

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2594

SPONSOR: Senator Diaz de la Portilla

SUBJECT: Medicaid Provider Fraud

DATE: April 1, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Parham</u>	<u>Wilson</u>	<u>HC</u>	<u>Favorable</u>
2.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill clarifies the Medicaid provider fraud statute to make it unlawful to knowingly *and willfully*, rather than just knowingly, engage in prohibited activities under the Medicaid program. The bill clarifies that proof that a document was submitted with false or misleading information or proof of a false claim creates an inference that the person whose signature appears on the document knew of and *willfully* made the false statement or misrepresentation. The bill reenacts the section of the Florida Statutes related to the Criminal Punishment Code to incorporate the clarification made by the bill in the Medicaid provider fraud statute.

By amending the statute to add the element of *willful* acts, one of the reasons the Third District Court of Appeal found s. 409.920(2)(e), F.S., unconstitutional is corrected by the bill. Another constitutional flaw raised by the court is not addressed in the bill.

This bill amends s. 409.920, Florida Statutes.

This bill reenacts s. 921.0022, Florida Statutes.

II. Present Situation:

Medicaid

Medicaid is a health care program that is jointly funded by the federal, state, and county governments to provide medical care to eligible individuals. Medicaid is the largest program providing medical and health-related services to the nation's poorest citizens. Within broad national guidelines, which the federal government establishes, each of the states:

- Establishes its own eligibility standards;
- Determines the type, amount, duration, and scope of services;
- Sets the rate of payment for services; and
- Administers its own program.

The Agency for Health Care Administration (AHCA) is the single state agency responsible for the Florida Medicaid Program. The statutory provisions for the Medicaid program appear in ss. 409.901 through 409.9205, F.S.

Florida's Medicaid budget for fiscal year 2003-2004 is \$12.5 billion. The Federal government currently contributes 61.88 percent of this total for Florida (58.93 percent Federal Medicaid Assistance Percentage plus a 2.95 percent supplemental through June 2004).

Medicaid Fraud and Abuse

Federal law requires states to establish programs designed to educate physicians and pharmacists regarding fraud, abuse, and inappropriate prescribing. In the past few years, federal and state agencies have expanded investigation and prosecution of Medicaid (and Medicare) fraud and abuse. In almost all cases, the investigations are focused on providers who may be double billing, over-billing, or charging for services not actually delivered to recipients. A 1999 General Accounting Office report on Medicaid (and Medicare) fraud and abuse suggests that this area deserves the ongoing attention of state government.

Regulation of Medicaid Providers

Section 409.920, F.S., contains provisions related to Medicaid provider fraud, and requires the Attorney General to conduct a statewide program of Medicaid fraud control. The duties of the program include investigation of possible criminal violations pertaining to the administration of the Medicaid program, in the provision of medical assistance, or in the activities of Medicaid providers. The Attorney General is required to investigate alleged abuse or neglect of patients in health care facilities receiving Medicaid payments, and misappropriation of patient's private funds in facilities receiving Medicaid payments, in coordination with AHCA. The Attorney General is required to refer all suspected abusive activities not of a criminal nature to AHCA, as well as each instance of overpayment which is discovered during the course of an investigation.

Medicaid Fraud Control Unit

Section 16.59, F.S., creates the Medicaid Fraud Control Unit (MFCU) within the Department of Legal Affairs. The unit is authorized to investigate all violations of s. 409.920, F.S., relating to Medicaid provider fraud, and any criminal violations discovered during the course of those investigations. The unit is authorized to refer any criminal violation to the appropriate prosecuting authority. As part of ongoing investigations, MFCU may request physician's accounts or records if MFCU suspects fraud.

State v. Gabriel Harden, 2004 WL 444154 (Fla. 3rd DCA 2004)

In a January, 2004, ruling, the Third District Court of Appeal held that s. 409.920(2)(e), F.S., the “kickback” provision in the Medicaid provider fraud statute, is unconstitutional under the Supremacy Clause of the U.S. Constitution (Art. VI, c1.2). Section 409.920, F.S., makes certain specified activities relating to Medicaid claims unlawful and declares violations to be a third degree felony.

