

**REPORT OF THE JUDICIAL COUNCIL  
FALSE CLAIMS ACT ADVISORY COMMITTEE  
ON 2008 HB 2943**

**NOVEMBER 19, 2008**

**BACKGROUND**

In March 2008, Rep. Mike O'Neal, Chair of the House Judiciary Committee, requested that the Judicial Council study and make recommendations to the Legislature regarding 2008 HB 2943, which establishes the Kansas false claims act. The Judicial Council formed the False Claims Act Advisory Committee to undertake the study.

**COMMITTEE MEMBERSHIP**

The members of the Committee taking part in this study are as follows:

1. **Stephen E. Robison, Chair**; practicing attorney in Wichita and member of the Judicial Council.
2. **Rep. Sydney Carlin**, Manhattan; Sponsor of the bill.
3. **Robert Collins**, Topeka; K-TAF Policy Research Group.
4. **Patrick Hurley**, Topeka; Chief Counsel, Kansas Department of Administration.
5. **Loren Snell**, Topeka; Asst. Attorney General, Medicaid Fraud and Abuse Division.
6. **Deborah Stern**, Topeka; General Counsel, Kansas Hospital Association.
7. **Catherine Walberg**, Topeka; General Counsel, KaMMCO.
8. **Melanie Wilson**, Lawrence; Associate Professor, University of Kansas School of Law.
9. **Nancy Zogleman**, Leawood; Director, State Government Relations, Pfizer, Inc.

## **INTRODUCTION**

The federal False Claims Act, 31 U.S.C. 3729 et seq., was passed in 1863 and has been used to fight a myriad of schemes aimed at stealing taxpayer dollars. A copy of the federal False Claims Act is attached to this report at page 23. In more recent years, the U. S. Department of Justice has used the False Claims Act to go after fraud in federal health care programs and has recovered billions of dollars.<sup>1</sup> States get a share of the recoveries in cases dealing with Medicaid fraud because the Medicaid program is funded jointly by state and federal governments (the federal government share is between 50% and 83%, depending on the state's per capita income). Despite some large recoveries, a huge amount of health care fraud goes unchecked. Experts estimate that anywhere from 3% to 10% of all health care spending is lost to fraud.<sup>2</sup> Seeking more state involvement in fighting Medicaid fraud, Congress included in the Deficit Reduction Act of 2005 ("DRA") a cash incentive to encourage states to pass false claims acts modeled on the federal act. Pursuant to § 6032 of the DRA, a new provision in the Social Security Act states that the federal government will decrease by 10% its share of the recovery in cases brought under a qualifying state false claims law. 42 U.S.C 1909. A copy of § 6032 of the DRA is attached to this report at page 38.

In order to be deemed in compliance with the DRA, a state false claims act must meet several requirements. One requirement is that the state act must provide for civil penalties at least as high as those in the federal law. Also required is the inclusion of "provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims" as those in the federal

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<sup>1</sup> *Information On False Claims Litigation*, United States Government Accountability Office, <http://www.gao.gov/new.items/d06320r.pdf> (Accessed November 19, 2008).

<sup>2</sup> *The Problem of Health Care Fraud*, National Health Care Fraud Association, [http://www.nhcaa.org/eweb/DynamicPage.aspx?webcode=anti\\_fraud\\_resource\\_cent&wpscode=TheProblemOfHCFraud#2](http://www.nhcaa.org/eweb/DynamicPage.aspx?webcode=anti_fraud_resource_cent&wpscode=TheProblemOfHCFraud#2) (Accessed November 19, 2008).

law. 42 U.S.C 1909(b)(2). Some states had false claims acts in place prior to the passage of the DRA, and others have passed new legislation in response to the incentive of an increased share of recovery in Medicaid fraud cases.

The requirement of including a qui tam provision, which allows “whistleblowers” to bring private causes of action and share in the recovery, has been a sticking point in some state legislatures. Opponents view the prospect of a new qui tam provision as a windfall for plaintiffs’ attorneys and are concerned that it would spur the filing of a high number of meritless actions. Supporters credit the qui tam provision of the federal law with the dramatic increase in the amount of taxpayer money recovered since the law was revised in 1986, and believe similar success is virtually guaranteed at the state level.<sup>3</sup>

When Rep. Sydney Carlin learned of the DRA’s incentive offer to states, she became interested in seeing Kansas qualify for an increased percentage of Medicaid fraud recoveries. Earlier versions of her proposal were drafted to meet all of the DRA’s requirements for qualifying for the 10% increase, but the version ultimately submitted as HB 2943 no longer contains a qui tam provision. It should be noted that, although Medicaid fraud was an important consideration for the drafters and for this Committee, HB 2943 has a broader application and covers any type of claim or demand for payment, property or services made to the state or a political subdivision of the state.

