S T A T E O F N E W Y O R K

8378

I N S E N A T E

June 27, 2010

Introduced by Sen. SCHNEIDERMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the state finance law, in relation to establishing the New York fraud, enforcement and recovery act

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 188 of the state finance law, as added by section 39 of part C of chapter 58 of the laws of 2007, is amended to read as follows:

S 188. Definitions. As used in this article, the following terms shall mean:

1. "Claim" (A) means any request or demand, whether under a contract or otherwise, for money or property [which is made to any employee, officer, or agent of the state or a local government, or to any contractor, grantee or other recipient, if the state or a local government provides any portion of the money or property which is requested or demanded or will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded] THAT

(I) IS PRESENTED TO AN OFFICER, EMPLOYEE OR AGENT OF THE STATE OR A LOCAL GOVERNMENT; OR

(II) IS MADE TO A CONTRACTOR, GRANTEE, OR OTHER RECIPIENT, IF THE MONEY OR PROPERTY IS TO BE SPENT OR USED ON THE STATE OR A LOCAL GOVERNMENT'S BEHALF OR TO ADVANCE A STATE OR LOCAL GOVERNMENT PROGRAM OR INTEREST, AND IF THE STATE OR LOCAL GOVERNMENT (A) PROVIDES OR HAS PROVIDED ANY PORTION OF THE MONEY OR PROPERTY REQUESTED OR DEMANDED; OR (B) WILL REIMBURSE SUCH CONTRACTOR, GRANTEE, OR OTHER RECIPIENT FOR ANY PORTION OF THE MONEY OR PROPERTY WHICH IS REQUESTED OR DEMANDED;

(B) DOES NOT INCLUDE REQUESTS OR DEMANDS FOR MONEY OR PROPERTY THAT THE STATE OR A LOCAL GOVERNMENT HAS ALREADY PAID TO AN INDIVIDUAL AS COMPENSATION FOR GOVERNMENT EMPLOYMENT OR AS AN INCOME SUBSIDY WITH NO RESTRICTIONS ON THAT INDIVIDUAL'S USE OF THE MONEY OR PROPERTY.

2. "False claim" means any claim which is, either in whole or part, false or fraudulent.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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3. "Knowing and knowingly" (A) means that [with respect to a claim, or information relating to a claim,] a person, WITH RESPECT TO INFORMATION:

[(a)] (I) has actual knowledge of [such claim or] THE information;

[(b)] (II) acts in deliberate ignorance of the truth or falsity of [such claim or] THE information; or

[(c)] (III) acts in reckless disregard of the truth or falsity of [such claim or] THE information[.]; AND

[Proof] (B) REQUIRE NO PROOF of specific intent to defraud [is not required], provided, however that acts occurring by mistake or as a result of mere negligence are not covered by this article.

4. "OBLIGATION" MEANS AN ESTABLISHED DUTY, WHETHER OR NOT FIXED, ARISING FROM AN EXPRESS OR IMPLIED CONTRACTUAL, GRANTOR-GRANTEE, OR LICENSOR-LICENSEE RELATIONSHIP, FROM A FEE-BASED OR SIMILAR RELATIONSHIP, FROM STATUTE OR REGULATION, OR FROM THE RETENTION OF ANY OVERPAYMENT.

5. "MATERIAL" MEANS HAVING A NATURAL TENDENCY TO INFLUENCE, OR BE CAPABLE OF INFLUENCING THE PAYMENT OR RECEIPT OF MONEY OR PROPERTY.

6. "Local government" means any NEW YORK county, city, town, village, school district, board of cooperative educational services, local public benefit corporation or other municipal corporation or political subdivision of the state, OR OF SUCH LOCAL GOVERNMENT.

