higher the percent of the proceeds that goes to the realtor, the less the percentage of the proceeds that goes back to the state Medicaid Program or school fund.

#### **5. Participation in NAMFU Qui Tam Working Group**

The National Association of Medicaid Fraud Control Units (NAMFCU) has established a working group that oversees all national qui tam investigations that involve Medicaid. The group is composed of representatives of all states that have enacted qui tam provisions. The group meets periodically to discuss national investigations and assigns two members to supervise each investigation. Establishing a North Carolina civil team will allow North Carolina to fully participate in the qui tam working group and stay abreast of investigation developments and ensure that North Carolina is represented in group discussions.

#### **6. Staffing Compared to Other States**

There are Medicaid Fraud Control Units (MFCU) in 48 states and the District of Columbia. They range in size from the largest, which is New York with a staff of over 300 investigating a Medicaid program with a budget of over \$44 billion, to the smallest, which is Wyoming with a staff of 4 investigating a Medicaid program with a budget of approximately \$396,000. North Carolina is in the middle range. A September 2006 comparison of eleven mid range states in which the Medicaid programs expend between \$14.2 billion to \$5 billion is as follows:

**DOJ Table 1. Ranked by Medicaid Budget (Highest to Lowest)**

	STATE	MEDICAID BUDGET	TOTAL STAFF
1	Pennsylvania	\$14.2 Billion	50
2	Ohio	\$11.0 Billion	47
3	Illinois	\$12.2 Billion	67
4	Tennessee	\$8.7 Billion	37
5	North Carolina	\$8.1 Billion	29
6	New Jersey	\$8.0 Billion	43
7	Michigan	\$8.0 Billion	40
8	Georgia	\$7.7 Billion	53
9	Louisiana	\$5.6 Billion	48
10	Massachusetts	\$5.3 Billion	32
11	Virginia	\$5.0 Billion	39

**DOJ Table 2. Ranked by MFCU Staff (Highest to Lowest)**

	STATE	TOTAL STAFF	MEDICAID BUDGET
1	Illinois	67	\$12.2 Billion
2	Georgia	53	\$7.7 Billion
3	Pennsylvania	50	\$14.2 Billion
4	Louisiana	48	\$5.6 Billion
5	Ohio	47	\$11.0 Billion
6	New Jersey	43	\$8.0 Billion
7	Michigan	40	\$8.0 Billion
8	Virginia	39	\$5.0 Billion
9	Tennessee	37	\$8.7 Billion
10	Massachusetts	32	\$5.3 Billion
11	North Carolina	29	\$8.1 Billion

As shown by Table 1 above, of these eleven states, North Carolina is the fifth largest state in terms of the size of its Medicaid Program budget. However, as shown by Table 2, North Carolina is last in terms of the size of its MFCU staffing. Additional civil and criminal positions will help the MIU better oversee an \$8.1 billion Medicaid program.

**Judicial Branch**

While the number of resultant qui tam cases and civil penalty appeals is unknown, the Administrative Office of the Courts expects that any additional caseload will increase court-time requirements and the associated costs of case disposal. Additional caseload will primarily impact superior court personnel workload (superior court judge, court reporter, and clerk).

**SOURCES OF DATA:** Department of Justice; Judicial Branch.

**TECHNICAL CONSIDERATIONS:** None

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