

The Florida Senate
PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Criminal and Civil Justice Appropriations Committee

BILL: CS/SB 2312

INTRODUCER: Judiciary Committee and Senator Oelrich

SUBJECT: Florida False Claims Act

DATE: April 13, 2007

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Luczynski</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Hendon</u>	<u>Sadberry</u>	<u>JA</u>	<u>Favorable</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The Florida False Claims Act (FFCA), §§ 68.081-68.09, F.S., authorizes civil actions by individuals and the state against persons who file or conspire to file false claims for payment or approval with a state agency.¹ This bill generally amends the FFCA to bring it into closer conformity to the Federal False Claims Act.²

This bill makes the following changes to the Florida False Claims Act:

- This bill amends several sections of the FFCA that provide the act applies only to claims that are “false” to apply to claims that are “false or fraudulent”;
- Increases the statute of limitation for bringing actions against people who violate the FFCA;
- Increases the civil penalty for violating the FFCA from between \$5,000 and \$10,000 to between \$5,500 and \$11,000; and
- Specifically provides that the FFCA pertains to false claims submitted electronically.

This bill amends sections 68.081 and 68.085, Florida Statutes. This bill substantially amends the following sections of the Florida Statutes: 68.082, 68.083, 68.084, and 68.089.

¹ See Section II, Present Situation for a complete list of actions that violate the FFCA.

² *False Claims Amendments Act of 1986*, S. Rep. No. 99-345, at 8 (1986), reprinted in 1986 U.S.C.A.N 5266, 5273.

II. Present Situation:

The Florida False Claims Act (FFCA)³ authorizes civil actions by individuals and the state against persons who file false claims for payment or approval with a state agency. The FFCA is modeled after the Federal False Claims Act that was enacted during the Civil War in response to widespread fraud among defense contractors.⁴ In addition to Florida, 15 states, the District of Columbia, New York City, and Chicago have a False Claims Acts with *qui tam* provisions.⁵

In Florida, the FFCA has often been used to combat health care, nursing home, Medicaid, and Medicare fraud. An action under the FFCA can be brought either by the state itself, or by a private individual on behalf of the state. The Department of Legal Affairs and then the Department of Financial Services are responsible for investigating and litigating actions brought under the FFCA. Actions brought by private entities on behalf of the state are called *qui tam* actions.⁶

Section 68.083(3), F.S., provides that when a *qui tam* action is filed in the circuit court of the Second Judicial Circuit, in and for Leon County, a copy of the complaint and disclosure of all material evidence must be served on the Attorney General, as head of the Department of Legal Affairs, and the Chief financial Officer, as head of the Department of Financial Services. The FFCA does not explicitly provide that a complaint is to be sealed automatically upon filing. However, certain provisions in s. 68.083, F.S., arguably only have meaning if they are construed to mean that a complaint is automatically sealed. Section 68.083(2), F.S., provides that “[p]rior to the court unsealing the complaint under subsection (3), the action may be voluntarily dismissed” Section 68.083(5), F.S., provides for the Department of Legal Affairs to request an extension of the time during which the complaint remains sealed under subsection (2). Furthermore, the Leon County Clerk of Courts office indicated that the office’s current practice in order to comply with s. 68.083, F.S., is to automatically seal such complaints for 90 days. The complaint is unsealed on the 91st day unless a party has successfully moved the court to keep it under seal.

Section 68.083(3), F.S., also provides that when a private individual brings a potential claim to the attention of the Department of Legal Affairs or the Department of Financial Services, these departments have 90 days to decide whether they are going to intervene, and take over litigating the FFCA action from the private individual.

³ Sections 68.081-68.09, F.S.

⁴ *False Claims Amendments Act of 1986*, S. Rep. No. 99-345, at 8 (1986), reprinted in 1986 U.S.C.C.A.N 5266, 5273 (“The Claims Act was adopted in 1863 and signed into law by President Abraham Lincoln in order to combat rampant fraud in Civil War defense contracts.”); see also *Rainwater v. United States*, 356 U.S. 590, 592 (1958) (“The Act was originally passed in 1863 after disclosure of widespread fraud against the Government during the War Between the States.”).

⁵ See THE FALSE CLAIMS ACT LEGAL CENTER, TAXPAYERS AGAINST FRAUD EDUCATION FUND, *State False Claims Acts*, <http://www.taf.org/statefca.htm> (last visited Mar. 28, 2007).

⁶ *Qui tam* cases usually arise from an employee of an institution such as a health care provider who discovers that violations of the FFCA are occurring. This is a type of whistleblower action. In a *qui tam* action under the FFCA, the employee will sue on behalf of the state to collect money that was illegally defrauded from the state. A private entity that brings a successful FFCA action on behalf of the state will receive an amount that the court decides is reasonable for collecting the civil penalty and damages. The amount must not be less than 25 percent and not more than 30 percent of the proceeds recovered under a judgment.

Section 68.084, F.S., provides that when the Department of Legal Affairs shows that certain actions of discovery by the private individual initiating the FFCA action would interfere with an investigation by the state or the prosecuting of another matter arising out of the same facts, then the court can stay the discovery for no more than 90 days. Under certain circumstances, the court can extend the 90-day period an additional 90 days, if the department shows that they have pursued their investigation with reasonable diligence.