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<sup>3</sup> See John Gibeaut, *Seeking the Cure*, 92 A.B.A. J., 44 (October 2006).

## **COMMITTEE'S REVIEW OF 2008 HB 2943**

2008 HB 2943 establishes a Kansas false claims act. The language in the bill is largely drawn from § 3729 of the federal False Claims Act. However, Sec. 3(a)(8) through 3(a)(11) are additions that are not found in the federal law. As noted earlier, HB 2943 also does not contain the qui tam and whistleblower provisions appearing in § 3730 of the federal act. A copy of the bill is attached to this report at page 18.

The Committee met on September 5, September 29, and November 19, 2008. In addition to review of the new false claims act proposed in 2008 HB 2943, the Committee reviewed the federal False Claims Act, the false claims laws from other states, Kansas common law on retaliatory discharge, and the Kansas whistleblower act.

Before considering the specific provisions of the bill, the Committee first debated the threshold issue of whether false claims legislation is needed in Kansas. There was no real opposition to the basic idea of enacting a false claims act. All Committee members agreed that fraud occurs and that all taxpayers are affected by the theft of public monies. As the Committee debated whether existing criminal statutes are sufficient, it was noted that the addition of civil provisions would be a valuable tool for the attorney general's office and could benefit even those under investigation for making false claims. The Committee acknowledged that a civil act could provide more flexibility for the attorney general's office on a case by case basis, even allowing a provider to stay in business as a case develops and progresses. The importance of the potential deterrent value of a false claims act was also noted. At the end of this discussion, the Committee unanimously agreed that it would support the proposal of a Kansas false claims act and agreed to move on to a more detailed consideration of the substance of HB 2943.

## **DRA Compliance**

The original incentive for the drafters of HB 2943 was to enable Kansas to qualify for a 10% increase in recoveries from Medicaid fraud cases. In order to qualify for the 10% increase, a state false claims act must meet certain requirements that ensure the state act is substantially similar to the federal False Claims Act. The four requirements are:

1. The law must establish liability to the State for false or fraudulent claims described in 31 U.S.C. 3729 with respect to any expenditure described in section 1903(a) of the Act;
2. The law must contain provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in 31 U.S.C. 3730–3732;
3. The law must contain a requirement for filing an action under seal for 60 days with review by the State Attorney General; and
4. The law must contain a civil penalty that is not less than the amount of the civil penalty authorized under 31 U.S.C. 3729.<sup>4</sup>

## **Qui Tam**

HB 2943 appears to meet the first and last of the four DRA requirements, but not the second or third. The Committee discussed the fact that Kansas would not qualify for the increased 10% in recoveries from Medicaid fraud in actions brought under a Kansas false claims act unless it met all of the requirements, including qui tam provisions. There were Committee members on both sides of this debate. Some members were strongly in favor of the protections that qui tam affords whistleblowers, noting that without such people willing to come forward, a great deal of fraud would simply remain undiscovered. It was also expressed that in the current economic climate, Kansas

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<sup>4</sup> “Publication of OIG’s Guidelines for Evaluating State False Claims Acts,” 71 Federal Register 161 (21 August 2006), pp. 48552 - 48554.

should take advantage of every opportunity to recover taxpayer dollars. On the other side of this debate were members who were very concerned about the potential for baseless suits and the high cost to defend them. These concerns were magnified when also considering that one can be found liable under HB 2943 without a finding of intent.

A suggestion was made to explore the possibility of some variation on qui tam in which the attorney general would serve as a gatekeeper for the lawsuits. The Committee agreed to review the false claims acts of other states to see how many had adopted qui tam and whether any variations on the federal qui tam provisions had thus far been deemed in compliance with DRA requirements.

This review showed that, to date, 20 states have submitted their false claims laws to the Office of Inspector General of the Department of Health and Human Services (“OIG”) for a determination of whether they meet the DRA requirements. A chart is attached to this report at page 39 showing which states have submitted their laws for certification and whether they have been deemed to be in compliance. Review of the six rejection letters sent out by OIG made clear that states must adhere very closely to the federal law in order to be certified. It is very unlikely that any variation in the structure of the qui tam section would be approved. Information about OIG review of state false claims acts and copies of the OIG response letters can be viewed at this web address: <http://www.oig.hhs.gov/fraud/falseclaimsact.asp>.

Although the Committee members who were opposed to qui tam expressed a willingness to at least consider some kind of modified or creative application of the principle, there was not sufficient support on the Committee for the idea of adding to HB 2943 qui tam and whistleblower provisions that mirror the federal law. The Committee acknowledged that the decision not to add qui tam provisions would guarantee that the legislation would not meet DRA requirements. However, the Committee still supports the adoption of a false claims act for the reasons previously stated.

