

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE PUBLIC AFFAIRS COMMITTEE SUBSTITUTE FOR
SENATE BILL 208

52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015

AN ACT

RELATING TO FRAUD AGAINST TAXPAYERS; CLARIFYING THAT THE FRAUD
AGAINST TAXPAYERS ACT APPLIES TO POLITICAL SUBDIVISIONS AND
CHARTER SCHOOLS AS WELL AS THE STATE.

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

SECTION 1. Section 44-9-2 NMSA 1978 (being Laws 2007,
Chapter 40, Section 2) is amended to read:

"44-9-2. 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,
property or services requested or demanded issues from or is
provided or reimbursed by the state or a political subdivision;

B. "employer" includes an individual, corporation,
firm, association, business, partnership, organization, trust,

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underscored material = new
[bracketed material] = delete

1 charter school and the state and any of its agencies,
2 institutions or political subdivisions;

3 C. "knowingly" means that a person, with respect to
4 information, acts:

5 (1) with actual knowledge of the truth or
6 falsity of the information;

7 (2) in deliberate ignorance of the truth or
8 falsity of the information; or

9 (3) in reckless disregard of the truth or
10 falsity of the information;

11 D. "person" means an individual, corporation, firm,
12 association, organization, trust, business, partnership,
13 limited liability company, joint venture or any legal or
14 commercial entity; ~~and~~

15 E. "political subdivision" means a political
16 subdivision of the state or a charter school; and

17 ~~[E.]~~ F. "state" means the state of New Mexico or
18 any of its branches, agencies, departments, boards,
19 commissions, officers, institutions or instrumentalities,
20 including the New Mexico finance authority, the New Mexico
21 mortgage finance authority and the New Mexico lottery
22 authority."

23 SECTION 2. Section 44-9-3 NMSA 1978 (being Laws 2007,
24 Chapter 40, Section 3) is amended to read:

25 "44-9-3. FALSE CLAIMS--LIABILITY--PENALTIES--EXCEPTION.--

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1 A. A person shall not:

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

7 (2) knowingly make or use, or cause to be made
8 or used, a false, misleading or fraudulent record or statement
9 to obtain or support the approval of or the payment on a false
10 or fraudulent claim;

11 (3) conspire to defraud the state or a
12 political subdivision by obtaining approval or payment on a
13 false or fraudulent claim;

14 (4) conspire to make, use or cause to be made
15 or used, a false, misleading or fraudulent record or statement
16 to conceal, avoid or decrease an obligation to pay or transmit
17 money or property to the state or a political subdivision;

18 (5) when in possession, custody or control of
19 property or money used or to be used by the state or a
20 political subdivision, knowingly deliver or cause to be
21 delivered less property or money than the amount indicated on a
22 certificate or receipt;

23 (6) when authorized to make or deliver a
24 document certifying receipt of property used or to be used by
25 the state or a political subdivision, knowingly make or deliver

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1 a receipt that falsely represents a material characteristic of
2 the property;

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

6 (8) knowingly make or use, or cause to be made
7 or used, a false, misleading or fraudulent record or statement
8 to conceal, avoid or decrease an obligation to pay or transmit
9 money or property to the state or a political subdivision; or

10 (9) as a beneficiary of an inadvertent
11 submission of a false claim and having subsequently discovered
12 the falsity of the claim, fail to disclose the false claim to
13 the state or political subdivision within a reasonable time
14 after discovery.

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

17 C. A person who violates Subsection A of this
18 section shall be liable for:

19 (1) three times the amount of damages
20 sustained by the state or political subdivision because of the
21 violation;

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

25 (3) the costs of a civil action brought to

1 recover damages or penalties; and

2 (4) reasonable attorney fees, including the
3 fees of the attorney general, [~~or~~] state agency or political
4 subdivision counsel.

5 D. A court may assess not less than two times the
6 amount of damages sustained by the state or a political
7 subdivision if the court finds all of the following:

8 (1) the person committing the violation
9 furnished the attorney general or political subdivision with
10 all information known to that person about the violation within
11 thirty days after the date on which the person first obtained
12 the information;

13 (2) at the time that the person furnished the
14 attorney general or political subdivision with information
15 about the violation, a criminal prosecution, civil action or
16 administrative action had not been commenced with respect to
17 the violation, and the person did not have actual knowledge of
18 the existence of an investigation into the violation; and

19 (3) the person fully cooperated with any
20 investigation by the attorney general or political subdivision.

