

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2007

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SENATE DRS15002-LN-15 (11/16)

Short Title: Actions to Address Medicaid Fraud.

(Public)

Sponsors: Senator Rand.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO STRENGTHEN THE PROSECUTION OF MEDICAID FRAUD BY  
INCREASING CRIMINAL PENALTIES FOR PROVIDER FRAUD,  
ESTABLISHING A PRIVATE CIVIL ACTION FOR PROVIDER FALSE  
CLAIMS, AUTHORIZING INVESTIGATIVE DEMAND PROCEDURES IN  
CASES OF PROVIDER FRAUD, MAKING IT UNLAWFUL TO ENGAGE IN  
KICKBACK ACTIVITIES RELATING TO REFERRALS TO AND PURCHASES  
FOR THE MEDICAID PROGRAM, 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."

**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

1           (4) Knowingly make, use, or cause to be made or used, a false record or  
2           statement to conceal, avoid, or decrease an obligation to pay or  
3           transmit money or property to the Medical Assistance Program.

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

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

7           "(b) Damages. –

8           (1) Except as provided in subdivision (2) of this subsection, a court shall  
9           assess against any provider of medical assistance under the Medical  
10           Assistance Program who violates this section a civil penalty of not less  
11           than five thousand five hundred dollars (~~\$5,000~~)(\$5,500) and not more  
12           than ~~ten thousand~~ dollars (~~\$10,000~~)eleven thousand dollars (\$11,000)  
13           plus three times the amount of damages which the ~~Medicaid~~ Medical  
14           Assistance Program sustained because of the act of the provider.

15           ..."

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

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

19           "§ 108A-70.17. Civil action filed by private persons.

20           (a) A person may bring a civil action for a violation of G.S. 108A-70.12 on  
21 behalf of the person and the State. The action shall be brought in the name of the State.  
22 The action may be dismissed only if the court and the Attorney General have given  
23 written consent to the dismissal and their reasons for consenting.

24           (b) A copy of the complaint and written disclosure of substantially all material  
25 evidence and information the person possesses shall be served on the State. The  
26 complaint shall be filed in camera, shall remain under seal for at least 120 days, and  
27 shall not be served on the defendant until the court so orders. The State may elect to  
28 intervene and proceed with the action within 120 days after it receives both the  
29 complaint and the material evidence and information.

30           (c) The State may, for good cause shown, move the court for extensions of the  
31 time during which the complaint remains under seal. Any of these motions may be  
32 supported by affidavits or other submission in camera. The defendant shall not be  
33 required to respond to any complaint filed under this section until 21 days after the  
34 complaint is unsealed and served upon the defendant.

35           (d) Before the expiration of the 120-day period or any extensions obtained under  
36 subsection (c) of this section, the State shall proceed with the action, in which case the  
37 action shall be conducted by the State, or notify the court that it declines to take over the  
38 action, in which case the person bringing the action shall have the right to prosecute the  
39 action.

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

43           "§ 108A-70.17A. Rights of private plaintiff and State.

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

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

9       (c) The State may settle the action with the defendant notwithstanding the  
10 objections of the person initiating the action if the court determines, after a hearing, that  
11 the proposed settlement is fair, adequate, and reasonable under all the circumstances.  
12 Upon a showing of good cause, such hearing may be held in camera. The State may, for  
13 good cause shown, move the court for a partial lifting of the seal to facilitate the  
14 investigative process or settlement.

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

23       (e) Upon a showing by the defendant that unrestricted participation during the  
24 course of the litigation by the person initiating the action would be for purposes of  
25 harassment or would cause the defendant undue burden or unnecessary expense, the  
26 court may limit the participation by the person in the litigation.

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

34       (g) Whether or not the State proceeds with the action, upon a showing by the  
35 State that certain actions of discovery by the person initiating the action would interfere  
36 with the State's investigation or prosecution of a criminal or civil matter arising out of  
37 the same facts, the court may stay the discovery for a period of not more than 60 days.  
38 The showing by the State shall be conducted in camera. The court may extend the  
39 60-day period upon a further showing in camera that the State has pursued the criminal  
40 or civil investigation or proceedings with reasonable diligence, and any proposed  
41 discovery in the civil action will interfere with the ongoing criminal or civil  
42 investigation or proceedings.

43       (h) Notwithstanding G.S. 108A-70.17(b), the State may elect to pursue its claim  
44 through any alternate remedy available to the State, including any administrative

1 proceeding to determine a civil money penalty. If an alternate remedy is pursued in  
2 another proceeding, the person initiating the action shall have the same rights in the  
3 alternate proceeding as the person would have had if the action had continued under this  
4 section. Any finding of fact or conclusion of law made in the alternate proceeding that  
5 has become final shall be conclusive on all parties to an action under this Part. For  
6 purposes of this subsection, a finding or conclusion is final if it has been finally  
7 determined on appeal to a court of competent jurisdiction of the State, if the time for  
8 filing an appeal with respect to the finding or conclusion has expired, or if the finding or  
9 conclusions are not subject to judicial review.

