

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

HOUSE BILL 314

**50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011**

INTRODUCED BY

Joseph Cervantes

AN ACT

RELATING TO CIVIL ACTIONS; PROVIDING THAT ANY PERSON MAY BRING AN ACTION ON BEHALF OF THE STATE PURSUANT TO THE MEDICAID FALSE CLAIMS ACT; CLARIFYING PROVISIONS OF THE FRAUD AGAINST TAXPAYERS ACT; PROVIDING THAT THE STATE IS ENTITLED TO ATTORNEY FEES AND COSTS FOR ADDITIONAL CLAIMS ASSERTED AGAINST A DEFENDANT; PROVIDING THAT THE STATE IS NOT PRECLUDED FROM BRINGING A SEPARATE ACTION IF IT DOES NOT INTERVENE IN A FRAUD AGAINST TAXPAYERS ACTION; SPECIFYING THE INFORMATION REQUIRED FROM A QUI TAM PLAINTIFF; PROVIDING FOR CIVIL INVESTIGATIVE DEMANDS.

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

**SECTION 1.** Section 27-14-7 NMSA 1978 (being Laws 2004, Chapter 49, Section 7) is amended to read:

"27-14-7. CIVIL ACTION FOR FALSE CLAIMS.--

.182876.4SA

underscoring material = new  
~~[bracketed material] = delete~~

underscoring material = new  
~~[bracketed material] = delete~~

1           A. The department shall diligently investigate  
2 suspected violations. If the department finds that a person  
3 has violated or is violating the provisions of the Medicaid  
4 False Claims Act, the department may bring a civil action  
5 pursuant to Subsection F of this section.

6           B. A private civil action may be brought by ~~[an~~  
7 ~~affected]~~ a person for a violation of the Medicaid False Claims  
8 Act on behalf of the person bringing suit and for the state.  
9 The action shall be brought in the name of the state. The  
10 action may be dismissed if the court and the department,  
11 pursuant to Subsection F of this section, give written consent  
12 to the dismissal and their reasons for consenting.

13           C. For private civil actions, a copy of the  
14 complaint and written disclosure of substantially all material  
15 evidence and information the person possesses shall be served  
16 on the department. The complaint shall be filed in writing and  
17 shall remain under seal for at least sixty days. The complaint  
18 shall not be served on the defendant until the expiration of  
19 sixty days or any extension approved. Within sixty days after  
20 receiving a copy of the complaint, the department shall conduct  
21 an investigation of the factual allegations and legal  
22 contentions made in the complaint, shall make a written  
23 determination of whether there is substantial evidence that a  
24 violation has occurred and shall provide the person against  
25 which a complaint has been made with a copy of the

.182876.4SA

underscoring material = new  
~~[bracketed material] = delete~~

1 determination. If the department determines that there is not  
2 substantial evidence that a violation has occurred, the  
3 complaint shall be dismissed.

4 D. The department may, for good cause shown, move  
5 the court for extensions of time during which the complaint  
6 remains under seal. Any such motion may be supported by  
7 affidavits or other submissions in camera. The defendant shall  
8 not be required to respond to a complaint filed pursuant to  
9 this section until twenty days after the complaint is unsealed  
10 and served to the defendant. The complaint shall be deemed  
11 unsealed at the expiration of the sixty-day period in the  
12 absence of a court-approved extension.

13 E. Before the expiration of the sixty-day period or  
14 any extensions obtained, the department, pursuant to Subsection  
15 F of this section, shall:

16 (1) proceed with the action, in which case the  
17 action shall be conducted by the department; or

18 (2) notify the court and the person who  
19 brought the action that it declines to take over the action, in  
20 which case the person bringing the action shall have the right  
21 to conduct the action if the department determined that there  
22 is substantial evidence that a violation of the Medicaid False  
23 Claims Act has occurred.

24 F. The department shall notify the attorney general  
25 prior to filing a civil action pursuant to the Medicaid False

.182876.4SA

underscored material = new  
[bracketed material] = delete

1 Claims Act and shall not proceed with the action except with  
2 the written approval of the attorney general. The attorney  
3 general shall, within twenty working days from the notification  
4 by the department, notify the department whether it may proceed  
5 with the civil action. Failure by the attorney general to  
6 notify the department of its determination within the specified  
7 time period shall be construed as consent to proceed. The  
8 department shall, after filing the civil action, notify the  
9 attorney general of any proposed dismissal or settlement, and  
10 the department shall not proceed with the dismissal or  
11 settlement except with the written approval of the attorney  
12 general."