## **COMMITTEE'S RECOMMENDATIONS REGARDING 2008 HB 2943**

The Judicial Council False Claims Act Advisory Committee recommends several revisions to 2008 HB 2943. The recommended changes are set forth and discussed below. The complete text of the bill, with the Committee's suggested changes shown in underline and strikethrough type, immediately follows this report at page 11.

### **Sec. 2(e)**

(e) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:

- (1) Has actual knowledge of the information;
- (2) acts in deliberate ignorance of the truth or falsity of the information; and or
- (3) acts in reckless disregard of the truth or falsity of the information.

The Committee unanimously agreed to changing the word "and" to "or." The federal False Claims Act uses "or" and the Committee believes this was simply an error in the bill that should be corrected to properly set forth the three subsections as alternatives.

### **Sec. 3(a)**

**Sec. 3. (a)** A person who commits any of the following acts shall be liable to the state or any affected political subdivision thereof, for three times the amount of damages which the state or such political subdivision sustains because of the act of that person and shall be liable to the state for a civil penalty of not less than \$5,500 \$1,000 and not more than \$11,000 for each violation. A person found to have committed any of the following acts shall be liable to the state or such affected political subdivision for all reasonable costs and attorney fees incurred in a civil action brought to recover any of those penalties or damages. The following acts constitute violations for which civil penalties, costs and attorney fees may be recovered by a civil action under this act:

The penalty provisions of the bill engendered spirited debate among the Committee members at all three meetings. Some Committee members were very concerned about the \$5,500 minimum penalty because the penalty is “per claim.” In a case involving health care, there could be hundreds of “claims” in a single day, and with a mandatory minimum set this high, the penalty becomes draconian. It was suggested that the mandatory minimum be deleted to give the judge the discretion to apply an appropriate amount of penalty for the circumstances of the case. Other Committee members argued just as strongly to retain the mandatory minimum penalty of \$5,500, noting that one of the great values of this act will be its deterrent value, and the penalty provisions are an integral part of that deterrence.

The penalty provision discussions included the idea of changing “shall” to “may” to give the courts more discretion and to softening the treble damages provision by amending it to say “up to” three times the amount of damages. Some changes were made and then changed back. Ultimately, the discussion focused on amending the minimum penalty amount. After much discussion, by a vote of 7 to 2, the minimum penalty was changed from \$5,500 to \$1,000 per claim.

### **Sec. 3(a)(8) to 3(a)(11)**

These sections were added by the drafters of the bill and did not come from the federal False Claims Act. Some Committee members were in agreement with the inclusion of these sections in the bill, noting that these are known problem areas and are worthy of being set forth clearly. Other members countered that the added sections seem to target the pharmaceutical industry and that “kickback” in section 3(a)(8) is ambiguous and not clearly defined. It was acknowledged that all of the acts set forth in these sections are currently prosecuted under the federal law in the absence of this language. At the end of the discussion, the Committee unanimously agreed that these sections be removed entirely.

### **Sec. 3(b)**

This section provides for a reduction in the damages that can be assessed when the person alleged to have violated the act cooperates with the investigation. HB 2943, like the federal False Claims Act, provides that “the court may assess not less than two times the amount of damages” sustained by the state because of the false claim violation, which is a reduction from the usual treble damages. The Committee amended this section to read that “the court may assess not more than two times the amount of damages” sustained. The Committee agreed that cooperation with false claims investigations should be encouraged, and that providing for a maximum of two times the amount of damages is a better incentive than merely lowering the mandatory damages from treble to double.

### **Sec. 5(a)**

**Sec. 5.** (a) A civil action under section 3, and amendments thereto, may not be brought more than 10 6 years after the date on which the violation was committed.

In the discussion of the statute of limitations set forth in Sec. 5(a), some Committee members expressed that 10 years is far too long. However, it was noted that these cases take a long time to develop and that any period of time less than 5 years would not be practical. The Committee settled on 6 years, noting that this is the same amount of time that providers are required to keep records of Medicaid claim submissions in Kansas. The Committee approved the change in the statute of limitations on a vote of 6 to 3.

### **Sec. 6 Addition**

**Sec. 6.** Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner retaliated against in the terms and conditions of employment by his or her employer because of lawful acts undertaken in good faith by the employee on behalf of the employee or others, in furtherance of an action

under this act, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this act, shall be entitled to all relief necessary to make the employee whole. An employee may bring an action in the appropriate district court of the state of Kansas for the relief provided in this section. This section shall not be construed to create any private cause of action for violations of this act, and is limited to the remedies expressly created by this section related to employment retaliation.

