

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2009

S

1

SENATE BILL 602

Short Title: Medicaid False Claims/Qui Tam Actions. (Public)

Sponsors: Senators Kinnaird, Rand, McKissick; Berger of Franklin, Clodfelter, Dannelly, Davis, Dorsett, Jones, Nesbitt, Stein, Vaughan, and Weinstein.

Referred to: Judiciary I.

March 16, 2009

A BILL TO BE ENTITLED

AN ACT TO STRENGTHEN THE PROSECUTION OF MEDICAID FRAUD BY INCREASING CRIMINAL PENALTIES FOR PROVIDER FRAUD, CREATING CRIMINAL PENALTIES FOR OBSTRUCTION AND MAKING FALSE ENTRIES, ESTABLISHING A PRIVATE CIVIL ACTION FOR PROVIDER FALSE CLAIMS, AUTHORIZING A SUBPOENA FOR DOCUMENTS IN CASES OF PROVIDER FRAUD AND ABUSE, AND TO APPROPRIATE FUNDS TO THE DEPARTMENT OF JUSTICE TO IMPLEMENT THIS ACT.

The General Assembly of North Carolina enacts:

SECTION 1.(a) G.S. 108A-70.11(5) reads as rewritten:

"(5) "Medical Assistance Program" means the Medical Assistance Program established pursuant to G.S. 108A-54 and includes the North Carolina Division of Medical Assistance and-or its fiscal agent or contractors."

SECTION 1.(b) G.S. 108A-70.12(a) reads as rewritten:

"§ 108A-70.12. Liability for certain acts; damages; effect of repayment.

(a) Liability for Certain Acts. – It shall be unlawful for any provider of medical assistance under the Medical Assistance Program to:

- (1) Knowingly present, or cause to be presented to the Medical Assistance Program a false or fraudulent claim for payment or approval; ~~or~~
- (2) Knowingly make, use, or cause to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the Medical Assistance ~~Program~~ ~~Program~~;
- (3) Conspire to defraud the Medical Assistance Program by getting a false or fraudulent claim allowed or paid; or
- (4) Knowingly make, use, or cause 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 Medical Assistance Program.

Each claim presented or caused to be presented in violation of this section is a separate violation."

SECTION 1.(c) G.S. 108A-70.12(b)(1) reads as rewritten:

"(b) Damages. –

- (1) Except as provided in subdivision (2) of this subsection, a court shall assess against any provider of medical assistance under the Medical Assistance Program who violates this section a civil penalty of not less than five thousand five hundred dollars ~~(\$5,000)~~ (\$5,500) and not more than ~~ten~~



1 ~~thousand dollars (\$10,000)~~ eleven thousand dollars (\$11,000) plus three
2 times the amount of damages which the ~~Medicaid~~ Medical Assistance
3 Program sustained because of the act of the provider.

4 "

5 **SECTION 2.** Article 2 of Chapter 108A of the General Statutes is amended by
6 adding the following new Part to read:

7 "Part 7A. Civil Action by Private Persons for Provider False Claims.

8 **"§ 108A-70.17. Civil action filed by private persons.**

9 (a) A person may bring a civil action for a violation of G.S. 108A-70.12 for the person
10 and for the State. The action shall be brought in the name of the State. The action may be
11 voluntarily dismissed by the person bringing the action only if the court and the Attorney
12 General have given written consent to the dismissal.

13 (b) A copy of the complaint and written disclosure of substantially all material evidence
14 and information the person possesses shall be served on the Attorney General. The complaint
15 shall be filed in camera, shall remain under seal for at least 120 days, and shall not be served on
16 the defendant until the court so orders. The State may elect to intervene and proceed with the
17 action within 120 days after it receives both the complaint and the material evidence and
18 information.

19 (c) The State may, for good cause shown, move the court for extensions of the time
20 during which the complaint remains under seal or a partial lifting of the seal. Any of these
21 motions may be supported by affidavits or other submission in camera. The defendant shall not
22 be required to respond to any complaint filed under this section until the complaint is unsealed
23 and served upon the defendant pursuant to the North Carolina Rules of Civil Procedure.

24 (d) Before the expiration of the 120-day period or any extensions obtained under
25 subsection (c) of this section, the State shall (i) proceed with the action, in which case the
26 action shall be conducted by the State; or (ii) notify the court that it declines to take over the
27 action, in which case the person bringing the action shall have the right to conduct the action.

28 (e) When a person brings an action under this section, no person other than the State
29 may intervene or bring a related action based on the facts underlying the pending action.

30 **"§ 108A-70.17A. Rights of the parties to qui tam actions.**

31 (a) If the State proceeds with the action, it shall have the primary responsibility for
32 prosecuting the action and shall not be bound by an act of the person bringing the action. The
33 person bringing the action shall have the right to continue as a party to the action, subject to the
34 limitations of this section.

