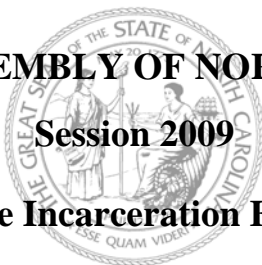


**GENERAL ASSEMBLY OF NORTH CAROLINA**



**Session 2009**

**Legislative Incarceration Fiscal Note**

**(G.S. 120-36.7)**

**BILL NUMBER:** Senate Bill 602 (First Edition)  
**SHORT TITLE:** Medicaid False Claims/Qui Tam Actions.  
**SPONSOR(S):** Senator Kinnaird

<b>FISCAL IMPACT</b>					
	Yes (X)	No ( )	No Estimate Available (X)		
	<u>FY 2009-10</u>	<u>FY 2010-11</u>	<u>FY 2011-12</u>	<u>FY 2012-13</u>	<u>FY 2013-14</u>
<b>GENERAL FUND</b>					
Correction		<b>Indeterminate fiscal impact</b>			
Probation		<b>Indeterminate fiscal impact</b>			
Judicial		<b>Indeterminate fiscal impact</b>			
Justice					
Receipts	\$439,209	\$427,285	\$440,103	\$453,306	\$466,905
Requirements	<u>\$585,612</u>	<u>\$569,713</u>	<u>\$586,804</u>	<u>\$604,408</u>	<u>\$622,540</u>
<b>TOTAL EXPENDITURES:</b>	<b>\$146,403</b>	<b>\$142,428</b>	<b>\$146,701</b>	<b>\$151,102</b>	<b>\$155,635</b>
<b>ADDITIONAL PRISON BEDS: (cumulative)*</b>					
		<b>Indeterminate prison bed impact</b>			
<b>POSITIONS: (cumulative)</b>	<b>5</b>	<b>5</b>	<b>5</b>	<b>5</b>	<b>5</b>
<b>PRINCIPAL DEPARTMENT(S) &amp; PROGRAM(S) AFFECTED:</b> Department of Correction; Judicial Branch; Department of Justice					
<b>EFFECTIVE DATE:</b> Sections 2 though 4 of this act become effective January 1, 2010, and a civil action under Sections 2 though 4 may be brought for activity prior to the effective date if the limitations period set in G.S. 108A-70.13 has not lapsed. The remainder of this act becomes effective July 1, 2009.					
<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:**

This bill strengthens the prosecution of Medicaid fraud by increasing criminal penalties for provider fraud, creating criminal penalties for obstruction and making false entries, establishing a private civil action for provider false claims, authorizing a subpoena for documents in cases of provider fraud and abuse, and to appropriate funds to the department of justice to implement this act.

## **ASSUMPTIONS AND METHODOLOGY:**

### **General**

The North Carolina 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**

Section 5 amends G.S. 108A-63, Medical Assistance Provider Fraud, to create 3 new offenses:

G.S. 108A-63(e) makes it a felony for a provider of goods or services under the Medical Assistance Program to knowingly and willfully execute or attempt to execute a scheme or artifice to: (1) defraud the Medical Assistance Program; or (2) obtain by false or fraudulent pretenses, representation, or promises, any money or property owned by, or under the custody or control of, the Medical Assistance Program, when the fraudulent conduct is in connection with the delivery of or payment for health care benefits, items, or services. The offense is a Class C felony if the value of the benefits, items, or services is \$100,000 or more, and a Class H felony if the value is less than \$100,000.