This section was added in response to concerns by some Committee members that, without a qui tam provision modeled after the federal act, employees who report or assist in a false claims investigation do not have adequate protection. The language in this section was originally copied from § 3730(h) of the federal law. It was argued by some Committee members that common law already provides a remedy for retaliatory discharge and that this section is not necessary. The majority of the Committee did not want to include language that could substantively impact existing common law and a sentence from the federal language that set forth specific relief, such as 2 times the amount of back pay, special damages, and litigation costs and reasonable attorneys' fees, was deleted. The Committee approved the addition of this section by a vote of 8 to 1. The one Committee member who opposed the language would have included the deleted sentence to ensure that whistleblowers are entitled to appropriate relief, including litigation costs and attorneys' fees, if the employer takes retaliatory action.

## **CONCLUSION**

The Judicial Council False Claims Act Advisory Committee is unanimous in its support for the adoption of a false claims act in Kansas. The Committee recommended several amendments to 2008 HB 2943, which changes are set forth in this report. Although votes were split on some of the individual changes to the bill, the Committee unanimously approved submission to the Kansas Judicial Council of this report and the proposed legislation contained herein.

**HOUSE BILL No. 2943**

**AS REVISED BY THE  
JUDICIAL COUNCIL FALSE CLAIMS ACT ADVISORY COMMITTEE**

1           **Section 1.** Sections 1 through 11 12, and amendments thereto, shall be known and may be  
2 cited as the “Kansas false claims act.”

3           **Sec. 2.** For purposes of this act:

4           (a) “Act” means the Kansas false claims act.

5           (b) “Claim” includes any request or demand, whether under contract or otherwise, for  
6 money, property or services made to any employee, officer or agent of the state or any political  
7 subdivision thereof or made to any contractor, grantee or other recipient if the state or any political  
8 subdivision thereof provides any portion of the money, property or services which is requested or  
9 demanded, or if the state will reimburse such contractor, grantee or other recipient for any portion  
10 of the money or property which is requested or demanded.

11           (c) “Political subdivision” includes political or taxing subdivisions of the state, including  
12 municipal and quasi-municipal corporations, boards, commissions, authorities, councils, committees,  
13 subcommittees and other subordinate groups or administrative units thereof, receiving or expending  
14 and supported, in whole or in part, by public funds and any municipality as defined in K.S.A. 75-  
15 1117, and amendments thereto.

16           (d) “Person” includes any natural person, corporation, firm, association, organization,  
17 partnership, business or trust.

18           (e) “Knowing” and “knowingly” mean that a person, with respect to information, does any  
19 of the following:

- 1 (1) Has actual knowledge of the information;
- 2 (2) acts in deliberate ignorance of the truth or falsity of the information; and or
- 3 (3) acts in reckless disregard of the truth or falsity of the information.

4 **Sec. 3. (a)** A person who commits any of the following acts shall be liable to the state or any  
5 affected political subdivision thereof, for three times the amount of damages which the state or such  
6 political subdivision sustains because of the act of that person and shall be liable to the state for a  
7 civil penalty of not less than \$5,500 \$1,000 and not more than \$11,000 for each violation. A person  
8 found to have committed any of the following acts shall be liable to the state or such affected  
9 political subdivision for all reasonable costs and attorney fees incurred in a civil action brought to  
10 recover any of those penalties or damages. The following acts constitute violations for which civil  
11 penalties, costs and attorney fees may be recovered by a civil action under this act:

12 (1) Knowingly presents or causes to be presented to any employee, officer or agent of the  
13 state or political subdivision thereof or to any contractor, grantee or other recipient of state funds or  
14 funds of any political subdivision thereof, a false or fraudulent claim for payment or approval;

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

17 (3) defrauds the state or any political subdivision thereof by getting a false claim allowed or  
18 paid or by knowingly making, using or causing to be made or used, a false record or statement to  
19 conceal, avoid or decrease an obligation to pay or transmit money or property to the state or to any  
20 political subdivision thereof;

21 (4) has possession, custody or control of public property or money used or to be used by the  
22 state or any political subdivision thereof and knowingly delivers or causes to be delivered less  
23 property or money than the amount for which the person receives a certificate or receipt;

1 (5) is authorized to make or deliver a document certifying receipt of property used or to be  
2 used by the state or any political subdivision thereof and knowingly makes or delivers a receipt that  
3 falsely represents the property received;

4 (6) knowingly buys or receives as a pledge of an obligation or debt, public property from any  
5 person who lawfully may not sell or pledge the property;

6 (7) is a beneficiary of an inadvertent submission of a false claim to any employee, officer or  
7 agent of the state or political subdivision thereof, or to any contractor, grantee or other recipient of  
8 state funds or funds of any political subdivision thereof, who subsequently discovers the falsity of  
9 the claim and fails to disclose the false claim and make satisfactory arrangements for repayment to  
10 the state or affected political subdivision thereof within a reasonable time after discovery of the false  
11 claim;

12 (8) obtains unlawful remuneration through any violation of federal or state anti-kickback  
13 provisions contained in 42 U.S.C. 1320(a)-7b; 41 U.S.C. 51-54; and K.S.A. 21-3487, and  
14 amendments thereto, where kickback leads to the defrauding of any publicly funded Kansas  
15 healthcare plan;

