

SECOND REGULAR SESSION

[P E R F E C T E D]

SENATE SUBSTITUTE FOR

SENATE BILL NO. 576

90TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR MAXWELL.

Offered February 17, 2000.

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Taken up for Perfection February 17, 2000. Bill declared Perfected and Ordered Printed, as amended.

TERRY L. SPIELER, Secretary.

2908S.04P

AN ACT

To amend chapters 33 and 570, RSMo, relating to stealing and related offenses by adding thereto seventeen new sections relating to financial exploitation of the elderly or disabled, with penalty provisions.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Chapters 33 and 570, RSMo, is amended by adding thereto seventeen new sections, to be known as sections 33.850, 33.853, 33.856, 33.859, 33.862, 33.865, 33.868, 33.871, 33.874, 33.877, 33.880, 33.883, 33.886, 33.889, 33.892, 33.895 and 570.145, to read as follows:

33.850. 1. Sections 33.850 to 33.895 shall be known and may be cited as the "Missouri Act to Prevent False Claims Against the Elderly".

2. As used in sections 33.850 to 33.895, the following terms shall mean:

(1) "Claim", includes any request or demand regarding health care for the elderly, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other person if the state provides any portion of the money or property which is requested or demanded regarding health care for the elderly, or if the state will reimburse such contractor, grantee, or other person for any portion of the money or property which is requested or demanded regarding health care for the elderly;

(2) "Custodian", the custodian, or any deputy custodian, designated by the attorney general pursuant to section 33.883;

(3) "Documentary material", includes the original or any copy of any book,

record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(4) "Exempt official", any of the following officials: any state official listed in article IV, section 12 of the Constitution of the state of Missouri and all other persons appointed by the governor by and with the consent of the senate;

(5) "Investigation", any inquiry conducted by an investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of sections 33.850 to 33.895;

(6) "Investigator", a person who is charged by the attorney general with the duty of conducting any investigation pursuant to sections 33.850 to 33.895, or any officer or employee of the state acting under the direction and supervision of the department of public safety, through the Missouri state highway patrol, with an investigation;

(7) "Knowing" and "knowingly", that a person, with respect to information:

(a) Has actual knowledge of the information; and
(b) Acts in deliberate ignorance of the truth or falsity of the information; or
(c) Acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required;

(8) "Original source", an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the state before filing an action pursuant to sections 33.850 to 33.895 which is based on the information;

(9) "Product of discovery" includes:

(a) The original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(b) Any digest, analysis, selection, compilation, or derivation of any item listed in paragraph (a) of this subdivision; and

(c) Any index or other manner of access to any item listed in paragraph (a) of this subdivision.

33.853. 1. Sections 33.850 to 33.895 are intended to provide for civil recovery for false or fraudulent claims paid by the state.

2. Any person who:

(1) Knowingly presents, or causes to be presented, to an officer or employee of the state 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 state;

(3) Conspires to defraud the state 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 state regarding health care for the elderly and, intending to defraud the state 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) Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the state regarding health care for the elderly and, intending to defraud the state, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) Knowingly buys, or receives as a pledge on an obligation or debt regarding health care for the elderly, public property from an officer or employee of the state 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 state regarding health care for the elderly, is liable to the state for a civil penalty of not less than five thousand dollars and not more than ten thousand dollars, plus three times the amount of damages which the state sustains because of the act of that person. A person found guilty of violating this section shall also be liable to the state for the costs of a civil action brought to recover any such penalty or damages.

3. This section does not apply to claims, records, or statements made pursuant to chapter 143, RSMo.

33.856. 1. The attorney general shall diligently investigate a civil violation pursuant to sections 33.850 to 33.895. If the attorney general finds that a person has violated or is violating section 33.853, the attorney general may bring a civil action pursuant to this section against the person.

2. A person may bring a civil action for a violation of section 33.853 for the person and for the state. The action shall be brought in the name of the state. The action may be dismissed only if the court and the attorney general give written consent to the dismissal and their reasons for consenting.

3. A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the attorney general for the state. The complaint shall be filed in camera, shall remain under seal for at least sixty days, and shall not be served on the defendant until the court so orders. The state may elect to intervene and proceed with the action within sixty days after it receives both the complaint and the material evidence and information.

4. The state may, for good cause shown, move the court for extensions of the

time during which the complaint remains under seal pursuant to subsection 3 of this section. Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed pursuant to this section until thirty days after the complaint is unsealed and served upon the defendant.

5. Before the expiration of the sixty-day period or any extensions obtained pursuant to subsection 4 of this section, the state shall:

(1) Proceed with the action, in which case the action shall be conducted by the state; or

(2) Notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

6. When a person brings an action pursuant to this section, no person other than the state may intervene or bring a related action based on the facts underlying the pending action.

7. If the false or fraudulent claim involves the attorney general's office, then the state auditor shall assume all powers, duties and obligations that the attorney general has pursuant to sections 33.850 to 33.856.

33.859. 1. If the state proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in subsection 2 of this section.

