Testimony of Brian Markovitz SB 666 2.27.23 (final
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JOSEPH, GREENWALD & LAAKE, P.A.
ATTORNEYS AT LAW

Brian J. Markovitz
Attorney at Law

Joseph, Greenwald & Laake, P.A.
6404 Ivy Lane, Suite 400
Greenbelt, MD 20770
Direct Dial: (240) 553-1207
Direct Fax: (240) 553-1747
Email: bmarkovitz@jgllaw.com

TESTIMONY IN SUPPORT OF SB 666

TO: Chairman Smith and Members of the Judicial Proceedings Committee
FROM: Brian J. Markovitz, Shareholder, Joseph, Greenwald & Laake, P.A.
DATE: February 27, 2023

Chairman Smith and members of the Judicial Proceedings Committee, my name is Brian Markovitz, and I am a litigation attorney in private practice in Greenbelt, Maryland. My firm, Joseph, Greenwald & Laake, P.A., represents a broad range of clients, including various businesses, as well as number of employees and non-profits.

As part of our practice and throughout the country, we represent whistleblowers who report fraud committed against a governmental entity. As a lifelong Maryland resident, I have personally represented whistleblowers in this capacity for almost twenty years. In the legal community, these types of cases are known as *qui tams* and are usually filed under a state or federal false claims act law like the one we have in Maryland, the Maryland False Claims Act. When this type of fraud happens, it is not localized. It causes harm to all of us that pay taxes and is devastating to whatever government program is robbed. It also directly harms the recipients of these government programs by reducing financial resources. I come before the Committee today to lend my and my firm's full support for SB 666.

SB 666 updates the law in two important ways. First, it allows clients of attorneys like me to pursue a case when the government is unable to do so. As everyone is aware, the government does not have endless resources, including the Attorney General of Maryland. SB 666 would allow attorneys who represent whistleblowers to move forward with cases and attempt to retrieve state taxpayer dollars taken by fraud. This change to the law would bring Maryland's False Claims Act in line with both its federal counterpart, the federal False Claims Act, and that of multiple states, including our neighbors in Virginia and Delaware.

In my federal practice, my office works hand in hand with Assistant U.S. Attorneys and investigators from the United States Department of Justice to recover fraudulently taken federal monies. Sometimes, Assistant U.S. Attorneys from the U.S. Justice Department inform me that they either (1) do not have the resources to pursue my client's whistleblower case or (2) they have other cases where the money illegally taken was much greater than my client's case so they have to concentrate their limited resources on those financially larger fraud cases.

Under these circumstances, I can personally attest that I have had several conversations with Assistant U.S. Attorneys informing me that they believe my client's case has merit, and they would like my law firm to continue to pursue it even though they must decline to do so. In several of those situations, my law firm has had favorable results and recovered stolen money for

U.S. taxpayers. I have been involved in two cases that were not pursued by the federal government but my law firm recovered over a combined total of $7M in federal funds.

Unfortunately, I have never had a conversation like this with any Assistant Attorney Generals from Maryland as the Maryland False Claims Act does not allow whistleblower attorneys like me to pursue a case declined by the Maryland Attorney General's Office. If the federal False Claims Act lacked the same enforcement mechanism by private attorneys as Maryland's law currently does, then the money that my firm has recovered, and the hundreds of millions of dollars recovered by other private attorneys, would still be in the hands of wrongdoers and crooks instead of at the U.S. Treasury. SB 666 fixes this problem in Maryland and will allow more illegally-taken money to be returned to the state.

The second update to the Maryland False Claims Act accomplished by SB 666 is setting a minimum fine of $5,000 per illegal claim. The current Maryland law has no such minimum penalty. Setting a minimum penalty of $5,000 will help deter people who may have an inclination to rip-off the state government and also provides guidance to judges when making such determinations. Furthermore, it is significantly less than half the current, minimum penalty amounts of the Federal False Claims Act, the Virginia False Claims Act, and the Delaware False Claims Act, which all currently sit at $12,537 per false claim. In this respect, any suggestion that a minimum penalty of $5,000 is excessive is overblown and wrong, and the Maryland law should be updated.

SB 666 provides commonsense updates to the Maryland False Claims Act and will benefit all Maryland taxpayers. We, therefore, urge a favorable report for SB 666.

Letter to Maryland Legislature 2.27.23.pdf
Uploaded by: Daniel Miller
Position: FAV

WALDEN MACHT & HARAN LLP

250 Vesey Street
27th Floor
New York, NY 10281

2000 Market Street
Suite 1430
Philadelphia, PA 19103

wmhlaw.com
T: 212-335-2030
F: 212-335-2040

February 27, 2023

To whom this concerns:

I am writing in support of the bill to amend the Maryland False Claims Act to permit whistleblowers in declined cases to proceed to active litigation.

I was a Deputy Attorney General for over 16 years in the Delaware Attorney General's Office, including approximately 7 years as the Director of the Medicaid Fraud Control Unit. While there, I saw first-hand the value in permitting whistleblowers to proceed in declined cases.

In 2010 I went into the private sector, and since that time, my practice has focused almost exclusively on representing whistleblowers in cases under the federal and state False Claims Acts ("FCA").

In the past ten years, I have successfully resolved approximately a dozen FCA cases which were initially declined by the government. The most recent of those resulted in a jury verdict in August 2022 against pharmaceutical manufacturer Eli Lilly and Company in the amount of $61 million. Once damages are trebled as required by statute, and once mandatory penalties imposed, the final judgment will exceed $200 million.

