

Supreme Judicial Court
FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-12973

COMMONWEALTH OF MASSACHUSETTS *ex rel.* JOHAN ROSENBERG,
Plaintiff-Appellant,

v.

JPMORGAN CHASE & CO., ET AL.,
Defendants-Appellees.

On Appeal from A Suffolk Superior Court Final Judgment
Dismissing Plaintiff's Second Amended Complaint

BRIEF FOR *AMICUS CURIAE*
THE GREATER BOSTON CHAMBER OF COMMERCE
SUPPORTING APPELLEES AND AFFIRMANCE

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Date: 12/16/2020

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae, the Greater Boston Chamber of Commerce, is an independent, non-profit business association representing more than 1,300 businesses throughout the region. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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IDENTITY AND INTEREST OF AMICUS CURIAE
THE GREATER BOSTON CHAMBER OF COMMERCE

The Greater Boston Chamber of Commerce (“GBCC” or “Chamber”) is an independent, non-profit organization that is the convener, voice, and advocate of the Greater Boston business community. The Chamber represents more than 1,300 businesses of all sizes from virtually every industry and profession in the Greater Boston region.

To that end, the Chamber is committed to driving the region’s economic growth and prosperity by ensuring that it remains a competitive place to start, expand, and run a business. One aspect of the Commonwealth’s competitiveness is maintaining consistency with federal law and other states on issues that can negatively impact businesses. If Massachusetts adopts a policy that is an outlier in the extent to which it exposes businesses in the Commonwealth to higher litigation risks and costs than other states, it risks losing out on future growth.

The Chamber believes that the trial court’s decision is a fair, clear and consistent interpretation of statutes that impact its membership and the business community, and therefore submits this Amicus Curiae brief urging that the decision below be affirmed.

**RULE 17 (c) (5) DECLARATION
OF AMICUS AND COUNSEL**

Amicus Curiae and its counsel declare that:

- A. No party or party's counsel authored this brief in whole or in part;
- B. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief;
- C. No person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief; and
- D. Neither amicus curiae nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

POSITION OF AMICUS CURIAE

The Chamber urges affirmance of the Superior Court's judgment. The Chamber and its members share the concern of all Massachusetts citizens and taxpayers over false claims submitted to State and Municipal governmental entities. The Massachusetts False Claims Act ("MFCA") provides strong remedies and sanctions against such claims and directs that the Attorney General shall have the primary role of enforcing the MFCA. The Attorney General's office has a long and distinguished record of fulfilling that role by vigorous enforcement of the MFCA.

The Massachusetts Legislature also included provisions encouraging a limited class of private parties to assist in the enforcement of the MFCA subject to specific statutory guardrails. These guardrails are intended to protect government contractors and others doing business with the Commonwealth from undue risks of parasitic litigation and to protect the public treasury from being depleted by the unnecessary diversion of public recoveries into private hands.

In concluding that the MFCA should be interpreted in accordance with the interpretation given by the overwhelming majority of federal courts to comparable language in the Federal False Claims Act ("FFCA"), the trial judge properly construed and applied the Massachusetts statute and correctly rejected contentions that could expose Massachusetts businesses to a flood of unwarranted litigation.

ARGUMENT

Introduction

This case requires the Court to construe certain language of the MFCA's public disclosure bar for the first time.¹ Although an opinion of the Appeals Court once described the MFCA's legislative history as "scant," *Scannell v. Attorney General*, 70 Mass. App. Ct. 46, 49 n.4 (2007), amendments to the MFCA in 2012, including changes to Section 5G(c), shed meaningful light on the Legislature's intentions.

In 2012, Massachusetts was faced with the threat of losing significant amounts in federal aid because the MFCA was deemed not to provide the same protection against false claims as the FFCA.² The Massachusetts Legislature responded to this threat by amending the MFCA to bring it into conformity with

¹ The public disclosure bar states in relevant part: "The court shall dismiss an action or claim pursuant to sections 5B to 5O, inclusive . . . if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed . . . from the news media, unless the action is brought by the attorney general, or the relator is an original source of the information." G.L. c. 12 § 5G(c). While the statute defines certain relevant terms of the public disclosure bar, *see* G.L. c. 12 § 5A, it is silent as to others. As such, it does not define (i) what it means for "substantially the same allegations or transactions" to be publicly disclosed and (ii) whether a disclosure was made through the "news media."

