S.B. 197

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(As Introduced)

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BILL SUMMARY

- Prohibits a person from doing any of the following: (1) knowingly presenting, or causing to be presented, to a state officer or employee or to the state a false or misleading claim for payment or approval, (2) knowingly making, using, or causing to be made or used, a false record or statement to get the state to pay or approve a false or misleading claim, (3) conspiring to defraud the state by getting a false or fraudulent claim allowed or paid, (4) having possession, custody, or control of property or money used or to be used by the state and, with intent to conceal it, delivering or causing to be delivered less property or money than the amount the person received, (5) with intent to defraud, making or delivering a document that certifies receipt of property used or to be used by the state and that the person is authorized to make or deliver if the person does not know the information on the document is true, (6) knowingly buying, or receiving as a pledge of an obligation or debt, public property from an unauthorized officer or employee of the state, (7) knowingly making, using, or causing to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state, or (8) knowingly soliciting, receiving, offering to pay, or paying a kickback, bribe, rebate, or other form of remuneration, in any manner or kind, for referring an individual to a health care provider or managed care organization or to a third person for specified purposes that relate to the receipt of goods or services under the state's medical assistance program or by the Bureau of Workers' Compensation.

- Provides civil penalties for violating the prohibition.

- Requires the Attorney General to diligently investigate suspected violations of the prohibition.

- Authorizes the Attorney General, or "any person," to bring civil enforcement actions on behalf of the state against persons who violate the prohibition, and provides procedures that govern such actions.

- Provides that, whenever the Attorney General has reason to believe that a person may be in possession, custody, or control of any documentary material or information relevant to an investigation conducted under its provisions, the Attorney General may issue civil investigative demands requiring the person to: (1) produce the documentary material for inspection and copying, (2) answer in writing written interrogatories with respect to the documentary material or information, (3) give oral testimony concerning the documentary material or information, or (4) furnish any combination of the material, answers, or testimony.

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CONTENT AND OPERATION

The bill enacts a mechanism that relates to the civil sanctioning of persons who file specified false or fraudulent claims with the state or who defraud the state in specified manners of money or property.

Prohibition and sanctions

Prohibition

The bill prohibits a person from doing any of the following (R.C. 109.45(B)):

(1) "Knowingly" (see "***Definitions regarding prohibition***," below) presenting, or causing to be presented, to an officer or employee of the state or to the state a false or misleading "claim" (see "***Definitions regarding prohibition***," below) for payment or approval;

(2) Knowingly making, using, or causing to be made or used, a false record or statement to get the state to pay or approve a false or misleading claim;

(3) Conspiring to defraud the state by getting a false or fraudulent claim allowed or paid;

(4) Having possession, custody, or control of property or money used or to be used by the state and, with intent to conceal the property or money, delivering or causing to be delivered less property or money than the amount for which the person receives a certificate or receipt;

(5) With intent to defraud, making or delivering a document that certifies receipt of property used by the state or to be used by the state and that the person is authorized to make or deliver if the person does not know that the information on the document is true;

(6) Knowingly buying, or receiving as a pledge of an obligation or debt, public property from an officer or employee of the state who lawfully may not sell or pledge the property;

(7) Knowingly making, using, or causing to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state;

(8) Knowingly soliciting, receiving, offering to pay, or paying a kickback, bribe, rebate, or any other form of remuneration, directly or indirectly, overtly or covertly, in cash or in kind, for referring an individual to a health care provider or

managed care organization or to a third person for the purpose of referral of the individual by the third person to a health care provider or managed care organization for furnishing the individual with goods or services that may be paid for, in whole or in part, by the medical assistance program established under existing R.C. Chapter 5111. (not in the bill) and rules adopted pursuant to that Chapter or by the Bureau of Workers' Compensation under existing R.C. Chapter 4121. (not in the bill) and rules adopted pursuant to that Chapter.

