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F I S C A L I M P A C T R E P O R T

SPONSOR Ortiz y Pino **ORIGINAL DATE** 3/7/17 **LAST UPDATED** **HB**

SHORT TITLE Medicaid False Claims and Taxpayer Fraud **SB** 519/SPACS

ANALYST Boerner

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
	Indeterminate (See Fiscal Impact)	Indeterminate (See Fiscal Impact)	Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI	NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
Human Services Department (HSD)
Office of the Attorney General (OAG)
Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

Senate Public Affairs Committee Substitute for SB 519 amends the New Mexico Medicaid False Claims Act, NMSA 1978, §§ 30–44–1 to –8 (1989, as amended through 2004) ("MFCA"). AOC points out the goal of the bill may be to retain additional federal money for the state by amending the current MFCA to mirror the federal False Claims Act, 31 U.S.C.A. § 3729 (2011) ("FCA"). Additionally, the bill authorizes the OAG to investigate and pursue violations of the MFCA. Currently, the MFCA only authorizes HSD to investigate and pursue MFCA claims. The

amendments do not remove the authority of HSD.

Finally, the bill incorporates language to mirror the FCA, including definitions of commonly used terms, and the mirroring of language throughout. The amendments also make the New Mexico Act more relator-friendly by removing the current language which provides for the automatic unsealing of the complaint at the expiration of the seal.

HSD provided the following detailed synopsis/analysis by section which is helpful given the length of the bill:

Section 1 expands the definitions applicable to the Medicaid False Claims Act, including new expanded definitions for the terms "claim," "document," "knowing" or "knowingly," "material," "Medicaid recipient," "obligation," "original source," "public official," "qui tam action," and "relator."

Section 2 restructures what constitutes a false claim under the Act, based largely on the new or amended definitions contained in Section 1. A key feature is the inclusion of "knowingly," which, as defined includes not just actual knowledge, but also reckless disregard and deliberate ignorance. It also includes as violations failure to deliver Medicaid funds or "property" in one's possession, claiming receipt of Medicaid property without verification, knowingly receiving Medicaid property from someone who does not have authority to transfer and conspiracy. Proof of fraudulent intent is not an element of a violation. The Section also expands the penalties to include a civil penalty of $5,500.00 to $11,000.00 per violation, plus costs and reasonable attorney fees, in addition to treble damages.

Section 3 expands the documentary provisions of Sec. 27-14-5 to the attorney general as well as the department.

Section 4 expands the civil action provisions of Sec. 27-14-7 to include the attorney general and include the terms "qui tam" and "relator" in replacement of "private action" and "person." It also removes language directing the department to conduct an investigation of a qui tam complaint to determine whether there is substantial evidence supporting it and to provide a copy of the written determination to the person against whom the complaint is made. The attorney general is to conduct an investigation while the complaint is under seal. The seal would no longer end after sixty days, but only upon court action. The attorney general must affirmatively consent to the department proceeding with a civil action within sixty days of notice from the department.

Section 5 reframes the rights of the parties in a qui tam action. The state may settle a qui tam case without the relator's consent and a court hearing to approve a settlement is only necessary if the relator requests it and upon good cause shown. The state can also delay a relator's ability to conduct discovery and limit a relator's participation at trial. The state can proceed, if it chooses, to pursue its claim through other means, such as an administrative proceeding, but the relator would have the same rights to participate as it would have in a lawsuit under 27-14-7.

Section 6 repeals and restates Section 27-14-9 with respect to a relator's right to participate in any qui tam recovery. It also provides that if a relator proceeds with a claim after the state has declined to participate, the defendant may recover cost and attorney fees if the claim is determined to be frivolous, vexatious, or brought for the purposes of harassment.

Section 7 repeals and restates Sec. 27-14-10 to clarify and expand the claims barred under the Act to include actions based on allegations or transactions that have previously been publicly disclosed in a court proceeding, legislative forum, or by the media.

Section 8 expands Sec. 27-15-11 to expand the exclusion from responsibility for a relator's expenses to include the state, rather than just the department.

Section 9 repeals and restates Sec 27-14-12 to clarify whistleblower protections, and includes retaliation for "other efforts to stop one or more violations of the Medicaid False Claims Act." It also establishes a three-year statute of limitations on whistleblower retaliation claims.

Section 10 repeals and replaces Sec. 27-14-13 to include statutes of limitations for the bringing of civil false claims actions. An action may not be brought more than 6 years after the date of a violation, or more than 3 years after the state knew or should have known of its right of action, whichever is later, but in no event more than 10 years after the violation. If the state intervenes in a qui tam proceeding, it pleading relates back to the filing date of the original complaint.

