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SENATE BILL DRS35188-MC-16

Short Title: Improper Action Claims Act. (Public)

Sponsors: Senators Moffitt and Hanig (Primary Sponsors).

Referred to:

A BILL TO BE ENTITLED
AN ACT TO CREATE AN ACTION FOR IMPROPER ACTIONS FOR PUBLIC ENTITIES
ACT.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 1 of the General Statutes is amended by adding a new Article
to read:

"Article 51A.

"Improper Action Claims Act.

"§ 1-620. Improper actions claims.

(a) Short Title; Purpose. – This Article shall be known and may be cited as the "Improper
Action Claims Act." The purpose of this Article is to allow citizens of the State who become
aware of actions by a public entity that do not comply with legislation enacted by the State to
have a cause of action against the public entity to cure noncompliance and to provide remedies
in the form of damages.

(b) The following definitions apply in this Article:

- (1) Attorney General. – The Attorney General of North Carolina, or any deputy,
assistant, or associate attorney general.
- (2) Judiciary. – A justice or judge of the General Court of Justice or clerk of court.
- (3) Knowing or knowingly. – Whenever a person, with respect to information,
does any of the following:
 - a. Has actual knowledge of the information.
 - b. Acts in deliberate ignorance of the truth or falsity of the information.
 - c. Acts in reckless disregard of the truth or falsity of the information.Proof of specific intent to not comply with an obligation is not required.
- (4) Material. – Having a natural tendency to influence, or be capable of
influencing, a decision to comply or not comply with an obligation.
- (5) Obligation. – An established duty, whether or not fixed, arising from
regulation, statute, or other legally enacted or adopted directive.
- (6) Public entity. – Any board, commission, department, executive department,
officer, institution, and any political subdivision of the State.
- (7) Senior executive branch official. – The Governor, Lieutenant Governor,
member of the Council of State, or head of department as defined in
G.S. 143B-3.

(c) Claim of Inaction on an Obligation. – A public entity that knowingly fails to comply
with an obligation shall be liable for a civil penalty of not less than five thousand five hundred
dollars (\$5,500) and not more than eleven thousand dollars (\$11,000) and for the costs of a civil



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1 action to recover any of those penalties or damages. For purposes of this Article, a public entity
2 may be sued notwithstanding any statutory or governmental immunity that the public entity could
3 otherwise invoke in any civil action not arising under this Article.

4 (d) Responsibilities of the Attorney General. – The Attorney General diligently shall
5 investigate a violation under this section. If the Attorney General finds that a public entity has
6 violated or is violating this section, the Attorney General may bring a civil action under this
7 section against that public entity.

8 (e) Actions by Private Persons. – A person may bring a civil action for a violation of this
9 section for the person and for the State, as follows:

10 (1) The action shall be brought in the name of the State, and the person bringing
11 the action shall be referred to as the qui tam plaintiff. The action may be
12 dismissed only if the court and the Attorney General have given written
13 consent to the dismissal and the reasons for consenting.

14 (2) A copy of the complaint and written disclosure of substantially all material
15 evidence and information the person possesses shall be served on the Attorney
16 General pursuant to applicable rules of the North Carolina Rules of Civil
17 Procedure. The complaint shall be filed in camera, shall remain under seal for
18 at least 120 days, and shall not be served on the defendant public entity until
19 the court so orders. The State may elect to intervene and proceed with the
20 action within 120 days after it receives both the complaint and the material
21 evidence and information.

22 (3) The State may, for good cause shown, move the court for extensions of the
23 time during which the complaint remains under seal under subdivision (2) of
24 this subsection. Any such motions may be supported by affidavits or other
25 submissions in camera. The defendant public entity shall not be required to
26 respond to any complaint filed under this section until 30 days after the
27 complaint is unsealed and served upon the defendant public entity pursuant to
28 the North Carolina Rules of Civil Procedure.

29 (4) Before the expiration of the 120-day period or any extensions obtained under
30 subdivision (3) of this subsection, the State shall:

31 a. Proceed with the action, in which case the action shall be conducted
32 by the State; or

33 b. Notify the court that it declines to take over the action, in which case
34 the person bringing the action shall have the right to conduct the
35 action.