16 (9) knowingly sells to any publicly funded Kansas healthcare plan any expired or adulterated  
17 medicine or defunct medical equipment;

18 (10) knowingly sells to any publicly funded Kansas healthcare plan any restocked or re-  
19 shelved medicine or medical equipment without having first fully reimbursed the first purchaser and  
20 fully disclosed the merchandise status to the new government purchasing agent;

21 (11) promotes or markets any prescription drug, dosage or medical device in a way or for a  
22 purpose that is not approved by the federal food and drug administration and thereby, in any way  
23 wrongfully obtains remuneration from any publicly funded Kansas healthcare plan; or

1 (12 8) conspires to commit any violation set forth in paragraphs (1) through (11 7), above.

2 (b) Notwithstanding the provisions of subsection (a), the court may assess not less more than  
3 two times the amount of damages which the state or any political subdivision thereof sustains  
4 because of the act of the person in violation of paragraphs (1) through (12 8) of subsection (a) and  
5 no civil penalty shall be imposed, if the court finds all of the following:

6 (1) The person committing the violation furnished officials of the state who are responsible  
7 for investigating false claims violations with all information known to that person about the violation  
8 with within 30 days after the date on which the person first obtained the information;

9 (2) the person fully cooperated with any investigation by the state; and

10 (3) at the time the person furnished the state with information about the violation, no criminal  
11 prosecution, civil action or administrative action had commenced with respect to the violation and  
12 the person did not have actual knowledge of the existence of an investigation into the violation. (c)  
13 In a civil action brought pursuant to subsection (a), proof of specific intent to defraud is not required.

14 (d) This section does not apply to claims, records or statements made under the state revenue  
15 and taxation code.

16 **Sec. 4.** (a) The attorney general shall diligently investigate a violation under section 3, and  
17 amendments thereto. If the attorney general finds that a person has violated or is violating section  
18 3, and amendments thereto, the attorney general may bring a civil action under this section against  
19 that person. Further, the attorney general may utilize the assistance of city and county attorneys in  
20 cases involving their respective political subdivisions or may utilize funds available pursuant to  
21 section 8, and amendments thereto, to engage the services of private attorneys to assist in carrying  
22 out the purposes of this act, or both, at times when the attorney general determines the need exists.  
23 All local prosecutors and private attorneys shall only participate at the request, and under the  
24 direction of, the attorney general.

1 (b) Nothing in this act shall be construed to create a private cause of action, except as  
2 provided in Sec. 6.

3 **Sec. 5.** (a) A civil action under section 3, and amendments thereto, may not be brought more  
4 than 10 6 years after the date on which the violation was committed.

5 (b) A civil action under section 3, and amendments thereto, may be brought for activity prior  
6 to the effective date of this act if the limitation period set in subsection (a) has not lapsed.

7 (c) In any action brought under section 3, and amendments thereto, the state shall be required  
8 to prove all essential elements of the cause of action, including damages, by a preponderance of the  
9 evidence.

10 (d) Notwithstanding any other provision of law, a guilty verdict rendered in a criminal  
11 proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of  
12 guilty or nolo contendere, shall estop the defendant from denying the essential elements of the  
13 offense in any action which involves the same transaction as in the criminal proceeding and which  
14 is brought under section 3, and amendments thereto.

15 **Sec. 6.** Any employee who is discharged, demoted, suspended, threatened, harassed, or in  
16 any other manner retaliated against in the terms and conditions of employment by his or her  
17 employer because of lawful acts undertaken in good faith by the employee on behalf of the employee  
18 or others, in furtherance of an action under this act, including investigation for, initiation of,  
19 testimony for, or assistance in an action filed or to be filed under this act, shall be entitled to all relief  
20 necessary to make the employee whole. An employee may bring an action in the appropriate district  
21 court of the state of Kansas for the relief provided in this section. This section shall not be construed  
22 to create any private cause of action for violations of this act, and is limited to the remedies  
23 expressly created by this section related to employment retaliation.  
24

1           **Sec. 67.** (a) The provisions of this act are not exclusive and the remedies provided for in this  
2 act shall be in addition to any other remedies provided for in any other law or available under  
3 common law.

4           (b) This act shall be liberally construed and applied to promote the public interest.

5           **Sec. 78.** (a) Proceeds recovered as a result of an action filed pursuant to this act shall be  
6 distributed in the following order:

7           (1) To refund moneys falsely obtained from the federal government, state government or  
8 political subdivision thereof pursuant to subsection (b); and

9           (2) to the state treasurer for deposit in the state general fund pursuant to subsection (c).

