

SSB 5978 - S AMD 22

By Senators Pflug, Keiser

ADOPTED 02/11/2012

1 Strike everything after the enacting clause and insert the
2 following:

3 "PART I

4 WASHINGTON MEDICAID FRAUD PROVISIONS

5 NEW SECTION. **Sec. 101.** The legislature intends to enact a state
6 false claims act in order to provide this state with another tool to
7 combat medicaid fraud. The legislature finds that between 1996 and
8 2009 state-initiated false claims acts resulted in over five billion
9 dollars in total recoveries to those states. The highest recoveries in
10 those cases were from claims relating to billing fraud, off-label
11 marketing, and withholding safety information; these cases were
12 primarily related to the pharmaceuticals industry and hospital
13 networks, hospitals, and medical centers. By this act, the legislature
14 does not intend to target a certain industry, profession, or retailer
15 of medical equipment, or to place an undue burden on health care
16 professionals. This act is not intended to harass health care
17 professionals, nor is intended to be used as a tool to target actions
18 that are related to incidental errors or clerical errors, which should
19 not be considered fraud. The intent is to use the false claims act to
20 root out significant areas of fraud that result in higher health care
21 costs to this state and to use the false claims act to recover state
22 money that could and should be used to support the medicaid program.

23 **Sec. 102.** RCW 74.09.210 and 2011 1st sp.s. c 15 s 15 are each
24 amended to read as follows:

25 (1) No person, firm, corporation, partnership, association, agency,
26 institution, or other legal entity, but not including an individual
27 public assistance recipient of health care, shall, on behalf of himself

1 or others, obtain or attempt to obtain benefits or payments under this
2 chapter in a greater amount than that to which entitled by means of:

3 (a) A willful false statement;

4 (b) By willful misrepresentation, or by concealment of any material
5 facts; or

6 (c) By other fraudulent scheme or device, including, but not
7 limited to:

8 (i) Billing for services, drugs, supplies, or equipment that were
9 unfurnished, of lower quality, or a substitution or misrepresentation
10 of items billed; or

11 (ii) Repeated billing for purportedly covered items, which were not
12 in fact so covered.

13 (2) Any person or entity knowingly violating any of the provisions
14 of subsection (1) of this section shall be liable for repayment of any
15 excess benefits or payments received, plus interest at the rate and in
16 the manner provided in RCW 43.20B.695. Such person or other entity
17 shall further, in addition to any other penalties provided by law, be
18 subject to civil penalties. The (~~secretary or~~) director(~~, as~~
19 ~~appropriate,~~) or the attorney general may assess civil penalties in an
20 amount not to exceed three times the amount of such excess benefits or
21 payments: PROVIDED, That these civil penalties shall not apply to any
22 acts or omissions occurring prior to September 1, 1979. RCW 43.20A.215
23 governs notice of a civil fine assessed by the director and provides
24 the right to an adjudicative proceeding.

25 (3) A criminal action need not be brought against a person for that
26 person to be civilly liable under this section.

27 (4) In all administrative proceedings under this section, service,
28 adjudicative proceedings, and judicial review of such determinations
29 shall be in accordance with chapter 34.05 RCW, the administrative
30 procedure act.

31 (5) Civil penalties shall be deposited (~~in the general fund~~) upon
32 their receipt into the medicaid fraud penalty account established in
33 section 103 of this act.

34 (6) The attorney general may contract with private attorneys and
35 local governments in bringing actions under this section as necessary.

36 NEW SECTION. Sec. 103. A new section is added to chapter 74.09
37 RCW to read as follows:

1 The medicaid fraud penalty account is created in the state
2 treasury. All receipts from civil penalties collected under RCW
3 74.09.210, all receipts received under judgments or settlements that
4 originated under a filing under the federal false claims act, and all
5 receipts received under judgments or settlements that originated under
6 the state medicaid fraud false claims act, chapter 74.--- RCW (the new
7 chapter created in section 215 of this act) must be deposited into the
8 account. Moneys in the account may be spent only after appropriation
9 and must be used only for medicaid services, fraud detection and
10 prevention activities, recovery of improper payments, and for other
11 medicaid fraud enforcement activities.

12 NEW SECTION. **Sec. 104.** A new section is added to chapter 74.09
13 RCW to read as follows:

14 (1) For the purposes of this section:

15 (a) "Employer" means any person, firm, corporation, partnership,
16 association, agency, institution, or other legal entity.

17 (b) "Whistleblower" means an employee of an employer that obtains
18 or attempts to obtain benefits or payments under this chapter in
19 violation of RCW 74.09.210, who in good faith reports a violation of
20 RCW 74.09.210 to the authority.

21 (c) "Workplace reprisal or retaliatory action" includes, but is not
22 limited to: Denial of adequate staff to fulfill duties; frequent staff
23 changes; frequent and undesirable office changes; refusal to assign
24 meaningful work; unwarranted and unsubstantiated report of misconduct
25 under Title 18 RCW; unwarranted and unsubstantiated letters of
26 reprimand or unsatisfactory performance evaluations; demotion;
27 reduction in pay; denial of promotion; suspension; dismissal; denial of
28 employment; or a supervisor or superior behaving in or encouraging
29 coworkers to behave in a hostile manner toward the whistleblower; or a
30 change in the physical location of the employee's workplace or a change
31 in the basic nature of the employee's job, if either are in opposition
32 to the employee's expressed wish.

33 (2) A whistleblower who has been subjected to workplace reprisal or
34 retaliatory action has the remedies provided under chapter 49.60 RCW.
35 RCW 4.24.500 through 4.24.520, providing certain protection to persons
36 who communicate to government agencies, apply to complaints made under
37 this section. The identity of a whistleblower who complains, in good

1 faith, to the authority about a suspected violation of RCW 74.09.210
2 may remain confidential if requested. The identity of the
3 whistleblower must subsequently remain confidential unless the
4 authority determines that the complaint was not made in good faith.

5 (3) This section does not prohibit an employer from exercising its
6 authority to terminate, suspend, or discipline an employee who engages
7 in workplace reprisal or retaliatory action against a whistleblower.
8 The protections provided to whistleblowers under this chapter do not
9 prevent an employer from: (a) Terminating, suspending, or disciplining
10 a whistleblower for other lawful purposes; or (b) reducing the hours of
11 employment or terminating employment as a result of the demonstrated
12 inability to meet payroll requirements. The authority shall determine
13 if the employer cannot meet payroll in cases where a whistleblower has
14 been terminated or had hours of employment reduced due to the inability
15 of a facility to meet payroll.

