

Client Alert

North Carolina's New False Claims Act

On August 28, 2009, Governor Bev Perdue signed into law North Carolina's False Claims Act, House Bill 1135. This Act closely parallels the Federal False Claims Act but provides for prosecution and recovery at the State level.

Any business who receives money or property from the State of North Carolina or who submits claims for State money or property needs to be familiar with this law, including contractors on State-funded construction projects, Medicaid providers, and other businesses selling goods or services to the State. The Act exposes any person or business who submits fraudulent claims to treble damages, statutory penalties and civil investigative demands. In addition, the Act creates a new class of potential plaintiffs who can collect money if they successfully "blow the whistle" on fraud.

The New Law Covers All Who Submit "Claims" for State Money or Property or Who Wrongfully Retain Overpayments of State Funds

The law makes liable any person who *knowingly* does one of the following:

- submits a false or fraudulent claim;
- makes or uses a false record "material" to a false or fraudulent claim;
- delivers less than all State money or property he is obligated to deliver;
- purchases public property from a State official who cannot lawfully sell it;
- uses a false record "material" to an obligation to transmit money to the State;
- fails to return an overpayment or decreases an obligation to transmit money or property to the State; or
- creates or delivers a document certifying receipt for State property without knowing the information contained in it is true.



Jackson Moore
[BIO](#) | 919.821.6688
jmoore@smithlaw.com



Sean Timmons
[BIO](#) | 919.821.6709
stimmons@smithlaw.com



Pete Marino
[BIO](#) | 919.821.6607
pmarino@smithlaw.com

A “claim” includes any request for State money or property made to a State officer or employee. A “claim” also includes any request or demand to a private party for money that will be used to advance a State program or interest, if the State provides *any* portion of the money to the person receiving the request or demand or agrees to reimburse the recipient for *any* portion of the money or property requested or demanded. A claim for reimbursement under Medicaid, for example, would satisfy the definition of “claim” under the Act, as would an invoice seeking payment under a government-funded contract.

A person can be liable even if he does not intend to defraud the State. The Act’s definition of “knowingly” makes one liable if he actually knows he is submitting false information or acts “in deliberate ignorance” or “in reckless disregard” of the truth or falsity of the information provided.

A person violating the False Claims Act is liable for three times the State’s damages, plus the costs of bringing the civil action, plus a civil penalty of between \$5,500 and \$11,000 for each violation. A court may limit these damages to twice the State’s damages under certain circumstances, including if the violator fully cooperates with any investigation of the violation.

The False Claims Act Creates a New Class of Potential “Qui Tam” Plaintiff

The North Carolina Attorney General may bring a civil action against a violator of the False Claims Act. Also, a private individual, called a “qui tam”¹ plaintiff, may file suit on behalf of the State and receive a portion of any damages recovered.

The qui tam plaintiff must file her complaint with the court under seal and serve it along with all material information about the violation to the Attorney General’s office. The complaint will remain sealed for 120 days while the State investigates and decides whether to intervene and proceed with the action on its own behalf. The State can extend the 120-day period if “good cause” is shown to the Court. After the deadline, the complaint is unsealed and served on the defendants.

If the State does intervene and prevails, the qui tam plaintiff can remain a party to the action and generally will recover between 10% and 25% of the proceeds of the action or settlement, plus reasonable fees and costs, depending on her relative contributions to the prosecution and the source of most of the information in the action.

If the State does not intervene, the qui tam plaintiff may proceed with the action and ultimately recover between 25% and 30% of the damages if she prevails, plus reasonable attorneys’ fees and costs.

These recovery allowances are incentives for a potential plaintiff to keep watch for potential false claims in her own industry and to bring actions for any she encounters. However, recovery is limited for qui tam plaintiffs who orchestrate violations for which they subsequently bring actions under the new law. Also, a defendant who prevails can recover his reasonable attorneys’ fees from a qui tam plaintiff who brings an action that was “clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.” Also, public employees who had a duty to investigate fraud as part of their employment may not be qui tam plaintiffs.

The new law also provides whistleblower protection for employees who are discharged or otherwise discriminated against in their employment because of their lawful efforts to stop violations of the False

¹ The phrase “qui tam” is an abbreviation of a longer Latin phrase meaning “who sues on behalf of the King as well as for himself.”

Claims Act. Such an employee may bring an action against the employer for sufficient relief to “make the employee whole,” including reinstatement at the same seniority, two times the amount of back pay due and interest, and compensation for litigation costs and reasonable attorneys’ fees.

The Attorney General Has Broadened Power to Discover Information About False Claims

The False Claims Act allows the Attorney General to issue an administrative subpoena called a civil investigative demand (“CID”) requiring the recipient to provide the Attorney General with documents or information relevant to an investigation of a False Claims Act violation. The Attorney General can initiate a CID before initiating or intervening in an action under the Act. A CID may require a deposition, documents, answers to written questions, written admissions, or other information from a person believed to have such information. A person who refuses to comply with the CID or a subsequent court order may be subject to contempt of court, injunctive relief restraining the conduct that is the subject of the investigation, or any other relief the court deems proper.

The Medical Assistance Provider Fraud Rules Are Expanded

The False Claims Act amends the existing medical assistance provider fraud rules by making it clearly unlawful for providers to knowingly execute or attempt a scheme to defraud the State Medicaid Program or to falsely obtain money or property owned or controlled by the Program. Violation of these new rules is a Class H Felony, and conspiracy to do so is a Class I Felony. Finally, the Act also makes it unlawful to intentionally obstruct an investigation of a violation of these rules by knowingly falsifying Medicaid-related records. It is important to keep in mind that, again, because the Act closely approximates the Federal False Claims Act, violators of these laws are potentially subject to liability under both State and Federal laws.

For further information, please contact your Smith Anderson attorney or the authors.

Special thanks to Kate Y. Lavoie, Smith Anderson Associate, contributing writer.

**SMITH, ANDERSON, BLOUNT, DORSETT,
MITCHELL & JERNIGAN, L.L.P.**

Offices:

2500 Wachovia Capitol Center
Raleigh, North Carolina 27601

Mailing Address:

Post Office Box 2611
Raleigh, North Carolina 27602

Telephone: 919-821-1220

Facsimile: 919-821-6800

Email: Info@smithlaw.com **Website:** www.smithlaw.com

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