

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

Senate Bill 187 (Senator Lenett)
Judicial Proceedings and Finance

Maryland False Claims Act

This bill (1) prohibits a person from knowingly making a false or fraudulent claim for money, property, or services against a governmental entity; (2) authorizes a person to bring an action involving claims covered under the Act on behalf of a governmental entity; (3) permits a governmental entity to intervene in and proceed with an action initiated on its behalf by a private person; (4) imposes penalties on persons found to be in violation of the Act; (5) entitles an individual who initiates an action on behalf of a governmental entity and who prevails in the action to a share of the proceeds; and (6) prohibits retaliatory actions by an employer against an employee for disclosure of the employer's participation in any violation of the bill's provisions.

Fiscal Summary

State Effect: Potential significant increase in general fund revenues beginning in FY 2011 from any damages and civil penalties awarded under the bill. Potential significant increase in special fund revenues from Medicaid special fund recoveries beginning as early as FY 2011, offset by a corresponding increase in special fund expenditures and decrease in general fund expenditures for the State's portion of the Medicaid match. Potential increase in general fund expenditures for additional personnel in the Office of the Attorney General (OAG). The Governor's proposed FY 2011 budget includes \$20 million in Medicaid reductions (\$9 million general funds, \$11 million federal funds) contingent on the enactment of the Maryland False Claims Act of 2010; however, actual savings in FY 2011 and future years cannot be reliably estimated. Any increase in actions filed in the District Court can be handled with existing resources.

Local Effect: Potential increase in revenues due to the bill's civil penalty provisions and damages awarded to local governments. The amount of any increase cannot be reliably estimated at this time. Any increase in actions filed in the circuit courts can be handled with existing resources.

Small Business Effect: None.

Analysis

Bill Summary:

Prohibited Activities: A “claim” is a request or demand for money, property, or services made under contract or otherwise by a contractor, grantee, or other person with an alleged claim to money or property if (1) a governmental entity provides any portion of the money or property that is requested or demanded; or (2) reimburses the contractor, grantee, or other person for any portion of the money or property that is requested or demanded. A “governmental entity” is defined as the State, a county, or any unit of the State or county government.

The bill prohibits a person from (1) knowingly presenting or causing to be presented a false or fraudulent claim for payment or approval; (2) knowingly making, using, or causing to be made or used a false record or statement to get a false or fraudulent claim approved or paid by a governmental entity; (3) conspiring to defraud a governmental entity by getting a false or fraudulent claim approved or paid by the governmental entity; (4) having possession, custody, or control of property or money used or to be used by the a governmental entity and knowingly delivering or causing to be delivered less property or money than was accounted for on the person’s certificate or receipt; (5) being authorized to make or deliver a document certifying receipt of property used or to be used by a governmental entity and knowingly making or delivering a receipt without knowing that the information contained in the receipt is true; (6) knowingly buying or receiving publicly owned property, as a pledge of an obligation or debt, from a person who may not lawfully sell or pledge the property; (7) knowingly making, using, or causing to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to a governmental entity; or (8) being a beneficiary of an inadvertent submission of a false claim to a governmental entity and failing to disclose the false claim to the governmental entity within a reasonable time after discovering the falsity of the claim.

“Knowing” and “knowingly” are defined to mean, with respect to information and without requiring proof of specific intent to defraud, that a person has actual knowledge of information, or acts in deliberate ignorance or reckless disregard of the truth or falsity of the information.

Awards/Damages: A person who violates the bill’s prohibitions is liable to a governmental entity for a civil fine of at least \$5,000 and up to \$10,000 and either (1) triple the governmental entity’s damages resulting from the violation; or (2) under specified circumstances in which the person cooperates with the governmental entity, not less than twice the governmental entity’s damages. Violators are also liable for the expenses, costs, and attorney’s fees in a civil action brought to recover the penalties or damages. Any

penalties provided are in addition to remedies provided for in any other law. The bill also establishes joint and several liability for any act committed by two or more persons.

Any remedy provided under the bill is in addition to any other appropriate legal or equitable relief provided under any other applicable statute or regulation.

Causes of Action by Private Parties on Behalf of the State: The bill authorizes a person to bring an action on behalf of himself/herself and a governmental entity against a person who has made a false claim against the governmental entity. A person who initiates an action on behalf of the governmental entity is entitled to a share of the damages if the person prevails in the action. If the governmental entity intervenes and proceeds with an action and prevails, the court must award the private party not less than 15% and not more than 25% of the proceeds, and in certain circumstances not more than 10% of the proceeds, proportional to the amount of time and effort that the party contributed to the final resolution of the action. If the governmental entity does not intervene and the private party proceeds with an action and prevails, the court must award the private party not less than 25% and not more than 30% of the proceeds. A person initiating an action on behalf of a governmental entity is also entitled to an award by the court for reasonable attorney's fees, costs, and expenses.

