

1 SENATE BILL 153

2 **51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013**

3 INTRODUCED BY

4 Joseph Cervantes

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8 ENDORSED BY THE COURTS, CORRECTIONS AND JUSTICE COMMITTEE

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10 AN ACT

11 RELATING TO CIVIL ACTIONS; CLARIFYING PROVISIONS OF THE FRAUD
12 AGAINST TAXPAYERS ACT; PROVIDING THAT THE STATE IS ENTITLED TO
13 ATTORNEY FEES AND COSTS FOR ADDITIONAL CLAIMS ASSERTED AGAINST
14 A DEFENDANT; PROVIDING A DEADLINE FOR THE STATE TO INTERVENE;
15 PROVIDING FOR CIVIL INVESTIGATIVE DEMANDS.

16
17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

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

20 "44-9-1. SHORT TITLE.--~~[This act]~~ Chapter 44, Article 9
21 NMSA 1978 may be cited as the "Fraud Against Taxpayers Act"."

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

24 "44-9-3. FALSE CLAIMS--LIABILITY--PENALTIES--EXCEPTION.--

25 A. A person shall not:

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

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

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

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

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

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

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

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

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

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

11 C. A person who violates Subsection A of this
12 section shall be liable for civil, remedial and curative
13 damages as follows:

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

18 "44-9-4. INVESTIGATION BY THE ATTORNEY GENERAL--
19 DELEGATION--CIVIL ACTION.--

20 A. To the extent the attorney general deems
21 appropriate, the attorney general shall diligently investigate
22 suspected violations of Section [~~3 of the Fraud Against~~
23 ~~Taxpayers Act]~~ 44-9-3 NMSA 1978, and if the attorney general
24 finds that a person has violated or is violating that section,
25 the attorney general may bring a civil action against that

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1 person pursuant to the Fraud Against Taxpayers Act.

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

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

10 "44-9-5. CIVIL ACTION BY QUI TAM PLAINTIFF--STATE MAY
11 INTERVENE.--

12 A. A person may bring a civil action for a
13 violation of Section [~~3 of the Fraud Against Taxpayers Act~~]
14 44-9-3 NMSA 1978 on behalf of the person and the state. The
15 action shall be brought in the name of the state. The person
16 bringing the action shall be referred to as the qui tam
17 plaintiff. Once filed, the action may be dismissed only with
18 the written consent of the court, taking into account the best
19 interest of the parties involved and the public purposes behind
20 the Fraud Against Taxpayers Act.

21 B. A complaint filed by a qui tam plaintiff shall
22 be filed in camera in district court and shall remain under
23 seal for at least sixty days. No service shall be made on a
24 defendant, and no response is required from a defendant until
25 the seal has been lifted and the complaint served pursuant to

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1 the rules of civil procedure.

2 C. On the same day as the complaint is filed, the
3 qui tam plaintiff shall serve the attorney general with a copy
4 of the complaint and written disclosure of substantially all
5 material evidence and information the qui tam plaintiff
6 possesses. The attorney general on behalf of the state may
7 intervene and proceed with the action within sixty days after
8 receiving the complaint and the material evidence and
9 information. Upon a showing of good cause and reasonable
10 diligence in the state's investigation, the state may move the
11 court for an extension of time during which the complaint shall
12 remain under seal; provided that extensions of time shall not
13 exceed an additional one hundred twenty days without the
14 consent of the qui tam plaintiff.

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

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

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

25 E. If the state has not intervened and proceeded

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1 with the action within one hundred eighty days after receiving
2 the complaint, the qui tam plaintiff may deem the state's
3 inaction to be a declination to act and elect to proceed with
4 the action as provided in Paragraph (2) of Subsection D of this
5 section.

6 [E-] F. When a person brings an action pursuant to
7 this section, no person other than the attorney general on
8 behalf of the state may intervene or bring a related action
9 based on the facts underlying the pending action."

