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HOUSE BILL 770

48TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2007

INTRODUCED BY

Joseph Cervantes

FOR THE COURTS, CORRECTIONS AND JUSTICE COMMITTEE

AN ACT

RELATING TO CIVIL ACTIONS; ENACTING THE FRAUD AGAINST TAXPAYERS
ACT; CREATING A PRIVATE CIVIL ACTION ON BEHALF OF THE STATE
AGAINST A PERSON WHO MAKES A FALSE CLAIM FOR PAYMENT BY THE
STATE; PROVIDING FOR A CIVIL ACTION BY A STATE AGENCY;
PROVIDING FOR INTERVENTION BY A STATE AGENCY; PROVIDING FOR QUI
TAM AWARDS; PROHIBITING RETALIATION BY EMPLOYERS; PROVIDING
PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Fraud Against Taxpayers Act".

Section 2. DEFINITIONS.--As used in the Fraud Against
Taxpayers Act:

A. "claim" means a request or demand for money,
property or services when all or a portion of the money,

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1 property or services requested or demanded issues from or is
2 provided by a state agency;

3 B. "employer" includes an individual, corporation,
4 firm, association, business, partnership, organization, trust
5 and the state and any of its agencies, institutions or
6 political subdivisions;

7 C. "knowingly" means that a person, with respect to
8 information, acts:

9 (1) with actual knowledge of the truth or
10 falsity of the information;

11 (2) in deliberate ignorance of the truth or
12 falsity of the information; or

13 (3) in reckless disregard of the truth or
14 falsity of the information;

15 D. "person" means an individual, corporation, firm,
16 association, organization, trust, business, partnership,
17 limited liability company, joint venture or any legal or
18 commercial entity; and

19 E. "state agency" means the state of New Mexico or
20 any of its branches, agencies, departments, boards,
21 commissions, officers, institutions or instrumentalities,
22 including the New Mexico finance authority, the New Mexico
23 mortgage finance authority and the New Mexico lottery
24 authority, to which a false claim is made.

25 Section 3. FALSE CLAIMS--LIABILITY--PENALTIES--

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EXCEPTION.--

A. A person shall not:

(1) knowingly present, or cause to be presented, to an employee, officer or agent of the state or to a contractor, grantee or other recipient of state funds a false or fraudulent claim for payment or approval;

(2) knowingly make or use, or cause to be made or used, a false record or statement to obtain approval or payment on a false or fraudulent claim;

(3) conspire to defraud the state by obtaining approval or payment on a false claim;

(4) when in possession, custody or control of property or money used or to be used by the state, knowingly deliver or cause to be delivered less property or money than the amount indicated on a certificate or receipt;

(5) when authorized to make or deliver a document certifying receipt of property used or to be used by the state, knowingly make or deliver a receipt that falsely represents the property used or to be used;

(6) knowingly buy, or receive as a pledge of an obligation or debt, public property from any person that may not lawfully sell or pledge the property;

(7) knowingly make or use, or cause to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to

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1 the state; or

2 (8) as a beneficiary of an inadvertent
3 submission of a false claim and having subsequently discovered
4 the falsity of the claim, fail to disclose the false claim to
5 the state agency within a reasonable time after discovery.

6 B. Proof of specific intent to defraud is not
7 required for a violation of Subsection A of this section.

8 C. A person who violates Subsection A of this
9 section shall be liable for:

10 (1) three times the amount of damages
11 sustained by a state agency because of the violation;

12 (2) a civil penalty of not less than five
13 thousand dollars (\$5,000) and not more than ten thousand
14 dollars (\$10,000) for each violation;

15 (3) the costs of a civil action brought to
16 recover damages or penalties; and

17 (4) reasonable attorney fees, including fees
18 for state agency counsel.

19 D. A court may assess two times the amount of
20 damages sustained by a state agency and no civil penalty if the
21 court finds all of the following:

22 (1) the person committing the violation
23 furnished the state agency with all information known to that
24 person about the violation within thirty days after the date on
25 which the person first obtained the information;

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1 (2) at the time that the person furnished the
2 state agency with information about the violation, a criminal
3 prosecution, civil action or administrative action had not been
4 commenced with respect to the violation, and the person did not
5 have actual knowledge of the existence of an investigation into
6 the violation; and

7 (3) the person fully cooperated with any
8 investigation by the state agency.

9 E. This section does not apply to claims, records
10 or statements made pursuant to the provisions of Chapter 7 NMSA
11 1978.

