

2017 DRAFTING REQUEST

Bill

For: **Lisa Subeck (608) 266-7521** Drafter: **swalkenh**
 By: **Zach** Secondary Drafters:
 Date: **11/21/2017** May Contact:

Same as LRB:

Submit via email: **YES**
 Requester's email: **Rep.Subeck@legis.wisconsin.gov**
 Carbon copy (CC) to: **sarah.walkenhorstbarber@legis.wisconsin.gov**
tamara.dodge@legis.wisconsin.gov

Pre Topic:

No specific pre topic given

Topic:

Individual authority for individuals to bring qui tam claims and attorney general actions against a person who makes false claims for medical assistance

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	swalkenh 12/7/2017	aernstr 12/7/2017			
/P1			dwalker 12/7/2017		
/1	swalkenh 1/19/2018		mbarman 1/5/2018		
/2	swalkenh 1/25/2018	aernstr 1/19/2018	mbarman 1/19/2018		

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/3		aernstr 1/25/2018	lparisi 1/25/2018	dwalker 2/23/2018	

FE Sent For:

2
Not
Needed

<END>

Walkenhorst Barber, Sarah

From: Hanaman, Cathlene
Sent: Tuesday, November 21, 2017 9:50 AM
To: Walkenhorst Barber, Sarah
Subject: Zach in the Subeck office

Would like to restore s. 20.931. I think you repealed it so I'm sending this to you (I found the draft, not Zach, so Zach is not committed to this language). Let me know if you'd like me to send it to someone else.



15b0131_P3
(2).pdf

✓
Reverse elimination of qui tam (individual)
from 2015 Act 55
SWB



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-4890(2)
SWB:...
ahe
1P1

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

IN 12/6
Requested
12/7 please
sav
gen

1 **AN ACT ...; relating to:** restoring private individual authority to bring a qui tam
2 claim against a person for making a false claim for medical assistance and
3 providing a penalty.

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. 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.

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

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

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

3 (b) "Claim" includes any request or demand for medical assistance made to any
4 officer, employee, or agent of this state.

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

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

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

15 **(2)** Except as provided in sub. (3), any person who does any of the following is
16 liable to this state for 3 times the amount of the damages sustained by this state
17 because of the actions of the person, and shall forfeit not less than \$5,000 nor more
18 than \$10,000 for each violation:

19 (a) Knowingly presents or causes to be presented to any officer, employee, or
20 agent of this state a false claim for medical assistance.

21 (b) Knowingly makes, uses, or causes to be made or used a false record or
22 statement to obtain approval or payment of a false claim for medical assistance.

23 (c) Conspires to defraud this state by obtaining allowance or payment of a false
24 claim for medical assistance, or by knowingly making or using, or causing to be made

1 or used, a false record or statement to conceal, avoid, or decrease an obligation to pay
2 or transmit money or property to the Medical Assistance program.

3 (g) Knowingly makes, uses, or causes to be made or used a false record or
4 statement to conceal, avoid, or decrease any obligation to pay or transmit money or
5 property to the Medical Assistance program.

6 (h) Is a beneficiary of the submission of a false claim for medical assistance to
7 any officer, employee, or agent of this state, knows that the claim is false, and fails
8 to disclose the false claim to this state within a reasonable time after the person
9 becomes aware that the claim is false.

10 (3) The court may assess against a person who violates sub. (2) not less than
11 2 nor more than 3 times the amount of the damages sustained by the state because
12 of the acts of the person, and shall not assess any forfeiture, if the court finds all of
13 the following:

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

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

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

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

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

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

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

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

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

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

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

24 (6) If the state proceeds with an action under sub. (5) or an alternate remedy
25 under sub. (10), the state has primary responsibility for prosecuting the action or

1 proceeding under sub. (10). The state is not bound by any act of the person bringing
2 the action, but that person has the right to continue as a party to the action, subject
3 to the limitations under sub. (7).

4 (7) (a) The state may move to dismiss an action under sub. (5) or an
5 administrative proceeding under sub. (10) to which the state is a party for good cause
6 shown, notwithstanding objection of the person bringing the action, if that person is
7 served with a copy of the state's motion and is provided with an opportunity to oppose
8 the motion before the court or the administrative agency before which the proceeding
9 is conducted.

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

18 (c) Upon a showing by the state that unrestricted participation in the
19 prosecution of an action under sub. (5) or an alternate proceeding to which the state
20 is a party by the person bringing the action would interfere with or unduly delay the
21 prosecution of the action or proceeding, or would result in consideration of
22 repetitious or irrelevant evidence or evidence presented for purposes of harassment,
23 the court may limit the person's participation in the prosecution, such as:

- 24 1. Limiting the number of witnesses that the person may call.
- 25 2. Limiting the length of the testimony of the witnesses.