Unfortunately, I was unable to bring claims on behalf of the State of Maryland because the Maryland FCA would not allow me to do so. Had the Maryland FCA permitted me to bring claims on behalf of Maryland's citizens, the results would have been extraordinary. The same goes for the other 10+ declined cases that I have successfully resolved.

Sincerely,

Daniel R. Miller

Testimony of Esmeralda Aguilar, Esq. (SB 666).pdf
Uploaded by: Esmeralda Aguilar
Position: FAV

Testimony of Esmeralda Aguilar, Esq.

Before The Senate Judicial Proceedings Committee

In Support of Senate Bill 666

February 28, 2023

My name is Esmeralda Aguilar, and I am a shareholder in the law firm of Sherman Dunn, P.C. I am submitting testimony on behalf of the Foundation for Fair Contracting – Mid-Atlantic Region ("FFC"), a nonprofit labor management organization dedicated to protecting workers on public construction projects from substandard wages and working conditions. The FFC monitors public construction projects for compliance with local, state and federal prevailing wage laws. Its enforcement efforts include interviewing workers on public projects and filing wage theft complaints on their behalf with the appropriate agencies, including the Maryland Department of Labor and U.S. Department of Labor.

On most public projects in Maryland, contractors and subcontractors are required to pay construction workers no less than the locally prevailing wage.[1] In addition, contractors and subcontractors are required to submit certified payroll reports to the government demonstrating and certifying compliance with prevailing wage requirements.[2] Prevailing wage laws were enacted, in part, to promote high quality standards in construction. Such laws seek to promote responsible contracting in public procurement by ensuring that contractors are able to compete for contracts on the basis of merit, not on the basis of who can assemble the cheapest workforce.

Unfortunately, the construction industry is an industry in which labor laws are too often ignored. According to U.S. DOL data, the construction industry consistently ranks among the top three industries for noncompliance.[3] This is because low road employers are able to save 30 percent or more in labor costs by ignoring federal and state labor

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1 *See, e.g.*, MD Code, State Fin. & Proc. Art., §17-201 *et seq*.; Prince George's County Code, Subtitle 2, Division 14; Baltimore City Code, Art. 5, Subtitle 25; Montgomery County Code, Ch. 11B, Sec. 33C; Charles County Code, Ch. 228.

2 *See, e.g*., MD Code, State Fin. & Proc. Art., §17-220.

3 U.S. DOL Website, WHD by the Numbers 2021, https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries

laws.[4] As a result, the modus operandi in the construction sector has become one of brazen lawbreaking.[5]

Unfortunately, many aggrieved workers are reluctant to report labor violations. Employee fear of retaliation, including the potential loss of employment, is always of great concern. Enforcement efforts in the construction industry are further complicated by the fact that many aggrieved workers are undocumented immigrants.[6] Undocumented workers are easy prey for low road contractors because of their reluctance to report illegal activity to government officials for fear of deportation and other reprisals. A frequently cited 2009 study surveyed 4,387 low-wage workers – including workers in residential construction – and found that more than two-thirds had experienced some form of wage theft and most did not complain for fear of losing their job or having their wages or hours cut.[7]

It is therefore critical that third-party stakeholders, such as responsible contractors and workers' rights organizations, have access to a wide range of enforcement mechanisms to help deter low road contracting practices in public procurement. Prevailing wage law violations can form the basis of a False Claims Act ("FCA") suit because contractors who violate such laws will, in their certified payroll reports, falsely certify to the government that they are paying workers the proper wage. The FCA is an important deterrence tool because in prevailing wage cases damages may include the value of the construction contract multiplied by three. The State may also recover up to $10,000 per violation of the Act.

FFC-MAR fully supports Senate Bill 666 which seeks to strengthen the FCA by allowing whistleblowers to proceed with FCA claims even without the participation of a government entity. Senate Bill 666 will bring Maryland's FCA in line with the federal FCA and every other state FCA law. Currently 30 states, including the District of Columbia, have their own FCA laws and Maryland is the *only* jurisdiction that bars

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4 National Employment Law Project ("NELP"), *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (July 22, 2015); Russell Ormiston, Dale Belman, Julie Brockman, & Matt Hinkel, *Rebuilding Residential Construction, in Creating Good Jobs: An Industry-Based Strategy* 75, 81 & 84 (Paul Osterman ed., MIT Press 2020) [hereinafter Ormiston (2020)].

5 Ormiston (2020), *supra* note 4, at 80-81.

6 Ormiston (2020), *supra* note 4, at 83-84, 92.

7 Annette Bernhardt et al., Broken Laws, *Unprotected Workers: Violations of Employment and Labor Laws in American Cities*, at 24-25 (NELP Sept. 21, 2009).

whistleblowers from proceeding with FCA claims where the government elects not to intervene.[8]

The ability for whistleblowers to unilaterally proceed with such actions has proven to be a useful tool for prevailing wage enforcement. Recently, a labor union secured a judgement of over $2 million in a federal FCA case stemming from a contractor's violations of the federal prevailing wage law. In *U.S. ex rel IBEW Local 98 v. Farfield Company*,[9] a union sued under the federal FCA alleging that the Farfield Company – an experienced government contractor – cheated 40 construction workers on a federally assisted rail project out of the wages to which they were entitled under the Davis-Bacon Act ("DBA"). The suit alleged that Farfield violated the FCA by submitting fraudulent payroll reports to the government, falsely asserting its compliance with DBA requirements. The Third Circuit affirmed the district court's order entering judgment against the contractor. The U.S. Department of Justice in that case elected not to intervene. As such, the contractor would not have been brought to justice but for the federal FCA's provision allowing whistleblowers to proceed without government intervention.

