

HOUSE BILL NO. 762

INTRODUCED BY J. FRENCH

BY REQUEST OF THE HOUSE HUMAN SERVICES STANDING COMMITTEE

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE MONTANA FALSE CLAIMS ACT; LIMITING THE GOVERNMENT ATTORNEYS WHO MAY BRING AN ACTION UNDER THE FALSE CLAIMS ACT; EXTENDING THE TIME PERIOD FOR FILING A FALSE CLAIMS ACTION; REVISING DAMAGE AWARDS TO PRIVATE PLAINTIFFS; AMENDING SECTIONS 17-8-402, 17-8-403, 17-8-404, 17-8-405, 17-8-406, 17-8-407, 17-8-408, 17-8-410, AND 17-8-411, MCA; AND PROVIDING AN EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 17-8-402, MCA, is amended to read:

"17-8-402. Definitions. As used in this part, the following definitions apply:

(1) "Claim" includes any request or demand for money, property, or services made to an employee, officer, or agent of a governmental entity or to a contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was provided by, a governmental entity.

(2) "Government attorney" means:

~~—— (a) the chief attorney for a governmental entity; or~~

~~—— (b) the attorney general with respect to the state, except for complaints involving~~ a unit of the university system.

(3) "Governmental entity" means:

(a) the state;

(b) a city, town, county, school district, tax or assessment district, or other political subdivision of the state; or

(c) a unit of the Montana university system.

(4) ~~"Knowingly"~~ "Knowing" or "knowingly" means that a person, with respect to information, does any of the following:

- 1 (a) has actual knowledge of the information;
2 (b) acts in deliberate ignorance of the truth or falsity of the information; or
3 (c) acts in reckless disregard of the truth or falsity of the information. No specific intent to defraud is

4 required.

5 (5) "Person" includes any natural person, corporation, firm, association, organization, partnership, limited
6 liability company, business, ~~or trust, or other legal or business entity.~~"

7
8 **Section 2.** Section 17-8-403, MCA, is amended to read:

9 **"17-8-403. False claims -- procedures -- penalties.** (1) ~~A~~ Except as provided in subsection (2), a
10 ~~person causing damages in excess of \$500 to a governmental entity is liable, as provided in 17-8-410 and~~
11 ~~17-8-411, for any of the following acts to a governmental entity for a civil penalty of not less than \$5,000 and not~~
12 ~~more than \$10,000 for each act specified in this section, plus three times the amount of damages that a~~
13 ~~governmental entity sustains because of the person's act, along with expenses, costs, and attorney fees, if the~~
14 ~~person:~~

15 (a) ~~knowingly presenting or causing~~ presents or causes to be presented to an officer or employee of the
16 governmental entity a false or fraudulent claim for payment or approval;

17 (b) ~~knowingly making, using, or causing~~ makes, uses, or causes to be made or used a false or fraudulent
18 record or statement to get a false or fraudulent claim paid or approved by the governmental entity;

19 (c) ~~conspiring~~ conspires to defraud the governmental entity by getting a false or fraudulent claim allowed
20 or paid by the governmental entity;

21 (d) ~~having~~ has possession, custody, or control of public property or money used or to be used by the
22 governmental entity and, ~~knowingly delivering or causing~~ intending to defraud the governmental entity or to
23 willfully conceal the property, delivers or causes to be delivered less property or money than the amount for which
24 the person receives a certificate or receipt;

25 (e) ~~being~~ is authorized to make or deliver a document certifying receipt of property used or to be used
26 by the governmental entity and, ~~knowingly making or delivering~~ intending to defraud the governmental entity or
27 to willfully conceal the property, makes or delivers a receipt ~~that falsely represents the property used or to be used~~
28 without knowing that the information on the receipt is true;

29 (f) ~~knowingly buying or receiving~~ buys or receives as a pledge of an obligation or debt public property
30 of the governmental entity from any person who may not lawfully sell or pledge the property;

(g) knowingly ~~making, using, or causing~~ makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the governmental entity or its contractors; or

(h) as a beneficiary of an inadvertent submission of a false or fraudulent claim to the governmental entity, subsequently ~~discovering~~ discovers the falsity of the claim or that the claim is fraudulent and ~~failing~~ fails to disclose the false or fraudulent claim to the governmental entity within a reasonable time after discovery of the false or fraudulent claim.

