

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 causing or assisting to cause the state to pay medicaid claims that are false and to provide remedies for obtaining treble damages and civil recoveries 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:

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

B. "department" means the human services department;

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

D. "medicaid recipient" means an individual on

whose behalf a person claims or receives a payment from the medicaid program, regardless of whether the individual was eligible for the medicaid program; and

E. "qui tam" means an action brought under a statute that allows a private person to sue for a recovery, part of which the state will receive.

Section 4. FALSE CLAIMS AGAINST THE STATE--LIABILITY FOR CERTAIN ACTS.--A person commits an unlawful act and shall be liable to the state for three times the amount of damages that the state sustains as a result of the act if the person:

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

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

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

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

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

F. knowingly applies for and receives a benefit or payment on behalf of another person, except pursuant to a lawful assignment of benefits, under the medicaid program and converts that benefit or payment to his own personal use;

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

H. knowingly makes a claim under the medicaid program for a service or product that was not provided.

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

A. The department shall have access to all documentary materials of persons and medicaid recipients to which a state agency has access. Documentary material provided pursuant to this subsection is provided to allow investigation of an alleged unlawful act or for use or potential use in an administrative or judicial proceeding.

B. Except for disclosure to any person under

investigation or who is the subject of allegations made pursuant to the Medicaid False Claim Act or as ordered by a court for good cause shown, the department shall not produce for inspection or copying or otherwise disclose the contents of documentary material obtained pursuant to this section to a person other than:

(1) an authorized employee of the attorney general;

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

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

(4) the United States attorney general; or

(5) a state or federal grand jury.

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

Section 7. CIVIL ACTION FOR FALSE CLAIMS.--

A. The department shall diligently investigate suspected violations. If the department finds that a person has violated or is violating the provisions of the Medicaid False Claims Act, the department may bring a civil action pursuant to Subsection F of this section.

B. A private civil action may be brought by an affected person for a violation of the Medicaid False Claims Act on behalf of the person bringing suit and for the state. The action shall be brought in the name of the state. The action may be dismissed if the court and the department, pursuant to Subsection F of this section, give written consent to the dismissal and their reasons for consenting.

C. For private civil actions, a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the department. The complaint shall be filed in writing and shall remain under seal for at least sixty days. The complaint shall not be served on the defendant until the expiration of sixty days or any extension approved. Within sixty days after receiving a copy of the complaint, the department shall conduct an investigation of the factual allegations and legal contentions made in the complaint, shall make a written determination of whether there is substantial evidence that a violation has occurred and shall provide the person against which a complaint has been made with a copy of the determination. If the department determines that there is not substantial evidence that a violation has occurred, the complaint shall be dismissed.

D. The department may, for good cause shown, move the court for extensions of time during which the complaint

remains under seal. Any such motion may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to a complaint filed pursuant to this section until twenty days after the complaint is unsealed and served to the defendant. The complaint shall be deemed unsealed at the expiration of the sixty-day period in the absence of a court-approved extension.

E. Before the expiration of the sixty-day period or any extensions obtained, the department, pursuant to Subsection F of this section, shall:

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

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

F. The department shall notify the attorney general prior to filing a civil action pursuant to the Medicaid False Claims Act and shall not proceed with the action except with the written approval of the attorney general. The attorney general shall, within twenty working days from the notification by the department, notify the department whether it may proceed with the civil action.

Failure by the attorney general to notify the department of its determination within the specified time period shall be construed as consent to proceed. The department shall, after filing the civil action, notify the attorney general of any proposed dismissal or settlement and the department shall not proceed with the dismissal or settlement except with the written approval of the attorney general.

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

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

B. The department may dismiss the action, pursuant to Subsection F of Section 7 of the Medicaid False Claims Act, notwithstanding the objections of the person bringing the action if the person has been notified by the department of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

C. The department may settle the action with the defendant, pursuant to Subsection F of Section 7 of the Medicaid False Claims Act, notwithstanding the objections of the person bringing the action if the court determines, after

the hearing, that the proposed settlement is fair, adequate and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

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

E. Whether or not the department proceeds with the action, upon a showing by the department that certain actions of discovery by the person bringing the action would interfere with the department's investigation or prosecution of a civil matter arising out of the same facts, the court may stay such discovery for a period not to exceed sixty days. Such a showing shall be conducted in camera. The court may extend the sixty-day period upon a further showing in camera that the department has pursued the civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing civil investigation or proceedings.