10          (b) A portion of the recovery equal to the amount of moneys falsely obtained from the federal  
11 government, state government, affected political subdivision thereof or state agencies, or a  
12 combination thereof, shall be remitted to the appropriate entity shown to be defrauded, subject to  
13 any further requirements established by federal or state law.

14          (c) That portion of any recovery remitted to the state treasurer pursuant to subsection (a) shall  
15 be remitted to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and  
16 amendments thereto. Upon receipt of such remittance, the state treasurer shall deposit the entire  
17 amount in the state general fund and, subject to any relevant guidelines of the federal department of  
18 health and human services' office of inspector general regarding repayment of fees or recoveries,  
19 shall credit 10% of such remittance to the false claims litigation revolving fund, which is hereby  
20 established in the state treasury. Moneys in the false claims litigation revolving fund may be  
21 expended by the attorney general for the purpose of hiring necessary staff and to defray the costs of  
22 investigating and litigating ongoing false claims cases and may be shared at the direction of the  
23 attorney general with the Kansas medicaid fraud control unit, Kansas bureau of investigation or any

1 county, city or private attorneys who may be utilized or contracted with pursuant to section 4, and  
2 amendments thereto, in carrying out the purposes of this act and any other operating expenses  
3 incurred in administering the Kansas false claims act. All expenditures from the false claims  
4 litigation revolving fund shall be made in accordance with appropriation acts upon warrants of the  
5 director of accounts and reports issued pursuant to vouchers approved by the attorney general or the  
6 attorney general's designee.

7 **Sec. 8 9.** Liability pursuant to this act is joint and several for any violation done by two or  
8 more persons.

9 **Sec. 9 10.** Any action under this act may be brought in any county or district court in which  
10 the defendant or, in the case of multiple defendants, any one defendant can be found, resides or  
11 transacts business or in which any act prohibited by section 3, and amendments thereto, occurred.

12 **Sec. 10 11.** If any provision of this act or the application thereof to any person or  
13 circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act  
14 which can be given effect without the invalid provision or application, and to this end the provisions  
15 of this act are severable.

16 **Sec. 11 12.** This act shall take effect and be in force from and after its publication in the  
17 Kansas register.

## HOUSE BILL No. 2943

By Committee on Appropriations

2-26

9 AN ACT concerning civil actions and civil penalties; relating to the sub-  
10 mission of false or fraudulent claims to or the performance of fraud-  
11 ulent acts upon the state or a political subdivision thereof.

12

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

14 Section 1. Sections 1 through 11, and amendments thereto, shall be  
15 known and may be cited as the "Kansas false claims act."

16 Sec. 2. For purposes of this act:

17 (a) "Act" means the Kansas false claims act.

18 (b) "Claim" includes any request or demand, whether under contract  
19 or otherwise, for money, property or services made to any employee,  
20 officer or agent of the state or any political subdivision thereof or made  
21 to any contractor, grantee or other recipient if the state or any political  
22 subdivision thereof provides any portion of the money, property or serv-  
23 ices which is requested or demanded, or if the state will reimburse such  
24 contractor, grantee or other recipient for any portion of the money or  
25 property which is requested or demanded.

26 (c) "Political subdivision" includes political or taxing subdivisions of  
27 the state, including municipal and quasi-municipal corporations, boards,  
28 commissions, authorities, councils, committees, subcommittees and other  
29 subordinate groups or administrative units thereof, receiving or expend-  
30 ing and supported, in whole or in part, by public funds and any munici-  
31 pality as defined in K.S.A. 75-1117, and amendments thereto.

32 (d) "Person" includes any natural person, corporation, firm, associa-  
33 tion, organization, partnership, business or trust.

34 (e) "Knowing" and "knowingly" mean that a person, with respect to  
35 information, does any of the following:

36 (1) Has actual knowledge of the information;

37 (2) acts in deliberate ignorance of the truth or falsity of the infor-  
38 mation; and

39 (3) acts in reckless disregard of the truth or falsity of the information.

40 Sec. 3. (a) A person who commits any of the following acts shall be  
41 liable to the state or any affected political subdivision thereof, for three  
42 times the amount of damages which the state or such political subdivision  
43 sustains because of the act of that person and shall be liable to the state

1 for a civil penalty of not less than \$5,500 and not more than \$11,000 for  
2 each violation. A person found to have committed any of the following  
3 acts shall be liable to the state or such affected political subdivision for  
4 all reasonable costs and attorney fees incurred in a civil action brought to  
5 recover any of those penalties or damages. The following acts constitute  
6 violations for which civil penalties, costs and attorney fees may be recov-  
7 ered by a civil action under this act:

8 (1) Knowingly presents or causes to be presented to any employee,  
9 officer or agent of the state or political subdivision thereof or to any  
10 contractor, grantee or other recipient of state funds or funds of any po-  
11 litical subdivision thereof, a false or fraudulent claim for payment or  
12 approval;