It is unclear what conduct covered by subsection (e) would be distinct from the existing offenses under subsections G.S. 108A-63(a) and (b). Subsections (a) and (b) currently prohibit a provider from knowingly and willfully (a) making a false statement or presentation of material fact in an application for payment from the Medical Assistance Program or with respect to the provider's qualification to provide medical assistance under the program, or (b) concealing or failing to disclose a fact or event affecting the provider's entitlement to payment from the Medical Assistance Program or the amount of such payment to which the provider is entitled. Both offenses are Class I felonies and address acts that would involve the actual or attempted "defraud[ing of] the Medical Assistance Program" as prohibited by (e)(1), or the actual or attempted obtaining of money or property from the Medical Assistance Program by false pretenses as prohibited by (e)(2). It is unclear if the execution of a "scheme or artifice" in subsection (e) requires a pattern of conduct and, if so, what quantum or duration of acts proscribed by subsections (a) and (b) would qualify for punishment under subsection (e).

Currently, violations of the proposed subsection (e) could qualify for punishment under G.S. 14-100, obtaining property by false pretenses. In FY 2007-08, there were seven Class C felony convictions for obtaining property that was valued at \$100,000 or more by false pretenses. The average minimum sentence imposed for these convictions was 72 months. In FY 2007-08, there were 1,478 Class H felony convictions for obtaining property that was valued at less than \$100,000 by false pretenses. The average minimum sentence imposed for these convictions was nine months. In addition, there were 105 convictions for attempted obtaining property by false pretenses. *It is unknown how many of these Class C felony convictions (n=7) and Class H felony convictions (n=1,478) convictions or attempt convictions (n=105) would meet the elements of the proposed offense.*

Under Structured Sentencing, with the exception of extraordinary mitigation, all Class C felony offenders are required to receive an active sentence. In FY 2007-08, the average estimated time served for an

offender convicted of a Class C felony offense was 95 months. If, for example, there was one conviction for this proposed offense per year, this proposed change would result in the need for one additional prison bed the first year and two additional prison beds the second year. In addition, since a period of Post-Release Supervision follows release from prison for offenders convicted of Class B1-E felonies, there will be some impact on Post-Release Supervision and prison beds due to revocations.

In FY 2007-08, 36% of Class H convictions resulted in active sentences, with an average estimated time served of 11 months. If, for example, there were three Class H 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 two additional prison beds the second year.

G.S. 108A-63(f) makes it a Class I felony for any provider to knowingly and willfully obstruct, delay, or mislead or attempt to obstruct, delay, or mislead an investigation of a violation of this section by the Attorney General's Office.

Currently, violations of the proposed subsection could qualify for punishment as a Class 1 misdemeanor under Common Law Obstruction of Justice or as a Class 2 misdemeanor under G.S. 14-223, Resisting, delaying, or obstructing a public officer in discharging or attempting to discharge an official duty. In FY 2007-08, there were 108 convictions for obstruction of justice and no convictions for violations of G.S. 14-223. *It is unknown how many of the 108 Class 1 misdemeanor convictions would meet the elements of the proposed offense.*

In FY 2007-08, 16% of Class I felony convictions resulted in active sentences, with an average estimated time served of seven months. If, for example, there were 12 Class I felony convictions for the 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(g) makes it unlawful for a provider to knowingly and willfully make or cause to be made a false entry in – or alter, destroy or conceal – a financial, medical or other record related to the provision of a benefit, item, or service under G.S. 108A, Article 2, Part 6 (Medical Assistance Program) with the intent to defraud. The bill leaves this offense unclassified, expressly excluding subsection (g) from the general Class I felony provision in G.S. 108A-63(c) without providing an alternative classification. Moreover, it is unclear what conduct addressed in subsection (g) would not be covered by the offenses in G.S. 108A-63(a) (false statement or representation of material fact in an application for payment) or (b) (concealing or failing to disclose a fact or event affecting the provider's entitlement to payment or the amount thereof).

Since the proposed subsection leaves this offense unclassified, impact cannot be estimated.

It is important to note that based on the most recent population projections and estimated bed capacity, *there are no surplus prison beds available for the five-year fiscal note horizon and beyond.* Therefore, any additional prison beds that may be required as a result of the implementation of this proposed legislation will place a further burden on the prison bed shortage.