The court may reduce any share of the proceeds on a finding that the party who brought the civil action deliberately participated in the violation on which the action was based. If a person who initiated a civil action is convicted of criminal conduct arising from a violation of this bill prior to a final determination of the action, the person will be dismissed from the action and not receive any share of the proceeds. If a person who was awarded proceeds is later convicted of criminal conduct arising from a violation of the bill's provisions, the person will be ordered to repay the proceeds previously awarded.

Procedural Requirements: The bill requires the legal counsel for a governmental entity to investigate violations and authorizes the governmental entity's counsel to file a civil action against a person who has made a false claim against the governmental entity. The bill also authorizes a person to initiate an action on behalf of a governmental entity. The governmental entity or any private party initiating an action must prove all essential elements by a preponderance of the evidence.

If the action is initiated by a person on behalf of a governmental entity, the person must serve on the governmental entity a copy of the complaint and all material evidence and information in accordance with the Maryland Rules. A complaint is to be filed *in camera* and must remain under seal for at least 60 days or until the court orders the complaint to be served on the defendant.

A governmental entity is permitted to intervene in and proceed with the civil action that has been initiated on its behalf by another person. The governmental entity is required to do so within 60 days of receipt of the complaint unless the court extends this period to 90 days for good cause shown. The governmental entity must proceed with the civil action or notify the

court that it will not proceed within the 60-day period or before any applicable extension period expires. The person who initiated the action may proceed with the action even if the governmental entity does not. If the governmental entity elects not to proceed, the court may allow the governmental entity to intervene at a later date on a showing of good cause.

If a governmental entity elects to proceed with a civil action, it has the primary responsibility for proceeding with the action and is not bound by any act of the person who initiated the action. However, the person who initiated the action may continue as a party to the action. The bill allows a governmental entity to petition the court to dismiss an action if the person who initiated the action is notified of the governmental entity's motion to dismiss and is provided an opportunity to be heard on the motion. A governmental entity is further permitted to settle a civil action brought under the Act, if the court determines after a hearing that the proposed settlement is fair, adequate, and reasonable.

The court is authorized to impose limitations on the participation of the person who initiated the civil action if the governmental entity can show that unrestricted participation may interfere with or delay the governmental entity or be repetitious, irrelevant, or harassing to the person allegedly in violation of the bill's provisions. Such limitations can include restricting the number of witnesses the person may call to testify, limiting the person's cross-examination of witnesses, or limiting the person's participation in the litigation.

If a governmental entity can show that discovery by a private party who initiated the civil action may interfere with the governmental entity's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay the discovery for no more than 60 days. This is permissible whether or not the governmental entity has elected to proceed with the civil action. The bill provides for an extension of this period if the governmental entity can show it has pursued the investigation or proceeding with reasonable diligence.

The bill permits a governmental entity to pursue alternative remedies, including any appropriate administrative proceeding to consider a civil money penalty. The person who initiated the civil action is afforded the same rights as the person would have had if the governmental entity had continued the action.

Statute of Limitations: A civil action brought under the bill may not be brought more than 10 years after the date on which the violation occurs or more than 3 years after the date when facts material to the right of action are known or should have been known by the official of the governmental entity charged with the responsibility for acting under the circumstances.

Retaliation by Employer Against Employee: An employee who is discriminated against because of lawful acts done by the employee in furtherance of a civil action is entitled to all relief necessary to make the employee whole, including reinstatement, two times the amount

of back pay, interest on back pay, and compensation for other damages, including litigation costs, reasonable attorney's fees, and where appropriate, punitive damages.

Current Law: The Attorney General may bring an action against a person who, for the purpose of defrauding the State, acts in collusion with another person in connection with the State procurement process. The person is liable for three times the State's damages attributable to the collusion. It is a felony, punishable by a fine of up to \$20,000 or up to five years imprisonment, or both, to willfully falsify, conceal, or suppress a material fact; make a false or fraudulent statement or representation; or use a false writing or document containing a false statement or entry in connection with a State procurement contract. (See State Finance and Procurement Article §§ 11-205 and 11-205.1.)