35 (b) The State may dismiss the action, notwithstanding the objections of the person
36 initiating the action, if the person has been notified by the State of the filing of the motion, and
37 the court has provided the person with an opportunity for a hearing on the motion.

38 (c) The State may settle the action with the defendant, notwithstanding the objections of
39 the person initiating the action, if the court determines, after a hearing, that the proposed
40 settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of
41 good cause, such hearing may be held in camera.

42 (d) Upon a showing by the State that unrestricted participation during the course of the
43 litigation by the person initiating the action would interfere with or unduly delay the State's
44 prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the
45 court may, in its discretion, impose limitations on the person's participation, such as (i) limiting
46 the number of witnesses the person may call; (ii) limiting the length of the testimony of such
47 witnesses; (iii) limiting the person's cross-examination of witnesses; and (iv) otherwise limiting
48 the participation by the person in the litigation.

49 (e) Upon a showing by the defendant that unrestricted participation during the course of
50 the litigation by the person initiating the action would be for purposes of harassment or would

1 cause the defendant undue burden or unnecessary expense, the court may limit the participation
2 by the person in the litigation.

3 (f) If the State elects not to proceed with the action, the person who initiated the action
4 shall have the right to conduct the action. If the State so requests, it shall be served with copies
5 of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts
6 at the State's expense. When a person proceeds with the action, the court, without limiting the
7 status and rights of the person initiating the action, may nevertheless permit the State to
8 intervene at a later date upon a showing of good cause.

9 (g) Whether or not the State proceeds with the action, upon a showing by the State that
10 certain actions of discovery by the person initiating the action would interfere with the State's
11 investigation or prosecution of a criminal or civil matter arising out of the same facts, the court
12 may stay the discovery for a period of not more than 60 days. The showing by the State shall be
13 conducted in camera. The court may extend the 60-day period upon a further showing in
14 camera that the State has pursued the criminal or civil investigation or proceedings with
15 reasonable diligence, and any proposed discovery in the civil action will interfere with the
16 ongoing criminal or civil investigation or proceedings.

17 (h) Notwithstanding G.S. 108A-70.17, the State may elect to pursue its claim through
18 any alternate remedy available to the State, including any administrative proceeding to
19 determine a civil money penalty. If an alternate remedy is pursued in another proceeding, the
20 person initiating the action shall have the same rights in the alternate proceeding as the person
21 would have had if the action had continued under this section. Any finding of fact or
22 conclusion of law made in the alternate proceeding that has become final shall be conclusive on
23 all parties to an action under this section. For purposes of this subsection, a finding or
24 conclusion is final if it has been finally determined on appeal to a court of competent
25 jurisdiction of the State, if the time for filing an appeal with respect to the finding or conclusion
26 has expired, or if the finding or conclusion is not subject to judicial review.

27 **"§ 108A-70.17B. Award to qui tam plaintiff.**

28 (a) Except as otherwise provided in this section, if the State proceeds with an action
29 brought by a person under G.S. 108A-70.17, the person shall, subject to the second sentence of
30 this subsection, receive at least fifteen percent (15%) but not more than twenty-five percent
31 (25%) of the proceeds of the action or settlement of the claim, depending upon the extent to
32 which the person substantially contributed to the prosecution of the action. Where the action is
33 one that the court finds to be based primarily on disclosures of specific information, other than
34 information proved by the person bringing the action, relating to allegations or transactions in a
35 federal or state criminal, civil, or administrative hearing, in a congressional, legislative,
36 administrative, General Accounting Office, or State Auditor's report, hearing, audit, or
37 investigation, or from the news media, the court may award such sums as it considers
38 appropriate, but in no case more than ten percent (10%) of the proceeds of the action, taking
39 into account the significance of the information and the role of the person bringing the action in
40 advancing the case to litigation. Any payment to a person under the first or second sentence of
41 this subsection shall be made from the proceeds. The person shall also receive an amount for
42 reasonable expenses that the court finds to have been necessarily incurred, plus reasonable
43 attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the
44 defendant.

45 (b) If the State does not proceed with an action, the person bringing the action or
46 settling the claim shall receive an amount that the court decides is reasonable for collecting the
47 civil penalty and damages. The amount shall be not less than twenty-five percent (25%) and not
48 more than thirty percent (30%) of the proceeds of the action or settlement and shall be paid out
49 of the proceeds. The person shall also receive an amount for reasonable expenses that the court
50 finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such
51 expenses, fees, and costs shall be awarded against the defendant.