² *See* Letter from Daniel R. Levinson, Inspector General, to Martha Coakley, Massachusetts Attorney General (Mar. 21, 2011), *available at* <https://web.archive.org/web/20120624023616/http://oig.hhs.gov/fraud/docs/falseclaimsact/Massachusetts.pdf> (last visited Dec. 14, 2020), reproduced in the Addendum (p. 20).

federal law.³ Specific changes were made to Section 5G(c) to adopt substantially the same language that was added to the FFCA in 2010. As amended, the MFCA conforms to the FFCA and preserves a strong public disclosure bar intended to prevent parasitic lawsuits based on matters of public record. As we discuss below, the legislative history establishes an intent that the MFCA follow the FFCA in all material respects, and that the MFCA be construed and applied consistently with federal decisions interpreting the FFCA.

I. THE COURT BELOW CORRECTLY CONSTRUED AND APPLIED THE MASSACHUSETTS FALSE CLAIMS ACT IN CONFORMITY WITH THE MAJORITY OF FEDERAL DECISIONS INTERPRETING THE FEDERAL FALSE CLAIMS ACT.

The MFCA's textual makeup and its legislative purpose inextricably link the public disclosure bar of the MFCA to that of the FFCA. A side-by-side comparison shows the significant substantive similarities between the two provisions:

³ St. 2012, c. 139, § 29.

<p align="center">Massachusetts Public Disclosure Bar⁴ G.L. c. 12, § 5G(c)</p>	<p align="center">Federal Public Disclosure Bar 31 U.S.C. § 3730(e)(4)(A)</p>
<p>The court shall dismiss an action or claim pursuant to sections 5B to 5O, inclusive, unless opposed by the commonwealth or any political subdivision thereof, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed:</p> <p style="padding-left: 40px;">(1) in a Massachusetts criminal, civil or administrative hearing in which the commonwealth is a party;</p> <p style="padding-left: 40px;">(2) in a Massachusetts legislative, administrative, auditor's or inspector general's report, hearing, audit or investigation; or</p> <p style="padding-left: 40px;">(3) from the news media,</p> <p style="padding-left: 40px;">unless the action is brought by the attorney general, or the relator is an original source of the information.</p>	<p>The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--</p> <p style="padding-left: 40px;">(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;</p> <p style="padding-left: 40px;">(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or</p> <p style="padding-left: 40px;">(iii) from the news media,</p> <p style="padding-left: 40px;">unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.</p>

In light of this virtually identical text, the legislative history of the relevant language of both the FFCA and the MFCA is of particular importance to the Court's construction of MFCA Section 5G(c). *See Dorrian v. LVNV Funding, LLC*, 479 Mass. 265, 272 (2018) (consulting legislative history of federal statute because it was "model" for Massachusetts statute under consideration).

⁴ Variances in the Massachusetts statute are highlighted in bold font for illustrative purposes.

A. The 2010 Amendments to the FFCA.

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (“ACA”). Pub. L. No. 111-148, 124 Stat. 119. Although the ACA narrowed the overall scope of the public disclosure bar, 31 U.S.C. § 3730(e)(4)(A), it reflects a deliberate legislative effort to accommodate the competing interests of identifying fraud against the government by incentivizing private citizens, and protecting honest businesses from opportunistic lawsuits based on publicly disclosed information.

The ACA changed the FFCA’s public disclosure bar from a jurisdictional requirement to a basis for compulsory dismissal, unless dismissal was opposed by the government.⁵ 31 U.S.C. § 3730(e)(4)(A). It also amended the quantum and type of publicly disclosed information that triggers the public disclosure bar by requiring “substantially the same allegations or transactions” to be publicly disclosed, as opposed to merely requiring the information to be “based upon the public disclosure of allegations or transactions.” *Id.*

⁵ Compare 31 U.S.C. § 3730(e)(4)(A) (1986) (“No court shall have *jurisdiction* over an action under this section based upon the public disclosure of allegations or transactions”) (emphasis added) with 31 U.S.C. § 3730(e)(4)(A) (2010) (“The court *shall* dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed”) (emphasis added).