Section 11 clarifies that costs and fees recovered in a qui tam action shall be paid to the attorney general or the department, depending upon which body incurred them.

Section 12 creates a new section of the Act providing for a "civil investigative demand," which is a procedural process to be utilized by the attorney general in advance of making a claim under the Act or intervening in a qui tam action. The attorney general may demand that an individual produce documents or tangible things, respond to written interrogatories, or give oral testimony. It is essentially an amalgam of discovery and subpoena processes, to be conducted without public disclosure.

Sections 13-23 modify the Fraud against Taxpayers Act, NMSA 44-9-1 *et seq.*

Section 14 amends Sec 44-9-2 to modify or include definitions for "document," "knowing or knowingly," "qui tam action," and "relator."

Section 15 amends Sec. 44-9-4 to give the attorney general discretion in deciding whether to investigate suspected violations of the Act.

Section 16 is amended to replace the term "qui tam plaintiff" with "relator" and to clarify that investigations are to be conducted by the attorney general. It also provides that qui tam cases are to remain under seal at least 60 days and remain under seal until lifted by an order of the court.

Section 17 amends Sec 44-9-6 with respect to the rights of qui tam parties as in Section 5 above.

Section 18 amends Sec. 44-9-7 with respect to a relator's right to share in a recovery as in Section 6 above. It also changes the allocation of proceeds recovered by the state remaining after distributions to the relator and state to the attorney general and the general fund.

Section 19 provides for recovery of costs and fees by the defendant for frivolous actions, as in Section 6 above.
Section 20 expands the definition of barred claims as if Section 7 above.

Section 23 adds a section entitled "civil investigative demand" as in Section 12 above.

FISCAL IMPLICATIONS

The bill would bring the MFCA into compliance with the FCA, enabling New Mexico to retain an additional 10 percent of recoveries made under the Act. Based on past recoveries, the additional funds could be significant. For example the State could have retained an additional $600.5 thousand in FFY 2016, if New Mexico's law had passed federal review.

SIGNIFICANT ISSUES

Below is a more detailed explanation by the OAG of how this bill may allow for an increased the federal medical assistance percentage ("FMAP") with respect to any amounts recovered under an action brought under a qualifying law:

> Section 1909 of the Social Security Act creates a financial incentive for states to enact legislation that establishes liability to the State for false or fraudulent claims to the Medicaid program. This incentive takes the form of a 10 percent decrease FMAP with respect to any amounts recovered under an action brought under a qualifying law. If New Mexico obtains a recovery as a result of an action relating to false or fraudulent claims under the Medicaid program, it must share the recovery with the Federal Government in the same proportion as the FMAP. The current MFCA does not pass federal review. Therefore, New Mexico is currently not qualified to retain the additional funds.
>
> In order to qualify for this incentive, the state law must meet certain requirements, as determined by the federal Department of Health and Human Services—Office of the Inspector General (HHS-OIG), in consultation with the U.S. Attorney General. HHS-OIG provides specific guidelines for drafting qualifying false claims legislation. False claims actions may be initiated by the State or a relator (a whistleblower in a qui tam lawsuit filed on behalf of the State). In reviewing state laws for compliance, HHS-OIG closely reviews any variation from the FCA. To qualify, a state false claims act must establish liability to the state for false or fraudulent claims, as described in the FCA with respect to Medicaid spending. It must contain provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in the FCA; contain a requirement for filing an action under seal for 60 days with review by the State Attorney General; and contain a civil penalty that is not less than the amount of the civil penalty authorized under the FCA. The state law must mirror the language within the FCA, including the definitions contained therein, with little variation.

However, HSD does point out the bill reduces its role in investigating qui tam complaints and participating in actions under the Medicaid Fraud Act, noting:

> The AGO will assume responsibility for conducting investigations while a case is under seal. Further, the AGO may bring civil claims under the Act. If the department desires to bring a civil action it must request permission from the attorney general after the seal has been lifted and the attorney general has 60 days to respond to the request. A failure to respond does not convey consent.
>
> The expanded definitions broaden the definition of "scienter" to include intentional ignorance and reckless disregard. Combined with the fact that intent to defraud is no

longer an element necessary to prove a violation, the bill should expand the universe of entities subject to claims under the Act.

PERFORMANCE IMPLICATIONS

HSD argues HSD's Office of Inspector General and Office of General Counsel will have a more limited role in investigation and prosecution of Medicaid Fraud Act claims.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AGO notes the state will continue to forego available federal money and the AGO will be unable to pursue cases under the MFCA, obtain attorney fees and costs, and use civil investigative demands in its investigations under the MFCA and FCA.

CB/jle