

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: April 16, 1998 Revised: \_\_\_\_\_

Subject: Medicaid Provider Fraud

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Maclure</u>	<u>Krasovsky</u>	<u>RC</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

**I. Summary:**

This bill reverses legislative action of the 1994 Regular Session relating to procedures and principles governing certain actions to recover Medicaid expenses from liable third parties. The bill removes from the Medicaid Third-Party Liability Act provisions that prohibit liable third parties from raising affirmative defenses in state actions seeking recovery of Medicaid expenses, that enable the state to pursue recovery of aggregate Medicaid expenses in one proceeding, that specify that the state has a cause of action independent of the Medicaid recipient, and that authorize the state to use statistical analysis in establishing that third parties caused injuries or illnesses treated through the Medicaid program. The provisions of the bill operate retroactively to July 1, 1994, with an exception for any civil actions filed prior to March 1, 1998. Any such filed action and any related matters including the enforcement of any settlement agreement would remain covered and shall proceed under the law as it existed on the date of the filing of such action. If the settlement is overturned, canceled, terminated or materially altered by subsequent court order, such action remains covered and shall proceed under the law as it existed on the date the action was filed.

This bill substantially amends sections 409.910 and 624.424 of the Florida Statutes.

**II. Present Situation:**

**Medicaid Third-Party Liability Act & 1994 Amendments**

Medicaid is a public assistance program through which health care services are provided to eligible poor and disabled. Under the program, which is funded with federal, state, and county resources, payments are made to qualified health care providers on behalf of Medicaid recipients for particular medical services. The single state agency responsible for administration of the

Medicaid program in Florida is the Agency for Health Care Administration (AHCA or agency), which assumed those duties from the Department of Health and Rehabilitative Services in 1993.

Federal law governing Medicaid provides that a state must commit to “take all reasonable measures to ascertain the legal liability of third parties (including health insurers, group health plans . . . , service benefit plans, and health maintenance organizations) to pay for care and services available under” the program. (42 U.S.C. s. 1396a(a)(25)(A).) Further, a state must commit to seek reimbursement in situations where a legal liability is found to exist after medical assistance has been made available and where the likely recovery will exceed the costs of securing such recovery. (*Id.* at s. 1396a(a)(25)(B).)

Florida has carried out activities related to third-party liability since the Medicaid program began in this state in 1970. The express state authority to pursue reimbursement for health care expenses paid for by Medicaid was first provided in 1978 and today is contained in the state’s Medicaid Third-Party Liability Act, s. 409.910, F.S. The act sets forth the legislative intent and the various rights of the state, Medicaid recipients, and liable third parties with respect to Medicaid recovery. Among other provisions, the act specifies that the state is automatically subrogated to any rights that a Medicaid recipient has to third-party benefits (s. 409.910(6)(b), F.S.), and that the recipient automatically assigns such rights to the state (s. 409.910(6)(c), F.S.). Under the third-party liability program, the state has employed a variety of tools through which to secure reimbursement for Medicaid payments, such as auditing hospital claims, sharing in judgments or settlements won by recipients, and recovering from insurers.

During the 1994 Regular Session, the Legislature made substantial revisions to the Medicaid Third-Party Liability Act through ch. 94-251, L.O.F. Paragraph 409.910(6)(a), F.S., which was added to the act by the 1994 amendments, provides that when the state pays for medical care under the Medicaid program, AHCA “has a cause of action against a liable third party to recover the full amount of medical assistance provided by Medicaid, and such cause of action is independent of any rights or causes of action of the recipient.” In addition, among other changes, the 1994 amendments specifically abrogated certain affirmative defenses for use by liable third parties in Medicaid recovery actions by the state (s. 409.910(1), F.S.); authorized the state to pursue in one proceeding reimbursement for medical services provided to multiple Medicaid recipients (s. 409.910(9), F.S.); specified that under certain circumstances the state does not have to identify individual Medicaid recipients (s. 409.910(9)(a), F.S.); authorized the state to use statistical analysis to prove causation and damages in such a consolidated proceeding (s. 409.910(9), F.S.); permitted the state to proceed under a market-share theory of recovery (s. 409.910(9)(b), F.S.); specified that the concept of joint and several liability applies to recoveries by the state (s. 409.910(1), F.S.); and specified that common law theories of recovery shall be liberally construed to fulfill the legislative intent that Medicaid be a payer of last resort (s. 409.910(1), F.S.).

