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FIRST REGULAR SESSION-2019

Legislative Document

No. 1503

S.P. 465

In Senate, April 4, 2019

An Act To Establish the Maine False Claims Act

Reference to the Committee on Health and Human Services suggested and ordered printed.

A handwritten signature in black ink, appearing to read 'D M Grant'.

DAREK M. GRANT
Secretary of the Senate

Presented by Senator CARPENTER of Aroostook.
Cosponsored by Representatives: BRADSTREET of Vassalboro, CARDONE of Bangor,
EVANGELOS of Friendship.

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

2 **Sec. 1. 22 MRSA §15**, as amended by PL 2013, c. 235, §§1 and 2, is repealed.

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

4 **§15-A. Maine False Claims Act**

5 **1. Short title.** This section may be known and cited as "the Maine False Claims
6 Act."

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

9 A. "Claim" means a request or demand, whether under a contract or otherwise, for
10 money or property, whether or not the State has title to the money or property, that:

11 (1) Is presented to an officer, employee or agent of the State; or

12 (2) Is made to a contractor, grantee or other recipient of the money or property, if
13 the money or property is to be spent or used on the State's behalf or to advance a
14 state program or interest and if the State:

15 (a) Provides or has provided any portion of the money or property requested
16 or demanded; or

17 (b) Will reimburse the contractor, grantee or other recipient for any portion
18 of the money or property that is requested or demanded.

19 "Claim" does not include a request or demand for money or property that the State
20 has paid to an individual as compensation for state employment or as an income
21 subsidy with no restrictions on that individual's use of the money or property.

22 B. "False claims action" means a court action brought under this section.

23 C. "Knowingly" or "knowing" means that a person, with respect to information:

24 (1) Has actual knowledge of the information;

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

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

27 "Knowingly" and "knowing" require no specific intent to defraud.

28 D. "Material" or "materially" means having a natural tendency to influence, or be
29 capable of influencing, the payment or receipt of money or the transfer or receipt of
30 property.

31 E. "Obligation" means an established duty, whether or not fixed, arising from an
32 express or implied contractual, grantor-grantee or licensor-licensee relationship, from
33 a fee-based or similar relationship, from statute or rule, or from the retention of any
34 overpayment.

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

1 G. "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 H. "Qui tam action" means an action brought by a person for the benefit of the
5 person and for the benefit of the State in the name of the State and, at the election of
6 the Attorney General, in which the State is also a plaintiff.

7 I. "Relator" means a person who brings a qui tam action for a violation of this
8 section.

9 J. "State" means the State of Maine and any agency or political subdivision of the
10 State.

11 **3. Acts subjecting persons to treble damages, costs and penalties; exceptions. A**
12 **person who files a false claim is liable for damages, costs and penalties as provided in**
13 **this subsection.**

14 A. A person who commits any of the acts listed in this paragraph is liable to the State
15 for 3 times the amount of damages that the State sustains because of the act of that
16 person. A person who commits any of the acts listed in this paragraph is also liable
17 to the State for the costs, including attorney's fees, of a civil action brought to recover
18 any of those penalties or damages and may be liable to the State for a fine of not less
19 than \$5,500 and not more than \$11,500, as adjusted by the Federal Civil Penalties
20 Inflation Adjustment Act of 1990, for each violation:

21 (1) Knowingly presents or causes to be presented a false or fraudulent claim for
22 payment or approval;

23 (2) Knowingly makes, uses or causes to be made or used a false record or
24 statement material to a false or fraudulent claim;

25 (3) Has possession, custody or control of money or property used or to be used
26 by the State and knowingly delivers or causes to be delivered less than all of that
27 money or property;

28 (4) Knowingly presents or causes to be presented a claim that includes items or
29 services resulting from a violation of Section 1128B of the Social Security Act,
30 42 United States Code, Section 1320a-7b;

31 (5) Is authorized to make or deliver a document certifying receipt of property
32 used or to be used by the State and intending to defraud the State makes or
33 delivers the receipt without completely knowing that the information on the
34 receipt is true;

35 (6) Knowingly buys, or receives as a pledge of an obligation or debt, public
36 property from an officer, employee or agent of the State who is not lawfully
37 authorized to sell or pledge the property;

38 (7) Enters into an agreement, contract or understanding with an official of the
39 State knowing the information contained therein is false;

1 (8) Knowingly makes, uses or causes to be made or used a false record or
2 statement material to an obligation to pay or transmit money or property to the
3 State;

4 (9) Knowingly conceals or knowingly and improperly avoids or decreases an
5 obligation to pay or transmit money or property to the State;

6 (10) Benefits from an inadvertent submission of a false claim to the State or
7 benefits from an overpayment from the State and subsequently discovers the
8 falsehood of the claim or the receipt of overpayment and fails to disclose the false
9 claim or receipt of overpayment to the State by the later of:

10 (a) The date that is 60 days after the date on which the false claim or receipt
11 of overpayment was identified; and

12 (b) The date any corresponding cost report is due, if applicable; or

13 (11) Conspires to violate this subsection.