16 (4) The authority shall adopt rules to implement procedures for
17 filing, investigation, and resolution of whistleblower complaints that
18 are integrated with complaint procedures under this chapter. The
19 authority shall adopt rules designed to discourage whistleblower
20 complaints made in bad faith or for retaliatory purposes.

21 NEW SECTION. **Sec. 105.** A new section is added to chapter 74.09
22 RCW to read as follows:

23 The following must be medicare providers in order to be paid under
24 the medicaid program: Providers of durable medical equipment and
25 related supplies and providers of medical supplies and related
26 services.

27 **PART II**

28 **MEDICAID FRAUD FALSE CLAIMS ACT**

29 NEW SECTION. **Sec. 201.** Unless the context clearly requires
30 otherwise, the definitions in this section apply throughout this
31 chapter:

32 (1)(a) "Claim" means any request or demand made for a medicaid
33 payment under chapter 74.09 RCW, whether under a contract or otherwise,
34 for money or property and whether or not a government entity has title
35 to the money or property, that:

- 1 (i) Is presented to an officer, employee, or agent of a government
2 entity; or
- 3 (ii) Is made to a contractor, grantee, or other recipient, if the
4 money or property is to be spent or used on the government entity's
5 behalf or to advance a government entity program or interest, and the
6 government entity:
- 7 (A) Provides or has provided any portion of the money or property
8 requested or demanded; or
- 9 (B) Will reimburse such contractor, grantee, or other recipient for
10 any portion of the money or property which is requested or demanded.
- 11 (b) A "claim" does not include requests or demands for money or
12 property that the government entity has paid to an individual as
13 compensation for employment or as an income subsidy with no
14 restrictions on that individual's use of the money or property.
- 15 (2) "Custodian" means the custodian, or any deputy custodian,
16 designated by the attorney general.
- 17 (3) "Documentary material" includes the original or any copy of any
18 book, record, report, memorandum, paper, communication, tabulation,
19 chart, or other document, or data compilations stored in or accessible
20 through computer or other information retrieval systems, together with
21 instructions and all other materials necessary to use or interpret the
22 data compilations, and any product of discovery.
- 23 (4) "False claims act investigation" means any inquiry conducted by
24 any false claims act investigator for the purpose of ascertaining
25 whether any person is or has been engaged in any violation of this
26 chapter.
- 27 (5) "False claims act investigator" means any attorney or
28 investigator employed by the state attorney general who is charged with
29 the duty of enforcing or carrying into effect any provision of this
30 chapter, or any officer or employee of the state of Washington acting
31 under the direction and supervision of the attorney or investigator in
32 connection with an investigation pursuant to this chapter.
- 33 (6) "Government entity" means all Washington state agencies that
34 administer medicaid funded programs under this title.
- 35 (7)(a) "Knowing" and "knowingly" mean that a person, with respect
36 to information:
- 37 (i) Has actual knowledge of the information;

1 (ii) Acts in deliberate ignorance of the truth or falsity of the
2 information; or

3 (iii) Acts in reckless disregard of the truth or falsity of the
4 information.

5 (b) "Knowing" and "knowingly" do not require proof of specific
6 intent to defraud.

7 (8) "Material" means having a natural tendency to influence, or be
8 capable of influencing, the payment or receipt of money or property.

9 (9) "Obligation" means an established duty, whether or not fixed,
10 arising from an express or implied contractual, grantor-grantee, or
11 licensor-licensee relationship, from a fee-based or similar
12 relationship, from statute or rule, or from the retention of any
13 overpayment.

14 (10) "Official use" means any use that is consistent with the law,
15 and the rules and policies of the attorney general, including use in
16 connection with: Internal attorney general memoranda and reports;
17 communications between the attorney general and a federal, state, or
18 local government agency, or a contractor of a federal, state, or local
19 government agency, undertaken in furtherance of an investigation or
20 prosecution of a case; interviews of any qui tam relator or other
21 witness; oral examinations; depositions; preparation for and response
22 to civil discovery requests; introduction into the record of a case or
23 proceeding; applications, motions, memoranda, and briefs submitted to
24 a court or other tribunal; and communications with attorney general
25 investigators, auditors, consultants and experts, the counsel of other
26 parties, and arbitrators or mediators, concerning an investigation,
27 case, or proceeding.

28 (11) "Person" means any natural person, partnership, corporation,
29 association, or other legal entity, including any local or political
30 subdivision of a state.

31 (12) "Product of discovery" includes:

32 (a) The original or duplicate of any deposition, interrogatory,
33 document, thing, result of the inspection of land or other property,
34 examination, or admission, which is obtained by any method of discovery
35 in any judicial or administrative proceeding of an adversarial nature;

36 (b) Any digest, analysis, selection, compilation, or derivation of
37 any item listed in (a) of this subsection; and

1 (c) Any index or other manner of access to any item listed in (a)
2 of this subsection.

3 (13) "Qui tam action" is an action brought by a person under
4 section 205 of this act.

5 (14) "Qui tam relator" or "relator" is a person who brings an
6 action under section 205 of this act.

7 NEW SECTION. **Sec. 202.** (1) Subject to subsections (2) and (4) of
8 this section, a person is liable to the government entity for a civil
9 penalty of not less than five thousand five hundred dollars and not
10 more than eleven thousand dollars, plus three times the amount of
11 damages which the government entity sustains because of the act of that
12 person, if the person:

13 (a) Knowingly presents, or causes to be presented, a false or
14 fraudulent claim for payment or approval;

15 (b) Knowingly makes, uses, or causes to be made or used, a false
16 record or statement material to a false or fraudulent claim;

17 (c) Conspires to commit one or more of the violations in this
18 subsection (1);

19 (d) Has possession, custody, or control of property or money used,
20 or to be used, by the government entity and knowingly delivers, or
21 causes to be delivered, less than all of that money or property;

22 (e) Is authorized to make or deliver a document certifying receipt
23 of property used, or to be used, by the government entity and,
24 intending to defraud the government entity, makes or delivers the
25 receipt without completely knowing that the information on the receipt
26 is true;

27 (f) Knowingly buys, or receives as a pledge of an obligation or
28 debt, public property from an officer or employee of the government
29 entity who lawfully may not sell or pledge property; or

30 (g) Knowingly makes, uses, or causes to be made or used, a false
31 record or statement material to an obligation to pay or transmit money
32 or property to the government entity, or knowingly conceals or
33 knowingly and improperly avoids or decreases an obligation to pay or
34 transmit money or property to the government entity.