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

2 4. Otherwise limiting the participation by the person in the prosecution of the
3 action or proceeding.

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

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

16 (9) Whether or not the state participates in an action under sub. (5), upon
17 showing in camera by the attorney general that discovery by the person bringing the
18 action would interfere with the state's ongoing investigation or prosecution of a
19 criminal or civil matter arising out of the same facts as the facts upon which the
20 action is based, the court may stay such discovery in whole or in part for a period of
21 not more than 60 days. The court may extend the period of any such stay upon
22 further showing in camera by the attorney general that the state has pursued the
23 criminal or civil investigation of the matter with reasonable diligence and the
24 proposed discovery in the action brought under sub. (5) will interfere with the
25 ongoing criminal or civil investigation or prosecution.

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

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

19 (b) Except as provided in par. (e), if an action or claim is one in which the court
20 or other adjudicator finds to be based primarily upon disclosures of specific
21 information not provided by the person who brings an action under sub. (5) relating
22 to allegations or transactions specifically in a criminal, civil, or administrative
23 hearing, or in a legislative or administrative report, hearing, audit, or investigation,
24 or report made by the news media, the court or other adjudicator may award such
25 amount as it considers appropriate, but not more than 10 percent of the proceeds of

1 the action or settlement of the claim, depending upon the significance of the
2 information and the role of the person bringing the action in advancing the
3 prosecution of the action or claim.

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

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

15 (e) Whether or not the state proceeds with the action or an alternate proceeding
16 under sub. (10), if the court or other adjudicator finds that an action under sub. (5)
17 was brought by a person who planned or initiated the violation upon which the action
18 or proceeding is based, then the court may, to the extent that the court considers
19 appropriate, reduce the share of the proceeds of the action that the person would
20 otherwise receive under par. (a), (b), or (d), taking into account the role of that person
21 in advancing the prosecution of the action or claim and any other relevant
22 circumstance pertaining to the violation, except that if the person bringing the action
23 is convicted of criminal conduct arising from his or her role in a violation of sub. (2),
24 the court or other adjudicator shall dismiss the person as a party and the person shall

1 not receive any share of the proceeds of the action or claim or any expenses, costs, and
2 fees under par. (c).

3 (12) (a) No court has jurisdiction over an action brought by a private person
4 under sub. (5) against a state public official if the action is based upon information
5 known to the attorney general at the time that the action is brought.

6 (b) No person may bring an action under sub. (5) that is based upon allegations
7 or transactions that are the subject of a civil action or an administrative proceeding
8 to assess a civil forfeiture in which the state is a party if that action or proceeding
9 was commenced prior to the date that the action is filed.

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

12 (14) Any employee who is discharged, demoted, suspended, threatened,
13 harassed, or in any other manner discriminated against by his or her employer
14 because of lawful actions taken by the employee, on behalf of the employee, or by
15 others in furtherance of an action or claim filed under this section, including
16 investigation for, initiation of, testimony for, or assistance in an action or claim filed
17 or to be filed under sub. (5) is entitled to all necessary relief to make the employee
18 whole. Such relief shall in each case include reinstatement with the same seniority
19 status that the employee would have had but for the discrimination, 2 times the
20 amount of back pay, interest on the back pay at the legal rate, and compensation for
21 any special damages sustained as a result of the discrimination, including costs and
22 reasonable actual attorney fees. An employee may bring an action to obtain the relief
23 to which the employee is entitled under this subsection.

24 (15) A civil action may be brought based upon acts occurring prior to October
25 27, 2007, if the action is brought within the period specified in s. 893.9815.

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

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

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

10 ↓ SECTION 2. 165.08 of the statutes is amended to read:

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

History: 2007 a. 20; 2015 a. 55.

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

20 **165.25 (11m) FALSE CLAIMS.** Diligently investigate possible violations of s.
21 20.9315, and, if the department determines that a person has committed an act that
22 is punishable under s. 20.9315, may bring a civil action against that person.

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

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

History: Sup. Ct. Order, 67 Wis. 2d 585, 589 (1975); 1975 c. 218; 1981 c. 289, 317; 1995 a. 27; 1997 a. 133, 187; 2001 a. 16; Sup. Ct. Order No. 03-06A, 2005 WI 86, 280 Wis. 2d xiii; 2007 a. 20; 2015 a. 55.

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

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

History: Sup. Ct. Order, 67 Wis. 2d 585, 650 (1975); 1975 c. 218; 2007 a. 20; 2015 a. 55.