Finally, despite the hard work of the dedicated professionals in the Maryland Attorney General's Office, the broad scope of that Office's jurisdiction and its limited resources, make it impossible for the government to intervene in every single FCA action filed. This results in fewer recoveries for the state and a reluctance on the part of whistleblowers to file such claims.

To rectify this, we need a solution that does not draw on the agency's already overextended resources. We need to give private citizens the right to pursue FCA claims on their own. In addition to making aggrieved workers whole, Senate Bill 666 will ensure greater compliance and deterrence across the industry.

Thank you for the opportunity to express these views.

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[8] *See, e.g.*, 31 U.S.C. § 3730(b)(4)(B); Connecticut, C.G.S. § 4-279; D.C. Code § 2-381.03; Florida, F.S. § 68.083; Illinois,740 ILCS 175/4; Iowa, I.C. § 685.3; Michigan, M.C.L. 400.610a; Nevada, N.R.S. 357.110; New Jersey, N.J. Stat. 2A:32C-5; Virginia, VA Code § 8.01-216.5.

[9] No. 20-1922 (3d Cir. July 13, 2021).

SB666_TaxpayersAgainstFraud_DeMar_FAV.pdf
Uploaded by: Jacklyn DeMar
Position: FAV

Written Testimony of Taxpayers Against Fraud in Support of Senate Bill SB666 to Expand the Maryland False Claims Act and Maryland False Health Claims Act

Chairman Smith, Vice Chairman Waldstreicher, and distinguished members of the Senate Judicial Proceedings Committee, thank you for the opportunity to submit written testimony on Senate Bill SB666, *Maryland False Claims Act and Maryland False Health Claims Act – Revisions*.

We write in support of Senate Bill SB666 to expand the Maryland False Claims Act and the Maryland False Health Claims Act (the "Maryland False Claims Acts") and permit relators to litigate declined *qui tam* actions. The proposed amendments effectuate the statutes' remedial purposes to recover taxpayer funds and thwart and deter fraud against the State of Maryland and governmental entities while supplementing the government's limited resources in fighting fraud (collectively "the State").

Although the State has recouped tens of millions of taxpayer dollars under the Maryland False Claims Acts, the State is forgoing millions of additional dollars in recoveries by preventing relators from continuing to pursue cases after the government declines to intervene. Under Md. Code §§ 8-104(a)(7) and 2-604(a)(7), a relator cannot litigate their case if the State declines to intervene, regardless of its reasons underlying that decision or the amount of taxpayer funds allegedly at issue. Maryland is the only state False Claims Act to prohibit relators from proceeding if the government declines to intervene, putting our state at a significant disadvantage in the fight against fraud. The current prohibitions in the Maryland False Claims Acts create barriers to effectuating the very purpose of the statutes and hinder the State's ability to root out fraud effectively and efficiently, rendering the proposed amendments critical to successful anti-fraud enforcement.

The Maryland False Claims Acts should be expanded for three reasons. First, declined cases have become an increasingly important avenue to recoup misspent funds, a fact underscored by the United States Department of Justice's (DOJ) recent announcement that declined *qui tam* cases helped the government recover more federal funds than did intervened cases this past fiscal year. Second, the relator's inability to advance their case absent government intervention reduces incentives for relators to come forward in the first place. Third, permitting relators to shoulder the litigation costs on behalf of the State promotes efficiencies in the fight against fraud. The Maryland legislature has an important opportunity to align the Maryland False Claims Acts with those of the federal government and other states by recognizing the tremendous contributions relators can make throughout the course of False Claims Act litigation, resulting in more successful resolutions on behalf of the State.

(1) The Proposed Amendments Allow the State to Recover Significant Taxpayer Funds

Relators bring fraud to the attention of the government at great risk to themselves and their careers in the hopes that they will protect the public fisc and further deter fraud. But for various reasons, governments may not be in a position to initially take on those cases themselves, including resource constraints and a court's unwillingness to extend the seal period. Courts and parties on all sides of *qui tam* litigation recognize that a government's declination decision does not speak to the underlying merits of the action. This fact is underscored by DOJ's acknowledgment that, in fiscal year 2022, more than half of the federal funds recovered under the federal False Claims Act were the result

of declined *qui tam* actions.[1] In other words, relators who advanced their own cases helped the government recoup more funds than the government did when it intervened, with both paths to resolution enforcing a public-private partnership in the common goal to thwart fraud and recoup taxpayer funds. Without relators litigating declined *qui tam* cases, the federal government would have missed out on nearly $1.2 billion recovered this past fiscal year alone, and over $4.7 billion since 1986.[2]

Not only do the current Maryland False Claims Acts prohibit relators from proceeding with their *qui tam* actions if the government does not intervene, but it also binds the State. In many federal and state False Claims Act cases, the government initially declines to intervene for various reasons but later moves to intervene in order to pursue or settle the case, including when the government discovers new evidence in the course of its continued investigation.[3] This later intervention often occurs after a relator has expended substantial resources to pursue the case on their own. If the *qui tam* complaint must be dismissed after an initial declination, as required under Md. Code §§ 8-104(a)(7) and 2-604(a)(7), the government loses this opportunity to later intervene in and resolve meritorious *qui tam* actions, or for the relator to resolve those actions on their own.

