

HOUSE BILL REPORT

SSB 5665

As Reported By House Committee On:
Judiciary

Title: An act relating to false claims against the government.

Brief Description: Enacting the Washington state false claims act.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Talmadge, Prentice and Moore).

Brief History:

Reported by House Committee on:
Judiciary, April 2, 1993, DP.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 9 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Chappell; Johanson; Long; H. Myers; Riley; Scott; and Wineberry.

Minority Report: Do not pass. Signed by 3 members: Representatives Ballasiotes, Assistant Ranking Minority Member; Campbell; and Mastin.

Staff: Margaret Allen (786-7191).

Background: State and local governments make innumerable payments to individuals and businesses in connection with governmental contracts, programs, and services. Sometimes those payments are made in reliance on incorrect or intentionally misleading information furnished by the other parties involved.

While a governmental entity can, in theory, recover undeserved payments under tort or contract law, or as restitution ordered in a criminal action, false claims for payment can be difficult to detect.

In most circumstances, under state law a private citizen is unable to initiate an action, based on a false claim, on behalf of an injured governmental entity. In contrast, a private citizen may bring such an action on behalf of the federal government under the federal false claims act.

Summary of Bill: The Washington State False Claims Act is created.

BASIS FOR LIABILITY:

A claim is a request for money, property, or services made to a governmental entity, or to a person if the governmental entity, either directly or through reimbursement, provides a portion of the money, property, or services requested. A false claim contains or is based upon a materially incorrect fact, statement, representation, or record.

A person commits a wrongful act if the person:

- (1) Knowingly presents, or causes to be presented, a false claim to a governmental entity;
- (2) Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false claim paid;
- (3) Conspires to get a false claim paid;
- (4) Delivers less property or money to a governmental entity than the amount for which the person receives a receipt;
- (5) Makes or delivers a false property receipt;
- (6) Knowingly buys, or receives as security for a debt, public property from a governmental employee or officer who may not lawfully sell or pledge the property; or
- (7) Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to a governmental entity.

The Washington False Claims Act applies only to controversies resulting in at least \$1,000 in damages to a governmental entity. A "controversy" includes one or more wrongful acts committed by the same person.

PROCEDURE:

The government's attorney must investigate wrongful acts diligently, but has discretion in deciding whether to bring a civil action against a wrongdoer.

Initiation of Action by Private Person: A private person may bring a civil action against an alleged wrongdoer. The action is brought in the names of the private person and the governmental entity, and can be dismissed only if the court

and governmental attorney consent in writing and provide reasons. The complaint is filed and served on the government but not served on the defendant until the court orders that it be served.

Within 60 days of being served with a copy of the complaint and receiving written disclosure of all material information, the governmental entity must decide whether to intervene in the action. If the governmental entity does intervene, it conducts the action. If the governmental entity does not intervene, the person may conduct the action. No one but the governmental entity may intervene or bring a related action based on the same underlying facts.

Even if a private person has initiated a civil action, a governmental entity may elect to pursue a claim through an alternate avenue, such as an administrative proceeding. If the governmental entity does so, the person initiating the action has the same rights in the alternate proceeding as the person would have had in the civil suit.

To avoid interfering with an investigation or prosecution of a criminal or civil matter arising from the same facts, throughout the proceedings the court may hold private hearings concerning a variety of issues, such as discovery or a proposed settlement. To the same end, the court may postpone discovery for 60 days. The act provides for extensions of this time frame and others upon good cause shown.

Role of Person in Action Conducted by Government: While a governmental entity electing to conduct the action has the primary responsibility for prosecuting the action, the private person has the right to continue as a party. However, the court may limit the person's participation in the action, upon a showing by either the governmental entity or a defendant that the person's unrestricted participation would interfere with or unduly delay prosecution of the case, or would be repetitious, irrelevant, or for the purposes of harassment.

