Approved

Date:

Feb 20, 2002

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson Senator Vratil at 9:37 a.m. on February 19, 2002 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Gordon Self, Revisor
Mike Heim, Research
Jerry Donaldson, Research
Mary Blair, Secretary

Conferees appearing before the committee:

Barb Hinton, Legislative Post Audit (LPA)
John Parisi, Kansas Trial Lawyers Association (KTLA)
Jerry Slaughter, Kansas Medical Society (KMS)
Tom Bell, Kansas Hospital Association (KHA)
Julie Hein, Prairie Band Potawatami Nation
Doug Smith, Professional Sureties
Jeff Bottenberg, Kansas Sheriffs' Association

Others attending: see attached list

The minutes of the February 18th, 2002 meeting were approved on a motion by Senator Donovan, seconded by Senator O'Connor. Carried.

SB 535–civil actions; re: false or fraudulent medicaid claims

Conferee Hinton testified in support of **SB 535**, a bill which would create civil monetary penalties for Medicaid fraud. She stated that the bill was introduced in response to an audit the LPA Committee contracted with a CPA firm to assess the adequacy of the state's system for identifying fraud and abuse in it's medicaid program.(attachment 1)

Conferee Parisi testified in opposition to **SB 535**. He stated the scope of the bill was too narrow and discussed why it should be expanded to include all public expenditures of Kansas taxpayers' money. He also discussed why the bill should contain a "whistleblower" provision identical to that in the Federal Claims Act and referred to a copy of a model Act being considered by the Missouri legislature (see attachment 2). He recommended an in-depth or interim study be done on the bill before it's passage.(attachment 2)

Conferee Slaughter testified in opposition to **SB 535.** He stated that there already exists enough legal authority to prosecute and punish those who defraud the Medicaid program and he elaborated on this. He further discussed concerns about a provision which punishes unintentional fraud and stated it needs clarification or elimination.(attachment 3)

Conferee Bell testified in opposition to **SB 535.** He discussed the Medicaid Fraud Control Act which provides for both criminal penalties and recovery of monies in Medicaid fraud cases and stated that existing regulations allow SRS to terminate a provider for civil or criminal fraud against Kansas Medicaid. He also discussed the federal false claims act which he stated has been inappropriately used to prosecute innocent mistakes.(attachment 4)

It was the consensus of the Chair and the Committee to recommend **SB 535** for interim study. Following discussion Senator Oleen agreed to prepare a scope statement for a proposed post-audit study.

SB 536–creating certain crimes involving use and possession of body armor

Senator Schmidt stated that he introduced **SB 536**, a bill which creates a new felony offense of criminal use or possession of body armor, because there was concern in the law enforcement community regarding this subject. He made reference to an available video which depicts bank robbers in Los Angeles wearing full body armor making their capture by law enforcement more difficult.(no attachment)

Conferee Smith testified in support of **SB 536** and offered a balloon amendment which would exempt professional surety service personnel due to the nature of their job.(attachment 5)

Conferee Hein testified as neutral on **SB 536** but wanted to offer a balloon amendment so that the bill would exempt tribal law enforcement officers while such an officer is on duty. She also cited other legislation regarding Tribal law enforcement officers which has passed the Senate for the past two years but has not been acted on by the House.(attachment 6)

Conferee Bottenberg stated briefly that the Kansas Sheriff's Association supports **SB 536**.(no attachment)

The Chair announced that Senate Judiciary Committee would hold meetings through Tuesday, February 26th of next week. He stated that any meetings after that date would be held solely to discuss House bills or other matters.

The meeting adjourned at 10:30 a.m. The next scheduled meeting is February 20, 2002.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb. 19, 2002

NAME	REPRESENTING
Brenda Harmon	KSC
Bill Morrison	KSC Johnson Co DA
Barbara Jennbs	KSC
Joe Herold	KSC
Mike Heim	Heim Law
TJB	KHA
GARY DAVENPORT	KS MOTOR CARRIERS ASSN
TOM WHITAKER	KS MOTOR CARRIERS ASSN
Connie Burns	Whitney B Damron, PA
[illegible]	[illegible]
[illegible]	SRS
Barb Conant	KTLA
John Parisi	KTLA
Kathy Porter	Judicial Branch
Paul Davis	KBA
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
[illegible]	KSC

Testimony for the Senate Judiciary Committee on SB 535
Barb Hinton, Legislative Post Auditor
February 19, 2002

Mr. Chairman and members of the Committee, thank you for allowing me to appear before you today on SB 535.

