

BILL

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

INTRODUCED BY

DISCUSSION DRAFT

AN ACT

RELATING TO MEDICAID FALSE CLAIMS; AMENDING THE MEDICAID FALSE CLAIMS ACT; CHANGING ENFORCEMENT OF THE MEDICAID FALSE CLAIMS ACT TO THE ATTORNEY GENERAL; CHANGING AND ADDING DEFINITIONS; INCREASING PENALTIES; EXPANDING LIABILITY; ALLOWING FOR RESTRICTIONS ON INDIVIDUALS INITIATING MEDICAID FALSE CLAIMS ACTIONS; PROVIDING FOR PURSUAL OF CLAIMS THROUGH ALTERNATE REMEDIES; CHANGING STANDARDS FOR ALLOWING A DEFENDANT TO OBTAIN ATTORNEY FEES AND COSTS; EXPANDING WHISTLEBLOWER PROTECTION TO INCLUDE AGENTS AND CONTRACTORS; SETTING TIME FRAMES FOR BRINGING AN ACTION.

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

SECTION 1. Section 27-14-3 NMSA 1978 (being Laws 2004, Chapter 49, Section 3) is amended to read:

"27-14-3. DEFINITIONS.--As used in the Medicaid False .190281.1SA

1 Claims Act:

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

5 B. [~~"department" means the human services~~
6 ~~department~~] "knowing" or "knowingly" means that a person, with
7 respect to information, has actual knowledge of the
8 information, acts in deliberate ignorance of the truth or
9 falsity of the information or acts in reckless disregard of the
10 truth or falsity of the information; but "knowing" or
11 "knowingly" requires no specific intent to defraud;

12 C. "material" means having a natural tendency to
13 influence, or be capable of influencing, the payment or receipt
14 of money or property;

15 [~~G.~~] 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 [~~D.~~] 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. "obligation" means an established duty, whether
23 or not fixed, arising from an express or implied contractual,
24 grantor-grantee or licensor-licensee relationship, from a
25 fee-based or similar relationship, from statute or regulation

1 or from the retention of any overpayment; and

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

5 SECTION 2. Section 27-14-4 NMSA 1978 (being Laws 2004,
6 Chapter 49, Section 4) is amended to read:

7 "27-14-4. FALSE CLAIMS AGAINST THE STATE--LIABILITY FOR
8 CERTAIN ACTS.--A person commits an unlawful act and shall be
9 liable to the state for a civil penalty of not less than five
10 thousand dollars (\$5,000) and not more than ten thousand
11 dollars (\$10,000) plus three times the amount of damages that
12 the state sustains as a result of the act if the person:

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

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

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

25 ~~[D. conspires to defraud the state by getting a~~

.190281.1SA

1 ~~claim allowed or paid under the medicaid program knowing that~~
2 ~~such claim is false or fraudulent;~~

3 ~~E.]~~ D. knowingly makes, uses or causes to be made
4 or used a false record or statement material to an obligation
5 to ~~[conceal, avoid or decrease]~~ pay or transmit money to the
6 state, or knowingly conceals or knowingly and improperly avoids
7 or decreases an obligation to pay or transmit money or property
8 to the state, relative to the medicaid program ~~[knowing that~~
9 ~~such record or statement is false];~~

10 ~~[F.]~~ E. knowingly applies for and receives a
11 benefit or payment on behalf of another person, except pursuant
12 to a lawful assignment of benefits, under the medicaid program
13 and converts that benefit or payment to ~~[his]~~ the person's own
14 ~~[personal]~~ use;

15 ~~[G.]~~ F. knowingly makes a false statement or
16 misrepresentation of material fact concerning the conditions or
17 operation of a health care facility in order that the facility
18 may qualify for certification or recertification required by
19 the medicaid program; ~~[or~~

20 ~~H.]~~ G. knowingly makes a claim under the medicaid
21 program for a service or product that was not provided;

22 H. knowingly and improperly avoids or decreases an
23 obligation to pay or transmit money or property to the state
24 under the medicaid program, or, when in possession, custody or
25 control of property or money used, or to be used, by the state

1 and knowingly delivers, or causes to be delivered, less than
2 all of that money or property; or

3 I. conspires to commit a violation of this
4 section."

5 SECTION 3. Section 27-14-5 NMSA 1978 (being Laws 2004,
6 Chapter 49, Section 5) is amended to read:

7 "27-14-5. DOCUMENTARY MATERIAL IN POSSESSION OF STATE
8 AGENCY.--

9 A. The [~~department~~] attorney general shall have
10 access to all documentary materials of persons and medicaid
11 recipients to which a state agency has access. Documentary
12 material provided pursuant to this subsection is provided to
13 allow investigation of an alleged unlawful act or for use or
14 potential use in an administrative or judicial proceeding.