### **Department of Correction – Division of Community Corrections**

For felony offense classes E through I and all misdemeanor classes, offenders may be given non-active (intermediate or community) sentences exclusively, or in conjunction with imprisonment (split-sentence). Intermediate sanctions include intensive supervision probation, special probation, house arrest with electronic monitoring, day reporting center, residential treatment facility, and drug treatment court. Community sanctions include supervised probation, unsupervised probation, community service, fines, and

restitution. Offenders given intermediate or community sanctions requiring supervision are supervised by the Division of Community Corrections (DCC); DCC also oversees community service.<sup>1</sup>

General supervision of intermediate and community offenders by a probation officer costs DCC \$2.37 per offender, per day; no cost is assumed for those receiving unsupervised probation, or who are ordered only to pay fines, fees, or restitution. The daily cost per offender on intermediate sanction ranges from \$8.43 to \$16.71, depending upon sanction type. Thus, assuming intensive supervision probation – the most frequently used intermediate sanction – the estimated daily cost per intermediate offender is \$16.71 for the initial six-month intensive duration, and \$2.09 for general supervision each day thereafter. Total costs to DCC are based on average supervision length and the percentage of offenders (per offense class) sentenced to intermediate sanctions and supervised probations.

Because there is no data available upon which to base an estimate of the number of convictions that will be sentenced to intermediate or community punishment, *potential costs to DCC cannot be determined.*

### **Judicial Branch**

The Administrative Office of the Courts (AOC) 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.

This bill would expand the State's response to Medicaid fraud by providing new and enhanced civil and criminal penalties, which would translate into potentially substantial additional workload for the courts. In FY 2007-08, a typical felony case took approximately 220 days to dispose in Superior Court. The court system also faces backlogs and workload strains in civil case dispositions. Any increase in judicial caseload without accompanying resources could be expected to further delay the disposition of cases.

#### Sections 1.(b) and (c), Expanding civil liability and damages for fraudulent provider claims:

Current G.S. 108A-70.12 imposes civil damages and penalties for certain conduct by a provider of medical assistance, such as presenting a false or fraudulent claim or record to get payment from the Medical Assistance Program (MAP). This bill would expand the conduct that could give rise to civil actions, making it unlawful to conspire to defraud the MAP, or to make or use a false record to conceal or avoid an obligation to pay. The bill would also increase the minimum and maximum civil penalties.

*AOC has no data on the number of civil cases filed against providers under this statute, and cannot estimate how frequently the conduct this bill would add is committed, or how often it might result in new civil actions* (which can be brought by the Attorney General under G.S. 70-13). The new cases would result in additional work for the courts. In addition, as penalties increase, cases can become more contested, time-consuming and costly.

#### Section 2, Allowing private citizens to file civil actions for fraud by a medical assistance provider:

This bill would enact a new Part within Article 2 of G.S. Chapter 108A, at G.S. 108A-70.17 et seq., authorizing a private person to bring a civil action in the name of the State to seek damages and penalties from a medical assistance provider who engages in fraudulent conduct against the Medical Assistance Program. (For fraudulent conduct as described in Section 1 above, which expands the conduct that could give rise to the civil actions and increase the penalties.) Once a lawsuit is filed, the bill would give the Attorney General substantial authority and discretion over prosecution of the action, settlement, and other

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<sup>1</sup> DCC incurs costs of \$0.69 per day for each offender sentenced to the Community Service Work Program; however, the total cost for this program cannot be determined.

matters. A private person who brings such an action would in general be entitled to from 10 percent to 30 percent of the proceeds (depending on a variety of circumstances).

Laws similar to this appear to be increasingly common. In general, they are modeled on the federal False Claims Act (31 U.S.C. Sec. 3729 et seq.) and are designed to give citizens an incentive to help combat fraud against government programs. The frequency of such citizen actions at the federal level appears to be on the rise.<sup>2</sup> *However, AOC has no data to predict how many private actions might be filed as authorized by this bill.* The citizen actions could be both numerous and time-consuming, with a substantial increase in workload for the courts.

