

1 COMMITTEE SUBSTITUTE

2 For

3 **H. B. 4001**

4
5 (By Delegates Manchin, Skinner, Lawrence, Barrett,
6 Young, Marcum, Sponaugle, Barker and Ellem)

7 (Originating in the Committee on the Judiciary)

8 [January 10, 2014]

9
10 A BILL to amend and reenact §9-7-6 the code of West Virginia, 1931,
11 as amended, and to amend said code by adding thereto a new
12 article, designated §14-4-1, §14-4-2, §14-4-3, §14-4-4,
13 §14-4-5, §14-4-6, §14-4-7, §14-4-8, §14-4-9, §14-4-10 and
14 §14-4-11, all relating to creating the False Claims Act;
15 amending the fraud and abuse in Medicaid program to provide
16 for damages under the False Claims Act; prohibited acts;
17 damages, costs and civil penalties; limitations on damages;
18 responsibilities of the Attorney General; civil actions by
19 private persons; rights of parties to *qui tam* proceedings;
20 awards to *qui tam* plaintiffs; the barring of certain civil
21 actions; state not liable for the expenses of private
22 litigants; private action for retaliatory conduct; limitation
23 of actions; retroactive application; state intervention in
24 action by private person; estoppel; jurisdiction and venue;
25 nonexclusivity of act; and liberality of construction.

1 *Be it enacted by the Legislature of West Virginia:*

2 That §9-7-6 of the Code of West Virginia, 1931, as amended, be
3 amended and reenacted; and that said code be amended by adding
4 thereto a new article, designated §14-4-1, §14-4-2, §14-4-3,
5 §14-4-4, §14-4-5, §14-4-6, §14-4-7, §14-4-8, §14-4-9, §14-4-10 and
6 §14-4-11, all to read as follows:

7 **CHAPTER 9. HUMAN SERVICES.**

8 **ARTICLE 7. FRAUD AND ABUSE IN THE MEDICAID PROGRAM.**

9 **§9-7-6. Civil remedies.**

10 (a) Any person, firm, corporation or other entity which
11 willfully, by means of a false statement or representation, or by
12 concealment of any material fact, or by other fraudulent scheme,
13 devise or artifice on behalf of himself, herself, itself, or
14 others, obtains or attempts to obtain benefits or payments or
15 allowances under the medical programs of the Department of Health
16 and Human Resources to which he or she or it is not entitled, or,
17 in a greater amount than that to which he or she or it is entitled,
18 shall be liable to the Department of Health and Human Resources in
19 an amount equal to three times the amount of such benefits,
20 payments or allowances to which he or she or it is not entitled,
21 and shall be liable for the payment of reasonable attorney fees and
22 all other fees and costs of litigation.

23 (b) No criminal action or indictment need be brought against
24 any person, firm, corporation or other entity as a condition for

1 establishing civil liability hereunder.

2 (c) A civil action under this section may be prosecuted and
3 maintained on behalf of the Department of Health and Human
4 Resources by the Attorney General and the Attorney General's
5 assistants or a prosecuting attorney and the prosecuting attorney's
6 assistants or by any attorney in contract with or employed by the
7 Department of Health and Human Resources to provide such
8 representation.

9 (d) Any person, firm, corporation, partnership, or other legal
10 entity who violates the provisions of any of the foregoing
11 subsections of this section or any provisions of section two,
12 article four, chapter fourteen of this code, shall, in addition to
13 any other penalties provided by law, be liable to civil penalties
14 of (1) payment of interest on the amount of the excess benefits or
15 payments at the maximum legal rate in effect on the date the
16 payment was made to said person, firm, corporation, partnership or
17 other legal entity for the period from the date upon which payment
18 was made to the date upon which repayment is made to the State, (2)
19 payment of an amount not to exceed three times the amount of such
20 excess benefits or payments, and (3) payment in the sum of not less
21 than and not more than the civil penalty allowed under section two,
22 article four, chapter fourteen of this code, as it may be adjusted
23 for inflation pursuant to the Federal Civil Penalties Inflation
24 Adjustment Act of 1990, Pub.L.101-410 for each excessive claim for
25 assistance, benefits or payments.

