

Department of Legislative Services
Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 773

(The Speaker)(By Request - Office of the Attorney
General)

Judiciary and Health and Government
Operations

Maryland False Claims Act and Maryland False Health Claims Act - Revisions

This bill makes several procedural changes to the Maryland False Claims Act (MFCA) and the Maryland False Health Claims Act (MFHCA) that, among other things, allow a person who initiates an action under the Acts to continue with the action if the governmental entity or the State elects not to intervene. The bill's provisions correspond to provisions in the federal False Claims Act.

Fiscal Summary

State Effect: General fund and special fund revenues increase, perhaps significantly, from recoveries and penalties in *qui tam* actions that are allowed to proceed under the bill and from court costs and attorney's fees awarded to the State when it intervenes in civil actions. Expenditures are not directly affected.

Local Effect: Local revenues may increase significantly from additional recoveries, penalties, attorney's fees, and court costs awarded in false claims actions.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary/Current Law:

MFCA and MFHCA – In General: Enacted under Chapter 165 of 2015, MFCA prohibits a person from knowingly making a false or fraudulent claim for payment or approval by a

governmental entity (defined as the State, a county, or a municipal corporation) and authorizes a private citizen to file a civil action on behalf of a governmental entity (often referred to as a “*qui tam*” action) against a person who has made a false claim.

Enacted under Chapter 4 of 2010, MFHCA prohibits a person from making a false or fraudulent claim for payment or approval by the State or the Maryland Department of Health under a State health plan or State health program and authorizes individuals to file private party causes of action on behalf of a governmental entity for false health claims made against the State.

Both Acts have extensive provisions regarding intervention by the State or a governmental entity in *qui tam* actions, penalties, and awards/damages for false claims violations.

Intervening in Qui Tam Actions: Under current law, if the State or a governmental entity elects not to intervene in an action brought by an individual on behalf of the government under the Acts or withdraws after intervening, the court must dismiss the action. The bill repeals this requirement and authorizes an individual to continue with an action if the State or a governmental entity elects not to intervene or withdraws after intervening. The bill makes corresponding changes to reflect this authorization.

Under the bill, on request, the State or a governmental entity must be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts. Notwithstanding the State’s or a governmental entity’s decision not to proceed with or to withdraw from the action, if the person initiating the action proceeds, the court must allow the State or a governmental entity to intervene at a later date. The bill authorizes the court to dismiss the action on a motion by the State or a governmental entity, over the objection of the person initiating the action if the person has been notified by the government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

Under the bill, if the State or a governmental entity does not intervene and the person initiating the action proceeds and prevails, the court must award the person initiating the action an amount that is at least 25% and not more than 30% of the proceeds and is proportional to the amount of time and effort that the person substantially contributed to the final resolution of the civil action. Under current law, if the State or a governmental entity intervenes and eventually prevails, the person initiating the action must be awarded an amount that is at least 15% and not more than 25% of the proceeds and is proportional to the time and effort the person contributed to the final resolution of the civil action.

Discovery/Subpoenas: Under current law, during an investigation by the governmental entity under MFCA or the State under MFHCA, conducted either independently or in conjunction with a civil action filed under the Acts, the State or a governmental entity must

have the same rights of discovery as a civil litigant in the circuit court under Title 2, Chapter 400 of the Maryland Rules. A person from whom State or a governmental entity seeks discovery must be considered a party under these same rules. The bill repeals these provisions. Instead, the bill specifies that if the State or a governmental entity has reason to believe that a person has possession, custody, or control of any relevant documentary material, or that the person has information relevant to the investigation, the State or governmental entity may, before the institution of a civil proceeding under the Acts, issue in writing and cause to be served on the person a subpoena requiring the person to produce the documentary material, answer written interrogatories under oath and in writing, give sworn oral testimony, or provide any combination of these materials. A subpoena served in this matter may be served in the same manner as a subpoena issued by a circuit court. (The federal False Claims Act refers to a “civil investigative demand,” which is considered an administrative subpoena.)

Penalties: Currently, a person who violates MFCA or MFHCA is liable to State or a governmental entity for a civil penalty of up to \$10,000 for each violation. The bill establishes a minimum penalty of \$5,000 for each violation.

Attorney’s Fees and Court Costs: Currently, the Acts authorize the State or a governmental entity to seek court costs and attorney’s fees, in accordance with specified guidelines, when it *files* a civil action under MFCA or MFHCA. The bill extends this authorization to civil actions in which the State or a governmental entity *intervenes*.

Background: According to the Office of the Attorney General (OAG), Medicaid fraud recoveries under MFHCA totaled \$62.6 million for 2018 through 2022. The State is required to give 50% of Medicaid fraud recoveries to the federal government.