In response to AOC's inquiry, the Attorney General estimates that there would be relatively few citizen actions filed in state court, with the bulk (some 95%) of the cases filed in federal courts. If, as the Attorney General estimates, there were only on the order of five additional Superior Court civil cases per year from this section of the bill, the impact would not be very substantial. (AOC has no data from which to predict how long trials in these cases might last, or how many would settle without trial. A one-day jury trial in Superior Court would cost about \$1,800 for the time of the Superior Court judge, deputy clerk, court reporter, and jury. Pretrial motions or other matters needing trial court action, of which there would be some, would translate into additional court time and cost, and any appeals would increase workload for the Court of Appeals and potentially the Supreme Court.) The Attorney General's prediction that most cases would be in federal court assumes that the private plaintiffs who could file these cases would know that the federal courts also have jurisdiction over these cases, and that they would choose federal court. To the extent this assumption does not bear out, the impact on the Superior Courts would be much more substantial. The Attorney General's offices estimates a total of some 100 cases filed in the first year (state and federal courts combined), with fewer filed in subsequent years.

#### Section 4, Expanding the Attorney General's subpoena powers:

This bill would enact new G.S. 108A-63.1, giving the Attorney General broad authority to compel any corporation or government entity to produce records that may be relevant to any criminal investigation of violations by a "provider" (presumably limited to a provider of medical assistance) of various specified statutes, including G.S. 108A-63 (medical assistance fraud), and some general offenses in G.S. Chapter 14, including obtaining property by false pretenses (G.S. 14-100), embezzlement (G.S. 14-90), and patient abuse or neglect (G.S. 140-32.2). Enhanced investigative law enforcement practices can lead to an increase in the number and scope of criminal prosecutions, and thus an increase in court workload, but *AOC has no basis to estimate the nature or number of new and existing cases that may be affected.*

#### Section 3, Enacting new medical assistance provider fraud offenses:

Current G.S. 108A-63 makes it a Class I felony for a provider of medical assistance to knowingly and willfully make a false statement or representation in an application for payment from the Medical Assistance Program (MAP), or with respect to whether the provider's operation meets the qualifications to be a provider under that program. It is also a Class I felony to conceal or fail to disclose a fact or event affecting the provider's entitlement to payment or the amount. In 2008, there were 36 defendants charged with a Class I felony under this statute.

The bill would add three new subsections to this statute, establishing new felony offenses:

New G.S. 108A-63(e) would make it a felony for a provider of medical assistance to knowingly and willfully execute or attempt to execute a scheme or artifice to defraud the MAP, or obtain MAP money or property by false or fraudulent pretenses, in connection with the delivery of or payment for health benefits,

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<sup>2</sup> U.S. Government Accountability Office, *Information on False Claims Act Litigation*, report to Congress, January 2006. Availability online at <http://www.gao.gov/new.items/d06320r.pdf>

items, or services. The new offenses are Class C felonies if the value of the benefits, items, or services is \$100,000 or more, and otherwise a Class H felony.

It appears that at least some conduct prescribed by new subsection (e) could be punishable under existing G.S. 14-100, obtaining property by false pretenses, which is also a Class C felony offense if the value of the property is \$100,00 or more, otherwise a Class H felony offense. AOC data for 2008 show 8,891 defendants charged with a Class H felony under G.S. 14-100 and 20 charged with a Class C felony. AOC data also show 1,001 defendants charged under this statute with attempt and 235 with aiding and abetting or conspiracy. *The data offer no way to determine whether any of these charges related to conduct that would constitute the medical assistance fraud defined in subsection (e) of this bill.*

Some, but not all of the conduct currently charged as Class I felonies under current G.S. 108A-63 could be charged as Class H or Class C felonies under this bill. It appears that the new offenses are narrower in scope than the current statute. For example, there may be circumstances in which the current statute could be violated by a false representation alone, which the new offense may require a concrete connection to actual MAP money or property of a certain, determinable value. The new offense may also require some ongoing pattern of conduct (“a scheme or artifice”), while an isolated fraud would violate the existing offense. AOC cannot determine which, if any, of the 36 defendants charged under G.S. 108A-63 in 2008 could have been charged with Class H or Class C felonies under this bill.

