

CHAPTER 2013-104

Committee Substitute for Committee Substitute for House Bill No. 935

An act relating to the Florida False Claims Act; amending s. 68.081, F.S.; revising a cross-reference; deleting a statement of purpose; amending s. 68.082, F.S.; deleting, revising, and providing definitions; revising conditions under which a person is liable for a specified civil penalty; amending s. 68.083, F.S.; revising terminology; revising language concerning who may intervene or bring a related action after a person files an action under the act; creating s. 68.0831, F.S.; providing for contingent effect; providing a definition; authorizing the Department of Legal Affairs to issue subpoenas for specified purposes before the institution of civil proceedings; providing requirements for the content and service of subpoenas; providing that such subpoenas may not require specified protected documents or testimony; specifying that the department's power to require the appearance of witnesses or production of documents or other tangible evidence located outside the state is unaffected; providing for petitions to modify or set aside subpoenas; providing for orders to comply with subpoenas; providing for the examination of witnesses; providing for review of transcripts of testimony; authorizing the department to stipulate to protective orders of submitted documents and information; providing for natural persons who decline to testify or produce documents after asserting a privilege against self-incrimination to be ordered to testify or produce documents; providing for contempt to comply with such orders; providing for examination of testimony, answers, or materials by the person who produced such materials or answers; providing for construction; prohibiting specified actions by a person knowing or having reason to believe that a subpoena is pending; providing civil penalties; amending s. 68.084, F.S.; clarifying that the department may dismiss actions at any point; revising language concerning the costs to the department for continuing to receive pleadings and transcripts of an action after it has elected to withdraw; providing that the state may elect to pursue available alternative remedies, including administrative proceedings; specifying what constitutes a final finding or conclusion in an alternative proceeding that is binding on all parties to an action under the act; amending s. 68.085, F.S.; providing for successful plaintiffs to receive, in addition to a portion of the amount recovered, awards of expenses and attorney fees and costs; amending s. 68.086, F.S.; deleting references to awards of attorney fees to successful plaintiffs; revising provisions relating to awards of attorney fees to the department; amending s. 68.087, F.S.; revising terminology; revising provisions relating to dismissal of an action if substantially the same allegations or transactions as alleged in the action were publicly disclosed; amending s. 68.089, F.S.; providing for the treatment for statutes of limitations purposes of pleadings filed in interventions by the department; amending s. 68.09, F.S.; providing for estoppel as to certain matters following a final judgment or decree rendered in favor of the state or the

Federal Government in certain criminal proceedings; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 68.081, Florida Statutes, is amended to read:

68.081 Florida False Claims Act; short title; ~~purpose~~.—

(1) Sections ~~68.081-68.092~~ 68.081-68.09 may be cited as the “Florida False Claims Act.”

~~(2) The purpose of the Florida False Claims Act is to deter persons from knowingly causing or assisting in causing state government to pay claims that are false or fraudulent, and to provide remedies for obtaining treble damages and civil penalties for state government when money is obtained from state government by reason of a false or fraudulent claim.~~

Section 2. Section 68.082, Florida Statutes, is amended to read:

68.082 False claims against the state; definitions; liability.—

(1) As used in this section, the term:

(a) ~~“Agency” means any official, officer, commission, board, authority, council, committee, or department of the executive branch of state government.~~

~~(a)(b) “Claim” means includes any written or electronically submitted request or demand, whether under a contract or otherwise, for money or property, regardless of whether the state has title to the money or property, that: or services, which~~

1. Is presented made to any employee, officer, or agent of the state; an agency, or

2. Is made to a any contractor, grantee, or other recipient if the state agency provides or has provided any portion of the money or property requested or demanded, or if the state agency will reimburse the contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.

~~(b)(e)~~ “Department” means the Department of Legal Affairs, except as specifically provided in ss. 68.083 and 68.084.

(c) “Knowing” or “knowingly” means, with respect to information, that a person:

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.

No proof of specific intent to defraud is required. Innocent mistake shall be a defense to an action under this act.

