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SENATE BILL NO. 1183

Offered January 10, 2007

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A BILL to amend and reenact §§ 8.01-216.3, 8.01-216.5, 8.01-216.6, 8.01-216.9, 32.1-312 and 32.1-313 of the Code of Virginia, relating to the payment of civil penalties for false claims; fraud actions for medical payments to the Commonwealth.

Patron—Williams

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-216.3, 8.01-216.5, 8.01-216.6, 8.01-216.9, 32.1-312 and 32.1-313 of the Code of Virginia are amended and reenacted as follows:

§ 8.01-216.3. False claims; civil penalty.

A. Any person who:

1. Knowingly presents, or causes to be presented, to an officer or employee of the Commonwealth 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 Commonwealth;

3. Conspires to defraud the Commonwealth 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 Commonwealth and, intending to defraud the Commonwealth 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. Authorizes to make or deliver a document certifying receipt of property used, or to be used, by the Commonwealth and, intending to defraud the Commonwealth, 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 Commonwealth 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 Commonwealth;

shall be liable to the Commonwealth for a civil penalty of not less than \$5,000 \$5,500 and not more than \$10,000 \$11,000, plus three times the amount of damages sustained by the Commonwealth.

A person violating this section shall be liable to the Commonwealth for reasonable attorney fees, expenses, and costs of a civil action brought to recover any such penalties or damages. All such fees, expenses, and costs shall be paid to the Attorney General's Office by the defendant and shall not be included in any damages or civil penalties recovered in a civil action based on a violation of this section.

B. If the court finds that (i) the person committing the violation of this section furnished officials of the Commonwealth responsible for investigating false claims violations with all information known to the person about the violation within 30 days after the date on which the defendant first obtained the information; (ii) such person fully cooperated with any Commonwealth investigation of such violation; (iii) at the time such person furnished the Commonwealth with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to such violation, and (iv) the person did not have actual knowledge of the existence of an investigation into such violation, the court may assess not less than two times the amount of damages that the Commonwealth sustains because of the act of the person. A person violating this section shall also be liable to the Commonwealth for the costs of a civil action brought to recover any such penalty or damages.

C. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

D. This section shall not apply to claims, records or statements relating to state or local taxes.

§ 8.01-216.5. Civil actions filed by private persons; Commonwealth may intervene.

A. A person may bring a civil action for a violation of § 8.01-216.3 for the person and for the Commonwealth. The action shall be brought in the name of the Commonwealth. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their

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59 reasons for consenting.

60 B. A copy of the ~~motion for judgment~~*complaint* and written disclosure of substantially all material
61 evidence and information the person possesses shall be served on the Commonwealth. The ~~motion for~~
62 ~~judgment~~ *complaint* shall be filed in camera, shall remain under seal for at least 120 days, and shall not
63 be served on the defendant until the court so orders. The Commonwealth may elect to intervene and
64 proceed with the action within 120 days after it receives both the ~~motion for judgment~~*complaint* and the
65 material evidence and information.

66 C. The Commonwealth may, for good cause shown, move the court for extensions of the time during
67 which the ~~motion for judgment~~*complaint* remains under seal. Any such motions may be supported by
68 affidavits or other submissions in camera. The defendant shall not be required to respond to any motion
69 for judgment filed under this section until twenty-one days after the ~~motion for judgment~~*complaint* is
70 unsealed and served upon the defendant.

71 D. Before the expiration of the 120-day period or any extensions obtained under subsection C, the
72 Commonwealth shall proceed with the action, in which case the action shall be conducted by the
73 Commonwealth, or notify the court that it declines to take over the action, in which case the person
74 bringing the action shall have the right to prosecute the action.

75 E. When a person brings an action under this section, no person other than the Commonwealth may
76 intervene or bring a related action based on the facts underlying the pending action.

77 § 8.01-216.6. Rights of private plaintiff and Commonwealth.

78 A. If the Commonwealth proceeds with the action, it shall have the primary responsibility for
79 prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person
80 shall have the right to continue as a party to the action, subject to the limitations of this section.

81 B. The Commonwealth may dismiss the action notwithstanding the objections of the person initiating
82 the action if the person has been notified by the Commonwealth of the filing of the ~~motion~~*complaint*
83 and the court has provided the person with an opportunity for a hearing on the ~~motion~~*complaint*.

84 C. The Commonwealth may settle the action with the defendant notwithstanding the objections of the
85 person initiating the action if the court determines, after a hearing, that the proposed settlement is fair,
86 adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may
87 be held in camera. The Commonwealth may, for good cause shown, move the court for a partial lifting
88 of the seal to facilitate the investigative process or settlement.

89 D. Upon a showing by the Commonwealth that unrestricted participation during the course of the
90 litigation by the person initiating the action would interfere with or unduly delay the Commonwealth's
91 prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may,
92 in its discretion, impose limitations on the person's participation, such as (i) limiting the number of
93 witnesses the person may call; (ii) limiting the length of the testimony of such witnesses; (iii) limiting
94 the person's cross-examination of witnesses; and (iv) otherwise limiting the participation by the person in
95 the litigation.

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

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

106 G. Whether or not the Commonwealth proceeds with the action, upon a showing by the
107 Commonwealth that certain actions of discovery by the person initiating the action would interfere with
108 the Commonwealth's investigation or prosecution of a criminal or civil matter arising out of the same
109 facts, the court may stay such discovery for a period of not more than sixty days. Such a showing shall
110 be conducted in camera. The court may extend the sixty-day period upon a further showing in camera
111 that the Commonwealth has pursued the criminal or civil investigation or proceedings with reasonable
112 diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil
113 investigation or proceedings.