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

12 "44-9-6. RIGHTS OF THE QUI TAM PLAINTIFF AND THE STATE.--

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

18 B. If the state proceeds with the action and
19 asserts other statutory or common law claims against the
20 defendant and the additional claims are based on allegations or
21 information provided by the qui tam plaintiff, the qui tam
22 plaintiff's award shall be as provided in Section 44-9-7 NMSA
23 1978 for any recovery based on the additional claims. The
24 state shall be entitled to an award of attorney fees and costs
25 as provided in Section 44-9-7 NMSA 1978 in any successful

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1 action based on the additional statutory or common law claims.

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

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

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

- 21 (1) limiting the number of witnesses the qui
22 tam plaintiff may call;
- 23 (2) limiting the length of testimony of such
24 witnesses;
- 25 (3) limiting the qui tam plaintiff's cross

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1 examination of witnesses; or

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

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

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

20 [~~G.~~] H. Whether or not the state proceeds with the
21 action, upon a showing by the attorney general on behalf of the
22 state that certain actions of discovery by the qui tam
23 plaintiff would interfere with the state's investigation or
24 prosecution of a criminal or civil matter arising out of the
25 same facts, the court may stay such discovery for a period of

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1 not more than sixty days. The showing by the state shall be
2 conducted in camera. The court may extend the sixty-day period
3 upon a further showing in camera that the state has pursued the
4 criminal or civil investigation or proceeding with reasonable
5 diligence and any proposed discovery in the civil action will
6 interfere with the ongoing criminal or civil investigation or
7 proceeding.

8 ~~[H.]~~ I. Notwithstanding the provisions of Section
9 ~~[5 of the Fraud Against Taxpayers Act]~~ 44-9-5 NMSA 1978, the
10 attorney general may elect to pursue the state's claim through
11 any alternate remedy available to the state, including an
12 administrative proceeding to determine a civil money penalty.
13 If an alternate remedy is pursued, the qui tam plaintiff shall
14 have the same rights in such a proceeding as the qui tam
15 plaintiff would have had if the action had continued pursuant
16 to this section. A finding of fact or conclusion of law made
17 in the other proceeding that has become final shall be
18 conclusive on all parties to an action under the Fraud Against
19 Taxpayers Act. For purposes of this subsection, a finding or
20 conclusion is final if it has been finally determined on appeal
21 to the appropriate court, if all time for filing an appeal with
22 respect to the finding or conclusion has expired or if the
23 finding or conclusion is not subject to judicial review."

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

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1 "44-9-7. 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~~] 44-9-3 NMSA 1978
10 upon which the action was based, the court may reduce the share
11 of the 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~~] 44-9-3 NMSA 1978 upon which the action was based, that
20 person shall be dismissed from the civil action and shall not
21 receive a share of the proceeds. The dismissal shall not
22 prejudice the right 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

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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 and
13 attorney fees and costs provided by the office of the attorney
14 general shall be paid to the office of the attorney general;

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

18 (3) all remaining proceeds shall be deposited
19 as follows:

20 (a) one-half into a fund for the use of
21 the office of the attorney general to provide staffing for
22 cases arising pursuant to the Fraud Against Taxpayers Act in
23 furtherance of the obligations imposed upon that office by [~~the~~
24 ~~Fraud Against Taxpayers~~] that act; and

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

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1 SECTION 7. 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--INFORMATION SOURCE.--

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 unless the employee, during employment with the state and
8 in good faith, exhausted existing internal procedures for
9 reporting false claims and the state failed to act on the
10 information provided within a reasonable period of time.

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

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

25 D. Upon motion of the attorney general, a court

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1 may, in its discretion, dismiss an action brought pursuant to
2 Section ~~[5 of the Fraud Against Taxpayers Act]~~ 44-9-5 NMSA 1978
3 if the elements of the alleged false or fraudulent claim by the
4 defendant have been publicly disclosed in a federal or state
5 criminal, civil or public administrative proceeding, in the
6 news media or in a publicly disseminated governmental report at
7 the time the complaint is filed, unless the person bringing the
8 action is an original source of the information on which the
9 action brought pursuant to Section 44-9-5 NMSA 1978 is based."

