The Legislature
of the
State of New Mexico

52nd Legislature, 1st Session

LAWS 2015

CHAPTER 128

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR
SENATE PUBLIC AFFAIRS COMMITTEE SUBSTITUTE FOR
SENATE BILL 208

Introduced by
CHAPTER 128

AN ACT

RELATING TO FRAUD AGAINST TAXPAYERS; CLARIFYING THAT THE
FRAUD AGAINST TAXPAYERS ACT APPLIES TO POLITICAL SUBDIVISIONS
AND CHARTER SCHOOLS AS WELL AS THE STATE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 44-9-2 NMSA 1978 (being Laws 2007,
Chapter 40, Section 2) is amended to read:

"44-9-2. DEFINITIONS.--As used in the Fraud Against
Taxpayers Act:

A. "claim" means a request or demand for money,
property or services when all or a portion of the money,
property or services requested or demanded issues from or is
provided or reimbursed by the state or a political
subdivision;

B. "employer" includes an individual, corporation,
firm, association, business, partnership, organization,
trust, charter school and the state and any of its agencies,
institutions or political subdivisions;

C. "knowingly" means that a person, with respect
to information, acts:

(1) with actual knowledge of the truth or
falsity of the information;

(2) in deliberate ignorance of the truth or
falsity of the information; or
(3) in reckless disregard of the truth or falsity of the information;

E. "person" means an individual, corporation, firm, association, organization, trust, business, partnership, limited liability company, joint venture or any legal or commercial entity;

E. "political subdivision" means a political subdivision of the state or a charter school; and

F. "state" means the state of New Mexico or any of its branches, agencies, departments, boards, commissions, officers, institutions or instrumentalities, including the New Mexico finance authority, the New Mexico mortgage finance authority and the New Mexico lottery authority."

SECTION 2. Section 44-9-3 NMSA 1978 (being Laws 2007, Chapter 40, Section 3) is amended to read:

"44-9-3. FALSE CLAIMS--LIABILITY--PENALTIES--EXCEPTION.--

A. A person shall not:

(1) knowingly present, or cause to be presented, to an employee, officer or agent of the state or a political subdivision or to a contractor, grantee or other recipient of state or political subdivision funds a false or fraudulent claim for payment or approval;

(2) knowingly make or use, or cause to be made or used, a false, misleading or fraudulent record or
statement to obtain or support the approval of or the payment on a false or fraudulent claim;

(3) conspire to defraud the state or a political subdivision by obtaining approval or payment on a false or fraudulent claim;

(4) conspire to make, use or cause to be made or used, a false, misleading or fraudulent record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the state or a political subdivision;

(5) when in possession, custody or control of property or money used or to be used by the state or a political subdivision, knowingly deliver or cause to be delivered less property or money than the amount indicated on a certificate or receipt;

(6) when authorized to make or deliver a document certifying receipt of property used or to be used by the state or a political subdivision, knowingly make or deliver a receipt that falsely represents a material characteristic of the property;

(7) knowingly buy, or receive as a pledge of an obligation or debt, public property from any person that may not lawfully sell or pledge the property;

(8) knowingly make or use, or cause to be made or used, a false, misleading or fraudulent record or
statement to conceal, avoid or decrease an obligation to pay
or transmit money or property to the state or a political
subdivision; or

(9) as a beneficiary of an inadvertent
submission of a false claim and having subsequently
discovered the falsity of the claim, fail to disclose the
false claim to the state or political subdivision within a
reasonable time after discovery.

B. Proof of specific intent to defraud is not
required for a violation of Subsection A of this section.

C. A person who violates Subsection A of this
section shall be liable for:

(1) three times the amount of damages
sustained by the state or political subdivision because of
the violation;

(2) a civil penalty of not less than five
thousand dollars ($5,000) and not more than ten thousand
dollars ($10,000) for each violation;

(3) the costs of a civil action brought to
recover damages or penalties; and

(4) reasonable attorney fees, including the
fees of the attorney general, state agency or political
subdivision counsel.

D. A court may assess not less than two times the
amount of damages sustained by the state or a political
subdivision if the court finds all of the following:

(1) the person committing the violation furnished the attorney general or political subdivision with all information known to that person about the violation within thirty days after the date on which the person first obtained the information;

(2) at the time that the person furnished the attorney general or political subdivision with information about the violation, a criminal prosecution, civil action or administrative action had not been commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation; and

(3) the person fully cooperated with any investigation by the attorney general or political subdivision.