12 Section 4. INVESTIGATION BY A STATE AGENCY--DELEGATION--
13 CIVIL ACTION.--

14 A. A state agency shall diligently investigate
15 suspected violations of Section 3 of the Fraud Against
16 Taxpayers Act, and if the state agency finds that a person has
17 violated or is violating that section, the state agency may
18 bring a civil action against that person pursuant to the Fraud
19 Against Taxpayers Act.

20 B. A state agency may in appropriate cases delegate
21 the authority to investigate or to bring a civil action to the
22 attorney general, and when this occurs, the attorney general
23 shall have every power conferred upon the state agency pursuant
24 to the Fraud Against Taxpayers Act.

25 Section 5. CIVIL ACTION BY QUI TAM PLAINTIFF--STATE

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1 AGENCY MAY INTERVENE.--

2 A. A person may bring a civil action for a
3 violation of Section 3 of the Fraud Against Taxpayers Act on
4 behalf of the person and the state. The action shall be
5 brought in the name of the state. The person bringing the
6 action shall be referred to as the qui tam plaintiff. Once
7 filed, the action may be dismissed only with the written
8 consent of the court, taking into account the best interest of
9 the parties involved and the public purposes behind the Fraud
10 Against Taxpayers Act.

11 B. A complaint filed by a qui tam plaintiff shall
12 be filed in camera in district court and shall remain under
13 seal for at least sixty days. No service shall be made on a
14 defendant and no response is required from a defendant until
15 the seal has been lifted and the complaint served pursuant to
16 the rules of civil procedure.

17 C. On the same day as the complaint is filed, the
18 qui tam plaintiff shall serve the state agency to which the
19 false claim was made with a copy of the complaint and written
20 disclosure of substantially all material evidence and
21 information the plaintiff possesses. The state agency may
22 intervene and proceed with the action within sixty days after
23 receiving the complaint and the material evidence and
24 information. Upon a showing of good cause and reasonable
25 diligence in the state agency's investigation, the state agency

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1 may move the court for an extension of time during which the
2 complaint shall remain under seal.

3 D. Before the expiration of the sixty-day period or
4 any extensions of time granted by the court, the state agency
5 shall notify the court that it:

6 (1) intends to intervene and proceed with the
7 action; in which case, the seal shall be lifted and the action
8 shall be conducted by the state agency; or

9 (2) declines to take over the action; in which
10 case, the seal shall be lifted and the qui tam plaintiff shall
11 proceed with the action.

12 E. When a person brings an action pursuant to this
13 section, no person other than the state agency to which the
14 false claim was made may intervene or bring a related action
15 based on the facts underlying the pending action.

16 Section 6. RIGHTS OF THE QUI TAM PLAINTIFF AND THE
17 STATE.--

18 A. If a state agency proceeds with the action, the
19 state agency shall have the primary responsibility of
20 prosecuting the action and shall not be bound by an act of the
21 qui tam plaintiff. The qui tam plaintiff shall have the right
22 to continue as a party to the action, subject to the
23 limitations of this section.

24 B. The state agency may seek to dismiss the action
25 for good cause notwithstanding the objections of the qui tam

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1 plaintiff if the qui tam plaintiff has been notified of the
2 filing of the motion and the court has provided the qui tam
3 plaintiff with an opportunity to oppose the motion and to
4 present evidence at a hearing.

5 C. The state agency may settle the action with the
6 defendant notwithstanding objections by the qui tam plaintiff
7 if the court determines, after a hearing providing the qui tam
8 plaintiff an opportunity to present evidence, that the proposed
9 settlement is fair, adequate and reasonable under all of the
10 circumstances.

11 D. Upon a showing by the state agency that
12 unrestricted participation during the course of the litigation
13 by the qui tam plaintiff would interfere with or unduly delay
14 the state agency's prosecution of the case, or would be
15 repetitious, irrelevant or for purposes of harassment, the
16 court may, in its discretion, impose limitations on the qui tam
17 plaintiff's participation, such as:

18 (1) limiting the number of witnesses the qui
19 tam plaintiff may call;

20 (2) limiting the length of testimony of such
21 witnesses;

22 (3) limiting the qui tam plaintiff's cross
23 examination of witnesses; or

24 (4) otherwise limiting the qui tam plaintiff's
25 participation in the litigation.

1 E. Upon a showing by a defendant that unrestricted
2 participation during the course of litigation by the qui tam
3 plaintiff would be for purposes of harassment or would cause
4 the defendant undue burden or unnecessary expense, the court
5 may limit the participation by the qui tam plaintiff in the
6 litigation.

7 F. If a state agency elects not to proceed with the
8 action, the qui tam plaintiff shall have the right to conduct
9 the action. If the state agency so requests, the qui tam
10 plaintiff shall serve the state agency with copies of all
11 pleadings filed and all deposition transcripts in the case, at
12 the state agency's expense. When the qui tam plaintiff
13 proceeds with the action, the court, without limiting the
14 status and rights of the qui tam plaintiff, may permit the
15 state agency to intervene at a later date upon a showing of
16 good cause.

