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Legislative Document

No. 1796

H.P. 1322

House of Representatives, January 24, 2012

An Act Relating to False Claims under the Medicaid Program

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 203.

Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "Heather J.R. Priest".

HEATHER J.R. PRIEST
Clerk

Presented by Representative GIFFORD of Lincoln.
Cosponsored by Senator THOMAS of Somerset and
Representatives: BLACK of Wilton, CRAY of Palmyra, LIBBY of Waterboro, McFADDEN
of Dennysville, O'CONNOR of Berwick, SIROCKI of Scarborough, TURNER of Burlington.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 22 MRSA §15**, as amended by PL 1995, c. 191, §§1 to 4, is further
3 amended by adding at the end a new paragraph to read:

4 Civil liability under this section is independent of liability under section 15-A.

5 **Sec. 2. 22 MRSA §15-A** is enacted to read:

6 **§15-A. MaineCare False Claims Act**

7 **1. Short title.** This section may be known and cited as "the MaineCare False Claims
8 Act."

9 **2. Definitions.** As used in this section, unless the context otherwise indicates, the
10 following terms have the following meanings.

11 A. "Claim" means a request or demand for money, property or services made to an
12 employee, officer or agent of the State or to any contractor, grantee or other recipient,
13 whether under contract or not, if any portion of the money, property or services
14 requested or demanded issued from or was provided by the State or if the State will
15 reimburse the contractor, grantee or other recipient for any portion of the money,
16 property or services requested or demanded.

17 B. "Employer" means a person or an entity affiliated with the State that is involved
18 in a nongovernmental function, including a postsecondary educational institution or a
19 hospital, and that compensates another person under a contract of hire, express or
20 implied, oral or written, to perform work for the employer.

21 C. "False claims action" means a court action brought under this section.

22 D. "Hospital" means a state mental health institute as defined in Title 34-B, section
23 3801, subsection 9 or a hospital licensed under chapter 405.

24 E. "Knowingly" means that a person, with respect to information:

25 (1) Has actual knowledge of the information;

26 (2) Acts in deliberate ignorance of the truth or falsity of the information; or

27 (3) Acts in reckless disregard of the truth or falsity of the information.

28 F. "MaineCare program" means the program of health coverage provided under
29 chapter 855.

30 G. "Original source" means a person who has direct and independent knowledge of
31 the information on which allegations are based and has voluntarily provided the
32 information to the State before filing an action under this section based on the
33 information.

34 H. "Person" means a natural person, corporation, firm, association, organization,
35 partnership, business or trust.

1 I. "Plaintiff," with respect to a qui tam action, means the relator and, if the Attorney
2 General elects to intervene in and prosecute the action, the State or both as
3 determined in the action.

4 J. "Postsecondary educational institution" means the University of Maine System,
5 the Maine Maritime Academy and the Maine Community College System.

6 K. "Proceeds" means the amount awarded to the State against a defendant in an
7 action under this section, including but not limited to damages, fines, payments for
8 costs of compliance and other economic benefit realized by the State as a result of an
9 action.

10 L. "Qui tam action" means an action brought by a person for the benefit of the person
11 and for the benefit of the State in the name of the State and, at the election of the
12 Attorney General, in which the State is also a plaintiff.

13 M. "Relator" means a person who brings a qui tam action for a violation of this
14 section.

15 **3. Prohibited acts.** A person may not file a false claim against the State with regard
16 to the MaineCare program.

17 A. A person who commits any of the acts listed in this paragraph with regard to the
18 MaineCare program is liable for damages, costs and penalties as provided in this
19 subsection.

