



State of Wisconsin  
2019 - 2020 LEGISLATURE

LRB-1715/P3  
SWB:ahe/klm/cjs

DOA:.....Schmidt, BB0242 - False claims private authority

**FOR 2019-2021 BUDGET -- NOT READY FOR INTRODUCTION**

**AN ACT ...; relating to:** the budget.

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*Analysis by the Legislative Reference Bureau*

**COURTS AND PROCEDURE**

**GENERAL COURTS AND PROCEDURE**

***1. Qui tam actions for false claims***

This bill restores a private individual's authority to bring a qui tam claim against a person who makes a false or fraudulent claim for medical assistance, which was eliminated in [2015 Wisconsin Act 55](#), and further expands qui tam actions to include any false or fraudulent claims to a state agency. A qui tam claim is a claim initiated by a private individual on his or her own behalf and on behalf of the state against a person who makes a false claim relating to medical assistance or other moneys from a state agency. The bill provides that, of moneys recovered as a result of a qui tam claim, a private individual may be awarded up to 30 percent of the amount recovered, depending upon the extent of the individual's contribution to the prosecution of the action. The individual may also be entitled to reasonable expenses incurred in bringing the action, as well as attorney fees. The bill also includes additional changes not included in the prior law to incorporate provisions enacted in the federal Deficit Reduction Act of 2005 and conform state law to the federal False Claims Act, including expanding provisions to facilitate qui tam actions and modifying the bases for liability to parallel the liability provisions under the federal False Claims Act. In addition to qui tam claims, DOJ has independent authority to

bring a claim against a person for making a false claim for medical assistance. The bill modifies provisions relating to DOJ's authority to parallel the liability and penalty standards relating to qui tam claims and to parallel the forfeiture amounts provided under the federal False Claims Act.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**SECTION 1.** 20.9315 of the statutes is created to read:

**20.9315 False claims; actions by or on behalf of state. (1)** In this section:

(b) "Claim" means any request or demand, whether under a contract or otherwise, for money or property and whether the state has title to the money or property, that is presented to an officer, employee, agent, or other representative of the state or to a contractor, grantee, or other person if the money or property is to be spent or used on the state's behalf or to advance a state program or interest, and if the state provides any portion of the money or property which is requested or demanded, or if the state will reimburse directly or indirectly such contractor, grantee, or other person for any portion of the money or property which is requested or demanded. "Claim" includes a request or demand for services from a state agency or as part of a state program. "Claim" does not include requests or demands for money or property that the state has paid to an individual as compensation for state employment or as an income subsidy with no restriction on that individual's use of the money or property.

(d) "Knowingly" means, with respect to information, having actual knowledge of the information, acting in deliberate ignorance of the truth or falsity of the information, or acting in reckless disregard of the truth or falsity of the information. "Knowingly" does not mean specifically intending to defraud.

(de) “Material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property or the receipt of services.

(dm) “Medical assistance” has the meaning given under s. 49.43 (8).

(dr) “Obligation” has the meaning given in [31 USC 3729](#) (b) (3).

(dt) “Original source” has the meaning given in [31 USC 3730](#) (e) (4) (B).

(e) “Proceeds” includes damages, civil penalties, surcharges, payments for costs of compliance, and any other economic benefit realized by this state as a result of an action or settlement of a claim.

**(2)** Except as provided in sub. (3), any person who does any of the following is liable to this state for 3 times the amount of the damages that were sustained by the state or would have been sustained by the state, whichever is greater, because of the actions of the person, and shall forfeit, for each violation, an amount within the range specified under [31 USC 3729](#) (a):

(a) Knowingly presents or causes to be presented a false or fraudulent claim to a state agency, including a false or fraudulent claim for medical assistance.

(b) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim to a state agency, including a false or fraudulent claim for medical assistance.

(dg) Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Medical Assistance program, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Medical Assistance program.

(dm) Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to a state

agency, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to a state agency.

(dr) Conspires to commit a violation under par. (a), (b), (dg), or (dm).

**(3)** The court may assess against a person who violates sub. (2) not less than 2 nor more than 3 times the amount of the damages sustained by the state because of the acts of the person, and shall not assess any forfeiture, if the court finds all of the following:

(a) The person who commits the acts furnished the attorney general with all information known to the person about the acts within 30 days after the date on which the person obtained the information.

(b) The person fully cooperated with any investigation of the acts by this state.