35 (2) The court may assess not less than two times the amount of
36 damages which the government entity sustains because of the act of a
37 person, if the court finds that:

1 (a) The person committing the violation of subsection (1) of this
2 section furnished the Washington state attorney general with all
3 information known to him or her about the violation within thirty days
4 after the date on which he or she first obtained the information;

5 (b) The person fully cooperated with any investigation by the
6 attorney general of the violation; and

7 (c) At the time the person furnished the attorney general with the
8 information about the violation, no criminal prosecution, civil action,
9 or administrative action had commenced under this title with respect to
10 the violation, and the person did not have actual knowledge of the
11 existence of an investigation into the violation.

12 (3) A person violating this section is liable to the attorney
13 general for the costs of a civil action brought to recover any such
14 penalty or damages.

15 (4) For the purposes of determining whether an insurer has a duty
16 to provide a defense or indemnification for an insured and if coverage
17 may be denied if the terms of the policy exclude coverage for
18 intentional acts, a violation of subsection (1) of this section is an
19 intentional act.

20 (5) The office of the attorney general must, by rule, annually
21 adjust the civil penalties established in subsection (1) of this
22 section so that they are equivalent to the civil penalties provided
23 under the federal false claims act and in accordance with the federal
24 civil penalties inflation adjustment act of 1990.

25 NEW SECTION. **Sec. 203.** Any information furnished pursuant to this
26 chapter is exempt from disclosure under the public records act, chapter
27 42.56 RCW, until final disposition and all court ordered seals are
28 lifted.

29 NEW SECTION. **Sec. 204.** The attorney general must diligently
30 investigate a violation under section 202 of this act. If the attorney
31 general finds that a person has violated or is violating section 202 of
32 this act, the attorney general may bring a civil action under this
33 section against the person.

34 NEW SECTION. **Sec. 205.** (1) A person may bring a civil action for
35 a violation of section 202 of this act for the person and for the

1 government entity. The action may be known as a qui tam action and the
2 person bringing the action as a qui tam relator. The action must be
3 brought in the name of the government entity. The action may be
4 dismissed only if the court, and the attorney general give written
5 consent to the dismissal and their reason for consenting.

6 (2) A relator filing an action under this chapter must serve a copy
7 of the complaint and written disclosure of substantially all material
8 evidence and information the person possesses on the attorney general
9 in electronic format. The relator must file the complaint in camera.
10 The complaint must remain under seal for at least sixty days, and may
11 not be served on the defendant until the court so orders. The attorney
12 general may elect to intervene and proceed with the action within sixty
13 days after it receives both the complaint and the material evidence and
14 information.

15 (3) The attorney general may, for good cause shown, move the court
16 for extensions of the time during which the complaint remains under
17 seal under subsection (2) of this section. The motions may be
18 supported by affidavits or other submissions in camera. The defendant
19 may not be required to respond to any complaint filed under this
20 section until twenty days after the complaint is unsealed and served
21 upon the defendant.

22 (4) If the attorney general does not proceed with the action prior
23 to the expiration of the sixty-day period or any extensions obtained
24 under subsection (3) of this section, then the relator has the right to
25 conduct the action.

26 (5) When a person brings an action under this section, no person
27 other than the attorney general may intervene or bring a related action
28 based on the facts underlying the pending action.

29 NEW SECTION. **Sec. 206.** (1) If the attorney general proceeds with
30 the qui tam action, the attorney general shall have the primary
31 responsibility for prosecuting the action, and is not bound by an act
32 of the relator. The relator has the right to continue as a party to
33 the action, subject to the limitations set forth in subsection (2) of
34 this section.

35 (2)(a) The attorney general may move to dismiss the qui tam action
36 notwithstanding the objections of the relator if the relator has been

1 notified by the attorney general of the filing of the motion and the
2 court has provided the relator with an opportunity for a hearing on the
3 motion.

4 (b) The attorney general may settle the action with the defendant
5 notwithstanding the objections of the relator if the court determines,
6 after a hearing, that the proposed settlement is fair, adequate, and
7 reasonable under all the circumstances. Upon a showing of good cause,
8 the hearing may be held in camera.

9 (c) Upon a showing by the attorney general that unrestricted
10 participation during the course of the litigation by the relator would
11 interfere with or unduly delay the attorney general's prosecution of
12 the case, or would be repetitious, irrelevant, or for purposes of
13 harassment, the court may, in its discretion, impose limitations on the
14 relator's participation, such as:

- 15 (i) Limiting the number of witnesses the relator may call;
- 16 (ii) Limiting the length of the testimony of the witnesses;
- 17 (iii) Limiting the relator's cross-examination of witnesses; or
- 18 (iv) Otherwise limiting the participation by the relator in the
19 litigation.

20 (d) Upon a showing by the defendant that unrestricted participation
21 during the course of the litigation by the relator would be for
22 purposes of harassment or would cause the defendant undue burden or
23 unnecessary expense, the court may limit the participation by the
24 relator in the litigation.

25 (3) If the attorney general elects not to proceed with the qui tam
26 action, the relator has the right to conduct the action. If the
27 attorney general so requests, the relator must serve on the attorney
28 general copies of all pleadings filed in the action and shall supply
29 copies of all deposition transcripts, at the attorney general's
30 expense. When the relator proceeds with the action, the court, without
31 limiting the status and rights of the relator, may nevertheless permit
32 the attorney general to intervene at a later date upon a showing of
33 good cause.

34 (4) Whether or not the attorney general proceeds with the qui tam
35 action, upon a showing by the attorney general that certain actions of
36 discovery by the relator would interfere with the attorney general's
37 investigation or prosecution of a criminal or civil matter arising out
38 of the same facts, the court may stay such discovery for a period of

1 not more than sixty days. The showing must be conducted in camera.
2 The court may extend the sixty-day period upon a further showing in
3 camera that the attorney general has pursued the criminal or civil
4 investigation or proceedings with reasonable diligence and any proposed
5 discovery in the civil action will interfere with the ongoing criminal
6 or civil investigation or proceedings.