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

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

1 whether the intervention will unduly delay or prejudice the adjudication of the rights
2 of the original parties.

History: Sup. Ct. Order, 67 Wis. 2d 585, 650 (1975); 1975 c. 218; 2007 a. 20; 2015 a. 55.

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

4 804.01 (2) SCOPE OF DISCOVERY. (intro.) Unless Except as provided in ^S20.9315
5 (9), and unless otherwise limited by order of the court in accordance with the
6 provisions of this chapter, the scope of discovery is as follows:

History: Sup. Ct. Order, 67 Wis. 2d 585, 654 (1975); 1975 c. 218; 1985 a. 236; Sup. Ct. Order, 130 Wis. 2d xx; Sup. Ct. Order, 141 Wis. 2d xxi; 1993 a. 486; Sup. Ct. Order No. 95-03, 191 Wis. 2d xix (1995); 1997 a. 35, 133; 2007 a. 20; Sup. Ct. Order No. 09-01, 2010 WI 67, filed 7-6-10, eff. 1-1-11; Sup. Ct. Order No. 09-01A, 2010 WI 129, 329 Wis. 2d xix; Sup. Ct. Order No. 12-03, 2012 WI 114, filed 11-1-12, eff. 1-1-13; 2015 a. 55.

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

8 805.04 (1) BY PLAINTIFF; BY STIPULATION. An Except as provided in sub. (2p), an
9 action may be dismissed by the plaintiff without order of court by serving and filing
10 a notice of dismissal at any time before service by an adverse party of responsive
11 pleading or motion or by the filing of a stipulation of dismissal signed by all parties
12 who have appeared in the action. Unless otherwise stated in the notice of dismissal
13 or stipulation, the dismissal is not on the merits, except that a notice of dismissal
14 operates as an adjudication on the merits when filed by a plaintiff who has once
15 dismissed in any court an action based on or including the same claim.

History: Sup. Ct. Order, 67 Wis. 2d 585, 691 (1975); 2005 a. 253; 2007 a. 20, 97; 2015 a. 55.

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

17 805.04 (2p) FALSE CLAIMS. An action filed under s. 20.9315 may be dismissed
18 only by order of the court. In determining whether to dismiss the action filed under
19 s. 20.9315, the court shall take into account the best interests of the parties and the
20 purposes of s. 20.9315.

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

Dodge, Tamara

From: Dodge, Tamara
Sent: Friday, January 05, 2018 9:31 AM
To: Walkenhorst Barber, Sarah
Subject: RE: Re-draft request ... LRB -4890/P1

Doesn't look like there are any issues (qui tam). I'll just flip it.

Tami

Tamara J. Dodge
Senior Legislative Attorney
Wisconsin Legislative Reference Bureau
P.O. Box 2037
Madison, WI 53701-2037
(608) 267 - 7380
tamara.dodge@legis.wisconsin.gov

From: Walkenhorst Barber, Sarah
Sent: Friday, January 05, 2018 9:24 AM
To: Dodge, Tamara <Tamara.Dodge@legis.wisconsin.gov>
Subject: FW: Re-draft request ... LRB -4890/P1

Tami,

Here's the redraft (/1) request for 4890. I don't think there are issues with it (but I can't manage to access from home). If you could flip to a /1 I'd appreciate it. Let me know if there's any problem--I'll be trying to keep an eye on email.

Thanks!
Sarah

From: Barman, Mike
Sent: Friday, January 05, 2018 6:52 AM
To: Walkenhorst Barber, Sarah
Subject: Re-draft request ... LRB -4890/P1

From: Madden, Zachary
Sent: Thursday, January 04, 2018 5:15 PM
To: LRB.Legal <lrblegal@legis.wisconsin.gov>
Subject: RE: Draft review: LRB -4890/P1

Could we get a /1.

Thanks,
Zach

Zachary Madden
Legislative Aide,
Representative Lisa Subeck

78th Assembly District
State Capitol, Room 418 North
P.O. Box 8953, Madison, WI 53708
(608) 266-7521

From: LRB.Legal
Sent: Thursday, December 07, 2017 11:52 AM
To: Rep.Subeck <Rep.Subeck@legis.wisconsin.gov>
Subject: Draft review: LRB -4890/P1

Following is the PDF version of draft LRB -4890/P1.



PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

No
change

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

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. In addition to qui tam claims, the Department of

1 whether the intervention will unduly delay or prejudice the adjudication of the rights
2 of the original parties.