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

15 "44-9-1. SHORT TITLE.--~~[This act]~~ Chapter 44, Article 9  
16 NMSA 1978 may be cited as the "Fraud Against Taxpayers Act"."

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

19 "44-9-4. INVESTIGATION BY THE ATTORNEY GENERAL--  
20 DELEGATION--CIVIL ACTION.--

21 A. To the extent the attorney general deems  
22 appropriate, the attorney general shall diligently investigate  
23 suspected violations of Section ~~[3 of the Fraud Against~~  
24 ~~Taxpayers Act]~~ 44-9-3 NMSA 1978, and if the attorney general  
25 finds that a person has violated or is violating that section,

.182876.4SA

underscored material = new  
[bracketed material] = delete

1 the attorney general may bring a civil action against that  
2 person pursuant to the Fraud Against Taxpayers Act.

3 B. The attorney general may in appropriate cases  
4 delegate the authority to investigate or to bring a civil  
5 action to the state agency to which a false claim was made, and  
6 when this occurs, the state agency shall have every power  
7 conferred upon the attorney general pursuant to the Fraud  
8 Against Taxpayers Act."

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

11 "44-9-5. CIVIL ACTION BY QUI TAM PLAINTIFF--STATE MAY  
12 INTERVENE.--

13 A. A person may bring a civil action for a  
14 violation of Section [~~3 of the Fraud Against Taxpayers Act]~~  
15 44-9-3 NMSA 1978 on behalf of the person and the state. The  
16 person shall not assert any claim other than a claim pursuant  
17 to Section 44-9-3 NMSA 1978 on behalf of the state. The action  
18 shall be brought in the name of the state. The person bringing  
19 the action shall be referred to as the qui tam plaintiff. Once  
20 filed, the action may be dismissed only with the written  
21 consent of the court, taking into account the best interest of  
22 the parties involved and the public purposes behind the Fraud  
23 Against Taxpayers Act.

24 B. A complaint filed by a qui tam plaintiff shall  
25 be filed in camera in district court and shall remain under

.182876.4SA

1 seal for at least sixty days. No service shall be made on a  
2 defendant, and no response is required from a defendant until  
3 the seal has been lifted and the complaint served pursuant to  
4 the rules of civil procedure.

5 C. On the same day as the complaint is filed, the  
6 qui tam plaintiff shall serve the attorney general with a copy  
7 of the complaint and written disclosure of substantially all  
8 material evidence and information the qui tam plaintiff  
9 possesses. The attorney general on behalf of the state may  
10 intervene and proceed with the action within sixty days after  
11 receiving the complaint and the material evidence and  
12 information. Upon a showing of good cause and reasonable  
13 diligence in the state's investigation, the state may move the  
14 court for an extension of time during which the complaint shall  
15 remain under seal.

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

19 (1) intends to intervene and proceed with the  
20 action; in which case, the seal shall be lifted and the action  
21 shall be conducted by the attorney general on behalf of the  
22 state; or

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

underscored material = new  
[bracketed material] = delete

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

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

7           "44-9-6. RIGHTS OF THE QUI TAM PLAINTIFF AND THE STATE.--

8           A. If the state proceeds with the action, it shall  
9 have the primary responsibility of prosecuting the action and  
10 shall not be bound by an act of the qui tam plaintiff. The qui  
11 tam plaintiff shall have the right to continue as a party to  
12 the action, subject to the limitations of this section.

13           B. If the state proceeds with the action and  
14 asserts other statutory or common law claims against the  
15 defendant and the additional claims are based on allegations or  
16 information provided by the qui tam plaintiff, the qui tam  
17 plaintiff's award shall be as provided in Section 44-9-7 NMSA  
18 1978 for any recovery based on the additional claims. The  
19 state shall be entitled to an award of attorney fees and costs  
20 as provided in Section 44-9-7 NMSA 1978 in any successful  
21 action based on the additional statutory or common law claims.