7 (5) Notwithstanding section 205 of this act, the attorney general
8 may elect to pursue its claim through any alternate remedy available to
9 the state, including any administrative proceeding to determine a civil
10 money penalty. If any alternate remedy is pursued in another
11 proceeding, the relator has the same rights in the proceeding as the
12 relator would have had if the action had continued under this section.
13 Any finding of fact or conclusion of law made in the other proceeding
14 that has become final is conclusive on all parties to an action under
15 this section. For purposes of this subsection, a finding or conclusion
16 is final if it has been finally determined on appeal to the appropriate
17 court of the state of Washington, if all time for filing the appeal
18 with respect to the finding or conclusion has expired, or if the
19 finding or conclusion is not subject to judicial review.

20 NEW SECTION. **Sec. 207.** (1)(a) Subject to (b) of this subsection,
21 if the attorney general proceeds with a qui tam action, the relator
22 must receive at least fifteen percent but not more than twenty-five
23 percent of the proceeds of the action or settlement of the claim,
24 depending upon the extent to which the relator substantially
25 contributed to the prosecution of the action.

26 (b) Where the action is one which the court finds to be based
27 primarily on disclosures of specific information, other than
28 information provided by the relator, relating to allegations or
29 transactions in a criminal, civil, or administrative hearing, in a
30 legislative or administrative report, hearing, audit, or investigation,
31 or from the news media, the court may award an amount it considers
32 appropriate, but in no case more than ten percent of the proceeds,
33 taking into account the significance of the information and the role of
34 the relator in advancing the case to litigation.

35 (c) Any payment to a relator under (a) or (b) of this subsection
36 must be made from the proceeds. The relator must also receive an

1 amount for reasonable expenses which the court finds to have been
2 necessarily incurred, plus reasonable attorneys' fees and costs. All
3 expenses, fees, and costs must be awarded against the defendant.

4 (2) If the attorney general does not proceed with a qui tam action,
5 the relator shall receive an amount which the court decides is
6 reasonable for collecting the civil penalty and damages. The amount
7 may not be less than twenty-five percent and not more than thirty
8 percent of the proceeds of the action or settlement and must be paid
9 out of the proceeds. The relator must also receive an amount for
10 reasonable expenses, which the court finds to have been necessarily
11 incurred, plus reasonable attorneys' fees and costs. All expenses,
12 fees, and costs must be awarded against the defendant.

13 (3) Whether or not the attorney general proceeds with the qui tam
14 action, if the court finds that the action was brought by a person who
15 planned and initiated the violation of section 202 of this act upon
16 which the action was brought, then the court may, to the extent the
17 court considers appropriate, reduce the share of the proceeds of the
18 action which the person would otherwise receive under subsection (1) or
19 (2) of this section, taking into account the role of that person in
20 advancing the case to litigation and any relevant circumstances
21 pertaining to the violation. If the person bringing the action is
22 convicted of criminal conduct arising from his or her role in the
23 violation of section 202 of this act, that person must be dismissed
24 from the civil action and may not receive any share of the proceeds of
25 the action. The dismissal may not prejudice the right of the state to
26 continue the action, represented by the attorney general.

27 (4) If the attorney general does not proceed with the qui tam
28 action and the relator conducts the action, the court may award to the
29 defendant reasonable attorneys' fees and expenses if the defendant
30 prevails in the action and the court finds that the claim of the
31 relator was clearly frivolous, clearly vexatious, or brought primarily
32 for purposes of harassment.

33 (5) Any funds recovered that remain after calculation and
34 distribution under subsections (1) through (3) of this section must be
35 deposited into the medicaid fraud penalty account established in
36 section 103 of this act.

1 NEW SECTION. **Sec. 208.** (1) In no event may a person bring a qui
2 tam action which is based upon allegations or transactions which are
3 the subject of a civil suit or an administrative civil money penalty
4 proceeding in which the state is already a party.

5 (2)(a) The court must dismiss an action or claim under this
6 section, unless opposed by the attorney general, if substantially the
7 same allegations or transactions as alleged in the action or claim were
8 publicly disclosed:

9 (i) In a state criminal, civil, or administrative hearing in which
10 the attorney general or other governmental entity is a party;

11 (ii) In a legislative report, or other state report, hearing,
12 audit, or investigation; or

13 (iii) By the news media;
14 unless the action is brought by the attorney general or the relator is
15 an original source of the information.

16 (b) For purposes of this section, "original source" means an
17 individual who either (i) prior to a public disclosure under (a) of
18 this subsection, has voluntarily disclosed to the attorney general the
19 information on which allegations or transactions in a claim are based,
20 or (ii) has knowledge that is independent of, and materially adds to,
21 the publicly disclosed allegations or transactions, and who has
22 voluntarily provided the information to the attorney general before
23 filing an action under this section.

24 NEW SECTION. **Sec. 209.** (1) Any employee, contractor, or agent is
25 entitled to all relief necessary to make that employee, contractor, or
26 agent whole, if that employee, contractor, or agent, is discharged,
27 demoted, suspended, threatened, harassed, or in any other manner
28 discriminated against in the terms and conditions of employment because
29 of lawful acts done by the employee, contractor, agent, or associated
30 others in furtherance of an action under this chapter or other efforts
31 to stop one or more violations of this chapter.

32 (2) Relief under subsection (1) of this section must include
33 reinstatement with the same seniority status that employee, contractor,
34 or agent would have had but for the discrimination, two times the
35 amount of back pay, interest on the back pay, and compensation for any
36 special damages sustained as a result of the discrimination, including
37 litigation costs and reasonable attorneys' fees, and any and all relief

1 available under RCW 49.60.030(2). An action under this subsection may
2 be brought in the appropriate superior court of the state of Washington
3 for the relief provided in this subsection.

4 (3) A civil action under this section may not be brought more than
5 three years after the date when the retaliation occurred.

6 NEW SECTION. **Sec. 210.** (1) A subpoena requiring the attendance of
7 a witness at a trial or hearing conducted under section 204 or 205 of
8 this act may be served at any place in the state of Washington.

9 (2) A civil action under section 204 or 205 of this act may be
10 brought at any time, without limitation after the date on which the
11 violation of section 202 of this act is committed.