Sanctions

Except as otherwise described in this paragraph, a person who violates the prohibition described above is liable to the state for a civil penalty of not less than $5,000 and not more than $10,000 for each false or misleading claim, plus three times the amount of damages that the state sustains because of the violation. A person who violates the prohibition is liable to the state for a civil penalty of not less than two times the amount of damages the state sustains because of the violation, plus the costs of a civil action brought to recover any such penalty or damages, if the court finds all of the following: (1) the person committing the violation furnished the Attorney General (the AG) with all information known to the person about the violation within 30 days after the date on which the defendant first obtained the information, (2) the person fully cooperated with any state investigation of the violation, and (3) at the time the person furnished the AG with the information about the violation, no criminal prosecution, civil action, or administrative action had been commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

Any information furnished as described in clause (1), (2), or (3) of the preceding paragraph is not a public record under, and is exempt from disclosure under, the existing Public Records Law (R.C. 149.43--not in the bill). (R.C. 109.45(C) and (D).)

Definitions regarding prohibition

The bill provides that, as used in the prohibition described above (R.C. 109.45(A)):

"***Knowing***" and "***knowingly***" mean that a person, with respect to information and with or without a specific intent to defraud, meets at least one of the following criteria: (1) the person has actual knowledge of the information, (2) the person acts in deliberate ignorance of the truth or falsity of the information, or (3) the person acts in reckless disregard of the truth or falsity of the information.

"***Claim***" includes any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient if the state provides any portion of the money or property that is requested or demanded or if the state will reimburse the contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.

Investigation by AG of violation of the prohibition; civil action against violator by AG or any person

Investigation by AG, and commencement of civil action by AG

The bill requires the AG to diligently investigate violations of the prohibition it enacts, as described above. If the AG finds that a person has violated or is violating the prohibition, the AG may bring a civil action under the provisions described below against the person. (R.C. 109.46(A).)

Commencement of civil action by any person; possible state intervention

In general. The bill authorizes "a person" to bring a civil action for a violation of the prohibition on behalf of the person and on behalf of the state, but specifies that a person may not bring an action under this provision against the state or a political subdivision, any department, board, office, commission, agency, institution, or other instrumentality of the state or a political subdivision, or any officer or employee of the state or a political subdivision. A person who brings an action under this provision must do so in the name of the state.

The bill requires that a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses be served on the AG pursuant to Civil Rule 4.2(J). The complaint must be filed *in camera*, remain under seal for at least 60 days, and not be served on the defendant until the court so orders. The state may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information. However, the state, for good cause shown, may file motions with the court requesting extensions of the time during which the complaint remains under seal, and the state may intervene as described in this paragraph; the motion may be supported by affidavits or other submissions *in camera*. The bill provides that the defendant cannot not be required to respond to any complaint filed under the bill's provisions (apparently, including an action brought by the AG under the provision described above) until 28 days after the complaint is unsealed and served upon the defendant pursuant to Civil Rule 4.

Before the expiration of the 60-day period described in the preceding paragraph or any extensions of that period obtained as described in that paragraph,

the state must either proceed with the action or notify the court that it declines to proceed with the action. If the state proceeds with the action, it must conduct the action. If the state declines to proceed with the action, the person bringing the action has the right to conduct the action.

When a person brings an action under these provisions, no person other than the state may intervene or bring a related action based on the facts underlying that pending action. (R.C. 109.46(B).)

State election to intervene in action commenced by a person; effect and procedures. If the state proceeds with an action commenced by "a person" as described above, it has the primary responsibility for prosecuting the action and is not bound by an action of the person bringing the action. The person bringing the action has the right to continue as a party to the action, subject to certain limitations described in the next two paragraphs, below.

The state may *dismiss* an action brought by "a person" as described above, notwithstanding the objections of the person initiating the action if the person has been notified by the state of the filing of the motion to dismiss and the court has provided the person with an opportunity for a hearing on the motion. The state may *settle* an action so brought with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, the court may hold the hearing *in camera*.

Upon a *showing by the state* that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the state's prosecution of the case or would be repetitious, irrelevant, or for purposes of harassment, the court, in its discretion, may impose limitations on the person's participation, including, but not limited to, all of the following: (1) limiting the number of witnesses the person may call, (2) limiting the length of the testimony of witnesses, (3) limiting the person's cross-examination of witnesses, and (4) otherwise limiting the participation by the person in the litigation. Upon a *showing by the defendant* that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit participation by the person initiating the action in the litigation. (R.C. 109.46(C)(1) and (2).)

