MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON GOVERNMENT AFFAIRS

Seventy-Seventh Session
April 23, 2013

The Committee on Government Affairs was called to order by Vice Chairwoman Dina Neal 8:34 a.m. on Tuesday, April 23, 2013, in Room 3143 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at nelis.leg.state.nv.us/77th2013. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblywoman Dina Neal, Vice Chairwoman
Assemblyman Elliot T. Anderson
Assemblywoman Irene Bustamante Adams
Assemblyman Skip Daly
Assemblyman John Ellison
Assemblyman James W. Healey
Assemblyman Pete Livermore
Assemblyman Harvey J. Munford
Assemblyman James Oscarson
Assemblyman Lynn D. Stewart
Assemblywoman Heidi Swank
Assemblywoman Melissa Woodbury

COMMITTEE MEMBERS ABSENT:

Assemblywoman Teresa Benitez-Thompson, Chairwoman (excused)
Assemblywoman Peggy Pierce (excused)

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Jennifer Ruedy, Committee Policy Analyst
Bonnie Hoffecker, Committee Manager
Lori McCleary, Committee Secretary
Cheryl Williams, Committee Assistant

OTHERS PRESENT:

Keith Munro, Assistant Attorney General, Office of the Attorney General
Cassandra P. Joseph, Senior Deputy Attorney General, Office of the Attorney General
Mark Kemberling, Chief Deputy Attorney General, Medicaid Fraud Control Unit, Office of the Attorney General
Donna Rohwer, Senior Deputy Attorney General, Medicaid Fraud Control Unit, Office of the Attorney General

Vice Chairwoman Neal:
[Roll was called. Rules and protocol were explained.]

We are going to have a hearing on two bills today, Senate Bill 22 (1st Reprint) and Senate Bill 437. I will open the hearing on Senate Bill 22 (1st Reprint).

Senate Bill 22 (1st Reprint): Makes various changes relating to the Office of the Attorney General. (BDR 18-213)

Keith Munro, Assistant Attorney General, Office of the Attorney General:
The Office of the Attorney General is created within the *Nevada Constitution*. The framers of our state constitution also gave the Legislature the authority to prescribe additional duties to the office, pursuant to Article 5, section 22. Most of these duties are set forth within *Nevada Revised Statutes* Chapter 228 or are related to that chapter. This is an omnibus bill so, therefore, there are various parts that relate to the office generally, but do not necessarily have correlation to each other. [Mr. Munro read portions of (Exhibit C).]

I want to start by discussing sections 2, 5, 6, and 7. Section 2 requires the Office of the Attorney General to provide the court rulings it receives pursuant to sections 5, 6, and 7. Section 5 provides that if the Nevada Supreme Court holds that a provision of Nevada law violates the *Nevada Constitution* or the *U.S. Constitution*, a copy of that ruling must be provided to the Office of the Attorney General. Sections 6 and 7 apply this same requirement if a district court or a justice court holds that a provision of Nevada law is unconstitutional.

As you will see in these provisions, it requires a biennial report from the Office of the Attorney General to be provided to the Legislature. The reason for this biennial report is pretty straightforward. It provides the public with knowledge of what state laws have been ruled unconstitutional by the Judicial Branch, and it provides the Legislature with this information so that the Legislature may make any corrections to existing laws that the Legislature may deem appropriate.

This bill draft is related to an existing provision that has been in the law for some time. That is, if someone challenges a law passed by the Legislature, they have to provide copies of the briefs to the Office of the Attorney General. With this provision, we wanted to extend that and get a copy of the orders, if their challenge was successful. We thought we would then create a matrix and provide it to the Legislature so everyone would know what has been held unconstitutional in the prior two years and the Legislature would have the ability to make any changes they thought necessary.

Section 4 relates to the Extraditions Division within the Attorney General's Office. We received a letter from the U.S. Department of State and have provided a copy of that letter to you (Exhibit D). This letter requests assistance in preventing criminal offenders and those persons facing criminal trial who are subject to court mandated international travel restrictions from using or obtaining a U.S. passport. We are living in an increasingly transient society and it makes sense that the state and federal governmental agencies with similar goals work together, when appropriate, to respond to the changing nature of our society.

As I have mentioned in previous testimony before this Committee, we are seeking approval to get involved in issues like this. When the State Senate considered this request, they agreed unanimously, and we hope we can get your support on this request as well.

Section 8 also deals with the Extraditions Division within the Office of the Attorney General. The Extraditions Division makes arrangements for returning fugitives captured in Nevada to another state to face trial for a crime committed in that state, or for the return of fugitives captured in another state who committed a crime in Nevada. These extraditions are conducted at the expense of the Nevada taxpayers. Existing law permits the court to order a prisoner to make restitution to the State for these extradition costs. When the repayment of extradition costs is ordered, section 8 allows our Extraditions Division to enter into an agreement with the Office of the State Controller, who is the State debt collector, so they can attempt to collect any extradition costs. This seemed like a natural extension for us in the last session. The Legislature

designated the Office of the State Controller to create a program to collect State debts, and this is a State debt. We work closely with the Controller's Office and they have provided an amendment (Exhibit E) that we set forth to this Committee so those costs can be referred to their office for collection.

Finally, section 14 provides clarifying language for the fund for insurance premiums, which is an internal service insurance fund used by the Department of Administration, Risk Management Division and the Office of the Attorney General. This statute had not defined the term "state agency" previously. Section 14 provides a definition to ensure that all state agencies contribute to this fund.

