

Department of Legislative Services
Maryland General Assembly
2008 Session

FISCAL AND POLICY NOTE

House Bill 292

(Delegate Smigiel, *et al.*)

Judiciary and Health and Government Operations

Maryland False Claims Act

This bill prohibits a person from knowingly making a false claim for money, property, or services against the State and provides penalties for those in violation. The bill authorizes a private person to bring an action on behalf of the State in which the person may be awarded a share of the proceeds from any action if the person prevails in the action. The bill permits the State to intervene in an action and prohibits retaliatory actions by an employer against an employee for disclosure of the employer's participation in any violation.

Fiscal Summary

State Effect: Potentially significant increase in general fund revenues beginning in FY 2009 from any damages and civil penalties. Potentially significant increase in general and federal fund expenditures for additional personnel in the Office of the Attorney General. Any such costs would depend on the number of actions filed as a result of this bill.

Local Effect: None.

Small Business Effect: None.

Analysis

Bill Summary: This bill prohibits a person from knowingly making a false claim against the State. A "claim" is a request or demand for money, property, or services made under contract or otherwise. A defendant found in violation is liable to the State for triple the

State's resulting damages, a civil fine of not less than \$5,000 and not more than \$10,000, and the expenses, costs, and attorney's fees in a civil action brought to recover the penalties or damages. A person who initiates an action on behalf of the State is entitled to a share of the damages if the person prevails in the action. A defendant without prior knowledge of an investigation who cooperates with the State within specified time limits may reduce the defendant's liability to two times the amount of damages sustained by the State. Any penalties provided are in addition to remedies provided for in any other law. This bill also establishes joint and several liability for any act committed by two or more persons.

The bill requires the Attorney General to investigate violations and permits it to file a civil action against an individual who has made a false claim against the State. The bill authorizes a person to initiate an action on behalf of the State under the Act. The person must serve on the State 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.

The State is permitted to intervene and proceed with the civil action that has been initiated. The State is required to do so within 60 days unless the court grants an extension of up to 90 days for good cause shown. The State must proceed with the civil action or notify the court that it will not proceed within the 60 days or before any applicable extension period expires. The person who initiated the action may proceed with the action even if the State does not. If the State elects not to proceed, the court may allow the State to intervene at a later date on a showing of good cause.

If the State elects to proceed with a civil action, it has the primary responsibility and is not bound by any act of the person who initiated the action. The bill allows the State to petition the court to dismiss an action if the person who initiated the action is notified of the State's motion to dismiss and is provided an opportunity to be heard on the motion. The State 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 permitted to impose limitations on the participation of the person who initiated the civil action if the State can show that unrestricted participation would interfere with or delay the State or be repetitious, irrelevant, or harassing to the person allegedly in violation under the Act. Such limitations can include restricting the number of witnesses the person may call to testify and limiting the person's cross-examination of witnesses.

If the State can show that discovery by a private party who initiated the civil action would interfere with the State'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 State has elected to proceed with the civil action. The bill provides for an extension of this period if the State can show it has acted with reasonable diligence.

The bill permits the State 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 they would have had if the State had continued the action.

If the State proceeds and prevails in an action brought by a person who initiated the action, the court shall award the person reasonable attorney's fees and costs and reasonable expenses that were incurred, as well as a proportional award of the proceeds. A person who initiated the action is also entitled to proceeds from the action as well as an award for reasonable attorney's fees and expenses if the State did not participate in the action. The court may reduce any proportional 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, the person will be ordered to repay the proceeds previously awarded.

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 material facts to the right of action are known or should have been known by the official of the State charged with the responsibility for acting under the Act. The State or any private party initiating an action must prove all essential elements by a preponderance of the evidence. Any remedy provided is in addition to any other appropriate legal or equitable relief provided under any other State or federal statute or regulation.

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 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 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, if done so willingly.

The Medicaid Fraud Control Unit of the Attorney General's Office 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 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 not exceeding five years or a fine not exceeding \$100,000 or both. If a violation results in the death of or serious physical injury to a person, the violator is subject to enhanced penalties. It is a misdemeanor, punishable by a fine of up to \$1,000 or up to three years imprisonment, or both, to obtain assistance under a publicly administered social, health, or nutritional program based on need, if done so willfully. No provision of law authorizes a private party to bring an action for fraud on behalf of the State.

An employer that enters into a contract with a unit of State government under the State Finance and Procurement Article is prohibited from taking or refusing to take any personnel action because of an employee's disclosure of information that the employee reasonably believes is evidence of an abuse of authority, gross mismanagement, or gross waste of money, a substantial and specific danger to public health and safety, or a violation of law. In a civil action brought against the employer, the courts are permitted to (1) issue injunctions to restrain continued violations; (2) reinstate the employee in the same or an equivalent position held before the violation; (3) remove adverse personnel record entries based on or related to the violation; (4) reinstate full fringe benefits and seniority rights; (5) require compensation for lost wages, benefits, and other remuneration; (6) award costs of litigation and reasonable attorney's fees to the prevailing employee; and (7) award any other appropriate damages and relief.

Background: The federal False Claims Act, 31 U.S.C. § 3729, is intended to reach all types of fraud that might result in financial loss to the federal government. The Act 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.

The federal False Claims Act only applies to fraud against the federal government, not the states, and does not cover the states' share of Medicaid spending. Traditionally when states prosecute Medicaid fraud cases, the states must forward the federal government its share of the recovered funds. Section 1909(b) of the Social Security Act (enacted by Section 6031 of the Deficit Reduction Act of 2005) increases by 10 percentage points the amount the states are allowed to retain of the federal share.

To qualify, a state false claims act must provide • liability to the state for false or fraudulent claims; • 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; • the placing of *qui tam* actions under seal for 60 days for review by the state Attorney General; and • 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.

Twenty states have enacted state false claims acts with *qui tam* provisions, eight of which qualify for increased recoveries under the DRA (Hawaii, Illinois, Massachusetts, New York, Nevada, Tennessee, Texas, and Virginia).

The Department of Health and Mental Hygiene has an Office of the Inspector General 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 total funds in fiscal 2006 and \$17.5 million in total funds in fiscal 2007.

State Revenues: 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 general fund revenues could increase under the bill beginning in fiscal 2009. Under current law, any Medicaid recoveries must be 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 were to recover \$1.0 million under the bill, the State share would be \$600,000 rather than the \$500,000 under current law.

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

State Expenditures: The Attorney General's Office advises it would require an additional assistant Attorney General position as well as an administrative officer for

their Medicaid Fraud Unit. It further advises that an additional assistant Attorney General position for the Civil Division would be necessary. While it is anticipated that this bill's enactment would increase the workload of the Attorney General's Office, it is difficult to reliably estimate the number of *qui tam* actions that would be filed by private parties, nor the number of cases in which the State would eventually elect to intervene. Consequently, any additional personnel expenditures that would be required cannot be reliably determined beforehand.

Additional Information

Prior Introductions: SB 367 of 2000, a similar bill, received no action from the Senate Judicial Proceedings Committee.

Cross File: None.

Information Source(s): Department of Human Resources, Judiciary (Administrative Office of the Courts), Department of Health and Mental Hygiene, Office of the Attorney General, Department of Legislative Services

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mll/jr

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