This bill was introduced in response to an audit we contracted with an Omaha CPA firm–Bland and Associates–to assess the adequacy of the State's system for identifying fraud and abuse in the State's Medicaid Program.

The audit firm didn't recommend that such a bill be introduced in its audit report, but the firm noted in its presentations to the Legislative Post Audit Committee and to other legislative committees that Kansas did not have a False Claims Act regarding Medicaid claims. They indicated that other states they were aware of had such legislation, and found it very useful in prosecuting intentional Medicaid fraud claims. During the hearing on this audit, members of the Legislative Post Audit Committee expressed support for such legislation.

To the extent this bill could could enhance the State's efforts to deter Medicaid fraud and abuse, prosecute those who have perpetrated intentional fraud or abuse, or recover moneys that have been fraudulently obtained, we support the recommendation of the audit firm and this bill.

Thank you again for allowing me to appear before you on this bill.

S Jud
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att 1

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the Senate Judiciary Committee

FROM: John Parisi, President-Elect
Kansas Trial Lawyers Association

RE: SB 535

DATE: Feb. 19, 2002

Chairman Vratil and Members of the Senate Judiciary Committee: my name is John Parisi, and I am president-elect of the Kansas Trial Lawyer's Association (KTLA). On behalf of KTLA, thank you for the opportunity to present testimony in opposition to SB 535 as it is currently written. While KTLA applauds the effort to protect the Kansas portion of Medicaid spending from fraud and abuse, we oppose SB 535 because it does not go far enough in protecting Kansas taxpayers from those who would commit fraud or otherwise abuse public programs funded by Kansas taxpayers. The scope of SB 535 is too narrow, and should be expanded to include all public expenditures of Kansas taxpayers' money. KTLA also opposes SB 535 because it prohibits a private right of action for "whistleblowers." We believe the bill should be amended to include a qui tam or whistleblower provision identical to that contained in the Federal False Claims Act (31 U.S.C. § 3729 et seq) and a growing number of state statutes.

The Breath of the Statute Should be Broadened

KTLA supports the intent of SB 535, which is to protect the Kansas State Medicaid Program from false or fraudulent claims for payment or approval. However, although the Medicaid budget is certainly a significant expenditure within the State, KTLA believes that this bill should be amended to include all state expenditures which are subject to false or fraudulent claims for payment or approval. By broadening the scope of SB 535 to include protection of all State money, the bill will more fully protect Kansas taxpayers from fraud and abuse. If a "False Claims Act" is appropriate to protect the Kansas Medicaid Program; clearly it is appropriate to similarly protect all other State programs from fraud and abuse by providing public assistance or otherwise dispensing State funds.

The Law Should Contain A Whistleblower Provision Identical to that Contained in the Federal False Claims Act, 31 U.S.C. § 3729 et seq)

Section 1(d) of SB 535 provides (page 2, lines 17-18) "nothing in this Act shall be construed to create a private cause of action" and limits a civil action solely to the Attorney General. In the view of KTLA, this limitation is unwarranted and is poor public policy. It ignores the enormous success that has been achieved under the Federal False

S Jud 2-19-02 attz

Terry Humphrey, Executive Director

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Claims Act since it was significantly amended by Congress in 1986 to fight fraud and abuse in all federal and public expenditures. Attached to our testimony are statistics issued by the Federal Government and reported by the Taxpayers Against Fraud (TAF), a group that supports the Federal False Claims Act amendments. As reported by the government, between 1986 and the end of FY 2000 (Sept. 30, 2000), over $4.1 billion were recovered in cases brought pursuant to qui tam cases, in those cases brought to the attention of the federal government by whistleblowers. In fact, FY 2000 was a record year with over $1.2 billion recovered by the federal government pursuant to False Claims Act cases initiated by whistleblowers.