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

4 804.01 (2) SCOPE OF DISCOVERY. (intro.) Unless Except as provided in s. 20.9315
5 (9), and unless otherwise limited by order of the court in accordance with the
6 provisions of this chapter, the scope of discovery is as follows:

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

8 805.04 (1) BY PLAINTIFF; BY STIPULATION. An Except as provided in sub. (2p), an
9 action may be dismissed by the plaintiff without order of court by serving and filing
10 a notice of dismissal at any time before service by an adverse party of responsive
11 pleading or motion or by the filing of a stipulation of dismissal signed by all parties
12 who have appeared in the action. Unless otherwise stated in the notice of dismissal
13 or stipulation, the dismissal is not on the merits, except that a notice of dismissal
14 operates as an adjudication on the merits when filed by a plaintiff who has once
15 dismissed in any court an action based on or including the same claim.

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

17 805.04 (2p) FALSE CLAIMS. An action filed under s. 20.9315 may be dismissed
18 only by order of the court. In determining whether to dismiss the action filed under
19 s. 20.9315, the court shall take into account the best interests of the parties and the
20 purposes of s. 20.9315.

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

22 **893.9815 False claims.** An action or claim under s. 20.9315 shall be
23 commenced within 10 years after the cause of the action or claim accrues or be
24 barred.

25

(END)

Walkenhorst Barber, Sarah

From: Madden, Zachary
Sent: Tuesday, January 09, 2018 1:05 PM
To: Walkenhorst Barber, Sarah
Subject: LRB-4890

Follow Up Flag: Follow up
Due By: Wednesday, January 10, 2018 10:00 AM
Flag Status: Flagged

Sarah,

I wanted to check in on LRB-4890 and see if the draft addresses the issues that the feds wanted addressed to qualify for full payments under their law.

<https://www.wisconsinwatch.org/2017/11/wisconsin-taxpayers-lose-out-on-millions-after-gov-scott-walker-lawmakers-repeal-anti-fraud-law/>
<https://www.wisconsinwatch.org/2017/11/wisconsin-taxpayers-lose-out-on-millions-after-gov-scott-walker-lawmakers-repeal-anti-fraud-law/>

See section "Anti-Fraud law weakened"

Link from article with memo outlining federal changes required:

<https://www.documentcloud.org/documents/3673631-Wisconsin.html>

Thanks,
Zach

Zachary Madden
Legislative Aide,
Representative Lisa Subeck
78th Assembly District
State Capitol, Room 418 North
P.O. Box 8953, Madison, WI 53708
(608) 266-7521

SWB:
Per Zach, pls do
draft (12) consistent
w/ requirements
of Federal Law.



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



December 28, 2016

The Honorable Brad Schimel
Office of the Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Attn: Director, Medicaid Fraud Control Unit

Dear Mr. Attorney General:

This letter supplements the March 21, 2011, letter from the Office of Inspector General (OIG), U.S. Department of Health and Human Services (HHS), regarding OIG's review of the Wisconsin False Claims Act, Wis. Stat. § 20.931, under the requirements of section 1909 of the Social Security Act (the Act). Section 1909 of the Act provides a financial incentive for a State to enact a law imposing liability for the submission of false or fraudulent claims to the State Medicaid program. For a State to qualify for this incentive, the State law must meet certain requirements enumerated under section 1909(b) of the Act, as determined by the Inspector General of HHS in consultation with the U.S. Department of Justice (DOJ). As explained in the March 21, 2011, letter, after consulting with DOJ, we determined that the Wisconsin False Claims Act does not meet the requirements of section 1909 of the Act.

Section 1909(b)(4) of the Act requires the State law to contain a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of the Federal False Claims Act. The Federal False Claims Act expressly provides for an adjustment of civil penalties under the Federal Civil Penalties Inflation Adjustment Act of 1990. See 31 U.S.C. § 3729(a). The Federal Civil Penalties Inflation Adjustment Improvements Act of 2015 amended the Federal Civil Penalties Inflation Adjustment Act of 1990 and mandated an increase in the civil penalties authorized under the Federal False Claims Act. Effective August 1, 2016, the civil penalties authorized under the Federal False Claims Act increased from a range of \$5,500 to \$11,000 per false claim to a range of \$10,781 to \$21,563 per false claim. The increased civil penalty applies to civil penalties assessed after August 1, 2016, and for violations occurring after November 2, 2015.

These increased penalties are not reflected in the penalties authorized under your State statute, and this discrepancy provides an additional basis for OIG's determination that your State statute does not meet the requirements of section 1909 of the Act. The civil penalties authorized under

Page 2 – The Honorable Brad Schimel

the Federal False Claims Act are expected to increase annually on August 1 in subsequent years. It is therefore recommended that your State statute reference the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 or the Federal False Claims Act in its civil penalties provision rather than state the exact dollar amount of the civil penalties authorized under your State statute.