That concludes my testimony and I would be happy to answer any questions.

Assemblyman Elliot Anderson:
I am looking at the Senate amendment. They took out "Clerk of the Court" and replaced it with "prevailing party" in terms of the notification procedures. Do you think most parties to an action are going to know about this requirement? When we cancel someone's voter registration, the district court sends the order directly to the Office of the Secretary of State. Would it not make more sense, in the limited instances when something is declared unconstitutional, to let the court do it?

Keith Munro:
Our original submission had the court requirement, but we worked with the courts and they requested that we give it a try, because, as I mentioned, the existing provision requires the parties. We agreed to give that amendment a try to see how much success we could have.

Assemblyman Stewart:
I would like to ask a little bit about the extradition part of the bill. Are we paying to extradite people from another state back to our state and from our state to another state? It seems to me it should only be one way or the other. Can you enlighten me on that? Secondly, is it difficult to get reimbursement from these individuals? It seems to me, if they commit a crime, they usually do not have a lot of money lying around.

Keith Munro:
I may not have been clear in my testimony. Whoever is requesting the person to be returned, that state pays. If someone committed a crime in the state of Maine and was captured in Las Vegas, we capture and detain them, but Maine would pay the extradition costs. Conversely, if someone here in Nevada

committed a crime and was captured in Maine, Nevada would pay the extradition costs.

It is extremely difficult to collect the money from the individuals who are extradited. We are hoping, and the Office of the State Controller agrees, that if we send it to the State debt collection agency, they will be able to use some mechanisms, such as liens, federal garnishments, and other more sophisticated means, to collect this money. Hopefully, we will get a better return.

Assemblyman Daly:
It seems fairly narrow when you talk about the Supreme Court cases and the file you are going to make up on just provisions that have been declared unconstitutional. To me, that just seems like a pretty narrow standard. There are a lot of cases where a law may be declared not to have the intent that everyone thought it had. If you just focus on the ones that are declared unconstitutional, it seems to me it would be pretty rare. Including laws that change the status quo or change what everyone understood it to be would be useful to us. It does not declare it unconstitutional; it just gives it a different meaning. Are those types of cases included in the things you are going to be reporting back to the Legislature?

Keith Munro:
The short answer is no. It will be the clear-cut cases where a court rules the Legislature passed a law that violates the *Nevada Constitution* or the *U.S. Constitution*. We thought that was a good starting place to bring that information to you now. You have an excellent staff and we catch most of them, but we do not necessarily catch all of them. We thought if we had some type of procedure or mechanism where we could bring that information to the Legislature, then we would also reap some benefit.

Assemblyman Daly:
You have been with the Office of the Attorney General for at least a couple of years. How many times has a law been declared unconstitutional? I do not recall that many.

Keith Munro:
I cannot give you an exact number, but it happens more often than you think.

Assemblyman Daly:
A dozen times or a half a dozen times, less or more? I am not going to hold you to it.

Keith Munro:
I will say a dozen.

Assemblyman Livermore:
Can you tell me a little bit about assessments, specifically assessments to the counties? How do you come to that and what triggers an assessment?

Keith Munro:
Are you referring to section 14?

Assemblyman Livermore:
I am.

Keith Munro:
We have a risk management division with the State. We make an assessment to agencies, and it is mostly done on a headcount basis, but it is also by cars, as well. It is an insurance fund that protects the State if we are sued for torts or car accidents. The Budget Division is more knowledgeable about this than I am. However, they figure out what our risk is and what our pool is. They figure this on a headcount basis and factor in the dollar value to raise enough money to meet the potential risk.

Assemblyman Livermore:
You described a headcount basis. Some counties have a very limited amount of resources for General Fund services, and evidently an assessment means they are responsible for paying it. Do they have an opt-out provision?

Keith Munro:
If you look at section 14, subsection 1, it is an internal service fund to be maintained for the state. It is each state agency. It is an effort to get the state agencies to contribute equally.

Assemblyman Livermore:
I am mainly concerned about the responsibility of the 17 counties that really do not have a lot of operating money. I am curious to know if there is an opt-out. As a county official, I do not recall ever having an assessment for this fund in the city budget. Is this something new, or has it been paid before?

Keith Munro:
This statute has been on the books for a while. It is called the Fund for Insurance Premiums, but it is more properly known as the tort claims fund. We have a lot of litigation in our state, so we have to figure out a way to pay potential damages if that happens. I would imagine counties probably have

a similar type of tort claim fund for when county officials are sued or if a county policy injured someone.

Assemblyman Livermore:
That is true. That is part of the insurance they generally pay. It is not an assessment.

Vice Chairwoman Neal:
When you changed the definition of "state agency" in section 14, subsection 5, paragraph (b), what was the problem that was occurring that you needed to redefine "state agency?" Were people not paying into the fund because they felt they were not captured in the definition?

Keith Munro:
Yes. We had some boards and commissions that were not sure if they fell within the definition of a state agency. Boards and commissions need to be covered by the tort claims fund and be a part of that, if they want to be covered. They are operating under the guise of the State of Nevada and because of that, if they injure someone, the State of Nevada is at risk, so they need to be part of the pool that is covered.

Vice Chairwoman Neal:
Is there any testimony in support of the bill? [There was none.] Is there any testimony neutral to the bill? [There was none.] Is there any testimony in opposition to the bill? [There was none.] I will close the hearing on Senate Bill 22 (1st Reprint). I will open the hearing for Senate Bill 437.