10 **"§ 108A-70.17B. Award to qui tam plaintiff.**

11 (a) Except as otherwise provided in this section, if the State proceeds with an  
12 action brought by a person under G.S. 108A-70.17, the person shall receive at least  
13 fifteen percent (15%) but not more than twenty-five percent (25%) of the proceeds of  
14 the action or settlement of the claim, depending upon the extent to which the person  
15 substantially contributed to the prosecution of the action. The plaintiff's share in the  
16 proceeds of the action or settlement is administrative costs of the action. Where the  
17 action is one that the court finds to be based primarily on disclosures of specific  
18 information, other than information proved by the person bringing the action, relating to  
19 allegations or transaction in a criminal, civil, or administrative hearing, in a legislative,  
20 administrative, or State Auditor's report, hearing, audit, or investigation, or from the  
21 news media, the court may award such sums as it considers appropriate, but in no case  
22 more than ten percent (10%) of the proceeds of the action, taking into account the  
23 significance of the information and the role of the person bringing the action in  
24 advancing the case to litigation. The person shall also receive an amount for reasonable  
25 expenses that the court finds to have been necessarily incurred, plus reasonable  
26 attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the  
27 defendant. A share of the proceeds of an action or settlement of the claim shall not be  
28 awarded to the person bringing the action in State court under this Part if the person has  
29 received or may receive a share of the proceeds or settlement of an action or claim on  
30 the same facts brought in federal court.

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

39 (c) Whether or not the State proceeds with the action, if the court finds that the  
40 action was brought by a person who planned and initiated the violation of  
41 G.S. 108A-70.12 upon which the action was brought, then the court may, to the extent  
42 the court considers appropriate, reduce the share of the proceeds of the action that the  
43 person would otherwise receive under subsection (a) or (b) of this section, taking into  
44 account the role of that person in advancing the case to litigation and any relevant

1 circumstances pertaining to the violation. If the person bringing the action is convicted  
2 of criminal conduct arising from the person's role in the violation of G.S. 108A-70.12,  
3 that person shall be dismissed from the civil action and shall not receive any share of the  
4 proceeds of the action. The dismissal shall not prejudice the right of the State to  
5 continue the action.

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

11 **"§ 108A-70.17C. Certain actions barred.**

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

18 (b) In no event may a person bring an action under this Part that is based upon  
19 allegations or transactions that are the subject of a civil suit or an administrative  
20 proceeding in which the State is already a party.

21 (c) No court shall have jurisdiction over an action under this Part based upon the  
22 public disclosure of allegations or transactions in a criminal, civil, or administrative  
23 hearing, in a legislative, administrative, or State Auditor's report, hearing, audit, or  
24 investigation, or from the news media, unless the action is brought by the Attorney  
25 General, or the person bringing the action is an original source of the information. For  
26 purposes of this section, "original source" means an individual who has direct and  
27 independent knowledge of the information on which the allegations are based and has  
28 voluntarily provided the information to the State before filing an action under this Part  
29 that is based on the information.

30 (d) The State is not liable for expenses a person incurs in bringing an action  
31 under this Part.

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

33 **"§ 108A-70.17D. Procedure; statute of limitations.**

34 A civil action under this Part may not be brought (i) more than six years after the  
35 date on which the violation is committed, or (ii) more than three years after the date  
36 when facts material to the right of the action are known or reasonably should have been  
37 known by the official of the State charged with responsibility to act in the  
38 circumstances, but in that event no more than 10 years after the date on which the  
39 violation is committed, whichever occurs last."

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

41 **"§ 108A-70.15. Employee remedies.**

42 (a) In the absence of fraud or malice, no person who furnishes information to  
43 officials of the State responsible for investigating false claims violations shall be liable  
44 for damages in a civil action for any oral or written statement made or any other action

1 that is necessary to supply information required pursuant to this ~~Part~~ Part or Part 7A of  
2 this Article.

3 (b) Any employee of a provider who is discharged, demoted, suspended,  
4 threatened, harassed, or in any other manner discriminated against in the terms and  
5 conditions of employment by the employee's employer because of lawful acts done by  
6 the employee on behalf of the employee or others in furtherance of an action under  
7 G.S. ~~108A-70.12,~~ 108A-70.12, or Part 7A of this Article, including investigation for,  
8 initiation of, testimony for, or assistance in an action filed or to be filed under  
9 G.S. ~~108A-70.12,~~ 108A-70.12, or Part 7A of this Article, shall be entitled to all relief  
10 necessary to make the employee whole. Relief shall include reinstatement with the same  
11 seniority status as the employee would have had but for the discrimination, two times  
12 the amount of back pay, interest on the back pay, and compensation for any special  
13 damages sustained as a result of the discrimination, including litigation costs and  
14 reasonable attorneys' fees. An employee may bring an action in the appropriate court for  
15 the relief provided in this section."

