

Department of Legislative Services
Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE

Senate Bill 830

(Senator Lenett)

Judicial Proceedings

Maryland False Claims Act

This bill: (1) prohibits a person from knowingly making a false or fraudulent claim for money, property, or services against the State; (2) authorizes a person to bring an action involving claims covered under the Act on behalf of the State; (3) permits the State 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 the State 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: Potentially significant increase in general fund revenues beginning in FY 2009 from any damages and civil penalties. Potentially significant increase in Medicaid general fund recoveries beginning as early as FY 2010. If the Attorney General receives fewer than 50 complaints per year stemming from this bill, any additional workload can be handled with existing resources. 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. 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.

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 the State; (3) conspiring to defraud the State by getting a false or fraudulent claim approved or paid by the State; (4) having possession, custody, or control of property or money used or to be used by the State 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 the State 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 the State; or (8) being a beneficiary of an inadvertent submission of a false claim to the State and failing to disclose the false claim to the State within a reasonable time after discovering the falsity of the claim.

Awards/Damages: A person who violates the bill’s prohibitions is liable to the State for a civil fine of at least \$5,000 and up to \$10,000 and either (1) triple the State’s damages resulting from the violation; or (2) under specified circumstances in which the person cooperates with the State, not less than twice the State’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.

The bill authorizes a person to bring an action on behalf of himself/herself and the State against a person who has made a false claim against the State. 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. If the State 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 State 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 the State 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.

Any remedy provided is in addition to any other appropriate legal or equitable relief provided under any other State or federal statute or regulation.

Procedural Requirements: The bill requires the Attorney General to investigate violations and authorizes the Attorney General to file a civil action against a person who has made a false claim against the State. The bill also authorizes a person to initiate an action on behalf of the State. The State 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 the State, 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 in and proceed with the civil action that has been initiated on its behalf by another person. The State 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 State 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 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 for proceeding with the action 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 authorized to impose limitations on the participation of the person who initiated the civil action if the State can show that unrestricted participation may interfere with or delay the State 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 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 may 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 the person would have had if the State 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 three years after the date when facts material 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 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 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. (*See* State Finance and Procurement Article §§ 11-205 and 11-205.1.)

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 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 maximum penalties of five years imprisonment and/or a fine of \$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 states 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.

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:

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% of the recovery of funds (by 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-two states and the District of Columbia have enacted state false claims acts with *qui tam* provisions, thirteen of which qualify for increased recoveries under the DRA (California, Georgia, Hawaii, Illinois, Indiana, Massachusetts, 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 are 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 might have erroneously paid) totaling \$13.4 million in fiscal 2006, \$17.5 million in fiscal 2007, and \$20.9 million in fiscal 2008.

State Revenues: To the extent that the bill is approved by OIG at the federal Department of Health and Human Services (DHMH), DHMH general fund revenues increase under the bill beginning as early as fiscal 2010. 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 recovers \$1.0 million under the bill, the State share is \$600,000 rather than the \$500,000 authorized under current law.

To the extent that 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 may be significant.

According to DHMH, to the extent that the bill generates additional referrals for false or fraudulent claims, additional personnel and resources may be required by the Office of the Attorney General. The amount of any increase cannot be reliably estimated at this time and depends on the number of additional referrals. If the Attorney General receives fewer than 50 complaints per year stemming from this bill, any additional workload can be handled with existing resources.

For illustrative purposes only, Washington State is currently considering a false claims act (SB 5144). 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 additional false or fraudulent claims are successfully prosecuted under the bill, local revenues increase under the bill’s monetary penalty provisions for those cases heard in the circuit courts.

Additional Information

Prior Introductions: 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 designated, however, except for stylistic differences, HB 915 is identical.

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

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mlm/kdm

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