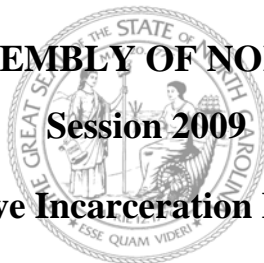


GENERAL ASSEMBLY OF NORTH CAROLINA



Session 2009

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: Senate Bill 675 (Third Edition)

SHORT TITLE: Prohibit Medicaid Fraud/Kickbacks.

SPONSOR(S): Senator Purcell

	FISCAL IMPACT				
	Yes (X)	No ()	No Estimate Available ()		
	<u>FY 2010-11</u>	<u>FY 2011-12</u>	<u>FY 2012-13</u>	<u>FY 2013-14</u>	<u>FY 2014-15</u>
REVENUE:					
Attorney General's Office- Medicaid Investigative Unit			Exact amount cannot be determined*		
TOTAL					
EXPENDITURES:					
Correction			Exact amount cannot be determined*		
Probation			Exact amount cannot be determined*		
Judicial			Exact amount cannot be determined*		
Attorney General's Office- Medicaid Investigative Unit			Exact amount cannot be determined*		
<i>*See Assumptions and Methodology</i>					
PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch; Medicaid Investigative Unit of the Attorney General's Office					
EFFECTIVE DATE: This act applies to offenses committed on or after December 1, 2010.					
<i>*This fiscal analysis is independent of the impact of other criminal penalty bills being considered by the General Assembly, which could also increase the projected prison population and thus the availability of prison beds in future years. The Fiscal Research Division is tracking the cumulative effect of all criminal penalty bills on the prison system as well as the Judicial Department.</i>					

BILL SUMMARY:

The bill amends G.S. 108A-63 to make it unlawful for any person to solicit or receive remuneration in return for referring any individual to a person for the furnishing of any item or service subject to reimbursement by Medicaid, or in return for purchasing, leasing, ordering any good, facility, service or item subject to reimbursement by Medicaid. The new section also makes

it unlawful to offer or pay remuneration for such referrals or purchases, leases or orders and specifies exceptions. The act applies to offenses committed on or after December 1, 2010. *Source: Bill Digest S.B. 675 (03/18/0200).*

ASSUMPTIONS AND METHODOLOGY:

General

The Sentencing and Policy Advisory Commission prepares prison population projections for each bill containing a criminal penalty. The Commission assumes for such bills that expanding existing, or creating new criminal offenses produces no deterrent or incapacitative effect on crime. Therefore, the Fiscal Research Division does not assume deterrent effects for any criminal penalty bill.

Department of Correction – Division of Prisons

An analysis of selected sections of S675 affecting the Department of Correction follows:

Section 1:

G.S. 108A-63(g) makes it a Class I felony for any person to knowingly and willfully solicit or receive any remuneration (including any kickback, bribe, or rebate) in exchange for (1) referring an individual for any item or service for which payment may be made in whole or part under the Medical Assistance Program, or (2) purchasing, leasing, or ordering (or recommending or arranging for same) any good, facility, service or item for which payment may be made in whole or part under the Medical Assistance Program.

The proposed offense is distinct from the existing crimes in G.S. 108A-63 insofar as it does not require any material misrepresentation or fraud by the offending person.

Because the bill creates a new offense, the Sentencing Commission does not have any historical data from which to estimate the impact of this bill on the prison population. It is not known how many offenders might be convicted and sentenced under the proposed bill. In FY 2008-09, 17% of Class I convictions resulted in active sentences, with an average estimated time served of 7 months. If, for example, there were 11 Class I convictions for this proposed offense per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and four additional prison beds the second year.

G.S. 108A-63(h) makes it a Class I felony for any person to knowingly and willfully offer or pay any remuneration (including any kickback, bribe, or rebate) to induce any person to (1) refer an individual for any item or service for which payment may be made in whole or part under the Medical Assistance Program, or (2) purchase, lease, or order (or recommend or arrange for same) any good, facility, service or item for which payment may be made in whole or part under the Medical Assistance Program.

The proposed offense is distinct from the existing crimes in G.S. 108A-63 insofar as it does not require any material misrepresentation or fraud by the offending person.

Because the bill creates a new offense, the Sentencing Commission does not have any historical data from which to estimate the impact of this bill on the prison population. It is not known how many offenders might be convicted and sentenced under the proposed bill. In FY 2008-09, 17% of Class I convictions resulted in active sentences, with an average estimated time served of 7 months. If, for example, there were 11 Class I convictions for this proposed offense per year, the combination of active sentences and probation revocations would result in the need for one additional prison bed the first year and four additional prison beds the second year.

To the extent that the acts prohibited by subsections (g) and (h) also involve misrepresentations or fraud related to a provider's entitlement to payment under the Medical Assistance Program, they would be covered by one or more existing crimes. Currently, 108A-63(a) and (b) make it a Class I felony for a provider to make false statements, misrepresentations, concealments, or non-disclosures of material fact related to an application for or entitlement to payment under the Medical Assistance Program. There were 2 Class I convictions under G.S. 108 A-63 for this offense in FY 2008-09. Because the AOC's Automated Criminal/Infractions System does not contain data on the specific elements of the offense, it is not known whether any of the 2 convictions were for conduct covered under the proposed offense. Subsection (e) makes it a Class H (Class I for a conspiracy), for a provider to execute or attempt to execute a scheme or artifice to defraud the Medical Assistance Program or obtain property of the Medical Assistance Program by false or fraudulent pretenses. Because Subsection (e) was not effective until December 1, 2009, the Sentencing Commission does not have any historical data on this offense.