17 G. Whether or not a state agency proceeds with the
18 action, upon a showing by the state agency that certain actions
19 of discovery by the qui tam plaintiff would interfere with the
20 state's investigation or prosecution of a criminal or civil
21 matter arising out of the same facts, the court may stay such
22 discovery for a period of not more than sixty days. The
23 showing by the state agency shall be conducted in camera. The
24 court may extend the sixty-day period upon a further showing in
25 camera that the state has pursued the criminal or civil

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1 investigation or proceeding with reasonable diligence and any
2 proposed discovery in the civil action will interfere with the
3 ongoing criminal or civil investigation or proceeding.

4 Section 7. AWARDS TO QUI TAM PLAINTIFF AND THE STATE.--

5 A. Except as otherwise provided in this section, if
6 a state agency proceeds with an action brought by a qui tam
7 plaintiff and the state prevails in the action, the qui tam
8 plaintiff shall receive:

9 (1) at least fifteen percent but not more than
10 twenty-five percent of the proceeds of the action or
11 settlement, depending upon the extent to which the qui tam
12 plaintiff substantially contributed to the prosecution of the
13 action; or

14 (2) no more than ten percent of the proceeds
15 of the action or settlement if the court finds that the action
16 was based primarily on disclosures of specific information, not
17 provided by the qui tam plaintiff, relating to allegations or
18 transactions in a criminal, civil, administrative or
19 legislative hearing, proceeding, report, audit or investigation
20 or from the news media, taking into account the significance of
21 the information and the role of the qui tam plaintiff in
22 advancing the case to litigation.

23 B. If a state agency does not proceed with an
24 action brought by a qui tam plaintiff and the state prevails in
25 the action, the qui tam plaintiff shall receive an amount that

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1 is not less than twenty-five percent or more than thirty
2 percent of the proceeds of the action or settlement, as the
3 court deems reasonable for collecting the civil penalty and
4 damages.

5 C. Whether or not a state agency proceeds with an
6 action brought by a qui tam plaintiff:

7 (1) if the court finds that the action was
8 brought by a person that planned or initiated the violation of
9 Section 3 of the Fraud Against Taxpayers Act upon which the
10 action was based, the court may reduce the share of the
11 proceeds that the person would otherwise receive under
12 Subsection A or B of this section, taking into account the role
13 of the person as the qui tam plaintiff in advancing the case to
14 litigation and any relevant circumstances pertaining to the
15 violation; or

16 (2) if the person bringing the action is
17 convicted of criminal conduct arising from that person's role
18 in the violation of Section 3 of the Fraud Against Taxpayers
19 Act upon which the action was based, that person shall be
20 dismissed from the civil action and shall not receive a share
21 of the proceeds. The dismissal shall not prejudice the right
22 of the state agency to continue the action.

23 D. Any award to a qui tam plaintiff shall be paid
24 out of the proceeds of the action or settlement, if any. The
25 qui tam plaintiff shall also receive an amount for reasonable

1 expenses necessarily incurred in the action plus reasonable
2 attorney fees; provided that if a qui tam plaintiff receives a
3 reduced award pursuant to Paragraph (1) of Subsection C of this
4 section, the court shall also reduce or not award attorney fees
5 and costs.

6 E. The state is entitled to all proceeds collected
7 in an action or settlement not awarded to a qui tam plaintiff.
8 The state is also entitled to reasonable expenses incurred in
9 the action plus reasonable attorney fees, including fees for
10 state agency counsel. Proceeds and penalties collected by the
11 state shall be deposited as follows:

12 (1) proceeds in the amount of the false claim
13 and attorney fees and costs shall be returned to the fund or
14 funds from which the money, property or services came;

15 (2) civil penalties shall be deposited in the
16 current school fund pursuant to Article 12, Section 4 of the
17 constitution of New Mexico; and

18 (3) all remaining proceeds shall be deposited
19 in the general fund.

20 Section 8. AWARD OF ATTORNEY FEES AND COSTS TO
21 DEFENDANT.--If a state agency does not proceed with the action
22 and the qui tam plaintiff conducts the action, the court may
23 award a defendant reasonable attorney fees and costs if the
24 defendant prevails and the court finds the action clearly
25 frivolous, clearly vexatious or brought primarily for purposes

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1 of harassment.