14 B. Notwithstanding paragraph A, a person who violates paragraph A, subparagraphs
15 (1) to (11) is liable for an amount equal to at least 2 times the amount of damages that
16 the State sustained because of the violation, but is not subject to a fine, if the court
17 finds that:

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

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

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

28 C. This subsection does not apply to claims, records or statements made to the State
29 under Title 36.

30 **4. Attorney General investigations and prosecutions; powers of prosecuting**
31 **authority; civil actions by persons as qui tam plaintiff and as private citizens;**
32 **jurisdiction.** A false claims action may be brought against a person who violates
33 subsection 3 in accordance with this subsection and subsections 5 to 7.

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

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

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

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

7 (3) The complaint must be filed in camera, must remain under seal for at least
8 120 days and may not be served on the defendant until the court so orders.

9 (4) The Attorney General may elect to intervene in and proceed with the action
10 on behalf of the State within 120 days after the Attorney General receives both
11 the copy of the complaint and the written disclosure of the material evidence and
12 information from the relator. Any information or documents furnished by the
13 relator to the Attorney General in connection with the initiation of a qui tam
14 action or investigation under subparagraph (2) are not public records and are
15 exempt from disclosure under Title 1, chapter 13.

16 (5) The Attorney General may, for good cause shown, move the court for
17 extensions of time during which the complaint remains under seal under
18 subparagraph (3) and during which the Attorney General may elect to intervene
19 in and proceed with the action under subparagraph (6). A motion under this
20 subparagraph must be supported by an affidavit or other submission in camera.

21 (6) Before the expiration of the 120-day period under subparagraph (4) or of any
22 extension ordered under subparagraph (5), the Attorney General shall:

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

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

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

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

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

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

40 (a) At the request of the Attorney General, and upon payment by the
41 Attorney General of the cost of transcription, copying and mailing, the relator
42 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 120-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.

1 A 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. If an
7 alternate remedy is pursued in another proceeding, the relator has the same rights
8 in the proceeding as the relator would have had if the action had continued under
9 this subsection. For the purposes of this subparagraph, a finding or conclusion is
10 final if it has been finally determined on appeal to the appropriate court of the
11 State, if all time for filing appeals with respect to the finding or conclusion has
12 expired or if the finding or conclusion is not subject to judicial review.

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

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

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

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

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

42 F. Whether or not the Attorney General intervenes in and proceeds with the action,
43 and whether or not a judgment is entered in favor of the plaintiff or a settlement is
44 entered in the action, if the court finds that the action was brought by a relator who

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

10 G. If the State does not proceed with the action and the person bringing the action
11 conducts the action, the court may award to the defendant the defendant's reasonable
12 attorney's fees and expenses if the defendant prevails in the action and the court finds
13 that the claim of the person bringing the action was clearly frivolous, clearly
14 vexatious or brought primarily for purposes of harassment.

15 H. Except as otherwise provided in this section, no liability may be incurred by the
16 State, the department or the Attorney General for any expenses, attorney's fees or
17 other costs incurred by any person in bringing or defending an action under this
18 subsection.

19 I. All money collected from the defendant in an action under this subsection, with the
20 exception of money payable under this subsection to another person, must be paid to
21 the State Controller for credit to the Maine False Claims Act Fund under subsection
22 8.

23 J. The following limitations apply to qui tam actions under this subsection.

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

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

33 (3) The court shall dismiss an action or claim under paragraph B, unless opposed
34 by the State, if substantially the same allegations or transactions as alleged in the
35 action or claim were publicly disclosed in a state criminal, civil or administrative
36 hearing in which the State or its agent is a party; in a federal congressional or
37 state legislative or other report, hearing or audit, investigation; or from the news
38 media unless the action is brought by the Attorney General or the person bringing
39 the action is an original source of the information.

40 For purposes of this subparagraph, "original source" means an individual either
41 who prior to a public disclosure has voluntarily disclosed to the State the
42 information on which allegations or transactions in a claim are based or who has
43 knowledge that is independent of and materially adds to the publicly disclosed

1 allegations or transactions and has voluntarily provided the information to the
2 State before filing an action under paragraph B.

3 (4) A person may not bring an action under paragraph B if the action is based
4 upon allegations or transactions that are the subject of a civil suit or an
5 administrative civil penalty proceeding in which the State is already a party.

6 K. An employee, contractor or agent who is discharged, demoted, suspended,
7 threatened, harassed or in any other manner discriminated against in the terms and
8 conditions of employment by the employer of the employee, contractor or agent
9 because of lawful acts done by the employee, contractor or agent in furtherance of a
10 qui tam action brought or to be brought under this subsection or other efforts to stop
11 one or more violations of this section, including investigation for, initiation of,
12 testimony for or assistance in an action filed or to be filed under this subsection, is
13 entitled to all relief necessary to make the employee, contractor or agent whole.
14 Relief under this paragraph includes reinstatement with the same seniority status that
15 the employee, contractor or agent would have had but for the discriminatory action, 2
16 times the amount of back pay, interest on the back pay and compensation for any
17 special damages sustained as a result of the discriminatory action, including litigation
18 costs and reasonable attorney's fees. An employee, contractor or agent may bring an
19 action in Superior Court in the county in which the employer is located or the county
20 of residence of the employee, contractor or agent. An action may not be brought
21 more than 3 years after the last act of the employer that is alleged to violate this
22 paragraph.