Senate Bill 437: Makes various changes to provisions relating to false claims. (BDR 31-1090)

Cassandra P. Joseph, Senior Deputy Attorney General, Office of the Attorney General:
With me via videoconference from Las Vegas are Deputy Attorney General Donna Rohwer and Chief Deputy Attorney General Mark Kemberling from the Medicaid Fraud Control Unit of the Office of the Attorney General. We are here to support Senate Bill 437.

Senate Bill 437 makes changes to the Nevada False Claims Act, which is also known as the whistleblower statute. [Ms. Joseph read portions of (Exhibit F).] The proposed changes are important for two main reasons. First, they will bring Nevada in compliance with federal incentive standards under the Deficit Reduction Act (DRA). Secondly, it will allow Nevada to earn a higher percentage of federal funds on false claims cases that bring in a reward. It will

also make prosecution of the false claims actions more efficient, enabling Nevada to pool its resources with federal and other state resources.

I would like to give you a little background on the Nevada False Claims Act. Nevada uses the False Claims Act to fight fraud committed against State government. The Nevada False Claims Act was modeled after the Federal False Claims Act and 27 other states have also adopted a false claims act. The act rewards whistleblowers, also called *qui tam* plaintiffs, who report fraud committed against the government. While the False Claims Act is used broadly for all types of fraud, it is largely used for Medicaid fraud today. This is because of the large amount of federal and state government funding that is involved. Medicaid serves the poorest citizens of Nevada, many of whom are elderly and disabled. The program is jointly funded by federal and state government, so the Nevada False Claims Act is important to protect both Nevada and federal money. The Nevada False Claims Act enables the Office of the Attorney General to protect Nevada's money against fraud by Medicaid health care providers. These providers include providers of medical goods, suppliers, health care workers, and facilities when there is improper or inadequate billing, sometimes billing for nonexistent products or services, or when these providers and suppliers inflate their billing.

These changes are necessary because the Federal False Claims Act was amended as a result of legislation between 2009 and 2010. The federal government indicated to Nevada that in order to continue to receive an additional 10 percent of the earnings on a case, the Nevada False Claims Act must be amended to be at least as effective as the Federal False Claims Act. A lot of the changes are wording changes because the federal government has looked at the Nevada False Claims Act and indicated, via letters, which you have copies of [(Exhibit G) and (Exhibit H)], that it is currently no longer in compliance. Nevada had been in compliance, but when the Federal False Claims Act was amended, Nevada's False Claims Act was no longer in compliance. The federal government gave Nevada until August of this year to come into compliance in order to earn the Deficit Reduction Act bump, or the DRA bump.

In addition to the benefits of earning this extra 10 percent of recoveries, there is also the incentive to be more like the False Claims Act in other states, as well as the Federal False Claims Act, so that Nevada can take advantage of federal and other state case law that may assist when there is wording of a statute that is very similar. More consistency will allow Nevada to pool its resources with other states. Many of these cases are multistate cases and also involve the federal government, so the more the Nevada False Claims Act resembles some

of the other states and the federal government, they can use the other's resources more easily.

I will quickly highlight some of the changes and then I would be happy to answer any questions.

Sections 2, 3, and 4 are additions of definitions. Section 5 clarifies when information is disclosed publicly before the claim is actually filed. Sections 6 and 7 are also definition changes. Section 7 expands the term "claim" to be a little broader. Section 8 basically moves the amount of the penalty to the bottom of the section and it also increases the penalties slightly, as adjusted by the Federal Civil Penalties Inflation Adjustment Act, from $5,000 to $5,500 and up to $11,000. That is for the penalty only and does not include damages. Section 9 adds the word "diligently."

A lot of the language change in section 10 is to make it more similar to the federal language and to clarify language. The changes in section 11 are to clarify that if information is publicly disclosed, the amount of recovery can be smaller than usual. Section 12 adds a provision to allow for the circumstance if a case is filed and then dropped, but another case is later filed, it can relate back to the original filing date. It expands the rights of *qui tam* plaintiffs.

Sections 13 and 14 have language changes to become more similar with federal language. Section 15 extends the time for response to a complaint by the defendant. Section 16 changes the word "solely" to "primarily." If it is "primarily" for harassment, then defendants can obtain attorney's fees.

Section 18 discusses if a whistleblower has involvement in the original fraud. It evaluates the type of involvement and can either reduce the amount of recovery that whistleblower gets, or it can eliminate them from any recovery whatsoever.

Sections 19 and 20 changes wording, again to try to make Nevada's False Claims Act at least as effective as the Federal False Claims Act. Section 20 adds a three-year statute of limitations.

Finally, there are a few repealed sections. Those primarily relate to cases that may be brought by a government employee. It reduces the number of steps a government employee must go through in order to file a False Claims Act to put them on equal footing to a nongovernment employee.

That is the sum of those changes. I am happy to answer any questions.

Assemblyman Stewart:
Are you certain that the language in this bill will now comply with the U.S. Department of Health and Human Services requirements? I know they determined our present language was not in line. Secondly, can you explain how difficult it is to reclaim money from people who are fraudulent and give us a little history of how successful you are in that area?

Keith Munro:
In answer to your first question, I would like to compliment your staff because we worked closely with them to do our best to make sure this language complies with what is required from the federal government. We think we have hit the mark.

In response to your second question, I would ask Chief Deputy Attorney General Mark Kemberling to step up and talk a little about the process of trying to recover this money. He works on these cases each and every day.

