

STORAGE NAME: h1123a.grr
DATE: April 1, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL RULES AND REGULATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 1123

RELATING TO: Medicaid Provider Fraud

SPONSOR(S): Representative Goode and others

STATUTE(S) AFFECTED: §§ 409.910 and 624.424 F.S.

COMPANION BILL(S): SB 1670 (similar), and SB 70 (compare)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) GOVERNMENTAL RULES AND REGULATIONS YEAS 6 NAYS 1
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I. SUMMARY:

During the 1994 Regular Session, the Legislature made substantial changes in the Third-Party Liability Act through Committee Substitute for Committee Substitute for Senate Bill 2110, enacted as ch. 94-251, Laws of Florida. The law amended the legislative intent of the Act to broaden principles of recovery to improve the prospects for greater dollar recovery by the state; broadened the scope of the state's cause of action against liable third parties; broadened the state's ability to consolidate cases involving common legal issues; provided for different notice requirements in certain instances; and provided additional remedies by construing each item of expense as a separate cause of action.

HB 1123 repeals the changes made to § 409.910, F.S. (1995), as amended by Ch. 94-251, Laws of Florida. It also provides that a civil action initiated on or since July 1, 1994, which seeks to establish liability pursuant to the 1994 amendment provisions may not be maintained, continued, or enforced. The effective date of the provisions of the bill are retroactive to July 1, 1994.

There was one amendment to conform s. 624.424, F.S.; it struck the Department of Health and Rehabilitative Services and inserted Agency for Health Care Administration to reflect the current structure of state government. It passed without objection.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

The Medicaid Program

Medicaid is a public assistance program through which health care services are provided to eligible poor and disabled individuals. Under the program, which is funded with federal, state, and county resources, payments are made to qualified health care providers on behalf of Medicaid recipients for particular medical services. The single state agency responsible for administration of the Medicaid program in Florida is the Agency for Health Care Administration (AHCA or agency), which assumed those duties from the Department of Health and Rehabilitative Services in 1993.

Federal law governing Medicaid provides that a state must commit to "take all reasonable measures to ascertain the legal liability of third parties (including health insurers, group health plans ..., service benefit plans, and health maintenance organizations) to pay for care and services available under" the program. 42 U.S.C. s. 1396a.(a)(25)(A). Further, a state must commit to seek reimbursement in situations where a legal liability is found to exist after medical assistance has been made available and where the likely recovery will exceed the costs of such recovery. Id. at s. 1396a(a)(25)(B).

Florida has carried out activities related to third-party liability since the Medicaid program began in this state in 1970. The express authority to pursue reimbursement for health care expenses paid for by Medicaid was first provided in 1978 and today is contained in the state's Medicaid Third-Party Liability Act, § 409.910, F.S. (1996 Supp.). The Act sets forth the legislative intent and the various rights of the state, Medicaid recipients, and liable third parties with respect to Medicaid recovery. Among other provisions, the Act specifies that the state is automatically subrogated to any rights that a Medicaid recipient has to third-party benefits § 409.910(6)(b), F.S. (1996 Supp.). Under the third-party liability program, the state has employed a variety of tools through which to secure reimbursement for Medicaid payments, such as auditing hospital claims, sharing in judgments or settlements won by recipients, and recovering from insurers. In fiscal years 1990-91 through 1993-94, the state collected cash reimbursements totaling approximately \$95 million. Fiscal information for fiscal years 1995 and 1996 is forthcoming.

Ch. 94-251, Laws of Florida

During the 1994 Regular Session, the Legislature made substantial changes in the Third-Party Liability Act through Committee Substitute for Committee Substitute for Senate Bill 2110, enacted in ch. 94-251, Laws of Florida. The measure amended the legislative intent of the Act to broaden principles of recovery to improve the prospects for greater dollar recovery by the state; broadened the scope of the state's cause of action against liable third parties; broadened the state's ability to consolidate cases involving common legal issues; provided for different notice requirements in certain instances; and provided additional remedies by construing each item of expense as a separate cause of action.