12 (3) If the attorney general elects to intervene and proceed with a
13 qui tam action, the attorney general may file its own complaint or
14 amend the complaint of a relator to clarify or add detail to the claims
15 in which the attorney general is intervening and to add any additional
16 claims with respect to which the attorney general contends it is
17 entitled to relief.

18 (4) In any action brought under section 204 or 205 of this act, the
19 attorney general is required to prove all essential elements of the
20 cause of action, including damages, by a preponderance of the evidence.

21 (5) Notwithstanding any other provision of law or the rules for
22 superior court, a final judgment rendered in favor of the government
23 entity in any criminal proceeding charging fraud or false statements,
24 whether upon a verdict after trial or upon a plea of guilty or nolo
25 contendere, estops the defendant from denying the essential elements of
26 the offense in any action which involves the same transaction as in the
27 criminal proceeding and which is brought under section 204 or 205 of
28 this act.

29 NEW SECTION. **Sec. 211.** (1) Any action under section 204 or 205 of
30 this act may be brought in the superior court in any county in which
31 the defendant or, in the case of multiple defendants, any one defendant
32 can be found, resides, transacts business, or in which any act
33 proscribed by section 202 of this act occurred. The appropriate court
34 must issue a summons as required by the superior court civil rules and
35 service must occur at any place within the state of Washington.

1 (2) The superior courts have jurisdiction over any action brought
2 under the laws of any city or county for the recovery of funds paid by
3 a government entity if the action arises from the same transaction or
4 occurrence as an action brought under section 204 or 205 of this act.

5 (3) With respect to any local government that is named as a
6 coplaintiff with the state in an action brought under section 205 of
7 this act, a seal on the action ordered by the court under section 205
8 of this act does not preclude the attorney general or the person
9 bringing the action from serving the complaint, any other pleadings, or
10 the written disclosure of substantially all material evidence and
11 information possessed by the person bringing the action on the law
12 enforcement authorities that are authorized under the law of the local
13 government to investigate and prosecute the action on behalf of the
14 local government, except that the seal applies to the law enforcement
15 authorities so served to the same extent as the seal applies to other
16 parties in the action.

17 NEW SECTION. **Sec. 212.** (1)(a) Whenever the attorney general, or
18 a designee, for purposes of this section, has reason to believe that
19 any person may be in possession, custody, or control of any documentary
20 material or information relevant to a false claims act investigation,
21 the attorney general, or a designee, may, before commencing a civil
22 proceeding under section 204 of this act or making an election under
23 section 205 of this act, issue in writing and serve upon the person, a
24 civil investigative demand requiring the person:

- 25 (i) To produce the documentary material for inspection and copying;
26 (ii) To answer in writing written interrogatories with respect to
27 the documentary material or information;
28 (iii) To give oral testimony concerning the documentary material or
29 information; or
30 (iv) To furnish any combination of such material, answers, or
31 testimony.

32 (b) The attorney general may delegate the authority to issue civil
33 investigative demands under this subsection (1). Whenever a civil
34 investigative demand is an express demand for any product of discovery,
35 the attorney general, the deputy attorney general, or an assistant
36 attorney general must serve, in any manner authorized by this section,
37 a copy of the demand upon the person from whom the discovery was

1 obtained and must notify the person to whom the demand is issued of the
2 date on which the copy was served. Any information obtained by the
3 attorney general or a designee of the attorney general under this
4 section may be shared with any qui tam relator if the attorney general
5 or designee determines it is necessary as part of any false claims act
6 investigation.

7 (2)(a) Each civil investigative demand issued under subsection (1)
8 of this section must state the nature of the conduct constituting the
9 alleged violation of this chapter which is under investigation, and the
10 applicable provision of law alleged to be violated.

11 (b) If the demand is for the production of documentary material,
12 the demand must:

13 (i) Describe each class of documentary material to be produced with
14 such definiteness and certainty as to permit the material to be fairly
15 identified;

16 (ii) Prescribe a return date for each class which will provide a
17 reasonable period of time within which the material so demanded may be
18 assembled and made available for inspection and copying; and

19 (iii) Identify the false claims act investigator to whom such
20 material must be made available.

21 (c) If the demand is for answers to written interrogatories, the
22 demand must:

23 (i) Set forth with specificity the written interrogatories to be
24 answered;

25 (ii) Prescribe dates at which time answers to written
26 interrogatories must be submitted; and

27 (iii) Identify the false claims law investigator to whom such
28 answers must be submitted.

29 (d) If the demand is for the giving of oral testimony, the demand
30 must:

31 (i) Prescribe a date, time, and place at which oral testimony must
32 be commenced;

33 (ii) Identify a false claims act investigator who must conduct the
34 examination and the custodian to whom the transcript of the examination
35 must be submitted;

36 (iii) Specify that the attendance and testimony are necessary to
37 the conduct of the investigation;

1 (iv) Notify the person receiving the demand of the right to be
2 accompanied by an attorney and any other representative; and

3 (v) Describe the general purpose for which the demand is being
4 issued and the general nature of the testimony, including the primary
5 areas of inquiry, which will be taken pursuant to the demand.

6 (e) Any civil investigative demand issued under this section which
7 is an express demand for any product of discovery is not due until
8 thirty days after a copy of the demand has been served upon the person
9 from whom the discovery was obtained.

10 (f) The date prescribed for the commencement of oral testimony
11 pursuant to a civil investigative demand issued under this section may
12 not be sooner than six days after the date on which demand is received,
13 unless the attorney general or an assistant attorney general designated
14 by the attorney general determines that exceptional circumstances are
15 present which warrant the commencement of the testimony sooner.

16 (g) The attorney general may not authorize the issuance under this
17 section of more than one civil investigative demand for oral testimony
18 by the same person unless the person requests otherwise or unless the
19 attorney general, after investigation, notifies that person in writing
20 that an additional demand for oral testimony is necessary.

21 (3) A civil investigative demand issued under subsection (1) or (2)
22 of this section may not require the production of any documentary
23 material, the submission of any answers to written interrogatories, or
24 the giving of any oral testimony if the material, answers, or testimony
25 would be protected from disclosure under:

26 (a) The standards applicable to subpoenas or subpoenas duces tecum
27 issued by a court to aid in a special inquiry investigation; or

28 (b) The standards applicable to discovery requests under the
29 superior court civil rules, to the extent that the application of these
30 standards to any demand is appropriate and consistent with the
31 provisions and purposes of this section.