Notably, the ACA did not adopt a proposed bill known as the False Claims Act Correction Act (“Correction Act”), that would have dramatically expanded the number of private *qui tam* actions. *See* False Claims Act Correction Act, H.R. 1788, 111th Cong. § 3(d)(4)(A) (2009) (proposing significant changes to the public disclosure bar).⁶ The Correction Act was never enacted, nor were its proposals to dramatically expand relator actions ever adopted by our Massachusetts Legislature.

B. In the 2012 Amendments to G.L. c. 12, § 5G(c), the Massachusetts Legislature Aligned the Public Disclosure Bar of the MFCA with its Federal Counterpart in the FFCA.

Substantive amendments to the MFCA were enacted in 2012 and, not surprisingly, were brought about by new developments at the federal level. St. 2012, c. 139, § 29.

Massachusetts had been certified previously as meeting certain requirements for receiving federal financial aid by having an adequate state false claims act.⁷ The Deficit Reduction Act of 2005, Pub. L. 109-171, 120 Stat. 4 (2006), requires

⁶ The False Claims Act Correction Act reflected a legislative effort to amend the FFCA to make it far more relator-friendly. Among other things, proponents of the Correction Act sought to limit the reach of the public disclosure bar so that “only actions where all essential parts of a case are derived from public disclosure can be dismissed.” H.R. Rep. 111-97, at 12 (2009).

⁷ The federal government shares a percentage of any amount recovered under a state’s false claims law with the state in question. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF THE INSPECTOR GENERAL, 71 F.R. 48552-02, OIG’S GUIDELINES FOR EVALUATING STATE FALSE CLAIMS ACTS, at *48553 (2006).

the Inspector General of the Department of Health and Human Services to determine whether a state has a false claims law in effect that meets certain criteria for federal medical assistance funding. 42 U.S.C. § 1396h(a)-(b). Section 1396h “creates a financial incentive for States to enact legislation that establishes liability to the State for individuals or entities that submit false or fraudulent claims to the State Medicaid Program.” U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF THE INSPECTOR GENERAL, 71 F.R. 48552-02, OIG’S GUIDELINES FOR EVALUATING STATE FALSE CLAIMS ACTS, at *48552 (2006).

In March 2011, however, the Inspector General notified the Commonwealth that the MFCA was deemed to “no longer meet[] the requirements of [Section 1396h]” due to several amendments to the FFCA that had taken place in the intervening years, including those brought on by ACA in 2010. Joseph M. Makalusky, *Blowing the Whistle on the Need to Clarify and Correct the Massachusetts False Claims Act*, 94 Mass. L. Rev. 41, 58 (2012), quoting Letter from Daniel R. Levinson, Inspector General, to Martha Coakley, Massachusetts Attorney General (Mar. 21, 2011). The Inspector General specifically highlighted the Massachusetts Act’s deviation from the FFCA’s recently-amended public disclosure bar as a basis for its non-compliance. *See* Inspector Levinson Letter to Attorney General Coakley (Mar. 21, 2011) (reproduced in the Addendum, p. 20). Massachusetts was “granted a grace period, expiring March 31, 2013, to amend the

Massachusetts False Claims Act and resubmit it to the OIG for approval.” This grace period permitted the Commonwealth to continue to receive financial aid in the interim. *Id.*⁸

Following the Inspector General’s letter, the Massachusetts Legislature used an outside section of the annual budget to amend the MFCA, and in particular the public disclosure bar, to mirror the language of the amended FFCA.⁹ The MFCA requires “substantially the same allegations or transactions” to be publicly disclosed through certain channels including the “news media” in order for the public disclosure bar to apply—just like its federal counterpart. The MFCA also defines an “original source” consistently with the definition found in the FFCA.¹⁰

⁸ The percentage of the Commonwealth’s share of such recoveries under the MFCA was threatened to be reduced by ten percentage points if the MFCA was not amended to conform to the FFCA’s standards, as amended in 2010. *See* Guidelines, *supra* (explaining financial incentive for state false claims laws to meet federal requirements).