36 When a person brings an action under this subsection, no person other than the State may
37 intervene or bring a related action based on the facts underlying the pending action.

38 (f) Proceeds Retention. – The Attorney General may retain a portion of the damages
39 recovered out of the proceeds of the action or settlement under this section as reimbursement for
40 costs incurred by the Attorney General in investigating and bringing a civil action under this
41 section, including reasonable attorneys' fees and investigative costs. Retained funds shall be used
42 by the Attorney General to carry out the provisions of this Article.

43 (g) Rights of the Parties to Qui Tam Actions. –

44 (1) If the State proceeds with an action under this section, it shall have the primary
45 responsibility for prosecuting the action and shall not be bound by an act of
46 the qui tam plaintiff. The qui tam plaintiff shall have the right to continue as
47 a party to the action, subject to the limitations set forth in this subsection.

48 (2) The State may dismiss the action for good cause notwithstanding the
49 objections of the qui tam plaintiff if the qui tam plaintiff has been notified by
50 the State of the filing of the motion and the court has provided the qui tam
51 plaintiff with an opportunity for a hearing on the motion.

- (3) The State may settle the action with the defendant public entity, notwithstanding the objections of the qui tam plaintiff, if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances. Upon a showing of good cause, the hearing may be heard in camera.
- (4) Upon a showing by the State that the qui tam plaintiff's unrestricted participation during the course of the litigation would interfere with or unduly delay the State's prosecution of the case or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as any of the following:
- a. Limiting the number of witnesses the qui tam plaintiff may call.
 - b. Limiting the length of the testimony of those witnesses.
 - c. Limiting the qui tam plaintiff's cross-examination of witnesses.
 - d. Otherwise limiting the participation by the qui tam plaintiff in the litigation.
- (5) Upon a showing by the defendant public entity that the qui tam plaintiff's unrestricted participation during the course of the litigation would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the qui tam plaintiff in the litigation.
- (6) If the State elects not to proceed with the action, the qui tam plaintiff shall have the right to conduct the action. If the State so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts at the State's expense. When a qui tam plaintiff proceeds with the action, the court, without limiting the status and rights of the qui tam plaintiff, may permit the State to intervene at a later date upon a showing of good cause.
- (7) Whether or not the State proceeds with the action, upon a showing by the State that certain actions of discovery by the qui tam plaintiff would interfere with the State's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 120 days. Such a showing shall be conducted in camera. The court may extend the 120-day period upon a further showing in camera that the State has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigations or proceedings.
- (8) The State may elect to pursue its claim through any alternate remedy available to the State, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the qui tam plaintiff shall have the same rights in that proceeding as the qui tam plaintiff would have had if the action had continued under this section. Any finding of fact or conclusion of law made in the other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of this subsection, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the State, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.
- (h) Award to Qui Tam Plaintiff. –
- (1) Except as otherwise provided in this section, if the State proceeds with an action brought by a qui tam plaintiff under this section, the qui tam plaintiff shall receive at least fifteen percent (15%) but not more than twenty-five

percent (25%) of the proceeds of the action or settlement of the claim, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action. Any payment to a qui tam plaintiff under this section shall be made from the proceeds.

(2) The qui tam plaintiff also shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant public entity.

(3) If the State does not proceed with an action under this section, the qui tam plaintiff shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall not be less than twenty-five percent (25%) and not more than thirty percent (30%) of the proceeds of the action or settlement and shall be paid out of the proceeds. The qui tam plaintiff also shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant public entity.

(4) If the State does not proceed with the action and the qui tam plaintiff conducts the action, the court may award to the defendant public entity its reasonable attorneys' fees and expenses if the defendant public entity prevails in the action and the court finds that the claim of the qui tam plaintiff was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

"§ 1-621. General provisions.

(a) Certain Actions Barred. –

(1) No court shall have jurisdiction over an action brought under this Article against a member of the General Assembly, a member of the judiciary, or a senior executive branch official acting in their official capacity if the action is based on evidence or information known to the State when the action was brought.