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In June 1994, Associated Industries of Florida, Publix Supermarkets, the National Association of Convenience Stores, and Philip Morris filed a complaint against the Agency for Health Care Administration (AHCA) and the Department of Business and Professional Regulation, challenging the constitutionality of the 1994 amendments to the Medicaid Third-Party Liability Act. A Leon County Circuit Court judge ruled that the AHCA, the entity charged with enforcing the provisions of ch. 94-251, Laws of Florida, was structured in violation of the Florida Constitution and that the amendments to § 409.910, F.S. were unconstitutional. On appeal, the First District Court of Appeal certified the judgement as a matter of great public importance for review by the Florida Supreme Court. Agency for Health Care Administration, et al., v. Associated Industries of Florida, Inc., et al., 678 So.2d 1239 (Fla. 1996).

The supreme court held that the AHCA was a valid independent agency and that most of the provisions enacted in ch. 94-251 Laws of Florida, were facially constitutional. Id. The court held that the creation of a new cause of action to which traditional affirmative defenses did not apply was not facially violative of due process, nor were provisions that allowed joinder of multiple claims and called for liberal construction of the provisions. Id. The court did hold provisions allowing the State to proceed without identifying individual recipients to be violative of due process because the provisions did not allow the defendant to rebut the statutory presumption that the class could be determined to by so large as to defeat attempts to identify each claim. Id. at 1254. Additionally, the court held that the abolition of the statute of repose could only apply to claims not yet barred by the statute of repose when the suit (discussed below) was filed. Id. Finally, the court held that the theories of joint and several liability and market share liability were incompatible where used in conjunction but that each theory of liability may be used independently. Id. at 1255-6.

A petition for certiorari to the United States Supreme Court was denied on March 17, 1997. Associated Industries of Fla., et al., v. Agency for Health Care Admin., 1996 WL 723400 (U.S.).

The State of Florida, et. al, v. The American Tobacco Co., et. al, is the State's action to recover Medicaid expenditures for Medicaid recipients injured from the use of tobacco products. Among the counts listed in the complaint are two that specifically refer to the provisions now found in § 409.910 F.S., as amended by ch. 94-251, Laws of Florida. This case has been filed in the Circuit Court of Palm Beach County, and is scheduled to go to trial in August 1997.

B. EFFECT OF PROPOSED CHANGES:

This bill repeals the changes made to s. 409.910, F.S., as amended by Chapter 94-251, Laws of Florida. It also provides that a civil action initiated on or since July 1, 1994, which seeks to establish liability pursuant to the 1994 amendment provisions may not be maintained, continued, or enforced. The effective date of the provisions of the bill are retroactive to July 1, 1994.

Please see section-by-section analysis for details.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

None.

(2) what is the cost of such responsibility at the new level/agency?

None.

(3) how is the new agency accountable to the people governed?

None,

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION RESEARCH:

Section 1: Amends § 409.910 F.S., (1995). This section repeals the provisions which were adopted in sec. 4, ch. 94-251, Laws of Florida. The section will:

1. Remove language that placed comparative negligence, assumption of risk, and all other affirmative defenses normally available to liable third parties on the list of legal principles specifically abrogated under the Act.

