GENERAL ASSEMBLY OF NORTH CAROLINA

Session 2009

Legislative Incarceration Fiscal Note

(G.S. 120-36.7)

BILL NUMBER: House Bill 1135 (First Edition)

SHORT TITLE: Qui Tam/Liability for False Claims.

SPONSOR(S): Representatives Ross, Glazier, Martin, and Hall

FISCAL IMPACT

	Yes (X)	No ( )	No Estimate Available (X)		
	FY 2009-10	**FY 2010-11**	**FY 2011-12**	**FY 2012-13**	**FY 2013-14**
GENERAL FUND					
Correction	**Indeterminate fiscal impact**				
Probation	**Indeterminate fiscal impact**				
Judicial	**Indeterminate fiscal impact**				
Justice					
Receipts	**$439,209**	**$427,285**	**$440,103**	**$453,306**	**$466,905**
Requirements	**$585,612**	**$569,713**	**$586,804**	**$604,408**	**$622,540**
TOTAL EXPENDITURES:	**$146,403**	**$142,428**	**$146,701**	**$151,102**	**$155,635**
ADDITIONAL PRISON BEDS: (cumulative)*	**Indeterminate prison bed impact**				
POSITIONS: (cumulative)	**5**	**5**	**5**	**5**	**5**

PRINCIPAL DEPARTMENT(S) & PROGRAM(S) AFFECTED: Department of Correction; Judicial Branch; Department of Justice

EFFECTIVE DATE: Section 1 of this ac becomes effective January 1, 2010, and applies to acts committed on or after that date, except that a civil action may be based on activity occurring prior to the effective date if the activity would otherwise be covered under G.S. 108A-70.12 and the limitations period set in G.S. 108A-70.13 has not lapsed. Sections 2 and 3 of this act become effective July 1, 2009. .

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.

BILL SUMMARY:

Adds a new Article 52 to Chapter 1 of the General Statutes:

- Any person who knowingly submits false claims to any state officer or employee or to any contractor who receives state funds or who engages in listed types of similar conduct is to be civilly liable to the state for three times the amount of the damages sustained by the state as a result, plus costs, plus a civil penalty of between $5,500 and $11,000 per violation. The penalties may be reduced by a court if the person voluntarily discloses his or her conduct to authorities and cooperates in any investigation.
- Provides that the Attorney General must investigate false claims and may file civil actions based on such claims, but also allows private persons to file such civil actions as qui tam plaintiffs. Civil actions filed by private persons must be filed under seal and provided to the Attorney General, who may choose to intervene within 120 days. If the Attorney General chooses to intervene, the state bears the primary responsibility for prosecuting the case, subject to certain rights of the qui tam plaintiff, and the qui tam plaintiff is entitled to between 15% and 25% of the proceeds of the action, plus attorneys' fees and costs. If the Attorney General chooses not to intervene, the qui tam plaintiff may prosecute the case, subject to certain rights of the state, and the qui tam plaintiff is entitled to between 25% and 30% of the proceeds of the action, plus attorneys' fees and costs. If the qui tam plaintiff conducts the action and a court later determines that it was frivolous, the court may award attorneys' fees and expenses to the defendant.
- Certain actions are barred, such as actions against a member of the General Assembly or a member of the judiciary acting in his or her official capacity, or actions based on information obtained by a state employee in the course of his or her employment, unless the employee exhausted all internal channels for reporting the information and seeking redress.
- Employers may not fire employees for their participation in qui tam actions, and employees who are fired for that reason are entitled to reinstatement, double back pay, and attorneys' costs and fees.
- The Attorney General is empowered to issue a "civil investigative demand," essentially an administrative subpoena, to any person with information relevant to a possible false claims action. Such a demand may be used before the Attorney General brings or intervenes in a false claims action to compel a person to appear and testify under oath, to answer written questions, or to produce documents or other items. Details the time limits and so forth of such demands, which frequently parallel the provisions of the North Carolina Rules of Civil Procedure, and provides consequences, including contempt, for failure to comply with such demands. Generally, responses to civil investigative demands will be maintained by the Department of Justice and will not be available for public inspection.
- False claims actions must be brought within six years of the violation, or within three years of the state's learning of the violation, whichever is later, but in any event no later than ten years after the violation. Other procedural requirements for such actions are also specified. Effective for acts committed on or after January 1, 2010, except that a civil action may be based on an activity occurring before the effective date if the activity would otherwise be covered under GS 108A-70.12 and the period in GS 108A-70.13 has not lapsed.

- The bill also enacts a new GS 108A-63.1, which allows the Attorney General to issue subpoenas duces tecum to any corporation or governmental entity for any records relevant to a criminal investigation of a health care provider. Effective July 1, 2009.
- Finally, the bill amends GS 108A-63, which covers medical assistance provider fraud, to make it a Class H felony for a medical assistance provider to defraud the Medical Assistance Program. If the value of the fraud exceeds $100,000, the offense is a Class C felony. Effective July 1, 2009.

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 3 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 medial 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 convictions for this proposed offense per year, this proposed change would result in the need for one additional 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 rand 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.[1]

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.

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, 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

[1] 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.

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 changes 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. Because the bill has a broad application, DOJ will monitor the impact of the provisions after implementation and may seek funding for additional staff, depending on the amount of additional volume and workload that may result from this bill.

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.

Annual Cost of the Medicaid Investigations Unit			
Position Classification	**FTE**	**Annual Salary (total)**	**State's Portion (25% of total)**
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
Total:	**5**	**$414,560**	**$103,640**
Other annual expenses:			$38,788
Total annual State appropriation:			**$142,428**

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: None

FISCAL RESEARCH DIVISION: (919) 733-4910

PREPARED BY: Danielle Seale, Jean Sandaire

APPROVED BY: Marilyn Chism, Director
Fiscal Research Division

DATE: May 22, 2009

Official Fiscal Research Division Publication

Signed Copy Located in the NCGA Principal Clerk's Offices