

Sixtieth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2126

Introduced by

Judiciary Committee

(At the request of the Department of Human Services)

1 A BILL for an Act to provide for investigations into alleged fraud in medicaid claims, qui tam
2 actions in cases of alleged fraud in medicaid claims, and protection for persons presenting
3 qui tam actions in cases of alleged fraud in medicaid claims; and to provide a penalty.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. Definitions.** The following definitions apply throughout this chapter:

- 6 1. "Claim" means any request or demand related to medical assistance for money,
7 property, or services made to any employee, officer, or agent of the state, or to any
8 contractor, grantee, or other recipient, whether under contract or not, if any portion
9 of the money, property, or services requested or demanded issued from, or was
10 provided by, the state, or if the state will reimburse the contractor, grantee, or other
11 recipient for any portion of the money or property which is requested or demanded.
- 12 2. "Document" means:
- 13 a. The original or a copy of a book, record, report, memorandum, paper,
14 communication, tabulation, chart, or other document;
- 15 b. A data compilation stored in or accessible through computer or other
16 information retrieval systems, together with instructions and all other materials
17 necessary to use or interpret the data compilations; or
- 18 c. A product of discovery.
- 19 3. "Investigation" means an inquiry conducted by an investigator to ascertain whether
20 a person is or has been engaged in a violation of this chapter.
- 21 4. "Knowing" or "knowingly" means that a person, with respect to information, does
22 any of the following:
- 23 a. Has actual knowledge of the information;
- 24 b. Acts in deliberate ignorance of the truth or falsity of the information; or

- 1 c. Acts in reckless disregard of the truth or falsity of the information.
2 "Knowing" or "knowingly" does not require proof of specific intent to defraud.
3 5. "Medical assistance program" means a program implemented pursuant to chapter
4 50-24.1 and title XIX of the Social Security Act [42 U.S.C. 1396 et seq.].
5 6. "Private person" means a person who brings a civil action in the name of the state
6 for a violation of this Act.
7 7. "Product of discovery" means the original or duplicate of any of the following that is
8 obtained by any method of discovery in an adversarial judicial or administrative
9 proceeding:
10 a. A deposition;
11 b. An interrogatory;
12 c. A document;
13 d. A result of the inspection of land or other property, or
14 e. An examination or admission.
15 The term includes a digest, an analysis, a selection, a compilation, a derivation, an
16 index, or another method of accessing an item listed in this subsection.
17 8. "State" means the state of North Dakota or its agencies. The term does not
18 include a political subdivision.

19 **SECTION 2. False claims - Civil penalty - Reduced penalty for certain**
20 **disclosures.**

- 21 1. A person who commits any of the acts identified in this subsection is liable to the
22 state for three times the amount of damages that the state sustains because of the
23 act of that person. A person who commits any of the acts identified in this
24 subsection is also liable to the state for the costs, including attorney's fees, of a
25 civil action brought to recover any of those penalties or damages and is liable to
26 the state for a civil penalty of not less than five thousand dollars and not more than
27 ten thousand dollars for each violation. A person may not:
28 a. Knowingly present or cause to be presented to any employee, officer, or
29 agent of the state, or to any contractor, grantee, or other recipient of state
30 funds, a false or fraudulent claim for payment or approval to the medical
31 assistance program;