[5.] 7. "Original source" means a person who (A) PRIOR TO A PUBLIC DISCLOSURE UNDER PARAGRAPH (B) OF SUBDIVISION NINE OF SECTION ONE HUNDRED NINETY OF THIS ARTICLE has [direct and independent] VOLUNTARILY DISCLOSED TO THE STATE OR A LOCAL GOVERNMENT THE INFORMATION ON WHICH ALLEGATIONS OR TRANSACTIONS IN A CAUSE OF ACTION ARE BASED, OR (B) WHO HAS knowledge [of the information on which allegations are based, and] THAT IS INDEPENDENT OF AND MATERIALLY ADDS TO THE PUBLICLY DISCLOSED ALLEGATIONS OR TRANSACTIONS, AND WHO has voluntarily provided the information to the state or a local government before OR SIMULTANEOUS WITH filing an action under this article [which is based on the information].

[6.] 8. "Person" means any natural person, partnership, corporation, association or any other legal entity or individual, other than the state or a local government.

[7.] 9. "State" means the state of New York and any state department, board, bureau, division, commission, committee, public benefit corporation, public authority, council, office or other governmental entity performing a governmental or proprietary function for the state.

S 2. Subdivision 1 of section 189 of the state finance law, as added by section 39 of part C of chapter 58 of the laws of 2007, is amended to read as follows:

1. Subject to the provisions of subdivision two of this section, any person who:

(a) knowingly presents, or causes to be presented[, to any employee, officer or agent of the state or a local government,] a false or fraudulent claim for payment or approval;

(b) knowingly makes, uses, or causes to be made or used, a false record or statement MATERIAL to [get] a false or fraudulent claim [paid or approved by the state or a local government];

(c) conspires to [defraud the state or a local government by getting a false or fraudulent claim allowed or paid] COMMIT A VIOLATION OF PARAGRAPH (A), (B), (D), (E), (F) OR (G) OF THIS SUBDIVISION;

(d) has possession, custody, or control of property or money used, or to be used, by the state or a local government and[, intending to defraud the state or a local government or willfully to conceal the property or money,] KNOWINGLY delivers, or causes to be delivered, less

[property or money] than [the amount for which the person receives a certificate or receipt] ALL OF THAT MONEY OR PROPERTY;

(e) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the state or a local government and, intending to defraud the state or a local government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(f) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the state or a local government knowing that the officer or employee [lawfully may not sell or pledge the property] VIOLATES A PROVISION OF LAW WHEN SELLING OR PLEDGING SUCH PROPERTY; or

(g) knowingly makes, uses, or causes to be made or used, a false record or statement MATERIAL to [conceal, avoid, or decrease] an obligation to pay or transmit money or property to the state or a local government[;] shall be liable[: (i)] to the state OR A LOCAL GOVERNMENT, AS APPLICABLE, for a civil penalty of not less than six thousand dollars and not more than twelve thousand dollars, plus three times the amount of ALL damages, INCLUDING CONSEQUENTIAL DAMAGES, which the state OR LOCAL GOVERNMENT sustains because of the act of that person[; and (ii) to any local government for three times the amount of damages sustained by such local government because of the act of that person].

S 3. Subdivision 4 of section 189 of the state finance law, as added by section 39 of part C of chapter 58 of the laws of 2007, is amended to read as follows:

4. (A) This section shall [not] apply to claims, records, or statements made under the tax law ONLY IF (I) THE NET INCOME OR SALES OF THE PERSON AGAINST WHOM THE ACTION IS BROUGHT EQUALS OR EXCEEDS ONE MILLION DOLLARS FOR ANY TAXABLE YEAR SUBJECT TO ANY ACTION BROUGHT PURSUANT TO THIS ARTICLE; AND (II) THE DAMAGES PLEADED IN SUCH ACTION EXCEED THREE HUNDRED AND FIFTY THOUSAND DOLLARS.