22           [~~B.~~] C. The state may seek to dismiss the action  
23 for good cause notwithstanding the objections of the qui tam  
24 plaintiff if the qui tam plaintiff has been notified of the  
25 filing of the motion and the court has provided the qui tam

underscored material = new  
[bracketed material] = delete

1 plaintiff with an opportunity to oppose the motion and to  
2 present evidence at a hearing.

3 ~~[G-]~~ D. The state may settle the action with the  
4 defendant notwithstanding any objection by the qui tam  
5 plaintiff if the court determines, after a hearing providing  
6 the qui tam plaintiff an opportunity to present evidence, that  
7 the proposed settlement is fair, adequate and reasonable under  
8 all of the circumstances.

9 ~~[D-]~~ E. Upon a showing by the state that  
10 unrestricted participation during the course of the litigation  
11 by the qui tam plaintiff would interfere with or unduly delay  
12 the state's prosecution of the case, or would be repetitious,  
13 irrelevant or for the purpose of harassment, the court may, in  
14 its discretion, impose limitations on the qui tam plaintiff's  
15 participation, such as:

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

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

20 (3) limiting the qui tam plaintiff's cross  
21 examination of witnesses; or

22 (4) otherwise limiting the qui tam plaintiff's  
23 participation in the litigation.

24 ~~[E-]~~ F. Upon a showing by a defendant that  
25 unrestricted participation during the course of litigation by



underscoring material = new  
~~[bracketed material] = delete~~

1 the qui tam plaintiff would be for purposes of harassment or  
2 would cause the defendant undue burden or unnecessary expense,  
3 the court may limit the participation by the qui tam plaintiff  
4 in the litigation.

5 ~~[F-]~~ G. If the state elects not to proceed with the  
6 action, the qui tam plaintiff shall have the right to conduct  
7 the action. If the attorney general so requests, the qui tam  
8 plaintiff shall serve the attorney general with copies of all  
9 pleadings filed in the action and all deposition transcripts in  
10 the case, at the state's expense. When the qui tam plaintiff  
11 proceeds with the action, the court, without limiting the  
12 status and rights of the qui tam plaintiff, may permit the  
13 attorney general to intervene at a later date upon a showing of  
14 good cause.

15 ~~[G-]~~ H. Whether or not the state proceeds with the  
16 action, upon a showing by the attorney general on behalf of the  
17 state that certain actions of discovery by the qui tam  
18 plaintiff would interfere with the state's investigation or  
19 prosecution of a criminal or civil matter arising out of the  
20 same facts, the court may stay such discovery for a period of  
21 not more than sixty days. The showing by the state shall be  
22 conducted in camera. The court may extend the sixty-day period  
23 upon a further showing in camera that the state has pursued the  
24 criminal or civil investigation or proceeding with reasonable  
25 diligence and any proposed discovery in the civil action will

.182876.4SA

underscored material = new  
[bracketed material] = delete

1 interfere with the ongoing criminal or civil investigation or  
2 proceeding.

3 I. The state's election not to intervene or  
4 participate in the action does not preclude it from seeking  
5 recovery based on other statutory or common law claims for the  
6 same conduct that was the subject of the qui tam plaintiff's  
7 action.

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

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

.182876.4SA

1 "44-9-7. AWARDS TO QUI TAM PLAINTIFF AND THE STATE.--

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

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

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

24 B. If the state does not proceed with an action  
25 brought by a qui tam plaintiff and the state prevails in the

.182876.4SA

underscored material = new  
[bracketed material] = delete

1 action, the qui tam plaintiff shall receive an amount that is  
2 not less than twenty-five percent or more than thirty percent  
3 of the proceeds of the action or settlement, as the court deems  
4 reasonable for collecting the civil penalty and damages.

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

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

16 (2) if the person bringing the action is  
17 convicted of criminal conduct arising from that person's role  
18 in the violation of Section [~~3 of the Fraud Against Taxpayers~~  
19 ~~Act~~] 44-9-3 NMSA 1978 upon which the action was based, that  
20 person shall be dismissed from the civil action and shall not  
21 receive a share of the proceeds. The dismissal shall not  
22 prejudice the right of the state to continue the action.