(d) "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(e) "Obligation" means an established duty, fixed or otherwise, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

~~(f)(d)~~ "State government" means the government of the state or any department, division, bureau, commission, regional planning agency, board, district, authority, agency, or other instrumentality of the state.

(2) Any person who:

(a) Knowingly presents or causes to be presented ~~to an officer or employee of an agency~~ a false or fraudulent claim for payment or approval;

(b) Knowingly makes, uses, or causes to be made or used a false record or statement material to get a false or fraudulent claim ~~paid or approved by an agency~~;

(c) ~~Conspires to commit a violation of this subsection submit a false or fraudulent claim to an agency or to deceive an agency for the purpose of getting a false or fraudulent claim allowed or paid;~~

(d) Has possession, custody, or control of property or money used or to be used by the state ~~an agency~~ and, ~~intending to deceive the agency or knowingly conceal the property~~, delivers or causes to be delivered less property than all of that money or property ~~the amount for which the person receives a certificate or receipt~~;

(e) Is authorized to make or deliver a document certifying receipt of property used or to be used by the state ~~an agency~~ and, intending to defraud ~~deceive the state agency~~, makes or delivers the receipt without knowing that the information on the receipt is true;

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

(g) Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state, or knowingly conceals or knowingly and improperly avoids or decreases to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state ~~an agency~~;

is liable to the state for a civil penalty of not less than \$5,500 and not more than \$11,000 and for treble the amount of damages the state agency sustains because of the act ~~or omission~~ of that person.

(3) The court may reduce the treble damages authorized under subsection (2) if the court finds one or more of the following specific extenuating circumstances:

(a) The person committing the violation furnished the department officials of the agency responsible for investigating false claims violations with all information known to the person about the violation within 30 days after the date on which the person first obtained the information;

(b) The person fully cooperated with any official investigation of the violation; or

(c) At the time the person furnished the department agency with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this section with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation;

in which case the court shall award no less than 2 times the amount of damages sustained by the state agency because of the act of the person. The court shall set forth in a written order its findings and basis for reducing the treble damages award.

Section 3. Subsection (7) of section 68.083, Florida Statutes, is amended to read:

68.083 Civil actions for false claims.—

(7) When a person files an action under this section, no person other than the department ~~on behalf of the state~~ may intervene or bring a related ~~an~~ action ~~under this act~~ based on the facts underlying the pending action.

Section 4. Effective upon the same date that HB 1297 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law, section 68.0831, Florida Statutes, is created to read:

68.0831 Subpoena.—

(1) As used in this section, the term “department” means the Department of Legal Affairs.

(2) Whenever the department has reason to believe that any person may be in possession, custody, or control of any documentary material or may have any information, which documentary material or information is relevant to a civil investigation authorized by s. 68.083, the department

may, before the institution of a civil proceeding thereon, issue in writing and cause to be served upon the person a subpoena requiring the person to:

(a) Produce such documentary material for inspection and copying or reproduction;

(b) Answer, under oath and in writing, written interrogatories;

(c) Give sworn oral testimony concerning the documentary material or information; or

(d) Furnish any combination of such material, answers, or testimony.

(3) The subpoena shall:

(a) Be served upon the person in the manner required for service of process in this state or by certified mail showing receipt by the addressee or by the authorized agent of the addressee.

(b) State the nature of the conduct that constitutes the violation of this act and that is alleged to have occurred or to be imminent.

(c) Describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such materials to be reasonably identified.

(d) Prescribe a date and time at which the person must appear to testify, under oath or affirmation, or by which the person must answer written interrogatories or produce the documentary material for inspection or copying; however, such date shall not be earlier than 30 days after the date of service of the subpoena.

(e) Specify a place for the taking of testimony or for the submission of answers to interrogatories and identify the person who is to take custody of any documentary material. Inspection and copying of documentary material shall be carried out at the place where the documentary material is located or at such other place as may be thereafter agreed to by the person and such designated custodian. Upon written agreement between the person and the designated custodian, copies may be substituted for original documents.

