

By: Wentworth

S.B. No. 1115

A BILL TO BE ENTITLED

AN ACT

relating to fraud against the state and actions by the state and private persons to prosecute those frauds; providing a civil penalty.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle C, Title 10, Government Code, is amended by adding Chapter 2116 to read as follows:

CHAPTER 2116. FRAUD AGAINST THE STATE

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 2116.001. DEFINITIONS. In this chapter:

(1) "Claim" includes any written or electronically submitted request or demand, under a contract or otherwise, for state funds or property.

(2) "Qui tam action" means an action brought by a private person against a person for the commission of an unlawful act.

(3) "Qui tam plaintiff" means a person bringing a qui tam action.

(4) "State" means state government as defined by Section 101.001, Civil Practice and Remedies Code.

(5) "Unlawful act" means an unlawful act under Section 2116.101.

Sec. 2116.002. WHEN A PERSON ACTS KNOWINGLY. In this chapter, a person acts "knowingly" with respect to information if

1 the person:

2 (1) has knowledge of the information;

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

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

7 Sec. 2116.003. CERTAIN ACTIONS BARRED. (a) A person may
8 not bring a qui tam action based on allegations or transactions that
9 are the subject of a civil suit or an administrative penalty
10 proceeding in which the state is already a party.

11 (b) A person may not bring a qui tam action against a member
12 of the legislature, a member of the judiciary, or a senior official
13 of the executive branch if the action is based on evidence or
14 information known to the state when the action was brought.

15 Sec. 2116.004. CHAPTER NOT APPLICABLE TO MEDICAID FRAUD.
16 This chapter does not apply to an unlawful act described by Section
17 36.002, Human Resources Code, relating to Medicaid fraud.

18 [Sections 2116.005-2116.050 reserved for expansion]

19 SUBCHAPTER B. INVESTIGATION BY ATTORNEY GENERAL

20 Sec. 2116.051. RESPONSIBILITY OF ATTORNEY GENERAL. The
21 attorney general shall diligently investigate the commission of an
22 unlawful act and may bring a civil action against the person
23 committing the unlawful act.

24 Sec. 2116.052. INVESTIGATION. (a) The attorney general
25 may take action under Subsection (b) if the attorney general has
26 reason to believe that:

27 (1) a person has information or custody or control of

1 documentary material relevant to the subject matter of an
2 investigation of an alleged unlawful act;

3 (2) a person is committing, has committed, or is about
4 to commit an unlawful act; or

5 (3) it is in the public interest to conduct an
6 investigation to ascertain whether a person is committing, has
7 committed, or is about to commit an unlawful act.

8 (b) In investigating an unlawful act, the attorney general
9 may:

10 (1) require the person to file on a prescribed form a
11 statement in writing, under oath or affirmation, as to all the facts
12 and circumstances concerning the alleged unlawful act and other
13 information considered necessary by the attorney general;

14 (2) examine under oath a person in connection with the
15 alleged unlawful act; and

16 (3) execute in writing and serve on the person a civil
17 investigative demand requiring the person to produce the
18 documentary material and permit inspection and copying of the
19 material under Section 2116.053.

20 (c) The office of the attorney general may not release or
21 disclose information that is obtained under Subsection (b)(1) or
22 (2) or any documentary material or other record derived from the
23 information except:

24 (1) by court order for good cause shown;

25 (2) with the consent of the person who provided the
26 information;

27 (3) to an employee of the attorney general;

1 (4) to an agency of this state, the United States, or
2 another state;

3 (5) to any attorney representing the state under
4 Section 2116.055 or in a civil action brought under Subchapter D;

5 (6) to a political subdivision of this state; or

6 (7) to a person authorized by the attorney general to
7 receive the information.

8 (d) The attorney general may use documentary material
9 derived from information obtained under Subsection (b)(1) or (2),
10 or copies of that material, as the attorney general determines
11 necessary in the enforcement of this chapter, including
12 presentation before a court.

13 (e) If a person fails to file a statement as required by
14 Subsection (b)(1) or fails to submit to an examination as required
15 by Subsection (b)(2), the attorney general may file in a district
16 court of Travis County a petition for an order to compel the person
17 to file the statement or submit to the examination within a period
18 stated by court order. Failure to comply with an order entered
19 under this subsection is punishable as contempt.

20 (f) An order issued by a district court under this section
21 is subject to appeal to the supreme court.