The State of Florida charged Gabriel Harden and nine other defendants with violating the “anti-kickback” provision of s. 409.920(e), F.S., by paying drivers for the “solicitation of transportation” of Medicaid-eligible children to dental facilities for treatment. Those drivers were allegedly employed by three corporate entities providing dental services to children.

In dismissing the state’s complaint, the trial court in Miami-Dade County held that s. 409.920(2)(e), F.S., was preempted by the federal Medicaid Act and a federal rule. On appeal to the Third District Court of Appeal, the state argued Florida’s anti-kickback statute did not conflict with the federal version and that there was no preemption under the Supremacy Clause of the U.S. Constitution.

The federal Medicaid anti-kickback statute, 42 U.S.C. 1320-7b, does not apply to compensation paid through a bona fide employment relationship and expressly protects such arrangements from prosecution. In contrast, Florida’s anti-kickback statute does not have a “safe harbor” provision for such conduct. The federal anti-kickback statute also contains a “knowing and willful” *mens rea* requirement. Florida’s anti-kickback statute (s. 409.920(1)(d) and (2), F.S.) only requires that the defendant act “knowingly.”

The appellate court found that because Florida criminalizes conduct that is protected under federal law, s. 409.920(2)(e), F.S., violates the Supremacy Clause.

III. Effect of Proposed Changes:

Section 1. Amends s. 409.920, F.S., related to Medicaid provider fraud to clarify that it is unlawful to *willfully*, rather than just knowingly:

- Make, cause to be made, or aid and abet in the making of any false statement or representation of a material fact in any claim submitted to AHCA;
- Make, cause to be made, or aid and abet in the making of a claim for items or services that are not authorized to be reimbursed by the Medicaid program;
- Charge, solicit, accept, or receive anything of value, other than an authorized copayment from a Medicaid recipient, from any source in addition to the amount legally payable for an item or service provided to a Medicaid recipient under the Medicaid program, or failing to credit AHCA for payment received from a third-party source;
- Make or cause to be made any false statement or representation of a material fact in any document containing items of income or expense that is or may be used by AHCA to determine payments for an item or service provided by a provider;
- Solicit, offer, pay, or receive any remuneration, including any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an

individual to a person for the furnishing or arranging of any item or service for which payment may be made, in whole or in part, under the Medicaid program, or in return for obtaining, purchasing, leasing, ordering, or arranging for or recommending, obtaining, purchasing, leasing, or ordering any goods, facility, item, or service, for which payment may be made, in whole or in part, under the Medicaid program; or

- Submit false or misleading information or statements to AHCA for the purpose of being accepted as a Medicaid provider.

This section also clarifies that proof that a document was submitted with false or misleading information, or proof of a false claim, creates an inference that the person whose signature appears on the claim or document knew of and *willfully* made the false statement or misrepresentation.

The bill cures one of the issues the court in *Harden* found to be a constitutional infirmity by making these changes.

Section 2. Reenacts s. 921, 0022(3), F.S., the Criminal Punishment Code, offense severity ranking chart, for the purpose of incorporating the amendment to s. 409.920, F.S., made by this act.

Section 3. Provides that the bill shall take effect July 1, 2004.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Article I, s. 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

The bill does not cure the other constitutional issue raised by the Third District Court, that Florida's Medicaid Fraud statute does not provide a "safe harbor" from criminal prosecution as the federal law does, in situations involving certain employer-employee payments. For that reason, the Florida law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and is, therefore preempted by federal law. *State v. Harden*, 2004 WL 444154 (Fla. 3rd DCA 2004), citing

Pharmaceutical Research & Mfrs. of Am. v. Meadows, 304 F.3d 1197 at 1206 (11th Cir. 2002).

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