(4) Such subpoena 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 this state in aid of a grand jury investigation; or

(b) The standards applicable to a discovery request under the Florida Rules of Civil Procedure, to the extent that the application of such standards

to any such subpoena is appropriate and consistent with the provisions and purposes of this act.

(5) This section does not limit the power of the department to require the appearance of witnesses or production of documents or other tangible evidence located outside the state.

(6) Within 30 days after the service of a subpoena upon any person or at any time before the return date specified therein, whichever period is longer, the person served may file, and serve on the department, a petition for an order of the court modifying or setting aside the subpoena. Any such petition shall be filed in the circuit court of the Second Judicial Circuit in and for Leon County. The time allowed for compliance in whole or in part with the subpoena as deemed proper and ordered by the court shall not run while the petition is pending before the court. The petition shall specify each ground upon which the petitioner relies in seeking relief and may be based upon the failure of the subpoena to comply with this section or upon any constitutional or other legal right or privilege of such person.

(7) In case of the failure of any person to comply in whole or in part with a subpoena and when such person has not filed a petition under subsection (6), the circuit court of the Second Judicial Circuit in and for Leon County, upon application of the department, may issue an order requiring compliance. The failure to obey the order of the court shall be punishable as a contempt of court.

(8) The examination of all witnesses under this section shall be conducted by the department before an officer authorized to administer oaths in this state. The testimony shall be taken stenographically or by a sound-recording device. Any person compelled to appear under a subpoena for oral testimony pursuant to this section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, either upon the request of such person or upon counsel's own initiative, 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 any such objection. If such person refuses to answer any question, the person conducting the examination may petition the circuit court as provided by subsection (11).

(9) When the testimony is fully transcribed, the person conducting the deposition shall afford the witness, and counsel, if any, a reasonable opportunity to examine the transcript, and the transcript shall be read to or by the witness, unless such examination and reading is waived by the witness. Any changes in form or substance that the witness desires to make shall be entered and identified upon the transcript by the officer or the department, 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 waives the signing in writing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after his or her being afforded a reasonable opportunity to examine it, the person

conducting the examination shall sign it and state on the record the fact of the waiver, illness, absence, or refusal to sign, together with the reason, if any, given therefor. Any person required to testify or to submit documentary evidence is entitled, on payment of reasonable costs, to procure a copy of any document produced by such person and of his or her own testimony as stenographically reported or, in the case of a deposition, as reduced to writing by or under the direction of the person taking the deposition.

(10) The department shall have the authority to stipulate to protective orders with respect to documents and information submitted in response to a subpoena under this section.

(11) The department may request that any natural person who refuses to comply with this section on the ground that the testimony or documents may incriminate him or her be ordered by the circuit court to provide the testimony or the documents. Except in a prosecution for perjury, a natural person who complies with a court order to provide testimony or documents after asserting a privilege against self-incrimination to which he or she is entitled by law may not be subject to a criminal proceeding with respect to the transaction to which he or she is required to testify or produce documents. Any natural person who fails to comply with such a court order to testify or produce documents may be adjudged in contempt and imprisoned until the time the person purges himself or herself of the contempt.

(12) While in the possession of the custodian, documentary material, answers to interrogatories, and transcripts of oral testimony shall be available, under such reasonable terms and conditions as the department shall prescribe, for examination by the person who produced such materials or answers or that person’s duly authorized representative.

(13) This section does not impair the authority of the department to:

(a) Institute a civil proceeding under s. 68.083;

(b) Invoke the power of a court to compel the production of evidence before a grand jury; or

(c) Maintain the confidential and exempt status of the complaint and any other information as provided in s. 68.083(8).