1 **CHAPTER 14. CLAIMS DUE AND AGAINST THE STATE.**

2 **ARTICLE 4. FALSE CLAIMS ACT.**

3 **§14-4-1. Definitions.**

4 For purposes of this article:

5 (1) "Claim" includes any request or demand, whether under a
6 contract or otherwise, for money or property, whether the state has
7 title to the money or property that:

8 (A) Is presented to an officer, employee or agent of the
9 state; or

10 (B) Is made to a contractor, grantee or other recipient of the
11 money or property, if the money or property is to be spent or used
12 on the state's behalf or to advance a state program or interest,
13 and if the state:

14 (i) Provides or has provided any portion of the money or
15 property requested or demanded; or

16 (ii) Will reimburse the contractor, grantee or other recipient
17 for any portion of the money or property that is requested or
18 demanded.

19 (C) "Claim" does not include a request or demand for money or
20 property that the state has paid to an individual as compensation
21 for state employment or as an income subsidy with no restrictions
22 on that individual's use of the money or property.

23 (2) "Employer" includes any natural person, corporation, firm,
24 association, organization, partnership, business, trust or
25 state-affiliated entity involved in proprietary function, including

1 state universities and state hospitals.

2 (3) "Knowingly" or "knowing" means that a person, with respect
3 to information:

4 (A) Has actual knowledge of the information;

5 (B) Acts in deliberate ignorance of the truth or falsity of
6 the information; or

7 (C) Acts in reckless disregard of the truth or falsity of the
8 information.

9 (D) "Knowingly" and "knowing" require no specific intent to
10 defraud.

11 (4) "Material" or "materially" means having a natural tendency
12 to influence, or be capable of influencing, the payment or receipt
13 of money or property.

14 (5) "Obligation" means an established duty, whether fixed,
15 arising from an express or implied contractual, grantor-grantee or
16 licensor-licensee relationship, from a fee-based or similar
17 relationship, from statute or rule or from the retention of any
18 overpayment.

19 (6) "Person" means any natural person, partnership,
20 corporation, organization, association, business, trust or other
21 legal entity, including any political subdivision of the state.

22 **§14-4-2. Acts subjecting person to treble damages, costs and civil**
23 **penalties; exceptions.**

24 (a) Any person who commits any of the following acts is liable
25 to the state for three times the amount of damages which the state

1 sustains because of the act of that person. A person who commits
2 any of the following acts is also liable to the state for the
3 costs, including attorneys' fees, of a civil action brought to
4 recover any of those penalties or damages, and may be liable to the
5 state for a civil penalty of not less than and not more than the
6 civil penalty allowed under the federal False Claims Act (31 U.S.C.
7 § 3729 et. seq.), as may be adjusted by the Federal Civil Penalties
8 Inflation Adjustment Act of 1990 (28 U.S.C. 2461; Public Law
9 104-410), for each violation:

10 (1) Knowingly presents or causes to be presented a false or
11 fraudulent claim for payment or approval;

12 (2) Knowingly makes, uses or causes to be made or used, a
13 false record or statement material to a false or fraudulent claim;

14 (3) Has possession, custody, or control of money or property
15 used or to be used by the state and knowingly delivers or causes to
16 be delivered less than all of that money or property;

17 (4) Is authorized to make or deliver a document certifying
18 receipt of property used, or to be used, by the state and,
19 intending to defraud the state, makes or delivers the receipt
20 without completely knowing that the information on the receipt is
21 true;

22 (5) Knowingly buys, or receives as a pledge of an obligation
23 or debt, public property from an officer, employee or agent of the
24 state who is not lawfully authorized to sell or pledge the
25 property;

1 (6) Knowingly makes, uses or causes to be made or used, a
2 false record or statement material to an obligation to pay or
3 transmit money or property to the state;

4 (7) Knowingly conceals, or knowingly and improperly avoids or
5 decreases, an obligation to pay or transmit money or property to
6 the state;

7 (8) Conspires to violate any provision of this section.

8 (b) This section does not apply to claims, records or
9 statements made under the state tax laws contained in chapter
10 eleven of the code.

11 (c) *Damages Limitation.* Notwithstanding subsection (a) of this
12 section, a person who violates any of the provisions of
13 subdivisions (1) through (8) of subsection (a) is liable to the
14 state for not less than two times the amount of damages that the
15 state sustains because of the violation and the costs of a civil
16 action brought to recover the damages, but no civil penalties, if
17 the court finds all of the following:

18 (1) The person committing the violation provided officials of
19 the state who are responsible for investigating false claims
20 violations with all information known to that person about the
21 violation within thirty days after the date on which the person
22 first obtained the information;

23 (2) The person fully cooperated with any state investigation
24 of the violation; and

25 (3) At the time the person provided the state with information

1 about the violation, a criminal prosecution, civil action or
2 administrative proceeding had not commenced with respect to the
3 violation, and the person did not have actual knowledge of the
4 existence of an investigation into the violation.