Note: G.S. 108A-63(i) excludes from the offenses in (g) and (h) any contracts between the State and a public or private agency where part of the agency's responsibility is to refer a person to a provider, or any conduct or activity that does not violate or is protected by 42 U.S.C. 1320a-7b(b) and any supporting regulations.

Judicial Branch

The Administrative Office of the Courts provides Fiscal Research with a fiscal impact analysis for most criminal penalty bills. For such bills, fiscal impact is typically based on the assumption that court time will increase due to anticipated increases in trials and corresponding increases in workload for judges, clerks, and prosecutors. This increased court time is also expected to result in greater expenditures for jury fees and indigent defense.

Current GS 108A-63 contains Medicaid provider fraud offenses. The proposed legislation creates two new, related offenses as new subsections of GS 108A-63, both of which would be Class I felonies pursuant to subsection (c) of that section:

- (g) soliciting or receiving remuneration for either:
 - (1) referring a person for provision of goods or services that might be paid for under Part 6 (Medicaid) of Chapter 108A, Article 2, or
 - (2) purchasing or arranging the purchase of a good or service that might be paid for by Medicaid.
- (h) offering or paying remuneration for the same purposes described in (g).

Both subsections qualify “remuneration” as “including any kickback, bribe, or rebate,” but that list does not appear to be exclusive. For example, subsection (g) appears to prohibit a person from accepting compensation from a recipient of medical services for researching, arranging for, or assisting with the receipt of those services, in addition to prohibiting receipt of traditional “kickbacks” from the provider or vendor.

Neither offense appears to be duplicative of any of the existing Medicaid provider fraud offenses under GS 108A-63. The offense of subdivision (2) of both subsections (offering/paying remuneration) appears to duplicate the existing Class 2 misdemeanor of G.S. 14-353 when the person soliciting/receiving (subsection (g)) or being offered/paid (subsection (h)) the remuneration is an employee or agent of the entity ultimately paying for the goods, services, etc. AOC does not have an offense code for G.S. 14-353, so any prosecutions under the new subsections (g) and (h) likely will not replace prosecutions under the current offense.

The offenses would not apply to (i) any agency contracting with the State when the agency’s duties under the contract include referrals to providers, and (ii) anyone not subject to prosecution under the federal Medicaid kickbacks statute, pursuant to 42 USC 1320a-7b. These exceptions include, among others, allowances for certain commission-based compensation practices and regulatory exceptions by the United States Department of Health and Human Services for certain medical payment practices.

Under current GS 108A-63, there were 15 defendants charged in 2009 with violations. There were also two defendants charged under GS 108A-63(e), a new Class H felony offense that was effective December 1, 2009. Subsection (e) states: “In connection with the delivery of or payment for benefits, items, or services under this Part, it shall be unlawful for any provider of medical assistance under this Part to knowingly and willfully execute, or attempt to execute, a scheme or artifice to: (1) Defraud the Medical Assistance Program; (2) Obtain, by means of false or fraudulent pretenses, representations, or promises of material fact, any of the money or property owned by, or under the custody or control of, the Medical Assistance Program.”

Given that there were two charges in the first month in which (e) was effective, there is the potential for significant charges under the proposed (g) and (h). Costs to dispose of these cases would depend on the mode of disposition. On average, for every Class I felony charge disposed by plea, the cost would be \$447. For every charge disposed by trial, the cost would be \$6,806. These costs represent the time involved for superior court judges, deputy clerks, court reporters, assistant district attorneys, victims witness legal assistants, and juries (trials only). In addition, indigent defense costs would average \$480 per indigent defendant.

Medicaid Investigative Unit – Attorney General's Office

Information provided to Fiscal Research from the Attorney General's Medicaid Investigative Unit (MIU) confirms that it is difficult to predict the number of cases that will be brought pursuant to the proposed anti-kickback statute. The statute impacts both criminal and civil health care fraud cases. With regard to the criminal aspects, the MIU estimates that the number of criminal actions brought under the statute will be less than ten per year. With regard to the civil aspects, civil actions filed under the False Claims Act often allege kickback violations as an underlying basis for False Claims Act liability. The MIU anticipates that approximately one hundred cases will be filed under the N.C. False Claims Act per year. Of these, approximately fifty could include kickback

allegations. However, most N.C. False Claims Act allegations are made in federal court as pendent claims in federal False Claims Act litigation. The MIU estimates that less than five N.C. False Claims Act cases alleging kickback violations would be filed in N.C. each year. Therefore, the impact on State court resources should be minimal.

Given the difficulty in determining the number of cases, amounts recovered pursuant to anti-kickback statute violations would also be difficult to predict. The MIU estimates that recoveries in criminal cases could be as much as \$10,000 per year, while recoveries in civil cases could be \$1,000,000. However, the most important feature of the anti-kickback statute would be deterrence. By deterring the payment and receipt of kickbacks there should be a reduction in the number of medically unnecessary services billed to the N.C. Medicaid Program. The dollar value of the deterrent effect cannot be predicted but should be substantial.

SOURCES OF DATA: North Carolina Sentencing and Policy Advisory Commission; Judicial Branch, Medicaid Investigative Unit of the Attorney General's Office

TECHNICAL CONSIDERATIONS: None

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DATE: June 28, 2010



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