15 B. Except for disclosure to any person under
16 investigation or who is the subject of allegations made
17 pursuant to the Medicaid False [~~Claim~~] Claims Act or as ordered
18 by a court for good cause shown, the [~~department~~] attorney
19 general shall not produce for inspection or copying or
20 otherwise disclose the contents of documentary material
21 obtained pursuant to this section to a person other than:

22 (1) an authorized employee of the attorney
23 general;

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

.190281.1SA

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

3 (4) the United States attorney general; or

4 (5) a state or federal grand jury."

5 SECTION 4. Section 27-14-7 NMSA 1978 (being Laws 2004,
6 Chapter 49, Section 7) is amended to read:

7 "27-14-7. CIVIL ACTION FOR FALSE CLAIMS.--

8 A. The ~~[department]~~ attorney general shall
9 diligently investigate suspected violations. If the
10 ~~[department]~~ attorney general finds that a person has violated
11 or is violating the provisions of the Medicaid False Claims
12 Act, the ~~[department]~~ state may bring a civil action pursuant
13 to ~~[Subsection F of]~~ this section.

14 B. A person may bring a private civil action ~~[may~~
15 ~~be brought by an affected person]~~ for a violation of the
16 Medicaid False Claims Act on behalf of the person bringing suit
17 and for the state. The action shall be brought in the name of
18 the state. The action may be dismissed only if the court and
19 the ~~[department, pursuant to Subsection F of this section]~~
20 attorney general give written consent to the dismissal and
21 their reasons for consenting.

22 C. For private civil actions, a copy of the
23 complaint and written disclosure of substantially all material
24 evidence and information the person possesses shall be served
25 on the ~~[department]~~ attorney general. The complaint shall be

.190281.1SA

1 filed in writing and shall remain under seal for at least sixty
2 days. The complaint shall not be served on the defendant until
3 the expiration of sixty days or any extension approved. Within
4 sixty days after receiving a copy of the complaint, the
5 ~~[department shall conduct an investigation of the factual~~
6 ~~allegations and legal contentions made in the complaint, shall~~
7 ~~make a written determination of whether there is substantial~~
8 ~~evidence that a violation has occurred and shall provide the~~
9 ~~person against which a complaint has been made with a copy of~~
10 ~~the determination. If the department determines that there is~~
11 ~~not substantial evidence that a violation has occurred, the~~
12 ~~complaint shall be dismissed]~~ attorney general may elect to
13 intervene and proceed with the action within sixty days after
14 the attorney general receives both the complaint and the
15 material evidence and information.

16 D. The ~~[department]~~ attorney general may, for good
17 cause shown, move the court for extensions of time during which
18 the complaint remains under seal. Any such motion may be
19 supported by affidavits or other submissions in camera. The
20 defendant shall not be required to respond to a complaint filed
21 pursuant to this section until twenty days after the complaint
22 is unsealed and served to the defendant. The complaint shall
23 be deemed unsealed at the expiration of the sixty-day period in
24 the absence of a court-approved extension.

25 E. Before the expiration of the sixty-day period or

1 any extensions obtained, the ~~[department, pursuant to~~
2 ~~Subsection F of this section]~~ attorney general shall:

3 (1) proceed with the action, in which case the
4 action shall be conducted by the ~~[department]~~ state; or

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

11 ~~F. The department shall notify the attorney general~~
12 ~~prior to filing a civil action pursuant to the Medicaid False~~
13 ~~Claims Act and shall not proceed with the action except with~~
14 ~~the written approval of the attorney general. The attorney~~
15 ~~general shall, within twenty working days from the notification~~
16 ~~by the department, notify the department whether it may proceed~~
17 ~~with the civil action. Failure by the attorney general to~~
18 ~~notify the department of its determination within the specified~~
19 ~~time period shall be construed as consent to proceed. The~~
20 ~~department shall, after filing the civil action, notify the~~
21 ~~attorney general of any proposed dismissal or settlement and~~
22 ~~the department shall not proceed with the dismissal or~~
23 ~~settlement except with the written approval of the attorney~~
24 ~~general]."~~

25 SECTION 5. Section 27-14-8 NMSA 1978 (being Laws 2004,

.190281.1SA

Chapter 49, Section 8) is amended to read:

"27-14-8. RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.--

A. If the ~~[department]~~ attorney general proceeds with the action, ~~[it]~~ the state shall have the ~~[exclusive]~~ primary 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]~~ subject to the limitations of this section.