- 1 b. Knowingly make, use, or cause to be made or used, a false record or
2 statement to get a false or fraudulent claim paid or approved by the medical
3 assistance program;
- 4 c. Conspire to defraud the medical assistance program by obtaining a false
5 claim allowance or payment, or conspire to defraud the medical assistance
6 program by knowingly making, using, or causing to be made or used, a false
7 record or statement to conceal, avoid, or decrease an obligation to pay or
8 transmit money or property to the state;
- 9 d. Have possession, custody, or control of public property or money used or to
10 be used by the medical assistance program and knowingly deliver or cause to
11 be delivered less property than the amount for which the person receives a
12 certificate or receipt;
- 13 e. As a person authorized to make or deliver a document certifying receipt of
14 property used or to be used by the medical assistance program, knowingly
15 make or deliver a receipt that falsely represents the property used or to be
16 used;
- 17 f. Knowingly buy, or receive as a pledge of an obligation or debt, public property
18 from any person who lawfully may not sell or pledge the property;
- 19 g. Knowingly make, use, or cause to be made or used, a false record or
20 statement to conceal, avoid, or decrease an obligation to pay or transmit
21 money or property to the medical assistance program; or
- 22 h. As a beneficiary of an inadvertent submission of a false medical assistance
23 claim to any employee, officer, or agent of the state, or to any contractor,
24 grantee, or other recipient of state funds, who subsequently discovers the
25 falsity of the claim, fail to disclose the false claim to the state within a
26 reasonable time after discovery of the false claim.
- 27 2. Notwithstanding subsection 1, the court may not assess less than two times the
28 amount of damages which the state sustains because of the violation committed
29 by a person as described in subsection 1 and may not assess a civil penalty if the
30 court finds all of the following:

- 1 a. The person committing the violation furnished officials of the state responsible
2 for investigating false claims violations with all information that person knew
3 about the violation within thirty days after the date on which the person first
4 obtained the information;
- 5 b. The person fully cooperated with any investigation by the state; and
- 6 c. At the time the person furnished the state with information about the violation,
7 no criminal prosecution, civil action, or administrative action had commenced
8 with respect to the violation, and the person did not have actual knowledge of
9 the existence of an investigation into the violation.
- 10 3. This section does not apply to claims, records, or statements made concerning
11 income tax.

12 **SECTION 3. Attorney general prosecutions - Powers of prosecuting authority -**
13 **Civil actions by individuals - Jurisdiction of courts.**

- 14 1. If the attorney general finds that a person has violated or is violating section 2 of
15 this Act, the attorney general may bring a civil action under this section against that
16 person.
- 17 2. a. A private person may bring a civil action for a violation of this Act. The action
18 must be brought in the name of the state. The action may be dismissed only
19 if the court and the attorney general give written consent to the dismissal and
20 their reasons for consenting.
- 21 b. The private person shall serve on the attorney general a copy of the
22 complaint and written disclosure of substantially all material evidence and
23 information the private person possesses which supports the complaint. The
24 private person shall file the complaint in camera and the complaint shall
25 remain under seal for at least sixty days. The state may elect to intervene
26 and proceed with the action within sixty days after the private person serves
27 the attorney general with both the complaint and the material evidence and
28 the information. If the state elects to intervene, it must serve the defendant
29 with a copy of the complaint. If the state does not intervene, the private
30 person must serve the defendant with a copy of the complaint.

- 1 c. The state may move the court for extensions of the time during which the
2 complaint remains under seal under subdivision b. A motion for an extension
3 may be supported by affidavits or other submissions in camera. The
4 defendant may not be required to respond to any complaint filed under this
5 section until after the complaint is unsealed and served upon the defendant
6 by the state or private person as required in subdivision b pursuant to the
7 North Dakota Rules of Civil Procedure.
- 8 d. Before the expiration of the sixty-day period or any extensions obtained under
9 subdivision c, the state shall:
- 10 (1) Proceed with the action; or
11 (2) Notify the court that it declines to take over the action, in which case
12 the private person may conduct the action.
- 13 e. When a private person brings a valid action under this subsection, only the
14 state may intervene or bring a related action based on the facts underlying
15 the pending action.
- 16 3. a. If the state proceeds with the action, it has the primary responsibility for
17 prosecuting the action and may not be bound by an act of the private person.
18 The private person may continue as a party to the action, subject to the
19 limitations set forth in subdivision b of this subsection.
- 20 b. The state may seek to dismiss the action for good cause notwithstanding the
21 objections of the private person if the state has notified the private person of
22 the filing of the motion and the court has provided the private person with an
23 opportunity to oppose the motion and present evidence at a hearing.
- 24 (1) The state may settle the action with the defendant notwithstanding the
25 objections of the private person if the court determines, after a hearing
26 providing the private person an opportunity to present evidence, that
27 the proposed settlement is fair, adequate, and reasonable under all of
28 the circumstances.
- 29 (2) Upon a showing by the state that unrestricted participation during the
30 course of the litigation by the private person would interfere with or
31 unduly delay the state's prosecution of the case, or would be