(c) At the time that the person furnished the attorney general with information concerning the acts, no criminal prosecution or civil or administrative enforcement action had been commenced with respect to any such act, and the person did not have actual knowledge of the existence of any investigation into any such act.

**(5)** (a) Except as provided in subs. (10) and (12), any person may bring a civil action as a qui tam plaintiff against a person who commits an act in violation of sub. (2) for the person and the state in the name of the state.

(b) The plaintiff shall serve upon the attorney general a copy of the complaint and documents disclosing substantially all material evidence and information that the person possesses. The plaintiff shall file a copy of the complaint with the court for inspection in camera. Except as provided in par. (c), the complaint shall remain under seal for a period of 60 days from the date of filing, and shall not be served upon the defendant until the court so orders. Within 60 days from the date of service upon

the attorney general of the complaint, evidence, and information under this paragraph, the attorney general may intervene in the action.

(bm) Any complaint filed by the state in intervention, whether filed separately or as an amendment to the qui tam plaintiff's complaint, shall relate back to the filing date of the qui tam plaintiff's complaint, to the extent that the state's claim arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the qui tam plaintiff's complaint.

(c) The attorney general may, for good cause shown, move the court for one or more extensions of the period during which a complaint in an action under this subsection remains under seal.

(d) Before the expiration of the period during which the complaint remains under seal, the attorney general shall do one of the following:

1. Proceed with the action or an alternate remedy under sub. (10), in which case the action or proceeding under sub. (10) shall be prosecuted by the state.

2. Notify the court that he or she declines to proceed with the action, in which case the person bringing the action may proceed with the action.

(e) If a person brings a valid action under this subsection, no person other than the state may intervene or bring a related action while the original action is pending based upon the same facts underlying the pending action.

\*\*\*\*NOTE: This provision may require additional consideration in light of recent changes made to s. 803.09 in [2017 Wisconsin Act 369](#). Act 369 created s. 803.09 (2m) which provides that "[w]hen a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene as set forth under s. 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14." Because par. (e) limits intervention, a case could give rise to issues with the intervention rights described under s. 803.09 (2m). One way to address any issue would be to add the same "except" language that this draft adds for s. 803.09 (1) and (2) (i.e., "[e]xcept as provided in s. 20.9315"). See SECTIONS 5 and 6 of this draft. I included those exceptions as they recreate

the law as it existed prior to enactment of [2015 Wisconsin Act 55](#). However, I wanted to flag the provision with respect to s. 803.09 (2m), as it relates to the new language enacted in [2017 Wisconsin Act 369](#).

(f) In any action or other proceeding under sub. (10) brought under this subsection, the plaintiff is required to prove all essential elements of the cause of action or complaint, including damages, by a preponderance of the evidence.

(6) If the state proceeds with an action under sub. (5) or an alternate remedy under sub. (10), the state has primary responsibility for prosecuting the action or proceeding under sub. (10). The state is not bound by any act of the person bringing the action, but that person has the right to continue as a party to the action.

(7) (b) With the approval of the governor, the attorney general may compromise and settle an action under sub. (5) or an administrative proceeding under sub. (10) to which the state is a party, notwithstanding objection of the person bringing the action, if the court determines, after affording to the person bringing the action the right to a hearing at which the person is afforded the opportunity to present evidence in opposition to the proposed settlement, that the proposed settlement is fair, adequate, and reasonable considering the relevant circumstances pertaining to the violation.

\*\*\*NOTE: This provision may be affected by changes made in [2017 Wisconsin Act 369](#), specifically changes made to s. 165.08. [2017 Wisconsin Act 369](#) changes the attorney general's authority to settle in civil actions prosecuted by the attorney general, modifying the approval from approval of the governor to approval by a legislative intervenor under new s. 803.09 (2m), if any, or, if none, the joint committee on finance. It is possible that the above specific provision might control, but I don't think that is entirely clear. The draft could address the issue by adding "notwithstanding" language to this provision (s. 20.9315 (7) (b) (created by the draft)) or by adding language to s. 165.08 to clarify the authority of the attorney general to settle in actions relating to false claims under s. 20.9315 (i.e., indicating which provision would control). I would be happy to discuss options.