21 E. This section does not apply to claims, records
22 or statements made pursuant to the provisions of Chapter 7 NMSA
23 1978."

24 **SECTION 3.** Section 44-9-4 NMSA 1978 (being Laws 2007,
25 Chapter 40, Section 4) is amended to read:

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1 "44-9-4. INVESTIGATION BY THE ATTORNEY GENERAL--
2 DELEGATION--CIVIL ACTION.--

3 A. The attorney general shall diligently
4 investigate suspected violations of Section [~~3 of the Fraud~~
5 ~~Against Taxpayers Act]~~ 44-9-3 NMSA 1978, and if the attorney
6 general finds that a person has violated or is violating that
7 section, the attorney general may bring a civil action against
8 that person pursuant to the Fraud Against Taxpayers Act.

9 B. The attorney general may in appropriate cases
10 delegate the authority to investigate or to bring a civil
11 action to the state agency or political subdivision to which a
12 false claim was made, and when this occurs, the state agency or
13 political subdivision shall have every power conferred upon the
14 attorney general pursuant to the Fraud Against Taxpayers Act.
15 If the attorney general has delegated authority to a state
16 agency or political subdivision, all references to the attorney
17 general in the Fraud Against Taxpayers Act shall apply to the
18 delegee."

19 SECTION 4. Section 44-9-5 NMSA 1978 (being Laws 2007,
20 Chapter 40, Section 5) is amended to read:

21 "44-9-5. CIVIL ACTION BY QUI TAM PLAINTIFF--STATE OR
22 POLITICAL SUBDIVISION MAY INTERVENE.--

23 A. A person may bring a civil action for a
24 violation of Section [~~3 of the Fraud Against Taxpayers Act]~~
25 44-9-3 NMSA 1978 on behalf of the person and the state or

1 political subdivision. The action shall be brought in the name
2 of the state or political subdivision. The person bringing the
3 action shall be referred to as the qui tam plaintiff. Once
4 filed, the action may be dismissed only with the written
5 consent of the court, taking into account the best interest of
6 the parties involved and the public purposes behind the Fraud
7 Against Taxpayers Act.

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

14 C. On the same day as the complaint is filed, the
15 qui tam plaintiff shall serve the attorney general, and the
16 political subdivision, if applicable, with a copy of the
17 complaint and written disclosure of substantially all material
18 evidence and information the qui tam plaintiff possesses. The
19 attorney general on behalf of the state or the political
20 subdivision, or the political subdivision on its own behalf,
21 may intervene and proceed with the action within sixty days
22 after receiving the complaint and the material evidence and
23 information. Upon a showing of good cause and reasonable
24 diligence in the state's or political subdivision's
25 investigation, the state or political subdivision may move the

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

3 D. Before the expiration of the sixty-day period or
4 any extensions of time granted by the court, the attorney
5 general or political subdivision shall notify the court that
6 the state or the political subdivision:

7 (1) intends to intervene and proceed with the
8 action; in which case, the seal shall be lifted and the action
9 shall be conducted by the attorney general on behalf of the
10 state or the political subdivision, or the political
11 subdivision shall conduct the action on its own behalf; or

12 (2) declines to take over the action; in which
13 case the seal shall be lifted and the qui tam plaintiff may
14 proceed with the action.

15 E. When a person brings an action pursuant to this
16 section, no person other than the attorney general on behalf of
17 the state or a political subdivision, or a political
18 subdivision on its own behalf, may intervene or bring a related
19 action based on the facts underlying the pending action."

20 SECTION 5. Section 44-9-6 NMSA 1978 (being Laws 2007,
21 Chapter 40, Section 6) is amended to read:

22 "44-9-6. RIGHTS OF THE QUI TAM PLAINTIFF AND THE STATE OR
23 POLITICAL SUBDIVISION.--

24 A. If the state or political subdivision proceeds
25 with the action, it shall have the primary responsibility of

1 prosecuting the action and shall not be bound by an act of the
2 qui tam plaintiff. The qui tam plaintiff shall have the right
3 to continue as a party to the action, subject to the
4 limitations of this section.