### **Challenges to the 1994 Amendments**

The act and the 1994 amendments to it do not identify a specific industry as a liable third party. The 1994 amendments were widely reported as being designed to improve the prospects of the state to recover Medicaid expenses for tobacco-related illnesses from the tobacco industry. Concerns were voiced, however, that the amendments could be applied as well against manufacturers of products other than tobacco products. Partly in response to such concerns, the governor, through an executive order issued in March 1995, directed AHCA in particular, and all gubernatorial agencies in general, to refrain from applying the provisions of the 1994 amendments against “defendants other than those responsible for disease and death caused by tobacco products and those responsible for disease and death caused by the sale and consumption of illegal drugs.” (Exec. Order No. 95-109.)

In June 1994, Associated Industries of Florida, Publix Supermarkets, the National Association of Convenience Stores, and Philip Morris filed a complaint in circuit court in Leon County against the state, AHCA, and the Department of Business and Professional Regulation, challenging the constitutionality of the 1994 amendments to the Medicaid Third-Party Liability Act. Following the circuit court’s ruling in June 1995 that upheld some of the 1994 amendments and struck down others (*Associated Industries, et al. v. Florida, et al.*, case no. 94-3128 (Fla. Cir. Ct. 1995)), the decision was certified for review by the Florida Supreme Court on the grounds that it involved a question of great public importance.

In June 1996, the Florida Supreme Court ruled that Medicaid Third-Party Liability Act, as revised by the 1994 amendments, was facially constitutional, although it cautioned that some of the act’s provisions could give rise to constitutional concerns in terms of their application. The Court further ruled that:

- The provision excusing the state from having to identify individual Medicaid recipients is violative of due process and must be stricken because it blocks a defendant from establishing that Medicaid payments were improperly made or from showing that its particular product was not used by a particular Medicaid recipient.
- Because the Legislature cannot resurrect a claim once it is barred, the 1994 amendment abolishing the statute of repose defense is unconstitutional with respect to those claims that are already barred.
- The ability of the state to proceed under a market-share theory of recovery cannot be used in conjunction with the act’s requirement that joint-and-several liability apply to state recoveries. Use of the concepts together, the Court said, would undermine the principle behind market-share recovery of limiting a defendant’s liability solely to its actual market share. However, the Court noted that the two theories may be used independently.

- The act may authorize the state to use statistical evidence to establish causation without violating the separation-of-powers elements of the Florida Constitution. The Court also upheld the portions of the act allowing the state to join claims and directing courts to liberally construe common law theories of recovery and the evidence code.
- The 1994 amendments, which made clear that the state has a cause of action independent of the Medicaid recipient, may be applied to the recovery of payments made after the amendments' July 1, 1994, effective date. Recovery of payments made before that date may be pursued through a traditional subrogation claim.

*(Agency for Health Care Admin. v. Associated Industries of Florida, Inc., 678 So. 2d 1239 (Fla. 1996), cert. denied, 117 S. Ct. 1245 (1997.))*

### **Florida's Action Against the Tobacco Industry**

Citing the authority provided in the 1994 amendments to pursue in one proceeding sums paid on behalf of multiple Medicaid recipients, Florida in February 1995 filed a lawsuit against the tobacco industry seeking to recover at least \$1.4 billion, representing what the state maintained it had spent over a five-year period on treatments for Medicaid patients with tobacco-related illnesses. Following the Supreme Court's decision in 1996, the trial judge in Palm Beach County hearing the state's lawsuit against the tobacco industry took several steps in essence implementing the Supreme Court's opinion. For example, the judge dismissed several of the counts in the state's amended complaint because they were unrelated to negligence or defective products, and he reiterated that the state under the act could only recover payments made after the Act's July 1, 1994, effective date. The judge also required the state to identify the individual Medicaid recipients underlying its claims. In August 1997, as the trial was about to commence, the state announced its settlement with the tobacco industry, which includes at least \$11.3 billion in payments to the state.

### **Legislative Action Relating to '94 Amendments**

During the 1995 Session, the Legislature passed Senate Bill 42, which reversed almost all of the amendments made to the Medicaid Third-Party Liability Act in 1994 -- essentially restoring the language in the act to its form prior to the 1994 Session. The governor vetoed SB 42, noting that the measure rescinded provisions that served as a substantial basis for the state's then pending lawsuit against the tobacco industry. During the 1996 legislative session, the Senate passed Committee Substitute for Senate Bills 12 & 406, which attempted to limit the application of the 1994 Medicaid third-party liability amendments to actions to recover costs of treatment of disease or injury caused by the use of cigarettes. A comparable measure in the House of Representatives was voted unfavorably by a House committee and laid on the table.