(14)(a) A person who knows or has reason to believe that a subpoena pursuant to this section is pending shall not:

1. Alter, destroy, conceal, or remove any record, document, or thing with the purpose of impairing its verity or availability in such proceeding or investigation; or

2. Make, present, or use any record, document, or thing knowing it to be false.

(b) Any natural person who violates this subsection is subject to a civil penalty of not more than \$100,000, reasonable attorney fees, and costs. Any other person who violates this subsection is subject to a civil penalty of not more than \$1 million, reasonable attorney fees, and costs.

Section 5. Subsections (2) through (5) of section 68.084, Florida Statutes, are amended to read:

68.084 Rights of the parties in civil actions.—

(2)(a) The department may at any point voluntarily dismiss the action notwithstanding the objections of the person initiating the action.

(b) Subject to s. 17.04, nothing in this act shall be construed to limit the authority of the department or the qui tam plaintiff to compromise a claim brought in a complaint filed under this act if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.

(c) Upon a showing by the department that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the department'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, including, but not limited to:

1. Limiting the number of witnesses the person may call;
2. Limiting the length of the testimony of the person's witnesses;
3. Limiting the person's cross-examination of witnesses; or
4. 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 department elects not to proceed with the action, the person who initiated the action has the right to conduct the action. If the Attorney General, as head of the department, or the Chief Financial Officer, as head of the Department of Financial Services, so requests, it shall be served, ~~at the requesting department's expense,~~ with copies of all pleadings and motions filed in the action along with ~~and~~ copies of all deposition transcripts at the requesting department's expense. When a person proceeds with the action, the court, without limiting the rights of the person initiating the action, may nevertheless permit the department to intervene and take over the action on behalf of the state at a later date upon showing of good cause.

(4) ~~Regardless of whether or not~~ the department proceeds with the action, upon a showing by the department that certain actions of discovery by the person initiating the action would interfere with an investigation by the state government or the 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 by the department that the criminal or civil investigation or proceeding has been pursued with reasonable diligence and any proposed discovery in the civil action will interfere with an ongoing criminal or civil investigation or proceeding.

(5) Notwithstanding paragraph (2)(b), the state may elect to pursue its claim through any available alternate remedy, 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 the person would have had if the action had continued under this section ~~The application of one civil remedy under this act does not preclude the application of any other remedy, civil or criminal, under this act or any other provision of law. Civil remedies under this act are supplemental, not mutually exclusive. 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 As used in this subsection, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is the term “final” means not subject to judicial review.~~

Section 6. Section 68.085, Florida Statutes, is amended to read:

68.085 Awards to plaintiffs bringing action.—

(1)(a) If the department proceeds with ~~and prevails in~~ an action brought by a person under this act, subject to the requirements of paragraph (b), the person shall receive except as provided in subsection (2), the court shall order the distribution to the person of at least 15 percent but not more than 25 percent of the proceeds of the recovered under any judgment obtained by the department in an action under s. 68.082 or of the proceeds of any settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.

(b)(2) ~~If the department proceeds with an action which the court finds the action to be based primarily on disclosures of specific information, other than information that provided by the person bringing the action, relating to allegations or transactions in a criminal, civil, or administrative hearing; a legislative, administrative, inspector general, or auditor general 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 recovered under a judgment or received in settlement of a claim under this act, taking into account the significance of the~~

information and the role of the person bringing the action in advancing the case to litigation.

(c) Any payment to a person under paragraph (a) or paragraph (b) shall be made from the proceeds. The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

~~(2)(3)~~ If the department does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount that ~~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 recovered under a judgment rendered in an action under this act or in settlement of a claim under this act. ~~The person shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.~~

~~(3)(4)~~ Following any distributions under subsection (1) or, ~~subsection (3)~~, the state entity ~~agency~~ injured by the submission of a false or fraudulent claim shall be awarded an amount not to exceed its compensatory damages. If the action was based on a claim of funds from the state Medicaid program, 10 percent of any remaining proceeds shall be deposited into the Operating Trust Fund to fund rewards for persons who report and provide information relating to Medicaid fraud pursuant to s. 409.9203. Any remaining proceeds, including civil penalties awarded under s. 68.082, shall be deposited in the General Revenue Fund.