23 **5. Limitation of actions; burden of proof.** The following provisions apply to an
24 action under subsection 4.

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

31 B. If the Attorney General elects to intervene in and proceed with an action brought
32 under subsection 4, paragraph B, the Attorney General may file a complaint or amend
33 the complaint of a relator to clarify or add detail to the claims in which the Attorney
34 General is intervening on behalf of the State and to add any additional claims with
35 respect to which the Attorney General contends the State is entitled to relief. For
36 statute of limitations purposes, any such Attorney General pleading relates back to
37 the filing date of the complaint of the relator who originally brought the action, to the
38 extent that the claim of the Attorney General on behalf of the State arises out of the
39 conduct, transactions or occurrences set forth or attempted to be set forth in the prior
40 complaint of the relator.

41 C. A civil action under subsection 4 may be brought for activity prior to the effective
42 date of this subsection if the limitations period set in paragraph A has not lapsed.

1 D. An action under subsection 4 may be brought by the relator in the county in
2 which the relator resides, in the county in which the defendant has its principal place
3 of business or in the Superior Court of Kennebec County.

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

7 F. Notwithstanding any other provision of law, a guilty verdict rendered in a criminal
8 proceeding alleging false statements or fraud, whether upon a verdict after trial or
9 upon a plea of guilty or nolo contendere, estops the defendant from denying the
10 essential elements of the offense in an action brought under subsection 4 that involves
11 the same transaction as in the criminal proceeding.

12 **6. Civil investigatory demands.** In an investigation of a violation under subsection
13 3, the provisions of Title 5, section 211 apply to civil investigatory demands and to the
14 examination of books, records, papers and memoranda of whatever nature and persons
15 having knowledge regarding those materials. Any information obtained by means of a
16 civil investigatory demand in connection with an action or investigation under this section
17 may be shared with any relator if the Attorney General or a designee of the Attorney
18 General determines it is necessary as part of any false claims act investigation under this
19 Act.

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

23 **8. Maine False Claims Act Fund.** There is established within the department the
24 Maine False Claims Act Fund. If the Attorney General initiates an action under
25 subsection 4, paragraph A or intervenes in and proceeds with an action under subsection
26 4, paragraph B, the Attorney General is entitled to receive a fixed 33% of the proceeds of
27 the action or settlement of the claim, which funds must be used to provide funding for
28 investigatory, enforcement and litigation expenses within the Office of the Attorney
29 General related to this section. The remaining 67% of the proceeds of the action or
30 settlement must be returned to the State. The Maine False Claims Act Fund is a
31 nonlapsing fund dedicated to the purposes of this section.

32 **9. Remedies under other laws; severability of provisions; liberality of legislative**
33 **construction; adoption of legislative history.** The remedies provided for in this section
34 are not exclusive and are in addition to any other remedies provided for under section 15,
35 in any other law or available under common law. If any provision of this section or the
36 application thereof to any person or circumstance is held to be unconstitutional, the
37 remainder of the section and the application of the provision to other persons and
38 circumstances is not affected thereby. This section must be liberally construed and
39 applied to promote the public interest. This section also adopts the congressional intent
40 behind the federal False Claims Act, 31 United States Code, Sections 3729 to 3733,
41 including the federal False Claims Amendments Act of 1986.

42 **Sec. 3. 22 MRSA §1714-A, sub-§10,** as enacted by PL 2017, c. 442, §2, is
43 amended to read:

1 **10. No imposition of liability on other persons.** The department may not by any
2 means, including without limitation any rule or any contract or agreement with a
3 provider, impose liability for a debt under this section on any person other than the
4 provider notified of the debt pursuant to subsection 2 or a person subject to collection by
5 offset pursuant to rules adopted under subsection 5. This subsection does not prohibit the
6 department from seeking recovery of civil penalties from any person as provided in
7 section ~~4~~ 15-A.

8

SUMMARY

9 This bill repeals the existing law governing the civil liability of persons making false
10 claims, and enacts the Maine False Claims Act in order to protect the State against false
11 and fraudulent claims upon or against the State and to protect the State and the Federal
12 Government against false and fraudulent claims under the Medicaid program, known in
13 the State as the MaineCare program. This bill provides authorization for qui tam actions,
14 which are brought by a person for the benefit of the person and the State in the name of
15 the State. This bill provides protection from discrimination for an employee who
16 participates in a qui tam action. This bill provides possible recoveries for the person who
17 brings the qui tam action in addition to recoveries for the State. This bill establishes the
18 Maine False Claims Act Fund to receive the proceeds payable to the State as a result of
19 false claims litigation to be used in part for investigatory, enforcement and litigation
20 expenses.