



## 2017 ASSEMBLY BILL 1021

March 15, 2018 - Introduced by Representatives SUBECK, KOLSTE, BROSTOFF, HEBL and SARGENT, cosponsored by Senator RISSER. Referred to Committee on Health.

1     **AN ACT** *to renumber and amend* 49.485; *to amend* 165.08, 801.02 (1), 803.09  
2           (1), 803.09 (2), 804.01 (2) (intro.) and 805.04 (1); and *to create* 20.9315, 49.485  
3           (1), 165.25 (11m), 805.04 (2p) and 893.9815 of the statutes; **relating to:**  
4           restoring private individual authority to bring a qui tam claim against a person  
5           for making a false claim for medical assistance, actions by the attorney general  
6           against a person for making a false claim for medical assistance, and providing  
7           a penalty.

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### ***Analysis by the Legislative Reference Bureau***

This bill restores a private individual's authority to bring a qui tam claim against a person who makes a false claim for medical assistance, which was eliminated in 2015 Wisconsin Act 55. A qui tam claim, as it relates to the Medical Assistance program under the bill, 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 for medical assistance. The bill provides, as did the law before 2015 Wisconsin Act 55 took effect, 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. This bill also includes additional changes not

**ASSEMBLY BILL 1021**

included in the prior law to 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, the Department of Justice has independent authority to bring a claim against a person for making a false claim for medical assistance. This bill modifies provisions relating to DOJ's authority to parallel the liability and penalty standards relating to qui tam claims, specifically, applying the definition of the term "claim" and the forfeiture amounts provided under the federal False Claims Act.

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

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

2           **20.9315 False claims for medical assistance; actions by or on behalf of**  
3 **state. (1)** In this section:

4           (b) "Claim" has the meaning given in 31 USC 3729 (b) (2).

5           (c) "Employer" includes all agencies and authorities.

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

10          (de) "Material" means having a natural tendency to influence, or be capable of  
11 influencing, the payment or receipt of money or property.

12          (dm) "Medical assistance" has the meaning given under s. 49.43 (8).

13          (dr) "Obligation" has the meaning given in 31 USC 3729 (b) (3).

14          (dt) "Original source" has the meaning given in 31 USC 3730 (e) (4) (B).

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

**ASSEMBLY BILL 1021**

1 (f) "State public official" has the meaning given in s. 19.42 (14).

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

7 (a) Knowingly presents or causes to be presented a false or fraudulent claim  
8 for medical assistance.

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

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

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

17 **(3)** The court may assess against a person who violates sub. (2) not less than  
18 2 nor more than 3 times the amount of the damages sustained by the state because  
19 of the acts of the person, and shall not assess any forfeiture, if the court finds all of  
20 the following:

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

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

**ASSEMBLY BILL 1021****SECTION 1**

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

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

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

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

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

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

**ASSEMBLY BILL 1021**

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

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

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

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

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

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

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

**ASSEMBLY BILL 1021****SECTION 1**

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

4 1. Limiting the number of witnesses that the person may call.

5 2. Limiting the length of the testimony of the witnesses.

6 3. Limiting the cross-examination of witnesses by the person.

7 4. Otherwise limiting the participation by the person in the prosecution of the  
8 action or proceeding.

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

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

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

**ASSEMBLY BILL 1021****SECTION 1**

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

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

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

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

**ASSEMBLY BILL 1021****SECTION 1**

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

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

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

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



**ASSEMBLY BILL 1021**

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

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

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

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

16 (c) From the news media.

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

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

**ASSEMBLY BILL 1021****SECTION 1**

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

9 (15) A civil action may be brought based upon acts occurring prior to October  
10 27, 2007, if the action is brought within the period specified in s. 893.9815.

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

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

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

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

22 49.485 (2) ~~Whoever knowingly presents or causes to be presented to any officer,~~  
23 ~~employee, or agent of this state a false claim for medical assistance~~ Except as  
24 provided under s. 20.9315 (3), whoever commits an act in violation of s. 20.9315 (2)  
25 shall forfeit not less than \$5,000 nor more than \$10,000 an amount within the range

**ASSEMBLY BILL 1021**

1 specified under 31 USC 3729 (a), plus 3 times the amount of the damages that were  
2 sustained by the state or would have been sustained by the state, whichever is  
3 greater, as a result of the false claim. The attorney general may bring an action on  
4 behalf of the state to recover any forfeiture incurred under this section.

