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SENATE BILL 622

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Richard C. Martinez

AN ACT

RELATING TO CIVIL ACTIONS; AMENDING SECTIONS OF THE FRAUD
AGAINST TAXPAYERS ACT; REPEALING THE MEDICAID FALSE CLAIMS ACT.

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, whether
pursuant to a contract or otherwise, for money or property [~~or~~
~~services~~] that is made to a contractor, grantee or other
recipient when all or a portion of the money or property [~~or~~
~~services~~] requested or demanded issues from or is provided or
reimbursed by the state;

B. "employer" includes an individual, corporation,

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1 firm, association, business, partnership, organization, trust
2 and the state and any of its agencies, institutions or
3 political subdivisions;

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

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

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

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

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

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

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

23 "44-9-3. FALSE CLAIMS--LIABILITY--PENALTIES--EXCEPTION.--

24 A. A person shall not:

25 (1) knowingly present, or cause to be

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1 presented, to an employee or officer [~~or agent~~] of the state
2 [~~or to a contractor, grantee or other recipient of state funds~~]
3 a false or fraudulent claim for payment or approval;

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

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

10 [~~(4) conspire to make, use or cause to be made~~
11 ~~or used, a false, misleading or fraudulent record or statement~~
12 ~~to conceal, avoid or decrease an obligation to pay or transmit~~
13 ~~money or property to the state;~~

14 ~~(5)]~~ (4) when in possession, custody or
15 control of property or money used or to be used by the state,
16 [~~knowingly~~] and intending to defraud the state or willfully to
17 conceal the property, deliver or cause to be delivered less
18 property or money than the amount indicated on a certificate or
19 receipt;

20 [~~(6)]~~ (5) when authorized to make or deliver a
21 document certifying receipt of property used or to be used by
22 the state, [~~knowingly~~] and intending to defraud the state, make
23 or deliver a receipt [~~that falsely represents a material~~
24 characteristic of the property] without knowledge that all of
25 the information on the receipt is true;

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1 ~~[(7)]~~ (6) knowingly buy, or receive as a
2 pledge of an obligation or debt, public property from any
3 person that may not lawfully sell or pledge the property; or
4 ~~[(8)]~~ (7) knowingly make or use, or cause to
5 be made or used, a false, misleading or fraudulent record or
6 statement to conceal, avoid or decrease an obligation to pay or
7 transmit money or property to the state [~~or~~
8 ~~(9) as a beneficiary of an inadvertent~~
9 ~~submission of a false claim and having subsequently discovered~~
10 ~~the falsity of the claim, fail to disclose the false claim to~~
11 ~~the state within a reasonable time after discovery].~~

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

14 C. A person who violates Subsection A of this
15 section shall be liable for:

16 (1) three times the amount of damages
17 sustained by the state because of the violation;

18 (2) a civil penalty of not less than five
19 thousand dollars (\$5,000) and not more than ten thousand
20 dollars (\$10,000) for each violation unless a penalty has been
21 or will be imposed for that claim or violation pursuant to the
22 federal False Claims Act in the same or a prior action; and

23 (3) the costs of a civil action brought to
24 recover damages or penalties [~~and~~

25 ~~(4) reasonable attorney fees, including the~~

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1 ~~fees of the attorney general or state agency counsel~~].

2 D. A court may assess not less than two times the
3 amount of damages sustained by the state if the court finds all
4 of the following:

5 (1) the person committing the violation
6 furnished the attorney general with all information known to
7 that person about the violation within thirty days after the
8 date on which the person first obtained the information;

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

15 (3) the person fully cooperated with any
16 investigation by the attorney general.

17 E. This section does not apply to claims, records
18 or statements made pursuant to the provisions of Chapter 7 NMSA
19 1978."

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

22 "44-9-4. INVESTIGATION BY THE ATTORNEY GENERAL--
23 DELEGATION--CIVIL ACTION.--[A.] The attorney general shall
24 diligently investigate suspected violations of Section [3 of
25 the Fraud Against Taxpayers Act] 44-9-3 NMSA 1978 and if the

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1 attorney general finds that a person has violated or is
2 violating that section, the attorney general may bring a civil
3 action against that person pursuant to the Fraud Against
4 Taxpayers Act.

