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**HOUSE BILL 468**

**46TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2004**

**INTRODUCED BY**

**Luciano "Lucky" Varela**

**AN ACT**

**RELATING TO MEDICAID; PROVIDING FOR CIVIL ACTION AGAINST THE  
FILING OF FALSE CLAIMS UNDER THE MEDICAID PROGRAM; PROVIDING  
FOR QUI TAM AWARDS; ENACTING THE MEDICAID FALSE CLAIMS ACT.**

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:**

**Section 1. SHORT TITLE. -- This may be cited as the  
"Medicaid False Claims Act".**

**Section 2. PURPOSE. -- The purpose of the Medicaid False  
Claims Act is to deter persons from knowingly causing or  
assisting to cause the state to pay medicaid claims that are  
false and to provide remedies for obtaining treble damages and  
civil penalties for the state when money is obtained from the  
state by reason of a false claim.**

**Section 3. DEFINITIONS. -- As used in the Medicaid False  
Claims Act:**

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1           A. "claim" means a written or electronically  
2 submitted request for payment of health care services pursuant  
3 to the medicaid program;

4           B. "department" means an agency of the state that  
5 participates in the medicaid program, including the human  
6 services department, the children, youth and families  
7 department or the department of health;

8           C. "knowing" or "knowingly" means, with respect to  
9 information, that a person:

10                   (1) has actual knowledge of the information;

11                   (2) acts in deliberate ignorance of the truth  
12 or falsity of the information; or

13                   (3) acts in reckless disregard of the truth or  
14 falsity of the information;

15           D. "medicaid" means the federal-state program  
16 administered by the human services department pursuant to Title  
17 19 or Title 21 of the federal Social Security Act;

18           E. "medicaid recipient" means an individual on  
19 whose behalf a person claims or receives a payment from the  
20 medicaid program, regardless of whether the individual was  
21 eligible for the medicaid program; and

22           F. "qui tam" means an action brought under a  
23 statute that allows a private person to sue for a penalty, part  
24 of which the state will receive.

25           Section 4. FALSE CLAIMS AGAINST THE STATE--

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1 LIABILITY FOR CERTAIN ACTS. --A person commits an unlawful act  
2 if the person:

3 A. presents, or causes to be presented, to the  
4 state a claim for payment under the medicaid program knowing  
5 that such claim is false or fraudulent;

6 B. presents, or causes to be presented, to the  
7 state a claim for payment under the medicaid program knowing  
8 that the person receiving a medicaid benefit or payment is not  
9 authorized or is not eligible for a benefit under the medicaid  
10 program;

11 C. makes, uses or causes to be made or used a  
12 record or statement to obtain a false or fraudulent claim under  
13 the medicaid program paid for or approved by the state knowing  
14 such record or statement is false;

15 D. conspires to defraud the state by getting a  
16 claim allowed or paid under the medicaid program knowing that  
17 such claim is false or fraudulent;

18 E. makes, uses or causes to be made or used a  
19 record or statement to conceal, avoid or decrease an obligation  
20 to pay or transmit money or property to the state, relative to  
21 the medicaid program, knowing that such record or statement is  
22 false;

23 F. knowingly or intentionally applies for and  
24 receives a benefit for payment on behalf of another person  
25 under the medicaid program and converts any part of the benefit

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1 or payment to a use other than for the benefit of the person on  
2 whose behalf it was received;

3 G. knowingly or intentionally makes a false  
4 statement or misrepresentation of material fact concerning the  
5 conditions or operation of a health care facility in order that  
6 the facility may qualify for certification or recertification  
7 required by the medicaid program; or

8 H. knowingly or intentionally makes a claim under  
9 the medicaid program for a service or product that is  
10 substantially inadequate or inappropriate when compared to  
11 generally recognized standards within the particular discipline  
12 or health care industry.

13 Section 5. DOCUMENTARY MATERIAL IN POSSESSION OF STATE  
14 AGENCY. --

15 A. The human services department shall provide the  
16 children, youth and families department or the department of  
17 health access to all documentary materials of persons and  
18 medicaid recipients to which that state agency has access.  
19 Documentary material provided pursuant to this subsection is  
20 provided to allow investigation of an alleged unlawful act or  
21 for use or potential use in an administrative or judicial  
22 proceeding.

