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Why TLR Opposes SB 496—Qui Tam

The term *qui tam* is a shortened version of a Latin phrase describing a civil action brought by a private party on the government's behalf. In a *qui tam* suit, an individual having knowledge of false or fraudulent claims on the government can sue on behalf of the government and receive a bounty from any recovery. SB 496 (by Wentworth) will create a general-purpose *qui tam* law in Texas, creating a “bounty-hunter” system for finding alleged fraud against the State. SB 496 is in the Senate State Affairs Committee.

Lawsuits brought under the Federal *qui tam* law show that most fraud against the government is related to healthcare or defense expenditures. Because Texas already has a powerful *qui tam* statute for healthcare and the State of Texas does not have significant defense expenditures, this proposed statute is unnecessary.

The bill, which does not have a limitations provision, would create enormous potential liability for companies doing business with or paying royalties, fees or taxes to the State of Texas. It opens new and expansive opportunities for mass tort lawyers, and is an unnecessary and dangerous expansion of governmental power.

TEXAS ALREADY HAS A QUI TAM STATUTE AND DOESN'T NEED ANOTHER

- 74% of the money recovered for the federal government under its *qui tam* statute has been related to healthcare fraud. Texas already authorizes *qui tam* action covering healthcare fraud, and actually strengthened that law in the 2007 legislative session at the insistence of the federal government. More than 13% of the other money recovered under the federal *qui tam* law was related to Defense Department expenditures. Obviously, Texas does not spend a significant amount of money on defense procurement contracts.
- Texas also already has a reasonable and adequate statute allowing a person to report to the Comptroller information about a possible claim that the State may be entitled to pursue to recover revenue or property (Government Code Sec. 403.0195). Under the statute, a person providing the information will receive up to five percent of the State's recovery. Thus, Texas already has a law giving private citizens an incentive to report fraud on the government and there is no need for SB 496.

SB 496 MAKES DEFENDANTS “BET THE COMPANY” IN LITIGATION

- Losses by defendants in *qui tam* litigation can be enormous, especially when compared to the State’s actual damages. SB 496 makes a defendant liable for the State’s actual damages **plus** two-times the State’s actual damages **plus** a \$5,000 – \$15,000 civil penalty per violation **plus** interest **plus** attorney fees, investigation expenses, and costs.
- If the defendant files multiple documents with the government having the same error, or files a single document repeating the same error, the defendant may have committed multiple violations of the law, with each violation carrying a \$5,000 – \$15,000 fine. The fines alone can accumulate to millions of dollars.
- The potential liability can become so great that a defendant cannot face the risk presented by defending the case. Government always has enormous leverage when suing a private-market defendant. Those who advocate for an expansion of government power should bear a heavy burden of persuasion.

SB 496 APPEARS TO EQUALLY PUNISH INADVERTENT ERRORS AND INTENTIONAL FRAUD

- Under SB 496, it appears that a person who inadvertently over-bills the State may have the same liability as a person who intentionally defrauds the State.

QUI TAM CREATES AN INCENTIVE FOR DELAY IN REPORTING FRAUD

- Because *qui tam* plaintiffs may be paid a percentage of the recovery, those filing *qui tam* claims have an economic incentive to delay reporting fraud in order to allow the claim to increase in value. A person with knowledge of fraud stands to benefit from delay, while taxpayers suffer the consequences of delay if fraud actually is occurring.
- State employees have an obligation to report fraud on the State. Some State employees are even charged with investigating fraud for the State. Nothing in SB 496, however, prevents a State employee from concealing information he discovers—to allow the damages to grow—then filing suit on the State’s behalf as a *qui tam* plaintiff. In fact, such a person would enjoy protection as a “whistle blower.”

LIABILITY UNDER SB 496 IS ENDLESS

- Unlike the federal *qui tam* statute, SB 496 does not have a statute of limitations. Consequently, liability under SB 496 is endless.

SB 496 PLACES TOO MUCH AUTHORITY IN A SINGLE ELECTED OFFICIAL

- Under SB 496, the Attorney General will be able to authorize unilaterally a *qui tam* lawsuit, causing concern about placing so much prosecutorial power in the hands of a single elected official. The quality of the discretion used when deciding whether to prosecute a bounty hunter case can be driven by the personality holding the office rather than the principles upholding the office.
- Under former Texas Attorney General Dan Morales, who was convicted of federal crimes related to the State's lawsuit against tobacco companies, Texans saw the abuses that can occur when an Attorney General teams up with outside lawyers to pursue litigation against private enterprises.

MOST FEDERAL QUI TAM SUITS FAIL

- Since 1986, 6,199 federal *qui tam* cases have been filed. To date, the Department of Justice has found only 19% of those cases to have enough merit for the government to join the case. Most of the cases the government has refused to join have failed—but only after costing businesses millions of dollars in attorney fees and countless hours of unproductive time.
- One study of 38 *qui tam* cases that the government did not join found that the defendants spent approximately \$53 million in outside legal costs, while the total amount of recoveries obtained against them was only \$3.7 million. The average expenditure in outside legal fees by defendants in these cases was \$1,431,660, and the average recovery was only \$97,223.

AN INSPECTOR GENERAL IS A PROVEN WAY TO EFFECTIVELY COMBAT FRAUD

- If there is, in fact, a problem that SB 496 is intended to address, a better solution is to have an Inspector General—or more than one—that would be active in discovering and preventing fraud in the first place.
- At least twenty-five states plus the District of Columbia enjoy the benefits of an Inspector General (“IG”). The federal government has, at last count, sixty-seven different IGs. Texas has IGs in several state agencies, including Health and Human Services, the Texas Department of Criminal Justice, and the Texas Youth Commission.

An Inspector General has Broad Power to Investigate and Pursue Fraud

- An IG has broad powers to investigate fraud.
 - An IG can receive whistle blower complaints and anonymous tips.
 - An IG can investigate allegations of fraud without revealing the whistleblower.

Using an Inspector General Provides Important Checks and Balances

- If an IG determines that a complaint has merit, the IG can recommend prosecution to the Attorney General, who, in turn, can decide about any further course of action—a checks-and-balances system that addresses the concern of locating substantial power in the hands of one elected official.
 - An IG serves as a kind of grand jury to screen-out frivolous claims of fraud. The IG makes an independent decision, and if a matter does not have merit, it is never referred to the Attorney General.
- Steps are taken to insulate the IG from direct political influence.
 - An IG is appointed, not elected.
 - Many IG statutes prohibit the IG from seeking elective office for a substantial period of time after taking office.