### III. Effect of Proposed Changes:

This bill reverses amendments made in 1994 to the Medicaid Third-Party Liability Act, essentially restoring the provisions governing third-party reimbursement of Medicaid expenses to their condition prior to the 1994 Regular Session. Among other changes, the bill has the effect of:

1) reinstating the availability of certain affirmative defenses for use by liable third parties in Medicaid recovery actions by the state, 2) removing specific authority given to the state to pursue in one proceeding reimbursement for medical services provided to multiple Medicaid recipients, and 3) eliminating the state's ability to use statistical evidence to prove causation and damages in such a consolidated proceeding.

This bill takes effect upon becoming a law, and it provides for retroactive application. This bill also specifies that any civil action or proceeding initiated on or after July 1, 1994, that seeks to pursue or establish liability under the 1994 amendments to the Medicaid Third-Party Liability Act may not be maintained, continued, or enforced.

Following is a section-by-section analysis of the measure.

**Section 1** substantially amends s. 409.910, F.S., the Medicaid Third-Party Liability Act (Act), as follows:

- Removes comparative negligence, assumption of risk, and all other affirmative defenses normally available to liable third parties from the list of legal principles specifically abrogated under the act.
- Removes provisions applying the concept of joint and several liability to Medicaid recoveries by the state and specifying that common law theories of recovery shall be liberally construed to fulfill the legislative intent that Medicaid be a payer of last resort.
- Deletes language directing the state to seek reimbursement in situations in which third-party liability or benefits are discovered either before or after Medicaid has provided medical assistance, and restores language directing the state to seek reimbursement in situations in which third-party benefits are discovered or become available after Medicaid has provided such assistance.
- Removes provisions specifying that the state has a cause of action against liable third parties, independent from the recipient, for the recovery of Medicaid expenses.
- Restores language conditioning the state's right to compromise a Medicaid recipient's claims to those situations in which the recipient is not otherwise represented by an attorney on the claim.
- Removes provisions specifically authorizing the state to: 1) seek recovery from liable third parties in one proceeding for payments made on behalf of multiple Medicaid recipients,

2) prove causation and damages in such a consolidated proceeding with statistical analysis, 3) seek recovery based on payments made on behalf of a class of recipients without having to name individual recipients, and 4) proceed under a market-share theory of recovery.

- Removes provision exempting the state from having to notify Medicaid recipients when the state elects to seek reimbursement for multiple payments in a single proceeding.
- Removes provision specifying that each item of Medicaid expense by the state shall constitute a separate cause of action for the purposes of the act's five-year statute of limitations. Removes provision specifying that the defense of statute of repose is inapplicable to third-party liability actions brought by the state. (A statute of limitations establishes a time period within which an action must be brought, measured from the time the cause of action accrues. A statute of repose precludes a right of action after a specified time, measured, for example, from the sale of a product. *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992).)
- Revises statutory cross-references in a provision allowing the state to seek treble damages in cases of suspected criminal violations or fraudulent activity. Removes provision allowing the state to keep all such treble damages when the recipient has no right to intervene or fails to intervene.

**Section 2** conforms a cross-reference to the Medicaid Third-Party Liability Act made in s. 624.424(9)(a), F.S., which governs reporting requirements for authorized insurers.

**Section 3** provides that the act takes effect upon becoming a law and specifies that the provisions of the bill operate retroactively to July 1, 1994, with an exception for any civil actions filed prior to March 1, 1998. Any such filed action and any related matters including the enforcement of any settlement agreement would remain covered and shall proceed under the law as it existed on the date of the filing of such action. If the settlement is overturned, canceled, terminated or materially altered by subsequent court order, such action remains covered and shall proceed under the law as it existed on the date the action was filed.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The actual direct economic impact of this bill on the private sector is not known. The 1994 amendments to the Medicaid Third-Party Liability Act facilitated the imposition of liability in some cases on individuals and businesses for injuries or illness suffered by Medicaid recipients and thereby may have increased the potential for private-sector sources to be held responsible for costs paid by Medicaid. By repealing those amendments, this bill restores the framework for establishing such third-party liability to the status held prior to the 1994 changes.

C. Government Sector Impact:

The actual direct economic impact of this bill on the governmental sector is not known. The 1994 amendments to the Medicaid Third-Party Liability Act facilitated the imposition of liability in some cases on third parties and thereby enabled the state to be potentially more successful in recovering health care expenses it pays on behalf of Medicaid recipients. By largely restoring the Act to its prior framework for imposing third-party liability, this bill returns the state's prospects for Medicaid reimbursement to the recovery status existing prior to the 1994 legislative session.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.