23 D. Any award to a qui tam plaintiff shall be paid  
24 out of the proceeds of the action or settlement, if any. The  
25 qui tam plaintiff shall also receive an amount for reasonable

.182876.4SA

underscored material = new  
[bracketed material] = delete

1 expenses incurred in the action plus reasonable attorney fees  
2 that shall be paid by the defendant.

3 E. The state is entitled to all proceeds collected  
4 in an action or settlement not awarded to a qui tam plaintiff.  
5 The state is also entitled to reasonable expenses incurred in  
6 the action plus reasonable attorney fees, including the fees of  
7 the attorney general or state agency counsel that shall be paid  
8 by the defendant. Proceeds and penalties collected by the  
9 state shall be deposited as follows:

10 (1) proceeds in the amount of the false claim  
11 paid and attorney fees and costs shall be returned to the fund  
12 or funds from which the money, property or services came and  
13 attorney fees and costs provided by the office of the attorney  
14 general shall be paid to the office of the attorney general;

15 (2) civil penalties shall be deposited in the  
16 current school fund pursuant to Article 12, Section 4 of the  
17 constitution of New Mexico; and

18 (3) all remaining proceeds shall be deposited  
19 as follows:

20 (a) one-half into a fund for the use of  
21 the office of the attorney general to provide staffing for  
22 cases arising pursuant to the Fraud Against Taxpayers Act in  
23 furtherance of the obligations imposed upon that office by [~~the~~  
24 ~~Fraud Against Taxpayers~~] that act; and

25 (b) one-half into the general fund."

.182876.4SA

underscored material = new  
[bracketed material] = delete

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

3           "44-9-9. CERTAIN ACTIONS BARRED--INFORMATION SOURCE.--

4           A. No court shall have jurisdiction over an action  
5 brought pursuant to Section [~~5 of the Fraud Against Taxpayers~~  
6 ~~Act~~] 44-9-5 NMSA 1978 by a present or former employee of the  
7 state unless the employee, during employment with the state and  
8 in good faith, exhausted existing internal procedures for  
9 reporting false claims and the state failed to act on the  
10 information provided within a reasonable period of time.

11           B. No court shall have jurisdiction over an action  
12 brought pursuant to Section [~~5 of the Fraud Against Taxpayers~~  
13 ~~Act~~] 44-9-5 NMSA 1978 against an elected or appointed state  
14 official, a member of the state legislature or a member of the  
15 judiciary if the action is based on evidence or information  
16 known to the state agency to which the false claim was made or  
17 to the attorney general when the action was filed.

18           C. Unless the attorney general determines and  
19 certifies in writing that the action is in the interest of the  
20 state, no court shall have jurisdiction over an action brought  
21 pursuant to Section [~~5 of the Fraud Against Taxpayers Act~~]  
22 44-9-5 NMSA 1978 when that action is based on allegations or  
23 transactions that are the subject of a criminal, civil or  
24 administrative proceeding in which the state is a party.

25           D. Upon motion of the attorney general, a court

.182876.4SA

underscored material = new  
[bracketed material] = delete

1 may, in its discretion, dismiss an action brought pursuant to  
2 Section [~~5 of the Fraud Against Taxpayers Act~~] 44-9-5 NMSA 1978  
3 if the elements of the alleged false or fraudulent claim by the  
4 defendant have been publicly disclosed in a federal or state  
5 criminal, civil or public administrative proceeding, in the  
6 news media or in a publicly disseminated governmental report at  
7 the time the complaint is filed, unless the person bringing the  
8 action is an original source of the information on which the  
9 action brought pursuant to Section 44-9-5 NMSA 1978 is based.  
10 As used in this subsection, "original source" means an  
11 individual who has direct and independent knowledge of the  
12 information on which the action brought pursuant to Section  
13 44-9-5 NMSA 1978 is based."