⁹ St. 2012, c. 139, § 29.

¹⁰ Compare G.L. c. 12, § 5A (an “original source” is “an individual who: (1) prior to a public disclosure under paragraph (3) of section 5G, has voluntarily disclosed to the commonwealth or any political subdivision thereof the information on which allegations or transactions in a claim are based; or (2) has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the commonwealth or any political subdivision thereof before filing a false claims action”) with 31 U.S.C. § 3730(e)(4)(B) (“For purposes of this paragraph, “original source” means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed

The MFCA amendments took effect on July 1, 2012, well in advance of the expiration of the grace period and the loss of federal funds. Thereafter, the amended Massachusetts False Claims Act was submitted for federal review and the Office of the Inspector General determined that it met the requirements needed to qualify for the federal financial incentives. Letter from Daniel R. Levinson, Inspector General, to Martha Coakley, Massachusetts Attorney General (dated July 31, 2013), reproduced in the Addendum (p. 24).

When considered “in connection with [its] development and history, and with the history of the times and prior legislation,” *Plumb v. Casey*, 469 Mass. 593, 595 (2014), quoting *Quincy City Hosp. v. Rate Setting Comm'n*, 406 Mass. 431, 443 (1990), the language of MFCA Section 5G(c), as amended in 2012, compels the conclusion that the Legislature intended to create a false claims law in Massachusetts that mirrored its companion federal statute.

C. Since the Massachusetts Legislature Intended to Conform the Public Disclosure Bar of the MFCA to the Public Disclosure Bar of the FFCA, This Court Ordinarily Follows the Adjudged Construction of the Federal Statute by the Federal Courts.

In light of the intention of the Legislature, the MFCA’s public disclosure bar should be interpreted in harmony with the majority of federal decisions interpreting the FFCA public disclosure bar, so that Massachusetts can continue to be eligible

allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section”).

for federal aid. *See Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 611 (1980) (“Where the Legislature in enacting a statute follows a Federal statute, we follow the adjudged construction of the Federal statute by the Federal courts”); *Howard v. Town of Burlington*, 399 Mass. 585, 589 (1987) (“In construing Massachusetts statutes [this Court is] ordinarily guided by the construction given the parallel Federal statute by the Federal courts”).

The trial judge correctly concluded that the Massachusetts False Claims Act’s public disclosure bar should be interpreted in accordance with the interpretation given to the Federal False Claims Act’s public disclosure bar by the overwhelming majority of federal courts.

CONCLUSION

For the foregoing reasons, the Greater Boston Chamber of Commerce, as Amicus Curiae, urges this Court to affirm the judgment of the Superior Court dismissing the Plaintiff’s Second Amended Complaint.

Respectfully submitted,

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Washington, D.C. 20201

March 21, 2011

The Honorable Martha Coakley
Office of the Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

Dear Madam Attorney General:

The Office of Inspector General (OIG) of the U.S. Department of Health & Human Services (HHS) previously received your office's request to review the Massachusetts False Claims Act, Mass. Gen. Laws ch. 12, §§ 5A through 5O, under the requirements of section 1909 of the Social Security Act (the Act) and determined that the Massachusetts False Claims Act met those requirements. Section 1909 of the Act provides a financial incentive for States to enact laws that establish liability to the State for individuals and entities that submit false or fraudulent claims to the State Medicaid program. For a State to qualify for this incentive, the State law must meet certain requirements enumerated under section 1909(b) of the Act, as determined by the Inspector General of HHS in consultation with the U.S. Department of Justice (DOJ). As explained below, we have determined, after consulting with DOJ, that the Massachusetts False Claims Act no longer meets the requirements of section 1909 of the Act.

On May 20, 2009, the Fraud Enforcement and Recovery Act of 2009 (FERA) made numerous amendments to the Federal False Claims Act, 31 U.S.C. §§ 3729-33. On March 23, 2010, the Patient Protection and Affordable Care Act (ACA) amended the Federal False Claims Act. Also, on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) further amended the Federal False Claims Act. These three acts, among other things, amended bases for liability in the Federal False Claims Act and expanded certain rights of *qui tam* relators. As a result of the FERA, the ACA, and the Dodd-Frank Act, the Massachusetts False Claims Act is no longer in compliance with section 1909 of the Act. OIG also identified additional provisions in the Massachusetts False Claims Act that do not satisfy the requirements of section 1909 of the Act.