(2) In no event may a person bring an action under G.S. 1-620 that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the State is already a party.

(3) Unless opposed by the State, the court shall dismiss an action or claim under G.S. 1-620 if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed by any of the following:

- a. A State criminal, civil, or administrative hearing in which the State or its agent is a party.
- b. A State legislative, Office of the State Auditor, or other State report, hearing, audit, or investigation.
- c. The news media.

This subsection shall not apply to any action brought by the Attorney General or when the person bringing the action is an original source of the information.

(4) For the purposes of this section, the term "original source" means an individual who meets one of the following descriptions:

- a. Prior to public disclosure under subdivision (3) of this subsection, the individual has voluntarily disclosed to the State the information on which allegations or transactions in a claim are based.
- b. The individual (i) has knowledge that is independent of, and materially adds to, the publicly disclosed allegations or transactions and (ii) has

voluntarily provided the information to the State before filing an action under G.S. 1-620.

(b) State Liability. – The State is not liable for expenses that a person incurs in bringing an action under this Article.

(c) Retaliation Action. – Any employee, contractor, or agent who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under this Article or other efforts to stop one or more violations of this Article shall be entitled to all relief necessary to make the employee, contractor, or agent whole. Such relief shall include reinstatement with the same seniority status the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action may be brought in North Carolina superior court for the relief provided in this section. A civil action under this section may not be brought more than three years after the date when the retaliation occurred.

"§ 1-622. Civil investigative demand.

(a) A civil investigative demand is an administrative subpoena. Whenever the Attorney General has reason to believe that a person has information or is in possession, custody, or control of any document or other object relevant to an investigation or that would lead to the discovery of relevant information in an investigation of a violation of G.S. 1-620, the Attorney General may issue in writing and cause to be served upon the person, before bringing or intervening or making an election in an action under G.S. 1-620, a civil investigative demand requiring the person to produce any documents or objects for their inspection and copying.

(b) The civil investigative demand shall comply with all of the following:

- (1) Be served upon the person in the manner required for service of process in civil actions and may be served by the Attorney General or investigator assigned to the North Carolina Department of Justice.
- (2) Describe the nature of the conduct constituting the violation under investigation.
- (3) Describe the class or classes of any documents or objects to be produced with sufficient definiteness to permit them to be fairly identified.
- (4) Prescribe a reasonable date and time at which the person shall produce any document or object.
- (5) Advise the person that objections to or reasons for not complying with the demand may be filed with the Attorney General on or before that date and time.
- (6) Designate a person to whom any document or object shall be produced.
- (7) Contain a copy of this subsection and subsection (c) of this section.

(c) The date within which any document or object must be produced shall be more than 30 days after the civil investigative demand has been served upon the person.

(d) A civil investigative demand may include an express demand for any product of discovery. A product of discovery includes the original or duplicate of any deposition, interrogatory, document, thing, examination, or admission, that is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature, and any digest, compilation, and index of any product of discovery. Whenever a civil investigative demand is an express demand for any product of discovery, a copy of the demand shall be served on the person from whom the discovery was obtained, and the Attorney General shall notify the person to whom the demand is issued of the date on which the copy was served. A demand for a product of discovery shall not be returned or returnable until 30 days after a copy of the demand has been served on the person from whom the discovery was obtained. Within 30 days after service of the

1 demand, the person from whom the discovery was obtained or the person on whom the demand
2 was served will serve on the Attorney General a copy of any protective order that prevents or
3 restrains disclosure of the product of discovery to the Attorney General. The Attorney General
4 may petition the court that issued the protective order to modify the order to allow compliance
5 with the demand. Disclosure of any product of discovery pursuant to any express demand does
6 not constitute a waiver of any right or privilege that the person making the disclosure may be
7 entitled to invoke to resist discovery of trial preparation materials.

8 (e) The production of documents and objects in response to a civil investigative demand
9 served under this section shall be made under a sworn certificate by a person having knowledge
10 of the facts and circumstances relating to the production and authorized to act on behalf of the
11 public entity. The certificate shall state that all of the documentary material required by the
12 demand and in the possession, custody, or control of the person to whom the demand is directed
13 has been produced and made available. Upon written agreement between the person served with
14 the civil investigative demand and the Attorney General, the person may substitute copies for
15 originals of all or any part of the documents requested.