OAG is required to report annually on MFCA litigation on behalf of all governmental entities. In its most recent report, OAG reported the following MFCA litigation and related activity for fiscal 2022:

- three actions were brought under MFCA, including two *qui tam* actions filed on the State’s behalf (both of these actions were still under investigation at the time of the report’s publication) and one action filed by Baltimore City seeking in excess of \$75,000 in damages for false claims related to a towing contract;
- OAG opened investigations into three additional matters based on information received from sources other than a *qui tam* relator;
- 22 matters were open for investigation at the time of the report, including matters opened in previous fiscal years;
- the State resolved three MFCA matters during the fiscal year, resulting in a \$370,660 settlement, a \$231,000 settlement, and \$27,737 in withheld payments; and
- Baltimore City resolved one MFCA matter, resulting in a \$91,755 settlement.

The report was based on responses from 11 of the State's 24 counties (including Baltimore City) and 60 of the State's 160 municipal corporations. According to OAG, there are currently 233 pending *qui tam* actions under Maryland statutes.

State Fiscal Effect: General fund and special fund revenues increase, perhaps significantly, from recoveries and penalties in *qui tam* actions that are allowed to proceed under the bill and from court costs and attorney's fees awarded to the State when it intervenes in civil actions. Special fund expenditures are not directly affected.

OAG advises that it does not have the resources required to intervene in all *qui tam* cases filed, which may result in the declination of cases that might have resulted in a recovery. Also, OAG has been informed by potential whistleblowers and their legal counsel (mostly in non-Medicaid cases) that they would file cases in Maryland if they were allowed to proceed with declined cases. Under current law, there is little incentive for whistleblowers to pursue Maryland-state level claims, since most of those cases are declined. OAG notes that most cases that are filed involve federal and State claims; the federal portion of these actions may proceed after the State declines to intervene.

The precise amount of additional recoveries expected under the bill cannot be reliably estimated at this time, however, based on available information they may exceed \$1.0 million annually.

In general, MFCA and MFHCA recoveries must be deposited into the general fund. (Medicaid recoveries under MFHCA are deposited into the general fund after the State returns a portion of the recovery to the federal government.) However, pursuant to Chapters 608 and 609 of 2022, any civil penalty or damages collected by the State for violations of MFCA or MFHCA that affect any of the following funds must be deposited into the affected fund(s):

- a fund not subject to § 7-302 of the State Finance and Procurement Article;
- a special fund requiring reversion of appropriated funds to the special fund under § 7-304 of the State Finance and Procurement Article;
- a fund under the jurisdiction of the Board of Trustees for the State Retirement and Pension System; or
- a fund under the jurisdiction of the State Employee and Retiree Health and Welfare Benefits Program.

If more than one fund is affected, the Comptroller must make deposits to the appropriate fund or the general fund on a *pro rata* basis.

Chapters 608 and 609 authorized OAG to seek court costs and attorney's fees in civil actions the office files under MFCA and established the False Claims Fund. The False Claims Fund is a special, nonlapsing fund that consists of (1) all attorney's fees and costs collected by the State by judgment, settlement, agreement, or otherwise under MFCA; (2) money appropriated in the State budget to the fund; (3) interest earnings; and (4) any other money from any other source accepted for the benefit of the fund. The fund may be used only by the Attorney General to investigate and litigate suspected violations of MFCA. Expenditures from the fund may only be made in accordance with the State budget. Money expended from the fund is supplemental to and not intended to supplant funding that would otherwise be appropriated for the Attorney General.

The federal government offers incentives for states to enact certain antifraud legislation modeled after the federal False Claims Act. The incentives apply only to Medicaid recoveries. States that enact qualifying legislation are eligible to receive an increase of 10% in their share of recovered funds. The 10% increase in the state share of the recovery corresponds to a 10% reduction in the federal share. MFHCA currently does not qualify for the incentive. While the bill brings Maryland closer to qualifying for the incentive, additional statutory changes are required for the State to qualify. OAG advises that if Maryland had qualified for the incentive, the State would have received approximately \$6.3 million in enhanced recoveries from 2018 through 2023.

Small Business Effect: The bill has a potential meaningful impact on small business law firms that are allowed to proceed with actions under the bill.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: SB 666 (The President)(By Request - Office of the Attorney General) - Judicial Proceedings.

Information Source(s): Charles and Garrett counties; Maryland Association of Counties; Office of the Attorney General; Judiciary (Administrative Office of the Courts); Maryland Department of Health; Maryland Insurance Administration; Department of Legislative Services

Fiscal Note History: First Reader - February 28, 2023
js/jkb

Analysis by: Amy A. Devadas

Direct Inquiries to:
(410) 946-5510
(301) 970-5510