The proposed amendments come at a time of increased government spending, new fraud schemes, and heightened attention to anti-fraud enforcement efforts. The State has expended significant funds to protect health, safety, lives, and livelihoods in response to the COVID-19 pandemic,[4] but opportunistic corporations and individuals have knowingly misappropriated those funds to line their pockets. These fraudsters also continue to game the Medicaid system and other state-funded programs at the expense of Maryland taxpayers. For example, former Maryland Comptroller Peter Franchott described the volume of fraudulent claims on the State's unemployment insurance program as "the single greatest highway robbery" of state and federal funds.[5] Fraud is not new but has only grown as government expenditures increased during the COVID-19 pandemic. It is increasingly important that the State can recover funds paid to corporations and individuals that knowingly defraud the State and its vital programs. The proposed amendments address these concerns by permitting a relator to pursue a declined *qui tam* case and permitting intervention at a later time, allowing for the recovery of significant taxpayer funds that have been paid to fraudulent corporations and individuals.

(2) The Proposed Amendments Incentivize More Relators to Come Forward

While DOJ's statistics for Fiscal Year 2022 demonstrate the value of declined *qui tam* cases to the public fisc, those trends leave out cases where an individual with knowledge about fraud chose not to file a *qui tam* complaint in the first place, representing an even larger pool of misspent taxpayer funds currently out of reach. The proposed amendments encourage more would-be relators to come

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[1] https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022.

[2] https://www.justice.gov/opa/press-release/file/1567691/download.

[3] See, e.g., *U.S. ex rel. Grob v. Precision Cable Assembles Inc.*, No. 22-CV-570-JPS, 2023 WL 1865338, at *2 (E.D. Wis. Feb. 9, 2023) (granting government's motion to intervene for good cause after obtaining additional evidence in support of relator's allegations).

[4] https://www.marylandtaxes.gov/media/2021/Comptroller-Workgroup-Probes-Unemployment-Insurance-Delays-Customer-Service-Woes-Fraudulent-Filings.pdf, at 3 ("it is likely the State has paid out fraudulent [unemployment insurance] claims").

[5] https://www.marylandtaxes.gov/media/2021/Comptroller-Workgroup-Probes-Unemployment-Insurance-Delays-Customer-Service-Woes-Fraudulent-Filings.pdf, at 3.

forward with allegations of fraud. Without the possibility of pursuing their cases in the event that the government declines to intervene, individuals with otherwise credible information about fraud against the State may decide not to file a *qui tam* complaint. Those individuals must weigh the time, resources, and damage to their personal and professional lives required to develop their allegations with the very real possibility that their cases may be dismissed if the State does not intervene due to a host of considerations separate from the merits of the case. In those situations, the risk sometimes outweighs the reward, allowing the fraud to continue unabated.

Taxpayers Against Fraud's sister organization, Taxpayers Against Fraud Education Fund (TAFEF), represents 400+ attorneys who represent whistleblowers under federal and state False Claims Acts and other whistleblower statutes. Several TAFEF members recall specific cases in which a relator would have alleged violations of the Maryland False Claims Acts if not for current language that requires dismissal if the State declines to intervene. In at least one of these cases, a relator brought *qui tam* allegations on behalf of nearly every other state with a False Claims Act, totaling 21 states and cities, but chose not to include claims under the Maryland False Claims Act because of its prohibition against litigating declined cases.

The proposed amendments address this concern by providing relators greater opportunities to advance their cases, with the possibility of relator's shares and attorneys' fees upon successful resolution. By providing a higher range for relator's shares in declined cases, the proposed amendments recognize that relators take on significant burdens to advance their cases—an onerous process that requires fulsome vetting and consideration of risks both personal and professional. By removing the State's declination as a barrier to advancement, the proposed amendments incentivize relators to come forward with more assuredness that they can pursue meritorious cases, resulting in greater recoveries of taxpayer funds for the State.

(3) The Proposed Amendments Promote Efficiencies in the Fight Against Fraud

While opponents to the proposed amendments may argue the State will be required to expend resources on meritless cases, such arguments ignore the practical considerations underlying a decision to initially file and to pursue *qui tam* litigation. *Qui tam* litigation in particular poses unique risks and considerations that necessitate relators and their counsel to attempt to assess the likelihood of success when deciding whether to proceed. Relator's counsel almost exclusively represent clients on a contingency fee basis; if the case is unsuccessful, the hours and costs spent to pursue the case are not reimbursed, which is compounded by the long duration of most *qui tam* actions. That consideration alone provides a disincentive for relator's counsel to pursue cases with a low likelihood of success. Further, relators face potential reputational harm and must also expend time and effort to advance their cases. When relators and relator's counsel choose to do so, it is because the balance of risks and rewards favors a likelihood of success on behalf of the State.

Permitting relators to shoulder the burden of advancing their cases when the State is unwilling or unable to expend the resources promotes efficiencies in the fight against fraud, with the common goal to recoup taxpayer funds for the State. Courts are well-positioned to protect the State from irrelevant discovery requests that would impose unnecessary costs on the government.[6] The costs necessitated by *qui tam* litigation are often justified by the potential to recoup misspent taxpayer funds,

[6] Md. Rule 2-402(a).

and, under the proposed amendments, the State still has the option to seek dismissal in the few cases where continued litigation could cause more harm than good.