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

15 (3) defrauds the state or any political subdivision thereof by getting  
16 a false claim allowed or paid or by knowingly making, using or causing to  
17 be made or used, a false record or statement to conceal, avoid or decrease  
18 an obligation to pay or transmit money or property to the state or to any  
19 political subdivision thereof;

20 (4) has possession, custody or control of public property or money  
21 used or to be used by the state or any political subdivision thereof and  
22 knowingly delivers or causes to be delivered less property or money than  
23 the amount for which the person receives a certificate or receipt;

24 (5) is authorized to make or deliver a document certifying receipt of  
25 property used or to be used by the state or any political subdivision  
26 thereof and knowingly makes or delivers a receipt that falsely represents  
27 the property received;

28 (6) knowingly buys or receives as a pledge of an obligation or debt,  
29 public property from any person who lawfully may not sell or pledge the  
30 property;

31 (7) is a beneficiary of an inadvertent submission of a false claim to  
32 any employee, officer or agent of the state or political subdivision thereof,  
33 or to any contractor, grantee or other recipient of state funds or funds of  
34 any political subdivision thereof, who subsequently discovers the falsity  
35 of the claim and fails to disclose the false claim and make satisfactory  
36 arrangements for repayment to the state or affected political subdivision  
37 thereof within a reasonable time after discovery of the false claim;

38 (8) obtains unlawful remuneration through any violation of federal or  
39 state anti-kickback provisions contained in 42 U.S.C. 1320(a)-7b; 41  
40 U.S.C. 51-54; and K.S.A. 21-3487, and amendments thereto, where kick-  
41 back leads to the defrauding of any publicly funded Kansas healthcare  
42 plan;

43 (9) knowingly sells to any publicly funded Kansas healthcare plan any

1 expired or adulterated medicine or defunct medical equipment;  
2 (10) knowingly sells to any publicly funded Kansas healthcare plan  
3 any restocked or re-shelved medicine or medical equipment without hav-  
4 ing first fully reimbursed the first purchaser and fully disclosed the mer-  
5 chandise status to the new government purchasing agent;

6 (11) promotes or markets any prescription drug, dosage or medical  
7 device in a way or for a purpose that is not approved by the federal food  
8 and drug administration and thereby, in any way wrongfully obtains re-  
9 munerations from any publicly funded Kansas healthcare plan; or

10 (12) conspires to commit any violation set forth in paragraphs (1)  
11 through (11), above.

12 (b) Notwithstanding the provisions of subsection (a), the court may  
13 assess not less than two times the amount of damages which the state or  
14 any political subdivision thereof sustains because of the act of the person  
15 in violation of paragraphs (1) through (12) of subsection (a) and no civil  
16 penalty shall be imposed, if the court finds all of the following:

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

21 (2) the person fully cooperated with any investigation by the state;  
22 and

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

27 (c) In a civil action brought pursuant to subsection (a), proof of spe-  
28 cific intent to defraud is not required.

29 (d) This section does not apply to claims, records or statements made  
30 under the state revenue and taxation code.

31 Sec. 4. (a) The attorney general shall diligently investigate a violation  
32 under section 3, and amendments thereto. If the attorney general finds  
33 that a person has violated or is violating section 3, and amendments  
34 thereto, the attorney general may bring a civil action under this section  
35 against that person. Further, the attorney general may utilize the assis-  
36 tance of city and county attorneys in cases involving their respective po-  
37 litical subdivisions or may utilize funds available pursuant to section 8,  
38 and amendments thereto, to engage the services of private attorneys to  
39 assist in carrying out the purposes of this act, or both, at times when the  
40 attorney general determines the need exists. All local prosecutors and  
41 private attorneys shall only participate at the request, and under the di-  
42 rection of, the attorney general.

43 (b) Nothing in this act shall be construed to create a private cause of

1 action.

2 Sec. 5. (a) A civil action under section 3, and amendments thereto,  
3 may not be brought more than 10 years after the date on which the  
4 violation was committed.

5 (b) A civil action under section 3, and amendments thereto, may be  
6 brought for activity prior to the effective date of this act if the limitation  
7 period set in subsection (a) has not lapsed.

8 (c) In any action brought under section 3, and amendments thereto,  
9 the state shall be required to prove all essential elements of the cause of  
10 action, including damages, by a preponderance of the evidence.

11 (d) Notwithstanding any other provision of law, a guilty verdict ren-  
12 dered in a criminal proceeding charging false statements or fraud,  
13 whether upon a verdict after trial or upon a plea of guilty or nolo con-  
14 tendere, shall estop the defendant from denying the essential elements  
15 of the offense in any action which involves the same transaction as in the  
16 criminal proceeding and which is brought under section 3, and amend-  
17 ments thereto.