B. The ~~[department]~~ attorney general 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]~~ state 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]~~ attorney general 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.

.190281.1SA

1 D. If the state elects not to proceed with the
2 action, the person bringing the action shall have the right to
3 conduct the action. If the ~~[department]~~ attorney general
4 requests, ~~[it]~~ the state shall be served with copies of the
5 pleadings filed in the action and shall be supplied with copies
6 of all deposition transcripts at the ~~[department's]~~ attorney
7 general's expense. When a person proceeds with the action, the
8 court, without limiting the status and rights of the person
9 bringing the action, may allow the ~~[department]~~ attorney
10 general to intervene at a later date upon a showing of good
11 cause.

12 E. Whether or not the ~~[department]~~ attorney general
13 proceeds with the action, upon a showing by the ~~[department]~~
14 attorney general that certain actions of discovery by the
15 person bringing the action would interfere with the
16 ~~[department's]~~ attorney general's investigation or prosecution
17 of a civil matter arising out of the same facts, the court may
18 stay such discovery for a period not to exceed sixty days.
19 Such a showing shall be conducted in camera. The court may
20 extend the sixty-day period upon a further showing in camera
21 that the ~~[department]~~ attorney general has pursued the civil
22 investigation or proceedings with reasonable diligence and any
23 proposed discovery in the civil action will interfere with the
24 ongoing civil investigation or proceedings.

25 F. Upon a showing by the attorney general that

1 unrestricted participation during the course of the litigation
2 by the person initiating the action would interfere with or
3 unduly delay the state's prosecution of the case, or would be
4 repetitious, irrelevant or for purposes of harassment, the
5 court may, in its discretion, impose limitations on the
6 person's participation, such as:

7 (1) limiting the number of witnesses that the
8 person may call;

9 (2) limiting the length of the testimony of
10 each witness;

11 (3) limiting the person's cross examination of
12 witnesses; or

13 (4) otherwise limiting the participation by
14 the person in the litigation.

15 G. Upon a showing by the defense that unrestricted
16 participation during the course of the litigation by the person
17 initiating the action would be for purposes of harassment or
18 would cause the defendant undue burden or unnecessary expense,
19 the court may limit the participation by the person in the
20 litigation.

21 H. Notwithstanding the provisions of Section
22 27-14-7 NMSA 1978, the attorney general may elect to pursue an
23 action through any alternate remedy available to the state,
24 including any administrative proceeding to determine a civil
25 money penalty. If any such alternate remedy is pursued in

1 another proceeding, the person initiating the action shall have
2 the same rights in the proceeding as the person would have had
3 if the action had continued under the Medicaid False Claims
4 Act.

5 I. For purposes of Subsection H of this section, a
6 finding or conclusion is final if it has been finally
7 determined on appeal to the appropriate court; if all time for
8 filing such an appeal with respect to the finding or conclusion
9 has expired; or if the finding or conclusion is not subject to
10 judicial review."

11 **SECTION 6.** Section 27-14-9 NMSA 1978 (being Laws 2004,
12 Chapter 49, Section 9) is amended to read:

13 "27-14-9. AWARD TO QUI TAM PLAINTIFF.--

14 A. If the ~~[department]~~ attorney general proceeds
15 with an action brought by a person pursuant to the Medicaid
16 False Claims Act, the person shall, subject to the limitations
17 in this subsection, receive at least fifteen percent but not
18 more than twenty-five percent of the proceeds of the action or
19 settlement of the claim, depending upon the extent to which the
20 person substantially contributed to the prosecution of the
21 action. Where the action is one that the court finds to be
22 based primarily on disclosures of specific information other
23 than information provided by the party bringing the action
24 relating to allegations or transactions in a criminal, civil or
25 administrative hearing or from the news media, the court shall