(B) THE ATTORNEY GENERAL SHALL CONSULT WITH THE COMMISSIONER OF THE DEPARTMENT OF TAXATION AND FINANCE PRIOR TO FILING OR INTERVENING IN ANY ACTION UNDER THIS ARTICLE THAT IS BASED ON THE FILING OF FALSE CLAIMS, RECORDS OR STATEMENTS MADE UNDER THE TAX LAW. IF THE STATE DECLINES TO PARTICIPATE OR TO AUTHORIZE PARTICIPATION BY A LOCAL GOVERNMENT IN SUCH AN ACTION PURSUANT TO SUBDIVISION TWO OF SECTION ONE HUNDRED NINETY OF THIS ARTICLE, THE QUI TAM PLAINTIFF MUST OBTAIN APPROVAL FROM THE ATTORNEY GENERAL BEFORE MAKING ANY MOTION TO COMPEL THE DEPARTMENT OF TAXATION AND FINANCE TO DISCLOSE TAX RECORDS.

S 4. Subdivision 1 of section 190 of the state finance law, as added by section 39 of part C of chapter 58 of the laws of 2007, is amended to read as follows:

1. Civil enforcement actions. The attorney general shall have the authority to investigate violations under section one hundred eighty-nine of this article. If the attorney general believes that a person has violated or is violating such section, then the attorney general may bring a civil action on behalf of the people of the state of New York or on behalf of a local government against such person. A local government also shall have the authority to investigate violations that may have resulted in damages to such local government under section one hundred eighty-nine of this article, and may bring a civil action on its own behalf, OR ON BEHALF OF ANY SUBDIVISION OF SUCH LOCAL GOVERNMENT, to recover damages sustained by such local government as a result of such violations. No action may be filed pursuant to this subdivision against the federal government, the state or a local government, or any officer

or employee thereof acting in his or her official capacity. The attorney general shall consult with the office of medicaid inspector general prior to filing any action related to the medicaid program.

S 5. Paragraphs (a) and (b) of subdivision 2 of section 190 of the state finance law, as added by section 39 of part C of chapter 58 of the laws of 2007, are amended to read as follows:

(a) Any person may bring a qui tam civil action for a violation of section one hundred eighty-nine of this article on behalf of the PERSON AND THE people of the state of New York or a local government. No action may be filed pursuant to this subdivision against the federal government, the state or a local government, or any officer or employee thereof acting in his or her official capacity.

(b) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the state pursuant to subdivision one of section three hundred seven of the civil practice law and rules. [The] ANY complaint FILED IN A COURT OF THE STATE OF NEW YORK shall be filed in supreme court in camera, shall remain under seal for at least sixty days, and shall not be served on the defendant until the court so orders. THE SEAL SHALL NOT PRECLUDE THE ATTORNEY GENERAL, A LOCAL GOVERNMENT, OR THE QUI TAM PLAINTIFF FROM SERVING THE COMPLAINT, ANY OTHER PLEADINGS, OR THE WRITTEN DISCLOSURE OF SUBSTANTIALLY ALL MATERIAL EVIDENCE AND INFORMATION POSSESSED BY THE PERSON BRINGING THE ACTION, ON RELEVANT STATE OR LOCAL GOVERNMENT AGENCIES, OR ON LAW ENFORCEMENT AUTHORITIES OF THE STATE, A LOCAL GOVERNMENT, OR OTHER JURISDICTIONS, SO THAT THE ACTIONS MAY BE INVESTIGATED OR PROSECUTED, EXCEPT THAT SUCH SEAL APPLIES TO THE AGENCIES OR AUTHORITIES SO SERVED TO THE SAME EXTENT AS THE SEAL APPLIES TO OTHER PARTIES IN THE ACTION.

If the allegations in the complaint allege a violation of section one hundred eighty-nine of this article involving damages to a local government, then the attorney general may at any time provide a copy of such complaint and written disclosure to the attorney for such local government; provided, however, that if the allegations in the complaint involve damages only to a city with a population of one million or more, or only to the state and such a city, then the attorney general shall provide such complaint and written disclosure to the corporation counsel of such city within thirty days.