Section 1909(b)(1) of the Act requires the State law to establish liability for false or fraudulent claims described in the Federal False Claims Act with respect to any expenditure described in section 1903(a) of the Act. The Federal False Claims Act, as amended by the FERA, establishes liability for, among other things:

- knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval (removing the requirement that the claim be presented to an officer or employee of the Government);

- knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim;
- conspiring to commit a violation of the Federal False Claims Act; and
- knowingly making, using, or causing to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the Government.

See 31 U.S.C. § 3729(a). Relevant to the above-described bases for liability, the Federal False Claims Act, as amended by the FERA, includes an expanded definition of the term “claim” and defines the terms “obligation” and “material.” See 31 U.S.C. § 3729(b). In contrast, the Massachusetts False Claims Act does not establish liability for the same breadth of conduct as the Federal False Claims Act, as amended.

Section 1909(b)(2) of the Act requires the State law to contain provisions that are at least as effective in rewarding and facilitating *qui tam* actions for false and fraudulent claims as those described in sections 3730 through 3732 of the Federal False Claims Act. The Federal False Claims Act, as amended by the FERA and the Dodd-Frank Act, provides certain relief to any employee, contractor, or agent who is retaliated against because of lawful acts done in furtherance of a Federal False Claims Act action or efforts to stop violations of the Federal False Claims Act. See 31 U.S.C. § 3730(h). The Massachusetts False Claims Act does not provide these persons with as much protection from retaliatory action. Therefore, the Massachusetts False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Federal False Claims Act, as amended by the FERA, provides that for statute of limitations purposes, any Government complaint in intervention, whether filed separately or as an amendment to the relator’s complaint, shall relate back to the filing date of the relator’s complaint, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the relator’s complaint. See 31 U.S.C. § 3731(c). In contrast, the Massachusetts False Claims Act does not contain a similar provision. Therefore, the Massachusetts False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Federal False Claims Act, as amended by the ACA, provides that the court shall dismiss an action or claim under the Federal False Claims Act, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed: (1) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (2) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (3) by the news media, unless the action

is brought by the Attorney General or a person who is an original source of the information. See 31 U.S.C. § 3730(e)(4)(A). In contrast, the Massachusetts False Claims Act requires a court to dismiss a broader category of cases based on a public disclosure and does not give Massachusetts the opportunity to oppose the dismissal. Therefore, the Massachusetts False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

Further, the Federal False Claims Act, as amended by the ACA, defines “original source” as an individual who either: (1) prior to a public disclosure, voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based or (2) has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action. See 31 U.S.C. § 3730(e)(4)(B). In contrast, the Massachusetts False Claims Act has a more restrictive definition of “original source.” Therefore, the Massachusetts False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Federal False Claims Act provides that the court may reduce the relator’s share if it finds that the relator “planned and initiated” the violation upon which the action was brought. See 31 U.S.C. § 3730(d)(3). In contrast, the Massachusetts False Claims Act provides that the court may reduce the relator’s share if it finds that the relator “planned, initiated, or knowingly participated in” the violation. See Mass. Gen. Laws ch. 12, § 5F(5). Therefore, the Massachusetts False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Massachusetts False Claims Act provides that no court shall have jurisdiction over an action brought by a person who knew or had reason to know that the attorney general, the State auditor, or the inspector general already had knowledge of the situation. See Mass. Gen. Laws ch. 12, § 5G(3). In contrast, the Federal False Claims Act contains no such Government knowledge bar. Therefore, the Massachusetts False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Massachusetts False Claims Act provides that “[a]n individual who is or was employed by the commonwealth or any political subdivision thereof as an auditor, investigator, attorney, financial officer, or contracting officer who otherwise performed such functions for the commonwealth or who discovered or learned of the allegations or the underlying facts from such persons, may not bring [a *qui tam* action] that is based upon allegations or transactions that the relator discovered or learned of in such capacity.” See Mass. Gen. Laws ch. 12, § 5G(4). The Federal False Claims Act contains no such limitation. Therefore, the Massachusetts False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

Section 1909(b)(4) of the Act requires the State law to contain a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of the Federal False Claims Act.