E. This section does not apply to claims, records or statements made pursuant to the provisions of Chapter 7 NMSA 1978."

SECTION 3. Section 44-9-4 NMSA 1978 (being Laws 2007, Chapter 40, Section 4) is amended to read:

"44-9-4. INVESTIGATION BY THE ATTORNEY GENERAL--DELEGATION--CIVIL ACTION.--

A. The attorney general shall diligently investigate suspected violations of Section 44-9-3 NMSA 1978,
and if the attorney general finds that a person has violated
or is violating that section, the attorney general may bring
a civil action against that person pursuant to the Fraud
Against Taxpayers Act.

B. The attorney general may in appropriate cases
delegate the authority to investigate or to bring a civil
action to the state agency or political subdivision to which
a false claim was made, and when this occurs, the state
agency or political subdivision shall have every power
conferred upon the attorney general pursuant to the Fraud
Against Taxpayers Act. If the attorney general has delegated
authority to a state agency or political subdivision, all
references to the attorney general in the Fraud Against
Taxpayers Act shall apply to the delegee."

SECTION 4. Section 44-9-5 NMSA 1978 (being Laws 2007,
Chapter 40, Section 5) is amended to read:

"44-9-5. CIVIL ACTION BY QUI TAM PLAINTIFF--STATE OR
POLITICAL SUBDIVISION MAY INTERVENE.--

A. A person may bring a civil action for a
violation of Section 44-9-3 NMSA 1978 on behalf of the person
and the state or political subdivision. The action shall be
brought in the name of the state or political subdivision.
The person bringing the action shall be referred to as the
qui tam plaintiff. Once filed, the action may be dismissed
only with the written consent of the court, taking into
account the best interest of the parties involved and the public purposes behind the Fraud Against Taxpayers Act.

B. A complaint filed by a qui tam plaintiff shall be filed in camera in district court and shall remain under seal for at least sixty days. No service shall be made on a defendant and no response is required from a defendant until the seal has been lifted and the complaint served pursuant to the rules of civil procedure.

C. On the same day as the complaint is filed, the qui tam plaintiff shall serve the attorney general, and the political subdivision, if applicable, with a copy of the complaint and written disclosure of substantially all material evidence and information the qui tam plaintiff possesses. The attorney general on behalf of the state or the political subdivision, or the political subdivision on its own behalf, may intervene and proceed with the action within sixty days after receiving the complaint and the material evidence and information. Upon a showing of good cause and reasonable diligence in the state's or political subdivision's investigation, the state or political subdivision may move the court for an extension of time during which the complaint shall remain under seal.

D. Before the expiration of the sixty-day period or any extensions of time granted by the court, the attorney general or political subdivision shall notify the court that
the state or the political subdivision:

(1) intends to intervene and proceed with
the action; in which case, the seal shall be lifted and the
action shall be conducted by the attorney general on behalf
of the state or the political subdivision, or the political
subdivision shall conduct the action on its own behalf; or

(2) declines to take over the action; in
which case the seal shall be lifted and the qui tam plaintiff
may proceed with the action.

E. When a person brings an action pursuant to this
section, no person other than the attorney general on behalf
of the state or a political subdivision, or a political
subdivision on its own behalf, may intervene or bring a
related action based on the facts underlying the pending
action."

SECTION 5. Section 44-9-6 NMSA 1978 (being Laws 2007,
Chapter 40, Section 6) is amended to read:

"44-9-6. RIGHTS OF THE QUI TAM PLAINTIFF AND THE STATE
OR POLITICAL SUBDIVISION.--

A. If the state or political subdivision proceeds
with the action, it shall have the primary responsibility of
prosecuting the action and shall not be bound by an act of
the qui tam plaintiff. The qui tam plaintiff shall have the
right to continue as a party to the action, subject to the
limitations of this section.
B. The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the motion and to present evidence at a hearing.

C. The state or political subdivision may settle the action with the defendant notwithstanding any objection by the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate and reasonable under all of the circumstances.

D. Upon a showing by the state or political subdivision that unrestricted participation during the course of the litigation by the qui tam plaintiff would interfere with or unduly delay the prosecution of the case, or would be repetitious, irrelevant or for the purpose of harassment, the court may, in its discretion, impose limitations on the qui tam plaintiff's participation, such as:

   (1) limiting the number of witnesses the qui tam plaintiff may call;

   (2) limiting the length of testimony of such witnesses;

   (3) limiting the qui tam plaintiff's cross examination of witnesses; or
(4) otherwise limiting the qui tam plaintiff's participation in the litigation.