State election not to intervene in action commenced by a person; effect and procedures; state election to pursue claims through other means. If the state elects not to proceed with an action brought by "a person" as described above, the person has the right to conduct the action. If the state so requests, it must be served with copies of all pleadings filed in the action and supplied with copies of

all deposition transcripts at the state's expense. When the person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the state to intervene at a later date upon a showing of good cause. (R.C. 109.46(C)(3).)

The bill provides that the state may elect to pursue its claim through any available means other than an action brought by "a person" as described above, including an administrative proceeding to determine a civil monetary penalty. If an alternate remedy is pursued in another proceeding, the person initiating the action has the same rights in that proceeding as the person would have had if the action had continued under the bill's provisions. Any finding of fact or conclusion of law made in the other proceeding that has become final is conclusive on all parties to an action under the bill's provisions. A finding or conclusion is final if it has been finally determined on appeal to the appropriate court, if the time for filing an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review. (R.C. 109.46(C)(5).)

Stay of discovery upon request of state. Whether or not the state proceeds with an action brought by "a person" as described above, upon a showing by the state that certain discovery by the person initiating the action would interfere with the state's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay that discovery for a period of not more than 60 days. The showing must be conducted *in camera*. The court may extend the 60-day period upon a further showing *in camera* that the state has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings. (R.C. 109.46(C)(4).)

Distribution of proceeds of sanctions imposed against violator; recovery of fees, costs, and expenses by state, person initiating action, or defendant. Except as otherwise described in this paragraph, *if the state proceeds with an action* brought by "a person" as described above, the person must receive at least 15% but not more than 25% of the "proceeds of the action or settlement of the claim," depending upon the extent to which the person substantially contributed to the prosecution of the action. If the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions in a criminal or civil hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award the sums that it considers appropriate, but in no case more than 10% of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person as described in this paragraph must be made from the proceeds. The person also must receive an

amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All expenses, fees, and costs must be awarded against the defendant.

But *if the state does not proceed with an action* brought by "a person" as described above, the person bringing the action or settling the claim must receive an amount that the court decides is reasonable for collecting the civil penalty and damages. The amount cannot be less than 25% and not more than 30% of the proceeds of the action or settlement and must be paid out of the proceeds. The person also must receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All expenses, fees, and costs must be awarded against the defendant.

Regardless of whether the state proceeds with the action brought by "a person" as described above, if the court finds that the action was brought by a person who planned and initiated the violation of the prohibition the bill enacts upon which the action was brought, then the court may, to the extent the court considers appropriate, eliminate or reduce the share of the proceeds of the action that the person otherwise would receive under the provisions described in the two preceding paragraphs, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from the person's role in the violation of the prohibition, the person must be dismissed from the civil action and cannot receive any share of the proceeds of the action. The dismissal does not prejudice the right of the state to continue the action.

If the state does not proceed with the action brought by "a person" as described above and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment. (R.C. 109.46(D).)

The bill specifies that the state is not liable for expenses that a person incurs in bringing an action under the bill's provisions (R.C. 109.46(F)).

Restrictions upon the bringing of an action by a person. The bill provides that in no event may "a person" bring an action as described above that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the state already is a party (R.C. 109.46(E)(1)).

Limitation on court jurisdiction over civil action for a violation

The bill provides that no court has jurisdiction over an action under the above-described provisions (either by the AG or by "a person") based upon the public disclosure of allegations or transactions in a criminal, civil, legislative, or administrative hearing, report, audit, or investigation, or from the news media, unless the action is brought by the state, or the person bringing the action has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the state before filing an action based on the information under those provisions (R.C. 109.46(E)(2)).

Relief for employee--acts done in relation to a civil action

The bill provides that any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by the employee's employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under the above-described provisions (either by the AG or by "a person"), including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under those provisions, is entitled to all relief necessary to make the employee whole. The relief includes reinstatement with the same seniority status the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An employee may bring an action in the appropriate court of common pleas for the relief provided in this provision. (R.C. 109.46(G).)

Civil action against violator by AG or any person--period of limitations, jurisdiction, subpoenas, state employee as defendant, burden of proof, and estoppel

The bill provides that a civil action against a violator by the AG or any person brought under its provisions, as described above, may not be brought after the later of the date that is six years after the date on which the violation of the bill's prohibition described above is committed or three years after the date when facts material to the right of action are known or reasonably should have been known by the AG. Except as otherwise described in this paragraph, a civil action so brought under its provisions may be brought in the Court of Common Pleas of Franklin County or of any county in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, or transacts business, or in which any act prohibited by R.C. 109.45 in the bill occurred. A civil action so brought under its provisions against an officer or employee of the state is subject to R.C. 9.86 and division (F) of R.C. 2743.02 (see **COMMENT** 1).