Mark Kemberling, Chief Deputy Attorney General, Medicaid Fraud Control Unit, Office of the Attorney General:
To the question regarding the difficulties in collecting funds from the fraudulent parties, it is somewhat difficult, especially in today's times. As everyone else, even the fraudsters have been affected by the recession. Certain types of fraudsters distribute their funds as quickly as they are brought in. The majority of the funds recouped from the use of this particular statute comes from established, long-term providers, such as manufacturers, pharmaceutical companies, and hospital chains. This statute is used by the Medicaid Fraud Control Unit to look at complex billing schemes. We are not talking about a criminal degree of fraud, we are talking about a degree of fraud sufficient enough to warrant a recoupment and penalties as deemed appropriate. Many of the people on the receiving end of these types of lawsuits are established businesses or entities and are able to pay.

It was brought up earlier that the additional 10 percent, which we are trying to maintain the ability to collect, was approximately $250,000 last year for the Medicaid Fraud Control Unit. Actually, it is for the State of Nevada's Medicaid agencies.

Assemblyman Ellison:
Under this law, these are 99.9 percent felonies, but are there any gross misdemeanors? What is usually the cap when you go in to investigate? Is there a certain amount that triggers this?

Mark Kemberling:
This is a civil statute. Although we are looking at the dollar amounts that would trigger felony, gross misdemeanor, and misdemeanor type crimes, we are also looking at a civil element of fraud. The burden of proof in the area of the civil statute is different from the element of fraud in the criminal statutes. Those are a completely different set of statutes to address the criminal behavior. This is primarily in the civil arena.

Assemblyman Ellison:
Can you explain a little bit more about the new language in section 20, subsection 1, regarding if an employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed or discriminated against?

Cassandra Joseph:
What this section does is move language that was found in a previous section to this section. What it is addressing is retaliatory conduct. If an employee is retaliated against for filing an action or giving information that might cause the filing of an action, that employee is statutorily protected and the employer cannot terminate or otherwise retaliate against the employee.

Assemblyman Ellison:
What about the protection for the employer?

Cassandra Joseph:
The employer is protected in the sense that at the time of the filing, the case is kept confidential until the Attorney General makes a decision about whether or not to intervene. During the investigatory stage, there is no public record of the litigation or the case that has been filed; not until the Attorney General has an opportunity to investigate and determine the merits of the case.

Assemblyman Daly:
In section 9, the only change is adding the word "diligently." Is that something the federal government is asking you to do? They have already told you to investigate, but now they want you to "diligently" investigate. I would take offense to that if I were in your office.

In section 13, subsection 3, regarding the new language, "Upon a showing for good cause, the court may hear the proposed settlement in camera." I am not sure what "in camera" means. What is the procedure now? Are the cases closed or not? Why does the court need this discretion if they were already open? If they were already open, why do we want to tell the court they have the discretion to close them?

The final question is regarding section 12, subsection 3. Could you explain and give me an example of when a plaintiff may have been part of the complaint?

Cassandra Joseph:
I will start with section 9. Again, many of these changes are being very sensitive to the federal language and wanting to ensure the signoff happens, so that word was added. I do not think there was any nuance that the Attorney General's office was not "diligently" investigating. However, to err on the side of caution, that word was added.

With respect to section 13, what this language is talking about is when the parties have agreed on a settlement, the court needs to review and approve that settlement. If the parties were all in agreement, it would be a rare case where the court would not agree. The proposed settlement can be reviewed in camera, but it would be put on the record in a hearing. The proposed settlement would be reviewed in camera because many times these cases settle before they have been disclosed to the public. There are benefits to all the parties when that happens. Many times, the defendant can settle under confidential terms and once the settlement is entered, then it can be put on the record, the case disclosed, and then there is a settlement. However, this is protection for resolving it in camera outside of the public.

Assemblyman Daly:
So "in camera" just means on the record?

Cassandra Joseph:
"In camera" means it is not a public record. It would be in chambers or outside of the public record. There would be some discussion of those terms outside of the public record and then it can be put on the public record in a different form.

With respect to section 12, subsection 3, what this is talking about is when a private plaintiff brings an action and private plaintiff is involved in the fraud to a degree. For example, if the plaintiff is criminally charged and convicted, then the statute prevents them from taking any recovery. In those cases, it may be that it is a very valid case and the state wants to pursue it, but they want to pursue it on their own terms without the *qui tam* plaintiff. Another situation may be where the plaintiff files a complaint but it is a poorly written complaint and perhaps does not encompass all the Attorney General would want to encompass in its own complaint. This is allowing for the Attorney General to take the case and file its own complaint. When and if the Attorney General determines to do that, the date of the Attorney General's filing would relate back to the original filing date so it can take advantage of the statute of limitations.

Vice Chairwoman Neal:
I have a question on section 7, subsection 1. This is an "or" statement and you separate paragraphs (a) and (b). The language states, "regardless of whether the State or a political subdivision has title to the money or property that is: (a) Presented to an officer . . . ." How then do you get a stake in the outcome to bring a suit if there is no title to the money? The State or the political subdivision does not have title. I do not understand that. If it is a claim and you have no title, tell me, how can you intervene?

Cassandra Joseph:
The word "title" is used in the legal sense of a formal title, either "in your possession," or, perhaps, title of property in terms of already having received it and it is now on the books. What this is doing is trying to expand claims so that if it is an expectant obligation—in other words, if an entity is required to pay the State, but has not yet received the payment. The State does not have title to it, but the State is entitled to it. The term "title" is used in the expectant sense. It is due and owing to the State, but has not actually transferred to the State. I will ask my counterparts in Las Vegas if they have anything to add to that.

