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HOUSE BILL 847

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

INTRODUCED BY

Joseph Cervantes

AN ACT

RELATING TO CIVIL ACTIONS; AMENDING THE FRAUD AGAINST TAXPAYERS
ACT; APPROPRIATING CERTAIN ATTORNEY FEES AND COSTS; SPECIFYING
SOURCE OF INFORMATION; PROVIDING FOR CIVIL INVESTIGATIVE
DEMANDS.

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

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

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

Section 2. Section 44-9-7 NMSA 1978 (being Laws 2007,
Chapter 40, Section 7) is amended to read:

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

A. Except as otherwise provided in this section, if
the state proceeds with an action brought by a qui tam

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1 plaintiff and the state prevails in the action, the qui tam
2 plaintiff shall receive:

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

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

21 B. If the state does not proceed with an action
22 brought by a qui tam plaintiff and the state prevails in the
23 action, the qui tam plaintiff shall receive an amount that is
24 not less than twenty-five percent or more than thirty percent
25 of the proceeds of the action or settlement, as the court deems

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1 reasonable for collecting the civil penalty and damages.

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

4 (1) if the court finds that the action was
5 brought by a person that planned or initiated the violation of
6 Section [~~3 of the Fraud Against Taxpayers Act~~] 44-9-3 NMSA 1978
7 upon which the action was based, the court may reduce the share
8 of the proceeds that the person would otherwise receive under
9 Subsection A or B of this section, taking into account the role
10 of the person as the qui tam plaintiff in advancing the case to
11 litigation and any relevant circumstances pertaining to the
12 violation; or

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

20 D. Any award to a qui tam plaintiff shall be paid
21 out of the proceeds of the action or settlement, if any. The
22 qui tam plaintiff shall also receive an amount for reasonable
23 expenses incurred in the action plus reasonable attorney fees
24 that shall be paid by the defendant.

25 E. The state is entitled to all proceeds collected

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

7 (1) proceeds in the amount of the false claim
8 paid and attorney fees and costs shall be returned to the fund
9 or funds from which the money, property or services came unless
10 the attorney fees and costs were provided by the office of the
11 attorney general, in which case the attorney fees and costs
12 shall be paid to the office of the attorney general;

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 office of the attorney general to provide staffing for
20 cases arising pursuant to the Fraud Against Taxpayers Act in
21 furtherance of the obligations imposed upon that office by [~~the~~
22 ~~Fraud Against Taxpayers~~] that act; and

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

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

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1 "44-9-9. CERTAIN ACTIONS BARRED--INFORMATION SOURCE.--

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

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

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

23 D. Upon motion of the attorney general, a court
24 may, in its discretion, dismiss an action brought pursuant to
25 Section [~~5 of the Fraud Against Taxpayers Act~~] 44-9-5 NMSA 1978

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1 if the elements of the alleged false or fraudulent claim have
2 been publicly disclosed [~~in~~] by an allegation or transaction in
3 a criminal, civil or administrative proceeding; in a
4 congressional, administrative or government accounting office
5 report, hearing, audit or investigation; or from the news media
6 or in a publicly disseminated governmental report at the time
7 the complaint is filed.

8 E. Unless an action is brought by the attorney
9 general, the person bringing the action must be an original
10 source of the information on which the action is based. As
11 used in this subsection, "original source" means an individual
12 who has direct and independent knowledge of the information on
13 which the allegations are based."

14 Section 4. A new section of the Fraud Against Taxpayers
15 Act is enacted to read:

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

17 A. Whenever the attorney general has reason to
18 believe that any person may be in possession, custody or
19 control of an original or copy of any book, record, report,
20 memorandum, paper, communication, tabulation, map, chart,
21 photograph, mechanical transcription or other tangible document
22 or recording that the attorney general believes to be relevant
23 to the subject matter of an investigation of a probable
24 violation of the Fraud Against Taxpayers Act, the attorney
25 general may, prior to the institution of a civil proceeding,

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1 execute in writing and cause to be served upon the person a
2 civil investigative demand requiring that person to produce
3 documentary material and permit the inspection and copying of
4 the material. The demand of the attorney general shall not be
5 a matter of public record and shall not be published by the
6 attorney general except by court order.

7 B. A civil investigative demand shall:

8 (1) state the general subject matter of the
9 investigation;

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

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

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

18 C. A demand shall not:

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

22 (2) require the disclosure of any documentary
23 material that would be privileged or for any other reason would
24 not be required by a subpoena duces tecum issued by a court of
25 this state; or

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

5 D. Service of a civil investigative demand may be
6 made by:

7 (1) delivering a duly executed copy of the
8 demand to the person to be served, or if the person is not a
9 natural person, to the statutory agent for the person or an
10 officer of the person to be served;

11 (2) delivering a duly executed copy of the
12 demand to the principal place of business in this state of the
13 person to be served; or

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

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

25 F. Unless otherwise ordered by the district court

1 in the county in which the person resides or has a principal
2 place of business for good cause shown, no documentary material
3 produced pursuant to a civil investigative demand, or copies of
4 that material, shall be produced for inspection or copying by
5 anyone other than an authorized employee of the attorney
6 general, nor shall the contents thereof be disclosed to anyone
7 other than an authorized employee of the attorney general, or
8 in court in an action relating to a violation of the Fraud
9 Against Taxpayers Act.

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

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