16 (f) If a person objects to or otherwise fails to comply with a civil investigative demand
17 served upon the person under subsection (a) of this section, the Attorney General may file an
18 action in superior court for an order to enforce the demand. Venue for the action to enforce the
19 demand shall be in either Wake County or the county of the public entity. Notice of a hearing on
20 the action to enforce the demand and a copy of the action shall be served upon the person in the
21 same manner as prescribed in the Rules of Civil Procedure. If the court finds that the demand is
22 proper, that there is reasonable cause to believe that there may have been a violation of
23 G.S. 1-620, and that the information sought or document or object demanded is relevant to the
24 violation, the court shall order the person to comply with the demand, subject to modifications
25 the court may prescribe.

26 (g) If the person fails to comply with an order entered pursuant to subsection (f) of this
27 section, the court may do any of the following:

28 (1) Adjudge the person to be in contempt of court.

29 (2) Grant injunctive relief against the person to whom the demand is issued to
30 restrain the conduct which is the subject of the investigation.

31 (3) Grant any other relief as the court may deem proper.

32 (h) A petition for an order of the court to modify or set aside a civil investigative demand
33 issued under this section may be filed by any person who has received a civil investigative
34 demand or in the case of an express demand for any product of discovery, the person on whom
35 the discovery was obtained. The petition may be filed in superior court in either Wake County or
36 the county of the public entity, or, in the case of a petition to modify an express demand for any
37 product of discovery, the petition shall be filed in the court in which the proceeding was pending
38 when the product of discovery was obtained. Any petition under this subsection must be filed
39 within 30 days after the date of service of the civil investigative demand or before the return date
40 specified in the demand, whichever date is earlier, or within a longer period as may be prescribed
41 in writing by the investigator identified in the demand. The petition shall specify each ground
42 upon which the petitioner relies in seeking relief and may be based upon any failure to comply
43 with the provisions of this section or upon any constitutional or other legal right or privilege of
44 the person. During the pendency of the petition in the court, the court may stay, as it deems
45 proper, the running of the time allowed for compliance with the demand, in whole or in part,
46 except that the person filing the petition shall comply with any portions of the demand not sought
47 to be modified or set aside.

48 (i) Any documents and objects produced pursuant to this section may be used in
49 connection with any civil action brought under G.S. 1-620 and for any use that is consistent with
50 the law, and the regulations and policies of the Attorney General, including use in connection
51 with internal Attorney General memoranda and reports; communications between the Attorney

General and a federal, State, or local governmental agency, or a contractor of a federal, State, or local governmental agency, undertaken in furtherance of an Attorney General investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding applications, motions, memoranda, and briefs submitted to a court or other tribunal; and communications with government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators, and mediators, concerning an investigation, case, or proceeding. Any documents and objects obtained by the Attorney General under this section may be shared with any qui tam relator if the Attorney General determines it is necessary as part of any improper actions act investigation. Before using or sharing documents and objects obtained by the Attorney General under this section with any person, the Attorney General may require that the person agree to an order of the court protecting the documents or objects, or any information contained in the documents or objects, from disclosure by that person. In the case of documents or objects the producing party has designated as a trade secret or otherwise confidential, the Attorney General shall either (i) require that the person with whom documents or objects are shared be prohibited from disclosing the documents or objects, or any information contained in the documents or objects, or (ii) petition the court for an order directing the producing party to either appear and support the designation or withdraw the designation.

(j) The Attorney General may designate an employee of the North Carolina Department of Justice to serve as a custodian of documents and objects.

(k) Except as otherwise provided in this section, no documents or objects, or copies thereof, while in the possession of the North Carolina Department of Justice, shall be available for examination by any person other than an employee of the North Carolina Department of Justice. The prohibition in the preceding sentence on the availability of documents or objects shall not apply if consent is given by the person who produced the documents or objects, or, in the case of any product of discovery produced pursuant to an express demand, consent is given by the person from whom the discovery was obtained, or prevent disclosure to any other federal or State agency for use by that agency in furtherance of its statutory responsibilities upon application made by the Attorney General to the superior court showing substantial need for the use of the documents or objects by any agency in furtherance of its statutory responsibilities.