For every charge elevated from a Class I to a Class H felony, the cost would range from \$111 to \$962 depending on the mode of disposition of the case. The increased cost for indigent defense would average \$60 per indigent defendant. For every charge elevated from a Class I to a Class C felony, the cost would range from \$1,817 to \$10,603 depending on the mode of disposition of the case. The increased cost for indigent defense would average \$660 per indigent defendant.

New subsections G.S. 108A-63(f) and (g) would enact additional felony offenses, making it unlawful to: (f) knowingly and willfully obstruct, delay, or mislead an investigation of a violation of this section by the Attorney General, or (g) knowingly and willfully make or cause to be made a false entry in, alter, destroy, or conceal a financial, medical, or other record related to the provision of a benefit, item, or service under this Part with the intent to defraud. The offense under subsection (f) would be a Class I felony, as specified in G.S. 108A-63(c) as amended. The bill does not specify a class for the offense in new subsection (g) (see Technical Considerations). Conduct covered by these new offenses may in some instances be punishable under existing law such as: common law obstruction of justice, a Class 1 misdemeanor; false report to a law enforcement agency under G.S. 14-255, a Class 2 misdemeanor; or current G.S. 108A-63(b), a Class I felony.

*AOC has no data from which to predict the number of existing cases that would be affected or the number of new charges that might be filed under this section of the bill. To the extent that bill results in enhancements of existing charges or new charges, there would be an increase in court workload, primarily for the Superior Courts, affecting judges, clerks, prosecutors, court reporters and indigent defense. The cost for a single Class C felony trial averages \$17,000, and a single Class H felony trial averages \$7,500. Indigent defense costs (overall averages, plea and trial) are \$1,245 for a Class C felony and \$540 for a Class H felony.*

#### **Department of Justice – Office of the Attorney General, Medicaid Investigations Unit**

The Department of Justice (DOJ) provided Fiscal Research with an estimate of the anticipated costs to the agency, should this bill become law. DOJ estimates that there will be a need for a five person team composed of one Attorney III, two Attorney IIs, one paralegal, and one auditor to handle the increased workload created by this bill. DOJ submitted the following justification for these positions:

1. Mandated Duties

The proposed North Carolina qui tam act would mandate new duties that only DOJ can perform, including the following:

- a. Accept service for filed qui tam actions;
- b. Review the action for merit to determine whether or not to intervene;
- c. Maintain information under seal;
- d. Move the court for extensions of the seal as necessary;
- e. Intervene or notify the court of its declination;
- f. Upon intervention, have primary responsibility for prosecuting the action including settling the action and defending the settlement in court if the relator objects to the settlement;
- g. Upon declination, track the progress of the case to reassess whether the State should intervene;
- h. Determine the extent of participation of the relator; and
- i. Negotiate or litigate the percentage of the proceeds to which the relator is entitled as an award.

These additional duties cannot be carried out effectively and the qui tam act will not be as effective in recovering funds for the State without funding for additional staff.

2. Increased Workload

States that have enacted qui tam provisions have seen the filing of between 50 and 100 qui tam actions soon after the bill’s effective date. DOJ anticipates that at least as many will be filed in North Carolina. These filings will require a sufficient number of staff to be able to review the filings for merit in a timely manner in order to make the required determination of where the State should intervene. Staff will need to review voluminous evidence and investigate and pursue cases in which the State intervenes.

