

HOUSE HEALTH AND GOVERNMENT AFFAIRS COMMITTEE SUBSTITUTE FOR
HOUSE BILL 770

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

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 INTERVENTION BY THE ATTORNEY GENERAL;
PROVIDING FOR A CIVIL ACTION BY THE STATE; 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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underscoring material = new
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1 property or services requested or demanded issues from or is
2 provided or reimbursed by the state;

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" means the state of New Mexico or any of
20 its branches, agencies, departments, boards, commissions,
21 officers, institutions or instrumentalities, including the New
22 Mexico finance authority, the New Mexico mortgage finance
23 authority and the New Mexico lottery authority.

24 Section 3. FALSE CLAIMS--LIABILITY--PENALTIES--
25 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 to
4 a contractor, grantee or other recipient of state funds a false
5 or fraudulent claim for payment or approval;

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

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

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

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

20 (6) when authorized to make or deliver a
21 document certifying receipt of property used or to be used by
22 the state, knowingly make or deliver a receipt that falsely
23 represents a material characteristic of the property;

24 (7) knowingly buy, or receive as a pledge of
25 an obligation or debt, public property from any person that may

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1 not lawfully sell or pledge the property;

2 (8) knowingly make or use, or cause to be made
3 or used, a false, misleading or fraudulent record or statement
4 to conceal, avoid or decrease an obligation to pay or transmit
5 money or property to the state; or

6 (9) as a beneficiary of an inadvertent
7 submission of a false claim and having subsequently discovered
8 the falsity of the claim, fail to disclose the false claim to
9 the state within a reasonable time after discovery.

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

12 C. A person who violates Subsection A of this
13 section shall be liable for:

14 (1) three times the amount of damages
15 sustained by the state because of the violation;

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

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

21 (4) reasonable attorney fees, including the
22 fees of the attorney general or state agency counsel.

23 D. A court may assess not less than two times the
24 amount of damages sustained by the state if the court finds all
25 of the following:

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1 (1) the person committing the violation
 2 furnished the attorney general with all information known to
 3 that person about the violation within thirty days after the
 4 date on which the person first obtained the information;

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

11 (3) the person fully cooperated with any
 12 investigation by the attorney general.

13 E. This section does not apply to claims, records
 14 or statements made pursuant to the provisions of Chapter 7 NMSA
 15 1978.

16 Section 4. INVESTIGATION BY THE ATTORNEY GENERAL--
 17 DELEGATION--CIVIL ACTION.--

18 A. The attorney general shall diligently
 19 investigate suspected violations of Section 3 of the Fraud
 20 Against Taxpayers Act, and if the attorney general finds that a
 21 person has violated or is violating that section, the attorney
 22 general may bring a civil action against that person pursuant
 23 to the Fraud Against Taxpayers Act.

24 B. The attorney general may in appropriate cases
 25 delegate the authority to investigate or to bring a civil

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1 action to the state agency to which a false claim was made, and
2 when this occurs, the state agency shall have every power
3 conferred upon the attorney general pursuant to the Fraud
4 Against Taxpayers Act.

5 Section 5. CIVIL ACTION BY QUI TAM PLAINTIFF--STATE MAY
6 INTERVENE.--

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

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

22 C. On the same day as the complaint is filed, the
23 qui tam plaintiff shall serve the attorney general with a copy
24 of the complaint and written disclosure of substantially all
25 material evidence and information the qui tam plaintiff

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1 possesses. The attorney general on behalf of the state may
2 intervene and proceed with the action within sixty days after
3 receiving the complaint and the material evidence and
4 information. Upon a showing of good cause and reasonable
5 diligence in the state's investigation, the state may move the
6 court for an extension of time during which the complaint shall
7 remain under seal.

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

11 (1) intends to intervene and proceed with the
12 action; in which case, the seal shall be lifted and the action
13 shall be conducted by the attorney general on behalf of the
14 state; or

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

18 E. When a person brings an action pursuant to this
19 section, no person other than the attorney general on behalf of
20 the state may intervene or bring a related action based on the
21 facts underlying the pending action.

22 Section 6. RIGHTS OF THE QUI TAM PLAINTIFF AND THE
23 STATE.--

24 A. If the state proceeds with the action, it shall
25 have the primary responsibility of prosecuting the action and

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

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

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

16 D. Upon a showing by the state that unrestricted
17 participation during the course of the litigation by the qui
18 tam plaintiff would interfere with or unduly delay the state's
19 prosecution of the case, or would be repetitious, irrelevant or
20 for the purpose of harassment, the court may, in its
21 discretion, impose limitations on the qui tam plaintiff's
22 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 elects not to proceed with the
13 action, the qui tam plaintiff shall have the right to conduct
14 the action. If the attorney general so requests, the qui tam
15 plaintiff shall serve the attorney general with copies of all
16 pleadings filed in the action and all deposition transcripts in
17 the case, at the state's expense. When the qui tam plaintiff
18 proceeds with the action, the court, without limiting the
19 status and rights of the qui tam plaintiff, may permit the
20 attorney general to intervene at a later date upon a showing of
21 good cause.