32 (4) Any demand which is an express demand for any product of
33 discovery supersedes any inconsistent order, rule, or provision of law,
34 other than this section, preventing or restraining disclosure of the
35 product of discovery to any person. Disclosure of any product of
36 discovery pursuant to any express demand does not constitute a waiver
37 of any right or privilege which the person making such disclosure may

1 be entitled to invoke to resist discovery of trial preparation
2 materials.

3 (5) Any civil investigative demand issued under this section may be
4 served by a false claims act investigator, or by a commissioned law
5 enforcement official, at any place within the state of Washington.

6 (6) Service of any civil investigative demand issued under (a) of
7 this subsection or of any petition filed under subsection (25) of this
8 section may be made upon a partnership, corporation, association, or
9 other legal entity by:

10 (a) Delivering an executed copy of the demand or petition to any
11 partner, executive officer, managing agent, or general agent of the
12 partnership, corporation, association, or entity, or to any agent
13 authorized by appointment or by law to receive service of process on
14 behalf of such partnership, corporation, association, or entity;

15 (b) Delivering an executed copy of the demand or petition to the
16 principal office or place of business of the partnership, corporation,
17 association, or entity; or

18 (c) Depositing an executed copy of the demand or petition in the
19 United States mail by registered or certified mail, with a return
20 receipt requested, addressed to such partnership, corporation,
21 association, or entity at its principal office or place of business.

22 (7) Service of any demand or petition may be made upon any natural
23 person by:

24 (a) Delivering an executed copy of the demand or petition to the
25 person; or

26 (b) Depositing an executed copy of the demand or petition in the
27 United States mail by registered or certified mail, with a return
28 receipt requested, addressed to the person at the person's residence or
29 principal office or place of business.

30 (8) A verified return by the individual serving any civil
31 investigative demand issued under subsection (1) or (2) of this section
32 or any petition filed under subsection (25) of this section setting
33 forth the manner of the service constitutes proof of the service. In
34 the case of service by registered or certified mail, the return must be
35 accompanied by the return post office receipt of delivery of the
36 demand.

37 (9)(a) The production of documentary material in response to a

1 civil investigative demand served under this section must be made under
2 a sworn certificate, in the form as the demand designates, by:

3 (i) In the case of a natural person, the person to whom the demand
4 is directed; or

5 (ii) In the case of a person other than a natural person, a person
6 having knowledge of the facts and circumstances relating to the
7 production and authorized to act on behalf of the person.

8 (b) The certificate must state that all of the documentary material
9 required by the demand and in the possession, custody, or control of
10 the person to whom the demand is directed has been produced and made
11 available to the false claims act investigator identified in the
12 demand.

13 (10) Any person upon whom any civil investigative demand for the
14 production of documentary material has been served under this section
15 shall make such material available for inspection and copying to the
16 false claims act investigator identified in the demand at the principal
17 place of business of the person, or at another place as the false
18 claims act investigator and the person thereafter may agree and
19 prescribe in writing, or as the court may direct under subsection (25)
20 of this section. The material must be made available on the return
21 date specified in the demand, or on a later date as the false claims
22 act investigator may prescribe in writing. The person may, upon
23 written agreement between the person and the false claims act
24 investigator, substitute copies for originals of all or any part of the
25 material.

26 (11)(a) Each interrogatory in a civil investigative demand served
27 under this section must be answered separately and fully in writing
28 under oath and must be submitted under a sworn certificate, in the form
29 as the demand designates, by:

30 (i) In the case of a natural person, the person to whom the demand
31 is directed; or

32 (ii) In the case of a person other than a natural person, the
33 person or persons responsible for answering each interrogatory.

34 (b) If any interrogatory is objected to, the reasons for the
35 objection must be stated in the certificate instead of an answer. The
36 certificate must state that all information required by the demand and
37 in the possession, custody, control, or knowledge of the person to whom
38 the demand is directed has been submitted. To the extent that any

1 information is not furnished, the information must be identified and
2 reasons set forth with particularity regarding the reasons why the
3 information was not furnished.

4 (12) The examination of any person pursuant to a civil
5 investigative demand for oral testimony served under this section must
6 be taken before an officer authorized to administer oaths and
7 affirmations by the laws of the state of Washington or of the place
8 where the examination is held. The officer before whom the testimony
9 is to be taken must put the witness on oath or affirmation and must,
10 personally or by someone acting under the direction of the officer and
11 in the officer's presence, record the testimony of the witness. The
12 testimony must be recorded and must be transcribed. When the testimony
13 is fully transcribed, the officer before whom the testimony is taken
14 shall promptly transmit a copy of the transcript of the testimony to
15 the custodian. This subsection does not preclude the taking of
16 testimony by any means authorized by, and in a manner consistent with,
17 the superior court civil rules.

18 (13) The false claims act investigator conducting the examination
19 shall exclude from the place where the examination is held all persons
20 except the person giving the testimony, the attorney for and any other
21 representative of the person giving the testimony, the attorney
22 general, any person who may be agreed upon by the attorney for the
23 government and the person giving the testimony, the officer before whom
24 the testimony is to be taken, and any stenographer taking the
25 testimony.

26 (14) The oral testimony of any person taken pursuant to a civil
27 investigative demand served under this section must be taken in the
28 county within which such person resides, is found, or transacts
29 business, or in another place as may be agreed upon by the false claims
30 act investigator conducting the examination and the person.

31 (15) When the testimony is fully transcribed, the false claims act
32 investigator or the officer before whom the testimony is taken must
33 afford the witness, who may be accompanied by counsel, a reasonable
34 opportunity to examine and read the transcript, unless the examination
35 and reading are waived by the witness. Any changes in form or
36 substance which the witness desires to make must be entered and
37 identified upon the transcript by the officer or the false claims act
38 investigator, with a statement of the reasons given by the witness for

1 making the changes. The transcript must then be signed by the witness,
2 unless the witness in writing waives the signing, is ill, cannot be
3 found, or refuses to sign. If the transcript is not signed by the
4 witness within thirty days after being afforded a reasonable
5 opportunity to examine it, the officer or the false claims act
6 investigator must sign it and state on the record the fact of the
7 waiver, illness, absence of the witness, or the refusal to sign,
8 together with the reasons given.

9 (16) The officer before whom the testimony is taken must certify on
10 the transcript that the witness was sworn by the officer and that the
11 transcript is a true record of the testimony given by the witness, and
12 the officer or false claims act investigator must promptly deliver the
13 transcript, or send the transcript by registered or certified mail, to
14 the custodian.

