

**FIRST ENGROSSMENT
with House Amendments
ENGROSSED SENATE BILL NO. 2347**

Introduced by

Senators K. Roers, Hogan, J. Lee

Representatives Boschee, Rohr, Schneider

1 A BILL for an Act to provide for liability for false medical assistance claims and to provide for a
2 Medicaid fraud control unit; and to provide a penalty.

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

4 **SECTION 1.**

5 **Definitions.**

6 As used in this Act, unless the context otherwise requires:

7 1. "Benefit" means the provision of anything of pecuniary value under the Medicaid
8 program.

9 2. "Claim" means:

10 a. Any request or demand, whether under a contract or otherwise, for money or
11 property under the Medicaid program regardless of whether the state has title to
12 the money or property which is:

13 (1) Presented to an officer, employee, or agent of the state; or

14 (2) Made to a contractor, grantee, or other recipient, if the money or property is
15 to be spent or used on the state's behalf or to advance a state program or
16 interest, and if the state:

17 (a) Provides or has provided any portion of the money or property
18 requested or demanded; or

19 (b) Will reimburse such contractor, grantee, or other recipient for any
20 portion of the money or property that is requested or demanded.

21 b. A claim does not include requests or demands for money or property the state
22 has paid to an individual as compensation for state employment or as an income
23 subsidy with no restrictions on that individual's use of the money or property.

24 3. "Department" means the department of human services.

- 1 4. "Document" means an application, claim, form, report, record, writing, or
2 correspondence, whether in written, electronic, magnetic, or other form.
- 3 5. "Fraud" means any conduct or activity prohibited by law or rule involving knowing
4 conduct or omission to perform a duty that results in or may result in payments to
5 which the person is not entitled.
- 6 6. "Knowingly" means "knowingly" as defined in section 12.1-02-02.
- 7 7. "Material" means having a natural tendency to influence, or be capable of influencing,
8 the payment or receipt of money or property.
- 9 8. "Medicaid agency" means an agency or entity of state, county, or local government
10 which administers any part of the Medicaid program, whether under direct statutory
11 authority or under contract with an authorized agency of the state or federal
12 government.
- 13 9. "Misappropriation of patient property" means exploitation, deliberate misplacement, or
14 wrongful use or taking of a patient's property, whether temporary or permanent,
15 without authorization by the patient or the patient's designated representative. The
16 term includes conduct with respect to a patient's property, which would constitute a
17 criminal offense under chapter 12.1-23.
- 18 10. "Obligation" means an established duty, whether fixed, arising from an express or
19 implied contractual, grantor-grantee, or licensor-licensee relationship, from a
20 fee-based or similar relationship, from statute or regulation, or from the retention of
21 any overpayment.
- 22 11. "Patient abuse" means the willful infliction of physical or mental injury of a patient or
23 unreasonable confinement, intimidation, or punishment that results in pain, physical or
24 mental harm, or mental anguish of a patient. The term includes conduct with respect to
25 a patient which would constitute a criminal offense under chapter 12.1-16, 12.1-17,
26 12.1-18, 12.1-20, or 12.1-22.
- 27 12. "Patient neglect" means a failure, through inattentiveness, carelessness, or other
28 omission, to provide to a patient goods and services necessary to avoid physical
29 harm, mental anguish, or mental illness if an omission is not caused by factors beyond
30 the person's control or by good-faith errors in judgment. The term includes conduct

1 with respect to a patient which would constitute a criminal offense under section
2 12.1-17-03.

3 13. "Provider" means a person that furnishes items or services for which payment is
4 claimed under the Medicaid program.

5 14. "Record" means medical, professional, business, or financial information and
6 documents, whether in written, electronic, magnetic, microfilm, or other form:

7 a. Pertaining to the provision of treatment, care, services, or items to a recipient;

8 b. Pertaining to the income and expenses of the provider; or

9 c. Otherwise relating to or pertaining to a determination of entitlement to payment or
10 reimbursement under the Medicaid program.

11 **SECTION 2.**

12 **Liability for certain acts - Civil penalty.**

13 1. Except as provided in subsections 2 and 3, a person is liable to the state for a civil
14 penalty of not less than one thousand dollars and not more than ten thousand dollars
15 for each act specified in this section, three times the amount of damages the state
16 sustains because of the person's act, and costs of the investigation and litigation fees,
17 if the person:

18 a. Knowingly presents or causes to be presented a false or fraudulent claim for
19 payment or approval;

20 b. Knowingly makes, uses, or causes to be made or used, a false record or
21 statement material to a false or fraudulent claim;

22 c. Conspires to commit a violation of this section;

23 d. Has possession, custody, or control of public property or money used or to be
24 used by the state and knowingly delivers or causes to be delivered less than all
25 of that money or property;

26 e. Is authorized to make or deliver a document certifying receipt of property used or
27 to be used by the state and, with the intent to defraud the state, makes or
28 delivers a receipt without completely knowing the information on the receipt is
29 true; or

30 f. Knowingly makes, uses, or causes to be made or used a false record or
31 statement material to an obligation to pay or transmit money or property to the

1 state or knowingly conceals or knowingly and improperly avoids or decreases an
2 obligation to pay or transmit money or property to the state.

