

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 OF THE
STATE 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 and the state and any of its agencies, institutions or
2 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 funds a false or fraudulent claim for
6 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 counsel or
4 political subdivision's 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 the political subdivision
10 with all information known to that person about the violation
11 within thirty days after the date on which the person first
12 obtained the information;

13 (2) at the time that the person furnished the
14 attorney general or the 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 OR
2 POLITICAL SUBDIVISION--DELEGATION--CIVIL ACTION.--

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

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

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

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

24 A. A person may bring a civil action for a
25 violation of Section [3 ~~of the Fraud Against Taxpayers Act]~~

1 44-9-3 NMSA 1978 on behalf of the person and the state or
2 political subdivision. The action shall be brought in the name
3 of the state or political subdivision. The person bringing the
4 action shall be referred to as the qui tam plaintiff. Once
5 filed, the action may be dismissed only with the written
6 consent of the court, taking into account the best interest of
7 the parties involved and the public purposes behind the Fraud
8 Against Taxpayers Act.

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

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

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1 subdivision may move the court for an extension of time during
2 which the 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 attorney
5 general or the political subdivision shall notify the court
6 that 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 on its own behalf; or

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

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

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

21 "44-9-6. RIGHTS OF THE QUI TAM PLAINTIFF AND THE STATE OR
22 POLITICAL SUBDIVISION.--

23 A. If the state or political subdivision proceeds
24 with the action, it shall have the primary responsibility of
25 prosecuting the action and shall not be bound by an act of the

1 qui tam plaintiff. The qui tam plaintiff shall have the right
2 to continue as a party to the action, subject to the
3 limitations of this section.

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

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

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

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

25 (2) limiting the length of testimony of such

1 witnesses;

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

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

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

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

24 G. Whether or not the state or political
25 subdivision proceeds with the action, upon a showing by the

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

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

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

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

8 "44-9-7. AWARDS TO QUI TAM PLAINTIFF AND THE STATE OR
9 POLITICAL SUBDIVISION.--

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

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

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

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

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

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

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

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1 litigation and any relevant circumstances pertaining to the
2 violation; or

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

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

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

24 F. Proceeds and penalties collected by the state,
25 school districts or charter schools shall be deposited as

1 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) all remaining proceeds shall be deposited
9 as follows:

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

13 (b) one-half into the general fund.

14 G. Proceeds and penalties collected by counties or
15 municipalities shall be deposited in accordance with the
16 direction of the governing body of the county or municipality."

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

19 "44-9-8. AWARD OF ATTORNEY FEES AND COSTS TO DEFENDANT.--
20 If the state or political subdivision does not proceed with the
21 action and the qui tam plaintiff conducts the action, the court
22 may award a defendant reasonable attorney fees and costs if the
23 defendant prevails and the court finds the action clearly
24 frivolous, clearly vexatious or brought primarily for the
25 purpose of harassment."

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

3 "44-9-9. CERTAIN ACTIONS BARRED.--

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

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

20 C. Unless the attorney general determines and
21 certifies in writing that the action is in the interest of the
22 state, no court shall have jurisdiction over an action brought
23 pursuant to Section [~~5 of the Fraud Against Taxpayers Act]~~
24 44-9-5 NMSA 1978 when that action is based on allegations or
25 transactions that are the subject of a criminal, civil or

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1 administrative proceeding in which the state is a party.

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

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

11 "44-9-10. STATE OR POLITICAL SUBDIVISION NOT LIABLE.--The
12 state or political subdivision shall not be liable for expenses
13 or fees that a qui tam plaintiff may incur in investigating or
14 bringing an action pursuant to the Fraud Against Taxpayers
15 Act."

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

18 "44-9-12. LIMITATION OF ACTIONS--ESTOPPEL--STANDARD OF
19 PROOF.--

20 A. A civil action pursuant to the Fraud Against
21 Taxpayers Act may be brought at any time. A civil action
22 pursuant to the Fraud Against Taxpayers Act may be brought for
23 conduct that occurred prior to the effective date of that act,
24 but not for conduct that occurred prior to July 1, 1987.

25 B. Notwithstanding any other provision of law, a

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1 final judgment rendered in a criminal proceeding charging fraud
2 or false statement, whether upon a guilty verdict after trial
3 or upon a plea of guilty or nolo contendere, shall estop the
4 defendant from denying the essential elements of a fraud
5 against taxpayers action where the criminal proceeding concerns
6 the same transaction that is the subject of the fraud against
7 taxpayers action.

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