

2019 DRAFTING REQUEST

Bill

For: **Administration-Budget** Drafter: **swalkenh**
 By: **Schmidt** Secondary Drafters:
 Date: **1/31/2019** May Contact:

Same as LRB:

Submit via email: **YES**
 Requester's email:
 Carbon copy (CC) to: **doasbostatlanguage@wisconsin.gov**
sarah.walkenhorstbarber@legis.wisconsin.gov
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Pre Topic:

DOA:.....Schmidt, BB0242 -

Topic:

False claims private authority

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	swalkenh 2/8/2019	aernstr 2/8/2019			
/P1	swalkenh 2/20/2019		lparisi 2/8/2019		State
/P2	swalkenh 2/21/2019	kmochal 2/20/2019	dwalker 2/20/2019		State
/P3		csicilia 2/21/2019	lparisi 2/21/2019		State

FE Sent For:

<END>

Walkenhorst Barber, Sarah

From: Cathlene Hanaman <cathleneh@gmail.com>
Sent: Thursday, January 31, 2019 10:06 AM
To: Dodge, Tamara; Walkenhorst Barber, Sarah
Subject: Fwd: Statutory Language Drafting Request - 2019-21

Sent from my iPhone

Begin forwarded message:

Biennial Budget: 2019-21

Topic: False Claims Private Authority

Tracking Code: BB0242

SBO Team: AEJ

SBO Analyst: Schmidt, Michael
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Agency Acronym: 455

Agency Number: 455

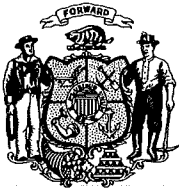
Priority: Medium

Intent:

Recreate private individual's authority to bring a qui tam claim against a person making a false claim for medical assistance and update so eligible with federal law incentives (i.e., Deficit Reduction Act of 2005, Pub.L. 109-171). See e.g., 2017 Assembly Bill 1021 and Wis. Stat. § 20.931 (2013-14).

Attachments: False

Please send completed drafts to SBOSatlanguage@spmail.enterprise.wistate.us



State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-1715/2
SWB:...

1/1/18

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

FOR 2019-2021 BUDGET -- NOT READY FOR INTRODUCTION

IN 2/8

save

no gen

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

Analysis by the Legislative Reference Bureau

HEALTH AND HUMAN SERVICES

MEDICAL ASSISTANCE

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 incorporate provisions enacted in the federal Deficit Reduction Act of 2005 and conform state law to the federal False Claims Act, including expanding provisions to facilitate qui tam actions and modifying the bases for liability to parallel the liability provisions under the federal False Claims Act. In addition to qui tam claims, DOJ has independent authority to bring a claim against a person for making a false claim for medical assistance. This bill modifies provisions relating to DOJ's authority to parallel the liability and penalty standards

the

the

relating to qui tam claims, specifically, applying the definition of the term “claim” and the forfeiture amounts provided under the federal False Claims Act.

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

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

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

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

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

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

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

17 **(2)** Except as provided in sub. (3), any person who does any of the following is
18 liable to this state for 3 times the amount of the damages that were sustained by the
19 state or would have been sustained by the state, whichever is greater, because of the

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

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

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

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

12 (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
14 2 nor more than 3 times the amount of the damages sustained by the state because
15 of the acts of the person, and shall not assess any forfeiture, if the court finds all of
16 the following:

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

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

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

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.

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.

****NOTE: This provision may require additional consideration in light of recent changes made to s. 803.09 in 2017 Wisconsin Act 369. Act 369 created s. 803.09 (2m) which provides that “[w]hen a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene as set forth under s. 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14.” Because par. (e) limits intervention, a case could give rise to issues with the intervention rights described under s. 803.09 (2m). One way to address any issue would be to add the same “except” language that this draft adds for s. 803.09 (1) and (2) (i.e., “[e]xcept as provided in s. 20.9315”). See SECTIONS 6 and 7 of this draft. I included those exceptions as they recreate the law as it existed prior to enactment of 2015 Wisconsin Act 55. However, I wanted to flag the provision with respect to s. 803.09 (2m), as it relates to the new language enacted in 2017 Wisconsin Act 369. ✓

a. f.

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.

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

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

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

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

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

10 4. Otherwise limiting the participation by the person in the prosecution of the
11 action or proceeding.