If the Wisconsin False Claims Act is amended to address the issues identified in this letter and the March 21, 2011, letter, please notify OIG for further consideration of the Wisconsin False Claims Act. If you have any questions, please contact me or have your staff contact Lisa Veigel or Susan Gillin at 202-619-0335.

Sincerely,

Daniel R. Levinson
Inspector General



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-4890/1
SWB:ahe

12
RMR

2017 BILL

IN 1/19

Requested READ today

(pls email me to call in
if ?s; at judicial
(council))

INSERT

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

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. In addition to qui tam claims, the Department of

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ANALYSIS

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1 (b) Knowingly makes, uses, or causes to be made or used a false record or
2 statement to obtain approval or payment of a false claim for medical assistance.

3 (c) Conspires to defraud this state by obtaining allowance or payment of a false
4 claim for medical assistance, or by knowingly making or using, or causing to be made
5 or used, a false record or statement to conceal, avoid, or decrease an obligation to pay
6 or transmit money or property to the Medical Assistance program.

7 (g) Knowingly makes, uses, or causes to be made or used a false record or
8 statement to conceal, avoid, or decrease any obligation to pay or transmit money or
9 property to the Medical Assistance program.

10 (h) Is a beneficiary of the submission of a false claim for medical assistance to
11 any officer, employee, or agent of this state, knows that the claim is false, and fails
12 to disclose the false claim to this state within a reasonable time after the person
13 becomes aware that the claim is false.

14 (3) The court may assess against a person who violates sub. (2) not less than
15 2 nor more than 3 times the amount of the damages sustained by the state because
16 of the acts of the person, and shall not assess any forfeiture, if the court finds all of
17 the following:

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

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

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

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3-13

BILL

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

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

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

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

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

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

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

BILL

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

4 (6) If the state proceeds with an action under sub. (5) or an alternate remedy
5 under sub. (10), the state has primary responsibility for prosecuting the action or
6 proceeding under sub. (10). The state is not bound by any act of the person bringing
7 the action, but that person has the right to continue as a party to the action, subject
8 to the limitations under sub. (7).

9 (7) (a) The state may move to dismiss an action under sub. (5) or an
10 administrative proceeding under sub. (10) to which the state is a party for good cause
11 shown, notwithstanding objection of the person bringing the action, if that person is
12 served with a copy of the state's motion and is provided with an opportunity to oppose
13 the motion before the court or the administrative agency before which the proceeding
14 is conducted.

15 (b) ^{act} 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. ^{set}

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

BILL**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

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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

BILL**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

BILL

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).

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7 (12) (a) No court has jurisdiction over an action brought by a private person
 8 under sub. (5) against a state public official if the action is based upon information
 9 known to the attorney general at the time that the action is brought.

10 (b) No person may bring an action under sub. (5) that is based upon allegations
 11 or transactions that are the subject of a civil action or an administrative proceeding
 12 to assess a civil forfeiture in which the state is a party if that action or proceeding
 13 was commenced prior to the date that the action is filed.

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

16 (14) Any employee ^{contractors or agent} who is discharged, demoted, suspended, threatened,
 17 harassed, or in any other manner discriminated against by his or her employer
 18 ^{in the terms and conditions of employment} because of lawful actions taken by the employee, ^{contractor, agent,} on behalf of the employee, or by
 19 others in furtherance of an action or claim filed under this section, ^{or on behalf of the employee, contractor, or agent} including
 20 investigation for, initiation of, testimony for, or assistance in an action or claim filed
 21 or to be filed under sub. (5) is entitled to all necessary relief to make the employee ^{contractor, or agent}
 22 whole. Such relief shall in each case include reinstatement with the same seniority
 23 status that the employee ^{contractors, or agent} would have had but for the discrimination, 2 times the
 24 amount of back pay, interest on the back pay at the legal rate, and compensation for
 25 any special damages sustained as a result of the discrimination, including costs and

BILL

1 reasonable actual attorney fees. An employee ^{contractor, or agent} may bring an action to obtain the relief
 2 to which the employee ^{contractor, or agent} is entitled under this subsection ^{within 3 years after the date the retaliation occurred.}

3 (15) A civil action may be brought based upon acts occurring prior to October
 4 27, 2007, if the action is brought within the period specified in s. 893.9815.