20 (1) A person is liable under this subsection if the person, with regard to the
21 MaineCare program:

22 (a) Knowingly presents or causes to be presented a false claim;

23 (b) Knowingly makes, uses or causes to be made or used a false record or
24 statement to conceal, avoid or decrease an obligation to pay or transmit
25 money or property to the State;

26 (c) Conspires to defraud the State by causing a false claim to be allowed or
27 paid or conspires to defraud the State by knowingly making, using or causing
28 to be made or used a false record or statement to conceal, avoid or decrease
29 an obligation to pay or transmit money or property to the State;

30 (d) Has possession, custody or control of public property or money used or
31 to be used by the State and knowingly delivers or causes to be delivered less
32 property or money than the amount for which the person receives a certificate
33 or receipt;

34 (e) Is authorized to make or deliver a document certifying receipt of property
35 used or to be used by the State and knowingly makes or delivers such a
36 document that falsely represents the property used or to be used;

37 (f) Knowingly purchases, or receives as a pledge of an obligation or debt,
38 public property from any person who lawfully may not sell or pledge the
39 property; or

40 (g) Is a beneficiary of an inadvertent submission of a false claim,
41 subsequently discovers the falsity of the claim and fails to disclose the false

1 claim to the State within a reasonable time after the discovery of the false
2 claim.

3 Proof of a person's specific intent to defraud is not required to determine that the
4 person acted knowingly.

5 (2) The court may determine a person liable to the State for a violation of this
6 paragraph:

7 (a) For damages in the amount of 3 times the amount of damages that the
8 State sustained because of the violation;

9 (b) For the costs of a qui tam action brought to recover any penalties and
10 damages; and

11 (c) For a fine of not less than \$5,000 and not more than \$10,000 for each
12 violation.

13 B. The court shall determine civil liability and assess damages against a person who
14 violates this subsection of at least 2 times the amount of damages that the State
15 sustained because of the violation, except that the court may not assess a fine if the
16 court finds that:

17 (1) The person who committed the violation furnished officials of the State who
18 are responsible for investigating false claims violations with all information
19 known to the person about the violation within 30 days after the date on which
20 the person first obtained the information;

21 (2) The person fully cooperated with any investigation into the violation by the
22 State; and

23 (3) At the time the person furnished the State with information about the
24 violation, no criminal prosecution, qui tam action or administrative action had
25 commenced with respect to the violation and the person did not have actual
26 knowledge of the existence of an investigation into the violation.

27 C. A person is liable to the State under this subsection for the acts of that person's
28 agent when the agent acted with apparent authority, regardless of whether the agent
29 acted, in whole or in part, to benefit the person and regardless of whether the person
30 adopted or ratified the agent's claim, representation, statement or other action or
31 conduct.

32 D. This subsection does not apply to claims, records or statements made to the State
33 under Title 36.

34 **4. False claims action; qui tam action.** A false claims action may be brought
35 against a person who violates subsection 3 in accordance with this subsection and
36 subsections 5 to 7.

37 A. The Attorney General shall diligently investigate a suspected or alleged violation
38 of subsection 3. If the Attorney General finds that a person has violated or is
39 violating subsection 3, the Attorney General may bring a false claims action under
40 this subsection against the person or intervene in a qui tam action brought by a person
41 under paragraph B.

1 B. A private person may bring a qui tam action for a violation of subsection 3.

2 (1) Once filed, the qui tam action may be dismissed only with the written
3 consent of the court, after taking into account the best interests of the parties
4 involved and the public purpose of this section.

5 (2) The relator shall serve on the Attorney General a copy of the complaint and
6 written disclosure of substantially all material evidence and information the
7 relator possesses as provided in the Maine Rules of Civil Procedure, Rule 5.

8 (3) The complaint must be filed in camera and must remain under seal for at
9 least 60 days and may not be served on the defendant until the court so orders.

10 (4) The Attorney General may elect to intervene in and proceed with the action
11 on behalf of the State within 60 days after the Attorney General receives both the
12 copy of the complaint and the written disclosure of the material evidence and
13 information from the relator.

14 (5) The Attorney General may, for good cause shown, move the court for
15 extensions of time during which the complaint remains under seal under
16 subparagraph (3) and during which the Attorney General may elect to intervene
17 in and proceed with the action under subparagraph (4). A motion under this
18 subparagraph must be supported by an affidavit or other submission in camera.