23 B. Except as ordered by a court for good cause  
24 shown, the children, youth and families department or the  
25 department of health shall not produce for inspection or

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1 copying or otherwise disclose the contents of documentary  
2 material obtained pursuant to this section to a person other  
3 than:

4 (1) an authorized employee of the attorney  
5 general;

6 (2) an agency of this state, the United States  
7 or another state;

8 (3) a district attorney, city attorney or  
9 county attorney of this state;

10 (4) the United States attorney general; or

11 (5) a state or federal grand jury.

12 Section 6. IMMUNITY. -- Notwithstanding any other law, a  
13 person is not civilly or criminally liable for providing access  
14 to documentary material pursuant to the Medicaid False Claims  
15 Act to a person identified in Subsection B of Section 5 of this  
16 act.

17 Section 7. CIVIL ACTION FOR FALSE CLAIMS. --

18 A. The appropriate department shall diligently  
19 investigate suspected violations. If the department finds that  
20 a person has violated or is violating the provisions of the  
21 Medicaid False Claims Act, the department may bring a civil  
22 action pursuant to this section against the person.

23 B. A private civil action may be brought by an  
24 affected person for a violation of the Medicaid False Claims  
25 Act on behalf of the person bringing suit and for the state.

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1 The action shall be brought in the name of the state. The  
2 action may be dismissed only if the court and the appropriate  
3 department give written consent to the dismissal and their  
4 reasons for consenting.

5 C. A copy of the complaint and written disclosure  
6 of substantially all material evidence and information the  
7 person possesses shall be served on the appropriate department.  
8 The complaint shall be filed in writing and shall remain under  
9 seal for at least sixty days. The complaint shall not be  
10 served on the defendant until the expiration of sixty days or  
11 any extension approved. Within sixty days after receiving a  
12 copy of the complaint, the appropriate department shall conduct  
13 an investigation of the factual allegations and legal  
14 contentions made in the complaint, shall make a written  
15 determination of whether there is substantial evidence that a  
16 violation has occurred and shall provide the person against  
17 which a complaint has been made with a copy of the  
18 determination. If the appropriate department determines that  
19 there is not substantial evidence that a violation has  
20 occurred, the complaint shall be dismissed.

21 D. The department may, for good cause shown, move  
22 the court for extensions of time during which the complaint  
23 remains under seal. Any such motion may be supported by  
24 affidavits or other submissions in camera. The defendant shall  
25 not be required to respond to a complaint filed pursuant to

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1 this section until twenty days after the complaint is unsealed  
2 and served to the defendant. The complaint shall be deemed  
3 unsealed at the expiration of the sixty-day period in the  
4 absence of a court-approved extension.

5 E. Before the expiration of the sixty-day period or  
6 any extensions obtained, the department shall:

7 (1) proceed with the action, in which case the  
8 action shall be conducted by the department; or

9 (2) notify the court that it declines to take  
10 over the action, in which case the person bringing the action  
11 shall have the right to conduct the action if the department  
12 determined that there is substantial evidence that a violation  
13 of the Medicaid False Claims Act has occurred.

14 F. When a person brings an action pursuant to this  
15 section, only the department may intervene or bring a related  
16 action based on the facts underlying the pending action.

17 Section 8. RIGHTS OF THE PARTIES TO QUI TAM ACTIONS. --

18 A. If the department proceeds with the action, it  
19 shall have the exclusive responsibility for prosecuting the  
20 action and shall not be bound by an act of the person bringing  
21 the action. The person bringing the action shall have the  
22 right to continue as a nominal party to the action and shall  
23 not have the right to participate in the litigation except as a  
24 witness.

25 B. The department may dismiss the action

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1 notwithstanding the objections of the person bringing the  
2 action if the person has been notified by the department of the  
3 filing of the motion and the court has provided the person with  
4 an opportunity for a hearing on the motion.

5 C. The department may settle the action with the  
6 defendant notwithstanding the objections of the person bringing  
7 the action if the court determines, after the hearing, that the  
8 proposed settlement is fair, adequate and reasonable under all  
9 the circumstances. Upon a showing of good cause, such hearing  
10 may be held in camera.