5 ~~[B. The attorney general may in appropriate cases~~
6 ~~delegate the authority to investigate or to bring a civil~~
7 ~~action to the state agency to which a false claim was made, and~~
8 ~~when this occurs, the state agency shall have every power~~
9 ~~conferred upon the attorney general pursuant to the Fraud~~
10 ~~Against Taxpayers Act.]"~~

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

13 "44-9-5. CIVIL ACTION BY QUI TAM PLAINTIFF--STATE MAY
14 INTERVENE.--

15 A. A person may bring a civil action for a
16 violation of Section ~~[3 of the Fraud Against Taxpayers Act]~~
17 44-9-3 NMSA 1978 on behalf of the person and the state. The
18 action shall be brought in the name of the state. The person
19 bringing the action shall be referred to as the qui tam
20 plaintiff. Once filed, the action may be dismissed only with
21 the written consent of the court ~~[taking into account the best~~
22 ~~interest of the parties involved and the public purposes behind~~
23 ~~the Fraud Against Taxpayers Act].~~

24 B. A complaint filed by a qui tam plaintiff shall
25 be filed in camera in district court and shall remain under

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1 seal for at least sixty days. No service shall be made on a
2 defendant and no response is required from a defendant until
3 the seal has been lifted and the complaint served pursuant to
4 the rules of civil procedure.

5 C. On the same day as the complaint is filed, the
6 qui tam plaintiff shall serve the attorney general with a copy
7 of the complaint and written disclosure of substantially all
8 material evidence and information the qui tam plaintiff
9 possesses. The attorney general, on behalf of the state, may
10 intervene and proceed with the action within sixty days after
11 receiving the complaint and the material evidence and
12 information. Upon a showing of good cause and reasonable
13 diligence in the state's investigation, the state may move the
14 court for an extension of time during which the complaint shall
15 remain under seal.

16 D. Before the expiration of the sixty-day period or
17 any extensions of time granted by the court, the attorney
18 general shall notify the court that the state:

19 (1) intends to intervene and proceed with the
20 action; in which case, the seal shall be lifted and the action
21 shall be conducted by the attorney general on behalf of the
22 state; or

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

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1 E. When a person brings an action pursuant to this
2 section, the federal False Claims Act or any similar provision
3 of the law of any other state, no person other than the
4 attorney general on behalf of the state may intervene or bring
5 a related action based on the facts underlying the pending
6 action."

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

9 "44-9-6. RIGHTS OF THE QUI TAM PLAINTIFF AND THE STATE.--

10 A. If the state proceeds with the action, it shall
11 have the primary responsibility of prosecuting the action and
12 shall not be bound by an act of the qui tam plaintiff. The qui
13 tam plaintiff shall have the right to continue as a party to
14 the action, subject to the limitations of this section.

15 B. The state may [~~seek to~~] dismiss the action [~~for~~
16 ~~good cause~~] notwithstanding the objections of the qui tam
17 plaintiff if the qui tam plaintiff has been notified of the
18 filing of the motion and the court has provided the qui tam
19 plaintiff with an opportunity [~~to oppose the motion and to~~
20 ~~present evidence at~~] for a hearing on the motion.

21 C. The state may settle the action with the
22 defendant notwithstanding any objection by the qui tam
23 plaintiff if the court determines, after a hearing [~~providing~~
24 ~~the qui tam plaintiff an opportunity to present evidence~~], that
25 the proposed settlement is fair, adequate and reasonable under

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1 all of the circumstances.

2 D. Upon a showing by the state that unrestricted
3 participation during the course of the litigation by the qui
4 tam plaintiff would interfere with or unduly delay the state's
5 prosecution of the case, or would be repetitious, irrelevant or
6 for the purpose of harassment, the court may, in its
7 discretion, impose limitations on the qui tam plaintiff's
8 participation, such as:

9 (1) limiting the number of witnesses the qui
10 tam plaintiff may call;

11 (2) limiting the length of testimony of such
12 witnesses;

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

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

17 E. Upon a showing by a defendant that unrestricted
18 participation during the course of litigation by the qui tam
19 plaintiff would be for purposes of harassment or would cause
20 the defendant undue burden or unnecessary expense, the court
21 may limit the participation by the qui tam plaintiff in the
22 litigation.

