HINMAN STRAUB PC
ATTORNEYS AT LAW

121 State Street
Albany, New York 12207-1693
Tel: 518-436-0751
Fax: 518-436-4751

RE: AN ACT to amend the insurance law, in relation to insurer recovery from health care providers

S873 (Rivera)
A2899 (Gottfried)

MEMORANDUM IN OPPOSITION

Submitted on behalf of the Blue Cross and Blue Shield Plans

The New York State Conference of Blue Cross and Blue Shields Plans strongly oppose enactment of this bill, which would make it exceedingly more difficult for health plans to recover overpayments made to providers by prohibiting the use of extrapolation. The use of extrapolation by health plans to recover provider overpayments (whether fraudulent or not) has long been accepted by the Insurance Department as a valid recovery mechanism as long as the audit is performed using a valid statistical methodology.

In response to concerns raised by providers, legislative enactments have drastically limited when extrapolation may be applied, and, while it has never been permitted when the underlying dispute involved an issue of medical necessity, the Insurance Law already contains a process with ample provider safeguards that obviate the need for this legislation.

1. Existing Extrapolation Process and Safeguards under the Law

In 2006, the Insurance Law[1] was amended to add additional safeguards and limit when health insurers can use extrapolation to recover overpayments. Under current law, health plans are required to provide thirty days written notice to providers before engaging in overpayment recovery efforts. Additionally, this notice must set forth specific claims information, including the patient name, service date, payment amount, proposed adjustment, and a reasonably specific explanation of the proposed amendment, with the intent of this provision being not only to give providers specific, and detailed information about each overpayment claim being sought, but to also limit the ability of a plan to use extrapolation to pursue multiple overpayments. Further, under existing law, health plans are barred from initiating overpayment recovery efforts more than twenty four months after the payment has been received by the provider.

[1] NY Ins. Law § 3224-b(b)(2).

Importantly, aware that the use of extrapolation could be advantageous and expeditious to both plans and providers, providers are allowed to voluntarily agree, in advance, to allow a health plan to use extrapolation and forgo their right to receive specific information about every overpayment claim sought. However, even in such instances, the DFS imposes stringent requirements on the extrapolation process that may be employed, opining[2] that the sample size utilized for extrapolation should be sufficiently large so that there is a reasonable probability that it is a representative sample, that the health plan select the sample in a random fashion to avoid the possibility of skewing the results toward a desired conclusion, that the extrapolation be limited to the medical codes under review, and that the extrapolation not be carried across the entire population of claims or claims outside the time frame of the claims sampled.

This legislation would prohibit the use of extrapolation, unless the provider consents to the use, which will result in increased costs for overpayment recovery. As the use of extrapolation is currently an accepted practice with considerable oversight, it has been recognized that this is a necessary recovery mechanism for health insurers to recover overpayments. In limiting the ability of health insurers to recover overpayments will only result in increased health care spending as post-payment recoupment will become more difficult. There is no justification for limiting an insurer's right to recover overpayments, whether the result of abuse or simply a billing error, as the provider was never entitled to the underlying payment received.

2. <u>In Light of Existing Safeguards and Limitations on the Use of Extrapolation, the Current Bill is not Necessary, Will Lead to Diminished Recoveries, and only Benefit Providers</u>

Accordingly, the Insurance Law has more than leveled the playing field when it comes to regulating the use of extrapolation as an overpayment recovery mechanism. Yet, this Bill would take this a step further and dictate that which the Legislature and industry decided should be left for health plans and providers to determine for themselves. Indeed, this Bill would make it much more difficult and expensive for health plans to recover overpayments, including suspected incidents of fraudulent conduct, and lead to less overall recoveries. Put simply, this Bill does not serve the broad interests of New Yorkers, the State and its municipalities, who have an affirmative obligation to ensure individual premiums and taxpayer funded health plan dollars are appropriately spent and recovered if there is error or fraud. Increasing ways for providers to avoid repaying what they rightfully owe undermines these important fiscal and policy objectives.

For the foregoing reasons, the Blue Cross and Blue Shield Plans urge that this bill not be enacted.

Respectfully submitted,

HINMAN STRAUB ADVISORS, LLC.
Legislative Counsel for the Blue Cross and Blue Shield Plans of New York

[2] *See* OGC Opinion 04-12-32.