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MEMORANDUM

January 26, 2016

SUBJECT: Committee substitute for SB 78
(CSSB 78(FIN); Work Order No. 29-GS1055\H)

TO: Senator Anna MacKinnon
Attn: Erin Shine

FROM: Kate S. Glover *KG*
Legislative Counsel

Attached is the draft CS you requested. Only a few of the sections of the draft CS were included in either the previous version of SB 78 or in HB 148, the companion legislation in the house. Given the length of the draft and the short time allowed to review the materials, I am not able to provide a thorough analysis of the bill. This memorandum explains some of the differences between the draft materials prepared by the Department of Law (forwarded to our office by Ms. Shine) and the draft CS. Although Ms. Shine authorized me to discuss the bill with Stacy Kraly at the Department of Law, I was unable to discuss most of these changes with Ms. Kraly in the time available to prepare the draft.

AS 09.10.075: The draft provided said "(2) three years after the date when facts material to the action were known, or reasonably should have been known, by the attorney general, the Department of Health and Social Services, but in no event more than 10 years" I did discuss this section with Ms. Kraly and added "or" between "the attorney general," and "the Department of Health and Social Services"

The section also states "For the purpose of this section, a complaint under AS 09.58.020 is considered filed on the date it is lodged in camera with the court." Under Rule 4, Alaska Rule of Civil Procedure and *Silverton v. Marler*, 389 P.2d 3 (Alaska 1964), a case is commenced and the statute of limitations tolled when the complaint is filed with the court. It does not appear that this sentence is intended to change that rule in any way, so the sentence is not necessary and is not included in the draft CS.

AS 09.10.120(a): The draft cited this as AS 09.20.120(a), but the citation was incorrect. It is actually AS 09.10.120(a).

Alaska Medicaid False Claim and Reporting Act: It appears that this section of the bill is intended to meet federal regulations that provide incentives for states to adopt Medicaid

false claims act statutes. For your information, you can review federal guidance related to this at 71 Fed. Reg. 48,552 (Aug. 21, 2006).

In the draft CS, "medical assistance" is used instead of "Medicaid" throughout this section. The statutes generally use the term "medical assistance program" to refer to the state's program and "Medicaid" to refer to the federal program. This section applies only to medical assistance providers and medical assistance recipients. Would you prefer to make it applicable to any person? As it is written, a person who never received any medical assistance services (and is therefore not a "recipient") could submit a claim and would not fall under the proposed false claims act.

AS 09.58.010: This section is reorganized in the draft CS for clarity and to avoid repetition and passive voice. Subsection (a) now specifies the prohibited conduct, (b) requires a beneficiary to report fraud, (c) provides the penalties, (d) modifies penalties, and (e) provides agency liability. In my opinion, the reorganization does not change the proposed statute substantively.

Subsections (c) and (d) from the materials provided are not included in the draft CS because it is not necessary to state that generally applicable court rules and laws apply unless the intent is to change the rules and laws. These sections did not appear to change the applicable rules and laws.

Subsection (b) of the draft materials ((d)(1) and (2) in the draft CS) refer to attorney general investigations under proposed AS 09.58.020. But, under that section, either the attorney general or the Department of Health and Social Services (DHSS) could conduct an investigation. For that reason, in the draft, DHSS is added after the attorney general.

You may want to consider providing a definition for "beneficiary of an intentional or inadvertent submission of a false or fraudulent claim" in subsection (b). Does this refer only to the person who received the payment or are there other people who could be beneficiaries? Does it also include a person who received medical services if the provider submitted a fraudulent claim?

AS 09.58.015: Moved the definition for "attorney general" to AS 09.58.100 because the definition applies to the whole chapter.

AS 09.58.020: Changed "relator" to "person" throughout and eliminated the definition of "relator" from AS 09.58.100. The materials provided allowed the private party bringing the suit to do so in the name of the state. In the draft CS, the person would bring the suit in the name of the person and the state, because the person is also entitled to recover an award if the suit is successful. This is consistent with the federal guidance.¹

¹ See 71 Fed. Reg. at 48,554.

AS 09.58.025: It is not necessary to specify that failing to obey a court order may be punished as contempt, so this sentence is not included in the draft CS. AS 09.50.010(5) already states that, and the courts have inherent power to punish a person for disobeying the court's lawful orders.

AS 09.58.030: Whether an amended complaint relates back to the original complaint is determined under existing court rules, so this language is not included in the draft CS. To the extent the proposed language is an attempt to change the court rules, the intended changes should be clearly stated, and may require a change to procedural court rules, which requires a two-thirds vote of both houses of the legislature.

AS 09.58.070: Corrected the citation to AS 39.90.120.

Proposed AS 09.58.080: Deleted this section because (a)(1), (a)(2), and (b) restate otherwise applicable law and are not necessary. Subsection (a)(3) eliminates jury trials for Medicaid false claims act cases. The right to a jury trial comes from art. I, sec. 16 of the Constitution of the State of Alaska. To the extent this section tries to change that, it would have no effect.

AS 09.58.100(4): The definition of "knowingly" under AS 11.81.900 does not track the definition required under federal regulations, so the draft CS substitutes a definition that is consistent with the federal guidance.²

AS 22.10.020: This section is not necessary, as the superior court is a court of general jurisdiction with original jurisdiction in all civil and criminal matters. Therefore, it is not included in the draft CS.

AS 37.05.146(c): Consider adding monetary recoveries from Medical Assistance False Claims Act cases to the program receipts fund described under AS 37.05.146(c)(59) instead of creating a new fund.