23 F. If the state elects not to proceed with the
24 action, the qui tam plaintiff shall have the right to conduct
25 the action. If the attorney general so requests, the qui tam

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1 plaintiff shall serve the attorney general with copies of all
2 pleadings filed in the action and all deposition transcripts in
3 the case, at the state's expense. When the qui tam plaintiff
4 proceeds with the action, the court, without limiting the
5 status and rights of the qui tam plaintiff, may permit the
6 attorney general to intervene at a later date upon a showing of
7 good cause.

8 G. Whether or not the state proceeds with the
9 action, upon a showing by the attorney general on behalf of the
10 state that certain actions of discovery by the qui tam
11 plaintiff would interfere with the state's investigation or
12 prosecution of a criminal or civil matter arising out of the
13 same facts, the court may stay such discovery for a period of
14 not more than sixty days. The showing by the state shall be
15 conducted in camera. The court may extend the sixty-day period
16 upon a further showing in camera that the state has pursued the
17 criminal or civil investigation or proceeding with reasonable
18 diligence and any proposed discovery in the civil action will
19 interfere with the ongoing criminal or civil investigation or
20 proceeding.

21 H. Notwithstanding the provisions of Section [~~5 of~~
22 ~~the Fraud Against Taxpayers Act~~] 44-9-5 NMSA 1978, the attorney
23 general may elect to pursue the state's claim through any
24 alternate remedy available to the state, including an
25 administrative proceeding to determine a civil money penalty.

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1 If an alternate remedy is pursued, the qui tam plaintiff shall
2 have the same rights in such a proceeding as the qui tam
3 plaintiff would have had if the action had continued pursuant
4 to this section. A finding of fact or conclusion of law made
5 in the other proceeding that has become final shall be
6 conclusive on all parties to an action under the Fraud Against
7 Taxpayers Act. For purposes of this subsection, a finding or
8 conclusion is final if it has been finally determined on appeal
9 to the appropriate court, if all time for filing an appeal with
10 respect to the finding or conclusion has expired or if the
11 finding or conclusion is not subject to judicial review."

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

14 "44-9-7. AWARDS TO QUI TAM PLAINTIFF AND THE STATE.--

15 A. Except as otherwise provided in this section, if
16 the state proceeds with an action brought by a qui tam
17 plaintiff and the state prevails in the action, the qui tam
18 plaintiff shall receive:

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

24 (2) no more than ten percent of the proceeds
25 of the action or settlement if the court finds that the action

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1 was based primarily on disclosures of specific information, not
2 provided by the qui tam plaintiff, relating to allegations or
3 transactions in a criminal, civil, administrative or
4 legislative hearing, proceeding, report, audit or investigation
5 or from the news media, taking into account the significance of
6 the information and the role of the qui tam plaintiff in
7 advancing the case to litigation. However, if the attorney
8 general determines and certifies in writing that the qui tam
9 plaintiff provided a significant contribution in advancing the
10 case, then the qui tam plaintiff shall receive the share of
11 proceeds set forth in Paragraph (1) of this subsection.

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

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

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

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1 this section to no more than ten percent, taking into account
2 the role of the person as the qui tam plaintiff in advancing
3 the case to litigation and any relevant circumstances
4 pertaining to the violation; or

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

12 D. If an action pursuant to Section 44-9-5 NMSA
13 1978 is based upon allegations or transactions of which the qui
14 tam plaintiff became aware while employed by, under contract to
15 or serving as an agent for a defendant and the qui tam
16 plaintiff failed to make an effective disclosure of those
17 allegations or transactions under that defendant's corporate
18 compliance plan, the court shall reduce the share of the
19 proceeds of the actions that the qui tam plaintiff would
20 otherwise receive to no more than ten percent of the proceeds
21 of the action.

22 [~~D.~~] E. Any award to a qui tam plaintiff shall be
23 paid out of the proceeds of the action or settlement, if any.
24 The qui tam plaintiff shall also receive an amount for
25 reasonable expenses incurred in the action plus reasonable

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1 attorney fees that shall be paid by the defendant.

