

**FIRST ENGROSSMENT
with House Amendments**

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; to provide a penalty; and to
4 provide an effective date.

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

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

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

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

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

21 **disclosures.**

- 22 1. A person who commits any of the acts identified in this subsection is liable to the
23 state for three times the amount of damages that the state sustains because of the
24 act of that person. A person who commits any of the acts identified in this
25 subsection is also liable to the state for the costs, including attorney's fees, of a
26 civil action brought to recover any of those penalties or damages and is liable to
27 the state for a civil penalty of not less than five thousand dollars and not more than
28 ten thousand dollars for each violation. A person may not:
29 a. Knowingly present or cause to be presented to any employee or officer of the
30 state 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 getting a false or
5 fraudulent claim allowed or paid;
- 6 d. Have possession, custody, or control of public property or money used or to
7 be used by the medical assistance program and, with the intent to defraud the
8 state or willfully to conceal the property, deliver or cause to be delivered less
9 property than the amount for which the person receives a certificate or
10 receipt;
- 11 e. As a person authorized to make or deliver a document certifying receipt of
12 property used or to be used by the medical assistance program, intentionally
13 defraud the state or make or deliver a receipt that falsely represents the
14 property used or to be used;
- 15 f. Knowingly buy, or receive as a pledge of an obligation or debt, public property
16 from an officer or employee of the state who lawfully may not sell or pledge
17 the property; or
- 18 g. Knowingly make, use, or cause to be made or used, a false record or
19 statement to conceal, avoid, or decrease an obligation to pay or transmit
20 money or property to the medical assistance program.
- 21 2. Notwithstanding subsection 1, the court may not assess less than two times the
22 amount of damages which the state sustains because of the violation committed
23 by a person as described in subsection 1 and may not assess a civil penalty if the
24 court finds all of the following:
- 25 a. The person committing the violation furnished officials of the state responsible
26 for investigating false claims violations with all information that person knew
27 about the violation within thirty days after the date on which the person first
28 obtained the information;
- 29 b. The person fully cooperated with any investigation by the state; and
30 c. At the time the person furnished the state with information about the violation,
31 no criminal prosecution, civil action, or administrative action had commenced

1 with respect to the violation, and the person did not have actual knowledge of
2 the existence of an investigation into the violation.

3 3. This section does not apply to claims, records, or statements made concerning
4 income tax.

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

7 1. If the attorney general finds that a person has violated or is violating section 2 of
8 this Act, the attorney general may bring a civil action under this section against that
9 person.

10 2. a. A private person may bring a civil action for a violation of this Act. The action
11 must be brought in the name of the state. The action may be dismissed only
12 if the court and the attorney general give written consent to the dismissal and
13 their reasons for consenting.

14 b. The private person shall serve on the attorney general a copy of the
15 complaint and written disclosure of substantially all material evidence and
16 information the private person possesses. The private person shall file the
17 complaint in camera and the complaint shall remain under seal for at least
18 sixty days. The state may elect to intervene and proceed with the action
19 within sixty days after the private person serves the attorney general with both
20 the complaint and the material evidence and the information. If the state
21 elects to intervene, it must serve the defendant with a copy of the complaint.
22 If the state does not intervene, the private person must serve the defendant
23 with a copy of the complaint.

24 c. The state may move the court for extensions of the time during which the
25 complaint remains under seal under subdivision b. A motion for an extension
26 may be supported by affidavits or other submissions in camera. The
27 defendant may not be required to respond to any complaint filed under this
28 section until after the complaint is unsealed and served upon the defendant
29 by the state or private person as required in subdivision b pursuant to the
30 North Dakota Rules of Civil Procedure.

- 1 d. Before the expiration of the sixty-day period or any extensions obtained under
2 subdivision c, the state shall:
- 3 (1) Proceed with the action; or
4 (2) Notify the court that it declines to take over the action, in which case
5 the private person may conduct the action.
- 6 e. When a private person brings a valid action under this subsection, only the
7 state may intervene or bring a related action based on the facts underlying
8 the pending action.
- 9 3. a. If the state proceeds with the action, it has the primary responsibility for
10 prosecuting the action and may not be bound by an act of the private person.
11 The private person may continue as a party to the action, subject to the
12 limitations set forth in subdivision b of this subsection.
- 13 b. The state may seek to dismiss the action notwithstanding the objections of
14 the private person if the state has notified the private person of the filing of the
15 motion and the court has provided the private person with an opportunity for a
16 hearing on the motion.
- 17 (1) The state may settle the action with the defendant notwithstanding the
18 objections of the private person if the court determines, after a hearing,
19 that the proposed settlement is fair, adequate, and reasonable under all
20 of the circumstances. If good cause is shown, the hearing may be held
21 in camera.
- 22 (2) Upon a showing by the state that unrestricted participation during the
23 course of the litigation by the private person would interfere with or
24 unduly delay the state's prosecution of the case, or would be
25 repetitious, irrelevant, or for purposes of harassment, the court may
26 impose limitations on the private person's participation, such as:
- 27 (a) Limiting the number of witnesses the private person may call;
28 (b) Limiting the length of the testimony of the private person's
29 witnesses;
30 (c) Limiting the private person's cross-examination of witnesses; or