Consistent with the overwhelming trend across the country, many states and localities bordering the Maryland—Delaware (6 Del. C. § 1204(d)), the District of Columbia (D.C. Code § 2-381.03(b)(4)(B)), Virginia (Va. Code § 8.01-216.5(D)), and Allegheny County, Pennsylvania (County Code § 485-3(B)(3)(b))—grant relators the right to conduct *qui tam* actions if the government declines to intervene. At this critical time for anti-fraud enforcement efforts, Maryland should not stand as an anomaly in the fight against fraud and miss opportunities to recover taxpayer funds. The proposed amendments strengthen the public-private partnership between the State and relators, freeing state resources to prioritize additional enforcement actions, further investigate allegations, or take a back seat as the relator frontloads resources to effectuate the policy goals of the Maryland False Claims Acts. The proposed amendments remove some of the practical consequences hindering anti-fraud enforcement under the current statutes, and the alternative–significant financial losses from unchecked and undeterred fraud—is too great a risk to sideline relators.

Accordingly, we urge the distinguished members of the Senate Judicial Proceedings Committee to strengthen the Maryland False Claims Acts by passing Senate Bill SB666.

Testimony of J. Monroe_Executive Director_Foundati

Uploaded by: John Monroe

Position: FAV

FOUNDATION FOR FAIR CONTRACTING
Mid-Atlantic Region

9301 Peppercorn Pl
Upper Marlboro, MD 20774
www.ffc-mar.org

Testimony of John L. Lewis Monroe, Executive Director

Foundation for Fair Contracting – Mid-Atlantic Region

Before The Senate Judicial Proceedings Committee

In Support of Senate Bill 666

February 28, 2023

The Foundation for Fair Contracting – Mid-Atlantic Region (FFC) appreciates the opportunity to submit testimony in support of Senate Bill 666.

The FFC is a non-profit labor and management trust headquartered in Prince George's County. We promote Maryland's high-road construction employers by partnering with industry and government to tackle anti-competitive compliance market failures pertaining to wage & hour laws, licensing, and apprenticeship standards. Since inception in 2014, our small shop has helped underpaid workers achieve more than $3 million in restitution, stemming from more than 100 wage theft claims. The FFC's funders include the National Electrical Contractors Association of Maryland, the National Electrical Contractors Association of Metro Washington, the Ironworkers Employers Association, and several local unions of the Baltimore DC Building Trades. Fidelity to workers, end-users, and the taxpayer return on investment for capital construction are core tenets.

The competitive value proposition that our high-road employer partners afford Maryland's end users is second to none. In fact, a December 2022 study conducted by Independent Project Analysis titled *Quantifying the Value of Union Labor in Construction Projects*, using data from 1550 capital construction projects in the United States ranging from infrastructure to office buildings and schools, both brownfield and greenfield, found projects that use union labor achieve 4 percent lower total costs than those that use open shop labor, and are 10 percent more predictable. Due to entrenched, anti-competitive compliance market failures however, Maryland's high-road construction employers are often underbid by non-credible amounts, losing work to unscrupulous primes and specialty subs who further subcontract down-tier to entities who carry their water. Maryland's level playing field promise is a hollow shell. Instead, it's cheat to compete.

Tackling the construction industry's compliance market failures of wage and hour abuses, minority business enterprise fraud, craft & business licensing misrepresentations, "ghost brokers" and labor trafficking, under-reporting to insurance companies for lower workers compensation premiums, manipulating incident reports, and use of improper materials not consistent with required specs on scopes such as electrical wiring and mechanical insulation on Maryland's public school construction requires our contracting and enforcement functions to leverage the high-road industry, nonprofits, and the private bar through various shared compliance modalities. Maryland's False Claims Act (FCA) is an arrow in our quiver, and the common-sense improvements SB666 afford are needed.

Our valued partners in the False Claims Unit within Maryland's Office of Attorney General (OAG) cannot, and should not, be solely relied upon for intervention on all meritorious qui tam actions. Bandwidth will always be a limiting force, not to mention political winds.

SB666 allows whistleblowers to proceed with claims where the OAG elects not to intervene. When the state does intervene, it should be authorized to serve certain subpoenas. Further, monetary penalties for each violation of the FCA must be sufficient for deterring fraud and financial crimes against our beloved Maryland. The necessary reforms in SB666 remedy the False Claims Act's shortcomings.

Thank you for your time and vote.

Respectfully,

John L. Lewis Monroe

John L. Lewis Monroe
Executive Director
Foundation for Fair Contracting – Mid-Atlantic Region

SB 666 - Statement of Support.pdf
Uploaded by: Shelly Martin
Position: FAV

ANTHONY G. BROWN
Attorney General

CANDACE MCLAREN LANHAM
Chief of Staff

CAROLYN A. QUATTROCKI
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.
(410) 457-6566

WRITER'S DIRECT DIAL NO.
(410) 576-6522

February 28, 2023

TO: The Honorable Will Smith Jr.
Chair, Judicial Proceedings Committee

FROM: Shelly Marie Martin
Director, False Claims Unit, Office of the Attorney General

William Z. Shirley, Director, Medicaid Fraud Control Unit, Office of the Attorney General

RE: SB 666 - Maryland False Claims Act and
Maryland False Health Claims Act – Revisions (Support)

The Maryland False Claims Act (Gen. Prov. §§ 8-101 through 8-111) and its companion statute the Maryland False Health Claims Act (Health Gen. §§ 2-601 through 2-611) prohibit contractors, grantees, and others who directly or indirectly receive government funds from making false or fraudulent claims for payment.

