

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 935 Florida False Claims Act
SPONSOR(S): Judiciary Committee; Civil Justice Subcommittee; Young
TIED BILLS: HB 1297 **IDEN./SIM. BILLS:** CS/SB 1494

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	13 Y, 0 N, As CS	Ward	Bond
2) Justice Appropriations Subcommittee	11 Y, 0 N	McAuliffe	Jones Darity
3) Judiciary Committee	16 Y, 0 N, As CS	Ward	Havlicak

SUMMARY ANALYSIS

The Florida False Claims Act (FFCA) authorizes civil actions by individuals and the state against persons who file false claims for payment or approval with a state agency. 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.

The penalty for violating the FFCA is \$5,500 to \$11,000 per claim, plus three times the amount of damages to the state government for FFCA violations. The bill:

- Expands the applicability of the FFCA to state subdivisions and instrumentalities.
- Adds definitions which conform to the Federal False Claims Act.
- Changes "intent to deceive" to "intent to defraud" the state.
- Makes the Department of Legal Affairs or the Department of Financial Services the sole state entities to pursue false claims.
- Grants the Department of Legal Affairs the ability to issue subpoenas to produce documents, to answer questions under oath, and to provide sworn testimony.
- Provides a civil penalty up to \$1 million for destroyed or created evidence.
- Allows the state to pursue a false claims action through an administrative remedy.
- Precludes a private false claims action where the underlying facts were publicly disclosed.
- Deprives the courts of jurisdiction of an action brought under the act against a county or municipality.
- Provides that no action may be brought more than three years after material facts were known to the Department of Legal Affairs or the Department of Financial Services.
- Allows either department to amend or supplant the pleadings if it intervenes in an existing action.
- Provides that either department may intervene and make such changes in actions pending as of the effective date.
- Estops a defendant who has pleaded guilty or nolo contendere in a criminal action from denying underlying facts that would support a false claims action.

The bill is effective July 1, 2013, except as otherwise expressly provided.

The bill does not appear to have a fiscal impact on the state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The Florida False Claims Act (FFCA)¹ 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.² In addition to Florida, 30 states, the District of Columbia, New York City, and Chicago have a False Claims Acts with *qui tam* provisions.³

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.⁴

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 60 days to decide whether they are going to intervene, and take over litigating the FFCA action from the private individual.

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

¹ Sections 68.081-68.092, F.S.

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 (“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.”).

³ See THE FALSE CLAIMS ACT LEGAL CENTER, TAXPAYERS AGAINST FRAUD EDUCATION FUND, *State False Claims Acts*, <http://www.taf.org/states-false-claims-acts> (last visited March 6, 2013).

⁴ *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.

- Making or using a false record to conceal, avoid, or decrease payments owed to the state government.⁵

The penalty for violating the FFCA is \$5,500 to \$11,000 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 \$5,500 to \$11,000 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 6 years after the date on which the false claim against the state is committed; or
- More than 3 years after the date when the facts are known or reasonably should have been known by the state; but
- In no event more than 10 years after the date on which the violation is committed.

Section by Section Analysis

1. The Florida False Claims Act - Section 68.081, F.S.

The current statute includes a statement of purpose, that the Act is to deter the payment of false claims, and to provide remedies in the form of treble damages and civil penalties.

The bill removes the statement of purpose, and specifies that the Florida False Claims Act is contained in ss. 68.081 - 68.092, F.S.

2. Definitions - Section 68.082, F.S.

The current statute defines "agency" as an official or other subset of the executive branch of the state government.

The bill removes this definition, and consistently changes the term "agency" throughout the balance of the FFCA to "state." The term "state" is defined in the bill so as to include state agencies, authorities, and instrumentalities. The net effect of these changes is to expand the applicability of the FFCA to state divisions and instrumentalities where prior law limited it to agencies.⁶

The bill also adds definitions for "material" and "obligation"⁷ which conforms with definitions found in the Federal False Claims Act. "Material" includes the ability to influence the payment of money, and "obligation" now includes an established duty.