22 Sec. 2116.053. CIVIL INVESTIGATIVE DEMAND. (a) An
23 investigative demand must:

24 (1) state the rule or statute under which the alleged
25 unlawful act is being investigated and the general subject matter
26 of the investigation;

27 (2) describe the class or classes of documentary

1 material to be produced with reasonable specificity to fairly
2 indicate the documentary material demanded;

3 (3) prescribe a return date within which the
4 documentary material is to be produced; and

5 (4) identify an authorized employee of the attorney
6 general to whom the documentary material is to be made available for
7 inspection and copying.

8 (b) A civil investigative demand may require disclosure of
9 any documentary material that is discoverable under the Texas Rules
10 of Civil Procedure.

11 (c) Service of an investigative demand may be made by:

12 (1) delivering an executed copy of the demand to the
13 person to be served or to a partner, an officer, or an agent
14 authorized by appointment or by law to receive service of process on
15 behalf of that person;

16 (2) delivering an executed copy of the demand to the
17 principal place of business in this state of the person to be
18 served; or

19 (3) mailing by registered or certified mail an
20 executed copy of the demand addressed to the person to be served at
21 the person's principal place of business in this state or, if the
22 person has no place of business in this state, to a person's
23 principal office or place of business.

24 (d) Documentary material demanded under this section shall
25 be produced for inspection and copying during normal business hours
26 at the office of the attorney general or as agreed by the person
27 served and the attorney general.

1 (e) The office of the attorney general may not produce for
2 inspection or copying or otherwise disclose the contents of
3 documentary material obtained under this section except:

4 (1) by court order for good cause shown;

5 (2) with the consent of the person who produced the
6 information;

7 (3) to an employee of the attorney general;

8 (4) to an agency of this state, the United States, or
9 another state;

10 (5) to any attorney representing the state under
11 Section 2116.055 or in a civil action brought under Subchapter D;

12 (6) to a political subdivision of this state; or

13 (7) to a person authorized by the attorney general to
14 receive the information.

15 (f) The attorney general shall prescribe reasonable terms
16 and conditions allowing the documentary material to be available
17 for inspection and copying by the person who produced the material
18 or by an authorized representative of that person. The attorney
19 general may use the documentary material or copies of it as the
20 attorney general determines necessary in the enforcement of this
21 chapter, including presentation before a court.

22 (g) A person may file a petition, stating good cause, to
23 extend the return date for the demand or to modify or set aside the
24 demand. A petition under this section shall be filed in a district
25 court of Travis County and must be filed before the earlier of:

26 (1) the return date specified in the demand; or

27 (2) the 20th day after the date the demand is served.

1 (h) Except as provided by court order, a person on whom a
2 demand has been served under this section shall comply with the
3 terms of an investigative demand.

4 (i) A person who has committed an unlawful act has submitted
5 to the jurisdiction of this state, and personal service of an
6 investigative demand under this section may be made on the person
7 outside of this state.

8 (j) This section does not limit the authority of the
9 attorney general to conduct investigations or to access a person's
10 documentary materials or other information under another state or
11 federal law, the Texas Rules of Civil Procedure, or the Federal
12 Rules of Civil Procedure.

13 (k) If a person fails to comply with an investigative
14 demand, or if copying and reproduction of the documentary material
15 demanded cannot be satisfactorily accomplished and the person
16 refuses to surrender the documentary material, the attorney general
17 may file in a district court of Travis County a petition for an
18 order to enforce the investigative demand.

19 (l) If a petition is filed under Subsection (k), the court
20 may determine the matter presented and may enter an order to
21 implement this section.

22 (m) Failure to comply with a final order entered under
23 Subsection (l) is punishable by contempt.

24 (n) A final order issued by a district court under
25 Subsection (l) is subject to appeal to the supreme court.

26 Sec. 2116.054. INJUNCTIVE RELIEF. (a) If the attorney
27 general has reason to believe that a person is committing, has

1 committed, or is about to commit an unlawful act, the attorney
2 general may institute an action for an appropriate order to
3 restrain the person from committing or continuing the unlawful act.

4 (b) An action under this section shall be brought in a
5 district court of Travis County, or in a county in which any part of
6 the unlawful act occurred, is occurring, or is about to occur.

7 Sec. 2116.055. ATTORNEY GENERAL AS RELATOR IN FEDERAL
8 ACTION. To the extent permitted by 31 U.S.C. Sections 3729-3733,
9 the attorney general may bring an action as relator under 31 U.S.C.
10 Section 3730 with respect to an act for which a person may be held
11 liable under 31 U.S.C. Section 3729. The attorney general may
12 contract with a private attorney to represent the state under this
13 section.

14 Sec. 2116.056. STANDARD OF PROOF. The standard of proof for
15 all elements of a cause of action under this chapter is
16 preponderance of the evidence.