While the majority of recoveries occurred in the arena of healthcare, a significant percentage of the claims occurred in other areas of federal spending. In FY 2000, the largest category of fraud recoveries other than healthcare involved the production of oil and other minerals from public lands for which more than $230 million was collected for underpaid royalties. The Department of Justice also recovered over $140 million in settlements with brokerage firms who sold securities with artificially low yields to municipalities refunding tax exempt bonds, thereby reducing the municipalities' purchase of special low-interest Treasury Bonds. Defense procurement fraud accounted for another $100 million in recovery in FY 2000. The point is, each of these cases was brought to the attention of the federal government by an insider or whistleblower. The whistleblower is provided a monetary incentive to come forward in the federal Act. This incentive ranges from 15 to 35% of the recovery, depending on whether or not the government intervenes in the action. If the government intervenes, the recovery is limited between 15 and 25%. If the government does not intervene than the whistleblower proceeds on their own, they are entitled to a higher percentage (between 25 and 35%). Importantly, even after paying relators' their shares, the federal government netted over $1 billion in FY 2000 as a result of litigation brought by private whistleblowers. Clearly, for the federal government the 1986 amendments to the False Claims Act have been an enormous success. KTLA believes that similar provisions should be incorporated into SB 535 so that Kansas taxpayers may receive similar benefit from this legislation.

False Claims Act Procedures

The Federal False Claims Act does include unique procedures for insuring that the information is brought to the government in a way that it can investigate and make a determination of whether to join in the case. KTLA believes that similar procedures should be written into the Kansas Act. Attached to our testimony is a recent article published by the *American Medical News* (Feb. 4, 2002) chronicling the story of four physicians who became whistleblowers and reported healthcare fraud under the False Claims Act. Importantly, it is specifically documented in the article that the pleading provisions of the False Claims Act enabled these doctors to come forward confidentially and protecting them from retaliation while maintaining their practices.

Conclusion

Although KTLA supports the basic premise of SB 535 to protect the Kansas Medicaid Program from false or fraudulent claims for payment, KTLA believes that the focus of

the law is too narrow and at this time requests that the bill be broadened to include all expenditures of public funds in the State of Kansas. Moreover, the Act should incorporate a whistleblower provision identical to that in the Federal False Claims Act which has been the key to the success of the federal act to recover literally billions of dollars for taxpayers over the last decade. Kansas taxpayers should be afforded no less protection from those who would commit fraud on the public.

We have included with our testimony an Act that is being considered in the Missouri legislature which KTLA believes provides a much better model for the type of False Claims Act litigation which would be appropriate for Kansas. Because this is such a complex issue, we recommend an in-depth study before passing a bill such as SB 535 or its House companion bill HB 2957. If there is not sufficient time to do this in-depth study, KTLA suggests that SB 535 and HB 2957 be sent to Interim Committee where alternative provisions can be studied and a more comprehensive bill drafted that will better protect Kansas taxpayers.

Thank you for this opportunity to offer our opposition to this bill as it is written and will take any questions.

TAXPAYERS AGAINST FRAUD
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Statistics

Qui Tam Statistics
(as reported by DOJ: FY ending September 30, 2000)

Total FCA amount recovered where there is an associated *qui tam* case, to date: **$4.174 billion**

Total FCA amount recovered by DOJ in cases that DOJ entered or otherwise pursued: **$3.962 billion**

Total FCA amount recovered by relators in cases declined by DOJ, to date: **$211 million***

Total number of *qui tam* cases files to date: **3,326**

***Qui tam* cases filed (by fiscal year):**

1987	33
1988	60
1989	95
1990	82
1991	90
1992	119
1993	132
1994	222
1995	277
1996	363
1997	533
1998	472
1999	482
2000	366

Recoveries in *qui tam* cases pursued by DOJ (by fiscal year):

1988	$355,000
1989	$15 million
1990	$40 million
1991	$70 million
1992	$134 million
1993	$171 million
1994	$376 million
1995	$245 million

FOR IMMEDIATE RELEASE

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THURSDAY, NOVEMBER 2, 2000

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JUSTICE RECOVERS RECORD $1.5 BILLION IN FRAUD PAYMENTS
HIGHEST EVER FOR ONE YEAR PERIOD

WASHINGTON, D.C. - The United States collected a record $1.5 billion in civil fraud recoveries during the past fiscal year - an increase of almost 50% above the largest previous annual recovery in 1997, Attorney General Janet Reno announced today.

"This new record demonstrates the Department's continued commitment to ensure the proper use of taxpayer monies," said Attorney General Reno. "The Department will continue to pursue those who seek to defraud the United States, whether by providing defective products, billing for services that were not provided or otherwise misusing public funds for private gain."

Approximately $1.2 billion of the Department's settlements and judgments occurred in connection with cases filed under the federal whistleblower statute, which allows individuals who disclose fraud to share in the government's recovery. To date, payments to whistleblowers for the past fiscal year (October 1, 1999 - September 30, 2000) have totaled approximately $173 million.