1 (c) Whether or not the State proceeds with the action, if the court finds that the action
2 was brought by a person who planned and initiated the violation of G.S. 108A-70.12 upon
3 which the action was brought, then the court may, to the extent the court considers appropriate,
4 reduce the share of the proceeds of the action that the person would otherwise receive under
5 subsection (a) or (b) of this section, taking into account the role of that person in advancing the
6 case to litigation and any relevant circumstances pertaining to the violation. If the person
7 bringing the action is convicted of criminal conduct arising from the person's role in the
8 violation of G.S. 108A-70.12, that person shall be dismissed from the civil action and shall not
9 receive any share of the proceeds of the action. The dismissal shall not prejudice the right of the
10 State to continue the action.

11 (d) If the State does not proceed with the action and the person bringing the action
12 conducts the action, the court may award to the defendant its reasonable attorneys' fees and
13 expenses if the defendant prevails in the action and if the court finds that the claim of the
14 person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for
15 purposes of harassment.

16 **"§ 108A-70.17C. Certain actions barred.**

17 (a) No court shall have jurisdiction over an action brought by a present or former
18 employee of the State based on information discovered during the course of the present or
19 former employee's employment unless that employee first, in good faith, exhausted existing
20 internal procedures for reporting and seeking recovery of the falsely claimed sums through
21 official channels, and unless the State failed to act on the information provided within a
22 reasonable period of time.

23 (b) In no event may a person bring an action under G.S. 108A-70.17 that is based upon
24 allegations or transactions that are the subject of a civil suit or an administrative proceeding in
25 which the State is already a party.

26 (c) No court shall have jurisdiction over an action under G.S. 108A-70.17 based upon
27 the public disclosure of allegations or transactions in a federal or state criminal, civil, or
28 administrative hearing, in a congressional, legislative, administrative, General Accounting
29 Office or State Auditor's report, hearing, audit, or investigation, or from the news media, unless
30 the action is brought by the Attorney General, or the person bringing the action is an original
31 source of the information. For purposes of this section, "original source" means an individual
32 who has direct and independent knowledge of the information on which the allegations are
33 based and has voluntarily provided the information to the State before filing an action under
34 G.S. 108A-70.17 that is based on the information.

35 (d) The State is not liable for expenses a person incurs in bringing an action under
36 G.S. 108A-70.17.

37 (e) G.S. 108A-70.14 and G.S. 108A-70.15 apply to this Part."

38 **SECTION 3.** G.S. 108A-70.15 reads as rewritten:

39 **"§ 108A-70.15. Employee remedies.**

40 (a) In the absence of fraud or malice, no person who furnishes information to officials
41 of the State responsible for investigating false claims violations shall be liable for damages in a
42 civil action for any oral or written statement made or any other action that is necessary to
43 supply information required pursuant to this ~~Part~~ Part or Part 7A of this Article.

44 (b) Any employee of a provider who is discharged, demoted, suspended, threatened,
45 harassed, or in any other manner discriminated against in the terms and conditions of
46 employment by the employee's employer because of lawful acts done by the employee on
47 behalf of the employee or others in furtherance of an action under G.S. ~~108A-70.12,~~
48 108A-70.12 or Part 7A of this Article, including investigation for, initiation of, testimony for,
49 or assistance in an action filed or to be filed under G.S. ~~108A-70.12,~~ 108A-70.12 or Part 7A of
50 this Article, shall be entitled to all relief necessary to make the employee whole. Relief shall
51 include reinstatement with the same seniority status as the employee would have had but for the

1 discrimination, two times the amount of back pay, interest on the back pay, and compensation
2 for any special damages sustained as a result of the discrimination, including litigation costs
3 and reasonable attorneys' fees. An employee may bring an action in the appropriate court for
4 the relief provided in this section."

5 **SECTION 4.** Part 6 of Article 2 of Chapter 108A of the General Statutes is
6 amended by adding the following new section to read:

7 **"§ 108A-63.1. Health care fraud and abuse subpoena duces tecum.**

8 (a) The Attorney General may issue in writing and cause to be served a subpoena duces
9 tecum upon any corporation or governmental entity requiring the production of any records,
10 books, papers, documents, electronic media, or other objects or tangible things, which may be
11 relevant to any criminal investigation of any act or activity of a provider involving a violation
12 of G.S. 108A-63, 14-100, 108A-60, 14-90, 14-112.2, 14-32.1, or 14-32.2 that a corporation or
13 governmental entity may possess or have care, custody, or control.

14 (b) Requiring a custodian of records to give testimony concerning the production and
15 authentication of the records.

16 (c) A subpoena under this section shall describe the objects required to be produced and
17 prescribe a return date within a reasonable period of time within which the objects can be
18 assembled and made available.

19 (d) The corporation or governmental entity may be required to produce the objects in
20 the county in which the corporation or governmental entity has its principle office or in Wake
21 County.