17 Sec. 2116.057. CHAPTER 41, CIVIL PRACTICE AND REMEDIES
18 CODE, INAPPLICABLE TO ACTION UNDER THIS CHAPTER. Chapter 41, Civil
19 Practice and Remedies Code, is not applicable to a cause of action
20 under this chapter.

21 [Sections 2116.058-2116.100 reserved for expansion]

22 SUBCHAPTER C. UNLAWFUL ACTS

23 Sec. 2116.101. UNLAWFUL ACTS. (a) A person commits an
24 unlawful act if the person:

25 (1) knowingly presents, or causes to be presented, a
26 false or fraudulent claim for state funds or property for payment or
27 approval;

1 (2) knowingly makes, uses, or causes to be made or used
2 a false record or statement material to payment or approval of a
3 false or fraudulent claim for state funds or property;

4 (3) has possession, custody, or control of state
5 property or funds used or to be used by this state and knowingly
6 delivers or causes to be delivered less property or funds than the
7 amount for which the person receives a certificate or receipt;

8 (4) is authorized to make or deliver a document
9 certifying receipt of property or funds used or to be used by this
10 state and knowingly makes or delivers a receipt that falsely
11 represents the property or funds used or to be used;

12 (5) knowingly buys, or receives as a pledge of an
13 obligation or debt, state property from any person who lawfully may
14 not sell or pledge the property;

15 (6) knowingly makes, uses, or causes to be made or used
16 a false record or statement to conceal, avoid, or decrease an
17 obligation to pay or transmit funds or property to this state; or

18 (7) conspires to commit a violation of this section.

19 (b) Proof of a person's specific intent to commit an
20 unlawful act under Subsection (a) is not required in a civil or
21 administrative proceeding to show that a person acted "knowingly"
22 with respect to information under this chapter.

23 Sec. 2116.102. CIVIL REMEDIES. (a) A person who commits
24 an unlawful act is liable to this state for:

25 (1) a civil penalty in an amount not less than \$5,000
26 and not more than \$10,000 for each unlawful act committed by the
27 person;

1 (2) except as provided by Subsection (b), three times
2 the amount of damages that this state sustains directly or
3 indirectly as a result of the act of the person; and

4 (3) fees, expenses, and costs reasonably incurred in
5 obtaining relief or civil remedies or conducting investigations
6 under this chapter, including court costs, reasonable attorney's
7 fees, witness fees, and deposition fees.

8 (b) A court may assess not less than two times the amount of
9 damages under Subsection (a)(2) if the court finds:

10 (1) that the person committing an unlawful act
11 furnished the attorney general with all information known to the
12 person about the unlawful act on or before the 30th day after the
13 date the person first obtained the information;

14 (2) that the person committing an unlawful act fully
15 cooperated with any investigation of the unlawful act; and

16 (3) at the time the person furnished information about
17 the unlawful act, a criminal prosecution, civil action, or
18 administrative action had not commenced in relation to the unlawful
19 act and the person did not have actual knowledge of the existence of
20 an investigation into the unlawful act.

21 Sec. 2116.103. EXCLUSION. This subchapter does not apply
22 to a claim, record, or statement made under the Tax Code.

23 [Sections 2116.104-2116.150 reserved for expansion]

24 SUBCHAPTER D. ACTIONS BY PRIVATE PERSONS

25 Sec. 2116.151. ACTIONS BY PRIVATE PERSON AUTHORIZED;
26 ALTERNATIVE REMEDY SOUGHT BY STATE. (a) Subject to Section
27 2116.201, a private person may bring a civil action against a person

1 committing an unlawful act.

2 (b) The action is a qui tam action on behalf of both the
3 person and the state and must be brought in the name of the state.

4 (c) No person other than the attorney general may intervene
5 or bring a related action based on the facts underlying a pending
6 action under this subchapter.

7 Sec. 2116.152. INITIATION OF ACTION. (a) A qui tam
8 plaintiff shall serve a copy of the petition and a written
9 disclosure of substantially all material evidence and information
10 the person possesses on the attorney general in compliance with the
11 Texas Rules of Civil Procedure.

12 (b) The petition shall be filed in camera, shall remain
13 under seal for at least 180 days, and may not be served on the
14 defendant until the court orders service.

15 (c) The state may elect to intervene and proceed with the
16 action not later than the 180th day after the date the attorney
17 general receives the petition and the material evidence and
18 information.

19 (d) The state may, for good cause shown, move the court for
20 an extension of the period during which the petition remains under
21 seal. A motion under this subsection may be supported by affidavits
22 or other submissions in camera.