A subpoena requiring the attendance of a witness at a trial or hearing conducted under the bill's provisions regarding civil actions against a violator under its provisions by the AG or any person, as described above, may be served pursuant to Rule 45 of the Rules of Civil Procedure. In any action brought under those provisions, the state must prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

The bill specifies that a final judgment rendered in favor of the state in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or *nolo contendere*, estops the defendant from denying the essential elements of the offense in any action that involves the same transaction as in the criminal proceeding and that is brought against a violator under its provisions by the AG or any person, as described above. (R.C. 109.47 and 109.48.)

Civil investigative demands by AG

Issuance and content of demand

Under the bill, whenever the AG has reason to believe that a person may be in possession, custody, or control of any "documentary material" (see "***Definitions regarding civil investigative demands***," below) or information relevant to an investigation conducted under the bill's provisions described above in "***Investigation by AG of violation of the prohibition . . ., etc.***," the AG may, before commencing a civil proceeding under those provisions, issue in writing and cause to be served upon the person (see "***Manner of service***," below) a *civil investigative demand* requiring the person to do any of the following: (1) produce the documentary material for inspection and copying, (2) answer in writing written interrogatories with respect to the documentary material or information, (3) give oral testimony concerning the documentary material or information, or (4) furnish any combination of the material, answers, or testimony.

Each civil investigative demand issued under these provisions must state the nature of the conduct constituting the alleged violation of the prohibition the bill enacts, as described above, that is under investigation. If the demand is for the *production of documentary material*, the demand also must describe each class of documentary material to be produced with such definiteness and certainty as to permit the material to be fairly identified, and prescribe a return date for each class of documentary material that will provide a reasonable period of time within which the material may be assembled and made available for inspection and copying. If the demand is for *answers to written interrogatories*, the demand also must set forth with specificity the written interrogatories to be answered, and prescribe dates at which time answers to written interrogatories must be submitted. If the demand is for the *giving of oral testimony*, the demand also must prescribe a

date, time, and place at which oral testimony will be commenced (see below), specify that the attendance and testimony are necessary to the conduct of the investigation, notify the person receiving the demand of the right to be accompanied by an attorney and any other representative, and describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, that will be taken pursuant to the demand.

The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand must be a date that is not less than seven days after the date on which the demand is received, unless the AG determines that exceptional circumstances are present that warrant the commencement of the testimony within a lesser period of time. The bill proscribes the AG from issuing more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the AG, after investigation, notifies the person in writing that an additional demand for oral testimony is necessary. (R.C. 109.49(A).)

Material, answers, and testimony exempt from civil investigative demands

The bill provides that a civil investigative demand issued under these provisions may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if the material, answers, or testimony would be protected from disclosure under either of the following: (1) the standards applicable to subpoenas or *subpoenas duces tecum* issued by a court to aid in a grand jury investigation, or (2) the standards applicable to discovery requests under the Rules of Civil Procedure, to the extent that the application of the standards to the demand is appropriate and consistent with the provisions and purposes of the bill's civil investigative demand provisions. (R.C. 109.49(B).)

Manner of service

The bill specifies that a civil investigative demand issued under its provisions described above, or a petition for a court order filed under the provisions described below in "***Court order for enforcement of demand***" may be served in the same manner as a summons under Civil Rules 4 to 4.3 and 4.5.

A verified return by the individual serving a civil investigative demand issued under the bill's provisions or a petition for a court order filed under the provisions described below in "***Court order for enforcement of demand***" setting forth the manner of the service is proof of the service. In the case of service by registered or certified mail, the return must be accompanied by the return post office receipt of delivery of the demand. (R.C. 109.49(C) and (D).)

Manner of production of documentary materials pursuant to a demand

The bill specifies that the production of documentary material in response to a civil investigative demand served under its provisions as described above must be made under a sworn certificate, in any form that the demand designates, by the following methods: (1) in the case of a natural person, the person to whom the demand is directed, or (2) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to the production and authorized to act on behalf of the person. The certificate must state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the AG.