2 Section 9. CERTAIN ACTIONS BARRED.--

3 A. No court shall have jurisdiction over an action
4 brought pursuant to Section 5 of the Fraud Against Taxpayers
5 Act by a present or former employee of a state agency unless
6 the employee, during employment with the agency and in good
7 faith, exhausted existing internal procedures for reporting
8 false claims and the agency failed to act on the information
9 provided within a reasonable period of time.

10 B. No court shall have jurisdiction over an action
11 brought pursuant to Section 5 of the Fraud Against Taxpayers
12 Act against an elected or appointed state official, a member of
13 the state legislature or a member of the judiciary if the
14 action is based on evidence or information known to the state
15 agency or to the attorney general when the action was brought.

16 C. No court shall have jurisdiction over an action
17 brought pursuant to Section 5 of the Fraud Against Taxpayers
18 Act when that action is based on allegations or transactions
19 that are the subject of a criminal, civil or administrative
20 proceeding in which the state is a party.

21 D. Upon motion of a state agency, a court may, in
22 its discretion, dismiss an action brought pursuant to Section 5
23 of the Fraud Against Taxpayers Act if the elements of the
24 alleged false claim have been publicly disclosed in the news
25 media or in a publicly disseminated governmental report at the

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1 time the complaint is filed.

2 Section 10. STATE NOT LIABLE.--A state agency is not
3 liable for expenses or fees that a qui tam plaintiff may incur
4 in investigating or bringing an action pursuant to the Fraud
5 Against Taxpayers Act.

6 Section 11. EMPLOYER INTERFERENCE WITH EMPLOYEE
7 DISCLOSURE--PRIVATE ACTION FOR RETALIATION.--

8 A. An employer shall not make, adopt or enforce a
9 rule, regulation or policy preventing an employee from
10 disclosing information to a government or law enforcement
11 agency or from acting in furtherance of a fraud against
12 taxpayers action, including investigating, initiating,
13 testifying or assisting in an action filed or to be filed
14 pursuant to the Fraud Against Taxpayers Act.

15 B. An employer shall not discharge, demote,
16 suspend, threaten, harass, deny promotion to or in any other
17 manner discriminate against an employee in the terms and
18 conditions of employment because of the lawful acts of the
19 employee on behalf of the employee or others in disclosing
20 information to a government or law enforcement agency or in
21 furthering a fraud against taxpayers action, including
22 investigating, initiating, testifying or assisting in an action
23 filed or to be filed pursuant to the Fraud Against Taxpayers
24 Act.

25 C. An employer that violates Subsection B of this

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1 section shall be liable to the employee for all relief
2 necessary to make the employee whole, including reinstatement
3 with the same seniority status that the employee would have had
4 but for the violation, two times the amount of back pay with
5 interest on the back pay, compensation for any special damage
6 sustained as a result of the violation and, if appropriate,
7 punitive damages. In addition, an employer shall be required
8 to pay the litigation costs and reasonable attorney fees of the
9 employee. An employee may bring an action pursuant to this
10 section in any court of competent jurisdiction.

11 Section 12. LIMITATION OF ACTIONS--ESTOPPEL--STANDARD OF
12 PROOF.--

13 A. A civil action pursuant to the Fraud Against
14 Taxpayers Act shall not be brought more than three years after
15 the date when facts material to the right of action are known
16 or reasonably should have been known, and in no event shall
17 such an action be brought more than ten years after the date on
18 which the violation was committed.

19 B. Notwithstanding any other provision of law, a
20 final judgment rendered in a criminal proceeding charging fraud
21 or false statement, whether upon a guilty verdict after trial
22 or upon a plea of guilty or nolo contendere, shall estop the
23 defendant from denying the essential elements of a fraud
24 against taxpayers action where the criminal proceeding concerns
25 the same transaction that is the subject of the fraud against

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1 taxpayers action.

2 C. In an action brought pursuant to the Fraud
3 Against Taxpayers Act, the state agency or the qui tam
4 plaintiff shall be required to prove all essential elements of
5 the cause of action, including damages, by a preponderance of
6 the evidence.

7 Section 13. JOINT AND SEVERAL LIABILITY.--Liability shall
8 be joint and several for any act committed by two or more
9 persons in violation of the Fraud Against Taxpayers Act.

10 Section 14. REMEDY NOT EXCLUSIVE.--The remedies provided
11 for in the Fraud Against Taxpayers Act are not exclusive and
12 shall be in addition to any other remedies provided for in any
13 other law or available under common law.

14 Section 15. SEVERABILITY.--If any part or application of
15 this act is held invalid, the remainder of the act and its
16 application to other persons or situations shall not be
17 affected.

18 Section 16. EFFECTIVE DATE.--The effective date of the
19 provisions of this act is July 1, 2007.