The state may elect to supersede or intervene and proceed with the action, or to authorize a local government that may have sustained damages to supersede or intervene, within sixty days after it receives both the complaint and the material evidence and information; provided, however, that if the allegations in the complaint involve damages only to a city with a population of one million or more, then the attorney general may not supersede or intervene in such action without the consent of the corporation counsel of such city. The attorney general shall consult with the office of the medicaid inspector general prior to superseding or intervening in any action related to the medicaid program. The attorney general may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under this subdivision. Any such motions may be supported by affidavits or other submissions in camera.

S 6. Paragraph (d) of subdivision 2 of section 190 of the state finance law, as added by section 39 of part C of chapter 58 of the laws of 2007, is amended to read as follows:

(d) If the state notifies the court that it intends to file a complaint against the defendant and thereby be substituted as the plain-

tiff in the action, or to permit a local government to do so, such complaint must be filed within thirty days after the notification to the court. FOR STATUTE OF LIMITATIONS PURPOSES, ANY SUCH COMPLAINT FILED BY THE STATE OR A LOCAL GOVERNMENT SHALL RELATE BACK TO THE FILING DATE OF THE COMPLAINT OF THE QUI TAM PLAINTIFF, TO THE EXTENT THAT THE CAUSE OF ACTION OF THE STATE OR LOCAL GOVERNMENT ARISES OUT OF THE CONDUCT, TRANSACTIONS, OR OCCURRENCES SET FORTH, OR ATTEMPTED TO BE SET FORTH, IN THE PRIOR COMPLAINT OF THE QUI TAM PLAINTIFF.

S 7. Paragraph (f) of subdivision 2 of section 190 of the state finance law is amended by adding a new closing paragraph to read as follows:

THE QUI TAM PLAINTIFF SHALL PROVIDE THE STATE OR ANY APPLICABLE LOCAL GOVERNMENT WITH A COPY OF ANY DOCUMENT FILED WITH THE COURT ON OR ABOUT THE DATE IT IS FILED, OR ANY ORDER ISSUED BY THE COURT ON OR ABOUT THE DATE IT IS ISSUED. A QUI TAM PLAINTIFF SHALL NOTIFY THE STATE OR ANY APPLICABLE LOCAL GOVERNMENT WITHIN FIVE BUSINESS DAYS OF ANY DECISION, ORDER OR VERDICT RESULTING IN JUDGMENT IN FAVOR OF THE STATE OR LOCAL GOVERNMENT.

S 8. Subdivision 9 of section 190 of the state finance law, as added by section 39 of part C of chapter 58 of the laws of 2007, is amended to read as follows:

9. Certain actions barred. [No court shall have jurisdiction over a qui tam civil action brought pursuant to subdivision two of this section:

(a) based on allegations or transactions which are the subject of a pending civil action or an administrative action in which the state or a local government is already a party;

(b) derived from public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit or investigation, or from the news media, unless the person who initiated the action is an original source of the information;]

(A) THE COURT SHALL DISMISS A QUI TAM ACTION UNDER THIS ARTICLE IF:

[(c)] (I) IT IS BASED ON ALLEGATIONS OR TRANSACTIONS WHICH ARE THE SUBJECT OF A PENDING CIVIL ACTION OR AN ADMINISTRATIVE ACTION IN WHICH THE STATE OR A LOCAL GOVERNMENT IS ALREADY A PARTY;

(II) the [agency] STATE OR LOCAL GOVERNMENT has reached a binding settlement or other agreement with the person who [submitted such false claims] VIOLATED SECTION ONE HUNDRED EIGHTY-NINE OF THIS ARTICLE resolving the matter and such agreement has been approved in writing by the attorney general, or by the APPLICABLE local government attorney [if the matter involves allegations of false claims submitted to a local government]; or

[(d)] (III) against a member of the legislature, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the state when the action was brought.