22 G. Whether or not the state proceeds with the
23 action, upon a showing by the attorney general on behalf of the
24 state that certain actions of discovery by the qui tam
25 plaintiff would interfere with the state's investigation or

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1 prosecution of a criminal or civil matter arising out of the
2 same facts, the court may stay such discovery for a period of
3 not more than sixty days. The showing by the state shall be
4 conducted in camera. The court may extend the sixty-day period
5 upon a further showing in camera that the state has pursued the
6 criminal or civil investigation or proceeding with reasonable
7 diligence and any proposed discovery in the civil action will
8 interfere with the ongoing criminal or civil investigation or
9 proceeding.

10 H. Notwithstanding the provisions of Section 5 of
11 the Fraud Against Taxpayers Act, the attorney general may elect
12 to pursue the state's claim through any alternate remedy
13 available to the state, including an administrative proceeding
14 to determine a civil money penalty. If an alternate remedy is
15 pursued, the qui tam plaintiff shall have the same rights in
16 such a proceeding as the qui tam plaintiff would have had if
17 the action had continued pursuant to this section. A finding
18 of fact or conclusion of law made in the other proceeding that
19 has become final shall be conclusive on all parties to an
20 action under the Fraud Against Taxpayers Act. For purposes of
21 this subsection, a finding or conclusion is final if it has
22 been finally determined on appeal to the appropriate court, if
23 all time for filing an appeal with respect to the finding or
24 conclusion has expired or if the finding or conclusion is not
25 subject to judicial review.

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

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

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

11 (2) no more than ten percent of the proceeds
12 of the action or settlement if the court finds that the action
13 was based primarily on disclosures of specific information, not
14 provided by the qui tam plaintiff, relating to allegations or
15 transactions in a criminal, civil, administrative or
16 legislative hearing, proceeding, report, audit or investigation
17 or from the news media, taking into account the significance of
18 the information and the role of the qui tam plaintiff in
19 advancing the case to litigation. However, if the attorney
20 general determines and certifies in writing that the qui tam
21 plaintiff provided a significant contribution in advancing the
22 case, then the qui tam plaintiff shall receive the share of
23 proceeds set forth in Paragraph (1) of this subsection.

24 B. If the state does not proceed with an action
25 brought by a qui tam plaintiff and the state prevails in the

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

5 C. Whether or not the state proceeds with an action
6 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 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 incurred in the action plus reasonable attorney fees
2 that shall be paid by the defendant.

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

10 (1) proceeds in the amount of the false claim
11 paid and attorney fees and costs shall be returned to the fund
12 or funds from which the money, property or services 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 8. AWARD OF ATTORNEY FEES AND COSTS TO
23 DEFENDANT.--If the state does not proceed with the action and
24 the qui tam plaintiff conducts the action, the court may award
25 a defendant reasonable attorney fees and costs if the defendant

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1 prevails and the court finds the action clearly frivolous,
2 clearly vexatious or brought primarily for the purpose of
3 harassment.

4 Section 9. CERTAIN ACTIONS BARRED.--

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

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

19 C. Unless the attorney general determines and
20 certifies in writing that the action is in the interest of the
21 state, no court shall have jurisdiction over an action brought
22 pursuant to Section 5 of the Fraud Against Taxpayers Act when
23 that action is based on allegations or transactions that are
24 the subject of a criminal, civil or administrative proceeding
25 in which the state is a party.

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

7 Section 10. STATE NOT LIABLE.--The state shall not be
8 liable for expenses or fees that a qui tam plaintiff may incur
9 in investigating or bringing an action pursuant to the Fraud
10 Against Taxpayers Act.

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

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

20 B. An employer shall not discharge, demote,
21 suspend, threaten, harass, deny promotion to or in any other
22 manner discriminate against an employee in the terms and
23 conditions of employment because of the lawful acts of the
24 employee on behalf of the employee or others in disclosing
25 information to a government or law enforcement agency or in

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1 furthering a fraud against taxpayers action, including
2 investigating, initiating, testifying or assisting in an action
3 filed or to be filed pursuant to the Fraud Against Taxpayers
4 Act.

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

16 Section 12. LIMITATION OF ACTIONS--ESTOPPEL--STANDARD OF
17 PROOF.--

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

23 B. Notwithstanding any other provision of law, a
24 final judgment rendered in a criminal proceeding charging fraud
25 or false statement, whether upon a guilty verdict after trial

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1 or upon a plea of guilty or nolo contendere, shall estop the
2 defendant from denying the essential elements of a fraud
3 against taxpayers action where the criminal proceeding concerns
4 the same transaction that is the subject of the fraud against
5 taxpayers action.

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

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

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

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

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