23 (e) An action under this subchapter may be dismissed before
24 the end of the period during which the petition remains under seal
25 only if the court and the attorney general consent in writing to the
26 dismissal and state their reasons for consenting.

27 Sec. 2116.153. ANSWER BY DEFENDANT. A defendant is not

1 required to file in accordance with the Texas Rules of Civil
2 Procedure an answer to a petition filed under this subchapter until
3 the petition is unsealed and served on the defendant.

4 Sec. 2116.154. CHOICE OF STATE. (a) Not later than the
5 last day of the period described by Section 2116.152(c) or an
6 extension of that period as provided by Section 2116.152(d), the
7 state shall:

8 (1) proceed with the action; or

9 (2) notify the court that the state declines to take
10 over the action.

11 (b) If the state declines to take over the action, the court
12 shall dismiss the action.

13 Sec. 2116.155. ACTION CONDUCTED BY STATE. (a) This
14 section applies to a qui tam action the state takes over under
15 Section 2116.154(a)(1).

16 (b) The state has the primary responsibility for
17 prosecuting the action and is not bound by an act of the qui tam
18 plaintiff.

19 (c) Subject to this section, the qui tam plaintiff is
20 entitled to continue as a party to the action.

21 (d) Notwithstanding the objection of the qui tam plaintiff,
22 the state may dismiss the action for good cause if:

23 (1) the state notifies the qui tam plaintiff that a
24 motion to dismiss has been filed; and

25 (2) the court provides the qui tam plaintiff with an
26 opportunity for a hearing on the motion.

27 (e) Notwithstanding the objection of the qui tam plaintiff,

1 the state may settle the action if the court determines, after a
2 hearing, that the proposed settlement is fair, adequate, and
3 reasonable under all the circumstances.

4 (f) On a showing by the state that unrestricted
5 participation in the litigation of the action by the qui tam
6 plaintiff would interfere with or unduly delay the state's
7 prosecution of the case or would be repetitious, irrelevant, or for
8 purposes of harassment, the court may impose limitations on the qui
9 tam plaintiff's participation, including:

10 (1) limiting the number of witnesses the qui tam
11 plaintiff may call;

12 (2) limiting the length of the testimony of witnesses
13 called by the qui tam plaintiff;

14 (3) limiting the qui tam plaintiff's cross-examination
15 of witnesses; or

16 (4) otherwise limiting the participation by the qui
17 tam plaintiff in the litigation.

18 (g) On a showing by the defendant that unrestricted
19 participation in the litigation of the action by the qui tam
20 plaintiff would be for purposes of harassment or would cause the
21 defendant undue burden or unnecessary expense, the court may limit
22 the participation by the qui tam plaintiff in the litigation.

23 Sec. 2116.156. STAY OF CERTAIN DISCOVERY. (a) On a
24 showing by the state that certain actions of discovery by the qui
25 tam plaintiff would interfere with the state's investigation or
26 prosecution of a criminal or civil matter arising out of the same
27 facts, the court may stay the discovery for a period not to exceed

1 60 days.

2 (b) The court shall hear a motion to stay discovery under
3 this section in camera.

4 (c) The court may extend the period prescribed by Subsection
5 (a) on a further showing in camera that the state has pursued the
6 criminal or civil investigation or proceedings with reasonable
7 diligence and that any proposed discovery in the civil action will
8 interfere with the ongoing criminal or civil investigation or
9 proceedings.

10 Sec. 2116.157. AWARD TO QUI TAM PLAINTIFF WHEN STATE
11 PROCEEDS WITH ACTION. (a) If the state proceeds with an action
12 under this subchapter, the qui tam plaintiff is entitled, except as
13 provided by Subsection (b), to receive at least 15 percent, but not
14 more than 25 percent, of the proceeds of the action, depending on
15 the extent to which the qui tam plaintiff substantially contributed
16 to the prosecution of the action.

17 (b) If the court finds that the action is based primarily on
18 disclosures of specific information, other than information
19 provided by the qui tam plaintiff, relating to allegations or
20 transactions in a civil or criminal hearing, in a legislative or
21 administrative report, hearing, audit, or investigation, or from
22 the news media, the court may award the amount the court considers
23 appropriate but not more than seven percent of the proceeds of the
24 action. The court shall consider the significance of the
25 information and the role of the qui tam plaintiff in advancing the
26 case to litigation.

27 (c) A payment to a qui tam plaintiff under this section

1 shall be made from the proceeds of the action. A qui tam plaintiff
2 receiving a payment under this section is also entitled to receive
3 from the defendant an amount for reasonable expenses, reasonable
4 attorney's fees, and costs that the court finds to have been
5 necessarily incurred. The court's determination of expenses, fees,
6 and costs to be awarded under this subsection shall be made only
7 after the defendant has been found liable in the action.