2. (1) The state may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the state of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(2) The state may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(3) Upon a showing by the state that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the state's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as:

- (a) Limiting the number of witnesses the person may call;
- (b) Limiting the length of the testimony of such witnesses;
- (c) Limiting the person's cross-examination of witnesses; or
- (d) Otherwise limiting the participation by the person in the litigation.

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

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

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

5. The state may elect to pursue its claim through any alternate remedy available to the state, including any administrative proceeding to determine a civil penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued pursuant to this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action pursuant to this section.

33.862. 1. If the state proceeds with an action brought by a person pursuant to section 33.856, such person shall receive at least fifteen percent but not more than twenty-five percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the action, the court may award such sums as it considers appropriate, but in no case more than ten percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to

have been necessarily incurred, plus reasonable attorneys' fees and costs. The state shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred by the attorney general, including reasonable attorneys' fees and costs, and the amount received shall be deposited in the whistleblower reward and protection fund created in section 33.895. All such expenses, fees, and costs shall be awarded against the defendant upon a finding of guilt.

2. If the state does not proceed with an action pursuant to this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than twenty-five percent and not more than thirty percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

3. Whether or not the state proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 33.853 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive pursuant to this section, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 33.853, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the state to continue the action.

4. If the state does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

33.865. 1. (1) No court shall have jurisdiction over an action brought pursuant to section 33.856 against a member of the general assembly, a member of the judiciary, or an exempt official if the action is based on evidence or information known as the violation to the state when the action was brought.

(2) In no event may a person bring an action pursuant to section 33.856 which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil penalty proceeding in which the state is already a party.

(3) No court shall have jurisdiction over an action pursuant to this section based upon the public disclosure of allegations or transactions in a criminal, civil, or

administrative hearing, in a legislative, administrative, or auditor report, hearing, audit, or investigation, or from the news media, unless the action is brought by the attorney general or the person bringing the action is an original source of the information.

2. The state is not liable for expenses which a person incurs in bringing an action pursuant to section 33.856.

3. Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done pursuant to sections 33.850 to 33.895, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the seniority status such employee would have had but for the discrimination, interest on the back pay which would have been otherwise due, two times the amount of back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate circuit court for the relief provided in this subsection.

33.868. 1. A subpoena requiring the attendance of a witness at a trial or hearing conducted pursuant to section 33.859 may be served at any place in the state.

2. A civil action pursuant to section 33.856 may not be brought:

(1) More than six years after the date on which the alleged violation of section 33.853 is committed; or

(2) More than three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the state charged with responsibility to act in the circumstances, whichever occurs last.

3. In any action brought pursuant to section 33.856, the state or the person shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

4. Notwithstanding any other provision of law, a final judgment rendered in favor of the state in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought pursuant to subdivision (1) or (2) of subsection 5 of section 33.856.

33.871. 1. When it appears to the attorney general that a person has engaged in, is engaging in or is about to engage in any violation of section 33.853 or when he or she believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in, or is about to engage in any such act or practice he or she may issue and cause to be served a civil investigative

demand to assist in the investigation of the matter. The issuance and enforcement of each civil investigative demand shall be conducted in compliance with all of the terms and provisions of sections 407.040 to 407.090, except as provided for in sections 33.850 to 33.895.

2. Any person served a civil investigative demand shall have the right to the assistance of counsel.

33.874. Any civil investigative demand issued pursuant to section 33.871 may be served as the Missouri rules of civil procedure prescribes for service of process. To the extent that the courts of this state can assert jurisdiction over any person outside the state consistent with due process, the courts of this state shall have the same jurisdiction to take any action respecting compliance with this section against any such person that such court would have if such person were personally within the jurisdiction of such court.

33.877. A verified return by the individual serving any civil investigative demand issued pursuant to section 33.871 or any petition filed pursuant to section 33.856 setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

33.880. 1. The oral testimony of any person taken pursuant to a civil investigative demand shall be taken in the county within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the investigator conducting the examination and such person.

2. When the testimony is fully transcribed, the investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within thirty days after being afforded a reasonable opportunity to examine it, the officer or investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

33.883. 1. The attorney general shall designate the Missouri state highway patrol to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received pursuant to sections 33.850 to 33.895, and shall designate additional employees of the Missouri state highway patrol as the attorney

general determines from time to time to be necessary to serve as deputies to the custodian.

2. An investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony pursuant to this section shall transmit them to the custodian. The custodian shall take physical possession of such material, and shall be responsible for the use made of them and for their return pursuant to subsection 5 of this section. The custodian may cause the preparation of such copies of such material as may be required for official use.

3. Nothing in this section is intended to prevent disclosure to the general assembly, including any committee or subcommittee of the general assembly, or to any other state agency for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the attorney general to a circuit court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

4. Whenever any attorney has been designated to appear on behalf of the state before any court, grand jury, or state agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received pursuant to this section shall deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

5. Material produced in the course of any investigation pursuant to a civil investigative demand shall be returned, upon written request of the person who produced such material, to such person except authorized copies or those which have passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding, if:

(1) Any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any state agency involving such material, has been completed; or

(2) No case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation.