Any person upon whom any civil investigative demand for the production of documentary material has been served under the bill's provisions described above must make the material available for inspection and copying to the AG at the principal place of business of the person or at any other place that the AG and the person after service of the demand may agree and prescribe in writing. The person must make the material available on the return date specified in the demand, or on any later date that the AG may prescribe in writing. The person may, upon written agreement between the person and the AG, substitute copies for originals of all or any part of the material. (R.C. 109.49(E).)

Manner of responding to interrogatories pursuant to a demand

The bill specifies that each interrogatory in a civil investigative demand served under its provisions as described above must be answered separately and fully in writing under oath and must be submitted under a sworn certificate, in the form that the demand designates, by the following persons: (1) in the case of a natural person, the person to whom the demand is directed, or (2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection must be stated in the certificate instead of an answer. The certificate must state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information must be identified and reasons set forth with particularity regarding the reasons why the information was not furnished. (R.C. 109.49(F).)

Manner of provision of oral testimony pursuant to a demand

Under the bill, the examination of any person pursuant to a civil investigative demand for oral testimony served under its provisions as described above must be taken before an officer authorized by law to administer oaths and affirmations. The officer before whom the testimony is to be taken must put the witness on oath or affirmation and, personally or by someone acting under the direction of the officer and in the officer's presence, must record the testimony of the witness. The testimony must be taken stenographically and be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken must promptly transmit a copy of the transcript of the testimony to the AG. The bill states that this provision does not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Rules of Civil Procedure. A person appearing for oral testimony under a civil investigative demand is entitled to the same fees and allowances that are paid to witnesses in the court of common pleas.

The AG must exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, any person agreed upon by the AG and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking the testimony. The oral testimony of any person taken pursuant to a civil investigative demand must be taken in Franklin County or in the county within which the person resides, is found, or transacts business, or in any other place agreed upon by the AG and the person. When the testimony is fully transcribed, the AG or the officer before whom it is taken must afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless examination and reading are waived by the witness. Any changes in form or substance that the witness desires to make must be entered and identified upon the transcript by the officer or the AG, with a statement of the reasons given by the witness for making the changes. The transcript then must be signed by the witness, unless the witness waives the signing in writing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the AG must sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given. The officer before whom the testimony is taken must certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or AG must take custody of the transcript.

Any person compelled to appear for oral testimony under a civil investigative demand issued under the bill's provisions may be accompanied,

represented, and advised by counsel. Counsel may advise the person, in confidence, with respect to any question asked of the person. The person or counsel may object on the record to any question, in whole or in part, and must briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that the person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. The person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If the person refuses to answer any question, a petition may be filed in the Court of Common Pleas in Franklin County or in the county in which the examination takes place for an order compelling the person to answer the question (see "***Court order for enforcement of demand***," below). If the person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of the person may be compelled in the manner provided in R.C. 2945.44 (see **COMMENT** 2). (R.C. 109.49(G).)

General confidentiality of material, answers, and testimony provided pursuant to a demand; use by AG; return to person who produced material

The bill specifies that, except as otherwise described below, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies of documentary material, answers to interrogatories, or transcripts of oral testimony, while in the AG's possession, is available for examination by any individual other than an employee of the AG. But this prohibition on the availability of material, answers, or transcripts does not apply if consent is given by the person who produced the material, answers, or transcripts. The bill states that nothing in these confidentiality provisions is intended to prevent disclosure to the General Assembly, including any of its committees or subcommittees, or to any other state agency for use by the agency in furtherance of its statutory responsibilities. Disclosure of information to any other agency is allowed only upon application, made by the AG to a court of common pleas showing substantial need for the use of the information by the agency in furtherance of its statutory responsibilities. While in the AG's possession and under any reasonable terms and conditions the AG prescribes, documentary material and answers to interrogatories must be available for examination by the person who produced the material or answers, or by a representative of that person authorized by that person to examine the material and answers.

The bill permits the AG to use any documentary material, answers to interrogatories, or transcripts of oral testimony received pursuant to a civil investigative demand under its provisions in connection with any case or proceeding before a court, grand jury, or state agency.