Health care fraud cases once again topped the list of annual recoveries, totaling more than $840 million. This amount included the largest civil fraud recovery ever - a $385 million settlement with Fresenius Medical Care to resolve sweeping allegations of wrongdoing by its kidney dialysis subsidiary. The Department also recovered $170 million from Beverly Enterprises, Inc., the largest nursing home operator in the United States, for alleged false billings to Medicare involving over 400 nursing homes around the country.

"Health care fraud imposes enormous costs on American taxpayers and decreases the quality of care provided to patients," said Assistant Attorney General David W. Ogden of the Department's Civil Division. "Although the vast majority of health care providers are honest and provide the highest standard of care, stopping those who prey on the health care system remains one of the Department's top law enforcement priorities."

After health care, the largest category of fraud recoveries involved the production of oil and other minerals from public lands. The Department recovered more than $230 million from companies alleged to have underpaid royalties on such production, including $95 million from Chevron, $56 million from Shell, $32 million from BP Amoco, $26 million from Conoco and $11.9 million from Devon Energy.

25

Department's recoveries also included over $140 million in settlements with twenty-five brokerage firms. These companies allegedly sold open market securities with artificially low yields to municipalities refunding tax-exempt bonds, thereby reducing the municipalities' purchase of special low-interest Treasury bonds. Defense procurement fraud accounted for another $100 million in recoveries, including up to $54 million from the Boeing Corporation to resolve allegations that it placed defective transmission gears in army Chinook helicopters.

The Department's record level of recoveries for fiscal year 2000 also included the following:

- $74 million from Anthem Blue Cross and Blue Shield, formerly the Medicare Part A intermediary for Connecticut, to resolve claims that it underreported the total amount of interim payments by hospitals to improve scores on Health Care Financing Administration evaluations;

- $53 million from Gambro Healthcare Patient Services, Inc. to resolve allegations that it billed Medicare for unnecessary laboratory tests;

- $35 million from Jacobs Engineering Group in connection with allegations that it improperly charged overhead costs to various government contracts;

- $33.5 million from Toshiba Corporation to settle claims arising from its sale of defective computer laptops to various federal agencies;

- $31 million from Community Health Systems for allegedly "upcoding" - the improper assignment of diagnostic codes to hospital inpatient discharges for the purpose of increasing reimbursement amounts to various hospital services; and

- $16.6 million from two government contractors, CRSS, Inc. and Metcalf & Eddy, for alleged false billings in connection with the construction of an air defense system in Saudi Arabia.

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00-641

N/S
Civil
Criminal

FIRST REGULAR SESSION

HOUSE BILL NO. 193

91ST GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE HOSMER.

Pre-filed December 19, 2000, and 1000 copies ordered printed.

ANNE C. WALKER, Chief Clerk

0263L.01I

AN ACT

To amend chapter 537, RSMo, by adding thereto two new sections relating to false claims against the state, with penalty provisions.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Chapter 537, RSMo, is amended by adding thereto two new sections, to be known as sections 537.800 and 537.805, to read as follows:

537.800. 1. Any person who:

(1) Knowingly presents, or causes to be presented, to an official or employee of the state a false or fraudulent claim for payment or approval;

(2) Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the state;

(3) Knowingly delivers, or causes to be delivered, less property or money used, or to be used by the state, than the amount for which the person receives a certificate or receipt;

(4) Knowingly delivers a document certifying receipt of property used, or to be used, by the state without completely knowing that the information on the receipt is true;

(5) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an official or employee of the state who lawfully may not sell or pledge the property; or

(6) Knowingly 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 state;

(7) Conspires to defraud the state by getting a false or fraudulent claim allowed or paid;

is liable to the state for a penalty of not less than five thousand dollars and not more than ten thousand dollars, plus three times the amount of damages which the state sustains because of the act of that person.

2. If the court finds that:

(1) The person committing the violation of this subsection furnished officials of the state responsible for investigating false claims violations with all information known to such person about the violation within thirty days after the date on which the defendant first obtained the information;

(2) Such person fully cooperated with any state investigation of such violation; and

(3) At the time such person furnished the state with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess only the amount of damages which the state sustains because of the act of the person. The court may also grant immunity from criminal prosecution to an individual for good cause at the request of the state. Any person violating subsection 1 of this section shall also be liable for the costs of any civil action brought to recover any such damages or penalties.

