

# MedChi

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TO: The Honorable Joseph F. Vallario, Jr., Chairman  
Members, House Judiciary Committee  
The Honorable Norman H. Conway, Chairman  
Members, House Appropriations Committee

FROM: Joseph A. Schwartz, III  
Pamela Metz Kasemeyer  
J. Steven Wise

DATE: March 10, 2010

RE: **OPPOSE** – House Bill 525 – *Maryland False Health Claims Act of 2010*

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The Maryland State Medical Society (MedChi), which represents over 7,300 Maryland physicians and their patients, opposes House Bill 525.

House Bill creates civil statutory remedies with respect to “False Health Claims” and essentially replicates the Federal qui tam statutes. Qui tam refers to the practice of allowing private “relators” to file lawsuits on behalf of the State with respect to “false claims.” The State is then given an opportunity to “take over” the lawsuit or to allow it to proceed independently of state intervention.

While the proponents of House Bill 525 will say that the legislation is necessary so the state can be adequately compensated for “false health claims,” MedChi submits that House Bill 525 is a fatally flawed mechanism which will result in extraordinarily expensive litigation against Maryland doctors and hospitals.

While there are many objections to House Bill 525 (for example, the bill is retroactive as the limitations period will allow the lawsuit to reach back 10-years retroactively to October 1, 2000, pg. 21, lines 7-18; damages would be quadrupled as opposed to tripled as in the federal law, pg. 9, lines 9-15). MedChi has two principal objections to House Bill 525.

First, is the definition of “knowing” or “knowingly” with respect to the submission of a false health claim. This definition occurs at pg. 4, lines 20-27. This definition is critical because a doctor or hospital which has “knowingly” submitted a false health claim would be subject to the following **extraordinary remedies**: Quadrupled damages, a civil

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fine of not less than \$5,000 per violation, additional “punitive” damages and an award of attorneys’ fees and costs. Since the “stakes” are so high, the evidentiary bar should be equally high. The current definition of “knowingly” in House Bill 525 does not require a specific intent to defraud, (pg. 4, line 21) and also incorporates an inane definition from the federal law at pg. 4, line 24 (“deliberate ignorance”). MedChi believes that if House Bill 525 is to go forward, this definition has to be corrected so it is consistent with the Maryland common law on fraud. In order to do so, the language on pg. 4, line 21, must be deleted (“and without requiring specific intent to defraud”) and the “deliberate ignorance” language on pg. 4, lines 24 and 25 should be deleted. If these changes are made, the definition of “knowing” or “knowingly” will match up with the Maryland common law on fraud. See, analysis of statutory definition as compared with Maryland law of fraud, attached.

The second principal objection is to the qui tam lawsuit regime. MedChi has no difficulty with awarding a “whistleblower” a bonus for coming forward to report false claims. However, replicating the federal qui tam provisions in state court is problematic. Such lawsuits are inherently complicated because they involve three parties as opposed to the normal two parties. For example, almost 40% of the text of House Bill 525 addresses the relationship between the “relator” and the State (see pgs., 9-16). Because of the Byzantine complexity of medical billing, MedChi has confidence that state authorities and state lawyers will make the correct judgments in bringing lawsuits; MedChi does not have the same confidence that private relators will do the same. The cost of defending such lawsuits is prohibitive and doctors rarely, if ever, can be reimbursed even if they win. See, AMA article on doctor’s unsuccessful attempt to recoup \$1,000,000 in attorney fees, attached.

MedChi believes that House Bill 525 should be amended to allow the state to bring a case for false health claims and would support making the remedies for such false health claims stringent (although it appears that the proposed remedies in House Bill 525 are quite extreme, particularly the civil fine level of \$5,000 to \$10,000 per violation). However, these “remedies” should only be available when the state proves that a hospital or doctor or other provider has had a “specific intent to defraud” the state in submitting such claims.

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Comparison of the Intent Requirements Under Maryland Common Law Fraud  
And Senate Bill 279 / House Bill 515 – 2010—False Claims Act

➤ **Common Law Fraud**

- In order to recover damages in an action for fraud or deceit, a plaintiff must prove:
  1. That the defendant made a false representation to the plaintiff;
  2. That its **falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth;**
  3. That the misrepresentation was **made for the purpose of defrauding** the plaintiff;
  4. That the plaintiff relied on the misrepresentation and had the right to rely on it; and
  5. That the plaintiff suffered compensable injury resulting from the misrepresentation.

See Ellerin v. Fairfax Savings, F.S.B., 337 Md. 216, 652 A.2d 1117 (1995).

- “Recovery in a tort action for fraud or deceit in Maryland is based upon a defendant’s *deliberate intent to deceive*.” Ellerin at 230.
- “The general rule undoubtedly is that in action for deceit there must be knowledge of the falsity, by the party making the representation, *and hence scienter must be expressly alleged and proven...*” Ellerin at 230.
- “Misjudgment, however gross, or want of caution, however marked, is not fraud.” Ellerin at 230.

➤ **Senate Bill 279/House Bill 525 - 2010**

- Premises violations of the Act upon “knowingly” taking certain actions (*see pp. 7-8*).
- “Knowingly” is defined as follows:
  - “Knowing or Knowingly means, with respect to information and *without requiring specific intent to defraud*, that a person:
    1. Has actual knowledge of the information;
    2. Acts in deliberate ignorance of the truth or falsity of the information; or
    3. Acts in reckless disregard of the truth or falsity of the information.”

➤ **Differences as to Intent**

- SB 279/HB 525 differ from MD common law with respect to intent in several respects:
  - The bill does not require “specific intent to defraud”;
  - The bill requires only that a person have “actual knowledge of the information”, not that they know of *the falsity* of the information; and
  - The bill also defines “knowing” to include “deliberate ignorance...”.
- The bill *does* track the common law by defining “knowingly” to include acting

in “reckless disregard” of the truth. *See* Ellerin at 231.