These changes culminate in s. 68.082(2)(g), F.S., to provide that any person who uses false information to make a claim against any state instrumentality, or conspires to do so, is liable to the state for a penalty of not less than \$5,500 and treble the amount of damages the state sustains as a result of the claim.

Currently, an agency or the department may address false claims. Because the bill consistently removes "agency" and replaces it with "department," the bill makes the Department of Legal Affairs the sole entity in the state to pursue the FFCA, except for those initiated by or intervened in by the Department of Financial Services pursuant to s. 68.083, F.S.

⁵ Section 68.082(2), F.S.

⁶ Cf. Fla. AGO 2011-10, which excludes municipalities from the act because of the definitions of "agency," and "instrumentality." 2011 WL 2429107.

⁷ See 31 U.S.C. 3729(b)(3) and (4).

3. Civil Actions for False Claims - Section 68.083, F.S.

Section 68.083(3), F.S., 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 60 days to decide whether they are going to intervene and take over litigating the FFCA action from the private individual. The bill removes the reference to "on behalf of the state," specifying that only the department may intervene or bring a related action.

4. Subpoenas - Section 68.0831, F.S.

Under current law, the Attorney General's office may investigate claims but does not have subpoena powers. The department reports that the lack of subpoena authority can make it difficult for the department to determine if it is appropriate to intervene in a FFCA case.

The bill grants the Department of Legal Affairs discovery capabilities prior to the institution of a civil proceeding, if it has reason to believe that any person has testimony or evidence relevant to the investigation. The bill provides that the department may issue subpoenas requiring the recipient to:

- Produce documents;
- Answer interrogatories under oath; and
- Give sworn testimony.

The bill provides:

- A subpoena will be served as other process;
- A subpoena must detail the materials requested and the nature of the conduct to which the materials relate;
- The recipient of a subpoena may petition the Circuit Court of Leon County for relief from the subpoena;
- The recipient of a subpoena has 30 days to respond at the time and place specified, or risk being subject to contempt;
- Transcribed testimony may be reviewed by the deponent;
- The department may stipulate to protective orders;
- The department may request that a person who refuses to comply on Fifth Amendment grounds may be compelled to comply by the court.

The bill provides that the discovery provisions do not impair the ability of the department to:

- Institute a civil proceeding; or
- Invoke the power of the court to compel production of evidence before a grand jury.

The bill provides for a civil penalty up to \$100,000 for a natural person and \$1 million for any other entity, plus attorney fees and costs in the event a subpoena is pending, if evidence is knowingly created or destroyed by such person or entity.

5. Rights of Parties in Civil Actions - Section 68.084, F.S.

Currently, the department may dismiss a cause voluntarily over the objections of the person who initiated the action. The bill adds that the department may dismiss an action "at any point" over the objections of said person.

Currently the application of one civil remedy under the Act does not preclude another. The bill adds that the state may elect to pursue a false claim through an administrative remedy to determine a civil monetary penalty, and if it does so, the person bringing the action has the same rights as the person has in an action brought through the courts.

The bill also specifies when a finding or ruling has become final, adding that a conclusion is final once the time for appeal has expired.

6. Awards to Plaintiffs Bringing Actions - Section 68.085, F.S.

Currently, the private party bringing the action is entitled to recover a portion of the proceeds awarded by the court in the event that the department prevails in a false claims action.

The bill adds that the person bringing the claim will also be entitled to expenses incurred in pursuit of the claim, including attorney fees and costs, and that such will be assessed against the defendant and are payable only from the proceeds of the action.

7. Expenses and Attorney Fees - Section 68.086, F.S.

Currently the provisions for the fees and costs of the person bringing the action and the department are contained in the same section of the FFCA. Since the provisions for the payment of private parties has been moved to s. 68.085, F.S., that provision was removed from s. 68.087, F.S., leaving provision for payment of attorney fees to the department intact.