11 D. If the department elects not to proceed with the  
12 action, the person bringing the action shall have the right to  
13 conduct the action. If the department requests, it shall be  
14 served with copies of the pleadings filed in the action and  
15 shall be supplied with copies of all deposition transcripts at  
16 the department's expense. When a person proceeds with the  
17 action, the court, without limiting the status and rights of  
18 the person bringing the action, may allow the department to  
19 intervene at a later date upon a showing of good cause.

20 E. Whether or not the department proceeds with the  
21 action, upon a showing by the department that certain actions  
22 of discovery by the person bringing the action would interfere  
23 with the department's investigation or prosecution of a  
24 criminal or civil matter arising out of the same facts, the  
25 court may stay such discovery for a period not to exceed sixty

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1 days. Such a showing shall be conducted in camera. The court  
2 may extend the sixty-day period upon a further showing in  
3 camera that the department has pursued the criminal or civil  
4 investigation or proceedings with reasonable diligence and any  
5 proposed discovery in the civil action will interfere with the  
6 ongoing criminal or civil investigation or proceedings.

7 Section 9. AWARD TO QUI TAM PLAINTIFF. --

8 A. If the department proceeds with an action  
9 brought by a person pursuant to the Medicaid False Claims Act,  
10 the person shall, subject to the limitations in this  
11 subsection, receive at least fifteen percent but not more than  
12 twenty-five percent of the proceeds of the action or settlement  
13 of the claim, depending upon the extent to which the person  
14 substantially contributed to the prosecution of the action.  
15 Where the action is one that the court finds to be based  
16 primarily on disclosures of specific information other than  
17 information provided by the party bringing the action relating  
18 to allegations or transactions in a criminal, civil or  
19 administrative hearing or from the news media, the court shall  
20 award a sum as it considers appropriate; provided that the sum  
21 does not exceed ten percent of the proceeds and takes into  
22 account the significance of the information and the role of the  
23 person bringing the action in advancing the case to litigation.  
24 A payment to a person pursuant to this subsection shall be made  
25 from the proceeds. The person shall also receive an amount for

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1 reasonable expenses that the court finds to have been  
2 necessarily incurred, plus reasonable attorney fees and costs.  
3 In determining the amount of reasonable attorney fees and  
4 costs, the court shall consider whether such fees and costs  
5 were necessary to the prosecution of the action, were incurred  
6 for activities that were duplicative of the activities of the  
7 department in prosecuting the case or were repetitious,  
8 irrelevant or for purposes of harassment or caused the  
9 defendant undue burden or unnecessary expense. All such  
10 expenses, fees and costs shall be awarded against the  
11 defendant.

12 B. If the department does not proceed with an  
13 action pursuant to the Medicaid False Claims Act, the person  
14 bringing the action or settling the claim shall receive an  
15 amount that the court decides is reasonable for collecting the  
16 civil penalty and damages. The amount shall be not less than  
17 twenty-five percent and not more than thirty percent of the  
18 proceeds of the action or settlement and shall be paid out of  
19 such proceeds. The person shall also receive an amount for  
20 reasonable expenses that the court finds to have been  
21 necessarily incurred, plus reasonable attorney fees and costs.  
22 In determining the amount of reasonable attorney fees and  
23 costs, the court shall consider whether such fees and costs  
24 were necessary to the prosecution of the action, were incurred  
25 for activities, which were repetitious, irrelevant or for

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1 purposes of harassment or caused the defendant undue burden or  
2 unnecessary expense. All such expenses, fees and costs shall  
3 be awarded against the defendant.

4 C. Whether or not the department proceeds with the  
5 action, if the court finds that the action was brought by a  
6 person who planned and initiated the violation upon which the  
7 action was brought, then the court may, to the extent the court  
8 considers appropriate, reduce the share of the proceeds of the  
9 action that the party would otherwise receive pursuant to  
10 Subsection A or B of this section, taking into account the role  
11 of that person in advancing the case to litigation and any  
12 relevant circumstances pertaining to the violation. If the  
13 person bringing the action is convicted of criminal conduct  
14 arising from the person's role in the violation of the Medicaid  
15 False Claims Act, that person shall be dismissed from the civil  
16 action and shall not receive any share of the proceeds of the  
17 action. Such dismissal shall not prejudice the right of the  
18 state to continue the action represented by the department. If  
19 the department does not proceed with the action and the person  
20 bringing the action conducts the action, the court may award to  
21 the defendant its reasonable attorney fees and costs if the  
22 defendant prevails in the action and the court finds that the  
23 claim of the party bringing the action was:

24 (1) filed for an improper purpose;

25 (2) not warranted by existing law or by a

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1 nonfrivolous argument for the extension, modification or  
2 reversal of existing law or the establishment of new law; or

3 (3) was based on allegations or factual  
4 contentions not supported.