3 2. The court may assess not less than two times the amount of damages the state
4 sustains because of the act of the person and the person is liable to the state for the
5 costs of the civil action brought to recover any such penalty or damages if the court
6 finds:

7 a. The person committing the act furnished the attorney general with all information
8 known to that person about the act within thirty days after the date on which the
9 person first obtained the information;

10 b. The person fully cooperated with any investigation of the act by the attorney
11 general; and

12 c. At the time the person furnished the attorney general with information about the
13 act, a criminal prosecution, civil action, or administrative action had not been
14 commenced with respect to the act and the person did not have actual
15 knowledge of the existence of an investigation into the violation.

16 3. If the total claim made or presented by a person under subsection 1 is less than one
17 hundred thousand dollars, the civil penalty for which the person is liable may not be
18 more than fifteen percent of the total claim submitted.

19 **SECTION 3.**

20 **Limitation of actions.**

21 1. A civil action filed under this Act must be brought by the later of:

22 a. Six years after the date on which the violation was committed; or

23 b. Three years after the date facts material to the right of action are known or
24 reasonably should have been known by the official of the state charged with
25 responsibility to act in the circumstances.

26 2. An action may not be brought pursuant to subdivision b of subsection 1 more than ten
27 years after the date on which the violation was committed.

28 **SECTION 4.**

1 **Investigation and action by attorney general.**

2 The attorney general's Medicaid fraud control unit shall investigate an alleged violation of
3 this Act and may file a civil action, a criminal action, or both against any person that violated or
4 is violating this Act.

5 **SECTION 5.**

6 **Burden of proof.**

7 The standard of proof in a civil action brought under this Act is the preponderance of the
8 evidence.

9 **SECTION 6.**

10 **Effect of criminal conviction.**

11 A defendant convicted in any criminal proceeding under this Act is precluded from
12 subsequently denying the essential elements of the criminal offense of which the defendant was
13 convicted in any civil proceeding. For purposes of this section, a conviction may result from a
14 verdict or plea of guilty.

15 **SECTION 7.**

16 **Costs and attorney's fees.**

17 If the state favorably settles or prevails in a civil action in which the state intervened or filed,
18 the state is entitled to be awarded reasonable expenses, consultant and expert witness fees,
19 costs, and attorney's fees. In an action in which outside counsel is engaged by the attorney
20 general, the costs and attorney's fees awarded to that counsel must equal the outside counsel's
21 charges reasonably incurred for costs and attorney's fees in prosecuting the action. The
22 expenses, fees, and costs must be awarded against the defendant. The state is not liable for
23 costs, attorney's fees, or other expenses incurred by a person in bringing or defending an action
24 under this Act.

25 **SECTION 8.**

26 **Relief from retaliatory actions.**

27 1. An employee, contractor, or agent is entitled to all relief necessary to make that
28 employee, contractor, or agent whole, if that employee, contractor, or agent is
29 discharged, demoted, suspended, threatened, harassed, or in any other manner
30 discriminated against in the terms and conditions of employment because of lawful

1 acts done by the employee, contractor, agent, or associated others in furtherance of
2 an action under this Act or other efforts to stop one or more violations of this Act.

3 2. Relief under subsection 1 includes reinstatement with the same seniority status that
4 employee, contractor, or agent would have had but for the discrimination, two times
5 the amount of back pay, interest on the back pay, and compensation for any special
6 damages sustained as a result of the discrimination, including litigation costs and
7 reasonable attorney's fees. An action under this section may be brought in the
8 appropriate district court for the relief provided in this subsection.

9 3. A civil action under this section may not be brought more than three years after the
10 date the retaliation occurred.

11 **SECTION 9.**

12 **Medicaid fraud control unit.**

13 The Medicaid fraud control unit is established as a division of the attorney general's office.
14 The Medicaid fraud control unit, which is under the supervision and control of the attorney
15 general, consists of the agents and employees the attorney general considers necessary and
16 appropriate. The Medicaid fraud control unit is a criminal justice agency within the meaning of
17 section 12-60-16.1. Agents designated by the attorney general have peace officer status and
18 authority, including the authority of search, seizure, and arrest. All recovered money will be
19 forwarded to the designated state Medicaid agency for appropriate allocation between the
20 federal government and the general fund. The portion of state match appropriations for the
21 Medicaid fraud control unit will be appropriated from the general fund.