- 1 (d) Otherwise limiting the private person's participation in the
2 litigation.
- 3 (3) Upon a showing by the defendant that unrestricted participation during
4 the course of the litigation by the private person would be for purposes
5 of harassment or would cause the defendant undue burden or
6 unnecessary expense, the court may limit the private person's
7 participation.
- 8 c. If the state elects not to proceed with the action, the private person has the
9 right to conduct the action. If the private person proceeds with the action, the
10 state may, by written request to the private person, require the private person
11 to serve the state with copies of all pleadings filed in the action and may
12 require the private person to supply the state with copies of all deposition
13 transcripts at the state's expense. When the private person proceeds with the
14 action, the court, without limiting the status and rights of the private person,
15 may nevertheless permit the state to intervene at a later date upon a showing
16 a good cause.
- 17 d. Regardless of whether the state proceeds with the action, if the state shows
18 that certain actions of discovery by the private person would interfere with the
19 state's investigation or prosecution of a criminal or civil matter arising out of
20 the same facts, the court may stay discovery by the private person for a
21 period of up to sixty days. The showing by the state must be conducted in
22 camera. The court may extend the sixty-day period upon a further showing in
23 camera that the state has pursued the criminal or civil investigation or
24 proceedings with reasonable diligence and any proposed discovery in the civil
25 action will interfere with the ongoing criminal or civil investigation or
26 proceedings.
- 27 e. Notwithstanding subsection 2, the state may elect to pursue its claim through
28 any alternate remedy available to the state, including any administrative
29 proceeding to determine a civil money penalty. If an alternate remedy is
30 pursued in another proceeding, the private person has the same rights in that
31 proceeding as the private person would have had if the action had continued

1 under this section. Any finding of fact or conclusion of law made in any other
2 proceeding that has become final is binding on all parties to an action under
3 this section. For purposes of this subdivision, a finding or conclusion is final if
4 it has been finally determined on appeal to the appropriate court of the state,
5 if all time for filing any appeal with respect to the finding or conclusion has
6 expired, or if the finding or conclusion is not subject to judicial review.

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

26 b. If the state does not proceed with an action under this section, the court may
27 award the private person an amount that the court decides is reasonable for
28 collecting the civil penalty and damages. The amount may not be less than
29 twenty-five percent nor more than thirty percent of the proceeds of the action
30 or settlement and must be paid out of the proceeds, which includes damages
31 and civil penalties realized by the state as a result of the action. The court

1 may award the private person an amount for reasonable expenses found to
2 have been necessarily incurred, plus reasonable attorney's fees and costs.
3 All expenses, fees, and costs awarded must be awarded to the private person
4 against the defendant.

5 c. Regardless of whether the state proceeds with the action, if the court finds
6 that the private person planned and initiated the violation upon which the
7 action was brought, the court may reduce the share of the proceeds of the
8 action which the private person would otherwise receive under this Act, taking
9 into account the role of the private person in advancing the case to litigation
10 and any relevant circumstances pertaining to the violation. If the private
11 person is convicted of criminal conduct arising from the private person's role
12 in the violation of this Act, the court shall dismiss the private person from the
13 civil action and may not award the private person any share of the proceeds
14 of the action. Dismissal of the private person shall not prejudice the right of
15 the state to continue the action.

16 d. If the state does not proceed with the action and the private person conducts
17 the action, the court may award to the defendant its reasonable attorney's
18 fees and expenses if the defendant prevails in the action and the court finds
19 that the claim of the private person was clearly frivolous, clearly vexatious, or
20 brought primarily for purposes of harassment.

21 5. A person may not bring an action under subsection 2 which is based upon
22 allegations or transactions which are the subject of a civil suit or an administrative
23 civil money penalty proceeding to which the state is already a party.

24 6. a. Unless the action is brought by the attorney general or by the person that is
25 the original source of the information, a person may not bring an action under
26 this section based on the public disclosure of allegations or transactions:

27 (1) In a criminal, civil, or administrative hearing;

28 (2) In an investigation, report, hearing, or audit conducted by, or at the
29 request of, the legislative assembly, the state auditor, or any city,
30 county, or political subdivision of the state; or

31 (3) Of the news media.

1 b. For purposes of this subsection, "original source" means an individual who
2 has direct and independent knowledge of the information on which the
3 allegations are based and who has voluntarily provided the information to the
4 government before filing an action under subsection 2 which is based on that
5 information.

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

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

20 **SECTION 4. Limitation of actions - Activities antedating this Act - Burden of**
21 **proof.**

- 22 1. A civil action under section 3 of this Act may not be brought later than:
23 a. Six years after the date on which a violation of section 2 of this Act is
24 committed; or
25 b. Three years after the date when facts material to the right of action are known
26 or reasonably should have been known by the attorney general, but in no
27 event more than ten years after the date on which the violation is committed.
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.

10 **SECTION 6. Limitations of actions.** An individual may not bring an action under this
11 Act if the individual knows or has reason to know that the attorney general already has
12 knowledge of the allegations.

13 **SECTION 7. EFFECTIVE DATE.** Section 6 of this Act becomes effective on the date
14 the department of human services certifies to the legislative council that the federal government
15 has determined that section 6 of this Act meets the requirements of section 1909 of the Social
16 Security Act [42 U.S.C. 1396d].