3. For the purposes of this section, the following terms mean:

(1) "Claim" includes, but is not limited to, each request or demand, whether under a contract or otherwise, for money or property which is made to the state or to a contractor, grantee, or other recipient if the state provides any portion of the money or property which is requested or demanded, or if the state will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded;

(2) "Knowing" and "knowingly", a person:

(a) Has actual knowledge of the information;

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

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

537.805. 1. The attorney general shall investigate violations of section 537.800. The attorney general may bring a civil action if the attorney general finds that a person has violated or is violating section 537.800.

2. Any person may bring a civil action for a violation of section 537.800 in the name of the person and on behalf of the state. The action shall be brought in the name of the state. No such action shall be dismissed without the written consent of the attorney general

28

and the court.

3. A copy of the petition filed by any person pursuant to sections 537.800 to 537.805 shall be served on the attorney general along with a disclosure statement describing the fraudulent acts or omissions and setting forth all evidence known to the person in support of the claims. The attorney general may proceed with the action by entering an appearance within one hundred eighty days of being served. The attorney general may, for good cause, extend such one hundred eighty-day period upon request to the court, as necessary. The person bringing the action may proceed with the action if the attorney general:

(1) By the end of the one hundred eighty-day period or whatever extensions are granted by the court does not enter, file a continuance or give written notice to the court of intent not to enter, the action; or

(2) Does not proceed with the action with reasonable diligence within six months after entering an appearance, or within additional time the court allows after notice.

4. If the attorney general proceeds with the action, the action is conducted solely by the state, with notice to the person who filed the action as another party. The state is not bound by an act of the person bringing the action.

5. Unless the state proceeds with the action, the court shall dismiss an action brought by the person if the action is based on evidence or information known to the state when the action was brought.

6. If the state proceeds with the action, the person bringing the action may receive an amount the court decides is reasonable for disclosing evidence or information the state did not have when the action was brought. The amount may not be more than twenty-five percent nor less than fifteen percent of the proceeds of the action plus costs and a reasonable attorney's fee and shall be paid out of those proceeds.

7. If the state does not proceed with an action, the person bringing the action may receive an amount the court decides is reasonable for collecting the penalty and damages. The amount may not be more than thirty-five percent nor less than twenty-five percent of the proceeds of the action or settlement and shall be paid out of those proceeds. The person may also recover costs and reasonable attorney's fees from the defendant.

8. The state shall not be liable for costs or attorney's fees a person incurs in bringing an action pursuant to this section.

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

| 3729.False claims

(a) Liability for certain acts. Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

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

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not 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 or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that--

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had

commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

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

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986 [Title 26, USCS].

TITLE 31. MONEY AND FINANCE SUBTITLE III. FINANCIAL MANAGEMENT CHAPTER 37. CLAIMS SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT 31 USCS | 3730 (1994)

| 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to *qui tam* actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

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

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to *qui tam* plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which 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 in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee 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 because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT
31 USCS | 3731 (1994)

| 3731. False claims procedure

(a) A subpena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title [31 USCS | 3730] may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 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 United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

TITLE 31. MONEY AND FINANCE SUBTITLE III. FINANCIAL MANAGEMENT CHAPTER 37. CLAIMS SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT 31 USCS | 3732 (1994)

| 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT
31 USCS | 3733 (1994)

| 3733. Civil investigative demands

(a) In general.

(1) Issuance and service. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person--

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony. The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines.

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall--

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall--

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall--

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) Protected material or information.

(1) In general. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under--

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction.

(1) By whom served. Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons.

(1) Legal entities. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by--

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. Service of any such demand or petition may be made upon any natural person by--

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(e) Proof of service. A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material.

(1) Sworn certificates. The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by--

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by--

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any

information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations.

(1) Procedures. The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony.

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts.

(1) Designation. The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under

regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe--

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and--

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly--

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated. Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings.

(1) Petition for enforcement. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition

addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the

United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction. Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure exemption. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) Definitions. For purposes of this section--

(1) the term "false claims law" means--

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes--

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

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To: Senate Judiciary Committee

From: Jerry Slaughter
Executive Director

Date: February 19, 2002

Subject: SB 535; civil penalties for Medicaid fraud

The Kansas Medical Society appreciates the opportunity to appear today as you consider the SB 535, which would create new statutory authority to assess civil monetary penalties for Medicaid fraud. We believe that providers or other individuals who intentionally defraud the Medicaid program should be prosecuted. However, we question the need for this bill and have some concerns about a key definition it includes.