5 **§14-4-3. Attorney General investigations and prosecutions; powers**
6 **of prosecuting authority; civil actions by individuals**
7 **as qui tam plaintiff and as private citizens;**
8 **jurisdiction of courts.**

9 The Attorney General shall diligently investigate a violation
10 under subsection (a) of section two of this article. If the
11 Attorney General finds that a person has violated or is violating
12 subsection (a) of section two, the Attorney General may bring a
13 civil action under this section against that person.

14 **§14-4-4. Actions by private persons.**

15 (a) A person may bring a civil action for a violation of this
16 article for the person and for the state in the name of the state.
17 The person bringing the action shall be referred to as the qui tam
18 plaintiff. Once filed, the action may be dismissed only with the
19 written consent of the court and the Attorney General, taking into
20 account the best interest of the parties involved and the public
21 purposes behind this article.

22 (b) A copy of the complaint and written disclosure of
23 substantially all material evidence and information the person
24 possesses shall be served on the Attorney General. The complaint

1 shall also be filed *in camera*, shall remain under seal for at least
2 sixty days and may not be served on the defendant until the court
3 so orders. The state may elect to intervene and proceed with the
4 action within sixty days after it receives both the complaint and
5 the material evidence and the information. Any information or
6 documents furnished by the relator to the Attorney General in
7 connection with the initiation of a *qui tam* action or investigation
8 under this subsection is not a public record and is exempt from
9 disclosure under chapter twenty-nine-b of this code.

10 (c) The state may, for good cause shown, move the court for
11 extensions of the time during which the complaint remains under
12 seal under subsection (b). Any such motions may be supported by
13 affidavits or other submissions *in camera*. The defendant may not be
14 required to respond to any complaint filed under this section until
15 after the complaint is unsealed and served upon the defendant
16 pursuant to West Virginia Rules of Civil Procedure.

17 (d) Before the expiration of the sixty-day period or any
18 extensions obtained under subsection (c), the state shall:

19 (1) Proceed with the action, in which case the Attorney
20 General shall intervene and conduct the action on behalf of the
21 state; or

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

25 (e) When a person brings a valid action under this section, no

1 person other than the state may intervene or bring a related action
2 based on the facts underlying the pending action.

3 **§14-4-5. Rights of the parties to *qui tam* actions.**

4 (a) If the state proceeds with the action, it has the primary
5 responsibility for prosecuting the action, and may not be bound by
6 an act of the person bringing the action. That person may continue
7 as a party to the action, subject to the limitations set forth in
8 subsection (b).

9 (b) (1) The state may seek to dismiss the action for good
10 cause notwithstanding the objections of the *qui tam* plaintiff if
11 the *qui tam* plaintiff has been notified by the State of the filing
12 of the motion and the court has provided the *qui tam* plaintiff with
13 an opportunity to oppose the motion and present evidence at a
14 hearing.

15 (A) Upon a hearing on the state's motion to dismiss the
16 action, the court shall consider, and is authorized to grant, a
17 proposal by the *qui tam* plaintiff to proceed with the action
18 without the Attorney General's participation.

19 (B) Any award resulting from an action authorized by the court
20 pursuant to paragraph (A) of this subdivision shall be made
21 pursuant to section six of this article.

22 (2) The state may settle the action with the defendant
23 notwithstanding the objections of the *qui tam* plaintiff if the
24 court determines, after a hearing providing the *qui tam* plaintiff

1 an opportunity to present evidence, that the proposed settlement is
2 fair, adequate and reasonable under all of the circumstances.

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

9 (A) Limiting the number of witnesses the person may call;

10 (B) Limiting the length of the testimony of such witnesses;

11 (C) Limiting the person's cross-examination of witnesses; or

12 (D) Otherwise limiting the participation by the person in the
13 litigation.