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

17 (8) Except as provided in sub. (7), if the state elects not to participate in an
18 action filed under sub. (5), the person bringing the action may prosecute the action.
19 If the attorney general so requests, the attorney general shall, at the state's expense,

1 be served with copies of all pleadings and deposition transcripts in the action. If the
2 person bringing the action initiates prosecution of the action, the court, without
3 limiting the status and rights of that person, may permit the state to intervene at a
4 later date upon showing by the state of good cause for the proposed intervention.

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

15 (10) The attorney general may pursue a claim relating to an alleged violation
16 of sub. (2) through an alternate remedy available to the state or any state agency,
17 including an administrative proceeding to assess a civil forfeiture. If the attorney
18 general elects any such alternate remedy, the attorney general shall serve timely
19 notice of his or her election upon the person bringing the action under sub. (5), and
20 that person has the same rights in the alternate venue as the person would have had
21 if the action had continued under sub. (5). Any finding of fact or conclusion of law
22 made by a court or by a state agency in the alternate venue that has become final is
23 conclusive upon all parties named in an action under sub. (5). For purposes of this
24 subsection, a finding or conclusion is final if it has been finally determined on appeal,

1 if all time for filing an appeal or petition for review with respect to the finding or
2 conclusion has expired, or if the finding or conclusion is not subject to judicial review.

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

9 (b) Except as provided in par. (e), if an action or claim is one in which the court
10 or other adjudicator finds to be based primarily upon disclosures of specific
11 information not provided by the person who brings an action under sub. (5) relating
12 to allegations or transactions specifically in a criminal, civil, or administrative
13 hearing, or in a legislative or administrative report, hearing, audit, or investigation,
14 or report made by the news media, the court or other adjudicator may award such
15 amount as it considers appropriate, but not more than 10 percent of the proceeds of
16 the action or settlement of the claim, depending upon the significance of the
17 information and the role of the person bringing the action in advancing the
18 prosecution of the action or claim.

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

24 (d) Except as provided in par. (e), if the state does not proceed with an action
25 or an alternate proceeding under sub. (10), the person bringing the action shall

1 receive an amount that the court decides is reasonable for collection of the civil
2 penalty and damages. The amount shall be not less than 25 percent and not more
3 than 30 percent of the proceeds of the action and shall be paid from the proceeds. In
4 addition, the person shall be paid his or her expenses, costs, and fees under par. (c).

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

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

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

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

1 (c) From the news media.

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

4 (14) Any employee, contractor, or agent who is discharged, demoted,
5 suspended, threatened, harassed, or in any other manner discriminated against in
6 the terms and conditions of employment because of lawful actions taken by the
7 employee, contractor, agent, or by others in furtherance of an action or claim filed
8 under this section or on behalf of the employee, contractor, or agent, including
9 investigation for, initiation of, testimony for, or assistance in an action or claim filed
10 or to be filed under sub. (5) is entitled to all necessary relief to make the employee,
11 contractor, or agent whole. Such relief shall in each case include reinstatement with
12 the same seniority status that the employee, contractor, or agent would have had but
13 for the discrimination, 2 times the amount of back pay, interest on the back pay at
14 the legal rate, and compensation for any special damages sustained as a result of the
15 discrimination, including costs and reasonable attorney fees. An employee,
16 contractor, or agent may bring an action to obtain the relief to which the employee,
17 contractor, or agent is entitled under this subsection within 3 years after the date the
18 retaliation occurred.

19 (15) A civil action may be brought based upon acts occurring prior to October
20 27, 2007, if the action is brought within the period specified in s. 893.9815.

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

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

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

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

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

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

17 49.485 (1) In this section, "claim" has the meaning given in s. 20.9315.

18 **SECTION 4.** 165.25 (11m) of the statutes is created to read:

19 165.25 (11m) **FALSE CLAIMS.** Diligently investigate possible violations of s.
20 20.9315, and, if the department determines that a person has committed an act that
21 is punishable under s. 20.9315, may bring a civil action against that person.

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

23 801.02 (1) ~~A~~ Except as provided in s. 20.9315 (5) (b), a civil action in which a
24 personal judgment is sought is commenced as to any defendant when a summons and
25 a complaint naming the person as defendant are filed with the court, provided service

1 of an authenticated copy of the summons and of the complaint is made upon the
2 defendant under this chapter within 90 days after filing.