Under the bill, if any documentary material has been produced by any person in the course of any investigation pursuant to a civil investigative demand under its provisions, the AG, upon written request of the person who produced the material, must return to the person the documentary material, other than copies furnished to the AG or made for the AG under the bill's provisions described above, that has not passed into the control of any court, grand jury, or agency through introduction into the record of the case or proceeding if either of the following applies: (1) any case or proceeding before the court or grand jury arising out of the investigation, or any proceeding before any state agency involving the material, has been completed, or (2) no case or proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of the investigation.

The bill also specifies that documentary material, answers to written interrogatories, and oral testimony provided under a civil investigative demand are not public records, and are exempt from disclosure under the existing Public Records Law, not in the bill. (R.C. 109.49(H) and (J).)

Court order for enforcement of demand

The bill provides that, whenever any person fails to comply with any civil investigative demand issued under its provisions as described above, or whenever satisfactory copying or reproduction of any material requested in the demand cannot be done and the person refuses to surrender the material, the AG may file in the Court of Common Pleas in Franklin County or in the county in which the person resides, is found, or transacts business, and serve upon the person, a petition for an order of the court for the enforcement of the civil investigative demand (R.C. 109.49(I)).

Definitions regarding civil investigative demands

The bill defines the following terms for use in its civil investigative demand provisions (R.C. 109.49(K)):

"***Documentary material***" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret the data compilations, and any "product of discovery" (see below).

"***Product of discovery***" includes all of the following: (1) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection

of land or other property, examination, or admission, that is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature, (2) any digest, analysis, selection, compilation, or derivation of any item listed in clause (1) of this paragraph, or (3) any index or other manner of access to any item listed in clause (1) of this paragraph.

Non-preemption

The bill provides that the commencement of an action or investigation under its provisions does not preclude the commencement of an action under R.C. 5111.03 (see **COMMENT** 3) with regard to claims, payments, reports, or documents to which R.C. 5111.03 applies (R.C. 109.45(E)).

COMMENT

1. Existing R.C. 9.86, not in the bill, provides that, except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no "officer or employee" (see below) is liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his or her duties, unless the officer's or employee's actions were manifestly outside the scope of his or her employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. The provision states that it does not eliminate, limit, or reduce any immunity from civil liability conferred upon an officer or employee by any other Revised Code provision or by case law, and that it does not affect the liability of the state in an action filed against the state in the Court of Claims.

Existing R.C. 2743.02(F), not in the bill, provides that a civil action against an "officer or employee" (see below) that alleges that the officer's or employee's conduct was manifestly outside the scope of his or her employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner first must be filed against the state in the Court of Claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to personal immunity under R.C. 9.86 and whether the courts of common pleas have jurisdiction over the civil action. The filing of a claim against an officer or employee under this provision tolls the running of the applicable statute of limitations until the Court of Claims determines whether the officer or employee is entitled to the personal immunity.

As used in these provisions, "officer or employee" means any of the following (existing R.C. 109.36, by reference): (a) a person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state, (b) a person that, at the

time a cause of action against the person, partnership, or corporation arises, is rendering medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state, (c) a person that, at the time a cause of action against the person, partnership, or corporation arises, is rendering peer review, utilization review, or drug utilization review services in relation to medical, nursing, dental, podiatric, optometric, physical therapeutic, psychiatric, or psychological services pursuant to a personal services contract or purchased service contract with a department, agency, or institution of the state, or (d) a person who, at the time a cause of action against the person arises, is rendering medical services to patients in a state institution operated by the Department of Mental Health, is a member of the institution's staff, and is performing the services pursuant to an agreement between the state institution and a board of alcohol, drug addiction, and mental health services described in R.C. 340.021. "Officer or employee" does not include any person elected, appointed, or employed by any political subdivision of the state.

2. Existing R.C. 2945.44, not in the bill, provides that, in any criminal proceeding in Ohio or in any criminal or civil proceeding brought pursuant to R.C. 2923.31 to 2923.36, if a witness refuses to answer or produce information on the basis of his or her privilege against self-incrimination, the court of common pleas of the county in which the proceeding is being held, unless it finds that to do so would not further the administration of justice, must compel the witness to answer or produce the information, if both of the following apply: (a) the prosecuting attorney of the county in which the proceedings are being held makes a written request to the court to order the witness to answer or produce the information, notwithstanding his or her claim of privilege, and (b) the court informs the witness that by answering, or producing the information he or she will receive immunity as described in the next paragraph.