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

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

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

SECTION 2. 165.08 of the statutes is amended to read:

14 **165.08 Power to compromise.** Any civil action prosecuted by the
 15 department by direction of any officer, department, board or commission, shall be
 16 compromised or discontinued when so directed by such officer, department, board or
 17 commission. ^{See (a) & (c), keep (b)}
 18 Any Except as provided in s. 20.9315 (7) (b), any civil action prosecuted
 19 by the department on the initiative of the attorney general, or at the request of any
 20 individual may be compromised or discontinued with the approval of the governor.
 21 In any criminal action prosecuted by the attorney general, the department shall have
 22 the same powers with reference to such action as are vested in district attorneys.

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

BILL

1 165.25 (11m) FALSE CLAIMS. Diligently investigate possible violations of s.
2 20.9315, and, if the department determines that a person has committed an act that
3 is punishable under s. 20.9315, may bring a civil action against that person.

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

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

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

11 803.09 (1) ~~Upon~~ Except as provided in s. 20.9315, upon timely motion anyone
12 shall be permitted to intervene in an action when the movant claims an interest
13 relating to the property or transaction which is the subject of the action and the
14 movant is so situated that the disposition of the action may as a practical matter
15 impair or impede the movant's ability to protect that interest, unless the movant's
16 interest is adequately represented by existing parties.

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

18 803.09 (2) ~~Upon~~ Except as provided in s. 20.9315, upon timely motion anyone
19 may be permitted to intervene in an action when a movant's claim or defense and the
20 main action have a question of law or fact in common. When a party to an action
21 relies for ground of claim or defense upon any statute or executive order or rule
22 administered by a federal or state governmental officer or agency or upon any
23 regulation, order, rule, requirement or agreement issued or made pursuant to the
24 statute or executive order, the officer or agency upon timely motion may be permitted
25 to intervene in the action. In exercising its discretion the court shall consider

BILL**SECTION 6**

1 whether the intervention will unduly delay or prejudice the adjudication of the rights
2 of the original parties.

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

4 804.01 (2) SCOPE OF DISCOVERY. (intro.) ~~Unless~~ Except as provided in s. 20.9315
5 (9), and unless otherwise limited by order of the court in accordance with the
6 provisions of this chapter, the scope of discovery is as follows:

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

8 805.04 (1) BY PLAINTIFF; BY STIPULATION. ~~An~~ Except as provided in sub. (2p), an
9 action may be dismissed by the plaintiff without order of court by serving and filing
10 a notice of dismissal at any time before service by an adverse party of responsive
11 pleading or motion or by the filing of a stipulation of dismissal signed by all parties
12 who have appeared in the action. Unless otherwise stated in the notice of dismissal
13 or stipulation, the dismissal is not on the merits, except that a notice of dismissal
14 operates as an adjudication on the merits when filed by a plaintiff who has once
15 dismissed in any court an action based on or including the same claim.

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

17 805.04 (2p) FALSE CLAIMS. An action filed under s. 20.9315 may be dismissed
18 only by order of the court. In determining whether to dismiss the action filed under
19 s. 20.9315, the court shall take into account the best interests of the parties and the
20 purposes of s. 20.9315.

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

22 **893.9815 False claims.** An action or claim under s. 20.9315 shall be
23 commenced within 10 years after the cause of the action or claim accrues or be
24 barred.

25

(END)

**2017-2018 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4890/2ins
SWB:ahe

INSERT ANALYSIS

This bill also includes additional changes not 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. ✓

(END INSERT ANALYSIS)

INSERT 2-4

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

(END INSERT 2-4)

INSERT 2-10

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

(END INSERT 2-10)

INSERT 2-11

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

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

(END INSERT 2-11)

INSERT 2-16

6 ✓ (2) Except as provided in sub. (3), any person who does any of the following is
7 liable to this state for 3 times the amount of the damages sustained by this state
8 because of the actions of the person, and shall forfeit, for each violation, an amount
9 within the range specified under 31 U.S.C. 3729 (a): ✓

(END INSERT 2-16)

INSERT 3-13

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

6 (dr) Conspiring ^{e Conspires} to commit a violation under par. (a), (b), or (dg).

(END INSERT 3-13)

INSERT 4-12

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

(END INSERT 4-12)

INSERT 9-6

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

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

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

1

(c)
③ From the news media.

(END INSERT 9-6)



1/25

Per discussion w/ Zach, add provision amending
49.485 to parallel changes to previous 20.931 (20.9315
in draft)



State of Wisconsin
2017 - 2018 LEGISLATURE

LRB-4890(2)
SWB:ahe
13
RMR

2017 BILL

IN 1/25
Revised ASIP
today
INSERT

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actions by the attorney general
against a person for making a
false claim for medical
assistance

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

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 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.

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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.