5 **SECTION 3.** 49.485 (1) of the statutes is created to read:

6 49.485 (1) In this section, “claim” has the meaning given in s. 20.9315.

7 **SECTION 4.** 165.08 of the statutes is amended to read:

8 **165.08 Power to compromise.** Any civil action prosecuted by the  
9 department by direction of any officer, department, board or commission, shall be  
10 compromised or discontinued when so directed by such officer, department, board or  
11 commission. Any Except as provided in s. 20.9315 (7) (b), any civil action prosecuted  
12 by the department on the initiative of the attorney general, or at the request of any  
13 individual may be compromised or discontinued with the approval of the governor.  
14 In any criminal action prosecuted by the attorney general, the department shall have  
15 the same powers with reference to such action as are vested in district attorneys.

16 **SECTION 5.** 165.25 (11m) of the statutes is created to read:

17 165.25 (11m) FALSE CLAIMS. Diligently investigate possible violations of s.  
18 20.9315, and, if the department determines that a person has committed an act that  
19 is punishable under s. 20.9315, may bring a civil action against that person.

20 **SECTION 6.** 801.02 (1) of the statutes is amended to read:

21 801.02 (1) ~~A~~ Except as provided in s. 20.9315 (5) (b), a civil action in which a  
22 personal judgment is sought is commenced as to any defendant when a summons and  
23 a complaint naming the person as defendant are filed with the court, provided service  
24 of an authenticated copy of the summons and of the complaint is made upon the  
25 defendant under this chapter within 90 days after filing.

**ASSEMBLY BILL 1021****SECTION 7**

1           **SECTION 7.** 803.09 (1) of the statutes is amended to read:

2           803.09 (1) ~~Upon~~ Except as provided in s. 20.9315, upon timely motion anyone  
3 shall be permitted to intervene in an action when the movant claims an interest  
4 relating to the property or transaction which is the subject of the action and the  
5 movant is so situated that the disposition of the action may as a practical matter  
6 impair or impede the movant's ability to protect that interest, unless the movant's  
7 interest is adequately represented by existing parties.

8           **SECTION 8.** 803.09 (2) of the statutes is amended to read:

9           803.09 (2) ~~Upon~~ Except as provided in s. 20.9315, upon timely motion anyone  
10 may be permitted to intervene in an action when a movant's claim or defense and the  
11 main action have a question of law or fact in common. When a party to an action  
12 relies for ground of claim or defense upon any statute or executive order or rule  
13 administered by a federal or state governmental officer or agency or upon any  
14 regulation, order, rule, requirement or agreement issued or made pursuant to the  
15 statute or executive order, the officer or agency upon timely motion may be permitted  
16 to intervene in the action. In exercising its discretion the court shall consider  
17 whether the intervention will unduly delay or prejudice the adjudication of the rights  
18 of the original parties.

19           **SECTION 9.** 804.01 (2) (intro.) of the statutes is amended to read:

20           804.01 (2) SCOPE OF DISCOVERY. (intro.) ~~Unless~~ Except as provided in s. 20.9315  
21 (9), and unless otherwise limited by order of the court in accordance with the  
22 provisions of this chapter, the scope of discovery is as follows:

23           **SECTION 10.** 805.04 (1) of the statutes is amended to read:

24           805.04 (1) BY PLAINTIFF; BY STIPULATION. ~~An~~ Except as provided in sub. (2p), an  
25 action may be dismissed by the plaintiff without order of court by serving and filing

**ASSEMBLY BILL 1021****SECTION 10**

1 a notice of dismissal at any time before service by an adverse party of responsive  
2 pleading or motion or by the filing of a stipulation of dismissal signed by all parties  
3 who have appeared in the action. Unless otherwise stated in the notice of dismissal  
4 or stipulation, the dismissal is not on the merits, except that a notice of dismissal  
5 operates as an adjudication on the merits when filed by a plaintiff who has once  
6 dismissed in any court an action based on or including the same claim.

7 **SECTION 11.** 805.04 (2p) of the statutes is created to read:

8 805.04 (2p) FALSE CLAIMS. An action filed under s. 20.9315 may be dismissed  
9 only by order of the court. In determining whether to dismiss the action filed under  
10 s. 20.9315, the court shall take into account the best interests of the parties and the  
11 purposes of s. 20.9315.

12 **SECTION 12.** 893.9815 of the statutes is created to read:

13 **893.9815 False claims.** An action or claim under s. 20.9315 shall be  
14 commenced within 10 years after the cause of the action or claim accrues or be  
15 barred.

16 (END)