5 B. The state or political subdivision may seek to
6 dismiss the action for good cause notwithstanding the
7 objections of the qui tam plaintiff if the qui tam plaintiff
8 has been notified of the filing of the motion and the court has
9 provided the qui tam plaintiff with an opportunity to oppose
10 the motion and to present evidence at a hearing.

11 C. The state or political subdivision may settle
12 the action with the defendant notwithstanding any objection by
13 the qui tam plaintiff if the court determines, after a hearing
14 providing the qui tam plaintiff an opportunity to present
15 evidence, that the proposed settlement is fair, adequate and
16 reasonable under all of the circumstances.

17 D. Upon a showing by the state or political
18 subdivision that unrestricted participation during the course
19 of the litigation by the qui tam plaintiff would interfere with
20 or unduly delay the [~~state's~~] prosecution of the case, or would
21 be repetitious, irrelevant or for the purpose of harassment,
22 the court may, in its discretion, impose limitations on the qui
23 tam plaintiff's participation, such as:

24 (1) limiting the number of witnesses the qui
25 tam plaintiff may call;

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1 (2) limiting the length of testimony of such
2 witnesses;

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

5 (4) otherwise limiting the qui tam plaintiff's
6 participation in the litigation.

7 E. Upon a showing by a defendant that unrestricted
8 participation during the course of litigation by the qui tam
9 plaintiff would be for purposes of harassment or would cause
10 the defendant undue burden or unnecessary expense, the court
11 may limit the participation by the qui tam plaintiff in the
12 litigation.

13 F. If the state or political subdivision elects not
14 to proceed with the action, the qui tam plaintiff shall have
15 the right to conduct the action. If the attorney general or
16 political subdivision so requests, the qui tam plaintiff shall
17 serve the attorney general or political subdivision with copies
18 of all pleadings filed in the action and all deposition
19 transcripts in the case, at the state's or political
20 subdivision's expense. When the qui tam plaintiff proceeds
21 with the action, the court, without limiting the status and
22 rights of the qui tam plaintiff, may permit the attorney
23 general or political subdivision to intervene at a later date
24 upon a showing of good cause.

25 G. Whether or not the state or political

1 subdivision proceeds with the action, upon a showing by the
 2 attorney general on behalf of the state or political
 3 subdivision, or a political subdivision on its own behalf, that
 4 certain actions of discovery by the qui tam plaintiff would
 5 interfere with [~~the state's~~] an investigation or prosecution of
 6 a criminal or civil matter arising out of the same facts, the
 7 court may stay such discovery for a period of not more than
 8 sixty days. The showing by the state or political subdivision
 9 shall be conducted in camera. The court may extend the sixty-
 10 day period upon a further showing in camera that the state or
 11 political subdivision has pursued the criminal or civil
 12 investigation or proceeding with reasonable diligence and any
 13 proposed discovery in the civil action will interfere with the
 14 ongoing criminal or civil investigation or proceeding.

15 H. Notwithstanding the provisions of Section [~~5 of~~
 16 ~~the Fraud Against Taxpayers Act~~] 44-9-5 NMSA 1978, the attorney
 17 general or political subdivision may elect to pursue the
 18 state's or political subdivision's claim through any alternate
 19 remedy available [~~to the state~~], including an administrative
 20 proceeding to determine a civil money penalty. If an alternate
 21 remedy is pursued, the qui tam plaintiff shall have the same
 22 rights in such a proceeding as the qui tam plaintiff would have
 23 had if the action had continued pursuant to this section. A
 24 finding of fact or conclusion of law made in the other
 25 proceeding that has become final shall be conclusive on all

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1 parties to an action under the Fraud Against Taxpayers Act.
2 For purposes of this subsection, a finding or conclusion is
3 final if it has been finally determined on appeal to the
4 appropriate court, if all time for filing an appeal with
5 respect to the finding or conclusion has expired or if the
6 finding or conclusion is not subject to judicial review."