~~(5)~~ Any payment under this section to the person bringing the action shall be paid only out of the proceeds recovered from the defendant.

~~(4)(6)~~ Regardless of whether or not the department proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of s. 68.082 upon which the action was brought, the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action that ~~which~~ the person would otherwise receive under this section, taking into account the role of the 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 s. 68.082, the 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 department to continue the action.

Section 7. Section 68.086, Florida Statutes, is amended to read:

68.086 Expenses; attorney ~~attorney's~~ fees and costs.—

(1) If the department initiates an action under this act or assumes control of an action brought by a person under this act, the department shall be awarded its reasonable attorney attorney's fees, expenses, and costs.

~~(2) If the court awards the person bringing the action proceeds under this act, the person shall also be awarded an amount for reasonable attorney's fees and costs. Payment for reasonable attorney's fees and costs shall be made from the recovered proceeds before the distribution of any award.~~

~~(2)(3)~~ If the department does not proceed with an action under this act and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorney attorney's fees and expenses ~~costs~~ 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.

~~(3)(4)~~ No liability shall be incurred by the state ~~government, the affected agency, or the department~~ for any expenses, attorney attorney's fees, or other costs incurred by any person in bringing or defending an action under this act.

Section 8. Subsections (2), (3), and (6) of section 68.087, Florida Statutes, are amended to read:

68.087 Exemptions to civil actions.—

(2) In no event may a person bring an action under s. 68.083(2) based upon allegations or transactions that are the subject of a civil action or an administrative proceeding in which the state ~~agency~~ is already a party.

(3) ~~The~~ ~~No~~ court shall dismiss ~~have jurisdiction over~~ an action brought under this act unless opposed by the department, if substantially the same based upon the public disclosure of allegations or transactions as alleged in the action were publicly disclosed:

(a) In a criminal, civil, or administrative hearing in which the state is a party;

(b) In a legislative, administrative, inspector general, or other state Auditor General, Chief Financial Officer, or Department of Financial Services report, hearing, audit, or investigation; or

(c) From the news media,

unless the action is brought by the department; or ~~unless~~ the person bringing the action is an original source of the information. For purposes of this subsection, the term "original source" means an individual who, before a public disclosure under subsection (3), has voluntarily disclosed to the department the information on which allegations or transactions in a claim are based, or who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions ~~has direct and~~

~~independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the department before filing an action under this section act based on the information.~~

(6) No court shall have jurisdiction over an action brought under this act against a local government. ~~For the purposes of this subsection, the term “local government” means any county or municipality.~~

Section 9. Section 68.089, Florida Statutes, is amended to read:

68.089 Limitation of actions; effect of interventions by department.—A civil action under this act may not be brought:

(1) More than 6 years after the date on which the violation of s. 68.082 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 department state official 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.

(3) If the department elects to intervene and proceed with an action brought under s. 68.083(2), the department may file its own complaint or amend the complaint of a person who has brought an action under s. 68.083(2) to clarify or add detail to the claims in which the department is intervening and to add any additional claims with respect to which the department contends it is entitled to relief. For statute of limitations purposes, any such pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the state arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person. This subsection applies to any actions under s. 68.083(2) pending on or filed after July 1, 2013.

Section 10. Section 68.09, Florida Statutes, is amended to read:

68.09 Burden of proof.—

(1) In any action brought under this act, the department ~~State of Florida~~ or the qui tam plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(2) Notwithstanding any other provision of law, a final judgment or decree rendered in favor of the state or the Federal Government in any criminal proceeding concerning the conduct of the defendant that forms the basis for a civil cause of action under this act, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant in any action by the department pursuant to this act as to all matters as to which such judgment or decree would be an estoppel as if the department had been a party in the criminal proceeding.

Section 11. Except as otherwise expressly provided in this act, this act shall take effect July 1, 2013.

Approved by the Governor June 3, 2013.

Filed in Office Secretary of State June 3, 2013.