18 Sec. 6. (a) The provisions of this act are not exclusive and the rem-  
19 edies provided for in this act shall be in addition to any other remedies  
20 provided for in any other law or available under common law.

21 (b) This act shall be liberally construed and applied to promote the  
22 public interest.

23 Sec. 7. (a) Proceeds recovered as a result of an action filed pursuant  
24 to this act shall be distributed in the following order:

25 (1) To refund moneys falsely obtained from the federal government,  
26 state government or political subdivision thereof pursuant to subsection  
27 (b); and

28 (2) to the state treasurer for deposit in the state general fund pursuant  
29 to subsection (c).

30 (b) A portion of the recovery equal to the amount of moneys falsely  
31 obtained from the federal government, state government, affected polit-  
32 ical subdivision thereof or state agencies, or a combination thereof, shall  
33 be remitted to the appropriate entity shown to be defrauded, subject to  
34 any further requirements established by federal or state law.

35 (c) That portion of any recovery remitted to the state treasurer pur-  
36 suant to subsection (a) shall be remitted to the state treasurer in accord-  
37 ance with the provisions of K.S.A. 75-4215, and amendments thereto.  
38 Upon receipt of such remittance, the state treasurer shall deposit the  
39 entire amount in the state general fund and, subject to any relevant guide-  
40 lines of the federal department of health and human services' office of  
41 inspector general regarding repayment of fees or recoveries, shall credit  
42 10% of such remittance to the false claims litigation revolving fund, which  
43 is hereby established in the state treasury. Moneys in the false claims

1 litigation revolving fund may be expended by the attorney general for the  
2 purpose of hiring necessary staff and to defray the costs of investigating  
3 and litigating ongoing false claims cases and may be shared at the direc-  
4 tion of the attorney general with the Kansas medicaid fraud control unit,  
5 Kansas bureau of investigation or any county, city or private attorneys  
6 who may be utilized or contracted with pursuant to section 4, and amend-  
7 ments thereto, in carrying out the purposes of this act and any other  
8 operating expenses incurred in administering the Kansas false claims act.  
9 All expenditures from the false claims litigation revolving fund shall be  
10 made in accordance with appropriation acts upon warrants of the director  
11 of accounts and reports issued pursuant to vouchers approved by the  
12 attorney general or the attorney general's designee.

13 Sec. 8. Liability pursuant to this act is joint and several for any vio-  
14 lation done by two or more persons.

15 Sec. 9. Any action under this act may be brought in any county or  
16 district court in which the defendant or, in the case of multiple defen-  
17 dants, any one defendant can be found, resides or transacts business or  
18 in which any act prohibited by section 3, and amendments thereto,  
19 occurred.

20 Sec. 10. If any provision of this act or the application thereof to any  
21 person or circumstance is held invalid, the invalidity shall not affect other  
22 provisions or applications of the act which can be given effect without  
23 the invalid provision or application, and to this end the provisions of this  
24 act are severable.

25 Sec. 11. This act shall take effect and be in force from and after its  
26 publication in the Kansas register.

# FEDERAL FALSE CLAIMS ACT

## 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].

### **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.

### **3731. False claims procedure**

(a) A subpoena 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.

### **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.

### **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).

## CHAPTER 3--ELIMINATING FRAUD, WASTE, AND ABUSE IN MEDICAID

### **SEC. 6032. ENCOURAGING THE ENACTMENT OF STATE FALSE CLAIMS ACTS.**

(a) IN GENERAL- Title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) is amended by inserting after section 1908A the following:

#### **STATE FALSE CLAIMS ACT REQUIREMENTS FOR INCREASED STATE SHARE OF RECOVERIES**

SEC. 1909. (a) IN GENERAL- Notwithstanding section 1905(b), 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, United States Code, with respect to any expenditure described in section 1903(a).
- (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, United States Code.
- (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, United States Code.

(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, United States Code, with respect to programs in addition to the State program under this title, or with respect to expenditures in addition to expenditures described in section 1903(a), from being considered to be in compliance with the requirements of subsection (a) so long as the law meets such requirements.

(b) EFFECTIVE DATE- Except as provided in section 6035(e), the amendments made by this section take effect on January 1, 2007.

**AS OF NOVEMBER 19, 2008**

<b>States with False Claims Acts Certified by OIG</b>	<b>States with False Claims Acts REJECTED by OIG</b>	<b>States with False Claims Acts including Qui Tam Provisions (No OIG certification yet)</b>	<b>States with laws for prosecuting false medicaid claims - no qui tam</b>
California Georgia Hawaii Illinois Indiana Massachusetts Michigan Nevada New York Rhode Island Tennessee Texas Virginia Wisconsin	Florida Louisiana Michigan New Hampshire New Mexico Oklahoma	Delaware D.C. Montana New Jersey	Arkansas Colorado Maine Missouri Nebraska South Carolina South Dakota Utah