9 DOJ's

This bill modifies provisions relating to the Department of Justice's independent authority to parallel the standards relating to qui tam claims, specifically the definition of the term "claim" and the amounts provided under the Federal False Claims Act.

Liability and Penalty

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.

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

19 **(2)** Except as provided in sub. (3), any person who does any of the following is
20 liable to this state for 3 times the amount of the damages sustained by this state

that were sustained by this state

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or would have been sustained by the state, whichever is greater.

1

because of the actions of the person, and shall forfeit, for each violation, an amount within the range specified under 31 USC 3729 (a):

2

3

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

4

5

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

6

7

(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.

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

13

(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:

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15

16

17

(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.

18

19

20

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

21

22

(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.

23

24

BILL**SECTION 1**

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

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

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

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

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

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

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

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

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

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

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

19 (c) Upon a showing by the state that unrestricted participation in the
20 prosecution of an action under sub. (5) or an alternate proceeding to which the state
21 is a party by the person bringing the action would interfere with or unduly delay the
22 prosecution of the action or proceeding, or would result in consideration of
23 repetitious or irrelevant evidence or evidence presented for purposes of harassment,
24 the court may limit the person's participation in the prosecution, such as:

- 25 1. Limiting the number of witnesses that the person may call.

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

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

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

17 (9) Whether or not the state participates in an action under sub. (5), upon
18 showing in camera by the attorney general that discovery by the person bringing the
19 action would interfere with the state's ongoing investigation or prosecution of a
20 criminal or civil matter arising out of the same facts as the facts upon which the
21 action is based, the court may stay such discovery in whole or in part for a period of
22 not more than 60 days. The court may extend the period of any such stay upon
23 further showing in camera by the attorney general that the state has pursued the
24 criminal or civil investigation of the matter with reasonable diligence and the

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1 proposed discovery in the action brought under sub. (5) will interfere with the
2 ongoing criminal or civil investigation or prosecution.

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

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

21 (b) Except as provided in par. (e), if an action or claim is one in which the court
22 or other adjudicator finds to be based primarily upon disclosures of specific
23 information not provided by the person who brings an action under sub. (5) relating
24 to allegations or transactions specifically in a criminal, civil, or administrative
25 hearing, or in a legislative or administrative report, hearing, audit, or investigation,

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1 or report made by the news media, the court or other adjudicator may award such
2 amount as it considers appropriate, but not more than 10 percent of the proceeds of
3 the action or settlement of the claim, depending upon the significance of the
4 information and the role of the person bringing the action in advancing the
5 prosecution of the action or claim.

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

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

17 (e) Whether or not the state proceeds with the action or an alternate proceeding
18 under sub. (10), if the court or other adjudicator finds that an action under sub. (5)
19 was brought by a person who planned or initiated the violation upon which the action
20 or proceeding is based, then the court may, to the extent that the court considers
21 appropriate, reduce the share of the proceeds of the action that the person would
22 otherwise receive under par. (a), (b), or (d), taking into account the role of that person
23 in advancing the prosecution of the action or claim and any other relevant
24 circumstance pertaining to the violation, except that if the person bringing the action
25 is convicted of criminal conduct arising from his or her role in a violation of sub. (2),

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1 the court or other adjudicator shall dismiss the person as a party and the person shall
2 not receive any share of the proceeds of the action or claim or any expenses, costs, and
3 fees under par. (c).

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

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

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

13 (c) From the news media.

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

16 (14) Any employee, contractor, or agent who is discharged, demoted,
17 suspended, threatened, harassed, or in any other manner discriminated against in
18 the terms and conditions of employment because of lawful actions taken by the
19 employee, contractor, agent, or by others in furtherance of an action or claim filed
20 under this section or on behalf of the employee, contractor, or agent, including
21 investigation for, initiation of, testimony for, or assistance in an action or claim filed
22 or to be filed under sub. (5) is entitled to all necessary relief to make the employee,
23 contractor, or agent whole. Such relief shall in each case include reinstatement with
24 the same seniority status that the employee, contractor, or agent would have had but
25 for the discrimination, 2 times the amount of back pay, interest on the back pay at

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1 the legal rate, and compensation for any special damages sustained as a result of the
2 discrimination, including costs and reasonable attorney fees. An employee,
3 contractor, or agent may bring an action to obtain the relief to which the employee,
4 contractor, or agent is entitled under this subsection within 3 years after the date the
5 retaliation occurred.

6 (15) A civil action may be brought based upon acts occurring prior to October
7 27, 2007, if the action is brought within the period specified in s. 893.9815.