3. Increased Likelihood of Intervention and Recoveries

A five person civil team composed of three attorneys, one paralegal, and one auditor could effectively pursue qui tam cases and increase recoveries. The Medicaid Investigations Unit staff is 75% federally funded and would only require a 25% State match. This 75% federal grant is available for civil positions. The costs for these five positions and the portion paid by the state are shown in the table below. The other annual expenses are overhead items such as office supplies and travel costs. These costs are shown in the fiscal impact table on page one of this fiscal note and have been calculated to reflect a 3% annual inflation rate.

<b>Annual Cost of the Medicaid Investigations Unit</b>			
<b>Position Classification</b>	<b>FTE</b>	<b>Annual Salary (total)</b>	<b>State’s Portion (25% of total)</b>
Attorney II	2	\$196,180	\$49,045
Attorney III	1	\$102,772	\$25,693
Paralegal II	1	\$47,791	\$11,948
Internal Auditor II	1	\$67,816	\$16,954
<b>Total:</b>	<b>5</b>	<b>\$414,560</b>	<b>\$103,640</b>
Other annual expenses:			\$38,788
<b>Total annual State appropriation:</b>			<b>\$142,428</b>

The experience of other states that have enacted qui tam provisions shows that states that have created positions to handle qui tam cases have shown a significant return on investment, while a state that did not create accompanying positions was not able to do more than minimal tracking, was not able to take any meaningful independent action, and had recoveries that were lower than those states with civil staff.

Having a team 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. It should be expected in stage 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.

An MIU civil team will be able to participate sooner and more effectively in national investigations being pursued by the National Association of Medicaid Fraud Control Units and the United States Department of Justice and be in a more effective position in negotiating settlements with defendants.

#### 4. Current Staffing Levels

There are Medicaid Fraud Control Units (“MFCU”) in 49 states and the District of Columbia that range in size from the largest, which is New York with a staff of 312 investigating a Medicaid program with a budget of over \$46.5 billion, to the smallest, which is Wyoming with a staff of four investigating a Medicaid program with a budget of approximately \$456,000. In 2008, North Carolina ranked as the ninth largest state in the amount of its Medicaid Program expenditures at \$11.7 billion (in 2009 it grew to \$11.7 billion). North Carolina was ranked forty-third in the size of its MFCU staffing per Medicaid dollar expenditures. MIU staffing has not kept pace with the significant increase in Medicaid expenditures, especially over the last four years. In 1988 there was one MUI staff person (which is including investigators, attorneys, and program assistants) for each \$54.6 million in N.C. Medicaid expenditures. Today there is one N.C. MFCU staff person for each \$345 million in N.C. Medicaid expenditures. Additional positions will allow the MIU to investigate and pursue additional cases and assist in preventing, deterring, and recovering the loss of State funds to Medicaid fraud.

#### 5. Cost-Benefits

The Return on Investment Schedule prepared in 2009 showed that for each \$1.00 in State matching funds provided to the MIU for employee salary and operating costs, the State realizes \$24.00 in fraud recoveries, school fund payments and related benefits. Using this calculation, *if North Carolina spends \$142,428 per year in matching funds the State can expect to realize \$3,418,272 in benefits.*

**SOURCES OF DATA:** Department of Correction; Judicial Branch; North Carolina Sentencing and Policy Advisory Commission; Department of Justice

#### **TECHNICAL CONSIDERATIONS:**

##### Section 4

New subsection G.S. 108A-63.1(b) is not a sentence – a phrase appears to be omitted (the intent is presumably to enable the subpoena to require the custodian to appear and testify).

##### Section 5

Under current G.S. 108A-63(c), existing offenses in this statute are Class I felonies. This bill enacts some new felony offenses, and amends subsection (c) to specify that offenses under the statute are Class I felonies “(e)xcept as otherwise provided in subsections (e) and (g) of this section.” Subsection (g), however, defines a new offense, but does not specify the punishment, thus leaving it unclassified.

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**DATE:** May 14, 2009



**Signed Copy Located in the NCGA Principal Clerk's Offices**