AS 40.25.120(a): Court records are generally public. It is not clear to me why court records related to medical assistance false claims cases would remain confidential after the court has unsealed them. Any confidential medical information could be redacted and would already be confidential under AS 40.25.120(a)(3).

AS 47.05.250: Changed this from "fines" to "civil penalties."

The broad delegation to DHSS to impose civil penalties could be construed as an over-delegation of authority. Consider adding a provision for administrative appeal and specifying which provisions of AS 47.05 and AS 47.07 may be subject to penalties, or providing narrower limits for specific types of violations. Sec. 6 from HB 227 is similar,

² See 71 Fed. Reg. 48,552 at 48,553 (Aug. 21, 2006); 31 U.S.C. § 3729(b)(1).

but provides for administrative review of civil penalties. Would civil penalties be available for the same conduct that is subject to civil prosecution under AS 09.58 and criminal prosecution under AS 47.05.210?

The delegation of authority is particularly broad in light of the range of criminal and civil penalties that would be available if the draft CS is enacted into law. There is already a crime of medical assistance fraud described under AS 47.05.210, and the draft bill would add a civil violation of medical assistance false claims, this separate provision for civil penalties, and a provision to allow forfeiture of property in association with a criminal case. This allows DHSS extremely broad authority in penalizing medical assistance providers and recipients. It is possible that a court would construe a civil penalty as proposed, as criminal in nature, barring a second action under AS 09.58 based on double jeopardy.

AS 47.05.260: This section raises issues under the due process clause of the United States and Alaska constitutions. Under decisions of the United States and Alaska Supreme Courts, property may be seized prior to a conviction in criminal proceedings only if the state can show probable cause to believe that the property is ultimately subject to forfeiture.³ This requires a two-part showing. First, there must be probable cause to believe that the defendant committed an offense permitting forfeiture, and second, there must be probable cause to believe that the property at issue has a requisite connection to the crime.⁴ Generally, this allows for the forfeiture of things like narcotics, fishing boats used in illegal fishing, or illegally harvested game.⁵ It is not clear that property seized under AS 47.05.260, as it is proposed in the draft bill, would meet that requirement. The draft requires a showing of probable cause that medical assistance fraud has been committed, but it does not require a showing that the property seized is connected to the crime (i.e. that it was used for the crime, is itself illegal, or is the fruits of the crime).

In addition, *State v. Rice*, 626 P.2d 104 (Alaska 1981) requires that not only innocent purchasers, but also innocent owners be protected from forfeiture. The proposed language only includes an exception for innocent purchasers. Co-owners should also be protected.

You may want to review AS 17.30.110 – 17.30.126. These statutes describe the proceedings for forfeiture that are applicable in cases involving controlled substances. AS 09.40.010 – 09.40.110 may also be relevant, as these statutes provide a process for attachment of assets in some civil cases.

³ See *Kaley v. U.S.* 134 S. Ct. 1090 (2014).

⁴ *Id.* at 1095.

⁵ See, e.g., *State v. Rice*, 626 P.2d 104 (Alaska 1981); *Waiste v. State*, 10 P.3d 1141 (Alaska 2000).

In addition, proposed subsections (d) and (f) conflict. If the action for forfeiture may be joined with other civil or criminal actions to recover damages from the alleged fraud, then what does it mean that the section does not apply to actions or damages under AS 09.58? What civil actions can it be joined with? Proposed subsection (f) did not appear to be necessary, because subsection (a) states that it only applies to actions for criminal fraud under AS 47.05.210. For that reason, (f) does not appear in the draft CS.

AS 47.07.036(d)(4): The authority to apply for demonstration projects under (d)(4) is broad. If the legislature wishes to constrain the department's authority to apply for demonstration projects, you may want to consider providing guidance regarding the type of projects for which the department may apply.

Indirect court rule amendments: In the time allowed, I have not been able to carefully review all of the sections of the bill to determine whether there are any other court rules that may be amended by this bill. It is important to ensure that all court rules that may be amended are indicated. Under Uniform Rule 39(e), a bill must expressly state what court rules it changes. To amend a rule of procedure requires a two-thirds majority vote of each house of the legislature under art. IV, sec. 15 of the Constitution of the State of Alaska. Court rule changes relating to the filing of complaints, factual allegations required to be made in a complaint, and other changes made by this bill are likely changes to rules of procedure. For that reason, the draft bill includes a conditional effect section specifying that the new sections of law creating the civil Medicaid false claims act do not take effect unless the indirect court rule change sections of the bill receive the necessary two-thirds vote. This is further discussed on pages 48 – 51 of the Legislative Drafting Manual.

The materials provided indicate that Rules 9 and 10 are indirectly affected, but it does not appear to me that those rules would be affected, so I have eliminated them from the draft CS. The sections of the draft CS providing for seizure and forfeiture of property likely affect court rules, in particular, Criminal Rule 37, which relates to search and seizure. It may be better to include a direct amendment for this criminal rule change. If the seizure provisions are also intended to apply in civil cases then Civil Rule 89 is affected. I included both the civil and criminal rule changes in the draft CS because I was unsure whether it is intended to apply only to criminal cases.

Projects in uncodified law: I recommend that you review each of these projects carefully to determine whether they meet your goals. If you would like any of these plans or projects to be permanent (longer than two years), they should be changed to codified law. In addition, most of the projects are not mandatory. Please review them carefully and let me know if you would like to provide additional guidance or to make any of them mandatory.

The primary care case management system is mandatory, and says that it must be integrated "in the demonstration project set out in this Act." I interpreted this to mean

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that the case management system is supposed to be integrated with the accountable care demonstration project. If this is not correct, please let me know.

If I may be of further assistance, please advise.

KSG:dla
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Attachment