There already exists ample statutory authority, both federal and state, to investigate and prosecute fraud in Medicaid. In addition to the criminal sanctions contained in the Kansas Medicaid Fraud Control Act found at K.S.A. 21-3844, *et seq*., the federal Office of Inspector General within the Department of Health and Human Services is empowered under Title XI of the Social Security Act (Section 1128A) to assess civil monetary penalties against entities found to have submitted false claims or committed fraud in the Medicare and Medicaid programs. In addition, the Program Fraud Civil Remedies Act (31 U.S.C. Sections 3801-12) also authorizes the OIG to levy civil monetary penalties and assessments against entities who make false statements or claims to any federal agency. The Anti-Fraud and Abuse Amendments of 1977 to Title XIX of the Social Security Act establishes the state Medicaid Fraud Control Units (MFCUs), which also operate in Kansas. Additionally, the Health Insurance Portability and Accountability Act or 1996 (HIPAA) also further authorizes OIG to conduct investigations, audits and evaluations related to health care fraud. In other words, there are numerous laws already on the books that contain both civil and criminal penalties for committing fraud in government programs such as Medicaid.

Setting aside for the moment our questions about the need for additional statutory tools to prosecute fraud, a provision in SB 535 particularly concerns us. The current state Medicaid Fraud Control Act at K.S.A. 21-3846 (a), currently defines making a false claim as "knowingly *and with intent to defraud*...." (emphasis added). Now SB 535 in section 1, (b)(1)(A) creates civil penalties for anyone who "knowingly presents, or causes to be presented, to the Medicaid program, a false or fraudulent claims for payment...." The bill then qualifies "knowingly" in section 1 (a)(2) to "*not require proof of specific intent to defraud*;" (emphasis added). Put

SJud 2-19-02 att3

another way, if this provision were enacted as it is written, a health care provider would be potentially in violation of the law for both intentional and *unintentional* acts relating to submitting claims in Medicaid programs.

For providers, this creates an untenable situation. Is the state going to prosecute simple errors in the billing office which go undetected for several months? The federal government has specifically not attempted to prosecute unintentional errors, because it has a chilling effect on participation in the program. Because these programs are complex for providers, with significant compliance requirements involving all aspects of service delivery, there are always going to be mistakes in billing related to eligibility, benefit, and medical necessity considerations. For physicians - where reimbursement for vast majority of services has not been increased since 1976, and where Medicaid fees often approximate only twenty to thirty cents on the dollar - the specter of being prosecuted with state civil penalties of $5,000 to $10,000, plus treble damages, for unintentional acts, does not send an encouraging or positive message about their participation in Medicaid related programs.

Our view is that there already exists in federal and state law plenty of legal authority to prosecute and punish those who defraud the Medicaid program. There are criminal and civil penalties galore, and adding state civil penalties does nothing more than heap additional financial punishment onto existing sanctions. For that matter, anyone who is convicted of Medicaid fraud is finished anyway, as their practice from all government programs is eliminated, followed in short order by their exclusion from the networks of private insurance plans. We do feel strongly that if you pass this bill, that the provision which punishes unintentional fraud be clarified or eliminated, so that honest mistakes or inadvertent violations do not carry civil penalties. Thank you for the opportunity to offer these comments.

Memorandum

KANSAS HOSPITAL ASSOCIATION

Donald A. Wilson
President

February 19, 2002

To: Senate Judiciary Committee
From: Thomas L. Bell
Senior Vice President/Legal Counsel
Re: Senate Bill 535

The Kansas Hospital Association appreciates the opportunity to comment regarding the provisions of Senate Bill 535. This bill creates a state level Medicaid "false claims act". We would like to preface our remarks by emphasizing that Kansas hospitals have no tolerance whatsoever for Medicaid fraud and abuse. It should be uncovered where found and prosecuted to the fullest extent of the law. We also feel, however, that the addition of a new state level false claims act should be looked at in the context of other applicable laws and regulatory activities.

Currently, Kansas has the Medicaid Fraud Control Act that provides for both criminal penalties and recovery of monies (if convicted). For example, KSA 21-3851 states that any person convicted of violation of the Kansas Medicaid Fraud Control act, may be liable, in addition to any other criminal penalties for "payment of full restitution of the amount of the excess payments," "payment of interest on the amount of any excess payments at the maximum legal rate ...," and "payment of all reasonable expenses that have been necessarily incurred in the enforcement of..." the act including, but not limited to, the costs of the investigation, litigation and attorney fees. Additionally, existing SRS regulations allow the agency to terminate a provider for civil or criminal fraud against Kansas Medicaid. K.A.R. 30-5-60(a)(12).