A governmental entity may dismiss the action, over the objections of the private person, if the person has been served with a copy of the motion for dismissal, and the court has provided the person with an opportunity for a hearing on the motion. Similarly, the governmental entity may settle an action over the objections of the person if the court determines, after a hearing, the proposed settlement is fair, adequate, and reasonable under the circumstances.

Role of Government in Action Conducted by Person: If the governmental entity elects not to proceed with the action, and the person initiating it does proceed, the governmental entity may only intervene at a later date with the court's permission, upon a showing of good cause. Unlike the earlier intervention, this later intervention by the governmental entity would not limit the status and rights of the person initiating the action.

Upon request, and at its own expense, the governmental entity must be served with copies of all pleadings, and supplied with copies of all deposition transcripts.

PENALTIES:

Ordinarily, a wrongdoer is liable to the governmental entity for: (1) a civil penalty of \$5,000; (2) an amount equal to three times the actual damages sustained by the governmental entity; and (3) all costs incurred by the governmental entity in maintaining a civil action under the act, including attorneys' fees.

However, if specified criteria apply, a court, in its discretion, may require the wrongdoer to pay to the governmental entity only an amount equal to the actual benefit the person received as a result of the wrongful act, plus all costs, including attorneys' fees, incurred by the governmental entity in collecting the amount. The criteria are that the wrongdoer: (1) furnished to the government's attorney all the information the wrongdoer had about the wrongful act within 30 days of obtaining the information; (2) fully cooperated with the investigation; and (3) had no actual knowledge of an ongoing investigation at the time of furnishing the information, and no criminal prosecution, civil or administrative action was underway. While the language of the bill is ambiguous, this penalty appears to be intended as an alternate rather than additional penalty.

PROCEEDS:

In general, the proceeds a private person receives depends on the extent to which the person contributed to the prosecution of the action. The person also receives an amount for reasonable and necessary expenses, reasonable attorneys' fees and costs. But, no governmental entity is liable for the expenses a person incurs in bringing an action under the act.

Action Conducted by Government: If the government prosecutes an action brought by a private person, the person receives not less than 15 percent nor more than 25 percent of the proceeds.

However, if the action is based primarily on disclosures of specific information, other than by the person bringing the action: (1) in a criminal, civil, or administrative hearing; (2) in a legislative, administrative, or state accounting office report, hearing, audit, or investigation; or (3) from the news media, the person may not receive more than 10 percent of the proceeds.

Any payment of any portion of a recovery is made on a pro rata basis between the person and the governmental entity.

Action Conducted by Person: The person receives not less than 25 percent nor more than 30 percent of the proceeds. The wrongdoer is liable for all expenses, fees, and costs.

The court may award reasonable attorneys' fees and expenses to the defendant if the defendant prevails in the action.

Wrongdoer: Whether or not a governmental entity proceeds with an action, if the court finds the action was brought by a person who planned and initiated the wrongful act upon which the action was brought, the court may reduce the person's share of the proceeds.

If the person bringing the action is convicted of a crime arising from his or her role in the wrongful act, the person will be dismissed from the civil action and receive no recovery.

WHISTLEBLOWER PROTECTION:

The act has alternate provisions to protect, from reprisals, persons who furnish information or otherwise participate in an investigation or civil action concerning a wrongful act.

One provision explicitly provides a governmental employee with the protection afforded to governmental employees under existing statutes. It provides a private employee with the protection to be afforded private employees under a bill currently in the Senate.

If the Senate bill is not enacted during this legislative session, the alternate provision applies. That provision gives any person who has been subjected to workplace reprisals, as a result of being a whistleblower or suspected whistleblower, the remedies currently available under the Human Rights Commission statutes.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: This act provides a tool for dealing with fraud against governmental entities. The federal statute on which this act is based has been an effective resource in deferring false claims.

Testimony Against: The potential for misuse of this act is significant. The act provides for bounty hunters and enormous penalties. Requiring the Attorney General's Office to diligently investigate wrongful acts is too great a burden.

Witnesses: Senator Talmadge, prime sponsor (for); and Dick Ducharme, WSCIC (against).