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

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

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

17 SECTION 2, 165.08 of the statutes is amended to read:

18 **165.08 Power to compromise.** Any civil action prosecuted by the
19 department by direction of any officer, department, board or commission, shall be
20 compromised or discontinued when so directed by such officer, department, board or
21 commission. Any Except as provided in s. 20.9315 (7) (b), any civil action prosecuted
22 by the department on the initiative of the attorney general, or at the request of any
23 individual may be compromised or discontinued with the approval of the governor.
24 In any criminal action prosecuted by the attorney general, the department shall have
25 the same powers with reference to such action as are vested in district attorneys.

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

2 165.25 (11m) FALSE CLAIMS. Diligently investigate possible violations of s.
3 20.9315, and, if the department determines that a person has committed an act that
4 is punishable under s. 20.9315, may bring a civil action against that person.

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

6 801.02 (1) ~~A~~ Except as provided in s. 20.9315 (5) (b), a civil action in which a
7 personal judgment is sought is commenced as to any defendant when a summons and
8 a complaint naming the person as defendant are filed with the court, provided service
9 of an authenticated copy of the summons and of the complaint is made upon the
10 defendant under this chapter within 90 days after filing.

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

12 803.09 (1) ~~Upon~~ Except as provided in s. 20.9315, upon timely motion anyone
13 shall be permitted to intervene in an action when the movant claims an interest
14 relating to the property or transaction which is the subject of the action and the
15 movant is so situated that the disposition of the action may as a practical matter
16 impair or impede the movant's ability to protect that interest, unless the movant's
17 interest is adequately represented by existing parties.

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

19 803.09 (2) ~~Upon~~ Except as provided in s. 20.9315, upon timely motion anyone
20 may be permitted to intervene in an action when a movant's claim or defense and the
21 main action have a question of law or fact in common. When a party to an action
22 relies for ground of claim or defense upon any statute or executive order or rule
23 administered by a federal or state governmental officer or agency or upon any
24 regulation, order, rule, requirement or agreement issued or made pursuant to the
25 statute or executive order, the officer or agency upon timely motion may be permitted

BILL**SECTION 6**

1 to intervene in the action. In exercising its discretion the court shall consider
2 whether the intervention will unduly delay or prejudice the adjudication of the rights
3 of the original parties.

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

5 804.01 (2) SCOPE OF DISCOVERY. (intro.) ~~Unless~~ Except as provided in s. 20.9315
6 (9), and unless otherwise limited by order of the court in accordance with the
7 provisions of this chapter, the scope of discovery is as follows:

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

9 805.04 (1) BY PLAINTIFF; BY STIPULATION. ~~An~~ Except as provided in sub. (2p), an
10 action may be dismissed by the plaintiff without order of court by serving and filing
11 a notice of dismissal at any time before service by an adverse party of responsive
12 pleading or motion or by the filing of a stipulation of dismissal signed by all parties
13 who have appeared in the action. Unless otherwise stated in the notice of dismissal
14 or stipulation, the dismissal is not on the merits, except that a notice of dismissal
15 operates as an adjudication on the merits when filed by a plaintiff who has once
16 dismissed in any court an action based on or including the same claim.

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

18 805.04 (2p) FALSE CLAIMS. An action filed under s. 20.9315 may be dismissed
19 only by order of the court. In determining whether to dismiss the action filed under
20 s. 20.9315, the court shall take into account the best interests of the parties and the
21 purposes of s. 20.9315.

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

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1 SECTION ^{e 2} 49.485 (1) of the statutes is created to read:

2 49.485 (1) In this section, "claim" has the meaning given in s. 20.9315. ✓

3 SECTION ^{e 3} 49.485 of the statutes is renumbered 49.485 (2) and amended to
4 read:

5 49.485 (2) FALSE CLAIMS. Whoever knowingly presents or causes to be presented
6 to any officer, employee, or agent of this state a false claim for medical assistance
7 Except as provided under s. 20.9315 (3), whoever commits an act in violation of s.
8 20.9315 (2) shall forfeit not less than \$5,000 nor more than \$10,000 an amount within
9 the range specified under 31 USC 3729 (a), plus 3 times the amount of the damages
10 that were sustained by the state or would have been sustained by the state,
11 whichever is greater, as a result of the false claim. The attorney general may bring
12 an action on behalf of the state to recover any forfeiture incurred under this section.

History: 2007 a. 20.

(END INSERT 10-16)

Walker, Dan

From: Madden, Zachary
Sent: Friday, February 23, 2018 11:15 AM
To: LRB.Legal
Subject: RUSH Draft Review: LRB -4890/3

RUSH Please Jacket LRB -4890/3 for the ASSEMBLY.