- 1 repetitious, irrelevant, or for purposes of harassment, the court may
2 impose limitations on the private person's participation, such as:
3 (a) Limiting the number of witnesses the private person may call;
4 (b) Limiting the length of the testimony of the private person's
5 witnesses;
6 (c) Limiting the private person's cross-examination of witnesses; or
7 (d) Otherwise limiting the private person's participation in the
8 litigation.
- 9 (3) Upon a showing by the defendant that unrestricted participation during
10 the course of the litigation by the private person would be for purposes
11 of harassment or would cause the defendant undue burden or
12 unnecessary expense, the court may limit the private person's
13 participation.
- 14 c. If the state elects not to proceed with the action, the private person has the
15 right to conduct the action. If the private person proceeds with the action, the
16 state may, by written request to the private person, require the private person
17 to serve the state with copies of all pleadings filed in the action and may
18 require the private person to supply the state with copies of all deposition
19 transcripts at the state's expense. When the private person proceeds with the
20 action, the court, without limiting the status and rights of the private person,
21 may nevertheless permit the state to intervene at a later date upon a showing
22 a good cause.
- 23 d. Regardless of whether the state proceeds with the action, if the state shows
24 that certain actions of discovery by the private person would interfere with the
25 state's investigation or prosecution of a criminal or civil matter arising out of
26 the same facts, the court may stay discovery by the private person for a
27 period of up to sixty days. The showing by the state must be conducted in
28 camera. The court may extend the sixty-day period upon a further showing in
29 camera that the state has pursued the criminal or civil investigation or
30 proceedings with reasonable diligence and any proposed discovery in the civil

1 action will interfere with the ongoing criminal or civil investigation or
2 proceedings.

3 e. Notwithstanding subsection 2, the state may elect to pursue its claim through
4 any alternate remedy available to the state, including any administrative
5 proceeding to determine a civil money penalty. If an alternate remedy is
6 pursued in another proceeding, the private person has the same rights in that
7 proceeding as the private person would have had if the action had continued
8 under this section. Any finding of fact or conclusion of law made in any other
9 proceeding that has become final is binding on all parties to an action under
10 this section. For purposes of this subdivision, a finding or conclusion is final if
11 it has been finally determined on appeal to the appropriate court of the state,
12 if all time for filing any appeal with respect to the finding or conclusion has
13 expired, or if the finding or conclusion is not subject to judicial review.

14 4. a. If the state proceeds with an action brought by a private person under
15 subsection 2, the private person is entitled to receive at least fifteen percent
16 but not more than twenty-five percent of the proceeds of the action or
17 settlement of the claim, which includes damages, civil penalties, payments for
18 costs of compliance and any other economic benefit realized by the
19 government as a result of the action, depending upon the extent to which the
20 person substantially contributed to the prosecution of the action, provided,
21 however, if the action is one which the court finds to be based primarily on
22 disclosures of specific information, other than information provided by the
23 private person, relating to allegations or transactions specifically in a criminal,
24 civil, or administrative hearing, or in a legislative or administrative report,
25 hearing, audit, or investigation, or from the news media, the court may award
26 such sums to the private person as it considers appropriate, up to ten percent
27 of the proceeds, taking into account the significance of the information and
28 the role of the private person in advancing the case to litigation. Any payment
29 to a private person must be made from the proceeds. The court may also
30 award the private person an amount for reasonable expenses found to have
31 been necessarily incurred, plus reasonable attorney's fees and costs. All