(c) Upon a showing by the state that unrestricted participation in the prosecution of an action under sub. (5) or an alternate proceeding to which the state is a party by the person bringing the action would interfere with or unduly delay the

prosecution of the action or proceeding, or would result in consideration of repetitious or irrelevant evidence or evidence presented for purposes of harassment, the court may limit the person's participation in the prosecution, such as:

1. Limiting the number of witnesses that the person may call.
2. Limiting the length of the testimony of the witnesses.
3. Limiting the cross-examination of witnesses by the person.
4. Otherwise limiting the participation by the person in the prosecution of the action or proceeding.

(d) Upon showing by a defendant that unrestricted participation in the prosecution of an action under sub. (5) or alternate proceeding under sub. (10) to which the state is a party by the person bringing the action would result in harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the person's participation in the prosecution.

**(8)** Except as provided in sub. (7), if the state elects not to participate in an action filed under sub. (5), the person bringing the action may prosecute the action. If the attorney general so requests, the attorney general shall, at the state's expense, be served with copies of all pleadings and deposition transcripts in the action. If the person bringing the action initiates prosecution of the action, the court, without limiting the status and rights of that person, may permit the state to intervene at a later date upon showing by the state of good cause for the proposed intervention.

**(9)** Whether or not the state participates in an action under sub. (5), upon showing in camera by the attorney general that discovery by the person bringing the action would interfere with the state's ongoing investigation or prosecution of a criminal or civil matter arising out of the same facts as the facts upon which the action is based, the court may stay such discovery in whole or in part for a period of

not more than 60 days. The court may extend the period of any such stay upon further showing in camera by the attorney general that the state has pursued the criminal or civil investigation of the matter with reasonable diligence and the proposed discovery in the action brought under sub. (5) will interfere with the ongoing criminal or civil investigation or prosecution.

**(10)** The attorney general may pursue a claim relating to an alleged violation of sub. (2) through an alternate remedy available to the state or any state agency, including an administrative proceeding to assess a civil forfeiture. If the attorney general elects any such alternate remedy, the attorney general shall serve timely notice of his or her election upon the person bringing the action under sub. (5), and that person has the same rights in the alternate venue as the person would have had if the action had continued under sub. (5). Any finding of fact or conclusion of law made by a court or by a state agency in the alternate venue that has become final is conclusive upon all parties named in an action under sub. (5). For purposes of this subsection, a finding or conclusion is final if it has been finally determined on appeal, if all time for filing an appeal or petition for review with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

**(11) (a)** Except as provided in pars. (b) and (e), if the state proceeds with an action brought by a person under sub. (5) or the state pursues an alternate remedy relating to the same acts under sub. (10), the person who brings the action shall receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person contributed to the prosecution of the action or claim.

**(b)** Except as provided in par. (e), if an action or claim is one in which the court or other adjudicator finds to be based primarily upon disclosures of specific



information not provided by the person who brings an action under sub. (5) relating to allegations or transactions specifically in a criminal, civil, or administrative hearing, or in a legislative or administrative report, hearing, audit, or investigation, or report made by the news media, the court or other adjudicator may award such amount as it considers appropriate, but not more than 10 percent of the proceeds of the action or settlement of the claim, depending upon the significance of the information and the role of the person bringing the action in advancing the prosecution of the action or claim.

(c) Except as provided in par. (e), in addition to any amount received under par. (a) or (b), a person bringing an action under sub. (5) shall be awarded his or her reasonable expenses necessarily incurred in bringing the action together with the person's costs and reasonable actual attorney fees. The court or other adjudicator shall assess any award under this paragraph against the defendant.

(d) Except as provided in par. (e), if the state does not proceed with an action or an alternate proceeding under sub. (10), the person bringing the action shall receive an amount that the court decides is reasonable for collection of the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action and shall be paid from the proceeds. In addition, the person shall be paid his or her expenses, costs, and fees under par. (c).

(e) Whether or not the state proceeds with the action or an alternate proceeding under sub. (10), if the court or other adjudicator finds that an action under sub. (5) was brought by a person who planned or initiated the violation upon which the action or proceeding is based, then the court may, to the extent that the court considers appropriate, reduce the share of the proceeds of the action that the person would otherwise receive under par. (a), (b), or (d), taking into account the role of that person

in advancing the prosecution of the action or claim and any other relevant circumstance pertaining to the violation, except that if the person bringing the action is convicted of criminal conduct arising from his or her role in a violation of sub. (2), the court or other adjudicator shall dismiss the person as a party and the person shall not receive any share of the proceeds of the action or claim or any expenses, costs, and fees under par. (c).