Cases may be brought by the government directly when it is aware of fraudulent conduct. This conduct, by its very nature, is often hidden from the government, limiting its ability to protect the public against unscrupulous conduct. To encourage the reporting of fraud, the false claims statutes allow whistleblowers to file suit on the government's behalf and to receive a portion of any funds recovered.

Declined Whistleblower Actions

Under the current versions of the Acts, a whistleblower alerts the government to allegations of fraud by filing a lawsuit, on behalf of the government, against the person or entity alleged to have committed the fraud. The government investigates those allegations and either intervenes in the case and pursues the litigation or declines to intervene, which results in dismissal of the case. The federal False Claims Act and those of the other states that have analogous laws do not require dismissal when the government declines to intervene. They allow the whistleblower to continue to litigate the case in the name of the government.

Senate Bill 666 would amend the Maryland statutes to allow a whistleblower to proceed with a fraud case, even if the government declines to intervene and take over that litigation. The amount the government can recover is limited by the resources available to conduct investigations and pursue litigation. Currently, if the government does not have the resources to pursue a whistleblower case, the case comes to an end, regardless of its merits. The OAG's current lack of resources negatively impacts the ability to pursue cases. The proposed amendments would allow those cases to continue, subject to government supervision, relieving some of the burden on government staff and allowing more cases to be pursued.[1]

Investigating cases through subpoenas

Both versions of the false claims act allow the government to investigate the case either prior to filing its own lawsuit or before deciding whether to intervene in a whistleblower suit. The process used for these investigations is that the government has "the same rights of discovery as a civil litigant in the circuit court . . . ." Senate Bill 666 changes the vehicle used for the government's investigation to a subpoena.

This change will harmonize the false claims Acts with other State statutes. Some other statutes that govern the disclosure of records, in particular certain opioid prescribing and substance abuse treatment records, allow those records to be disclosed only in response to a "subpoena," hampering the government's ability to investigate some cases because the false claims Acts authorize issuance of "discovery" that is not a "subpoena." This change is a technical amendment that does not change the substance of the government's investigatory authority under the Acts.

Establishing a minimum penalty

The Acts currently state that a court may award the government an amount of up to $10,000 per violation and up to treble the amount of damages incurred by the government. No penalty is mandatory. The minimum amount a court must award is the damages sustained by the government.

The Acts are intended to deter future fraud. Without a minimum penalty, the prospect of repaying the damages, even if trebled, may not be sufficient to act as a deterrent in cases in which the damages are relatively small. Some contracts are vulnerable to a pattern in which contractors submit dozens, or even hundreds, of frivolous claims for additional compensation for

[1] The OAG's Medicaid Fraud Control Unit is currently authorized to have 40 positions. In addition to cases under the Maryland False Health Claims Act, it is responsible for cases of criminal Medicaid Fraud, identity theft, and related crimes and criminal cases of abuse and neglect of vulnerable adults in long-term care facilities. Many other states with similarly sized Medicaid programs have larger MFCU's to handle this responsibility. Virginia, for example, which has a slightly smaller Medicaid program, staffs its MFCU with 90 people. The OAG's False Claims Unit, which is responsible for the investigation and litigation of fraud cases involving all State programs except Medicaid, has only one person. Cities and counties can also recover under the False Claims Act, but none have dedicated anti-fraud units. Some do not even have full-time attorneys on staff.

work allegedly outside of the scope of their contract, hoping that overwhelmed procurement staff will have no choice but to offer some type of settlement of the claims. When procurement staff deny the claims, the government incurs no "damages," but nonetheless expends substantial time and effort in addressing these claims. Without a minimum penalty amount, the government cannot feel confident that pursuing these false claims under the Acts will result in penalties commensurate with the effort required to obtain them.

The $5,000 minimum penalty is still significantly less than required under the federal act or analogous laws in other states. The federal act requires mandatory treble damages in addition to the mandatory $5,000 penalty, which is adjusted for inflation and is currently more than $11,000 per violation.

Making these changes to the Maryland False Claims Act/False Health Claims Act will enable the government to manage its limited resources more effectively and rely on whistleblowers' counsel to pursue recoveries in appropriate cases, harmonize the form of investigative process with other statutes, and assure that those who commit fraud are subject to a minimum penalty for their actions. All of these changes will assist with the important mission of protecting the public fisc and deterring future misconduct. The Office of the Attorney General urges the Committee to vote favorably on Senate Bill 666.

SB 0666 2.27.2023.pdf
Uploaded by: Terreia Smalls
Position: FAV

PLUMBERS LOCAL UNION NO. 5

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA. AFL-CIO

4755 Walden Ln. Lanham, MD 20706 • 301-899-7861 (T) • 301-899-7868 (F)

Testimony of Terriea "T" Smalls, BM / F.S.T
United Association Plumbers & Gasfitters Local 5
Before The Senate Judicial Proceedings Committee
In Support of Senate Bill 666
February 28, 2023

The Plumbers & Gasfitters Local 5 (Plumbers 5) appreciate the opportunity to submit testimony in support of Senate Bill 666.