8 (d) In this section, "proceeds of the action" includes
9 proceeds of a settlement of the action.

10 Sec. 2116.158. REDUCTION OF AWARD. (a) If the court finds
11 that the qui tam plaintiff planned and initiated the unlawful act
12 that is the basis of the qui tam action, the court may, to the extent
13 the court considers appropriate, reduce the share of the proceeds
14 of the action the qui tam plaintiff would otherwise receive under
15 Section 2116.157, taking into account the qui tam plaintiff's role
16 in advancing the case to litigation and any relevant circumstances
17 pertaining to the violation.

18 (b) If the qui tam plaintiff is convicted of criminal
19 conduct arising from that person's role in the unlawful act, the
20 court shall dismiss that person from the civil action and that
21 person may not receive any share of the proceeds of the action. A
22 dismissal under this subsection does not prejudice the right of the
23 state to continue the qui tam action.

24 Sec. 2116.159. STATE NOT LIABLE FOR CERTAIN EXPENSES. The
25 state is not liable for expenses that a qui tam plaintiff incurs in
26 bringing an action under this subchapter.

27 Sec. 2116.160. RETALIATION BY EMPLOYER AGAINST PERSON

1 BRINGING SUIT PROHIBITED. (a) A person who is discharged,
2 demoted, suspended, threatened, harassed, or in any other manner
3 discriminated against in the terms of employment by the person's
4 employer because of a lawful act taken by the person in furtherance
5 of a qui tam action, including investigation for, initiation of,
6 testimony for, or assistance in a qui tam action filed or to be
7 filed, is entitled to all relief necessary to make the person whole,
8 including:

9 (1) reinstatement with the same seniority status the
10 person would have had but for the discrimination; and

11 (2) two times the amount of back pay, interest on the
12 back pay, and compensation for any special damages sustained as a
13 result of the discrimination, including litigation costs and
14 reasonable attorney's fees.

15 (b) A person may bring an action in the appropriate district
16 court for the relief provided in this section.

17 [Sections 2116.161-2116.200 reserved for expansion]

18 SUBCHAPTER E. ACTION BY STATE

19 Sec. 2116.201. STATE MAY PURSUE ALTERNATIVE REMEDY.

20 (a) After a qui tam action is filed, the state may elect to
21 prosecute the unlawful act that is the subject of the action through
22 any alternative remedy available to the state, including any
23 administrative proceeding to determine an administrative penalty.

24 (b) The qui tam plaintiff has the same rights in the other
25 proceeding as that person would have had if the action had continued
26 in the original forum, including a monetary award as provided by
27 Subchapter D.

1 (c) A finding of fact or conclusion of law made in the other
2 proceeding that has become final is conclusive on all parties to the
3 qui tam action. For purposes of this subsection, a finding or
4 conclusion is final if:

5 (1) the finding or conclusion has been finally
6 determined on appeal to the appropriate court;

7 (2) no appeal has been filed with respect to the
8 finding or conclusion and all time for filing an appeal has expired;
9 or

10 (3) the finding or conclusion is not subject to
11 judicial review.

12 SECTION 2. Section 41.002(d), Civil Practice and Remedies
13 Code, is amended to read as follows:

14 (d) Notwithstanding any provision to the contrary, this
15 chapter does not apply to:

16 (1) Section 15.21, Business & Commerce Code (Texas
17 Free Enterprise and Antitrust Act of 1983);

18 (2) an action brought under the Deceptive Trade
19 Practices-Consumer Protection Act (Subchapter E, Chapter 17,
20 Business & Commerce Code) except as specifically provided in
21 Section 17.50 of that Act;

22 (3) an action brought under Chapter 36, Human
23 Resources Code; ~~or~~

24 (4) an action brought under Chapter 541 [~~21~~],
25 Insurance Code; or

26 (5) an action brought under Chapter 2116, Government
27 Code.

1 SECTION 3. This Act applies only to an unlawful act as
2 described by Section 2116.101, Government Code, as added by this
3 Act, that takes place on or after the effective date of this Act. An
4 unlawful act takes place on or after the effective date of this Act
5 only if all elements of the unlawful act take place on or after the
6 effective date of this Act.

7 SECTION 4. This Act takes effect immediately if it receives
8 a vote of two-thirds of all the members elected to each house, as
9 provided by Section 39, Article III, Texas Constitution. If this
10 Act does not receive the vote necessary for immediate effect, this
11 Act takes effect September 1, 2011.