Vice Chairwoman Neal:
I would like to clarify what it is I am asking for. You are modeling the federal statute, and I was reading the term "claim" and how it is defined under the Federal False Claims Act, 31 *United States Code* §§ 3729-33. If you are saying the words "Presented to an officer . . . ," is prospective, then Mr. Kemberling needs to help me understand how the words "claim" and having no "title," but yet being presented, mix together based on what you just said, because I am not understanding.

Mark Kemberling:
I think some of the emphasis is on the term "claim." Consider it to be like filing a false statement. If someone files a false application for a certain type of license in front of a regulatory board, that would be submitting a false statement. The claim itself is false. The falseness of the claim is what generates the cause of action.

Vice Chairwoman Neal:
It still goes back to my question. If I am sitting at the table and make a false claim, the Attorney General has no title—meaning possession or interest—in the statement I am saying. How do you get a nexus to that relationship? What is the legal relationship? The language in section 7, subsection 1, states, ". . . regardless of whether the State or a political subdivision has title to the money or property, that is: (a) Presented . . . ," how then do you get involved

to bring an action against me? You do not have a relationship to the issue. Are you the proper party who can then go after me, because you do not have a relationship to my statement? That is what that means to me.

Mark Kemberling:
There are occasions in which other entities make payments on behalf of the government. The money has already been provided to another entity that holds that money on behalf of the government and distributes it when the claims come in. It could be private contractors. I focus on the area of health care fraud, so you may want to consider a private contractor in the area of health care fraud. This may not be the best analogy, but a managed care organization receives a portion of money every month or every quarter to distribute within its managed care organizations to pay out on behalf of claims that are submitted by contractors within the managed care organization. If there is falseness in the claim itself that generates the monies being paid out through the managed care organization, those are the types of claims and false documents that authorize government enforcement or inquiry. That is what this is speaking to.

Vice Chairwoman Neal:
Thank you for that, but it still puts me at the "or" statement. What you just explained refers to section 7, subsection 1, paragraph (b), meaning that regardless of a contract or otherwise, "Made to a contractor, grantee, or other recipient if the money, property or services are to be spent or used on behalf of the State . . . ." Paragraph (a) is the actual presentation to an officer of a false claim, regardless of whether or not they have a stake or title to the money or property. It does not say "other services."

Cassandra Joseph:
I have an example I think may fit into the first category, but it is outside the realm of Medicaid. If you have a construction contractor who is working for the State or a political subdivision and they are submitting invoices to the State and those invoices are false, the State does not have title to any money or property, but they are paying on false invoices. That is considered a false claim and that fits within the context of this statute. Section 7, subsection 1 is more of a direct false claim made to the State. It may not be the occasion where it is State money that is involved in a federal program, it is just that the contractor happens to be contracting with the State, and those actions fall within this statute as well.

Vice Chairwoman Neal:
Basically, you can be or act as a third party and go after someone just because they made a statement which is presented to an officer. Is that not broad?

Cassandra Joseph:
It is broad. The idea is that there is a lot of fraud committed against the government. The reason for that is the government does not always have the resources to be diligent about investigating or double-checking this fraud. The purpose of the statute is to allow the public to help the government investigate fraud against it. It is broad and the idea is if you are going to commit fraud against the State, be prepared to pay penalties and trouble damages.

Vice Chairwoman Neal:
I will move on to another section, but my final comment on that issue is that this perhaps opens the door for a plaintiff who challenges the claim that they made a false assertion. The plaintiff could come back and say they are not even a party of interest. There is no direct relationship to why the State can even file against the plaintiff without falling into some chasm of the law under civil procedure. The plaintiff will want proof that the State is the correct party filing the suit under this broad category.

Cassandra Joseph:
If I understand you correctly, the government is absolutely a party to whatever the transaction is. It is either that there has been a false claim against the government, or the government's money has been used in a fraudulent manner. The government is not going to be able to get involved in other fraud; it is fraud against the government.

Vice Chairwoman Neal:
Can you define "title" somewhere in this section? To me "title" means possession or authority. If the word "regardless" is coming before the word "title," then it seems to completely abrogate possession, interest, and authority.

Mark Kemberling:
I would like Ms. Rohwer to give you one more example on that before we move on.

Donna Rohwer, Senior Deputy Attorney General, Medicaid Fraud Control Unit, Office of the Attorney General:
I think I can give you an example that we saw in another state. A particular provider under a managed care system was billing health care when he was not providing any services at all. He was billing the health maintenance organization (HMO) for services, but he was not being paid by the State. The State paid the umbrella HMO and the HMO paid the health care provider. However, those claims were false. It is an indirect relationship with the State because the HMO negotiates its rates with the State based on the services that are billed by the providers underneath. Even though the State had no direct relationship between

the State and the health care provider, the HMO in the middle benefited from additional rate increases by virtue of being able to submit encounter reports, which end up increasing rates for the State. It is difficult for us to prosecute people when the State will be hit with fraudulent money in an indirect way. This allows the State to reach to an indirect provider who is committing fraud in a very deliberate way. Does that make sense?

Vice Chairwoman Neal:
It does make sense and I appreciate all the examples. I still think it is too broad. It would have been better if I had an example specific to Nevada, being this is a Nevada statute.