There also exists a federal false claims act that allows the federal government to take action against a provider for fraud against any federal or state health care program including Medicaid. Over approximately the last decade this federal false claims act has been the subject of much debate and has been used by the government to accuse health care providers of fraudulent activity. Health care providers generally feel that in numerous instances this law was used inappropriately to prosecute honest clerical or other errors that result from an inadvertent misinterpretation of law or regulations.

SJud 2-19-02 att 4

Other federal enforcement activities are incredibly specific concerning the kind of health care oversight the government currently pursuing. For example, for this year the Department of Health and Human Services Office of Inspector General has announced that it will be examining literally hundreds of activities related to Medicare and Medicaid issues. Our point here is not to debate the federal government's use of the False Claims Act or the OIG's choice of topics to study. Nor are we necessarily opposed to giving the Attorney General another tool to combat Medicaid fraud. We simply suggest that before the Legislature enacts a new state level False Claims Act, it should carefully consider how such a new law would interact with other laws and regulatory activities and, ultimately, whether it is truly needed.

Kansas Professional Sureties

TESTIMONY
SENATE JUDICIARY COMMITTEE
SENATE BILL NO. 536
February 19, 2002

Dear Chairman Vratil and Honorable Members of the Senate Judiciary Committee:

Thank you for the opportunity to appear before you this morning. I appear on behalf of the Kansas Professional Sureties. Sureties, or bail bondsman, provide a valuable service to the judicial branch of government and to individuals involved in legal matters before the courts.

We want to express our support Senate Bill No. 536 and would like to offer the attached amendment for your consideration.

Professional surety services include issuing and depositing the required forms for bond or appearance with the court and recovery of defendants for violations of court orders or bonds conditions. Professional sureties can get into a situation during the recovery of a defendant where their own safety comes into question. In these cases, the surety needs to wear the proper protective covering (or body armor) to ensure their own security and that of others. Therefore, we believe that an additional exemption for a professional surety is appropriate and necessary.

Testimony presented by Douglas E. Smith

Session of 2002

SENATE BILL No. 536

By Committee on Judiciary

2-7

AN ACT concerning crimes, criminal procedure and punishment; creating certain crimes involving use and possession of body armor and prescribing penalties therefor.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Criminal use of body armor is committing any person felony while wearing body armor.

(b) The provisions of this section shall not apply to: (1) A uniformed or properly identified state, county or city law enforcement officer, while such officer is engaged in the performance of such officer's duty; or

(2) a security officer, while such officer is engaged in the performance of such officer's duty.

(b)(3) a professional surety, while such professional surety is engaged in the performance of such professional surety's duty.

(c) As used in this section: (1) "Body armor" means clothing or a device designed or intended to protect a person's body or a portion of a person's body from death or injury caused by a firearm; and

(2) "security officer" means a person lawfully employed to protect another person or to protect the property of another person.

(c)(3) "professional surety" means person or entity authorized or appointed by the court to perform professional surety services for court ordered bail and appearance bonds.

(d) Criminal use of body armor is a severity level 5, person felony.

(e) The provisions of this section shall be part of and supplemental to the Kansas criminal code.

Sec. 2. (a) Criminal possession of body armor is possession, purchase or ownership of body armor by a person who has been convicted of a person felony.

(b) (1) The provisions of this section shall not apply to any person who has been granted permission to possess, purchase or own body armor as provided in this section.

(2) (A) A person who has been convicted of a person felony whose employment, livelihood or safety is dependent on such person's ability to purchase, own, possess or use body armor may petition the county sheriff of the county in which such person resides for written permission to purchase, own, possess or use body armor.

(B) The sheriff may grant a person who properly petitions the sheriff under this subsection written permission to purchase, own, possess or use body armor as provided in this section if the sheriff determines that the petitioner is likely to use body armor in a safe and lawful manner and has

reasonable need for the protection provided by body armor.

(C) In making the determination required under this subsection the sheriff must consider the petitioner's continued employment, the interests of justice and other circumstances justifying issuance of written permission to purchase, own, possess or use body armor.

(D) The sheriff may restrict written permission issued to a petitioner under this section in any manner determined appropriate by the sheriff. If permission is restricted, the sheriff must state the restrictions in the permission document.