- 1 expenses, fees, and costs awarded must be awarded to the private person
2 against the defendant.
- 3 b. If the state does not proceed with an action under this section, the court may
4 award the private person an amount that the court decides is reasonable for
5 collecting the civil penalty and damages. The amount may not be less than
6 twenty-five percent nor more than thirty percent of the proceeds of the action
7 or settlement and must be paid out of the proceeds, which includes damages,
8 civil penalties, payments for costs of compliance and any other economic
9 benefit realized by the state as a result of the action. The court may award
10 the private person an amount for reasonable expenses found to have been
11 necessarily incurred, plus reasonable attorney's fees costs. All expenses,
12 fees, and costs awarded must be awarded to the private person against the
13 defendant.
- 14 c. Regardless of whether the state proceeds with the action, if the court finds
15 that the private person planned and initiated the violation upon which the
16 action was brought, the court may reduce the share of the proceeds of the
17 action which the private person would otherwise receive under this Act, taking
18 into account the role of the private person in advancing the case to litigation
19 and any relevant circumstances pertaining to the violation. If the private
20 person is convicted of criminal conduct arising from the private person's role
21 in the violation of this Act, the court shall dismiss the private person from the
22 civil action and may not award the private person any share of the proceeds
23 of the action. Dismissal of the private person shall not prejudice the right of
24 the state to continue the action.
- 25 d. If the state does not proceed with the action and the private person conducts
26 the action, the court may award to the defendant its reasonable attorney's
27 fees and expenses if the defendant prevails in the action and the court finds
28 that the claim of the private person was clearly frivolous, clearly vexatious, or
29 brought primarily for purposes of harassment.
- 30 5. a. A person may not bring an action under subsection 2 which is based upon
31 allegations or transactions which are the subject of a civil suit or an

1 administrative civil money penalty proceeding to which the state is already a
2 party.

3 b. Upon motion of the attorney general, the court may dismiss a private person
4 from the action if the elements of the actionable false claims alleged in the
5 private person's complaint have been publicly disclosed in the news media or
6 in a publicly disseminated governmental report at the time the complaint is
7 filed.

8 6. The state is not liable for expenses that a private person incurs in bringing an
9 action under this section.

10 7. An employee who is discharged, demoted, suspended, threatened, harassed, or in
11 any other manner retaliated against in the terms and conditions of employment by
12 the employee's employer because of lawful acts done by the employee on behalf
13 of the employee or others in furtherance of an action under this Act, is entitled to
14 all relief necessary to make the employee whole. For purposes of this subsection,
15 a "lawful act" includes investigation for, initiation of, testimony for, or assistance in
16 an action filed or to be filed under this Act. "Relief" includes reinstatement with the
17 same seniority status the employee would have had but for the discrimination, two
18 times the amount of back pay, interest on the back pay, and compensation for any
19 special damages sustained as a result of the discrimination, including litigation
20 costs and reasonable attorney's fees. An employee may bring an action in the
21 appropriate court of the state for the relief provided in this subsection.

22 **SECTION 4. Limitation of actions - Activities antedating this Act - Burden of**
23 **proof.**

24 1. A civil action under section 3 of this Act may not be brought more than ten years
25 after the date on which the violation was committed. A civil action under section 3
26 of this Act may be brought for activity prior to the effective date of this Act if the
27 limitations period described in this subsection has not lapsed.

28 2. In any action brought under section 3 of this Act, the state or the private person
29 shall prove all essential elements of the cause of action, including damages, by a
30 preponderance of the evidence.

1 3. Notwithstanding any other provision of law, the defendant in a criminal proceeding
2 charging false statements or fraud brought under subsections 1 through 3 of
3 section 3 of this Act is estopped from denying the essential elements of the offense
4 in any action which involves the same transaction as in the criminal proceeding if a
5 guilty verdict is rendered in the criminal proceeding whether upon a verdict after
6 trial, upon a plea of guilty, or upon a nolo contendere plea.

7 **SECTION 5. Remedies under other laws.** The provisions of this Act are not
8 exclusive and the remedies provided in this Act are in addition to any other remedies provided
9 in any other law.