8. Exemptions to Civil Actions - Section 68.087, F.S.

Publicly Disclosed Evidence

Currently if a false claim is brought based upon evidence which was disclosed in a pending investigation, the court does not have jurisdiction to entertain the action. Disclosure of the evidence through the media, or through a pending action by the state also causes the court to lose jurisdiction, unless the person bringing the action was the original source of the information.⁸

The bill provides that the court may dismiss an action brought upon publicly disclosed facts, and gives the department the opportunity to object to such dismissal of the action.

Local Governments

Currently, the statute provides that the court has no jurisdiction over a case brought against local governments, which is defined as a county or municipality.

The bill removes the reference to local governments and continues to provide that the court cannot have jurisdiction over an action brought under the act against a county or municipality.

9. Limitations and Interventions by the Department - Section 68.089, F.S.

Limitation of Actions

Currently, no action may be brought for false claims more than six years after the violation, or more than three years after the material facts were known to the public official charged with responsibility of the matter.

The bill deletes the reference regarding the knowledge of public officials, and changes it to knowledge of the "department." Therefore, no action may be brought more than three years after material facts were known to the department.

Intervention by the Department

⁸ The current provision which deprives the court of jurisdiction subjects a suit in these circumstances to dismissal pursuant to Fla. R. Civ. Pro. 1.140 on the basis of a lack of subject matter jurisdiction. Further, a court order entered without jurisdiction is void. *Blewitt v. Nicholson*, 2 Fla. 200 (1848).

The bill adds a new provision which allows the department to amend the pleadings if it intervenes in an existing action. It may also file a completely new complaint. The bill provides that such changes relate back to the original date the action was brought for statute of limitations purposes. The bill provides that the department may intervene and make such changes in pending actions.

10. Burden of Proof - Section 68.09, F.S.

Currently the statute provides that the State of Florida must prove the essential elements of a false claim action by a preponderance of the evidence.

The bill changes the "State of Florida" to the "department."

The bill adds that if a defendant in a state or federal proceeding is found guilty, pleads guilty, or pleads *nolo contendere* in a criminal action with underlying facts that would support a *qui tam* action, the defendant is estopped (may not deny) any of the matters in the criminal proceeding, as if the department had been a party.

11. Effective date

The bill is effective July 1, 2013 except as otherwise provided in the bill.

B. SECTION DIRECTORY:

Section 1 amends s. 68.081, F.S., regarding the Florida False Claims Act.

Section 2 amends s. 68.082, F.S., regarding false claims against the state.

Section 3 amends s. 68.083, F.S., regarding civil actions for false claims.

Section 4 creates s. 68.0831, F.S., regarding subpoenas.

Section 5 amends s. 68.084, F.S., regarding rights of the parties in civil actions.

Section 6 amends s. 68.085, F.S., regarding awards to plaintiffs bringing actions.

Section 7 amends s. 68.086, F.S., regarding expenses.

Section 8 amends s. 68.087, F.S., regarding exemptions to civil actions.

Section 9 amends s. 68.089, F.S., regarding limitation of actions.

Section 10 amends s. 68.09, F.S., regarding burden of proof.

Section 11 provides an effective date of July 1, 2013, except as otherwise provided.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

None.

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 3, 2013, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment deletes a proposed change to s. 68.087, F.S., and restored the word "state" for "department," thus leaving s. 68.087(1), F.S., unchanged.

On April 3, 2013, the Judiciary Committee adopted two amendments and reported the bill favorably as a committee substitute. The amendments provide:

- A definition of the term "department" for purposes of s. 68.0831, F.S.
- The confidential and exempt status of the complaint and information held by the department in an investigation is not impaired;
- Conforming amendments to statutory references; and
- An effective date of July 1, 2013, except as otherwise expressly provided in the bill.

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.