If, but for the preceding paragraph, the witness would have been privileged to withhold an answer or any information given in any criminal proceeding, and he or she complies with an order under the provision described in the preceding paragraph compelling him or her to give an answer or produce any information, he or she cannot be prosecuted or subjected to any criminal penalty in Ohio's courts for or on account of any transaction or matter concerning which, in compliance with the order, he or she gave an answer or produced any information. A witness granted immunity under these provisions may be subjected to a criminal penalty for any violation of R.C. 2921.11, 2921.12, or 2921.13, or for contempt committed in answering, failing to answer, or failing to produce information in compliance with the order.

3. Existing R.C. 5111.03, not in the bill, prohibits a provider of services or goods contracting with the Department of Job and Family Services pursuant to the Medicaid program from, by deception, obtaining or attempting to obtain payments under R.C. Chapter 5111. to which the provider is not entitled pursuant to the provider agreement, or the rules of the federal government or the Department relating to the program. It also prohibits a provider from willfully receiving payments to which the provider is not entitled, or willfully receiving payments in a greater amount than that to which the provider is entitled; and from falsifying any report or document required by state or federal law, rule, or provider agreement relating to Medicaid payments. As used in this provision, a provider engages in "deception" when the provider, acting with actual knowledge of the representation or information involved, acting in deliberate ignorance of the truth or falsity of the representation or information involved, or acting in reckless disregard of the truth or falsity of the representation or information involved, deceives another or causes another to be deceived by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission that creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact. No proof of specific intent to defraud is required to show, for purposes of this provision, that a provider has engaged in deception.

A provider who violates a prohibition described in the preceding paragraph is liable, in addition to any other penalties provided by law, for all of the following civil penalties: (a) payment of interest on the amount of the excess payments at the maximum interest rate allowable for real estate mortgages under the law on the date the payment was made to the provider for the period from the date upon which payment was made, to the date upon which repayment is made to the state, (b) payment of an amount equal to three times the amount of any excess payments, (c) payment of a sum of not less than $5,000 and not more than $10,000 for each deceptive claim or falsification, and (d) all reasonable expenses which the court determines have been necessarily incurred by the state in the enforcement of this section.

In addition to these civil penalties, the Director of Job and Family Services, upon the conviction of, or the entry of a judgment in either a criminal or civil action against, a Medicaid provider or its owner, officer, authorized agent, associate, manager, or employee in an action brought pursuant to R.C. 109.85, must terminate the provider agreement between the Department and the provider and stop reimbursement to the provider for services rendered for a period of up to five years from the date of conviction or entry of judgment. No such provider, owner, officer, etc., may own or provide services to any other Medicaid provider or risk contractor or arrange for, render, or order services for Medicaid recipients during the period of termination, nor, during the period of termination, may the

provider, owner, officer, etc., receive reimbursement in the form of direct payments from the Department or indirect payments of Medicaid funds in the form of salary, shared fees, contracts, kickbacks, or rebates from or through any participating provider or risk contractor. The provider agreement is not terminated or reimbursement terminated if the provider or owner can demonstrate that the provider or owner did not directly or indirectly sanction the action of its authorized agent, associate, manager, or employee that resulted in the conviction or entry of a judgment. Nursing facility or intermediate care facility for the mentally retarded providers whose agreements are terminated pursuant to this provision may continue to receive reimbursement for up to 30 days after the termination if the provider makes reasonable efforts to transfer recipients to another facility or to alternate care and if federal funds are provided for the reimbursement.

The Attorney General on behalf of the state may commence proceedings to enforce the provisions described above in any court of competent jurisdiction; and the Attorney General may settle or compromise any case brought under the provisions with the approval of the Department of Job and Family Services. Notwithstanding any other provision of law providing a shorter period of limitations, the Attorney General may commence a proceeding to enforce these provisions at any time within six years after the conduct in violation of this section terminates. The authority, under state and federal law, of the Department or a county department of job and family services to recover excess payments made to a provider is not limited by the availability of remedies under R.C. 5111.11 and 5111.12 for recovering benefits paid on behalf of recipients of medical assistance.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	02-12-04	p. 1526

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