.190281.1SA

1 award a sum as it considers appropriate; provided that the sum
2 does not exceed ten percent of the proceeds and takes into
3 account the significance of the information and the role of the
4 person bringing the action in advancing the case to litigation.
5 A payment to a person pursuant to this subsection shall be made
6 from the proceeds. The person shall also receive an amount for
7 reasonable expenses that the court finds to have been
8 necessarily incurred, plus reasonable attorney fees and costs.
9 ~~[In determining the amount of reasonable attorney fees and~~
10 ~~costs, the court shall consider whether such fees and costs~~
11 ~~were necessary to the prosecution of the action, were incurred~~
12 ~~for activities that were duplicative of the activities of the~~
13 ~~department in prosecuting the case or were repetitious,~~
14 ~~irrelevant or for purposes of harassment or caused the~~
15 ~~defendant undue burden or unnecessary expense.]~~ All such
16 expenses, fees and costs shall be awarded against the
17 defendant.

18 B. If the ~~[department]~~ attorney general does not
19 proceed with an action pursuant to the Medicaid False Claims
20 Act, the person bringing the action or settling the claim shall
21 receive an amount that the court decides is reasonable for
22 collecting the civil recovery and damages ~~[recoverable by the~~
23 ~~state]~~. The amount shall be not less than twenty-five percent
24 and not more than thirty percent of the proceeds of the action
25 or settlement and shall be paid out of such proceeds. The

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

11 C. Whether or not the ~~[department]~~ attorney general
12 proceeds with the action, if the court finds that the action
13 was brought by a person who planned and initiated the violation
14 upon which the action was brought, then the court may, to the
15 extent the court considers appropriate, reduce the share of the
16 proceeds of the action that the party would otherwise receive
17 pursuant to Subsection A or B of this section, taking into
18 account the role of that person in advancing the case to
19 litigation and any relevant circumstances pertaining to the
20 violation. If the person bringing the action is convicted of
21 criminal conduct arising from the person's role in the
22 violation of the Medicaid False Claims Act, that person shall
23 be dismissed from the civil action and shall not receive any
24 share of the proceeds of the action. Such dismissal shall not
25 prejudice the right of the state to continue the action

.190281.1SA

1 represented by the ~~[department]~~ attorney general. If the
2 ~~[department]~~ attorney general does not proceed with the action
3 and the person bringing the action conducts the action, the
4 court may award to the defendant its reasonable attorney fees
5 and costs if the defendant prevails in the action and the court
6 finds that the claim of the party bringing the action was:

7 (1) ~~[filed for an improper purpose]~~ clearly
8 frivolous;

9 (2) ~~[not warranted by existing law or by a~~
10 ~~nonfrivolous argument for the extension, modification or~~
11 ~~reversal of existing law or the establishment of new law]~~
12 clearly vexatious; or

13 (3) ~~[was based on allegations or factual~~
14 ~~contentions not supported]~~ brought primarily for purposes of
15 harassment."

16 SECTION 7. Section 27-14-10 NMSA 1978 (being Laws 2004,
17 Chapter 49, Section 10) is amended to read:

18 "27-14-10. CERTAIN ACTIONS BARRED.--

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

24 B.] A. A person shall not bring an action pursuant
25 to the Medicaid False Claims Act that is substantially based

.190281.1SA

1 upon allegations or transactions that are the subject of a
2 civil suit or an administrative proceeding in which the
3 ~~[department]~~ state is already a party.

4 ~~[G.]~~ B. A court shall not have jurisdiction over an
5 action pursuant to the Medicaid False Claims Act substantially
6 based upon the public disclosure of allegations or actions in a
7 criminal, civil or administrative hearing in which the state is
8 a party or from the news media, unless the action is brought by
9 the ~~[department]~~ attorney general or the person bringing the
10 action is an original source of the information. For the
11 purposes of this subsection, "original source" means the person
12 bringing suit that has independent knowledge, including
13 knowledge based on the person's own investigation of the
14 defendant's conduct, of the information on which the
15 allegations are based and has voluntarily provided or verified
16 the information on which the allegations are based or has
17 voluntarily provided the information to the ~~[department]~~
18 attorney general before filing an action pursuant to this
19 section that is based on the information."

20 **SECTION 8.** Section 27-14-11 NMSA 1978 (being Laws 2004,
21 Chapter 49, Section 11) is amended to read:

22 "27-14-11. ~~[DEPARTMENT]~~ STATE NOT LIABLE FOR CERTAIN
23 EXPENSES.--The ~~[department]~~ state shall not be liable for
24 expenses that a person incurs in bringing an action pursuant to
25 the Medicaid False Claims Act."