I would like to move to section 8, subsection 1, paragraph (d). This subsection begins with, "Except as otherwise provided in NRS 357.050, a person who, with or without specific intent to defraud, does any of the following listed acts is liable to the State or a political subdivision, whichever is affected . . . ." I went down the list and in paragraph (d) you deleted "receipt that falsely represented the money or property" and added "document without knowing that the information on the document is true." Please tell me how I become—if it were me—liable for a document without knowing that the information on the document is true. Tell me how that works, because I would be really angry if you told me I was liable for a document that I had no knowledge whether the information on the document was true or false.

Cassandra Joseph:
The intent here is that it is achieving the reckless disregard standard. You cannot purposely ignore the truth and you cannot put something on a document without doing a modicum of research or investigation to ensure that the information is correct before you submit it.

Vice Chairwoman Neal:
I keep trying to tie everything together. Section 3 defines "obligation" and you have literally mimicked the federal law. The definition for "obligation" in the bill says "means any established duty, regardless of whether the duty is a fixed duty . . . ." The way you explained that, the connection between whether or not a person decided they did not want to know what was in the document then ties into what is now an existing duty of that person. We have created a duty that you should know what is in the document regardless, or we are creating a duty that you should not act stupid and act like you do not know what was written on that paper, because now you have a duty to understand every single aspect of everything.

Cassandra Joseph:
I am going to pass that on to Las Vegas for a good example. However, I think the idea is to say you cannot submit something without doing a little homework to make sure that what you are submitting is, in fact, accurate. Many times, especially with Medicaid, there are regular submittals of services or supplies provided. The intent is there must be the duty, when someone is submitting a claim to the government or to a contractor of the government for reimbursement to make sure it is accurate.

Vice Chairwoman Neal:
Who is liable? Is it the recipient, the grantee, or the owner? For example, Clerk X signed off on a document that I then passed to another Assemblyman. The Office of the Attorney General comes to me and tells me that under this bill, I am now liable for that document. I did not prepare it. I did not have a line of connection to this document, and now I am liable for a document Clerk X prepared. What is the line here? Maybe the line is because we are talking about something in abstract from the actual action of the Medicaid Fraud Control Unit of how this transaction occurred. To me, once again, we are at a broad statement with some wonderful wordsmithing that leads me into another situation of how this gets proven.

Cassandra Joseph:
The proof is difficult and is definitely something that comes up in these cases. There has to be an element of fraud. For the example that you gave, the employer is liable for the acts of his employee up to a certain extent, especially if it has been institutionalized in that employer's office. If the employer knows or even suspects that there is a practice of regularly submitting claims without having anyone check them, that would fall into reckless disregard. The employer is purposely turning his head from the truth of the matter. The employer would then be liable for that employee. We are getting into a different area of law here, but essentially, the employer must show that the employee did this on their own and it was not within the scope of their employment or that they had an intent that was separate and apart from what the employer had guided them to.

Vice Chairwoman Neal:
That is a great example. Do you know what popped into my mind as soon as you were explaining that? What if it was in the category of an agent relationship? Not the employee, but an agent/principal relationship. The context of what you are saying, with the chain of custody on the document, is different when an agent is involved. Talk to me about that relationship, because it would still apply under this section. You appear to be covering all

relationships where government dollars are affected, presented, thought about, et cetera.

Cassandra Joseph:
There are a lot of entities involved in some of these types of transactions. It can go from one office to an agent to another office. When you have those divisions, then you look at each of those separately. In the example of where you have the employer and the employee within the same office, that is largely going to be looked at as one entity, unless the employer can show the employee did something out of their scope. Once you are looking at a different entity, such as a subcontractor or an agent, then that is looked at separately. Each entity that has their hand in it may or may not be liable under this statute. If one is liable, it does not mean that everyone who touched it is liable.

Vice Chairwoman Neal:
In section 8, subsection 1, paragraph (g), it states, "Knowingly conceals or knowingly and improperly avoids . . . ." What does "improperly avoids" mean?

Cassandra Joseph:
I do not have a great example of this, but perhaps my colleagues in Las Vegas do. I think, generally speaking, it is where you have a duty to report something to the government and avoid reporting it.

Vice Chairwoman Neal:
Mr. Kemberling, please define "improperly avoids." I think we are stretching duty way out of bounds.

Cassandra Joseph:
I think a quick definition would be that you are deviating from normal procedure.

Mark Kemberling:
This deals with those who are primarily providers or work on behalf of the government, not in normal commercial settings. In order to become a provider in that scenario, there has to be a provider application and qualifications. There is an acceptance process. In that process, many of the duties of the provider are laid out. Those duties include the certification that the claim submitted by the provider will be true and correct and reviewed for accuracy. In that respect, when the provider entered the agreement to be a provider of government services or to work on behalf of the government, they have agreed to supply their claims with correct and accurate information. They have the obligation and the duty to know that the information on those claims is correct.

To your question regarding "unknowingly conceal" or "knowingly and improperly avoid or decrease an obligation," this is a listing of terms or incidents. Paragraph (g) will not apply in every instance. In the instances where a provider supplies products to the government as well as nongovernment entities, there may be a clause in their contract that will state something to the effect that the government will always receive the lowest bargain price. If the government bargains with a provider today for $5 per widget, and the provider manufactures the widgets and submits claims for $5 each, the government wants the benefit of the best bargain possible. Many of the contracts have a clause indicating the best price that is afforded to commercial buyers. If the government learns that the widgets are also being provided to a private company for $3 per widget, this clause allows the government to get a $2 per widget rebate. Then comes some accounting and tracking to make sure the government can accurately obtain the rebate after the fact.