19 (6) Before the expiration of the 60-day period under subparagraph (4) or of any
20 extension ordered under subparagraph (5), the Attorney General shall:

21 (a) Proceed with the action by intervention on behalf of the State as plaintiff,
22 in which case the action must be conducted by the Attorney General as the
23 attorney for the plaintiff; or

24 (b) Notify the court that the Attorney General declines to take over the
25 action, in which case the relator has the right to conduct the action as
26 plaintiff.

27 (7) The defendant is not required to respond to any complaint filed under this
28 paragraph until after the complaint is unsealed and served on the defendant as
29 provided in the Maine Rules of Civil Procedure, Rule 5.

30 (8) When a person brings an action as relator under this paragraph, a person
31 other than the Attorney General on behalf of the State may not intervene or bring
32 a related action based on the facts underlying the action while the action is
33 pending.

34 C. The rights of the parties to a qui tam action under this subsection are determined
35 under this paragraph.

36 (1) If the Attorney General elects not to intervene in and proceed with the action,
37 the relator has the right to conduct the action as plaintiff.

38 (a) At the request of the Attorney General, and upon payment by the
39 Attorney General of the cost of transcription, copying and mailing, the relator
40 shall serve on the Attorney General copies of all pleadings filed in the action.

1 (b) The court, upon the Attorney General's showing good cause and without
2 limiting the status and rights of the relator, may permit the Attorney General
3 to intervene after the expiration of the 60-day period under paragraph B,
4 subparagraph (4) and any extension ordered under paragraph B,
5 subparagraph (5).

6 (2) If the Attorney General intervenes in and proceeds with the qui tam action,
7 the Attorney General has the primary responsibility for prosecuting the action
8 and is not bound by any acts of the relator. The relator has the right to continue
9 as a party to the action, subject to the limitations of this subparagraph.

10 (a) The Attorney General may move to dismiss the action for good cause
11 shown notwithstanding the objections of the relator if the relator has been
12 notified by the Attorney General of the filing of the motion and the court has
13 provided the relator with an opportunity to oppose the motion and present
14 evidence at a hearing.

15 (b) The Attorney General may settle the action with the defendant
16 notwithstanding the objections of the relator if the court determines, after a
17 hearing at which the relator has had an opportunity to present evidence, that
18 the proposed settlement is fair, adequate and reasonable under all of the
19 circumstances.

20 (c) Upon a showing by the Attorney General that unrestricted participation
21 during the course of the action by the relator would interfere with or unduly
22 delay the prosecution of the action by the Attorney General or would be
23 repetitious, irrelevant or for purposes of harassment, the court may, in its
24 discretion, impose limitations on the participation of the relator, including but
25 not limited to:

26 (i) Limiting the number of witnesses the relator may call;

27 (ii) Limiting the length of the testimony of the witnesses called by the
28 relator; and

29 (iii) Limiting the relator's cross-examination of witnesses.

30 (d) Upon a showing by the defendant that unrestricted participation during
31 the course of the action by the relator would be for purposes of harassment or
32 would cause the defendant undue burden or unnecessary expense, the court
33 may limit the participation of the relator in the action.

34 (3) Whether or not the Attorney General intervenes in and proceeds with the
35 action, upon a showing by the Attorney General that certain actions of discovery
36 by the relator would interfere with the Attorney General's investigation or
37 prosecution of a criminal or civil matter arising out of the same facts, the court
38 may stay the discovery for a period of not more than 60 days. A showing under
39 this subparagraph must be conducted in camera. The court may extend a 60-day
40 stay granted under this subparagraph upon a further showing in camera that the
41 Attorney General has pursued the criminal or civil investigation or proceedings
42 with reasonable diligence and that the proposed discovery in the qui tam action
43 would interfere with the ongoing criminal or civil investigation or proceedings. A

1 motion with regard to discovery in a qui tam action must be filed with the court
2 in accordance with the Maine Rules of Civil Procedure, Rules 26 to 37, as
3 applicable.

