

DOUGLAS R GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 18, 2010

The Honorable Samuel I. "Sandy" Rosenberg
101 Taylor House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Rosenberg

You have asked for advice concerning Senate Bill 279 and House Bill 525, "Maryland False Health Claims Act of 2010." Specifically, you have asked whether the provision of the bills permitting retroactive qui tam actions would permit an action against a physician who fraudulently billed the Medicaid program in the year 2005.¹ You have also asked whether that physician would have a defense based on the invalidity of the retroactivity provision. While the bills purport to authorize a person to file an action for violations occurring prior to the effective date if the statute of limitations set in the bills has not run, it is my view that application of the qui tam provisions to cases arising prior to the effective date of the bills raises serious constitutional issues.

Senate Bill 279 and House Bill 525 set out a list of civil offenses relating to false claims or fraudulent claims against a State health plan or State health program.² The penalties for these civil offenses include a civil fine of between \$5,000 and \$10,000 for each violation, and treble damages for loss sustained by the State as a result of the false claim. Lesser penalties may be imposed if certain showings are made. The bill specifies that the State may file a civil action for compensatory damages, the penalties set in the bill, and court costs and attorney's fees. It also provides that "a person" may file a civil action on behalf of the person and the State against a person who violates any of the prohibitions, and may seek common law tort damages, the penalties set in the bill, compensatory damages for the damages sustained by the State, court costs and attorney's fees. The person bringing the action can receive a portion of the recovery. Of most relevance to this case,

¹ A "qui tam" action is one filed by a nongovernmental party on behalf of themselves and the government to recover money due the government.

² The title and some of the offenses reflect the limitation to a State health plan or State health program, and this limitation is reflected in the Fiscal and Policy Note, but not all of the offenses are clearly so limited. This would appear to stem from the fact that the bills are modeled on the federal False Claims Act, 31 U.S.C. §§ 3729-3733, which is not limited to health programs. It may be desirable to clarify this point.

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§ 2-609(B) provides, with respect to the qui tam action created by the bill:

A CIVIL ACTION MAY BE FILED UNDER § 2-604 OF THIS SUBTITLE FOR ACTIVITY THAT OCCURRED PRIOR TO OCTOBER 1, 2010, IF THE LIMITATIONS PERIOD UNDER SUBSECTION (A) OF THIS SECTION HAS NOT LAPSED.

The limitations period set in subsection (a) allows a claim to be brought up to the later of six years after the date of the violation, or three years after the date when facts material to the right of action are known, but in no event later than ten years after the date of the violation.

In *Dua v. Comcast*, 370 Md. 604, 633 (2002), the Court of Appeals held that:

the Maryland Constitution ordinarily precludes the Legislature (1) from retroactively abolishing an accrued cause of action, thereby depriving the plaintiff of a vested right, and (2) from retroactively creating a cause of action, or reviving a barred cause of action, thereby violating the vested right of the defendant.

The Court noted an exception, however, for the situation where the legislature "retroactively abrogate[s] a remedy for the enforcement of a property right when an alternate remedy is open to the plaintiff." *Id.* at 638. This exception reflects the general rule that changes that are merely procedural or remedial may ordinarily be given retroactive effect. *Langston v. Riffe*, 359 Md. 396, 410 (2000).

The actions set out as civil offenses in Senate Bill 279 and House Bill 525 would already provide a basis for a cause of action by the State for the recovery of damages.³ In addition, the provisions of the bill reflect the provisions of the federal False Claims Act, which would permit the United States government, or a person on behalf of the United States government to bring charges with respect to State health programs that receive federal funding. That statute allows the recovery of treble damages for the damages sustained by the United States government, civil fines, costs and attorneys' fees. 31 U.S.C. § 3729(a). Recovery of damages sustained by the State requires a parallel action under State law. 31 U.S.C. § 3732(b). It is my view that the bills cannot be seen as a mere procedural change in the remedies available under current law.

In *Hughes Aircraft v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Supreme Court considered whether a 1986 change to the federal False Claims Act that expanded the cases in which the qui tam action was available should be given retroactive effect. The amendment itself did not address the issue of retroactivity. The Court discussed the presumption against giving retroactive effect to substantive legislation, and concluded that by "permitting actions by an expanded universe of plaintiffs with different incentives, the 1986 amendment essentially creates a new cause of action, and not just an increased likelihood that an existing cause of action will be pursued." *Id.* at 946, 950.

³ They would generally also form a basis for a prosecution for common law fraud.

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Thus, the Court concluded that the provision should not be given retroactive effect, although the claims in question could have been brought by the government prior to the amendment. *See also U.S. ex rel. Bogart v. King Pharmaceuticals*, 410 F.Supp.2d 404 (E.D.Pa. 2006) *affirmed* 493 F.3d 323 (3rd Cir. 2007) (state false claims act not interpreted to have retroactive effect).

The issue before the Court in *Hughes* was not whether the statute could constitutionally be given retroactive effect, but whether it ought to be interpreted to have retroactive effect. Nevertheless, the conclusion of the Court that the expansion of the qui tam remedy effectively creates a new cause of action would appear to bring the qui tam provision of Senate Bill 279 and House Bill 525 firmly within the holding in *Dua* that an act creating a new cause of action cannot be given retroactive effect.

In addition, the qui tam provision permits the person bringing the action to recover treble damages and civil penalties that are not available under current law.⁴ The Supreme Court has stated that the retroactive imposition of punitive damages would raise a serious constitutional question. *Landgraf v. USI Film Products*, 511 U.S. 244, 281 (1994). Both treble damages and civil fines under the federal False Claims Act have been viewed as punitive. *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 784-85 (2000); *U.S. v. Southern Maryland Home Health Services*, 95 F.Supp.2d 465, 469 (D.Md. 2000), *cf.*, *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 971 (2nd Cir.1985) (treble damages amendment to Trademark Counterfeiting Act interpreted to apply prospectively only to avoid *ex post facto* problem). Thus, the bills would arguably impose new penalties on false claims that were not available at the time that the acts were committed. Although not expressly mentioned in *Dua*, it is my view that the Court of Appeals might well find that the retroactive application of such penalties would also violate due process. In fact, in dicta in *U.S. ex rel. Sanders v. Allison Engine Co., Inc.*, 667 F.Supp.2d 747 (S.D. Ohio 2009) the court suggested that retroactive application of an amendment to the federal False Claims Act that expanded the type of claim that was covered by the act would be *ex post facto*.⁵

Sincerely,



Kathryn M. Rowe
Assistant Attorney General

⁴ While these penalties are available under the federal False Claims Act, that Act, as discussed above, relates to recovery of losses incurred by the federal government rather than the State government, though the losses may have arisen from the same fraud.

⁵ It is my understanding that the holding in this case is being appealed to the Sixth Circuit.