(B) THE COURT SHALL DISMISS A QUI TAM ACTION UNDER THIS ARTICLE, UNLESS OPPOSED BY THE STATE OR AN APPLICABLE LOCAL GOVERNMENT, OR UNLESS THE QUI TAM PLAINTIFF IS AN ORIGINAL SOURCE OF THE INFORMATION, IF SUBSTANTIALLY THE SAME ALLEGATIONS OR TRANSACTIONS AS ALLEGED IN THE ACTION WERE PUBLICLY DISCLOSED:

(I) IN A STATE OR LOCAL GOVERNMENT CRIMINAL, CIVIL, OR ADMINISTRATIVE HEARING IN WHICH THE STATE OR A LOCAL GOVERNMENT OR ITS AGENT IS A PARTY;

(II) IN A FEDERAL, NEW YORK STATE OR NEW YORK LOCAL GOVERNMENT REPORT, HEARING, AUDIT, OR INVESTIGATION THAT IS MADE ON THE PUBLIC RECORD OR

DISSEMINATED BROADLY TO THE GENERAL PUBLIC; PROVIDED THAT SUCH INFORMATION SHALL NOT BE DEEMED "PUBLICLY DISCLOSED" IN A REPORT OR INVESTIGATION BECAUSE IT WAS DISCLOSED OR PROVIDED PURSUANT TO ARTICLE SIX OF THE PUBLIC OFFICERS LAW, OR UNDER ANY OTHER FEDERAL, STATE OR LOCAL LAW, RULE OR PROGRAM ENABLING THE PUBLIC TO REQUEST, RECEIVE OR VIEW DOCUMENTS OR INFORMATION IN THE POSSESSION OF PUBLIC OFFICIALS OR PUBLIC AGENCIES;

(III) IN THE NEWS MEDIA, PROVIDED THAT SUCH ALLEGATIONS OR TRANSACTIONS ARE NOT "PUBLICLY DISCLOSED" IN THE "NEWS MEDIA" MERELY BECAUSE INFORMATION OF ALLEGATIONS OR TRANSACTIONS HAVE BEEN POSTED ON THE INTERNET OR ON A COMPUTER NETWORK.

S 9. Section 191 of the state finance law, as added by section 39 of part C of chapter 58 of the laws of 2007, is amended to read as follows:

S 191. Remedies [of employees]. 1. Any CURRENT OR FORMER employee, CONTRACTOR, OR AGENT of any private or public employer who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment, [by his or her employer] OR OTHERWISE HARMED OR PENALIZED BY AN EMPLOYER, OR A PROSPECTIVE EMPLOYER, because of lawful acts done by the employee [on behalf of the employer], CONTRACTOR, AGENT, or ASSOCIATED others in furtherance of an action brought under this article[, including the investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section] OR OTHER EFFORTS TO STOP ONE OR MORE VIOLATIONS OF THIS ARTICLE, shall be entitled to all relief necessary to make the employee, CONTRACTOR OR AGENT whole. Such relief shall include but not be limited to:

(a) an injunction to restrain continued discrimination;

(b) HIRING, CONTRACTING OR reinstatement to the position such [employee] PERSON would have had but for the discrimination or to an equivalent position;

(c) reinstatement of full fringe benefits and seniority rights;