Actions that violate the FFCA include:

- Submitting a false claim for payment or approval;
- Making or using a false record to get a false or fraudulent claim paid or approved;
- Conspiring to make a false claim or to deceive an agency to get a false or fraudulent claim allowed or paid; or
- Making or using a false record to conceal, avoid, or decrease payments owed to the state government.⁷

The penalty for violating the FFCA is \$5,000 to \$10,000 per claim, plus three times the amount of damages to the state government for FFCA violations. For example, if a person were found guilty of making a false claim where he or she defrauded \$100,000 from the state, that person would be liable to pay the state \$300,000 plus the \$5,000 to \$10,000 penalty per claim.

Section 68.089, F.S., provides a statute of limitation where a civil action under the FFCA cannot be brought:

- more than 5 years after the date on which the false claim against the state is committed; or
- more than 2 years after the date when the facts are known or reasonably should have been known by the state, but in no event more than 7 years after the date on which the violation is committed.

III. Effect of Proposed Changes:

This bill generally amends the Florida False Claims Act (FFCA) to bring it into closer conformity to the Federal False Claims Act. The provisions of this bill seem to satisfy federal law that provides “if a State has in effect a law relating to false or fraudulent claims that meets [certain requirements], the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under such law, shall be decreased by 10 percentage points.”⁸ Section 1396h(b) of Title 42 provides that the State must have in effect a law that meets the following requirements:

- (1) The law establishes liability to the State for false or fraudulent claims described in section 3729 of Title 31, with respect to any expenditure described in section 1396b(d) of this title.

⁷ Section 68.082(2), F.S.

⁸ 42 U.S.C.A. § 1396h(a) (West 2007).

- (2) The law contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of Title 31.
- (3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General.
- (4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of Title 31.⁹

This bill amends s. 68.082, F.S., to provide that the definition of “claim” includes all “written or electronically” submitted requests or demands. In some cases, the existing FFCA provides that the act applies to claims that are “false.” This bill amends several sections of the FFCA to specifically provide that the act will apply to claims that are “false or fraudulent.” This bill also amends s. 68.082, F.S., to increase the level of civil penalties that the state is authorized to charge against a person who is found to have violated the FFCA from between \$5,000 - \$10,000 to between \$5,500 - \$11,000, while still allowing for treble damages. This increase in penalties is consistent with the penalties under the Federal False Claims Act.¹⁰

This bill also reduces from 90 to 60 days the time the Department of Legal Affairs or the Department of Financial Services has to decide whether either entity is going to intervene, and take over litigating an FFCA action from a private individual who has filed suit under the act in circuit court.

This bill amends s. 68.084, F.S., to reduce from 90 to 60 days the time that the court can stay actions of discovery by a private individual initiating an FFCA action where the Department of Legal Affairs shows that the discovery would interfere with an investigation by the state or the prosecuting of another matter arising out of the same facts. This bill also reduces from 90 to 60 days the time that a court can further extend the stay if the Department of Legal Affairs shows that it has pursued its investigation with reasonable diligence.

This bill amends s. 68.089, F.S., to increase the statute of limitations to 6 years after the date on which the false claim against the state is committed, or 3 years after the date when the facts are known by the state, but in no event more than 10 years after the date on which the violation is committed.

The bill provides for an effective date of July 1, 2007.

⁹ In a letter, dated December 21, 2006, from Daniel R. Levinson, Inspector General, U.S. Department of Health & Human Services to L. Clayton Roberts, Deputy Attorney General, Office of the Attorney General, State of Florida, the Inspector General determined that the current version of the FFCA does not meet the requirements of 42 U.S.C. § 1396h. The letter notes the differences between the Federal False Claims Act and the FFCA that appear to have resulted in the negative determination by the Inspector General. Those differences concern the FFCA’s use of “false claims” versus “false or fraudulent claims” and the time limitations for bringing actions. The differences are addressed by the bill’s proposed revisions. The letter does not indicate that there is an issue related to the requirement that complaints are sealed for 60 days.

¹⁰ 28 C.F.R. § 85.3(a)(9) (2003) (increasing the statutory penalties for inflation under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, § 5, 104 Stat. 891).

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

Article I, section 24 of the Florida Constitution provides that every person has the right to inspect or copy any public record made or received in connection with the official business of any public body of the state, except with respect to records exempted. As discussed in Section II, Present Situation, certain provisions in current s. 68.083, F.S., arguably could be construed to be a public records exemption. If those provisions are a public records exemption, then it appears that they were unconstitutionally enacted; however, the reenactment of the Florida Statutes may have cured the violation.¹¹

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Individuals and businesses that are found to be in violation of the Florida False Claims Act could be required to pay between \$500 and \$1,000 more in penalties per false claim under this bill.

C. Government Sector Impact:

This bill appears to have a positive impact on state government revenues due to the 10 percent increased civil penalty that the state could collect in certain circumstances if Florida law complies with federal law, as previously discussed in Section III, Effect of Proposed Changes. For example, the State Medicaid Control Fraud Unit within the Office of the Attorney General recovered \$32,755,764.79 under the Florida False Claims Act in 2006. Had the language of this bill been law in 2006, the state would have received an extra 10 percent or \$3,275,576.48.¹²

¹¹ If s. 68.083, F.S., is construed to contain a public records exemption, then it appears to have been unconstitutionally enacted because it was enacted as part of the substantive bill creating the Florida False Claims Act. *See* Ch. 1994-316, § 3, Laws of Fla. Arguably the reenactment of the Florida Statutes cures the single-subject requirement of article I, section 24 of the Florida Constitution in the same manner that reenactment cures a violation of the single-subject requirement of article III, section 6 of the Florida Constitution.

¹² The extra recovery is based on the assumption that after the bill became law, the Inspector General, U.S. Department of Health & Human Services, would then make a determination that the FFCA meets the requirements of 42 U.S.C. § 1396h.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate Professional Staff Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

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