**(12)** Except if the action is brought by the attorney general or the person bringing the action is an original source of the information, the court shall dismiss an action or claim under this section, unless opposed by the state, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed in any of the following ways:

(a) In a federal criminal, civil, or administrative hearing in which the state or its agent is a party.

(b) In a congressional, government accountability office, or other federal report, hearing, audit, or investigation.

(c) From the news media.

**(13)** The state is not liable for any expenses incurred by a private person in bringing an action under sub. (5).

**(14)** Any employee, contractor, or agent who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful actions taken by the employee, contractor, agent, or by others in furtherance of an action or claim filed under this section or on behalf of the employee, contractor, or agent, including investigation for, initiation of, testimony for, or assistance in an action or claim filed or to be filed under sub. (5) is entitled to all necessary relief to make the employee,

contractor, or agent whole. Such relief shall in each case include reinstatement with the same seniority status that the employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay at the legal rate, and compensation for any special damages sustained as a result of the discrimination, including costs and reasonable attorney fees. An employee, contractor, or agent may bring an action to obtain the relief to which the employee, contractor, or agent is entitled under this subsection within 3 years after the date the retaliation occurred.

**(15)** A civil action may be brought based upon acts occurring prior to the effective date of this subsection .... [LRB inserts date], if the action is brought within the period specified in s. 893.9815.

**(16)** A judgment of guilty entered against a defendant in a criminal action in which the defendant is charged with fraud or making false statements estops the defendant from denying the essential elements of the offense in any action under sub. (5) that involves the same elements as in the criminal action.

**(17)** The remedies provided for under this section are in addition to any other remedies provided for under any other law or available under the common law.

**(18)** This section shall be liberally construed and applied to promote the public interest and to effect the congressional intent in enacting [31 USC 3729 to 3733](#), as reflected in the act and the legislative history of the act.

**SECTION 2.** 49.485 of the statutes is renumbered 20.9315 (19) and amended to read:

20.9315 **(19)** ~~Whoever knowingly presents or causes to be presented to any officer, employee, or agent of this state a false claim for medical assistance shall forfeit not less than \$5,000 nor more than \$10,000, plus 3 times the amount of the~~

~~damages that were sustained by the state or would have been sustained by the state, whichever is greater, as a result of the false claim.~~ The attorney general may bring an action on behalf of the state to recover any forfeiture incurred under this section.

**SECTION 3.** 165.25 (11m) of the statutes is created to read:

165.25 (11m) FALSE CLAIMS. Diligently investigate possible violations of s. 20.9315, and, if the department determines that a person has committed an act that is punishable under s. 20.9315, may bring a civil action against that person.

**SECTION 4.** 801.02 (1) of the statutes is amended to read:

801.02 (1) ~~A~~ Except as provided in s. 20.9315 (5) (b), a civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service of an authenticated copy of the summons and of the complaint is made upon the defendant under this chapter within 90 days after filing.

**SECTION 5.** 803.09 (1) of the statutes is amended to read:

803.09 (1) ~~Upon~~ Except as provided in s. 20.9315, upon timely motion anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

**SECTION 6.** 803.09 (2) of the statutes is amended to read:

803.09 (2) ~~Upon~~ Except as provided in s. 20.9315, upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order or rule

administered by a federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely motion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

**SECTION 7.** 804.01 (2) (intro.) of the statutes is amended to read:

804.01 (2) SCOPE OF DISCOVERY. (intro.) ~~Unless~~ Except as provided in s. 20.9315 (9), and unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows:

**SECTION 8.** 805.04 (1) of the statutes is amended to read:

805.04 (1) BY PLAINTIFF; BY STIPULATION. ~~An~~ Except as provided in sub. (2p), an action may be dismissed by the plaintiff without order of court by serving and filing a notice of dismissal at any time before service by an adverse party of responsive pleading or motion or by the filing of a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is not on the merits, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.

**SECTION 9.** 805.04 (2p) of the statutes is created to read:

805.04 (2p) FALSE CLAIMS. An action filed under s. 20.9315 may be dismissed only by order of the court. In determining whether to dismiss the action filed under s. 20.9315, the court shall take into account the best interests of the parties and the purposes of s. 20.9315.

**SECTION 10.** 893.9815 of the statutes is created to read:

**893.9815 False claims.** An action or claim under s. 20.9315 shall be commenced within 10 years after the cause of the action or claim accrues or be barred.

**(END)**