4 (4) Notwithstanding the provisions of paragraph B, the Attorney General may
5 elect to pursue its claim through any alternate remedy available to the State,
6 including any administrative proceeding to determine a civil penalty or any
7 action under section 15. If an alternate remedy is pursued in another proceeding,
8 the relator has the same rights in the proceeding as the relator would have had if
9 the action had continued under this subsection. For the purposes of this
10 subparagraph, a finding or conclusion is final if it has been finally determined on
11 appeal to the appropriate court of the State, if all time for filing appeals with
12 respect to the finding or conclusion has expired or if the finding or conclusion is
13 not subject to judicial review.

14 D. If the Attorney General intervenes in and proceeds with a qui tam action under
15 this subsection and a judgment is entered in favor of the plaintiff or a settlement is
16 entered in the action, the court shall enter an order as follows.

17 (1) Except as provided in subparagraph (2), the court may award the relator at
18 least 15% but not more than 25% of the proceeds of the action or settlement of
19 the claim, depending on the extent to which the relator and the counsel for the
20 relator contributed to the prosecution of the action. Any payment to the relator
21 under this subparagraph must be made from the proceeds.

22 (2) If the court finds that the action is based primarily on disclosures of specific
23 information, other than information provided by the relator, relating to allegations
24 or transactions specifically in a criminal, civil or administrative hearing, in a
25 legislative or administrative report, hearing, audit or investigation or from the
26 news media, the court may award the relator such sums as it considers
27 appropriate, but in no case more than 10% of the proceeds, taking into account
28 the significance of the information and the role of the relator in advancing the
29 case to litigation. Any payment to the relator under this subparagraph must be
30 made from the proceeds.

31 (3) The court shall order payment of the reasonable expenses of the relator that
32 the court finds to be necessarily incurred, plus reasonable attorney's fees and
33 costs. All expenses, fees and costs must be awarded against the defendant.

34 E. If the Attorney General does not intervene in and proceed with a qui tam action
35 under this subsection and a judgment is entered in favor of the plaintiff or a
36 settlement is entered in the action, the court shall enter an order as follows. The
37 relator must receive an amount that the court determines reasonable for causing to be
38 collected the fines and damages. The amount must be at least 25% but not more than
39 30% of the proceeds of the action or settlement and must be paid out of the proceeds.
40 The relator must also receive an amount for reasonable expenses that the court finds
41 to be necessarily incurred, plus reasonable attorney's fees and costs. All expenses,
42 fees and costs must be awarded against the defendant.

43 F. Whether or not the Attorney General intervenes in and proceeds with the action,
44 and whether or not a judgment is entered in favor of the plaintiff or a settlement is

1 entered in the action, if the court finds that the action was brought by a relator who
2 planned and initiated the violation of subsection 3 upon which the action was
3 brought, the court may, to the extent the court considers appropriate, reduce the share
4 of the proceeds of the action that the person would otherwise receive under this
5 subsection. The court shall take into account the role of the relator in advancing the
6 case to litigation and any relevant circumstances pertaining to the violation. If the
7 relator is convicted of a crime arising from the role of the relator in the violation of
8 subsection 3, the relator must be dismissed from the qui tam action and may not
9 receive any share of the proceeds of the action. Dismissal of the relator under this
10 paragraph does not prejudice the right of the State to continue the action as plaintiff.

11 G. Except as otherwise provided in this section, no liability may be incurred by the
12 State, the department or the Attorney General for any expenses, attorney's fees or
13 other costs incurred by any person in bringing or defending an action under this
14 subsection.

15 H. All money collected from the defendant in an action under this subsection, with
16 the exception of money payable under this subsection to another person, must be paid
17 to the State Controller for credit to the MaineCare False Claims Act Fund under
18 subsection 8.