(l) While in the possession of the custodian and under reasonable terms and conditions as the Attorney General shall prescribe, documents or objects shall be available for examination by the person who produced the documents or objects, or by a representative of that person authorized by that person to examine the documents or objects.

(m) If any documents or objects have been produced by any person in the course of any investigation pursuant to a civil investigative demand under this section, and any case or proceeding before any court arising out of the investigation, or any proceeding before any agency involving the documents or objects, has been completed, or no case or proceeding in which the documents or objects may be used has been commenced within a reasonable time after completion of the investigation, the custodian shall, upon written request of the person who produced the documents or objects, return to the person any documents or objects that have not passed into the control of any court or agency.

(n) The North Carolina Rules of Civil Procedure shall apply to this section to the extent that the rules are not inconsistent with the provisions of this section.

"§ 1-623. Improper actions procedure.

(a) Statute of Limitations. – A civil action under G.S. 1-620 may not be brought (i) more than six years after the date on which the violation of G.S. 1-620 was committed or (ii) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the public entity or official of the public entity charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(b) If the Attorney General elects to intervene and proceed with an action brought pursuant to G.S. 1-620, the State may file its own complaint or amend the complaint of a person who has brought the action to clarify or add detail to the claims with respect to which the State is intervening and to add any additional claims with respect to which the State contends it is entitled to relief. For statute of limitations purposes, any such State pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the State arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(c) Burden of Proof. – In any action brought under G.S. 1-620, the State or the qui tam plaintiff shall be required to prove all essential elements of the cause of action by a preponderance of the evidence. For purposes of damages under this Article, a plaintiff that shows malfeasance or nonfeasance by a public entity in the performance of an obligation is entitled to a presumption that the element of actual damages has been met.

(d) Estoppel. – Notwithstanding any other provision of law, a final judgment rendered in favor of the State in a proceeding charging malfeasance or nonfeasance by a public entity, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant public entity from denying the essential elements of the offense in any action that involves the same transaction as in the criminal proceeding and which is brought under G.S. 1-620.

(e) Venue. – Venue for any action brought pursuant to G.S. 1-620 shall be in either Wake County or in any county of the public entity.

(f) Service on Federal, State, or Local Authorities. – With respect to the United States or any State or local government that is named as a co-plaintiff in an action brought under G.S. 1-620, a seal on the action ordered by the court shall not preclude the State or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of the co-plaintiff government to investigate and prosecute such actions on behalf of that co-plaintiff government, except that the seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

"§ 1-624. Remedies under other laws; severability of provisions; liberality of legislative construction; reporting; rules.

(a) Remedies Under Other Laws. – The provisions of this Article are not exclusive, and the remedies provided for in this Article shall be in addition to any other remedies provided for in any other law or available under common law. No criminal or administrative action need be brought against any person as a condition for establishing civil liability under this section.

(b) If any provision of this Article or the application of this Article to any person or circumstance is held to be unconstitutional, the remainder of this Article and the application of the provision to other persons or circumstances shall not be affected by that holding.

(c) In reporting on the terms and disbursements set forth in any settlement agreement or final order or judgment in a case filed under this Article as required by G.S. 114-2.5, the report shall include the percentage of the proceeds and the amount paid to any qui tam plaintiff under G.S. 1-620.

(d) On or before February 1 of each year, the Attorney General shall submit to the Joint Legislative Commission on Governmental Operations and the chairs of the Appropriations Subcommittees on Justice and Public Safety of the House of Representatives and the Senate a report on the number of qui tam cases under this Article pending in the State, the number of qui tam cases under this Article that were settled, the number of qui tam cases in which judgment was entered, and the amount of proceeds paid to qui tam plaintiffs during the previous calendar year.

1 (e) The Attorney General may adopt rules necessary to carry out the purposes set forth
2 in this Article."

3 **SECTION 2.** This act is effective when it becomes law and applies to obligations
4 existing on or after that date.