(2) (a) In a civil action brought under 17-8-405 or 17-8-406, a court shall assess a civil penalty of not less than \$5,000 and not more than \$10,000 for each act specified in this section, plus not less than two times and not more than three times the amount of damages that a governmental entity sustains because of the person's act, along with costs and attorney fees, and may impose a civil penalty of up to \$10,000 for each act. ~~The court may not assess a civil penalty~~ if the court finds all of the following:

(a)(i) The person committing the act furnished the government attorney with all information known to that person about the act within 30 days after the date on which the person first obtained the information.

(b)(ii) The person fully cooperated with any investigation of the act by the government attorney.

(c)(iii) At the time that the person furnished the government attorney with information about the act, a criminal prosecution, civil action, or administrative action had not been commenced with respect to the act and the person did not have actual knowledge of the existence of an investigation into the act.

(b) A person violating this section is also liable to the government attorney for the expenses, costs, and attorney fees of the civil action brought to recover the penalty or damage.

(3) Liability under this section is joint and several for any act committed by two or more persons.

(4) This section does not apply to claims, records, or statements made in relation to claims filed with the state compensation insurance fund under Title 39, chapter 71, or to claims, records, payments, or statements made under the tax laws contained in Title 15 or 16 or made to the department of natural resources and conservation under Title 77.

(5) A ~~private citizen~~ person may not file a complaint or civil action:

(a) against a governmental entity or an officer or employee of a governmental entity arising from conduct by the officer or employee within the scope of the officer's or employee's duties to the governmental entity;

(b) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil penalty proceeding in which an agency of the governmental entity is already a party;

(c) that is based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing or in an investigation, report, hearing, or audit conducted by or at the request of the senate or house or representatives, the state auditor or legislative auditor, the auditor or legislative body of a political subdivision, or the news media, unless the ~~private citizen person~~ has direct and independent knowledge of the information on which the allegations are based and, before filing the complaint or civil action, voluntarily provided the information to the agency of the governmental entity that is involved with the claim that is the basis for the complaint or civil action and unless the information provided the basis or catalyst for the investigation, report, hearing, or audit that led to the public disclosure; or

(d) that is based upon information discovered by a present or former employee of the governmental entity during the course of employment unless the employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and the governmental entity failed to act on the information provided within a reasonable period of time."

Section 3. Section 17-8-404, MCA, is amended to read:

"17-8-404. Limitation of actions. A complaint or civil action ~~may not be~~ filed under 17-8-405 or 17-8-406 may not be brought more than 6 years after the date on which the violation occurred or more than 3 years after the date on which an when facts material to the right of action are known or reasonably should have been known by the official of the governmental entity charged with responsibility to act in the circumstances ~~discovers the act or, but in no event~~ more than 10 years after the date on which the ~~act occurred~~ violation was committed, whichever occurs ~~first~~ last."

Section 4. Section 17-8-405, MCA, is amended to read:

"17-8-405. Investigation and civil action by government attorney. A government attorney ~~may~~ shall investigate an alleged violation of 17-8-403 and may file a civil action against any person who has violated or is violating 17-8-403."

Section 5. Section 17-8-406, MCA, is amended to read:

"17-8-406. Complaint by ~~private citizen person~~ -- civil action. ~~(1) A private citizen may file with the government attorney a notice alleging a violation of 17-8-403 against a governmental entity of which the private citizen is a resident. The private citizen shall file a complaint with the government attorney that includes a written~~

~~disclosure of material evidence and information alleging violations.~~

(1) A person may bring a civil action for a violation of 17-8-403 on behalf of the person and the governmental entity. The action must be brought in the name of the governmental entity. The action may be dismissed only if the court and the government attorney give written consent to the dismissal and provide their reasons for consenting to the dismissal.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information that the person possesses must be served on the government attorney pursuant to Rule 4D, Montana Rules of Civil Procedure. The complaint must be filed under seal and must remain under seal for at least 60 days. The complaint may not be served upon the defendant until the court orders that it be served.

~~(2)(3)~~ Within 60 days after receiving a notice and the complaint; and the material evidence and information, the government attorney may elect to file a civil action and intervene and proceed with the action or to notify the court that the government attorney declines to take over the action. If the government attorney declines to intervene or take over the action, the person bringing the action has the right to conduct the action. The government attorney may, for good cause shown, move the court for extensions of the time for filing an action; during which the complaint remains under seal.

(4) The defendant may not be required to respond to any complaint until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4D, Montana Rules of Civil Procedure.