22 **SECTION 10.**

23 **Powers and duties of Medicaid fraud control unit.**

24 1. The Medicaid fraud control unit shall:
25 a. Investigate and prosecute under applicable criminal or civil laws fraud and patient
26 abuse or neglect by providers or any other person, including cases referred by
27 the department;
28 b. Review complaints of patient abuse, patient neglect, and misappropriation of
29 patient property and, if appropriate, investigate and initiate criminal or civil
30 proceedings or refer the complaint to another federal, state, or local agency for
31 action;

- 1 c. Refer to the department for collection and, if appropriate, imposition of
- 2 appropriate provider administrative actions involving provider overpayments and
- 3 abuse;
- 4 d. Communicate and cooperate with and, subject to applicable confidentiality laws,
- 5 provide information to other federal, state, and local agencies involved in the
- 6 investigation and prosecution of health care fraud, patient abuse, and other
- 7 improper activities related to the Medicaid program;
- 8 e. Transmit to other state and federal agencies, in accordance with law, reports of
- 9 convictions, copies of judgments and sentences imposed and other information
- 10 and documents for purposes of program exclusions or other sanctions or
- 11 penalties under Medicaid, Medicare, or other state or federal benefit or
- 12 assistance programs;
- 13 f. Recommend to state agencies appropriate or necessary adoption or revision of
- 14 laws, rules, policies, and procedures to prevent fraud, abuse, and other improper
- 15 activities under the Medicaid program and to aid in the investigation and
- 16 prosecution of fraud, abuse, and other improper activities under the Medicaid
- 17 program; and
- 18 g. Enter an agreement with the Medicaid agency regarding referrals, information
- 19 sharing, and improper payment recoveries as provided in title 42, Code of
- 20 Federal Regulations, part 455, section 23.
- 21 2. The Medicaid fraud control unit may:
- 22 a. Initiate criminal prosecutions and civil actions pursuant to subsection 1 in any
- 23 court of competent jurisdiction in the state;
- 24 b. Upon request, obtain information and records from applicants, recipients, and
- 25 providers;
- 26 c. Subject to applicable federal confidentiality laws and rules and for purposes
- 27 related to any investigation or prosecution under subsection 1, obtain from the
- 28 department, local offices of public assistance, and other local, county, or state
- 29 government departments or agencies records and other information, including
- 30 applications, provider enrollment forms, claims and reports, individual or entity

- 1 tax returns, or other information provided to or in the possession of the tax
2 commissioner or the state auditor;
3 d. Refer appropriate cases to federal, other state, or local agencies for investigation,
4 prosecution, or imposition of penalties, restrictions, or sanctions;
5 e. Work cooperatively with federal agencies; and
6 f. Enter agreements with the department and other federal, state, and local
7 agencies in furtherance of the unit's mission.

8 **SECTION 11.**

9 **Medicaid fraud - Criminal penalty.**

- 10 1. A person commits a criminal offense under this section if the person knowingly:
11 a. Presents for allowance, for payment, or for the purpose of concealing, avoiding,
12 or decreasing an obligation to pay a false or fraudulent medical assistance claim,
13 bill, account, voucher, or writing to a public agency, public servant, or contractor
14 authorized to allow or pay medical assistance claims;
15 b. Solicits, accepts, offers, or provides any remuneration, including a kickback,
16 bribe, or rebate in exchange for purchasing, leasing, ordering, arranging for, or
17 recommending the purchasing, leasing, or ordering of any services or items from
18 a provider for which payment may be made under the Medicaid program;
19 c. Solicits, accepts, offers, or provides any remuneration, including a kickback,
20 bribe, or rebate in exchange for a fee for referring a recipient to another provider
21 or arranging for the furnishing of services or items for which payment may be
22 made under the Medicaid program;
23 d. Fails or refuses to provide covered medically necessary services to eligible
24 recipients as required with respect to a managed care contract, health
25 maintenance organization contract, or similar contract or subcontract under the
26 Medicaid program; or
27 e. Conspires with another person to commit a violation of this section.
28 2. Conduct or activity that does not violate or which is protected under the provisions of,
29 or federal regulations adopted under 42 U.S.C. 1395nn and 42 U.S.C. 1320a-7b(b), is
30 not considered an offense under subdivision b of subsection 1, and the conduct or

1 activity must be accorded the same protections allowed under federal laws and
2 regulations.