.190281.1SA

1 **SECTION 9.** Section 27-14-12 NMSA 1978 (being Laws 2004,
2 Chapter 49, Section 12) is amended to read:

3 "27-14-12. ~~[EMPLOYEE]~~ WHISTLEBLOWER PROTECTION.--Any
4 employee, agent or contractor who is discharged, demoted,
5 suspended, threatened, harassed or otherwise discriminated
6 against in the terms and conditions of employment by the
7 employer because of lawful acts done by the employee, agent or
8 contractor on behalf of the employee, agent or contractor or
9 others in disclosing information to the ~~[department]~~ attorney
10 general or in furthering a false claims action pursuant to the
11 Medicaid False Claims Act, including investigation for,
12 initiation of, testimony for or assistance in an action filed
13 or to be filed pursuant to that act, shall be entitled to all
14 relief necessary to make the employee, agent or contractor
15 whole. Such relief shall include reinstatement with the same
16 seniority status that the employee, agent or contractor would
17 have had but for the discrimination, two times the amount of
18 back pay, interest on the back pay and compensation for any
19 special damages sustained as a result of the discrimination,
20 including litigation costs and reasonable attorney fees. An
21 employee, agent or contractor may bring an action in the
22 appropriate court of the state for the relief provided in this
23 subsection."

24 **SECTION 10.** Section 27-14-13 NMSA 1978 (being Laws 2004,
25 Chapter 49, Section 13) is amended to read:

.190281.1SA

1 "27-14-13. FALSE CLAIMS AND REPORTING PROCEDURE.--

2 A. A civil action [~~shall be brought within the~~
3 ~~limitations set forth in Section 37-1-4 NMSA 1978]~~ under
4 Section 27-14-4 NMSA 1978 may not be brought more than six
5 years after the date on which the violation of Section 27-14-4
6 NMSA 1978 is committed, or more than three years after the date
7 when facts material to the right of action are known or
8 reasonably should have been known by the attorney general, but
9 in no more than ten years after the date on which the violation
10 is committed, whichever occurs last.

11 B. If the state elects to intervene and proceed
12 with an action brought under Section 27-14-8 NMSA 1978, the
13 state may file its own complaint or amend the complaint of a
14 person who has brought an action under Section 27-14-8 NMSA
15 1978 to clarify or add detail to the claims in which the state
16 is intervening and to add any additional claims with respect to
17 which the state contends it is entitled to relief. For
18 statute-of-limitations purposes, any such state pleading shall
19 relate back to the filing date of the complaint of the person
20 who originally brought the action, to the extent that the claim
21 of the state arises out of the conduct, transactions or
22 occurrences set forth, or attempted to be set forth, in the
23 prior complaint of that person.

24 [~~B.~~] C. In any action brought pursuant to the
25 Medicaid False Claims Act, the [~~department~~] state or the person

.190281.1SA

1 bringing the action shall be required to prove all essential
2 elements of the cause of action, including damages, by a
3 preponderance of the evidence.

4 [G.] D. Notwithstanding any rule or other provision
5 of law, a final judgment rendered in favor of the [department]
6 state in any criminal proceeding charging fraud or false
7 statements, whether upon a verdict after trial or upon a plea
8 of guilty or nolo contendere, shall preclude the defendant from
9 denying the essential elements of the offense in any action
10 that involves the same transaction as in the criminal
11 proceeding and that is brought pursuant to the Medicaid False
12 Claims Act."

13 SECTION 11. Section 27-14-15 NMSA 1978 (being Laws 2004,
14 Chapter 49, Section 15) is amended to read:

15 "27-14-15. USE OF FUNDS.--

16 A. Damages collected pursuant to the Medicaid False
17 Claims Act on behalf of the state shall be remitted to the
18 state treasurer for deposit in the general fund to be used for
19 the state's medicaid program.

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

25 C. Pursuant to Subsection C of Section 30-44-8 NMSA
.190281.1SA

underscored material = new
[bracketed material] = delete

1 1978, penalties recovered pursuant to the Medicaid False Claims
2 Act on behalf of the state may be claimed by the attorney
3 general [~~pursuant to procedures established by the department~~
4 ~~and the attorney general~~]."

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