15 (17) Upon payment of reasonable charges therefor, the false claims
16 act investigator must furnish a copy of the transcript to the witness
17 only, except that the attorney general, the deputy attorney general, or
18 an assistant attorney general may, for good cause, limit the witness to
19 inspection of the official transcript of the witness' testimony.

20 (18)(a) Any person compelled to appear for oral testimony under a
21 civil investigative demand issued under subsection (1) or (2) of this
22 section may be accompanied, represented, and advised by counsel.
23 Counsel may advise the person, in confidence, with respect to any
24 question asked of the person. The person or counsel may object on the
25 record to any question, in whole or in part, and must briefly state for
26 the record the reason for the objection. An objection may be made,
27 received, and entered upon the record when it is claimed that the
28 person is entitled to refuse to answer the question on the grounds of
29 any constitutional or other legal right or privilege, including the
30 privilege against self-incrimination. The person may not otherwise
31 object to or refuse to answer any question, and may not directly or
32 through counsel otherwise interrupt the oral examination. If the
33 person refuses to answer any question, a special injury proceeding
34 petition may be filed in the superior court under subsection (25) of
35 this section for an order compelling the person to answer the
36 question.

37 (b) If the person refuses to answer any question on the grounds of

1 the privilege against self-incrimination, the testimony of the person
2 may be compelled in accordance with the provisions of the superior
3 court civil rules.

4 (19) Any person appearing for oral testimony under a civil
5 investigative demand issued under subsection (1) or (2) of this section
6 is entitled to the same fees and allowances which are paid to witnesses
7 in the superior courts.

8 (20) The attorney general must designate a false claims act
9 investigator to serve as custodian of documentary material, answers to
10 interrogatories, and transcripts of oral testimony received under this
11 section, and must designate such additional false claims act
12 investigators as the attorney general determines from time to time to
13 be necessary to serve as deputies to the custodian.

14 (21)(a) A false claims act investigator who receives any
15 documentary material, answers to interrogatories, or transcripts of
16 oral testimony under this section must transmit them to the custodian.
17 The custodian shall take physical possession of the material, answers,
18 or transcripts and is responsible for the use made of them and for the
19 return of documentary material under subsection (23) of this section.

20 (b) The custodian may cause the preparation of the copies of the
21 documentary material, answers to interrogatories, or transcripts of
22 oral testimony as may be required for official use by any false claims
23 act investigator, or employee of the attorney general. The material,
24 answers, and transcripts may be used by any authorized false claims act
25 investigator or other officer or employee in connection with the taking
26 of oral testimony under this section.

27 (c)(i) Except as otherwise provided in this subsection (21), no
28 documentary material, answers to interrogatories, or transcripts of
29 oral testimony, or copies thereof, while in the possession of the
30 custodian, may be available for examination by any individual other
31 than a false claims act investigator or other officer or employee of
32 the attorney general authorized under (b) of this subsection.

33 (ii) The prohibition in (c)(i) of this subsection on the
34 availability of material, answers, or transcripts does not apply if
35 consent is given by the person who produced the material, answers, or
36 transcripts, or, in the case of any product of discovery produced
37 pursuant to an express demand for the material, consent is given by the
38 person from whom the discovery was obtained. Nothing in this

1 subsection (c)(ii) is intended to prevent disclosure to the
2 legislature, including any committee or subcommittee for use by such an
3 agency in furtherance of its statutory responsibilities.

4 (d) While in the possession of the custodian and under the
5 reasonable terms and conditions as the attorney general shall
6 prescribe:

7 (i) Documentary material and answers to interrogatories must be
8 available for examination by the person who produced the material or
9 answers, or by a representative of that person authorized by that
10 person to examine the material and answers; and

11 (ii) Transcripts of oral testimony must be available for
12 examination by the person who produced the testimony, or by a
13 representative of that person authorized by that person to examine the
14 transcripts.

15 (22) Whenever any official has been designated to appear before any
16 court, special inquiry judge, or state administrative judge in any case
17 or proceeding, the custodian of any documentary material, answers to
18 interrogatories, or transcripts of oral testimony received under this
19 section may deliver to the official the material, answers, or
20 transcripts for official use in connection with any case or proceeding
21 as the official determines to be required. Upon the completion of
22 such a case or proceeding, the official must return to the custodian
23 any material, answers, or transcripts so delivered which have not
24 passed into the control of any court, grand jury, or agency through
25 introduction into the record of such a case or proceeding.

26 (23) If any documentary material has been produced by any person in
27 the course of any false claims act investigation pursuant to a civil
28 investigative demand under this section, and:

29 (a) Any case or proceeding before the court or special inquiry
30 judge arising out of the investigation, or any proceeding before any
31 administrative judge involving the material, has been completed; or

32 (b) No case or proceeding in which the material may be used has
33 been commenced within a reasonable time after completion of the
34 examination and analysis of all documentary material and other
35 information assembled in the course of the investigation:

36 Then, the custodian shall, upon written request of the person who
37 produced the material, return to the person the material, other than
38 copies furnished to the false claims act investigator under subsection

1 (10) of this section or made for the attorney general under subsection
2 (21)(b) of this section, which has not passed into the control of any
3 court, grand jury, or agency through introduction into the record of
4 the case or proceeding.

5 (24)(a) In the event of the death, disability, or separation from
6 service of the attorney general of the custodian of any documentary
7 material, answers to interrogatories, or transcripts of oral testimony
8 produced pursuant to civil investigative demand under this section, or
9 in the event of the official relief of the custodian from
10 responsibility for the custody and control of the material, answers, or
11 transcripts, the attorney general must promptly:

12 (i) Designate another false claims act investigator to serve as
13 custodian of the material, answers, or transcripts; and

14 (ii) Transmit in writing to the person who produced the material,
15 answers, or testimony notice of the identity and address of the
16 successor so designated.

17 (b) Any person who is designated to be a successor under this
18 subsection (24) has, with regard to the material, answers, or
19 transcripts, the same duties and responsibilities as were imposed by
20 this section upon that person's predecessor in office, except that the
21 successor may not be held responsible for any default or dereliction
22 which occurred before that designation.