33.886. 1. At any time during which any custodian is in custody or control of any material received pursuant to section 33.871, such person as provided the material, and

in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the circuit court of the county within which the office of such custodian holding any of the material is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

2. Whenever any petition is filed in any circuit court pursuant to this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal in the same manner as appeals of other final orders in civil matters. Any disobedience of any final order entered pursuant to this section by any court shall be punished as a contempt of the court.

33.889. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand shall be a closed record pursuant to chapter 610, RSMo.

33.892. The Missouri rules of civil procedure shall apply to all proceedings pursuant to sections 33.850 to 33.895, except when rules are inconsistent with sections 33.850 to 33.895.

33.895. 1. There is hereby created the "Whistleblower Reward and Protection Fund" within the state treasury. All proceeds of an action or settlement of a claim brought pursuant to sections 33.850 to 33.895 shall be transmitted to the director of revenue for deposit in the fund.

2. Monies in the fund shall be allocated, subject to appropriation, as follows: One-sixth of the moneys shall be paid to the attorney general and one-sixth of the moneys shall be paid to the Missouri state highway patrol for state law enforcement purposes. The remaining two-thirds of the moneys in the fund shall be used for payment of awards to citizen plaintiffs, for attorneys' fees and expenses, and as otherwise specified in sections 33.850 to 33.895. The attorney general shall direct the state treasurer to make disbursement of funds as provided in court orders setting those awards, fees, and expenses. The state treasurer shall transfer any fund balances in excess of those required for these purposes to the general revenue fund at the end of each biennium.

570.145. 1. A person is guilty of the offense of financial exploitation of an elderly or disabled person if such person stands in a position of trust and confidence with the elderly or disabled person, and such person knowingly and by deception or intimidation obtains control over the elderly or disabled person's property with the intent to permanently deprive the elderly or disabled person of the use, benefit or possession of his or her property thereby benefiting such person or detrimentally affecting the elderly or disabled person. Financial exploitation of an elderly or disabled

person is a class A misdemeanor if the value of the property is less than two hundred fifty dollars and a class D felony if the value of the property is two hundred fifty dollars or more.

2. For purposes of this section, the following terms mean:

(1) "Deception", a misrepresentation or concealment of material fact relating to the terms of a contract or agreement entered into with the elderly or disabled person or to the existing or preexisting condition of any of the property involved in such contract or agreement, or the use or employment of any misrepresentation, false pretense or false promise in order to induce, encourage or solicit the elderly or disabled person to enter into a contract or agreement. "Deception" includes:

(a) Creating or confirming another person's impression which is false and which the offender does not believe to be true; or

(b) Failure to correct a false impression which the offender previously has created or confirmed; or

(c) Preventing another person from acquiring information pertinent to the disposition of the property involved; or

(d) Selling or otherwise transferring or encumbering property, failing to disclose a lien, adverse claim or other legal impediment to the enjoyment of the property, whether such impediment is or is not valid, or is or is not a matter of official record; or

(e) In a transaction involving a service, the misrepresentation, concealment, or selling of such service without the confirmed, express consent of the elderly or disabled person; or

(f) Promising performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not sufficient evidence to prove that the offender did not intend to perform; or

(g) Failing or refusing, as an assignee of the Social Security check of an elderly or disabled person, or as a person having control of such check, to remit when due the proceeds of such check to a facility as defined in chapter 198, RSMo;

(2) "Disabled person", a person who suffers from a physical or mental impairment resulting from disease, injury, functional disorder or congenital condition which renders such person incapable of avoiding or preventing the commission of an offense;

(3) "Elderly person", a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by physical, mental or emotional dysfunctioning to the extent that such person is incapable of avoiding or preventing the commission of the offense;

(4) "Intimidation", the communication to an elderly or disabled person that he or she will be deprived of food and nutrition, shelter, prescribed medication, or medical

care and treatment.

3. For purposes of this section, a person stands in a position of trust and confidence with an elderly or disabled person when such person:

(1) Is a parent, spouse, adult child or other relative by blood or marriage of the elderly or disabled person;

(2) Is a joint tenant or tenant in common with the elderly or disabled person with knowledge of such relationship;

(3) Has a legal, fiduciary or provider relationship with the elderly or disabled person; or

(4) Has a relationship with the elderly or disabled person as a health care or personal care worker.

4. Nothing in this section shall be construed to limit the remedies available to the victim pursuant to any state law relating to domestic violence.

5. Nothing in this section shall be construed to impose criminal liability on a person who has made a good faith effort to assist the elderly or disabled person in the management of his or her property, but through no fault of his or her own has been unable to provide such assistance.

6. Nothing in this section shall limit the ability to engage in bona fide estate planning, to transfer property and to otherwise seek to reduce estate and inheritance taxes; provided that such actions do not impact the standard of living to which the elderly or disabled person has become accustomed at the time of such actions.

7. It shall not be a defense to financial exploitation of an elderly or disabled person that the accused reasonably believed that the victim was not an elderly or disabled person.

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