10 SECTION 8. A new section of the Fraud Against Taxpayers
11 Act is enacted to read:

12 "[NEW MATERIAL] CIVIL INVESTIGATIVE DEMAND.--

13 A. Whenever the attorney general has reason to
14 believe that any person may be in possession, custody or
15 control of an original or copy of any book, record, report,
16 memorandum, paper, communication, tabulation, map, chart,
17 photograph, mechanical transcription or other tangible document
18 or recording that the attorney general believes to be relevant
19 to the subject matter of an investigation of a probable
20 violation of the Fraud Against Taxpayers Act, the attorney
21 general may, prior to the institution of a civil proceeding,
22 execute in writing and cause to be served upon the person a
23 civil investigative demand requiring that person to produce
24 documentary material and permit the inspection and copying of
25 the material. The demand of the attorney general shall not be

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1 a matter of public record and shall not be published by the
2 attorney general except by court order.

3 B. A civil investigative demand shall:

4 (1) state the general subject matter of the
5 investigation;

6 (2) describe with reasonable certainty the
7 classes of documentary material to be produced;

8 (3) prescribe the return date within which the
9 documentary material is to be produced, which in no case shall
10 be less than ten days after the date of service; and

11 (4) identify the members of the attorney
12 general's staff to whom such documentary material is to be made
13 available for inspection and copying.

14 C. A civil investigative demand shall not:

15 (1) contain any requirement that would be
16 unreasonable or improper if contained in a subpoena duces tecum
17 issued by a court of this state;

18 (2) require the disclosure of any documentary
19 material that would be privileged or for any other reason would
20 not be required by a subpoena duces tecum issued by a court of
21 this state; or

22 (3) require the removal of any documentary
23 material from the custody of the person upon whom the demand is
24 served except in accordance with the provisions of Subsection E
25 of this section.

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1 D. Service of a civil investigative demand may be
2 made by:

3 (1) delivering a duly executed copy of the
4 demand to the person to be served, or if the person is not a
5 natural person, to the statutory agent for the person or an
6 officer of the person to be served;

7 (2) delivering a duly executed copy of the
8 demand to the principal place of business in this state of the
9 person to be served; or

10 (3) mailing by registered or certified mail a
11 duly executed copy of the demand addressed to the person to be
12 served at the person's principal place of business in this
13 state or, if the person has no place of business in this state,
14 to the person's principal office or place of business.

15 E. Documentary material demanded pursuant to this
16 section shall be produced for inspection and copying during
17 normal business hours at the principal office or place of
18 business of the person served or may be inspected and copied at
19 such other times and places as may be agreed upon by the person
20 served and the attorney general.

21 F. Except as provided in Subsection G of this
22 section, no documentary material produced pursuant to a civil
23 investigative demand, or copies of that material, shall be
24 produced for inspection or copying by anyone other than an
25 authorized employee of the attorney general, nor shall the

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1 contents thereof be disclosed to anyone other than an
2 authorized employee of the attorney general.

3 G. Documentary material produced pursuant to a
4 civil investigative demand, or copies of that material, may be
5 produced for inspection or copying to:

6 (1) other state attorneys general for the
7 purposes of investigation into the particular action in which
8 the civil investigation demand was served;

9 (2) federal, state and other law enforcement
10 agencies; or

11 (3) the qui tam plaintiff.

12 H. At any time before the return date of a civil
13 investigative demand, a petition to set aside or modify the
14 demand or extend the return date set forth in the demand may be
15 filed in the district court in the county in which the person
16 resides or has a principal place of business, and the court
17 upon a showing of good cause, may set aside or modify the
18 demand or extend the return date of the demand.

19 I. After service of the civil investigative demand
20 upon a person, if that person neglects or refuses to comply
21 with the demand, the attorney general may invoke the aid of the
22 court in the enforcement of the demand. In appropriate cases,
23 the court shall issue its order requiring the person to appear
24 and produce the documentary material required in the demand and
25 may, upon failure of the person to comply with the order,

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1 punish the person for contempt."

2 SECTION 9. EFFECTIVE DATE.-The effective date of the
3 provisions of this act is July 1, 2013.

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