22 (e) A custodian of records summoned under this section shall be paid the same fees and
23 mileage that are paid witnesses in the courts of the State.

24 (f) A corporation or governmental entity may move to quash or modify the subpoena if
25 it is oppressive or unreasonable. The motion must be made before the time specified in the
26 subpoena for production and may be made before a judge of the superior court in the county in
27 which the corporation or governmental entity is required to produce the objects or in which it
28 has its principle office.

29 (g) In the case of failure by any corporation or governmental entity without adequate
30 excuse to obey a subpoena, the Attorney General may invoke the aid of a judge of the superior
31 court. The court may issue an order requiring the subpoenaed corporation or governmental
32 entity to appear before the Attorney General to produce records, if so ordered, or to give
33 testimony concerning the production and authentication of the records. Failure to obey the
34 order of the court may be punished as contempt of court.

35 (h) Any corporation or governmental entity, including officers, agents, and employees,
36 who comply in good faith with the subpoena and produce the materials sought, shall not be
37 liable in any court of this State to any person for the production of the objects or for the
38 nondisclosure of the production to any person.

39 (i) Health information about an individual that is disclosed under this section may not
40 be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or
41 investigation directed against the individual who is the subject of the information unless the
42 action or investigation arises out of and is directly related to receipt of health care or payment
43 for health care or action involving a fraudulent claim related to health; or if authorized by an
44 appropriate order of a court of competent jurisdiction, granted after application showing good
45 cause therefor.

46 (1) In assessing good cause under this subsection, the court shall weigh the
47 public interest and the need for disclosure against the injury to the patient, to
48 the physician-patient relationship, and to the treatment services.

49 (2) Upon the granting of an order to disclose, the court, in determining the
50 extent to which any disclosure of all or any part of any record is necessary,
51 shall impose appropriate safeguards against unauthorized disclosure."

1 **SECTION 5.** G.S. 108A-63 reads as rewritten:

2 "**§ 108A-63. Medical assistance provider fraud.**

3 (a) It shall be unlawful for any provider of medical assistance under this Part to
4 knowingly and willfully make or cause to be made any false statement or representation of a
5 material fact:

6 (1) In any application for payment under this Part, or for use in determining
7 entitlement to such payment; or

8 (2) With respect to the conditions or operation of a provider or facility in order
9 that such provider or facility may qualify or remain qualified to provide
10 assistance under this Part.

11 (b) It shall be unlawful for any provider of medical assistance to knowingly and
12 willfully conceal or fail to disclose any fact or event affecting:

13 (1) His initial or continued entitlement to payment under this Part; or

14 (2) The amount of payment to which such person is or may be entitled.

15 (c) ~~Any~~ Except as otherwise provided in subsections (e) and (g) of this section, any
16 person who violates a provision of this section shall be guilty of a Class I felony.

17 (d) "Provider" shall include any person who provides goods or services under this Part
18 and any other person acting as an employee, representative or agent of such person.

19 (e) It shall be unlawful for any provider of medical assistance under this Part to
20 knowingly and willfully execute, or attempt to execute, a scheme or artifice to:

21 (1) Defraud the Medical Assistance Program; or

22 (2) Obtain, by means of false or fraudulent pretenses, representations, or
23 promises, any of the money or property owned by, or under the custody or
24 control of, the Medical Assistance Program,

25 in connection with the delivery of or payment for health care benefits, items, or services under
26 this Part. If the value of the health care benefits, items, or services is one hundred thousand
27 dollars (\$100,000) or more, a violation of this subsection is a Class C felony. If the value of the
28 health care benefits, items, or services is less than one hundred thousand dollars (\$100,000), a
29 violation of this subsection is a Class H felony.

30 (f) It shall be unlawful for any provider to knowingly and willfully obstruct, delay, or
31 mislead or attempt to obstruct, delay, or mislead an investigation of a violation of this section
32 by the Attorney General's Office.

33 (g) It shall be unlawful for any provider to knowingly and willfully make or cause to be
34 made a false entry in, alter, destroy, or conceal a financial, medical, or other record related to
35 the provision of a benefit, item, or service under this Part with the intent to defraud."

36 **SECTION 6.** There is appropriated from the General Fund to the Department of
37 Justice the sum of \$ for the 2009-2010 fiscal year and the sum of \$ for the 2010-2011 fiscal
38 year. These funds shall be used for additional investigative legal and support positions and for
39 other purposes to carry out the provisions of this act.

40 **SECTION 7.** Sections 2 through 4 of this act become effective January 1, 2010,
41 and a civil action under Sections 2 through 4 may be brought for activity prior to the effective
42 date if the limitations period set in G.S. 108A-70.13 has not lapsed. The remainder of this act
43 becomes effective July 1, 2009.