As amended by the FERA, the Federal False Claims Act now expressly provides that its civil penalty shall be adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990. See 31 U.S.C. § 3729(a). Pursuant to the Federal Civil Penalties Inflation Adjustment Act, a civil penalty under the Federal False Claims Act is not less than \$5,500 and not more than \$11,000. In contrast, the Massachusetts False Claims Act provides for a penalty of not less than \$5,000 and not more than \$10,000. See Mass. Gen. Laws ch. 12, §§ 5B.

Massachusetts will be granted a grace period, ending March 31, 2013, to amend the Massachusetts False Claims Act and resubmit it to OIG for approval. Until March 31, 2013, Massachusetts will continue to qualify for the incentive under section 1909 of the Act. Resubmission to OIG of an amended act will toll the expiration of the grace period until OIG issues a letter deeming the act either compliant or not compliant with section 1909 of the Act. To continue to qualify for the incentive after March 31, 2013, or after the expiration of any tolling period, if applicable, Massachusetts must amend the Massachusetts False Claims Act to meet the requirements of section 1909 of the Act with reference to the Federal False Claims Act in effect on the date of this letter, submit it for review, and receive approval by OIG. If any provision of the Federal False Claims Act that is relevant to section 1909 of the Act is amended further, Massachusetts will again be granted a 2-year grace period from the date of enactment of any such amendments in which to amend its act to conform with the amended Federal False Claims Act and resubmit it to OIG for approval.

If you have any questions regarding this review, please contact me or have your staff contact Katie Arnholt, Senior Counsel, at 202-205-3203 or Tony Maida, Deputy Chief, Administrative and Civil Remedies Branch, at 202-205-9323.

Sincerely,

/Daniel R. Levinson/

Daniel R. Levinson
Inspector General



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



July 31, 2013

The Honorable Martha Coakley
Office of the Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

Attn: George Zachos, Chief, Medicaid Fraud Division

Dear Madam Attorney General:

The Office of Inspector General (OIG) of the U.S. Department of Health and Human Services (HHS) received your request to review the amended Massachusetts False Claims Act, Mass. Gen. Laws ch. 12, §§ 5A through 5O, under the requirements of section 1909 of the Social Security Act (the Act). Section 1909 of the Act provides a financial incentive for a State to enact a law relating to the submission of false or fraudulent claims to the State Medicaid program. For a State to qualify for this incentive, the State law must meet certain requirements enumerated under section 1909(b) of the Act, as determined by the Inspector General of HHS in consultation with the U.S. Department of Justice (DOJ). We have determined, after consulting with DOJ, that the Massachusetts False Claims Act meets the requirements of section 1909 of the Act.

Any amendment to the Massachusetts False Claims Act could affect OIG's determination that it meets the requirements of section 1909 of the Act. Therefore, please notify OIG of any amendment to the Massachusetts False Claims Act within 30 days after such amendment.

If you have any questions regarding this review, please contact me or have your staff contact Tamara Forys or Lisa Veigel at 202-619-0335.

Sincerely,

/Daniel R. Levinson/

Daniel R. Levinson
Inspector General

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)

Chapter 12. Department of the Attorney General, and the District Attorneys (Refs & Annos)

M.G.L.A. 12 § 5A

§ 5A. False claims; definitions applicable to Secs. 5A to 5O

Effective: July 1, 2012

[Currentness](#)

As used in sections 5A to [5O](#), inclusive, the following words shall, unless the context clearly requires otherwise, have the following meanings:--

“Claim”, a request or demand, whether pursuant to a contract or otherwise, for money or property, whether or not the commonwealth or a political subdivision thereof has title to the money or property, that: (1) is presented to an officer, employee, agent or other representative of the commonwealth or a political subdivision thereof; or (2) is made to a contractor, subcontractor, grantee or other person, if the money or property is to be spent or used on behalf of or to advance a program or interest of the commonwealth or political subdivision thereof and if the commonwealth or any political subdivision thereof: (i) provides or has provided any portion of the money or property which is requested or demanded; or (ii) will reimburse directly or indirectly such contractor, subcontractor, grantee or other person for any portion of the money or property which is requested or demanded. A claim shall not include requests or demands for money or property that the commonwealth or a political subdivision thereof has paid to an individual as compensation for employment with the commonwealth or a political subdivision thereof or as an income subsidy with no restrictions on that individual's use of the money or property.