5 Section 10. CERTAIN ACTIONS BARRED. --

6 A. A court shall not have jurisdiction of an action  
7 brought pursuant to the Medicaid False Claims Act against a  
8 department official if the action is substantially based on  
9 evidence or information known to the department when the action  
10 was brought.

11 B. A person shall not bring an action pursuant to  
12 the Medicaid False Claims Act that is substantially based upon  
13 allegations or transactions that are the subject of a civil  
14 suit or an administrative proceeding in which the department is  
15 already a party.

16 C. A court shall not have jurisdiction over an  
17 action pursuant to the Medicaid False Claims Act substantially  
18 based upon the public disclosure of allegations or actions in a  
19 criminal, civil or administrative hearing or from the news  
20 media, unless the action is brought by the department or the  
21 person bringing the action is an original source of the  
22 information. For purposes of this subsection, "original  
23 source" means the person bringing suit that has independent  
24 knowledge, including knowledge based on the person's own  
25 investigation of the defendant's conduct, of the information on

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1 which the allegations are based and has voluntarily provided or  
2 verified the information on which the allegations are based or  
3 has voluntarily provided the information to the department  
4 before filing an action pursuant to this section that is based  
5 on the information.

6 Section 11. DEPARTMENT NOT LIABLE FOR CERTAIN EXPENSES. --  
7 The department shall not be liable for expenses that a person  
8 incurs in bringing an action pursuant to the Medicaid False  
9 Claims Act.

10 Section 12. EMPLOYEE PROTECTION. -- Any employee who is  
11 discharged, demoted, suspended, threatened, harassed or  
12 otherwise discriminated against in the terms and conditions of  
13 employment by the employer because of lawful acts done by the  
14 employee on behalf of the employee or others in furtherance of  
15 an action pursuant to the Medicaid False Claims Act, including  
16 investigation for, initiation of, testimony for, or assistance  
17 in an action filed or to be filed pursuant to that act, shall  
18 be entitled to all relief necessary to make the employee whole.  
19 Such relief shall include reinstatement with the same seniority  
20 status that the employee would have had but for the  
21 discrimination, two times the amount of back pay, interest on  
22 the back pay and compensation for any special damages sustained  
23 as a result of the discrimination, including litigation costs  
24 and reasonable attorney fees. An employee may bring an action  
25 in the appropriate court of the state for the relief provided

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1 in this subsection.

2 Section 13. FALSE CLAIMS AND REPORTING PROCEDURE. --

3 A. A civil action shall not be brought:

4 (1) more than six years after the date on  
5 which the violation is committed; or

6 (2) more than three years after the date when  
7 facts material to the right of action are known or reasonably  
8 should have been known by the official of the department  
9 charged with responsibility to act in these circumstances, but  
10 in no event more than ten years after the date on which the  
11 violation is committed, whichever occurs last.

12 B. In any action brought pursuant to the Medicaid  
13 False Claims Act, the department or the person bringing the  
14 action shall be required to prove all essential elements of the  
15 cause of action, including damages, by a preponderance of the  
16 evidence.

17 C. Notwithstanding any other provision of law, a  
18 final judgment rendered in favor of the department in any  
19 criminal proceeding charging fraud or false statements, whether  
20 upon a verdict after trial or upon a plea of guilty, shall  
21 preclude the defendant from denying the essential elements of  
22 the offense in any action that involves the same transaction as  
23 in the criminal proceeding and that is brought pursuant to the  
24 Medicaid False Claims Act.

25 Section 14. APPLICATION OF OTHER LAW. --The application of

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1 a civil remedy pursuant to this law does not preclude the  
2 application of other laws, statutes or regulatory remedy,  
3 except that a person may not be liable for a civil remedy  
4 pursuant to the Medicaid False Claims Act and civil damages or  
5 penalty pursuant to the Medicaid Fraud Act if the civil remedy  
6 and the civil damages or penalty are assessed for the same.