7 SECTION 6. Section 44-9-7 NMSA 1978 (being Laws 2007,
8 Chapter 40, Section 7) is amended to read:

9 "44-9-7. AWARDS TO QUI TAM PLAINTIFF AND THE STATE OR
10 POLITICAL SUBDIVISION.--

11 A. Except as otherwise provided in this section, if
12 the state or a political subdivision proceeds with an action
13 brought by a qui tam plaintiff and the state or political
14 subdivision prevails in the action, the qui tam plaintiff shall
15 receive:

16 (1) at least fifteen percent but not more than
17 twenty-five percent of the proceeds of the action or
18 settlement, depending upon the extent to which the qui tam
19 plaintiff substantially contributed to the prosecution of the
20 action; or

21 (2) no more than ten percent of the proceeds
22 of the action or settlement if the court finds that the action
23 was based primarily on disclosures of specific information, not
24 provided by the qui tam plaintiff, relating to allegations or
25 transactions in a criminal, civil, administrative or

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1 legislative hearing, proceeding, report, audit or investigation
 2 or from the news media, taking into account the significance of
 3 the information and the role of the qui tam plaintiff in
 4 advancing the case to litigation. However, if the attorney
 5 general or political subdivision determines and certifies in
 6 writing that the qui tam plaintiff provided a significant
 7 contribution in advancing the case, then the qui tam plaintiff
 8 shall receive the share of proceeds set forth in Paragraph (1)
 9 of this subsection.

10 B. If the state or political subdivision does not
 11 proceed with an action brought by a qui tam plaintiff and the
 12 state or political subdivision prevails in the action, the qui
 13 tam plaintiff shall receive an amount that is not less than
 14 twenty-five percent or more than thirty percent of the proceeds
 15 of the action or settlement, as the court deems reasonable for
 16 collecting the civil penalty and damages.

17 C. Whether or not the state or political
 18 subdivision proceeds with an action brought by a qui tam
 19 plaintiff:

20 (1) if the court finds that the action was
 21 brought by a person that planned or initiated the violation of
 22 Section [~~3 of the Fraud Against Taxpayers Act~~] 44-9-3 NMSA 1978
 23 upon which the action was based, the court may reduce the share
 24 of the proceeds that the person would otherwise receive under
 25 Subsection A or B of this section, taking into account the role

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1 of the person as the qui tam plaintiff in advancing the case to
2 litigation and any relevant circumstances pertaining to the
3 violation; or

4 (2) if the person bringing the action is
5 convicted of criminal conduct arising from that person's role
6 in the violation of Section [~~3 of the Fraud Against Taxpayers~~
7 ~~Act~~] 44-9-3 NMSA 1978 upon which the action was based, that
8 person shall be dismissed from the civil action and shall not
9 receive a share of the proceeds. The dismissal shall not
10 prejudice the right of the state or political subdivision to
11 continue the action.

12 D. Any award to a qui tam plaintiff shall be paid
13 out of the proceeds of the action or settlement, if any. The
14 qui tam plaintiff shall also receive an amount for reasonable
15 expenses incurred in the action plus reasonable attorney fees
16 that shall be paid by the defendant.

17 E. The state or political subdivision is entitled
18 to all proceeds collected in an action or settlement not
19 awarded to a qui tam plaintiff. The state or political
20 subdivision is also entitled to reasonable expenses incurred in
21 the action plus reasonable attorney fees, including the fees of
22 the attorney general or state agency counsel or counsel
23 employed by the political subdivision that shall be paid by the
24 defendant.

25 F. Proceeds and penalties collected by the state or

1 political subdivision shall be deposited as follows:

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

5 (2) civil penalties shall be deposited in the
6 current school fund pursuant to Article 12, Section 4 of the
7 constitution of New Mexico; ~~and~~

8 (3) except as provided in Paragraph (4) of
9 this subsection, all remaining proceeds shall be deposited as
10 follows:

11 (a) one-half into a fund for the use of
12 the attorney general in furtherance of the obligations imposed
13 upon that office by the Fraud Against Taxpayers Act; and

14 (b) one-half into the general fund; or
15 (4) remaining proceeds collected by counties
16 or municipalities as political subdivisions acting on their own
17 behalf shall be disposed of in accordance with the direction of
18 the governing body of the county or municipality."