“False claims action”, an action filed by the office of the attorney general or a relator under sections 5A to [5O](#), inclusive.

“False claims law”, sections 5A to [5O](#), inclusive.

“Knowing” or “knowingly”, possessing actual knowledge of relevant information, acting with deliberate ignorance of the truth or falsity of the information or acting in reckless disregard of the

truth or falsity of the information; provided, however, that no proof of specific intent to defraud shall be required.

“Material”, having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

“Obligation”, an established duty, whether or not fixed, 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 after the deadline for reporting and returning the overpayment under paragraph (10) of [section 5B](#).

“Original source”, an individual who: (1) prior to a public disclosure under [paragraph \(3\) of section 5G](#), has voluntarily disclosed to the commonwealth or any political subdivision thereof the information on which allegations or transactions in a claim are based; or (2) has knowledge that is independent of and materially adds to the publicly- disclosed allegations or transactions, and who has voluntarily provided the information to the commonwealth or any political subdivision thereof before filing a false claims action.

“Overpayment”, any funds that a person receives or retains, including funds received or retained under Title XVIII or XIX of the Social Security Act, to which the person, after applicable reconciliation, is not entitled.

“Person”, a natural person, corporation, partnership, association, trust or other business or legal entity.

“Political subdivision”, a city, town, county or other governmental entity authorized or created by law, including public corporations and authorities.

“Relator”, an individual who brings an action under [paragraph \(2\) of section 5C](#).

Credits

Added by [St.2000, c. 159, § 18](#). Amended by [St.2012, c. 139, § 22](#), eff. July 1, 2012.

[Notes of Decisions \(4\)](#)

M.G.L.A. 12 § 5A, MA ST 12 § 5A

Current through Chapter 113 of the 2020 Second Annual Session of the General Court.

End of Document

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Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title II. Executive and Administrative Officers of the Commonwealth (Ch. 6-28a)

Chapter 12. Department of the Attorney General, and the District Attorneys (Refs & Annos)

M.G.L.A. 12 § 5G

§ 5G. Actions brought against governor, lieutenant governor, attorney general, treasurer, secretary of state, etc.; jurisdiction

Effective: July 1, 2013

[Currentness](#)

(a) No court shall have jurisdiction over an action brought pursuant to [section 5C](#) against the governor, the lieutenant governor, the attorney general, the treasurer, the secretary of state, the auditor, a member of the general court, the inspector general or a member of the judiciary, if the action is based on evidence or information known to the commonwealth when the action was brought.

(b) An individual may not bring an action pursuant to paragraph (2) of said [section 5C](#) that is based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the commonwealth or any political subdivision thereof is already a party.

(c) The court shall dismiss an action or claim pursuant to [sections 5B to 5O](#), inclusive, unless opposed by the commonwealth or any political subdivision thereof, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed: (1) in a Massachusetts criminal, civil or administrative hearing in which the commonwealth is a party; (2) in a Massachusetts legislative, administrative, auditor's or inspector general's report, hearing, audit or investigation; or (3) from the news media, unless the action is brought by the attorney general, or the relator is an original source of the information.

Credits

Added by [St.2000, c. 159, § 18](#). Amended by [St.2012, c. 139, § 29](#), eff. July 1, 2012; [St.2013, c. 38, § 28](#), eff. July 1, 2013.

M.G.L.A. 12 § 5G, MA ST 12 § 5G

Current through Chapter 113 of the 2020 Second Annual Session of the General Court.