The Medicaid Fraud Control Unit of OAG investigates and prosecutes provider fraud in State Medicaid programs. In addition to any other penalties provided by law, a health care provider that violates a provision of the Medicaid fraud part of the Criminal Law Article is liable to the State for a civil penalty of not more than triple the amount of the overpayment. If the value of the money, goods, or services involved is \$500 or more in the aggregate, a person who violates Medicaid fraud provisions is guilty of a felony and on conviction is subject to imprisonment for up to five years and/or a fine of up to \$100,000. If a violation results in the death of or serious physical injury to a person, the violator is subject to enhanced penalties.

The federal False Claims Act (FCA), 31 U.S.C. § 3729, allows the bringing of a *qui tam* action by a private citizen (relator) on behalf of the federal government, seeking remedies for fraudulent claims against the government. If successful, the relator is entitled to a share of the recovery of federal damages and penalties, depending on the extent to which the relator substantially contributed to the case. Relators are not entitled to a share of a state's portion of recoveries. Many states have enacted state false claims acts under which they must share the damages recovered with the federal government in the same proportion as the federal government's share in the cost of the state Medicaid program.

Signed into law on May 20, 2009, the Fraud Enforcement and Recovery Act of 2009 (FERA) contains the most significant changes to the FCA since 1986. The most significant amendments to the FCA are listed below.

- *Intent* – Prior to FERA, FCA liability attached whenever a person “knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.” Under FERA, a person is liable under the FCA if he/she “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” The amendment is a response to the United States Supreme Court's ruling in *Allison Engine v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008). In *Allison Engine*, two former employees of a subcontractor to a navy contractor filed a *qui tam* action alleging that their former employer submitted false certificates of conformance in

order to secure payment. The court held that it was insufficient for the plaintiffs to establish that the defendant's false statement resulted in payment of the claim or that the primary contractor used government money to pay the subcontractor. Instead, a plaintiff must prove that the false statement was made with the intent that it would result in the government paying the claim.

- *Presentment* – FERA defines a “claim” under the FCA to include requests or demands “made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest.” This language expands the scope of the FCA by allowing claims made by subcontractors to private entities using government funds or advancing government interests to qualify as false claims. The FERA amendments reverse rulings by some federal courts requiring a false claim to have been presented to the government in order for the claim to qualify under the FCA. See *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3ed 488 (D.C. Cir. 2004).
- *Reverse False Claims* – Prior to FERA, a person who knowingly made a fraudulent statement for the purpose of avoiding or decreasing an obligation to pay money to the government was liable to the government. FERA expanded this “reverse false claim” provision by making a person liable for “knowingly conceal[ing] or knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government.” Under FERA “obligation” includes “retention of an overpayment.” Thus, knowingly retaining an overpayment by the government may result in a violation of the FCA.

Background:

Federal Incentives: The federal Deficit Reduction Act of 2005 (DRA) established incentives for states to enact certain antifraud legislation modeled after the federal FCA. States that enact qualifying legislation are eligible to receive an increase of 10% in their share of recovered funds (through a corresponding 10% reduction in the federal share).

To qualify, a state false claims act must provide (1) liability to the state for false or fraudulent claims; (2) provisions for *qui tam* actions to be initiated by whistleblowers and for the rewarding of those whistleblowers in amounts that are at least as effective as those provided by the federal FCA; (3) the placing of *qui tam* actions under seal for 60 days for review by the state Attorney General; and (4) civil penalties not less than those provided in the federal FCA, to be imposed on those who have been judicially determined to have filed false claims.

Other States: Twenty-three states and the District of Columbia have enacted state false claims acts with *qui tam* provisions, 14 of which qualify for increased recoveries under

DRA (California, Georgia, Hawaii, Illinois, Indiana, Massachusetts, Michigan, Nevada, New York, Rhode Island, Tennessee, Texas, Virginia, and Wisconsin).

Some states have realized significant savings the year after enacting a state false claims act. However, given that false claims recoveries involve lengthy and complex litigation, it is unclear what portion of those increased recoveries is directly attributable to enactment of a state act rather than large recoveries from existing cases.

Current Medicaid Fraud Control Efforts: DHMH has an Office of the Inspector General (OIG) that works closely with the Medicaid Fraud Control Unit to maximize efforts to contain fraud, waste, and abuse in Medicaid and other departmental programs. Through its efforts under existing law, OIG identified cost avoidance (claims the State would have erroneously paid) totaling \$13.4 million in fiscal 2006, \$17.5 million in fiscal 2007, \$20.9 million in fiscal 2008, and \$26.7 million in fiscal 2009.