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

19 (c) If the state elects not to proceed with the action, the
20 person who initiated the action may conduct the action. If the
21 state so requests, it shall be served with copies of all pleadings
22 filed in the action and shall be supplied with copies of all
23 deposition transcripts (at the state's expense). When a person
24 proceeds with the action the court, without limiting the status and
25 rights of the person initiating the action, may nevertheless permit

1 the state to intervene at a later date upon a showing of good
2 cause.

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

14 (e) Notwithstanding section four of this article, the state
15 may elect to pursue its claim through any alternate remedy
16 available to the state, including any administrative proceeding to
17 determine a civil money penalty. If any alternate remedy is pursued
18 in another proceeding, the person initiating the action has the
19 same rights in that proceeding as the person would have had if the
20 action had continued under section four of this article. Any
21 finding of fact or conclusion of law made in such other proceeding
22 that has become final shall be conclusive on all parties to an
23 action under section four of this article. A finding or conclusion
24 is final if it has been finally determined on appeal to the
25 appropriate court of the state, if all time for filing an appeal

1 with respect to the finding or conclusion has expired or if the
2 finding or conclusion is not subject to judicial review.

3 **§14-4-6. Award to qui tam plaintiff.**

4 (a) (1) If the state proceeds with an action brought by a
5 person under section four of this article, that person shall,
6 subject to subdivision (2) of this subsection, receive at least
7 fifteen percent but not more than twenty-five percent of the
8 proceeds of the action or settlement of the claim, depending upon
9 the extent to which the person substantially contributed to the
10 prosecution of the action.

11 (2) Where the action is one which the court finds to be based
12 primarily on disclosures of specific information (other than
13 information provided by the person bringing the action) relating to
14 allegations or transactions specifically in a criminal, civil or
15 administrative hearing, in a legislative or administrative report,
16 hearing, audit or investigation, or from the news media, the court
17 may award such sums as it considers appropriate, but in no case
18 more than ten percent of the proceeds, taking into account the
19 significance of the information and the role of the person bringing
20 the action in advancing the case to litigation.

21 (3) Any payment to a person under subdivision (1) or (2) of
22 this subsection shall be made from the proceeds. Any such person
23 shall also receive an amount for reasonable expenses which the
24 court finds to have been necessarily incurred, plus reasonable
25 attorneys' fees and costs. All expenses, fees and costs shall be

1 awarded against the defendant.

2 (b) If the state does not proceed with an action under this
3 section, the person bringing the action or settling the claim shall
4 receive an amount which the court decides is reasonable for
5 collecting the civil penalty and damages. The amount may not be
6 less than twenty-five percent and not more than thirty percent of
7 the proceeds of the action or settlement and shall be paid out of
8 the proceeds. The person shall also receive an amount for
9 reasonable expenses which the court finds to have been necessarily
10 incurred, plus reasonable attorneys' fees and costs. All expenses,
11 fees and costs shall be awarded against the defendant.

12 (c) Whether or not the state proceeds with the action, if the
13 court finds that the action was brought by a person who planned and
14 initiated the violation of section two upon which the action was
15 brought, then the court may, to the extent the court considers
16 appropriate, reduce the share of the proceeds of the action which
17 the person would otherwise receive under subsection (a) or (b) of
18 this section, taking into account the role of that person in
19 advancing the case to litigation and any relevant circumstances
20 pertaining to the violation. If the person bringing the action is
21 convicted of criminal conduct arising from his or her role in the
22 violation of section two of this article, that person shall be
23 dismissed from the civil action and may not receive any share of
24 the proceeds of the action. The dismissal does not prejudice the
25 right of the state to continue the action.

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

7 (e) Following any distributions under subsections (a) through
8 (d), all remaining proceeds, including civil penalties awarded
9 under this article, shall be deposited in the general revenue.

10 **§14-4-7. Certain actions barred.**

11 (a) A court does not have jurisdiction over an action brought
12 under section four of this article against a member of the state
13 legislative branch, a member of the judiciary or a senior executive
14 branch official if the action is based on evidence or information
15 known to the state when the action was brought.

16 (b) A court does not have jurisdiction over an action brought
17 under section four of this article by an inmate incarcerated within
18 a state or local correctional facility as defined in this code.

19 (c) A person may not bring an action under section four of
20 this article which is based upon allegations or transactions which
21 are the subject of a civil suit or an administrative civil money
22 penalty proceeding in which the state is already a party.