E. Upon a showing by a defendant that unrestricted participation during the course of litigation by the qui tam plaintiff would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the qui tam plaintiff in the litigation.

F. If the state or political subdivision elects not to proceed with the action, the qui tam plaintiff shall have the right to conduct the action. If the attorney general or political subdivision so requests, the qui tam plaintiff shall serve the attorney general or political subdivision with copies of all pleadings filed in the action and all deposition transcripts in the case, at the state's or political subdivision's expense. When the qui tam plaintiff proceeds with the action, the court, without limiting the status and rights of the qui tam plaintiff, may permit the attorney general or political subdivision to intervene at a later date upon a showing of good cause.

G. Whether or not the state or political subdivision proceeds with the action, upon a showing by the attorney general on behalf of the state or political subdivision, or a political subdivision on its own behalf, that certain actions of discovery by the qui tam plaintiff
would interfere with an investigation or prosecution of a
criminal or civil matter arising out of the same facts, the
court may stay such discovery for a period of not more than
sixty days. The showing by the state or political
subdivision shall be conducted in camera. The court may
extend the sixty-day period upon a further showing in camera
that the state or political subdivision has pursued the
criminal or civil investigation or proceeding with reasonable
diligence and any proposed discovery in the civil action will
interfere with the ongoing criminal or civil investigation or
proceeding.

H. Notwithstanding the provisions of Section
44-9-5 NMSA 1978, the attorney general or political
subdivision may elect to pursue the state's or political
subdivision's claim through any alternate remedy available,
including an administrative proceeding to determine a civil
money penalty. If an alternate remedy is pursued, the qui
tam plaintiff shall have the same rights in such a proceeding
as the qui tam plaintiff would have had if the action had
continued pursuant to this section. A finding of fact or
conclusion of law made in the other proceeding that has
become final shall be conclusive on all parties to an action
under the Fraud Against Taxpayers Act. For purposes of this
subsection, a finding or conclusion is final if it has been
finally determined on appeal to the appropriate court, if all
time for filing an appeal with respect to the finding or conclusion has expired or if the finding or conclusion is not subject to judicial review."

SECTION 6. Section 44-9-7 NMSA 1978 (being Laws 2007, Chapter 40, Section 7) is amended to read:

"44-9-7. AWARDS TO QUI TAM PLAINTIFF AND THE STATE OR POLITICAL SUBDIVISION.--

A. Except as otherwise provided in this section, if the state or a political subdivision proceeds with an action brought by a qui tam plaintiff and the state or political subdivision prevails in the action, the qui tam plaintiff shall receive:

(1) at least fifteen percent but not more than twenty-five percent of the proceeds of the action or settlement, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action; or

(2) no more than ten percent of the proceeds of the action or settlement if the court finds that the action was based primarily on disclosures of specific information, not provided by the qui tam plaintiff, relating to allegations or transactions in a criminal, civil, administrative or legislative hearing, proceeding, report, audit or investigation or from the news media, taking into account the significance of the information and the role of
the qui tam plaintiff in advancing the case to litigation. However, if the attorney general or political subdivision determines and certifies in writing that the qui tam plaintiff provided a significant contribution in advancing the case, then the qui tam plaintiff shall receive the share of proceeds set forth in Paragraph (1) of this subsection.

B. If the state or political subdivision does not proceed with an action brought by a qui tam plaintiff and the state or political subdivision prevails in the action, the qui tam plaintiff shall receive an amount that is not less than twenty-five percent or more than thirty percent of the proceeds of the action or settlement, as the court deems reasonable for collecting the civil penalty and damages.

C. Whether or not the state or political subdivision proceeds with an action brought by a qui tam plaintiff:

(1) if the court finds that the action was brought by a person that planned or initiated the violation of Section 44-9-3 NMSA 1978 upon which the action was based, the court may reduce the share of the proceeds that the person would otherwise receive under Subsection A or B of this section, taking into account the role of the person as the qui tam plaintiff in advancing the case to litigation and any relevant circumstances pertaining to the violation; or

(2) if the person bringing the action is
convicted of criminal conduct arising from that person's role in the violation of Section 44-9-3 NMSA 1978 upon which the action was based, that person shall be dismissed from the civil action and shall not receive a share of the proceeds. The dismissal shall not prejudice the right of the state or political subdivision to continue the action.

D. Any award to a qui tam plaintiff shall be paid out of the proceeds of the action or settlement, if any. The qui tam plaintiff shall also receive an amount for reasonable expenses incurred in the action plus reasonable attorney fees that shall be paid by the defendant.