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

18 **"§ 108A-63.1. Authorized investigative demand procedures.**

19 (a) In any investigation relating to any act or activity involving a violation of  
20 G.S. 108A-64, 108A-60, 14-32.1, or 14-32.2, the Attorney General may issue in writing  
21 and cause to be served a subpoena:

22 (1) Requiring the production of any records, books, papers, documents,  
23 electronic media, or other objects or tangible things, which may be  
24 relevant to an authorized law enforcement inquiry, that a person or  
25 legal entity may possess or have care, custody, or control; or

26 (2) Requiring a custodian of records to give testimony concerning the  
27 production and authentication of the records.

28 (b) A subpoena under this section shall describe the objects required to be  
29 produced and shall also prescribe a return date within a reasonable period of time within  
30 which the objects can be assembled and made available.

31 (c) Witnesses summoned under this section shall be paid the same fees and  
32 mileage that are paid witnesses in the courts of the State.

33 (d) A subpoena issued under this section may be served in the manner provided  
34 in Rule 45(b) of the Rules of Civil Procedure, G.S. 1A-1, except that subdivision (2) of  
35 subsection (b) of Rule 45(b) does not apply to subpoenas issued under this section.

36 (e) In the case of failure by any person without adequate excuse to obey a  
37 subpoena served upon the person, the Attorney General may invoke the aide of any  
38 court of this State. The court may issue an order requiring the subpoenaed person to  
39 appear before the Attorney General to produce records, if so ordered, or to give  
40 testimony concerning the production and authentication of the records. Failure to obey  
41 the order of the court may be punished by the court as contempt thereof.

42 (f) Notwithstanding any other State law to the contrary, any person, including  
43 officers, agents, and employees, receiving a subpoena under this section, who complies  
44 in good faith with the subpoena and thus produces the materials sought, shall not be

1 liable in any court of this State to any customer or other person for the production or for  
2 nondisclosure of the production to the customer.

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

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

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

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

19 **"§ 108A-63. Medical assistance provider fraud.**

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

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

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

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

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

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

32 (c) ~~Any~~ Except as otherwise provided in subsection (e) of this section, any  
33 person who violates a provision of this section shall be guilty of a Class I felony.

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

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

38 (1) Defraud the Medical Assistance Program; or

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

42 in connection with the delivery of or payment for health care benefits, items, or  
43 services. If the value of the health care benefits, items, or services is one hundred  
44 thousand dollars (\$100,000) or more, a violation of this subsection is a Class C felony.

1 If the value of the health care benefits, items, or services is less than one hundred  
2 thousand dollars (\$100,000), a violation of this subsection is a Class H felony.

3 (f) It shall be unlawful for any person to knowingly and willfully solicit or  
4 receive any remuneration (including any kickback, bribe, or rebate) directly or  
5 indirectly, overtly or covertly, in cash or in kind:

6 (1) In return for referring an individual to a person for the furnishing or  
7 arranging for the furnishing of any item or service for which payment  
8 may be made in whole or in part under this Part, or

9 (2) In return for purchasing, leasing, ordering, or arranging for or  
10 recommending purchasing, leasing, or ordering any good, facility,  
11 service, or item for which payment may be made in whole or in part  
12 under this Part.

13 (g) It shall be unlawful for any person to knowingly and willfully offer or pay  
14 any remuneration (including any kickback, bribe, or rebate) directly or indirectly,  
15 overtly or covertly, in cash or in kind to any person to induce such person:

16 (1) To refer an individual to a person for the furnishing or arranging for  
17 the furnishing of any item or service for which payment may be made  
18 in whole or in part under this Part, or

19 (2) To purchase, lease, order, or arrange for or recommend purchasing,  
20 leasing, or ordering any good, facility, service, or item for which  
21 payment may be made in whole or in part under this Part.

22 (h) Subsections (f) and (g) of this section shall not apply to:

23 (1) Contracts between the State and a public or private agency where part  
24 of the agency's responsibility is referral of a person to a provider; and

25 (2) Any conduct or activity that does not violate 42 U.S.C. § 1320a-7b(b),  
26 and amendments thereto, or is protected by 42 C.F.R. § 1001.952, and  
27 amendments thereto."

28 **SECTION 6.** There is appropriated from the General Fund to the  
29 Department of Justice the sum of \$ for the 2007-2008 fiscal year, and the sum of \$ for  
30 the 2008-2009 fiscal year. These funds shall be used for additional investigative legal  
31 and support positions and for other purposes to carry out the provisions of this act.

32 **SECTION 7.** Sections 1 through 4 of this act become effective December 1,  
33 2007. The remainder of this act becomes effective July 1, 2007.