19 I. The following limitations apply to qui tam actions under this subsection.

20 (1) The court does not have jurisdiction over an action brought against a member
21 of the Legislature, a Judge of the District Court or a Justice of the Superior Court
22 or Supreme Judicial Court or an executive branch official appointed by the
23 Governor if the action is based on evidence or information known to the State
24 when the action was brought.

25 (2) The court does not have jurisdiction over an action based upon the public
26 disclosure of allegations or transactions in a criminal, civil or administrative
27 hearing, in a legislative or administrative report, hearing, audit or investigation or
28 from the news media, unless the Attorney General intervenes in and proceeds
29 with the action or the relator is the original source of the information.

30 (3) The court does not have jurisdiction over an action brought by a former or
31 present member of the Armed Forces of the United States against another
32 member of the Armed Forces arising out of that other member's service in the
33 Armed Forces.

34 (4) A person may not bring an action if the action is based upon allegations or
35 transactions that are the subject of a civil suit or an administrative civil penalty
36 proceeding in which the State is a party.

37 (5) Upon motion of the Attorney General, the court may, in consideration of all
38 the equities, dismiss a relator as plaintiff if the elements of the false claims action
39 alleged in the complaint have been publicly disclosed specifically in the news
40 media or in a publicly disseminated governmental report at the time the
41 complaint is filed.

42 J. In the furtherance of a qui tam action under this subsection, the provisions of this
43 paragraph apply as protections for employees. An employee who is discharged,

1 demoted, suspended, threatened, harassed or in any other manner discriminated
2 against in the terms and conditions of employment by the employee's employer
3 because of lawful acts done by the employee on behalf of the employee or others in
4 furtherance of a qui tam action under this subsection, including investigation for,
5 initiation of, testimony for or assistance in an action filed or to be filed under this
6 subsection, is entitled to all relief necessary to make the employee whole. Relief
7 under this paragraph includes reinstatement with the same seniority status that the
8 employee would have had but for the discriminatory action of the employer, 2 times
9 the amount of back pay, interest on the back pay and compensation for any special
10 damages sustained as a result of the employer's discriminatory action, including
11 litigation costs and reasonable attorney's fees. An employee may bring an action in
12 Superior Court in the county in which the employer is located or the county of
13 residence of the employee.

14 **5. Qui tam action procedures.** The following provisions apply to a qui tam action
15 under subsection 4.

16 A. An action under subsection 4 may not be brought more than 6 years after the date
17 on which the violation was committed or more than 3 years after the date when facts
18 material to the cause of action are known or reasonably should have been known by
19 the state official charged with the responsibility to act in such circumstances but in no
20 event more than 10 years after the date on which the violation is committed,
21 whichever occurs later.

22 B. An action under subsection 4 may be brought by the relator in the county in which
23 the relator resides, in the county in which the defendant has its principal place of
24 business or in the Superior Court of Kennebec County.

25 C. In an action brought under subsection 4, the State or the relator is required to
26 prove all essential elements of the cause of action, including damages, by a
27 preponderance of the evidence.

28 D. Notwithstanding any other provision of law, a guilty verdict rendered in a
29 criminal proceeding alleging false statements or fraud, whether upon a verdict after
30 trial or upon a plea of guilty or nolo contendere, estops the defendant from denying
31 the essential elements of the offense in an action brought under subsection 4 that
32 involves the same transaction as in the criminal proceeding.

33 **6. Civil investigatory demands.** In an investigation of a violation under subsection
34 3, the provisions of Title 5, section 211 apply to civil investigatory demands and to the
35 examination of books, records, papers and memoranda of whatever nature and persons
36 having knowledge regarding those materials.

37 **7. Applicable rules of civil procedure.** The Maine Rules of Civil Procedure apply
38 to all aspects of service, subpoena power, discovery and court procedure of an action filed
39 pursuant to subsection 4 unless inconsistent with the provisions of this section.

40 **8. Application.** This section applies to false claims filed against the State on or after
41 January 1, 2006 with regard to the MaineCare program, subject to the statute of
42 limitations specified in subsection 5, paragraph A.