2. Remove provisions applying the concept of joint and several liability to Medicaid recoveries by the agency and specifying that common law theories of recovery shall be liberally construed to fulfill the legislative intent;
3. (a) Delete language directing the state to seek reimbursement in situations in which third-party liability or benefits are discovered either before or after Medicaid has provided medical assistance, and (b) restore language directing the state to seek reimbursement in situations in which third-party benefits are discovered or become available after Medicaid has provided such assistance;
4. Removes a provision specifying that the state has a cause of action against liable third parties, independent from the Medicaid recipient, for the recovery of Medicaid expenses;
5. Inserts language that the state's right to compromise a Medicaid recipient's claim is limited to those situations in which the recipient is not otherwise represented by an attorney on the claim;
6. Removes provisions specifically authorizing the state to:
 - (a) seek recovery from liable third parties in one proceeding for payments made on behalf of multiple Medicaid recipients;
 - (b) prove causation and damages in such a consolidated proceeding with statistical analysis;
 - (c) seek recovery based on payments made on behalf of a class of recipients without having to name individual recipients; and
 - (d) proceed under a market-share theory of recovery;
7. Removes provisions exempting the state from having to notify Medicaid recipients when the state elects to seek reimbursement for multiple payments in a single proceeding;
8. Removes a provision specifying that each item of Medicaid expense incurred by the State shall constitute a separate cause of action for purposes of the Act's five-year statute of limitations;
9. Removes a provision specifying that the defense of statute of repose is inapplicable to third-party liability actions brought by the state; and
10. Corrects a statutory cross-reference in a provision allowing the state to seek treble damages in cases of suspected criminal violations or fraudulent activity. In addition to correcting the cross-reference, this section removes a provision allowing the state to keep all such treble damages when the recipient has no right to intervene or fails to intervene.

Section 2: Amends § 624.424, F.S., (1995), to conform a statutory cross-reference to the changes made in section 1 of this bill.

Section 3: Provides that civil action initiated on or since July 1, 1994 which seeks to establish liability pursuant to the 1994 amendment provisions may not be maintained, continued, or enforced.

Section 4: Provides an effective date of upon becoming a law retroactive to July 1, 1994.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

The provisions of ch. 94-251, Laws of Florida, arguably improve the prospects of the state recovering Medicaid expenditures for injuries to Medicaid recipients from liable third parties. The state is currently employing these provisions in its suit against several tobacco companies. By repealing the provisions of ch. 94-251, Laws of Florida, the prospects for recovery from liable third parties by the state for Medicaid expenditures for injuries to Medicaid recipients are returned to the status prior to the enactment of the 1994 law.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

4. Total Revenues and Expenditures:

Indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

The statute still provides the state with the potential to recover for Medicaid expenditures against liable third parties. The repeal of the provisions of ch. 94-251, Laws of Florida, will return the State to the position it had prior to 1994 for recovery of Medicaid costs from liable third parties. The costs to private entities are indeterminate.

2. Direct Private Sector Benefits:

Indeterminate.

3. Effects on Competition, Private Enterprise and Employment Markets:

Indeterminate.

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require the counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenue in the aggregate

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the authority that municipalities or counties have to raise revenue in the aggregate

V. COMMENTS:

A statute of limitation establishes a time period within which an action must be brought, measured from the time the cause of action accrues. A statute of repose is not a true statute of limitations since it begins to run not from the accrual of the cause of action, but from an established or fixed event. A statute of repose abolishes or completely eliminates the underlying substantive right of action and not just the remedy available to the plaintiff. 35 Fla. Jur. 2d 10-11.

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Market share theory of liability developed to provide a remedy where there is an inherent inability to identify the manufacturer of the product that caused the injury. Conley v. Boyle Drug Co., 570 So.2d 275 (Fla. 1990). It is based on the premise that defendant manufacturers are initially presumed to have equal shares of the market of the offending product and do not otherwise establish their market share and are then liable for the percentage of the plaintiff's judgment that represents their presumptive share of the market and are not jointly and severally liable. Conley at 282.

Joint and several liability, as modified by Florida Statute, applies only to economic damages. Foreman v. Russo, 624 So.2d 333 (Fla. 2d DCA 1993). It applies in cases where a party's fault equals or exceeds that of the claimant, in all cases in which the total damages do not exceed \$25,000, or in cases based on an intentional tort or where joint and several liability is specifically provided for in statute. See Conley, 570 So.2d at 285.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Amendment number one struck the Department of Health and Rehabilitative Services and inserted Agency for Health Care Administration in section three of the bill. This amendment conformed the Florida Statutes to reflect the current structure of state government. It passed without objection.

VII. SIGNATURES:

COMMITTEE ON GOVERNMENTAL RULES AND REGULATIONS:

Prepared by:

Legislative Research Director:

David M. Greenbaum

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