A. If the department proceeds with an action brought by a person pursuant to the Medicaid False Claims Act, the person shall, subject to the limitations in this subsection, receive at least fifteen percent but not more than twenty-five percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one that the court finds to be based primarily on disclosures of specific information other than information provided by the party bringing the action relating to allegations or transactions in a criminal, civil or administrative hearing or from the news media, the court shall award a sum as it considers appropriate; provided that the sum does not exceed ten percent of the proceeds and takes into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. A payment to a person pursuant to this subsection shall be made from the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney fees and costs. In determining the amount of reasonable attorney fees and costs, the court shall consider whether such fees and costs were necessary to the prosecution of the action, were incurred for activities that were duplicative of the activities of the department in prosecuting the case or

were repetitious, irrelevant or for purposes of harassment or caused the defendant undue burden or unnecessary expense. All such expenses, fees and costs shall be awarded against the defendant.

B. If the department does not proceed with an action pursuant to the Medicaid False Claims Act, the person bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil recovery and damages recoverable by the state. The amount shall be not less than twenty-five percent and not more than thirty percent of the proceeds of the action or settlement and shall be paid out of such proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney fees and costs. In determining the amount of reasonable attorney fees and costs, the court shall consider whether such fees and costs were necessary to the prosecution of the action, were incurred for activities, which were repetitious, irrelevant or for purposes of harassment or caused the defendant undue burden or unnecessary expense. All such expenses, fees and costs shall be awarded against the defendant.

C. Whether or not the department proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation upon which the

action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action that the party would otherwise receive pursuant to Subsection A or B of this section, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from the person's role in the violation of the Medicaid False Claims Act, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the state to continue the action represented by the department. If the department does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney fees and costs if the defendant prevails in the action and the court finds that the claim of the party bringing the action was:

- (1) filed for an improper purpose;
- (2) not warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law; or
- (3) was based on allegations or factual contentions not supported.

Section 10. CERTAIN ACTIONS BARRED.--

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

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

C. A court shall not have jurisdiction over an action pursuant to the Medicaid False Claims Act substantially based upon the public disclosure of allegations or actions in a criminal, civil or administrative hearing or from the news media, unless the action is brought by the department or the person bringing the action is an original source of the information. For the purposes of this subsection, "original source" means the person bringing suit that has independent knowledge, including knowledge based on the person's own investigation of the defendant's conduct, of the information on which the allegations are based and has voluntarily provided or verified the information on which the allegations are based or has voluntarily provided the information to the department before filing an action pursuant to this section that is based on the information.

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

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

Section 13. FALSE CLAIMS AND REPORTING PROCEDURE.--

A. A civil action shall be brought within the limitations set forth in Section 37-1-4 NMSA 1978.

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

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

Section 14. APPLICATION OF OTHER LAW.--The application of a civil remedy pursuant to this law does not preclude the application of other laws, statutes or regulatory remedy, except that a person may not be liable for a civil remedy pursuant to the Medicaid False Claims Act and civil damages or recovery pursuant to the Medicaid Fraud Act if the civil remedy and the civil damages or recoveries are assessed for the same conduct by another government agency.

Section 15. USE OF FUNDS.--

A. Damages collected pursuant to the Medicaid False Claims Act on behalf of the state shall be remitted to the state treasurer for deposit in the general fund to be used

for the state's medicaid program.

B. Penalties, legal fees or costs of investigation recovered pursuant to the Medicaid False Claims Act on behalf of the state shall be remitted to the state treasurer for deposit in the general fund to be used for the state's medicaid program.

C. Pursuant to Subsection C of Section 30-44-8 NMSA 1978, penalties recovered pursuant to the Medicaid False Claims Act on behalf of the state may be claimed by the attorney general pursuant to procedures established by the department and the attorney general.