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Unconstitutional or Preempted Limitation Recognized by [United States ex rel. Maharaj v. Estate of Zimmerman](#), D.Md., Dec. 12, 2019

United States Code Annotated

Title 31. Money and Finance (Refs & Annos)

Subtitle III. Financial Management

Chapter 37. Claims (Refs & Annos)

Subchapter III. Claims Against the United States Government (Refs & Annos)

31 U.S.C.A. § 3730

§ 3730. Civil actions for false claims

Effective: July 22, 2010

[Currentness](#)

(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](#).¹ 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 Government² 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) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government² Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) 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 either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

(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) Relief from retaliatory actions.--

(1) In general.--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) Relief.--Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent 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 action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) Limitation on bringing civil action.--A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

CREDIT(S)

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub.L. 99-562, §§ 3, 4, Oct. 27, 1986, 100 Stat. 3154, 3157; Pub.L. 100-700, § 9, Nov. 19, 1988, 102 Stat. 4638; Pub.L. 101-280, § 10(a), May 4, 1990, 104 Stat. 162; Pub.L. 103-272, § 4(f)(1)(P), July 5, 1994, 108 Stat. 1362; Pub.L. 111-21, § 4(d), May 20, 2009, 123 Stat. 1624; Pub.L. 111-148, Title X, § 10104(j)(2), Mar. 23, 2010, 124 Stat. 901; Pub.L. 111-203, Title X, § 1079A(c), July 21, 2010, 124 Stat. 2079.)

Notes of Decisions (2525)

Footnotes

¹ See, now, Rule 4(i) of the Federal Rules of Civil Procedure.

² So in original. Probably should be "General".

31 U.S.C.A. § 3730, 31 USCA § 3730

Current through P.L. 116-214.

United States Code Annotated

Title 42. The Public Health and Welfare

Chapter 7. Social Security (Refs & Annos)

Subchapter XIX. Grants to States for Medical Assistance Programs (Refs & Annos)

42 U.S.C.A. § 1396h

§ 1396h. State False Claims Act requirements for increased State share of recoveries

Effective: January 1, 2007

[Currentness](#)

(a) In general

Notwithstanding [section 1396d\(b\)](#) of this title, if a State has in effect a law relating to false or fraudulent claims that meets the requirements of subsection (b), the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under such law, shall be decreased by 10 percentage points.

(b) Requirements

For purposes of subsection (a), the requirements of this subsection are that the Inspector General of the Department of Health and Human Services, in consultation with the Attorney General, determines that the State has in effect a law that meets the following requirements:

- (1) The law establishes liability to the State for false or fraudulent claims described in [section 3729 of Title 31](#) with respect to any expenditure described in [section 1396b\(a\)](#) of this title.
- (2) The law contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in [sections 3730 through 3732 of Title 31](#).
- (3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General.

(4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under [section 3729 of Title 31](#).

(c) Deemed compliance

A State that, as of January 1, 2007, has a law in effect that meets the requirements of subsection (b) shall be deemed to be in compliance with such requirements for so long as the law continues to meet such requirements.

(d) No preclusion of broader laws

Nothing in this section shall be construed as prohibiting a State that has in effect a law that establishes liability to the State for false or fraudulent claims described in [section 3729 of Title 31](#), with respect to programs in addition to the State program under this subchapter, or with respect to expenditures in addition to expenditures described in [section 1396b\(a\)](#) of this title, from being considered to be in compliance with the requirements of subsection (a) so long as the law meets such requirements.

CREDIT(S)

(Aug. 14, 1935, c. 531, Title XIX, § 1909, as added [Pub.L. 109-171, Title VI, § 6031\(a\)](#), Feb. 8, 2006, 120 Stat. 72.)

42 U.S.C.A. § 1396h, 42 USCA § 1396h
Current through P.L. 116-214.

**CERTIFICATE OF COMPLIANCE
PURSUANT TO RULE 17 (c) (9) AND RULE 20 OF THE
MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

Undersigned counsel hereby certifies that the foregoing brief complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to:

Mass. R. A. P. 17; and

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional spaced font Times New Roman at size 14 point and contains 2,669 countable words.

A handwritten signature in blue ink, reading "Thomas J. Carey, Jr.", is positioned above a horizontal line.

Thomas J. Carey, Jr.

Date: 12/16/2020

CERTIFICATE OF SERVICE

Pursuant to Mass. R.A.P. 13(e), I hereby certify, under the penalties of perjury, that I have made service of this Brief on December 16, 2020 via the Massachusetts Tyler Host electronic filing system or email upon:

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