114 H. Notwithstanding the provisions of subsection B of § 8.01-216.5, the Commonwealth may elect to
115 pursue its claim through any alternate remedy available to the Commonwealth, including any
116 administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in
117 another proceeding, the person initiating the action shall have the same rights in such proceeding as such
118 person would have had if the action had continued under this section. Any finding of fact or conclusion
119 of law made in such other proceeding that has become final shall be conclusive on all parties to an
120 action under this article. For purposes of this subsection, a finding or conclusion is final if it has been

121 finally determined on appeal to a court of competent jurisdiction of the Commonwealth, if the time for
122 filing an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is
123 not subject to judicial review.

124 § 8.01-216.9. Procedure; statute of limitations.

125 A subpoena requiring the attendance of a witness at a trial or hearing conducted under this article
126 may be served at any place in the Commonwealth.

127 A civil action under § 8.01-216.4 or § 8.01-216.5 may not be brought (i) more than six years after
128 the date on which the violation is committed or (ii) more than three years after the date when facts
129 material to the right of action are known or reasonably should have been known by the official of the
130 Commonwealth charged with responsibility to act in the circumstances, but in that event no more than
131 ten years after the date on which the violation is committed, whichever occurs last.

132 In any action brought under § 8.01-216.4 or § 8.01-216.5, the Commonwealth shall be required to
133 prove all essential elements of the cause of action, including damages, by a preponderance of the
134 evidence.

135 Notwithstanding any other provision of law, a final judgment rendered in favor of the
136 Commonwealth in any criminal proceeding charging fraud or false statements, whether upon a verdict
137 after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the
138 essential elements of the offense in any action that involves the same transaction as in the criminal
139 proceeding and which is brought under § 8.01-216.4 or § 8.01-216.5.

140 § 32.1-312. Fraudulently obtaining excess or attempting to obtain excess benefits or payments;
141 penalty.

142 A. No person, agency or institution, but not including an individual medical assistance recipient of
143 health care, on behalf of himself or others, *whether under a contract or otherwise*, shall obtain or
144 attempt to obtain benefits or payments *where the Commonwealth directly or indirectly provides any*
145 *portion of the benefits or payments* pursuant to the Plan for Medical Assistance and any amendments
146 thereto as provided for in § 32.1-325, hereafter referred to as "medical assistance" in a greater amount
147 than that to which entitled by means of:

- 148 1. A willful false statement;
- 149 2. By willful misrepresentation, or by willful concealment of any material facts; or
- 150 3. By other fraudulent scheme or device, including, but not limited to, billing for services, drugs,
151 supplies or equipment that were unfurnished or were of a lower quality, or a substitution or
152 misrepresentation of items billed.

153 B. Any person, agency or institution knowingly violating any of the provisions of subsection A of
154 this section shall be liable for repayment of any excess benefits or payments received, plus interest on
155 the amount of the excess benefits or payments at the rate of 1 1/2 percent each month for the period
156 from the date upon which payment was made to the date upon which repayment is made to the
157 Commonwealth. Such person, agency or institution, in addition to any other penalties provided by law,
158 shall be subject to civil penalties. The state Attorney General may petition the circuit court in the
159 jurisdiction of the alleged offense, to seek an order assessing civil penalties in an amount not to exceed
160 three times the amount of such excess benefits or payments. Such civil penalties shall not apply to any
161 acts or omissions occurring prior to the effective date of this law.

162 C. A criminal action need not be brought against a person for that person to be civilly liable under
163 this section.

164 D. Civil penalties shall be deposited in the general fund of the state treasury upon their receipt.

165 E. A civil action under this section shall be brought (i) within six years of the date on which the
166 violation was committed, or (ii) within three years of the date when an official of the Commonwealth
167 charged with the responsibility to act in the circumstances discovered or reasonably should have
168 discovered the facts material to the cause of action. However, in no event shall the limitations period
169 extend more than 10 years from the date on which the violation was committed.

170 § 32.1-313. Liability for excess benefits or payments obtained without intent to violate chapter.

171 A. Any person, agency or institution, but not including an individual medical assistance recipient of
172 health care, that, without intent to violate this chapter, *whether under contract or otherwise*, obtains
173 benefits or payments *where the Commonwealth directly or indirectly provides any portion of the benefits*
174 *or payments* under medical assistance to which such person, agency or institution is not entitled, or in a
175 greater amount than that to which entitled, shall be liable for (i) any excess benefits or payments
176 received, and (ii) interest on the amount of the excess benefits or payments at the judgment rate as
177 defined in § 6.1-330.54 from the date upon which such person, agency, or institution knew or reasonably
178 should have known that it had received excess benefits or payments to the date upon which repayment
179 is made to the Commonwealth. No person, agency or institution shall be liable for payment of interest,
180 however, when excess benefits or payments were obtained as a result of errors made solely by the
181 Department of Medical Assistance Services. Whenever a penalty or interest is due under this section or

182 § 32.1-312, such penalty or interest shall not be reimbursable by the Commonwealth as an allowable
183 cost under any of the provisions of this chapter.

184 *B. A civil action under this section shall be brought (i) within six years of the date on which the*
185 *violation was committed, or (ii) within three years of the date when an official of the Commonwealth*
186 *charged with the responsibility to act in the circumstances discovered or reasonably should have*
187 *discovered the facts material to the cause of action. However, in no event shall the limitations period*
188 *extend more than 10 years from the date on which the violation was committed.*