19 SECTION 7. Section 44-9-8 NMSA 1978 (being Laws 2007,
20 Chapter 40, Section 8) is amended to read:

21 "44-9-8. AWARD OF ATTORNEY FEES AND COSTS TO DEFENDANT.--
22 If the state or political subdivision does not proceed with the
23 action and the qui tam plaintiff conducts the action, the court
24 may award a defendant reasonable attorney fees and costs if the
25 defendant prevails and the court finds the action clearly

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1 frivolous, clearly vexatious or brought primarily for the
2 purpose of harassment."

3 SECTION 8. Section 44-9-9 NMSA 1978 (being Laws 2007,
4 Chapter 40, Section 9) is amended to read:

5 "44-9-9. CERTAIN ACTIONS BARRED.--

6 A. No court shall have jurisdiction over an action
7 brought pursuant to Section [~~5 of the Fraud Against Taxpayers~~
8 ~~Act~~] 44-9-5 NMSA 1978 by a present or former employee of the
9 state or political subdivision unless the employee, during
10 employment with the state or political subdivision and in good
11 faith, exhausted existing internal procedures for reporting
12 false claims and the state or political subdivision failed to
13 act on the information provided within a reasonable period of
14 time.

15 B. No court shall have jurisdiction over an action
16 brought pursuant to Section [~~5 of the Fraud Against Taxpayers~~
17 ~~Act~~] 44-9-5 NMSA 1978 against an elected or appointed state
18 official, a member of the state legislature or a member of the
19 judiciary if the action is based on evidence or information
20 known to the state agency to which the false claim was made or
21 to the attorney general when the action was filed.

22 C. Unless the attorney general or political
23 subdivision determines and certifies in writing that the action
24 is in the interest of the state or political subdivision, no
25 court shall have jurisdiction over an action brought pursuant

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1 to Section [~~5 of the Fraud Against Taxpayers Act~~] 44-9-5 NMSA
 2 1978 when that action is based on allegations or transactions
 3 that are the subject of a criminal, civil or administrative
 4 proceeding in which the state or political subdivision is a
 5 party.

6 D. Upon motion of the attorney general or political
 7 subdivision, a court may, in its discretion, dismiss an action
 8 brought pursuant to Section [~~5 of the Fraud Against Taxpayers~~
 9 ~~Act~~] 44-9-5 NMSA 1978 if the elements of the alleged false or
 10 fraudulent claim have been publicly disclosed in the news media
 11 or in a publicly disseminated governmental report at the time
 12 the complaint is filed."

13 SECTION 9. Section 44-9-10 NMSA 1978 (being Laws 2007,
 14 Chapter 40, Section 10) is amended to read:

15 "44-9-10. STATE OR POLITICAL SUBDIVISION NOT LIABLE.--The
 16 state or political subdivision shall not be liable for expenses
 17 or fees that a qui tam plaintiff may incur in investigating or
 18 bringing an action pursuant to the Fraud Against Taxpayers
 19 Act."

20 SECTION 10. Section 44-9-12 NMSA 1978 (being Laws 2007,
 21 Chapter 40, Section 12) is amended to read:

22 "44-9-12. LIMITATION OF ACTIONS--ESTOPPEL--STANDARD OF
 23 PROOF.--

24 A. A civil action pursuant to the Fraud Against
 25 Taxpayers Act may be brought at any time. A civil action

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1 pursuant to the Fraud Against Taxpayers Act may be brought for
2 conduct that occurred prior to the effective date of that act,
3 but not for conduct that occurred prior to July 1, 1987.

4 B. Notwithstanding any other provision of law, a
5 final judgment rendered in a criminal proceeding charging fraud
6 or false statement, whether upon a guilty verdict after trial
7 or upon a plea of guilty or nolo contendere, shall estop the
8 defendant from denying the essential elements of a fraud
9 against taxpayers action where the criminal proceeding concerns
10 the same transaction that is the subject of the fraud against
11 taxpayers action.

12 C. In an action brought pursuant to the Fraud
13 Against Taxpayers Act, the state or political subdivision or
14 the qui tam plaintiff shall be required to prove all essential
15 elements of the cause of action, including damages, by a
16 preponderance of the evidence."