23 (d) (1) The court shall dismiss an action or claim under this
24 section, unless opposed by the state, if substantially the same
25 allegations or transactions as alleged in the action or claim were

1 publicly disclosed:

2 (A) In a state criminal, civil or administrative hearing in
3 which the state or its agent is a party;

4 (B) In a state legislative or other state report, hearing,
5 audit or investigation; or

6 (C) From the news media, unless the action is brought by the
7 Attorney General or the person bringing the action is an original
8 source of the information.

9 (2) For purposes of this paragraph, "original source" means an
10 individual who either:

11 (A) Prior to a public disclosure under subsection (c), has
12 voluntarily disclosed to the state or federal government the
13 information on which allegations or transactions in a claim are
14 based, or

15 (B) Who has knowledge that is independent of and materially
16 adds to the publicly disclosed allegations or transactions, and who
17 has voluntarily provided the information to the state or federal
18 government before filing an action under this article.

19 **§14-4-8. State not liable for certain expenses.**

20 The state is not liable for expenses which a person incurs in
21 bringing an action under this article.

22 **§14-4-9. Private action for retaliatory actions.**

23 (a) Any employee, contractor or agent who is discharged,
24 demoted, suspended, threatened, harassed or in any other manner
25 discriminated against in the terms and conditions of employment by

1 the employer of the employee, contractor or agent because of lawful
2 acts done by the employee, contractor, agent or associated others
3 in furtherance of an action brought or to be brought under sections
4 three or four of this article, or other efforts to stop one or more
5 violations of this article, including investigation for, initiation
6 of, testimony for, or assistance in the action, is entitled to all
7 relief necessary to make the employee, contractor or agent whole.
8 The relief shall include reinstatement with the same seniority
9 status the employee, contractor or agent would have had but for the
10 discrimination, two times the amount of back pay, interest on the
11 back pay and compensation for any special damages sustained as a
12 result of the discrimination, including litigation costs and
13 reasonable attorney's fees.

14 (b) An employee, contractor or agent may bring an action in
15 the appropriate court for the relief provided under this section.
16 The action may not be brought under this section more than three
17 years after the last act of the employer that is alleged to violate
18 this section.

19 **§14-4-10. Limitation of actions; activities antedating this**
20 **article; burden of proof.**

21 (a) A civil action under section three or four of this article
22 may not be brought:

23 (1) More than six years after the date on which the violation
24 of section two of this article is committed, or

25 (2) More than three years after the date when facts material

1 to the right of action are known or reasonably should have been
2 known by the official of the state charged with responsibility to
3 act in the circumstances, but in no event more than ten years after
4 the date on which the violation is committed, whichever occurs
5 last.

6 (b) Retroactivity. A civil action under section three or four
7 of this article may be brought for activity prior to the effective
8 date of this article if the limitations period set in subsection
9 (a) has not lapsed.

10 (c) If the state elects to intervene and proceed with an
11 action brought under section four of this article, the state may
12 file its own complaint or amend the complaint of a person who has
13 brought an action under section four of this article to clarify or
14 add detail to the claims in which the state is intervening and to
15 add any additional claims with respect to which the state contends
16 it is entitled to relief. For statute of limitations purposes, any
17 such state pleading shall relate back to the filing date of the
18 complaint of the person who originally brought the action, to the
19 extent that the claim of the state arises out of the conduct,
20 transactions, or occurrences set forth, or attempted to be set
21 forth, in the prior complaint of that person.

22 (d) Estoppel. Notwithstanding any other provision of law, a
23 guilty verdict rendered in a criminal proceeding charging false
24 statements or fraud, whether upon a verdict after trial or upon a
25 plea of guilty or *nolo contendere*, shall estop the defendant from

1 denying the essential elements of the offense in any action which
2 involves the same transaction as in the criminal proceeding and
3 which is brought under section three or four of this article.

4 (e) An action under section three or four of this article may
5 be brought in a circuit court of any county in which the defendant
6 or any one of multiple defendants can be found, resides, or
7 transacts business, or in any county in which any act prohibited by
8 section two of this article occurred. The Attorney General or the
9 person who brought the action shall prove all essential elements of
10 the cause of action, including damages, by a preponderance of the
11 evidence.

12 **§14-4-11. Remedies under other laws; liberality of construction.**

13 (a) The provisions of this article are not exclusive, and the
14 remedies provided for in this article shall be in addition to any
15 other remedies provided in any other law or available under common
16 law.

17 (b) This article shall be liberally construed and applied to
18 promote the public interest.