~~(3)(5)~~ If the government attorney files a civil action, the private citizen may enter the action as a coplaintiff, but the government attorney has control of the plaintiffs' strategy, tactics, and other decisionmaking proceeds with the action, the government attorney has the primary responsibility for prosecuting the action and is not bound by an act of the person bringing the action. The person bringing the action has the right to continue as a party to the action, subject to the limitations set forth in this part. If the government attorney does not file a civil action within the time allowed under subsection (2), the private citizen may file a civil action.

~~(4) The court shall permit the government attorney to intervene in an action that the government attorney declined to file under subsection (2) if the court determines that the interests of the governmental entity are not being adequately represented by the private citizen. If intervention is allowed, the private citizen retains principal responsibility for and control of the action and any damages, civil penalty, costs, and attorney fees must be awarded under 17-8-410 and 17-8-411 as if the government attorney had not intervened.~~

(6) In a case in which the government attorney elects not to proceed with the action and the person who initiated the action conducts it:

1 (a) the person who initiated the action shall, upon the government attorney's request, serve the
2 government with copies of all pleadings filed in the action and shall supply the government attorney with copies
3 of all deposition transcripts, at the government attorney's expense;

4 (b) the court, without limiting the status and rights of the person initiating the action, may permit the
5 government attorney to intervene at a later date upon a showing of good cause.

6 ~~(5)(7) After a private citizen~~ When a person files a civil action pursuant to this section, no other private
7 ~~citizen may file a civil action~~ person other than the government attorney may intervene or bring a related action
8 based on the facts underlying the pending action.

9 (8) Upon a showing by the government attorney that unrestricted participation during the course of the
10 litigation by the person initiating the action would interfere with or unduly delay the government attorney's
11 prosecution of the case or would be repetitious, irrelevant, or for purposes of harassment, the court may in its
12 discretion impose limitations on the person's participation, including but not limited to:

13 (a) limiting the number of witnesses the person may call;

14 (b) limiting the length of testimony of witnesses called by the person;

15 (c) limiting the person's cross-examination of witnesses; or

16 (d) otherwise limiting the participation of the person in the litigation."

17
18 **Section 6.** Section 17-8-407, MCA, is amended to read:

19 **"17-8-407. Dismissal of private citizen's civil action.** On the motion of a government attorney, the
20 court may dismiss a private citizen's civil action for good cause. If an intervening government attorney seeks
21 dismissal of a private citizen's civil action, the private citizen must be notified by the government attorney
22 notwithstanding the objection of the person who initiated the action if the government attorney has notified the
23 person of the filing of the motion to dismiss and ~~must be~~ the court has given the person an opportunity to oppose
24 the motion and present evidence at a hearing."
25

26 **Section 7.** Section 17-8-408, MCA, is amended to read:

27 **"17-8-408. Settlement.** ~~An action may be settled if the court determines after a hearing that the~~
28 ~~proposed settlement is fair, adequate, and reasonable under all the circumstances. In a private citizen's action~~
29 ~~in which the government attorney intervened and seeks a settlement, the private citizen may present evidence~~
30 ~~at the settlement hearing. The government attorney may settle the case with the defendant notwithstanding the~~

objections of the person who initiated the action if the court determines, after a hearing, that the settlement is fair, adequate, and reasonable under all circumstances. Upon a showing of good cause, the hearing may be held in camera."

Section 8. Section 17-8-410, MCA, is amended to read:

"17-8-410. Distribution of damages and civil penalty. ~~(1) If an action is settled or the governmental entity or private citizen prevails in an action:~~

~~—— (a) filed by a governmental entity under 17-8-406(2) and the private citizen elected not to enter the action as a coplaintiff, except as provided in subsection (1)(c), the private citizen is entitled to between 10% and 15%, as determined by the court, of any damages and civil penalty awarded the governmental entity in the settlement or judgment;~~

~~—— (b) filed by a private citizen either as plaintiff or as coplaintiff, except as provided in subsection (1)(c), the private citizen is entitled to between 15% and 50%, as determined by the court, of any damages and civil penalty awarded the governmental entity in the settlement or judgment;~~

~~—— (c) and if a private citizen referred to in subsection (1)(a) or (1)(b) participated in the act or acts found to be in violation of 17-8-403, an award of damages and civil penalty to the private citizen are at the discretion of the court;~~

(1) Except as provided in subsection (2), if the government attorney proceeds with an action brought by a person pursuant to 17-8-406, the person shall receive at least 15% but not more than 25% of the proceeds recovered and collected in the action or in settlement of the claim, depending on the extent to which the person substantially contributed to the prosecution of the action.