(d) payment of two times back pay, plus interest; and

(e) compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

2. FOR PURPOSES OF THIS SECTION, A "LAWFUL ACT" SHALL INCLUDE, BUT NOT BE LIMITED TO, OBTAINING OR TRANSMITTING TO THE STATE, A LOCAL GOVERNMENT, A QUI TAM PLAINTIFF, OR PRIVATE COUNSEL SOLELY EMPLOYED TO INVESTIGATE, POTENTIALLY FILE, OR FILE A CAUSE OF ACTION UNDER THIS ARTICLE, DOCUMENTS, DATA, CORRESPONDENCE, ELECTRONIC MAIL, OR ANY OTHER INFORMATION, EVEN THOUGH SUCH ACT MAY VIOLATE A CONTRACT, EMPLOYMENT TERM, OR DUTY OWED TO THE EMPLOYER OR CONTRACTOR, SO LONG AS THE POSSESSION AND TRANSMISSION OF SUCH DOCUMENTS ARE FOR THE SOLE PURPOSE OF FURTHERING EFFORTS TO STOP ONE OR MORE VIOLATIONS OF THIS ARTICLE. NOTHING IN THIS SUBDIVISION SHALL BE INTERPRETED TO PREVENT ANY LAW ENFORCEMENT AUTHORITY FROM BRINGING A CIVIL OR CRIMINAL ACTION AGAINST ANY PERSON FOR VIOLATING ANY PROVISION OF LAW.

3. An employee, CONTRACTOR OR AGENT described in subdivision one of this section may bring an action in the appropriate supreme court for the relief provided in this section.

S 10. Subdivision 1 of section 192 of the state finance law, as added by section 39 of part C of chapter 58 of the laws of 2007, is amended to read as follows:

1. A civil action under this article shall be commenced no later than[:

(a) six years after the date on which the violation of section one hundred eighty-nine of this article is committed; or

(b) three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the state or local government charged with responsibility to act in the circumstances, but in no event more than] ten years after the date on which the violation OF THIS ARTICLE is committed[, whichever occurs last]. Notwithstanding any other provision of law, for the purposes of this article, an action under this article is commenced by the filing of the complaint [in the supreme court].

S 11. Section 192 of the state finance law is amended by adding a new subdivision 1-a to read as follows:

(1-A) FOR PURPOSES OF APPLYING RULE THREE THOUSAND SIXTEEN OF THE CIVIL PRACTICE LAW AND RULES, IN PLEADING AN ACTION BROUGHT UNDER THIS ARTICLE THE QUI TAM PLAINTIFF SHALL NOT BE REQUIRED TO IDENTIFY SPECIFIC CLAIMS THAT RESULT FROM AN ALLEGED COURSE OF MISCONDUCT, OR ANY SPECIFIC RECORDS OR STATEMENTS USED, IF THE FACTS ALLEGED IN THE COMPLAINT, IF ULTIMATELY PROVEN TRUE, WOULD PROVIDE A REASONABLE INDICATION THAT ONE OR MORE VIOLATIONS OF SECTION ONE HUNDRED EIGHTY-NINE OF THIS ARTICLE ARE LIKELY TO HAVE OCCURRED, AND IF THE ALLEGATIONS IN THE PLEADING PROVIDE ADEQUATE NOTICE OF THE SPECIFIC NATURE OF THE ALLEGED MISCONDUCT TO PERMIT THE STATE OR A LOCAL GOVERNMENT EFFECTIVELY TO INVESTIGATE AND DEFENDANTS FAIRLY TO DEFEND THE ALLEGATIONS MADE.

S 12. Paragraph (a) of subdivision 2 of section 190 of the state finance law, is amended by adding a new closing paragraph to read as follows:

FOR PURPOSES OF SUBPARAGRAPHS (I) AND (IV) OF PARAGRAPH (A) OF SUBDIVISION EIGHT OF SECTION SEVENTY-THREE OF THE PUBLIC OFFICERS LAW, ANY ACTIVITY BY A FORMER GOVERNMENT EMPLOYEE IN CONNECTION WITH THE SECURING OF RIGHTS, PROTECTIONS OR BENEFITS RELATED TO PREPARING OR FILING AN ACTION UNDER THIS ARTICLE SHALL NOT BE DEEMED TO BE AN APPEARANCE OR PRACTICE BEFORE ANY AGENCY.

S 13. This act shall take effect fourteen days after it shall have become a law and shall apply to claims, records or statements made or used prior to, on or after April 1, 2007.