(E) Sheriffs shall exercise broad discretion in determining whether to issue written permission to purchase, own, possess or use body armor under this section. Nothing in this section requires a sheriff to issue written permission to any particular petitioner. The issuance of written permission to purchase, own, possess or use body armor under this section does not relieve any person or entity from criminal liability that might otherwise be imposed.

(F) A person who receives written permission from a sheriff to purchase, own, possess or use body armor must have the written permission in such person's possession when purchasing, owning, possessing or using body armor.

(3) A law enforcement agency may issue body armor to a person who is in the custody of a law enforcement agency or a local or state correctional facility or who is a witness to a crime for his protection without a petition being filed under this subsection. If the law enforcement agency issues body armor to a person under this subsection, the law enforcement agency must document the reasons for issuing the body armor and retain a copy of that document as an official record. The law enforcement agency must issue written permission to the person to possess and use body armor under this section.

(c) As used in this section, "body armor" means the same as provided in section 1, and amendments thereto.

(d) Criminal possession of body armor is a severity level 8, person felony.

(e) The provisions of this section shall be part of and supplemental to the Kansas criminal code.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

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Ronald R. Hein
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Email: rhein@hwchtd.com

Testimony re: SB 536
Senate Judiciary Committee
Presented by Ronald R. Hein
on behalf of
Prairie Band Potawatomi Nation
February 19, 2002

Mr. Chairman, Members of the Committee:

My name is Ron Hein, and I am legislative counsel for the Prairie Band Potawatomi Nation. The Prairie Band Potawatomi Nation is one of the four Kansas Native American Indian Tribes.

The Prairie Band Potawatomi Nation is neutral on SB 536 only because we are not sure whether this legislation would impact our Tribal law enforcement officers. The exemption for law enforcement officers only includes state, county, or municipal law enforcement officers. However, federal law enforcement officers do not seem to be included, nor do Tribal law enforcement officers.

I have attached a balloon amendment that would solve the problem for Tribal law enforcement officers.

I would also call to the committee's attention that the Senate has passed legislation two years in a row that would grant Tribal law enforcement officers the same privileges and immunities of other law enforcement officers when they are called to assist other law enforcement officers. The House has still not acted on that legislation.

That was a simple first step in recognizing that Tribal law enforcement officers play a role in the efforts of all law enforcement personnel in this state to deal with issues of crime, terrorism, and other threats.

An argument could be made that the "security officer" exemption would cover Tribal law enforcement officers, although we are not sure if that is the intent of the language.

In light of these questions, we would urge the committee to adopt the balloon amendment.

Thank you very much for permitting me to testify, and I will be happy to yield to questions.

SJud
2-19-02
att 6

Session of 2002

SENATE BILL No. 536

By Committee on Judiciary

2-7

AN ACT concerning crimes, criminal procedure and punishment; creating certain crimes involving use and possession of body armor and prescribing penalties therefor.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) Criminal use of body armor is committing any person felony while wearing body armor.

(b) The provisions of this section shall not apply to: (1) A uniformed or properly identified state, county or city law enforcement officer, while such officer is engaged in the performance of such officer's duty; or

(2) a security officer, while such officer is engaged in the performance of such officer's duty; or

(3) a tribal law enforcement officer, while such officer is engaged in the performance of such officer's duty.

(c) As used in this section: (1) "Body armor" means clothing or a device designed or intended to protect a person's body or a portion of a person's body from death or injury caused by a firearm; and

(2) "security officer" means a person lawfully employed to protect another person or to protect the property of another person.

(d) Criminal use of body armor is a severity level 5, person felony.

(e) The provisions of this section shall be part of and supplemental to the Kansas criminal code.

Sec. 2. (a) Criminal possession of body armor is possession, purchase or ownership of body armor by a person who has been convicted of a person felony.

(b) (1) The provisions of this section shall not apply to any person who has been granted permission to possess, purchase or own body armor as provided in this section.

(2) (A) A person who has been convicted of a person felony whose employment, livelihood or safety is dependent on such person's ability to purchase, own, possess or use body armor may petition the county sheriff of the county in which such person resides for written permission to purchase, own, possess or use body armor.

(B) The sheriff may grant a person who properly petitions the sheriff under this subsection written permission to purchase, own, possess or use body armor as provided in this section if the sheriff determines that the petitioner is likely to use body armor in a safe and lawful manner and has