State Fiscal Effect: Although the bill applies to any type of false or fraudulent claim made against a governmental entity, the bill's provisions may be used extensively to combat fraud in the Medicaid program.

Special fund revenues may increase as a result of damages awarded in Medicaid false claims cases and an increase in the State's share of Medicaid fraud recoveries. To the extent that the bill is approved by the Office of the Inspector General at the federal Department of Health and Human Services, DHMH special fund revenues increase under the bill beginning as early as fiscal 2011. Under current law, Medicaid recoveries are usually split 50/50 between the State and federal government. An approved State false claims act would allow the State to retain 60% of recoveries. *For example*, if DHMH recovers \$1.0 million under the bill, the State share is \$600,000 rather than the \$500,000 normally allowed under current law.

To the extent that any additional false or fraudulent claims are successfully prosecuted under the bill, general fund revenues increase. Any revenues from fines and damages recovered by the Attorney General cannot be accurately estimated at this time, but they may be significant.

Medicaid recoveries are special fund revenues that are used to offset the State's portion of the Medicaid match. If the State's Medicaid recoveries increase, special fund revenues will increase and special fund expenditures will increase to assist with the State's portion of the Medicaid match. As a result, general fund expenditures for the State's portion of the Medicaid match will decrease by a corresponding amount. The bill may effectuate a contingent reduction in the Governor's proposed fiscal 2011 Medicaid budget as discussed below.

To the extent that the bill generates additional referrals for false or fraudulent claims, additional personnel and resources may be required by OAG. The amount of any increase cannot be reliably estimated at this time and depends on the number of additional referrals.

For illustrative purposes only, Washington State considered a false claims act (SB 5144) last year. The fiscal note for that bill indicates that 25 new positions are required “to provide legal services in complex litigation pharmaceutical cases” at an estimated cost of \$3.8 million annually.

Local Revenues: To the extent that local governments successfully prosecute additional false or fraudulent claims under the bill, local revenues increase from monetary penalties imposed in circuit court cases and damages awarded to local governments.

Additional Comments: The Governor’s proposed fiscal 2011 budget (SB 140/HB 150) contains a reduction of \$9 million in general fund expenditures and \$11 million in federal fund expenditures for Medicaid “contingent upon the enactment of the Maryland False Claims Act of 2010.” However, the title of this bill is “Maryland False Claims Act.” The title of SB 279/HB 525, another piece of false claims legislation being considered this session, is “Maryland False *Health* Claims Act of 2010.”

Maryland is currently receiving an enhanced federal Medicaid match (61.6% federal funds, 38.4% general funds) for the first half of fiscal 2011 under the federal American Recovery and Reinvestment Act of 2009. The Governor’s proposed fiscal 2011 budget assumes that the enhanced match will continue throughout fiscal 2011.

As of February 2010, two pieces of Congressional legislation (H.R. 2847 and H.R. 3962) contain provisions to extend this enhanced match through June 30, 2011. H.R. 2847 passed both chambers and is in conference. H.R. 3962 (the House health care reform bill) has passed the House of Representatives and is currently in an informal conference with the Senate health care reform bill. Extension of the enhanced federal medical assistance percentage is anticipated to result in \$389 million in additional federal funds for Maryland in fiscal 2011.

Additional Information

Prior Introductions: SB 830 of 2009 received an unfavorable report from the Senate Judicial Proceedings Committee. SB 845 of 2008 received a hearing in the Senate Judicial Proceeding Committee, but no further action was taken. The cross filed bill, HB 292, received a hearing in the Judiciary Committee but was later withdrawn.

Cross File: None.

Information Source(s): Department of Health and Mental Hygiene, Judiciary (Administrative Office of the Courts), Washington State Legislature; Statehealthfacts.org; *Amendments to the False Claims Act Significantly Increase Exposure for Government Contractors and Service Providers*, Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates; *Supreme Court's Allison Engine Decision Narrows the Scope of False Claims Act Cases That Can Be Brought Against Subcontractors*, Foley & Lardner LLP; *Congress Quickly Passes Significant FCA Amendments as Part of a Bill Funding Federal Law Enforcement*, Foley & Lardner LLP; *FERA Amendments To The False Claims Act May Have Serious Implications for Health Care Providers*, Jackson Walker LLP (martindale.com); *Newstand: Fraud Enforcement and Recovery Act of 2009 ("FERA")*, K&L Gates; Department of Legislative Services

Fiscal Note History: First Reader - February 22, 2010
mam/mwc

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