(2) (a) The court may award an amount it considers appropriate but in no case more than 10% of the proceeds in an action that the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, relating to allegations or transactions disclosed through:

(i) a criminal, civil, or administrative hearing;

(ii) a legislative, administrative, auditor, or inspector general report, hearing, audit, or investigation; or

(iii) the news media.

(b) In determining the award, the court shall take into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.

(3) Any payment to a person bringing an action pursuant to this part may be made only from the proceeds

1 recovered and collected in the action or in settlement of the claim. The person must also receive an amount for
2 reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney fees and
3 costs. The expenses, fees, and costs must be awarded against the defendant.

4 (4) If the government attorney does not proceed with an action pursuant to 17-8-406, the person bringing
5 the action or settling the claim must receive an amount that the court decides is reasonable for collecting the civil
6 penalty and damages on behalf of the government attorney or governmental entity. The amount may not be less
7 than 25% or more than 30% of the proceeds recovered and collected in the action or settlement of the claim and
8 must be paid out of the proceeds. The person must also receive an amount for reasonable expenses that the
9 court finds were necessarily incurred, plus reasonable attorney fees and costs. All expenses, fees, and costs
10 must be awarded against the defendant.

11 (5) Whether or not the government attorney proceeds with the action, if the court finds that the action
12 was brought by a person who planned, initiated, or knowingly participated in the violation of 17-8-403, the court
13 may, to the extent the court considers appropriate, reduce or eliminate the share of the proceeds of the action
14 that the person would otherwise receive pursuant to subsections (1) through (4) of this section, taking into
15 account the role of the person in advancing the case to litigation and any relevant circumstances pertaining to
16 the violation. If the person bringing the action is convicted of criminal conduct arising from the person's role in the
17 violation of this part, the person must be dismissed from the civil action and may not receive any share of the
18 proceeds of the action. The dismissal does not prejudice the right of the government attorney to continue the
19 action.

20 ~~(d)(6)~~ The ~~the~~ The governmental entity is entitled to any damages and civil penalty not awarded to a private
21 ~~citizen~~ the person, and the damages and civil penalty must be deposited in the general fund of the governmental
22 entity, except that if a trust fund of the governmental entity suffered a loss as a result of the defendant's actions,
23 the trust fund must first be fully reimbursed for the loss and the remainder of the damages and any civil penalty
24 must be deposited in the general fund of the governmental entity.

25 ~~(2)(7)~~ Unless otherwise provided, the remedies or penalties provided by this part are cumulative to each
26 other and to the remedies or penalties available under all other laws of the state."

27
28 **Section 9.** Section 17-8-411, MCA, is amended to read:

29 **"17-8-411. Costs and attorney fees.** ~~A governmental entity in an action in which its~~ The government
30 attorney who filed a civil action or intervened is entitled to its reasonable costs and attorney fees if the action is

1 settled favorably for the governmental entity or if the governmental entity prevails. In an action in which outside
2 counsel ~~represents a governmental entity~~ is engaged by a government attorney, the costs and attorney fees
3 awarded ~~to a governmental entity~~ must equal the outside counsel's charges reasonably incurred ~~by the~~
4 ~~governmental entity~~ for costs and attorney fees in prosecuting the action. In any other actions in which costs and
5 attorney fees are awarded to a ~~governmental entity~~ government attorney, they must be calculated by reference
6 to the hourly rate charged by the department of justice agency legal services bureau for the provision of legal
7 services to state agencies, multiplied by the number of attorney hours devoted to the prosecution of the action,
8 plus the actual cost of any expenses reasonably incurred in the prosecution of the action. A ~~private citizen person~~
9 who is a plaintiff or coplaintiff is entitled to an amount for reasonable expenses that the court finds to have been
10 necessarily incurred, plus reasonable costs and attorney fees, if the action is settled favorably for the
11 governmental entity or the governmental entity prevails in the action. A ~~person who is the subject of a civil action~~
12 ~~and defendant in a civil action brought pursuant to this part~~ who prevails in an action that is not settled and that
13 the court finds was clearly frivolous or brought solely for harassment purposes is entitled to the ~~person's~~
14 defendant's reasonable costs and attorney fees, which must be equitably apportioned against the ~~private citizen~~
15 person who brought the action and the governmental entity if a ~~private citizen person~~ and a governmental entity
16 were coplaintiffs."

17
18 NEW SECTION. Section 10. Effective date. [This act] is effective July 1, 2007.

19 - END -