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FISCAL IMPACT REPORT

ORIGINAL DATE
LAST UPDATED 2/21/09 **HB** _____

SPONSOR R Martinez

SHORT TITLE Liability for False Claims **SB** 622

ANALYST Wilson

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
	(Unknown) See Below	(Unknown) See Below	(Recurring)	General Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$50.0+ See Below	\$50.0+ See Below		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

General Services Department (GSD)

Human Services Department

SUMMARY

Synopsis of Bill

Senate Bill 622 amends sections of the Fraud Against Taxpayers Act (FATA) enhancing the power of the AG to bring civil actions for violations of the FATA and will no longer allow the AG to delegate its authority to investigate or bring suit under the FATA to state agencies.

It clarifies the procedures that apply to actions initiated on behalf of the state by a private individual known as a "qui tam" plaintiff as well as the rights of such plaintiffs.

The bill limits awards to qui tam plaintiffs that planned, initiated or participated in a violation of the FATA or if the suit is based upon allegations or transactions that the qui tam plaintiff became aware of while employed by, under contract to or serving as an agent for a defendant who also failed to disclose those allegations or transactions to that defendant to no more than ten percent of the proceeds from the suit.

The bill also denies jurisdiction to courts for violations of the FATA if the action is based on the public disclosure of allegations or transactions from a criminal, civil or administrative hearing or any investigation, report, hearing or audit conducted or requested by the legislature, state auditor or any agency of a city, county, town/political subdivision or from the news media, unless the action is brought by the AG or the qui tam plaintiff is an original source of the information.

The bill also limits the time frame in which such actions may be brought to six years after the date the violation was committed or three years after the date when material facts are known by the official charges with responsibility to act but in no event more than ten years after the date the violation was committed – whichever occurs last. Currently actions in violation of the FATA can be brought based on conduct that occurred anytime after July 1, 1987.

The bill repeals the Medicaid False Claims Act (MFCA) in its entirety.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase

SB 622 removes the current provision for attorneys' fees and litigation costs to be awarded to the state or the qui tam plaintiff in the event they prevail in an action under this FATA. In doing so, it will deprive the state of the benefit of that award. The actual amount of the potential loss to the state cannot be accurately estimated. However, in a typical qui tam action under this FATA, an award of attorney's fees could easily reach \$500,000 to \$1,000,000. Costs for that same case could easily reach half of the usual attorney fee, or \$25,000 or more. This change will either eliminate the recoverable fees and costs for the AGO or eliminate those fees and costs recoverable by a qui tam plaintiff's counsel, requiring those fees to come out of the overall award, thereby reducing the award funds left for the state.

SB 622 eliminates the state's ability to impose a penalty or fine that currently \$5,000 to \$10,000 for each violation, if a penalty has been imposed upon the defendant for the same acts in another lawsuit. For instance, if a defendant was assessed fines in a federal lawsuit for fraud, in which New Mexico was not a party, New Mexico could not recover penalties under its own action.

SB 622 eliminates current provision providing for an award of attorney's fees to the state or the qui tam plaintiff. This reduces the incentive on the part of potential qui tam plaintiff to file an action since their attorney's fees will not be paid. SB 622's amendment to this statute also will reduce the amount paid to the state. The inability to collect attorney fees and costs means that more of the award will go directly to the qui tam plaintiff rather than the state. The inability to collect costs will have a similar effect in loss of revenue to the state.

SB 622 will repeal the current provision allowing the AGO to move for dismissal of an action if the elements of the claim have been previously publicly disclosed. Instead, the provision removes jurisdiction from the court to hear a case in which the information brought by the qui tam plaintiff had be previously publicly disclosed. The AGO states this could result in a drastic loss of recovery for the state.

HSD notes that amending the portion of the FATA that allows the AG to designate another state agency to pursue a false claims case and repealing the MFCA that currently allows HSD to pursue a civil action for a false claim will reduce the recovery to the State.

SB 622 repeals the MFCA which allows the HSD to pursue a civil action for a false claim. The Human Services Department is the single state agency that administers Medicaid and is in the best position to determine when a false claim may have been presented. Allowing only the attorney general to bring or pursue a civil action for a false claim will reduce the possibility that the state will make any recovery in these cases.