The skilled members of Plumbers 5 have been committed to protecting the health of the Old Line State since 1890 through our work installing, maintaining and servicing waste, water & gas systems. Investment in family-sustaining wages & benefits, fidelity to end-users, and commitment to taxpayer return on investment for capital construction are core tenets. Our signatory employer partners of the Mechanical Contractors Association of Metro Washington (MCAMW) represent 200 contractors and 133 years of industry service. Together, the competitive value proposition we afford Maryland's end users is second to none. In fact, a December 2022 study conducted by Independent Project Analysis titled *Quantifying the Value of Union Labor in Construction Projects*, using data from 1550 capital construction projects in the United States ranging from infrastructure to office buildings and schools, both brownfield and greenfield, found that projects that use union labor enjoy 4 percent lower total costs than those that use open shop labor and are 10 percent more predictable. Due to entrenched, anti-competitive compliance market failures however, our MCAMW employer partners are often underbid by non-credible amounts, losing work to unscrupulous mechanical primes and specialty subs who further subcontract down-tier to entities who carry their water. The level playing field promise is a hollow shell; cheat to compete.

Tackling the compliance market failures of wage and hour abuses, minority business enterprise fraud, craft & business licensing misrepresentations, "ghost brokers" and labor trafficking, under-reporting to insurance companies for lower workers compensation premiums, manipulating incident reports, and use of improper materials not consistent with required specs on scopes such as electrical wiring and mechanical insulation on Maryland's public school construction requires our contracting and enforcement functions to leverage the high-road industry, nonprofits, and the private bar through various shared compliance modalities. Maryland's False Claims Act (FCA) is an arrow in our quiver, and the common-sense improvements SB666 afford are needed.

Terriea "T" L. Smalls
Business Mgr. / Financial Sec-Treas.

James L. "Lou" Spencer
Asst. Business Manager

Anthony A. Solis
Business Rep. and Organizer

Micheal S. Canales, Jr.
Business Rep. and Organizer

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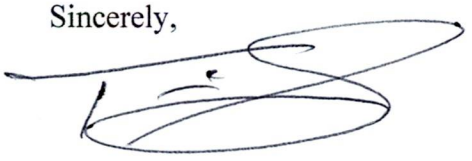
The valued False Claims Unit within Maryland's Office of Attorney General (OAG) cannot and should not be solely relied upon for intervention on all meritorious qui tam actions. Bandwidth, for instance, will always be a limiting force. SB666 allows whistleblowers to proceed with claims where the OAG elects not to intervene. When the state does intervene, it ought to be authorized to serve certain subpoenas. Further, monetary penalties for each violation of the FCA ought to be sufficient for deterring financial crimes against our beloved state. SB666 addresses these impediments.

Thank you for your time and vote.

Sincerely,



Terriea "T" Smalls
Business Manager & Financial Secretary-Treasurer
United Association Plumbers & Gasfitters Local 5

SB0666_UNF_MedChi, LifeSpan, MNCHA_MD False Claims
Uploaded by: Danna Kauffman
Position: UNF

The Maryland State Medical Society
1211 Cathedral Street
Baltimore, MD 21201-5516
410.539.0872
Fax: 410.547.0915
1.800.492.1056
www.medchi.org

TO: The Honorable William C. Smith, Jr., Chair
Members, Senate Judicial Proceedings Committee
The Honorable Anthony G. Brown

FROM: J. Steven Wise
Pamela Metz Kasemeyer
Danna L. Kauffman
Andrew G. Vetter
Christine K. Krone
410-244-7000

DATE: February 28, 2023

RE: **OPPOSE** – Senate Bill 666 – *Maryland False Claims Act and Maryland False Health Claims Act – Revisions*

On behalf of the Maryland State Medical Society, the LifeSpan Network, and the Maryland-National Capital Homecare Association, we respectfully **oppose** Senate Bill 666.

Senate Bill 666 relates to the Maryland False Health Claims Act, a statute which allows a person to sue on behalf of the State to recover State funds that were disbursed as the result of fraud. These *qui tam* lawsuits allow a private "relator" to file lawsuits on behalf of the State, and the State then takes over the case, rewarding the relator with up to 15-25% of the funds recovered.

Under current Maryland law, however, the relator cannot continue the case if the State chooses not to proceed. The State in effect serves as a gatekeeper so that only meritorious cases advance. This was an important aspect of the original law, adopted in 2010, that helps to prevent frivolous cases from being maintained by private parties and plaintiffs' attorneys. Senate Bill 666 would repeal this important check and balance.

The Committee should keep in mind that while many *qui tam* cases are filed against larger health care facilities and entities, they may also be maintained against smaller physician practices and providers. Where fraud has occurred there should be a remedy for the State, and the above-referenced organizations believe that the current law provides that. The ability for countless "relators" and their attorneys to be permitted to advance cases that the State has not seen fit to maintain is troublesome, and we state this with full knowledge that the federal false claims statute and that of some other states already permit what is proposed here. Indeed, Senate Bill 666 ups the ante on filing such suits by providing the relator with the right to retain 25-30% of the proceeds of the claim. This higher payout coupled with the removal of the State as a gatekeeper is of serious concern to these organizations.