E. The state or political subdivision is entitled to all proceeds collected in an action or settlement not awarded to a qui tam plaintiff. The state or political subdivision is also entitled to reasonable expenses incurred in the action plus reasonable attorney fees, including the fees of the attorney general or state agency counsel or counsel employed by the political subdivision that shall be paid by the defendant.

F. Proceeds and penalties collected by the state or political subdivision shall be deposited as follows:

(1) proceeds in the amount of the false claim paid and attorney fees and costs shall be returned to the fund or funds from which the money, property or services came;
(2) civil penalties shall be deposited in
the current school fund pursuant to Article 12, Section 4 of
the constitution of New Mexico;

(3) except as provided in Paragraph (4) of
this subsection, all remaining proceeds shall be deposited as
follows:

(a) one-half into a fund for the use of
the attorney general in furtherance of the obligations
imposed upon that office by the Fraud Against Taxpayers Act;
and

(b) one-half into the general fund; or

(4) remaining proceeds collected by counties
or municipalities as political subdivisions acting on their
own behalf shall be disposed of in accordance with the
direction of the governing body of the county or
municipality."

SECTION 7. Section 44-9-8 NMSA 1978 (being Laws 2007,
Chapter 40, Section 8) is amended to read:

"44-9-8. AWARD OF ATTORNEY FEES AND COSTS TO
DEFENDANT.--If the state or political subdivision does not
proceed with the action and the qui tam plaintiff conducts
the action, the court may award a defendant reasonable
attorney fees and costs if the defendant prevails and the
court finds the action clearly frivolous, clearly vexatious
or brought primarily for the purpose of harassment."
SECTION 8. Section 44-9-9 NMSA 1978 (being Laws 2007, Chapter 40, Section 9) is amended to read:

"44-9-9. CERTAIN ACTIONS BARRED.--

A. No court shall have jurisdiction over an action brought pursuant to Section 44-9-5 NMSA 1978 by a present or former employee of the state or political subdivision unless the employee, during employment with the state or political subdivision and in good faith, exhausted existing internal procedures for reporting false claims and the state or political subdivision failed to act on the information provided within a reasonable period of time.

B. No court shall have jurisdiction over an action brought pursuant to Section 44-9-5 NMSA 1978 against an elected or appointed state official, a member of the state legislature or a member of the judiciary if the action is based on evidence or information known to the state agency to which the false claim was made or to the attorney general when the action was filed.

C. Unless the attorney general or political subdivision determines and certifies in writing that the action is in the interest of the state or political subdivision, no court shall have jurisdiction over an action brought pursuant to Section 44-9-5 NMSA 1978 when that action is based on allegations or transactions that are the subject of a criminal, civil or administrative proceeding in which
the state or political subdivision is a party.

D. Upon motion of the attorney general or political subdivision, a court may, in its discretion, dismiss an action brought pursuant to Section 44-9-5 NMSA 1978 if the elements of the alleged false or fraudulent claim have been publicly disclosed in the news media or in a publicly disseminated governmental report at the time the complaint is filed."

SECTION 9. Section 44-9-10 NMSA 1978 (being Laws 2007, Chapter 40, Section 10) is amended to read:

"44-9-10. STATE OR POLITICAL SUBDIVISION NOT LIABLE.-- The state or political subdivision shall not be liable for expenses or fees that a qui tam plaintiff may incur in investigating or bringing an action pursuant to the Fraud Against Taxpayers Act."

SECTION 10. Section 44-9-12 NMSA 1978 (being Laws 2007, Chapter 40, Section 12) is amended to read:

"44-9-12. LIMITATION OF ACTIONS--ESTOPPEL--STANDARD OF PROOF.--

A. A civil action pursuant to the Fraud Against Taxpayers Act may be brought at any time. A civil action pursuant to the Fraud Against Taxpayers Act may be brought for conduct that occurred prior to the effective date of that act, but not for conduct that occurred prior to July 1, 1987.

B. Notwithstanding any other provision of law, a
final judgment rendered in a criminal proceeding charging fraud or false statement, whether upon a guilty verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of a fraud against taxpayers action where the criminal proceeding concerns the same transaction that is the subject of the fraud against taxpayers action.

C. In an action brought pursuant to the Fraud Against Taxpayers Act, the state or political subdivision or the qui tam plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence."
John A. Sanchez, President
Senate

Lenore M. Naranjo, Chief Clerk
Senate

Don L. Tripp, Speaker
House of Representatives

Denise Ramonas, Chief Clerk
House of Representatives

Approved by me this 10th day of April, 2015

Governor Susana Martinez
State of New Mexico