SIGNIFICANT ISSUES

SB 622 amends sections of the FATA. The FATA is known as a qui tam statute. Qui tam is short for the Latin phrase, for the King as well as himself. The statute, went into effect in July, 2007 to enable the state to recoup money lost due to fraud. The statute was intended to allow a private person with knowledge of the fraud to file a suit on behalf of the state, and recover funds for the state. Other states have followed this model of the federal False Claims Act that has been in existence since the Civil War as a means of using private citizens and attorneys to help recoup fraudulent losses to the State when the State has insufficient resources to prosecute the case itself. It also rewards the whistleblower by providing them with a portion of the award, thereby encouraging disclosure of fraud.

Since the FATA became law more than 100 suits have been filed on behalf of New Mexico under this legislation. In amending the FATA, SB 622 reduces the circumstances under which a claim can be brought on behalf of the state for fraud. In doing so, SB 622 also raises the standards that must be met in order for these claims to successfully brought. Additionally, SB 622, as written, takes away the provision under which the AGO can collect attorney fees and costs for bringing an action under this statue, reduces the instances in which penalties can be imposed, and reduces the authority of the AGO to utilize the resources of other state agencies to investigate and prosecute these cases and shortens the statute of limitations for these cases.

The AGO provided the following:

As written, SB 622 will amend the FATA to exclude acts of fraud against an agent, contractor, grantee or other recipient of state funds as violations under this act. Changes to this section in SB 622 will also remove as a cause of action fraud that was used to reduce or eliminate an obligation or payment. Changes to this section also increase the burden on the state by requiring a prosecutor to show that the fraud was done with the specific intent to defraud the state, whereas the current version requires that the fraud be done knowingly but not intentionally.

SB 622 allows for dismissal of a case brought under this statute upon motion by the State after the qui tam plaintiff has had an opportunity for a hearing on the motion. The change proposed by SB 622 removes the requirement that the dismissal be based upon good cause and eliminates the qui tam plaintiff's ability to present evidence as a dismissal hearing.

Current law does not provide for a statute of limitations and applies retroactively to conduct and losses to the state that occurred for any time, unless prior to July 1, 1987. SB 622 will alter that provision to include a 6 year statute of limitations for the conduct, or three years after the state knew or should have known of the conduct, which ever is later, but in no instance more than ten years after the event.

SB 622 repeals the Medicaid False Claims Act (MFCA) in its entirety. While FATA and MFCA are similar, they are different in significant ways, provide different means to prosecute fraud that cost the state, and assign the award funds differently. Removing the MFCA as a means to challenge fraud against the state will provide the state and the Human Services division in particular with few means to recovery money lost to the Medicaid system as a result of fraudulent practices on a large scale.

ADMINISTRATIVE IMPLICATIONS

The amendments in SB 622 provide disincentives to potential qui tam plaintiffs that may reduce the number of cases filed under this FATA, and may therefore increase the burden on the AGO to prosecute these cases with less assistance from private counsel. SB 622 will also require more investigative and research work on the part of the AGO since it removes the AGO's ability to have the agency involved in the fraud to investigate the claims. This increase in work could require an estimated one-half attorney position, and a one-half paralegal position, costing the AG an estimated cost of \$50,000.

SB 622 deletes the current section that provides for AGO to delegate the authority to investigate claims to the agency for which the claim is made. For example, this bill will prevent the AGO from sending a claim for Medicaid Fraud to HSD for investigation. This will increase the work that must necessarily be done by the AGO, and will make investigation into these claims more difficult.

RELATIONSHIP

The AGO has also submitted a bill proposal with recommended changes to FATA. However, many of the changes that will be proposed by the AGO are directly contrary to the amendments SB 622 provides.

TECHNICAL ISSUES

The AOC states there may be a problem with the amendment's insertion of the required element of "intent to defraud the state" in several of the prohibited actions of Section 44-9-3(A) while Section 44-9-3(B) remains unchanged: Proof of specific intent to defraud is not required for a violation of Subsection A of this section.