3 **SECTION 6.** 803.09 (1) of the statutes is amended to read:

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

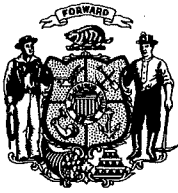
10 **SECTION 7.** 803.09 (2) of the statutes is amended to read:

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

21 **SECTION 8.** 804.01 (2) (intro.) of the statutes is amended to read:

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

25 **SECTION 9.** 805.04 (1) of the statutes is amended to read:



State of Wisconsin
2019 - 2020 LEGISLATURE

LRB-1715/PT
SWB:ah

Handwritten initials and notes: "skm", "1PZ", "RMR"

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

FOR 2019-2021 BUDGET -- NOT READY FOR INTRODUCTION

H: COURTS AND PROCEDURE
SUB: GENERAL COURTS AND PROCEDURE
sub-sub: Qui tam actions for false claims
Italicized: *Italicized*

IN 2/20
INSERT

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

Analysis by the Legislative Reference Bureau

HEALTH AND HUMAN SERVICES

MEDICAL ASSISTANCE

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. The bill also includes additional changes not included in the prior law to incorporate provisions enacted in the federal Deficit Reduction Act of 2005 and conform state law to the federal False Claims Act, including expanding provisions to facilitate qui tam actions and modifying the bases for liability to parallel the liability provisions under the federal False Claims Act. In addition to qui tam claims, DOJ has independent authority to bring a claim against a person for making a false claim for medical assistance. The bill modifies provisions relating to DOJ's authority to parallel the liability and penalty standards

Further to include qui tam actions
And expands
Qui tam actions
to include
claims
relating to
agencies
Municipalities

relating to medical assistance or other moneys from a state agency

relating to qui tam claims, specifically, applying the definition of the term “claim” and the forfeiture amounts provided under the federal False Claims Act.

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

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 *INS* *2-4* ← (b) “Claim” has the meaning given in 31 USC 3729 (b) (2) →

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

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

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

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

17 **(2)** Except as provided in sub. (3), any person who does any of the following is
18 liable to this state for 3 times the amount of the damages that were sustained by the
19 state or would have been sustained by the state, whichever is greater, because of the

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

3 (a) Knowingly presents or causes to be presented a false or fraudulent claim
4 for medical assistance, *or for other moneys from a state agency*

5 (b) Knowingly makes, uses, or causes to be made or used, a false record or
6 statement material to a false or fraudulent claim for medical assistance, *or for other moneys from a state agency*

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

INS
3-11

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

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

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

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

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

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.

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.

****NOTE: This provision may require additional consideration in light of recent changes made to s. 803.09 in 2017 Wisconsin Act 369. Act 369 created s. 803.09 (2m) which provides that “[w]hen a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene as set forth under s. 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14.” Because par. (e) limits intervention, a case could give rise to issues with the intervention rights described under s. 803.09 (2m). One way to address any issue would be to add the same “except” language that this draft adds for s. 803.09 (1) and (2) (i.e., “[e]xcept as provided in s. 20.9315”). See SECTIONS 6 and 7 of this draft. I included those exceptions as they recreate the law as it existed prior to enactment of 2015 Wisconsin Act 55. However, I wanted to flag the provision with respect to s. 803.09 (2m), as it relates to the new language enacted in 2017 Wisconsin Act 369.

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.

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

under s. 20.9315 ✓

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

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

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

17 (8) Except as provided in sub. (7), if the state elects not to participate in an
 18 action filed under sub. (5), the person bringing the action may prosecute the action.
 19 If the attorney general so requests, the attorney general shall, at the state's expense,

1 be served with copies of all pleadings and deposition transcripts in the action. If the
2 person bringing the action initiates prosecution of the action, the court, without
3 limiting the status and rights of that person, may permit the state to intervene at a
4 later date upon showing by the state of good cause for the proposed intervention.

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

15 (10) The attorney general may pursue a claim relating to an alleged violation
16 of sub. (2) through an alternate remedy available to the state or any state agency,
17 including an administrative proceeding to assess a civil forfeiture. If the attorney
18 general elects any such alternate remedy, the attorney general shall serve timely
19 notice of his or her election upon the person bringing the action under sub. (5), and
20 that person has the same rights in the alternate venue as the person would have had
21 if the action had continued under sub. (5). Any finding of fact or conclusion of law
22 made by a court or by a state agency in the alternate venue that has become final is
23 conclusive upon all parties named in an action under sub. (5). For purposes of this
24 subsection, a finding or conclusion is final if it has been finally determined on appeal,

1 if all time for filing an appeal or petition for review with respect to the finding or
2 conclusion has expired, or if the finding or conclusion is not subject to judicial review.