For the reasons set forth above, we oppose Senate Bill 666.

sb666.pdf
Uploaded by: Matthew Pipkin
Position: UNF

MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS

Hon. Matthew J. Fader
Chief Justice

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO:	Senate Judicial Proceedings Committee
FROM:	Legislative Committee Suzanne D. Pelz, Esq. 410-260-1523
RE:	Senate Bill 666 Maryland False Claims Act and Maryland False Health Claims Act – Revisions
DATE:	February 15, 2023 (2/28)
POSITION:	Oppose, as drafted

The Maryland Judiciary opposes Senate Bill 666, as drafted. This bill makes revisions to the Maryland False Claims Act and False Health Claims Act.

The Judiciary takes no issues with the policy aims of the legislation but notes opposition to certain mandatory provisions, in the current drafting of the bill. This bill includes several mandatory provisions that take away discretion that is more appropriately left with courts. At General Provisions § 8-102(c)(1)(i) and Health – General § 2-602(b)(1)(i) the bill includes mandatory minimum civil penalties. At General Provisions § 8-104(b)(7)(iii) and Health – General § 2-604(b)(7)(iii), the bill mandates that courts allow government entities to intervene in certain cases. At General Provisions § 8-105(a) and Health – General § 2-605(a), the bill sets mandatory minimum fractions of proceeds of an action that must be awarded to the initiating party. The Judiciary generally opposes mandatory minimums because courts should retain discretion to fashion appropriate judgments based on the individual circumstances of each case. And decisions whether to allow parties to intervene in a case should similarly be left to courts so that the circumstances of the case can inform the decision. Finally, General Provisions § 8-105(a) and Health – General § 2-605(a) also instructs the court to set make the percentage award "proportional to the amount of time and effort" that the initiating party contributed to the case. That is a vague standard which would benefit from additional clarification.

cc. Hon. Bill Ferguson
Judicial Council
Legislative Committee
Kelley O'Connor

SB 666 - Maryland False Claims Act Revisions - Let
Uploaded by: Nicole Stallings
Position: UNF

Maryland
Hospital Association

February 28, 2023

To: The Honorable William C. Smith Jr., Chair, Senate Judicial Proceedings Committee

Re: Letter of Opposition - Senate Bill 666- Maryland False Claims Act and Maryland False Health Claims Act - Revisions

Dear Chair Smith:

On behalf of the Maryland Hospital Association's (MHA) 60 member hospitals and health systems, we appreciate the opportunity to comment in opposition to Senate Bill 666. Protecting the government and taxpayers from false claims is a goal shared by all Maryland citizens. We are concerned, however, that SB 666 as proposed may be overly punitive, increase the risk of frivolous lawsuits, and unnecessarily expand government power.

First, the proposed minimum penalty is overly punitive. Maryland's existing law, which does not specify a minimum, provides flexibility to tailor a penalty to fit the nature of the offense. As the statute already includes the potential for additional treble damage, it allows a minor violation to have a correspondingly lower penalty, whereas more serious offenses are punished with higher fines. Imposing a minimum penalty eliminates this flexibility and may be excessively punitive for minor transgressions.

Second, introducing a private right of action after the government elects not to intervene is likely to increase the number of nuisance lawsuits. The promise of an award as a percentage of the judgment or settlement creates strong incentives for plaintiffs to pursue frivolous claims. If the government elects not to intervene after reviewing the facts and circumstances of a case, then the lawsuit likely lacks merit. Allowing such cases to proceed would encourage frivolous lawsuits, which are not only time-consuming to defend, but will divert precious hospital resources away from vital patient care activities.

Finally, the bill would allow the government to issue subpoenas upon any suspicion of relevant information. Furthermore, the government would be permitted to issue a subpoena prior to the institution of a civil proceeding. While we support provisioning the government with the necessary tools to investigate fraudulent claims, we are concerned this unnecessarily expands government power without an adequate check and balance from the courts.

If this Committee proceeds with the expansion of Maryland's False Claims Act, MHA requests that the Committee strongly consider amendments that would protect Maryland's hospitals and other private institutions that submit to Maryland agencies claims for payment. These amendments must start with:

1. An explicit adoption of the standard established by Rule 9(b) of the Federal Rules of Civil Procedure, which requires a plaintiff alleging fraud to "state with particularity the circumstances constituting fraud or mistake." Further, any reform to the current Maryland law should explicitly adopt the U.S. Supreme Court's interpretation of Rule 9(b) in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), holding that a complaint must plead sufficient factual matter to "state a claim to relief that is plausible on its face."

2. The Maryland False Claims Act already requires a "knowing" act on the part of the alleged violator. Both common sense and a recent Fourth Circuit opinion, *U.S. ex rel. Sheldon v. Allergan Sales, LLC*, command that a person's objective reasonable interpretation of a law is a complete defense under the federal False Claims Act. Naturally, Maryland should follow this reasoning and include codification that a person may defend "knowing" actions based on an objectively reasonable interpretation of a relevant statute when it has not been warned away from that interpretation by authoritative guidance.

3. The Maryland False Claims Act should provide that the Attorney General shall promptly make a determination as to whether a person's claim under this title complies with all applicable pleading standards (including the *Iqbal* and *Sheldon* standards) and shall file a motion to dismiss the case upon making a determination that the person's claim fails one or more of those standards.

For these reasons, we request an ***unfavorable*** report on SB 666.

For more information, please contact:
Nicole Stallings, Executive Vice President and Chief External Affairs Officer
Nstallings@mhaonline.org

SB0666_UNF_MedChi, LifeSpan, MNCHA_MD False Claims
Uploaded by: Steve Wise
Position: UNF

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