23 (25) Whenever any person fails to comply with any civil
24 investigative demand issued under subsection (1) or (2) of this
25 section, or whenever satisfactory copying or reproduction of any
26 material requested in the demand cannot be done and the person refuses
27 to surrender the material, the attorney general may file, in any
28 superior court of the state of Washington for any county in which the
29 person resides, is found, or transacts business, and serve upon the
30 person a petition for an order of the court for the enforcement of the
31 civil investigative demand.

32 (26)(a) Any person who has received a civil investigative demand
33 issued under subsection (1) or (2) of this section may file, in the
34 superior court of the state of Washington for the county within which
35 the person resides, is found, or transacts business, and serve upon the
36 false claims act investigator identified in the demand a petition for
37 an order of the court to modify or set aside the demand. In the case
38 of a petition addressed to an express demand for any product of

1 discovery, a petition to modify or set aside the demand may be brought
2 only in the district court of the United States for the judicial
3 district in which the proceeding in which the discovery was obtained is
4 or was last pending. Any petition filed under this subsection (26)(a)
5 must be filed:

6 (i) Within thirty days after the date of service of the civil
7 investigative demand, or at any time before the return date specified
8 in the demand, whichever date is earlier; or

9 (ii) Within a longer period as may be prescribed in writing by any
10 false claims act investigator identified in the demand.

11 (b) The petition must specify each ground upon which the petitioner
12 relies in seeking relief under (a) of this subsection, and may be based
13 upon any failure of the demand to comply with the provisions of this
14 section or upon any constitutional or other legal right or privilege of
15 the person. During the pendency of the petition in the court, the
16 court may stay, as it deems proper, the running of the time allowed for
17 compliance with the demand, in whole or in part, except that the person
18 filing the petition shall comply with any portions of the demand not
19 sought to be modified or set aside.

20 (27)(a) In the case of any civil investigative demand issued under
21 subsection (1) or (2) of this section which is an express demand for
22 any product of discovery, the person from whom the discovery was
23 obtained may file, in the superior court of the state of Washington for
24 the county in which the proceeding in which the discovery was obtained
25 is or was last pending, and serve upon any false claims act
26 investigator identified in the demand and upon the recipient of the
27 demand, a petition for an order of the court to modify or set aside
28 those portions of the demand requiring production of any product of
29 discovery. Any petition under this subsection (27)(a) must be filed:

30 (i) Within twenty days after the date of service of the civil
31 investigative demand, or at any time before the return date specified
32 in the demand, whichever date is earlier; or

33 (ii) Within a longer period as may be prescribed in writing by any
34 false claims act investigator identified in the demand.

35 (b) The petition must specify each ground upon which the petitioner
36 relies in seeking relief under (a) of this subsection, and may be based
37 upon any failure of the portions of the demand from which relief is
38 sought to comply with the provisions of this section, or upon any

1 constitutional or other legal right or privilege of the petitioner.
2 During the pendency of the petition, the court may stay, as it deems
3 proper, compliance with the demand and the running of the time allowed
4 for compliance with the demand.

5 (28) At any time during which any custodian is in custody or
6 control of any documentary material or answers to interrogatories
7 produced, or transcripts of oral testimony given, by any person in
8 compliance with any civil investigative demand issued under subsection
9 (1) or (2) of this section, the person, and in the case of an express
10 demand for any product of discovery, the person from whom the discovery
11 was obtained, may file, in the superior court of the state of
12 Washington for the county within which the office of the custodian is
13 situated, and serve upon the custodian, a petition for an order of the
14 court to require the performance by the custodian of any duty imposed
15 upon the custodian by this section.

16 (29) Whenever any petition is filed in any superior court of the
17 state of Washington under this section, the court has jurisdiction to
18 hear and determine the matter so presented, and to enter an order or
19 orders as may be required to carry out the provisions of this section.
20 Any final order so entered is subject to appeal under the rules of
21 appellate procedure. Any disobedience of any final order entered under
22 this section by any court must be punished as a contempt of the court.

23 (30) The superior court civil rules apply to any petition under
24 this section, to the extent that the rules are not inconsistent with
25 the provisions of this section.

26 (31) Any documentary material, answers to written interrogatories,
27 or oral testimony provided under any civil investigative demand issued
28 under subsection (1) or (2) of this section are exempt from disclosure
29 under the public records act, chapter 42.56 RCW.

30 NEW SECTION. **Sec. 213.** Beginning November 15, 2012, and annually
31 thereafter, the attorney general in consultation with the health care
32 authority must report results of implementing the medicaid fraud false
33 claims act. This report must include:

- 34 (1) The number of attorneys assigned to qui tam initiated actions;
- 35 (2) The number of cases brought by qui tam actions and indicate how
36 many cases are brought by the attorney general and how many by the qui
37 tam relator without attorney general participation;

1 (3) The results of any actions brought under subsection (2) of this
2 section, delineated by cases brought by the attorney general and cases
3 brought by the qui tam relator without attorney general participation;
4 and

5 (4) The amount of recoveries attributable to the medicaid false
6 claims.

7 NEW SECTION. **Sec. 214.** This chapter may be known and cited as the
8 medicaid fraud false claims act.

9 NEW SECTION. **Sec. 215.** Sections 201 through 214 of this act
10 constitute a new chapter in Title 74 RCW.

11 NEW SECTION. **Sec. 216.** This act is necessary for the immediate
12 preservation of the public peace, health, or safety, or support of the
13 state government and its existing public institutions, and takes effect
14 immediately."

SSB 5978 - S AMD
By Senators Pflug, Keiser

ADOPTED 02/11/2012

15 On page 1, line 1, after "fraud;" strike the remainder of the title
16 and insert "amending RCW 74.09.210; adding new sections to chapter
17 74.09 RCW; adding a new chapter to Title 74 RCW; creating a new
18 section; prescribing penalties; and declaring an emergency."

EFFECT: Eliminates the extension of the statute of limitations for
Medicaid-related crimes and eliminates the creation of the specific
crime of Medicaid Theft.

Provides that receipts from judgments obtained under the state or

federal false claims acts are deposited into the Medicaid Fraud Penalty Account (currently only refers to settlements).

With respect to the Attorney General's duty to diligently investigate violations of the act, removes the provision stating that the duty is subject to funds appropriated for this purpose.

Makes a number of technical and clarifying amendments to correct inaccurate cross-references and terms (e.g., replaces some references to federal or congressional reports/hearings with references to state or legislative reports/hearings).

--- END ---