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

9 (b) Except as provided in par. (e), if an action or claim is one in which the court
10 or other adjudicator finds to be based primarily upon disclosures of specific
11 information not provided by the person who brings an action under sub. (5) relating
12 to allegations or transactions specifically in a criminal, civil, or administrative
13 hearing, or in a legislative or administrative report, hearing, audit, or investigation,
14 or report made by the news media, the court or other adjudicator may award such
15 amount as it considers appropriate, but not more than 10 percent of the proceeds of
16 the action or settlement of the claim, depending upon the significance of the
17 information and the role of the person bringing the action in advancing the
18 prosecution of the action or claim.

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

24 (d) Except as provided in par. (e), if the state does not proceed with an action
25 or an alternate proceeding under sub. (10), the person bringing the action shall

1 receive an amount that the court decides is reasonable for collection of the civil
2 penalty and damages. The amount shall be not less than 25 percent and not more
3 than 30 percent of the proceeds of the action and shall be paid from the proceeds. In
4 addition, the person shall be paid his or her expenses, costs, and fees under par. (c).

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

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

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

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

1 (c) From the news media.

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

4 (14) Any employee, contractor, or agent who is discharged, demoted,
5 suspended, threatened, harassed, or in any other manner discriminated against in
6 the terms and conditions of employment because of lawful actions taken by the
7 employee, contractor, agent, or by others in furtherance of an action or claim filed
8 under this section or on behalf of the employee, contractor, or agent, including
9 investigation for, initiation of, testimony for, or assistance in an action or claim filed
10 or to be filed under sub. (5) is entitled to all necessary relief to make the employee,
11 contractor, or agent whole. Such relief shall in each case include reinstatement with
12 the same seniority status that the employee, contractor, or agent would have had but
13 for the discrimination, 2 times the amount of back pay, interest on the back pay at
14 the legal rate, and compensation for any special damages sustained as a result of the
15 discrimination, including costs and reasonable attorney fees. An employee,
16 contractor, or agent may bring an action to obtain the relief to which the employee,
17 contractor, or agent is entitled under this subsection within 3 years after the date the
18 retaliation occurred.

19 (15) A civil action may be brought based upon acts occurring prior to October
20 27, 2007 if the action is brought within the period specified in s. 893.9815.
the effective date of this subsection ... [LRB inserts date]

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

9 (14) STET

1

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

3

8 (14) STET

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

6

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

20.9315 (18) (19) (B)

8

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

10

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

17

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

18

SECTION 4. 165.25 (11m) of the statutes is created to read:

19

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

22

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

23

801.02 (1) ~~A~~ Except as provided in s. 20.9315 (5) (b), a civil action in which a personal judgment is sought is commenced as to any defendant when a summons and a complaint naming the person as defendant are filed with the court, provided service

24

25

1 of an authenticated copy of the summons and of the complaint is made upon the
2 defendant under this chapter within 90 days after filing.

3 **SECTION 6.** 803.09 (1) of the statutes is amended to read:

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

10 **SECTION 7.** 803.09 (2) of the statutes is amended to read:

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

21 **SECTION 8.** 804.01 (2) (intro.) of the statutes is amended to read:

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

25 **SECTION 9.** 805.04 (1) of the statutes is amended to read:

INSERT 2-4

1 (b) "Claim" means any request or demand, whether under a contract or
2 otherwise, for money or property and whether the state has title to the money or
3 property, ^{or that} which is presented to an officer, employee, agent, or other representative
4 of the state or to a contractor, grantee, or other person if the money or property is to
5 be spent or used on the state's behalf or to advance a state program or interest, and
6 if the state provides any portion of the money or property which is requested or
7 demanded, or if the state will reimburse directly or indirectly such contractor,
8 grantee, or other person for any portion of the money or property which is requested
9 or demanded. "Claim" does not include requests or demands for money or property
10 that the state has paid to an individual as compensation for state employment or as
11 an income subsidy with no restriction on that individual's use of the money or
12 property.

(END INSERT 2-4)

INSERT 3-11

13 (dm) Knowingly makes, uses, or causes to be made or used ^g a false record or
14 statement material to an obligation to pay or transmit money or property to a state
15 agency, or knowingly conceals or knowingly and improperly avoids or decreases an
16 obligation to pay or transmit money or property to a state agency.

****NOTE: Is the term "moneys" broad enough with respect to the state agencies?
I was pondering whether "services" should be included. Please let me know if you would
like to make changes.

(END INSERT 3-11)



Per Mike:

- modify to include false claims beyond MA
- Any re state agencies