There is an area of fraud that exists which his deemed best price fraud or rebate fraud. When we look into it, we have to rely on the manufacturers' and providers' records. Unfortunately, in the cases we move forward on, we have seen where those records establish a fake rebate, an improper rebate, or no rebate. That is what this speaks to. They knowingly and improperly avoid their obligation or decrease their obligation.

This could also be undermining of public lands where you are supposed to pay so much per cubic yard or ton. As the trucks leave the yard, they falsify how much tonnage there is. Therefore, they are improperly avoiding their obligation to pay a tax per ton by minimizing the tonnage they are carrying.

Donna Rohwer:
The other trend we have seen more and more in the last few years is in health care fraud. Services used to be directly billed. The providers are getting much more sophisticated, and many times the fraud is now accounting fraud, particularly with facilities but also with managed care and other kinds of organizations. They will increase expenses improperly so it looks like they decrease income in another area. They may also play a shell game with different corporate structures and then divert funds, one through another, for the corporate structures.

Part of the restructuring of this section, as well as some of the other sections, is to allow the government to track the money wherever it is going, whether it is accounting fraud or other types of fraud. That makes it very difficult.

Vice Chairwoman Neal:
Basically, we might want to rethink what "improperly avoids" means. I understand the intended application, but if I was on the other side and I wanted to defend myself against that, I would be looking at everything that was vague, everything that was overly broad, and I would be trying to challenge exactly what you put in there to say I did not do it. You would not be able to give me a legal definition of the term and I would be able to argue my way around it 15 times.

I would like to move on to section 16, subsection 2, where it states, "If the Attorney General or the Attorney General's designee does not proceed with the action and the defendant prevails in the action brought by a private plaintiff, the court may award . . . ." In section 18, subsection 3, it looks to me as if you limit the recovery if it is brought by a private plaintiff. Talk to me about those two sections together. I need to understand that because when I was reading it, I kept trying to look at all the things they could be liable for and trying to understand the action brought by a private plaintiff who planned or initiated the violation. I am still trying to figure out what they are really liable for initiating, because that seemed to be broad also. Walk me through those two sections and how they work together.

Cassandra Joseph:
I will start with section 16, subsection 2. That section is really about an occasion where you have a private plaintiff who files an action and the action was not legitimate. Essentially, it was brought for harassment. It was a disgruntled employee who wanted to make the employer angry, for example. In those cases, what is happening is the court is telling the employer they will be able to get the attorney fees back if the case is dismissed because it was found to be brought for harassment. It discourages frivolous claims by a plaintiff.

Section 18 is really the meat of the amount of recovery a plaintiff may get if he or she files an action that is meritorious—in other words, for bringing a claim that is not frivolous and is actually pursued. Depending on whether or not the Attorney General intervenes, the plaintiff may recover a certain amount of whatever is recovered as a result of the fraud. If the plaintiff files an action and the government determines it wants to intervene in the action and essentially take over as the party in interest, then the plaintiff will get anywhere between 15 to 33 percent, depending on what their contribution is in terms of pursuing the action or assisting the Attorney General in pursuing the action. If the Attorney General determines she does not want to intervene, then the plaintiff can receive between 25 to 50 percent. It is a greater percentage because at

that point, the plaintiff is essentially litigating on his or her own without the assistance of the Attorney General or use of the Attorney General's resources.

Vice Chairwoman Neal:
In section 18, subsection 3, line 45, it states, "The court shall consider the role of a private plaintiff in advancing the action and any other relevant circumstances." I am confused about what the phrase "any other relevant circumstances" could be. I was looking at how broad the other terms are where folks are liable and I was wondering about "any other relevant circumstances." I understand that people are running games, but I also feel we have gotten so broad, we may get into issues in terms of proving what is really happening.

Cassandra Joseph:
I think "any other relevant circumstances" relates largely to the kind and quality of information that is provided by the plaintiff. "Advancing the action" would be the efforts by the plaintiff and the amount of work and resources they may be using to assist in the investigation. "Any other relevant circumstances" is meant to capture other added value. For example, it may be information they may have gleaned from their position as an employee of the employer who is committing the fraud.

Assemblyman Elliot Anderson:
I am wondering about your changing the definition of "original source" in section 4. The way I read it, and correct me if I am wrong, it seems to supplement and add to the definition for folks who really did not start the allegations, but who materially added to it. It does not seem like they are really the original source if they saw something publicly and came in to talk about it. It seems like something would have to already have been initiated for them to materially add to it. Does that not really take away from the plain text of what "original source" is known to be?

Cassandra Joseph:
The original source can occur in a couple of different ways. An original source is always going to be someone who has knowledge that is not otherwise publicly known. Sometimes you have an original source who knows about something that is isolated and there is no other information about it anywhere. They can either file a complaint or report it to the Attorney General's Office. The other occasion is what this is addressing, which is where you have a person who has valuable information, but they may not have pieced it all together. Then there is something else that occurs that is maybe more publicly known. That information, although it is separate and independent, can be used to really make the case. In other words, it is bridging information. It is also valuable, because it is adding to something that might be publicly known, but is

a key piece of the puzzle that you otherwise would not have in order to pursue an action. It is still very valuable information, but it is not as isolated as the original source, where nothing else is publicly disclosed.