3 3. A person convicted of this offense involving payments, benefits, kickbacks, bribes,
4 rebates, remuneration, services, or claims not exceeding one thousand dollars in
5 value is guilty of a class A misdemeanor.

6 4. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
7 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
8 common scheme and exceed one thousand dollars in value, a violation of this Act is a
9 class C felony.

10 5. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
11 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
12 common scheme and exceed ten thousand dollars in value but do not exceed fifty
13 thousand dollars, a violation of this Act is a class B felony.

14 6. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
15 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
16 common scheme and exceed fifty thousand dollars in value, a violation of this Act is a
17 class A felony.

18 a. For purposes of imposing sentence for a conviction under this Act, the value of
19 payments, benefits, kickbacks, bribes, rebates, remuneration, services, or claims
20 involved is the greater of the value of Medicaid payments or benefits received as
21 a result of the illegal conduct or activity or the value of the payments, benefits,
22 kickbacks, bribes, rebates, remuneration, services, or claim involved.

23 b. Amounts involved in Medicaid fraud committed pursuant to a common scheme or
24 the same transaction may be aggregated in determining the value involved.

25 c. A person convicted of the offense of Medicaid fraud must be suspended from
26 participation in the Medicaid program:

27 (1) For any period of time not less than one year for a first offense or the person
28 may be permanently terminated from participation in the medical assistance
29 program:

1 (2) For any period of time not less than three years for a second offense, or the
2 person may be permanently terminated from participation in the medical
3 assistance program; or

4 (3) Permanently for a third offense.

5 7. In addition to any other penalty provided by law, a person convicted of Medicaid fraud
6 is not entitled to bill or collect from the recipient, the Medicaid program, or any other
7 third-party payer for the services or items involved and shall repay to the Medicaid
8 program any payments or benefits obtained by any person for the services or items
9 involved.

10 **SECTION 12.**

11 **Civil investigative demands and subpoenas - Failure to comply - Confidentiality.**

- 12 1. If the attorney general, or a designee, has reason to believe a person may be in
13 possession, custody, or control of documentary material or information relevant to an
14 investigation under this Act, the attorney general, or a designee, may, before
15 commencing a civil proceeding under section 5 of this Act, issue in writing and cause
16 to be served upon the person, a civil investigative demand or subpoena requiring the
17 person to, under oath:
- 18 a. Produce the documentary material for inspection and copying;
19 b. Answer in writing written interrogatories with respect to the documentary material
20 or information;
21 c. Give oral testimony concerning the subject matter of the investigation, including
22 any documentary material or information; or
23 d. Furnish any combination of the material, answers, or testimony.
- 24 2. If a civil investigative demand or subpoena is an express demand for product of
25 discovery, the attorney general or a designee shall cause to be served, a copy of such
26 demand upon the person from which the discovery was obtained and shall notify the
27 person to which such demand is issued of the date on which the copy was served.
- 28 3. If a person objects to or otherwise fails to comply with a civil investigative demand or
29 subpoena served upon that person under subsection 1, the attorney general may file
30 in the district court a petition for an order to enforce the demand or subpoena. If the
31 court finds the demand or subpoena is proper, the court shall order the person to

1 comply with the demand or subpoena and may grant such injunctive or other relief as
2 may be required until the person complies with the demand or subpoena. Notice of
3 hearing on the petition and a copy of the petition must be served upon the person that
4 may appear in opposition to the petition. If the attorney general prevails in an action
5 brought under this subsection, the court shall award to the attorney general
6 reasonable attorney's fees, costs, and expenses incurred in bringing the action.

7 4. Any testimony taken or material produced under this section must be kept confidential
8 by the attorney general before bringing an action against a person under this chapter
9 for the violation under investigation, unless confidentiality is waived by the person
10 being investigated and the person that testified, answered interrogatories, or produced
11 material, or disclosure is authorized by the court.

12 5. Information obtained by the attorney general or designee may be shared with a person
13 that initiated the action if the attorney general or designee determine it is necessary as
14 part of any investigation under this Act and the person agrees to comply with the
15 confidentiality provisions provided in subsection 4, and unless otherwise provided by
16 state or federal law.

17 **SECTION 13.**

18 **Cooperation of governmental agencies with Medicaid fraud control unit.**

19 All local, county, and state departments and agencies shall cooperate with the Medicaid
20 fraud control unit and the unit's agents and employees to effectuate the purposes of the unit.

21 **SECTION 14.**

22 **Authorization to adopt rules.**

23 The attorney general may adopt rules, pursuant to chapter 28-32, to implement this Act.