14 SECTION 8. A new section of the Fraud Against Taxpayers  
15 Act is enacted to read:

16 "[NEW MATERIAL] CIVIL INVESTIGATIVE DEMAND.--

17 A. Whenever the attorney general has reason to  
18 believe that any person may be in possession, custody or  
19 control of an original or copy of any book, record, report,  
20 memorandum, paper, communication, tabulation, map, chart,  
21 photograph, mechanical transcription or other tangible document  
22 or recording that the attorney general believes to be relevant  
23 to the subject matter of an investigation of a probable  
24 violation of the Fraud Against Taxpayers Act, the attorney  
25 general may, prior to the institution of a civil proceeding,

.182876.4SA

1 execute in writing and cause to be served upon the person a  
2 civil investigative demand requiring that person to produce  
3 documentary material and permit the inspection and copying of  
4 the material. The demand of the attorney general shall not be  
5 a matter of public record and shall not be published by the  
6 attorney general except by court order.

7 B. A civil investigative demand shall:

8 (1) state the general subject matter of the  
9 investigation;

10 (2) describe with reasonable certainty the  
11 classes of documentary material to be produced;

12 (3) prescribe the return date within which the  
13 documentary material is to be produced, which in no case shall  
14 be less than ten days after the date of service; and

15 (4) identify the members of the attorney  
16 general's staff to whom such documentary material is to be made  
17 available for inspection and copying.

18 C. A civil investigative demand shall not:

19 (1) contain any requirement that would be  
20 unreasonable or improper if contained in a subpoena duces tecum  
21 issued by a court of this state;

22 (2) require the disclosure of any documentary  
23 material that would be privileged or for any other reason would  
24 not be required by a subpoena duces tecum issued by a court of  
25 this state; or



underscoring material = new  
~~[bracketed material] = delete~~

1 (3) require the removal of any documentary  
2 material from the custody of the person upon whom the demand is  
3 served except in accordance with the provisions of Subsection E  
4 of this section.

5 D. Service of a civil investigative demand may be  
6 made by:

7 (1) delivering a duly executed copy of the  
8 demand to the person to be served, or if the person is not a  
9 natural person, to the statutory agent for the person or an  
10 officer of the person to be served;

11 (2) delivering a duly executed copy of the  
12 demand to the principal place of business in this state of the  
13 person to be served; or

14 (3) mailing by registered or certified mail a  
15 duly executed copy of the demand addressed to the person to be  
16 served at the person's principal place of business in this  
17 state, or, if the person has no place of business in this  
18 state, to the person's principal office or place of business.

19 E. Documentary material demanded pursuant to this  
20 section shall be produced for inspection and copying during  
21 normal business hours at the principal office or place of  
22 business of the person served or may be inspected and copied at  
23 such other times and places as may be agreed upon by the person  
24 served and the attorney general.

25 F. Except as provided in Subsection G of this

underscoring material = new  
~~[bracketed material]~~ = delete

1 section, no documentary material produced pursuant to a civil  
2 investigative demand, or copies of that material, shall be  
3 produced for inspection or copying by anyone other than an  
4 authorized employee of the attorney general, nor shall the  
5 contents thereof be disclosed to anyone other than an  
6 authorized employee of the attorney general.

7 G. Documentary material produced pursuant to a  
8 civil investigative demand, or copies of that material, may be  
9 produced for inspection or copying:

10 (1) to other state attorneys' general for the  
11 purposes of investigation into the particular action in which  
12 the civil investigation demand was served;

13 (2) to federal, state and other law  
14 enforcement agencies; or

15 (3) to the qui tam plaintiff.

16 H. At any time before the return date of a civil  
17 investigative demand, a petition to set aside or modify the  
18 demand or extend the return date set forth in the demand may be  
19 filed in the district court in the county in which the person  
20 resides or has a principal place of business, and the court  
21 upon a showing of good cause may set aside or modify the demand  
22 or extend the return date of the demand.

23 I. After service of the civil investigative demand  
24 upon a person, if that person neglects or refuses to comply  
25 with the demand, the attorney general may invoke the aid of the

.182876.4SA

underscoring material = new  
~~[bracketed material] = delete~~

1 court in the enforcement of the demand. In appropriate cases,  
2 the court shall issue its order requiring the person to appear  
3 and produce the documentary material required in the demand and  
4 may, upon failure of the person to comply with the order,  
5 punish the person for contempt."

6 SECTION 9. EFFECTIVE DATE.--The effective date of the  
7 provisions of this act is July 1, 2011.

8 - 19 -

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25