Vice Chairwoman Neal:
In section 18, subsection 3, it says, "If the private plaintiff is convicted of criminal conduct . . . the private plaintiff must be dismissed from the civil action . . . ." Basically, we are going to bring a criminal action first. Some of the conversation has been around contracts. In what category are we bringing the criminal actions?

Cassandra Joseph:
That is referring to when you have a person who was actively involved in the fraud they are now reporting. They were so actively involved, there was actually a criminal prosecution against them for that fraud. If you help steal money from the government and the government pursues you criminally for your involvement in that scheme, you cannot then use that scheme to file under this statute to recover some of the proceeds.

Vice Chairwoman Neal:
I apologize if this is lasting longer than the Senate's ten-minute hearing, but I actually have an interest in this provision. To me, section 20 means we are going to protect the contractor or agent who is discharged if their employer comes after them and tries to treat them badly because they help in this effort. However, they are going to be liable for so much. We will protect the person if they are discharged for not knowing whether the information on the document was true. How does this work in that broad category of liabilities? How do you protect the person who may have been ignorant and who knows probably more than what they should know? Based on this testimony, people are basically making false assertions all the time, but we want to protect them in section 20.

Cassandra Joseph:
Essentially, what section 20 is doing is protecting employees from retaliation. It is not protecting employees who do not do their job. If you have not done your job and you are fired, suspended, or otherwise penalized for legitimate reasons, then this statute does not apply. It is focused on preventing an employer from retaliating against an employee because that employee reported information that may lead to a claim under the statute.

Vice Chairwoman Neal:
I guess I found it a little interesting. If I was the employee who used section 8, paragraph (f) as my reason to report my employer, then there may be some retaliation if my employer submitted the document without knowing if the

information on the document was true. I think because we have such a broad category of liability, there are some things that may be flexed out or written differently so people know what they are liable for. An employer, who then responds to an employee, agent, or recipient, should know what paragraph (f) means, what he did, and what he is liable for. Those are my thoughts and I do not think I have any more questions on the bill.

Keith Munro:
May we conclude?

Vice Chairwoman Neal:
Yes.

Keith Munro:
The biggest part of our State budget is probably Medicaid. The largest part of our dollars comes from the federal government. They place requirements upon us to receive those dollars. Our state has created our Medical Fraud Unit to police the Medicaid budget. We have provided you the letters we received from the federal government [(Exhibit G) and (Exhibit H)] telling us how we are not in compliance with federal law. Our Medicaid budget is only going to start getting bigger with the Affordable Care Act.

We brought this bill because we think probably $250,000 per year is at stake for Nevada. We worked with your staff to develop these words. They may not be perfect, but they are not of our making, they are from the federal government telling us the requirements.

Each legislative session, we amend existing statutes and we work on the language. By falling within the parameters of what the federal government is telling us to do, along with the other states, we will be able to use the experience from those other states in case law and in developing statutes to help improve our words. We have worked with your staff to get these words the best we can. If you can get these words better and still be within the federal confines, we are fine with that. However, it is important that we do our best to stay within those guidelines if we want to keep meeting the federal requirements.

We would pledge to work with your staff to make these words better. Some of the points you are raising, Vice Chairwoman Neal, are excellent. We are presenting these things as best we can pursuant to what the federal government is telling us. Are they always clear? No. Are we trying to make sure we are compliant in order to get that $250,000 per year? Yes.

Vice Chairwoman Neal:
I appreciate the context. I also know we want the carrot. Sometimes the federal law can say things and do things, but sometimes the language has a different effect when we think about the application of the law to our state and individuals. At the end of that, that is what happens—we apply it.

Keith Munro:
Correct. We are essentially here today saying there is a policy decision that needs to be made and we think it is our obligation to bring these types of policy decisions to you to make. Here is what they are requiring. Here is how we think we can accomplish it. The Legislature may say they do not care. That would fine. Because we are interested, we are presenting the bill the best way we can to make sure we meet that requirement.

Vice Chairwoman Neal:
Is there any testimony in support of the bill? [There was none.] Is there any testimony neutral to the bill? [There was none.] Is there any testimony in opposition to the bill? [There was none.] Are there any closing remarks?

Keith Munro:
We work well with your staff and we would be willing to work with them on this bill.

Vice Chairwoman Neal:
I am going to close the hearing on Senate Bill 437. Is there any public comment? [There was none.]

This meeting of the Assembly Committee on Government Affairs is adjourned [at 10:05 a.m.].

RESPECTFULLY SUBMITTED:

_____
Lori McCleary
Committee Secretary

APPROVED BY:

_____
Assemblywoman Dina Neal, Vice Chairwoman

DATE: _____

EXHIBITS

Committee Name: Committee on Government Affairs

Date: April 23, 2013 **Time of Meeting: 8:34 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 22	C	Keith Munro, Office of the Attorney General	Letter from Attorney General
S.B. 22	D	Keith Munro, Office of the Attorney General	Letter from U.S. Department of State to Attorney General
S.B. 22	E	Keith Munro, Office of the Attorney General	Proposed amendment
S.B. 437	F	Cassandra Joseph, Office of the Attorney General	Letter from Attorney General
S.B. 437	G	Cassandra Joseph, Office of the Attorney General	Letter from U.S. Department of Health & Human Services to Attorney General, dated March 21, 2011
S.B. 437	H	Cassandra Joseph, Office of the Attorney General	Letter from U.S. Department of Health & Human Services to Attorney General, dated August 31, 2011