2 ~~[E.]~~ F. The state is entitled to all proceeds
3 collected in an action or settlement not awarded to a qui tam
4 plaintiff. ~~[The state is also entitled to reasonable expenses~~
5 ~~incurred in the action plus reasonable attorney fees, including~~
6 ~~the fees of the attorney general or state agency counsel that~~
7 ~~shall be paid by the defendant.]~~ Proceeds and penalties
8 collected by the state shall be deposited as follows:

9 (1) proceeds in the amount of the false claim
10 paid ~~[and attorney fees]~~ and costs shall be returned to the
11 fund or funds from which the money or property ~~[or services]~~
12 came;

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

16 (3) all remaining proceeds shall be deposited
17 as follows:

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

21 (b) one-half into the general fund."

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

24 "44-9-9. CERTAIN ACTIONS BARRED.--

25 A. No court shall have jurisdiction over an action

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1 brought pursuant to Section [~~5 of the Fraud Against Taxpayers~~
2 ~~Act~~] 44-9-5 NMSA 1978 by a present or former employee of the
3 state unless the employee, during employment with the state and
4 in good faith, exhausted existing internal procedures for
5 reporting false claims and the state failed to act on the
6 information provided within a reasonable period of time.

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

14 C. Unless the attorney general determines and
15 certifies in writing that the action is in the interest of the
16 state, no court shall have jurisdiction over an action brought
17 pursuant to Section [~~5 of the Fraud Against Taxpayers Act~~]
18 44-9-5 NMSA 1978 when that action is based on allegations or
19 transactions that are the subject of a criminal, civil or
20 administrative proceeding in which the state is a party.

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

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1 ~~governmental report at the time the complaint is filed.]~~ No
2 court shall have jurisdiction over an action brought pursuant
3 to Section 44-9-5 NMSA 1978 based upon the public disclosure of
4 allegations or transactions in a criminal, civil or
5 administrative hearing; in an investigation, report, hearing or
6 audit conducted by or at the request of the legislature, the
7 state auditor or any agency of a city, county, town or other
8 political subdivision of the state; or from the news media,
9 unless the action is brought by the attorney general or the
10 person bringing the action is an original source of the
11 information. For purposes of this subsection, "original
12 source" means an individual who has direct and independent
13 knowledge of the information on which the allegations are based
14 and who has voluntarily provided the information to the state
15 before filing an action pursuant to Section 44-9-5 NMSA 1978
16 that is based on the information.

17 E. A person shall not bring an action pursuant to
18 Section 44-9-5 NMSA 1978 that is based on allegations or
19 transactions that the person knew or had reason to know were
20 known to the attorney general or the state's other law
21 enforcement officials prior to that person filing the action or
22 -serving the disclosure of material evidence."

23 Section 8. Section 44-9-12 NMSA 1978 (being Laws 2007,
24 Chapter 40, Section 12) is amended to read:

25 "44-9-12. LIMITATION OF ACTIONS--ESTOPPEL--STANDARD OF

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1 PROOF.--

2 A. ~~[A civil action pursuant to the Fraud Against~~
3 ~~Taxpayers Act may be brought at any time. A civil action~~
4 ~~pursuant to the Fraud Against Taxpayers Act may be brought for~~
5 ~~conduct that occurred prior to the effective date of that act,~~
6 ~~but not for conduct that occurred prior to July 1, 1987.] A~~
7 civil action pursuant to the Fraud Against Taxpayers Act shall
8 not be brought:

9 (1) more than six years after the date on
10 which the violation of Section 44-9-3 NMSA 1978 is committed;
11 or

12 (2) more than three years after the date when
13 facts material to the right of action are known or reasonably
14 should have been known by the official charged with
15 responsibility to act in the circumstances, but in no event
16 more than ten years after the date on which the violation is
17 committed, whichever occurs last.

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

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

5 Section 9. REPEAL.--Sections 27-14-1 through 27-14-15
6 NMSA 1978 (being Laws 2004, Chapter 49, Sections 1 through 15)
7 are repealed.

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